COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-3007

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

DEANNA GRAETZ AND TERRY GRAETZ,

PLAINTIFFS-APPELLANTS,

V.

NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH AND WAL-MART STORES EAST, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Deanna and Terry Graetz appeal from a judgment dismissing their claims against Wal-Mart Stores, East, Inc. and Wal-Mart's insurer for injuries Deanna Graetz (Graetz) suffered when items fell off a shelf and hit her

on the head and shoulders while she was shopping at Wal-Mart. On appeal, Graetz argues that the circuit court erred when it declined to instruct the jury on *res ipsa loquitur*. Because we conclude that the court properly declined to give this instruction, we affirm.

¶2 Graetz was shopping at Wal-Mart with her four-month-old daughter when three "Pack-N-Ride" infant carriers fell off a shelf and injured her head and shoulders. Two of the carriers were boxed; one was out of its box. It is undisputed that neither Graetz nor an eyewitness to the incident touched or bumped the shelving before the three "Pack-N-Ride" infant carriers fell off the shelf and hit Graetz. No one else was seen in the area of the shelving immediately after the carriers fell on Graetz.

¶3 Wal-Mart uses open shelving to stack items above the area where goods are displayed. The shelving begins approximately seven feet off the ground; the parties disputed how high the carriers were stacked. While Wal-Mart posts signs asking customers to seek assistance from a Wal-Mart employee to retrieve items from the shelving, a Wal-Mart employee testified that she daily observes customers attempting to reach shelved items without assistance.

¶4 Graetz sued Wal-Mart, alleging a safe-place violation under WIS. STAT. § 101.11 (1997-98) and negligence in the manner in which Wal-Mart "designed, constructed, stocked and maintained the premises."[1] Pre-trial, Graetz argued that the circuit court should instruct the jury on *res ipsa loquitur*. The circuit court declined to do so, citing factual disputes regarding the cause of the

[1] Terry Graetz alleged, inter alia, loss of consortium.

falling carriers. The jury found that Wal-Mart was not negligent and did not fail to maintain a safe place.

¶5 On postverdict motions, the circuit court found that Graetz had not demonstrated that Wal-Mart had exclusive control of the shelving which was necessary for a *res ipsa loquitur* instruction because customers could reach up to the shelving. The court found that Graetz needed to exclude the possibility of another force intervening to topple the carriers and that she failed to do so. Graetz appeals.

¶6 A jury instruction must be warranted by the evidence presented at trial. *See* ***Nowatske v. Osterloh***, 198 Wis. 2d 419, 428, 543 N.W.2d 265 (1996). The decision not to give a requested jury instruction lies within the circuit court's discretion. ***State v. McCoy***, 143 Wis. 2d 274, 289, 421 N.W.2d 107 (1988).

¶7 For the doctrine of *res ipsa loquitur* to apply, "(1) the event in question must be of a kind which does not ordinarily occur in the absence of negligence; and (2) the agency of instrumentality causing the harm must have been within exclusive control of the defendant." ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶34, 241 Wis. 2d 804, 623 N.W.2d 151. A *res ipsa* instruction is warranted when "the evidence offered is sufficient to remove the causation question from the realm of conjecture, but not so substantial that it provides a full and complete explanation of the event." ***Peplinski v. Fobe's Roofing, Inc.***, 193 Wis. 2d 6, 17, 531 N.W.2d 597 (1995) (citation omitted). However, *res ipsa* does not apply "where an unexplained accident may be attributable to one of several causes." ***Turk v. H.C. Prange Co.***, 18 Wis. 2d 547, 554, 119 N.W.2d 365 (1963). If the evidence shows that the accident might have happened "as the result of one

of two causes," *res ipsa* does not apply. ***Klein v. Beeten***, 169 Wis. 385, 389, 172 N.W.2d 736 (1919).

¶8 Whether the evidence is sufficient to remove the question of causation from the realm of conjecture is a question of fact. *See* ***Peplinski***, 193 Wis. 2d at 17-19. The evidence at trial supported two possible causes for the falling carriers: the actions of customers reaching up to the shelving or the actions of Wal-Mart in shelving and stacking items.[2] The circuit court's finding that customers could reach up to the shelving is not clearly erroneous based on the record at trial. WIS. STAT. § 805.17(2) (1999-2000). Because the toppled carriers could be attributed to the customers' attempts to reach them, Graetz did not demonstrate that Wal-Mart's activity was the only possible cause of the accident.

¶9 Graetz argues that "[t]he most likely scenario, and most reasonable inference, is that the boxes were stacked improperly and unstably and eventually fell onto Graetz's head while she was in the area." However, this scenario does not take into account the involvement of customers in touching and moving items on the shelving. Even if Wal-Mart's actions and decisions may have caused the accident, the actions of customers who disturbed the overstock area might also have caused the boxes to fall off the shelf and bombard Graetz. Graetz proved too little by failing to remove the question of causation from the realm of speculation.

¶10 Graetz argues that the Wal-Mart employee who testified that she daily observed customers attempting to remove items from the shelving was not at work on the day of the accident. We do not find this evidence as lacking in

[2] Graetz contended that the safety of Wal-Mart's shelving methods was within the knowledge of the jurors and therefore an expert was not necessary.

probative value as Graetz suggests. This testimony permitted the jury to infer that a customer disturbed the "Pack-N-Ride" storage area, even if a customer was not observed doing so in proximity to the time the carriers fell on Graetz.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).