COURT OF APPEALS
DECISION
DATED AND FILED

August 3, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1595 **Cir. Ct. No. 2007CV3649**

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

GREAT LAKES DART MFG. CO., INC. AND NORTHERN INSURANCE COMPANY OF NEW YORK,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

V.

STARLA DEVELOPMENT, LLC AND WEST BEND MUTUAL INSURANCE COMPANY,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Kessler, J.

¶1 PER CURIAM. This is an appeal and a cross-appeal in a case involving property loss due to a fire in a warehouse storage building owned by Starla Development, LLC. Starla and West Bend Mutual Insurance Company

appeal from a judgment in favor of Great Lakes Dart Mfg. Co., Inc. and Northern Insurance Company of New York, arguing that dismissal was required because there are multiple possible causes of the fire and there is insufficient evidence of negligence and causation. Great Lakes and Northern cross-appeal, challenging the amount of the damages the jury awarded. We affirm the judgment.

¶2 Lawrence W. Katz formed Starla Development, LLC in 1999 for the purpose of purchasing the building that is the subject of this appeal. Katz, fifty percent owner of Starla Development, was the person who knew the most about the building because, prior to purchasing it in 2001, Katz had been employed by the previous owners of the building and had worked in the building "virtually every day" from 1990 to 1999.

¶3 On December 15, 2004, a fire occurred at the building. At the time of the fire, Great Lakes, one of Starla's tenants, stored game tables and equipment in the building. Northern Insurance, Great Lakes' insurer, paid Great Lakes $815,318 to replace the inventory lost as a result of the fire.

¶4 Subsequently, Great Lakes and Northern sued Starla and its insurer, West Bend Mutual, for the losses sustained as a result of the fire.

¶5 Starla and West Bend moved the court, in limine, to preclude any inference that Starla had been negligent or that any conduct on the part of Starla was a cause of the fire. They argued that Great Lakes and Northern had not produced, and would not produce, any evidence of the cause of the fire, and that there were multiple possible causes of the fire, several of which would not impose liability on Starla and West Bend. The motion was based upon ***Merco Distribution Corp. v. Commercial Police Alarm Co., Inc.***, 84 Wis. 2d 455, 267 N.W.2d 652 (1978).

¶6 A four day trial began on February 16, 2010. Great Lakes and Northern contended that the fire was electrical in origin. Katz and several other witnesses testified in support of their claim.

¶7 In 2002, Katz asked for a tax reassessment on the building because, as he put it, "[v]irtually every metal surface and support in the building is rusted and/or corroded to the extent that replacement is needed within the near future." Katz wrote a letter in 2002 to his Starla partners to share with them what he planned to tell the tax assessor. In the letter, he stated that the over one-half million dollar assessment was equal to or substantially less than what Starla would have to spend to make the building usable:

> [G]iven the purchase price of the property and contents, some $160,000 in December of 2001, and the tremendous costs in bringing the structure and land into usable condition, it is our firm belief that the assessed valuation of the building by your office in the sum of $509,700 is equal to or substantially less than the cost we anticipate having to spend to bring the building into usable habitable condition.

¶8 Great Lakes Dart salesman Nicholas Voden testified that in 2004, when he was considering leasing storage space in the building, he set up a meeting with Katz in which he specifically asked about the roof and Katz told him "it is new." Katz admitted in his testimony that he did not tell Voden that the roof had failed.

¶9 City of Muskego tax assessor, Laura L. Mecha, testified that her department received a letter from Katz disputing the building's assessment; attached to Katz's letter was a construction company's proposal for work to bring the building up to a useable condition. Among a list of projects, the proposal included the need to "[r]epair electrical and piping feeds."

¶10 On April 30, 2002, Mecha and the city's mayor met with Katz to consider reassessment and tour the building. Katz testified that he was truthful to Mecha when he stated that the building was in an unusable condition and would require more money than its assessed value to make it usable.

¶11 After this meeting, Starla's 2002 tax assessment value for the building was reduced from over one-half million dollars to zero. Mecha testified that one of the factors she considered in reducing the assessed value of the building to zero was the condition of the electrical system.

¶12 In June 2002, despite Katz's claimed unusable condition of the building, Starla began leasing the building out to a variety of tenants.

¶13 In August 2002, Katz wrote a letter to his two partners in which he stated that "[o]ur insurance coverage is effective June 11th, 2002. Since that date we have had HVAC, electrical, plumbing, roofing, and other assorted problems with the building."

¶14 In 2003, Mecha became aware that Katz was putting the building to commercial use. She said, "We were concerned in that, you know, here the building was led to believe to be not functional. It was being utilized, so we raised [] the assessment [from zero the year before to $257,200]."

¶15 Thereafter, in April 2003, Katz called the assessor's office to complain about the raised assessment. Stuart Hamel, a contracted commercial appraiser within the office, met with Katz. Among other building issues, Katz represented to Hamel that "the electrical was shot." Hamel subsequently lowered the assessment from $257,200 to $97,500.

¶16 Zarko Pelicaric, a tenant in Starla's warehouse from July 2004 until the time of the fire, testified that he observed lights located on the west wall of the warehouse sparking during rain events "many times; not just once or twice, probably a number of times." He further testified that he informed Katz about the sparking lights.

¶17 Michael McFayden, a delivery truck driver, testified that he was at the building on December 15, 2004, at the time the fire broke out. He testified that before the fire broke out, he was walking through the building and heard "like a snapping sound, like a piece of plastic breaking or a loud click." At that time the lights "went off briefly" and then came back on. Shortly after he left the building and as he was pulling away with his tractor, something caught his eye that "looked like a fire." He went to take a look and could "see there was a fire in the building towards the ceiling."

¶18 Michael Quick, a special agent with the Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, testified that he eliminated all other possible causes of the fire except electrical.

¶19 Greg Eggum, a fire investigator for EFI Global, testified that "this fire was caused by a failure in the light or the electrical system or a combination of it all in the southwest wall, second bay." He further testified that in "[a] large fire such as this, it is not uncommon that the element that started the fire is destroyed, gone, or disappeared, and cannot be examined by any credible engineer."

¶20 At the close of trial, the jury found both sides to be negligent: Starla, sixty percent negligent and Great Lakes Dart, forty percent negligent. The jury also found each side's negligence was a cause of the damage to Great Lakes

Dart's property. It awarded Great Lakes Dart and Northern $803,000 to compensate for damages incurred as a result of the December 15, 2004 fire.

Standard of Review

¶21 Our review of a jury's verdict is narrow. ***Betterman v. Fleming Cos., Inc.***, 2004 WI App 44, ¶15, 271 Wis. 2d 193, 677 N.W.2d 673. We will sustain a jury verdict if there is any credible evidence to support it. ***Id.*** In applying this narrow standard of review, we consider the evidence in a light most favorable to the jury's determination. ***Id.*** It is the jury's role, not an appellate court's, to balance the credibility of witnesses and the weight given to the testimony of those witnesses. ***Id.*** To that end, we search the record for credible evidence that sustains the jury's verdict, not for evidence to support a verdict that the jury could have reached but did not. ***Id.***

¶22 The standard of review in this case is even more stringent because the circuit court approved the jury's verdict by denying all motions after the verdict. *See* ***id.***, ¶16. We afford special deference to a jury determination in those situations in which the trial court approves the jury's finding. ***Id.*** In such cases, we will not overturn the jury's verdict unless there is such a complete failure of proof that the verdict must be based on speculation. ***Id.***

Law and Discussion

Starla and West Bend's Appeal

¶23 The elements of a cause of action for negligence are (1) a duty of care on the part of the defendants, (2) a breach of that duty, (3) a causal connection between the conduct and the injury, and (4) an actual loss or damage as a result of

the injury. ***Transporation Ins. Co., Inc. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 293, 507 N.W.2d 136 (Ct. App. 1993).

¶24 If defendant's conduct forseeably created an unreasonable risk to others, defendant was negligent. *See* ***Morgan v. Pennsylvania Gen. Ins. Co.***, 87 Wis. 2d 723, 732, 275 N.W.2d 660 (1979).

¶25 The existence of negligence is a mixed question of law and fact. ***Id.*** As a general rule, negligence is a jury question. ***Id.*** The trial court, as well as an appellate court, however, has the authority to decide the preliminary question of law of whether a jury question on the issue of negligence has been presented. *See* ***id.*** at 732-33. To hold that a person or entity is not negligent as a matter of law, the court must be able to say that no properly instructed, reasonable jury could find, based upon the facts presented, that the defendants failed to exercise ordinary care. *See* ***id.***

¶26 The test of cause in Wisconsin is whether the defendant's negligence was a substantial factor in contributing to the result. ***Merco***, 84 Wis. 2d 458. There may be more than one substantial causative factor in any given case. ***Id.*** at 459. Apportionment of negligence is also generally a jury question. ***Morgan***, 87 Wis. 2d at 736. Causation is a fact; the existence of causation frequently is an inference to be drawn from the circumstances by the trier of fact. ***Merco***, 84 Wis. 2d at 459.

¶27 Starla and West Bend argue that Great Lakes and Northern failed to introduce sufficient credible evidence of both the negligence and causation elements of the negligence cause of action. Starla and West Bend cite to a myriad of cases to support their position that there was insufficient evidence of Starla's negligence and the cause of the fire; we are not persuaded. There was sufficient

credible evidence of ongoing electrical problems up and to the time of the fire; it was reasonable for the jury to find that Starla, as the owner of the building, failed to exercise ordinary care and was therefore negligent in its maintenance of the building's electrical components. *See* ***Morgan***, 87 Wis. 2d at 732.

¶28 With regard to cause, Starla and West Bend insist that there were multiple possible causes of the fire, several of which would not impose liability on Starla and West Bend and, therefore, ***Merco*** instructs that we must hold as a matter of law that no jury could reasonably find that Starla's negligence caused the fire. We disagree; this is not a ***Merco*** case.

¶29 In ***Merco***, an alarm company contracted to provide burglar alarm services to Merco Distributing Corporation. ***Merco***, 84 Wis. 2d at 456. Merco was in charge of setting the alarm at closing. ***Id.*** at 457. Testimony was that it had done so. ***Id.*** The alarm company's normal procedure, if it does not receive a closing signal from a customer, is to call the customer's place of business to see if someone was working late. ***Id.*** If no one answers, it then calls the persons on a list provided by the customer to notify the customer that the alarm has not been set. ***Id.*** The alarm company called the client building but did not call anyone else. ***Id.***

¶30 Sometime between 5:00 p.m. December 4 and 8:00 a.m. December 5, Merco's warehouse was burglarized. ***Id.*** at 458. At 6:25 p.m. on December 4, the alarm company received notice that the telephone lines that connected Merco's alarm system, as well as those of several other customers, to the alarm company's office, were out of order. ***Id.*** at 457. After learning that the telephone lines were out, the alarm company made no effort to contact Merco employees. ***Id.*** The telephone line breakdown was the result of two days of steady rain. ***Id.*** So many

lines were and had been out of order that the alarm company's employees were overworked and unable to follow the normal customer notification procedures. ***Id.*** at 457-58.

¶31 After being burglarized, Merco successfully sued the alarm company for its loss. There was nothing in the trial court record to indicate either when the burglary occurred or when the phone lines were repaired. ***Id.*** at 459. The supreme court speculated as to the possible causation scenarios and ultimately concluded that because there was no credible evidence upon which the trier of fact could base a reasoned choice between possible inferences, any finding of causation would be in the realm of speculation and conjecture. ***Id.*** at 459-61.

¶32 The supreme court held that Merco failed to remove the issue of causation from the realm of speculation by establishing facts affording a logical basis for the inference that the loss occurred because the alarm company failed to notify Merco that the alarm system was not functioning. ***Id.*** at 460-61. The court reversed the judgment and remanded with directions to the trial court to enter judgment in favor of the alarm company and to dismiss Merco's complaint. ***Id.*** at 461.

¶33 Here, unlike in ***Merco***, the jury was not left to speculate by being presented with possibilities of cause with no basis to choose among those possibilities. Rather, the jury had before it a plethora of credible evidence to establish that the cause of the fire was electrical, even if there was no direct evidence of exactly what in the electrical system caused the fire: in 2002, Katz described the building in a letter stating, "Virtually every metal surface and support in the building is rusted and/or corroded to the extent that replacement is needed within the near future"; in 2002, a construction company's proposal for

work to bring the building up to a useable condition included the need to "[r]epair electrical and piping feeds"; Muskego's tax assessor testified that one of the factors she considered in reducing the assessed value of the building to zero was the condition of the electrical system; in 2003, Katz represented to a commercial appraiser from the tax assessor's office that "the electrical was shot"; a tenant in the building from July 2004 until the December 15, 2004 fire testified that during rain events he would often see lights sparking and that he had reported this to Katz; on the date of the fire, moments before the fire started, a delivery truck driver saw problems with the building lights and heard a snapping sound; a fire investigator testified that the fire was caused by a failure in the light or the electrical system or a combination of it all, and further testified that it is not uncommon that the element that started the fire is destroyed, gone, or disappeared, and cannot be examined by any credible engineer; and a special agent with the Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives testified that he eliminated any causes of the fire other than electrical.

¶34 Again, the question on appeal is whether the evidence is sufficient to support the finding of causation made by the trier of fact. ***Id.*** at 459. Upon this record, it plainly is.

Great Lakes' and Northern's Cross-Appeal

¶35 Maryln Hempel, part owner of Great Lakes, testified on behalf of Great Lakes and Northern. Hempel used a chart to explain the damages calculations she performed to the jury. In the chart, Hempel included $1,443,317 as her calculation for the fair market value of destroyed property (i.e., cost of goods x 150% markup = $865,990 + cost of goods, $577,327 which equals the total marked up value of goods, $1,443,317). Hempel testified that Great Lakes'

large customers, like Target, JCPenney and Dunhams, had their own warehouses which had already been fully stocked with Great Lakes' goods for the Christmas season. She further testified that even though the fire occurred only ten days before Christmas, Great Lakes' own warehouse, plus two leased warehouses, were full of inventory. Hempel testified that after the fire, Great Lakes was able to replenish its inventory so that it was able to meet all orders for the next year's Christmas holiday season. Finally, Hempel admitted that the only nonspeculative information to prove lost sales were canceled orders for six game tables due to the fire.

¶36 Curtis Reynolds, a certified public accountant, testified on behalf of Starla and West Bend. Based upon his review of Hempel's deposition testimony and the documents produced by Great Lakes and Northern in support of their damage claim, it was his opinion that an award of $803,000 would put Great Lakes and Northern back in the position that they would have been in if the fire had not occurred. He testified that if Great Lakes and Northern were paid for the marked-up value of the goods, "they would be paid twice for the same loss" and this would put them in a position that is better than they would have been in if the loss had not occurred. Specifically, Reynolds explained why Great Lakes' calculations represented a "double dip or double accounting":

> [T]he cost of the product and the freight … pays them to replace the product and bring it back into their possession and gives them the ability to sell that product to their customers again. And if they make that sale to their customers … then they've had the benefit of that sale and have earned their markup.
>
> And if they're paid for the retail markup here in addition to them making the sales, there's a double dip or double accounting.

¶37 Again, there was sufficient credible evidence to support the jury's damages award. It appears the jury accepted Reynold's opinion that an award of $803,000 would put Great Lakes and Northern back in the position that they would have been in if the fire had not occurred. The jury was given an appropriate instruction telling it that compensation for destroyed inventory "is measured by the fair market value of the property at the time and place of its destruction." This permitted the jury to award lost profits, but pursuant to the instruction, Great Lakes and Northern had to show that there were willing buyers at the time. Great Lakes and Northern did not present evidence to the amount of lost sales claimed. Besides the proof of lost profit for six game tables, they offered no proof other than Hempel's speculation of lost sales.[1]

¶38 From the evidence before it, the jury could have reasonably concluded that Great Lakes' and Northern's claimed markup included the costs of goods sold, plus fifty percent of the cost of goods sold, in addition to the costs of the goods themselves, that this was actually counting the same thing twice and putting Great Lakes and Northern in a better position than they would have been in if no fire occurred.

Conclusion

¶39 On all issues before the jury there is sufficient credible evidence to support its verdict.

¶40 No costs awarded to either party.

[1] Hempel's "Summary of Damages" chart also listed "[a]ccounting costs for calculating the loss" to be $50,318. It was reasonable for the jury to reject this unsupported calculation; we need say no more about this.

By the Court.—Judgment affirmed.

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