COURT OF APPEALS
DECISION
DATED AND FILED

September 18, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1956 **Cir. Ct. No. 2009CV12191**

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

JAMES E. KOCHANSKI AND CYNTHIA KOCHANSKI,

PLAINTIFFS-RESPONDENTS,

BLUE CROSS BLUE SHIELD OF WISCONSIN AND KATHLEEN SEBELIUS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

INVOLUNTARY-PLAINTIFFS,

V.

SPEEDWAY SUPERAMERICA, LLC,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Reversed and cause remanded.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 CURLEY, P.J. Speedway SuperAmerica appeals the order: (1) affirming the jury's verdict finding Speedway negligent and consequently liable for injuries James E. Kochanski suffered when he tripped and fell outside one of Speedway's convenience stores, and (2) denying Speedway's subsequent motion for a new trial. Speedway argues, among other things, that the trial court erred in giving WIS JI—CIVIL 410, the absent witness instruction, to the jury, and that this error was prejudicial. Specifically, Speedway argues that the instruction was inappropriate in this case because: (1) the former employees it listed in its interrogatory answers as having been on duty when Kochanski tripped and fell on its premises were not material to the case or in Speedway's control at the time of the lawsuit; (2) it was not more natural for Speedway to call its former employees as witnesses; and (3) there was no reasonable relationship between Speedway's decision not to call the witnesses and the inference, allowed by WIS JI—CIVIL 410, that their testimony would have been unfavorable to Speedway. We agree with Speedway that the decision to give the absent witness instruction was erroneous and prejudicial, and therefore reverse the order and remand the matter for a new trial.

BACKGROUND

¶2 This case arises from an incident on February 6, 2007, in which Kochanski suffered injuries resulting from a fall outside one of Speedway's convenience stores. On the day of the accident, Kochanski stopped at the Speedway station at 9091 N. 76th Street in Milwaukee to fill his car with gas. His credit card was not working at the pump, so he decided to go into the store to pay his bill. There was, according to Kochanski, about two inches of snow on the ground. As Kochanski approached the curb of the walkway leading to the store entrance, which was painted yellow, he noticed snow covering portions of it. He

testified that he could not actually see the curb in front of the store entrance because it was covered with snow. Kochanski noticed yellow paint denoting the curb to the right and to the left of him, but because he did not see any yellow paint directly in front of him, he thought he would be stepping onto a place where the curb had been cut out. However, the cut out, or wheelchair access, for the curb was actually located four to five feet to the side of the entrance doors. Kochanski tripped on the curb and fell to the ground, suffering a broken arm and a wrist injury. He consequently sued Speedway for negligence and for violation of Wisconsin's Safe Place Statute, WIS. STAT. § 101.11 (2009-10).[1]

¶3 The case went before a jury in May 2011. At trial, Kochanski testified, as did his wife and two of his treating physicians. Additionally, Kochanski's attorney offered into evidence Speedway's interrogatory responses indicating that there were five Speedway employees working when Kochanski fell. The interrogatories asked Speedway to identify the name and contact information of each person believed to have knowledge of the accident. Speedway answered that the following Speedway employees were on duty February 6, 2007, at the time of Kochanski's accident:

> Former Store Manager Ralph Whiting….
>
> Former Customer Service Representative Unette Brown….
>
> Former Customer Service Representative Venia Packer….
>
> Former Food Stewar[d] Markisha Jones….
>
> Former Food Stewar[d] Robin Wenninger….

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 Speedway called no witnesses at trial. Instead, it presented the jury with store surveillance footage of the accident. Speedway explained during its opening statement that it would not be calling any witnesses because the video was enough to prove that Speedway was not negligent:

> Now, Speedway is not going to be calling any witnesses from the store. There was a manager on duty at the time; however, he left. He is no longer employed by Speedway. He left, I think, in August of 2007. He moved out of state. We tried to contact him … but were unable to do so. However, we don't need any testimony from the manager in this case. It's all clear from the videotapes.

(Some spacing and formatting omitted.)

¶5 Given Speedway's decision not to call any witnesses, Kochanski requested that the trial court give WIS JI—CIVIL 410 to the jury. Over Speedway's objection, the trial court decided to give the instruction:

> Okay. Now I'll make my ruling: Number one, all five were placed on the witness list by Speedway; number two, it does not appear that any effort was made to subpoena any of those five; number three, as to Speedway's policy and practices, current employees are capable of giving that testimony, and none of them have been subpoenaed, either…. And then number four, I think that the jury has a right to know what Speedway's policies are regarding salting; and, particularly the videotape, at least so far, has not shown whether or not the premises or the area were salted before the accident. For all of these reasons, the Court has decided that Instruction 410 should be given.

(Some spacing, capitalization and formatting omitted.)

¶6 The trial court instructed the jury on the uncalled witnesses as follows:

> Now, absence of a witness. If a party fails to call a material witness within his control, or whom it would be more natural for that party to call than the opposing party, and the party fails to give you a satisfactory explanation for

> not calling a witness, you may infer that the evidence which the witness would have given would be unfavorable to the party who failed to call the witness.

¶7 During closing argument, Kochanski's counsel commented on the fact that Speedway had not called any witnesses and suggested that Speedway was withholding information from the jury:

> The law says—and you've taken an oath to follow the law—that if there is a witness that would have been natural for SuperAmerica to call to explain to you what was done on this day, you can infer that had they called on that witness, they would have gotten some unfavorable testimony.
>
> Why didn't [Speedway] call anybody? What would that unfavorable testimony have been? Other evidence that is missing in this case….
>
> Not a single document, and not a single witness. It makes you wonder[,] what's going on? What is it that's being decided at the highest levels of SuperAmerica? How will they defend these cases? Why don't you get to hear the whole story?

¶8 The jury determined that Speedway was negligent in failing to maintain its premises, and also found that Kochanski was not negligent. Following the verdict, Speedway moved the trial court to set aside the verdict and for a new trial. The trial court denied the motion.

¶9 In denying Speedway's motion—specifically, regarding the jury instruction issue—the court determined that Speedway had offered no evidence that the former Speedway employees were no longer in its employ, saying that Speedway:

> didn't … effectively prove … either by affidavit or any testimony on the record that these were ex-employees. For all I know, they're currently employed in a different Super America. We don't know that. It's not part of the evidence.

¶10 As for the interrogatory responses indicating that the uncalled witnesses were *former* Speedway employees, the trial court found that they only implied that the individuals no longer worked at the particular store where Kochanski fell and that regardless of whether they were current employees, Speedway had a "special relationship" with them:

> That implies former employees of that location. It doesn't mean they don't have a special relationship with Speedway as an employer/employee at a different location…. That's not clear from the record, in my view.
>
> Even if they are former employees, which I don't think is established in the record, they still have a special relationship with Speedway as ex-employees. Ex-employees that have to obtain letters of recommendation for future employers from their former employer, Speedway….
>
> Also, the possibility that the manager may be on a pension or a deferred pension. These are all things that I believe the burden to establish was on the defense.

¶11 The trial court further explained that there had been no showing that there was not a special relationship between Speedway and the witnesses, and that Speedway had made a strategic decision not to call the witnesses.

¶12 Speedway now appeals.

ANALYSIS

¶13 In this case, we are asked to determine whether the trial court erred in denying Speedway's motion for a new trial. Specifically, we consider whether the trial court erred in giving WIS JI—CIVIL 410 to the jury.

Standard of Review

¶14 While "[a] trial court 'has broad discretion in deciding whether to give a particular jury instruction,'" it "'must exercise its discretion to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence.'" ***Root v. Saul***, 2006 WI App 106, ¶13, 293 Wis. 2d 364, 718 N.W.2d 197 (citation and some internal quotation marks omitted); *see also* ***McMahon v. Brown***, 125 Wis. 2d 351, 354, 371 N.W.2d 414 (Ct. App. 1985) (jury instructions "must be framed with regard to the evidence," and "should be tailored to meet the needs of the specific case"). If a court erroneously exercises its discretion, and if the error is prejudicial, we will order a new trial. *See* ***Horst v. Deere & Co.***, 2008 WI App 65, ¶13, 312 Wis. 2d 421, 752 N.W.2d 406, *aff'd*, 2009 WI 75, 319 Wis. 2d 147, 769 N.W.2d 536. A court erroneously exercises its discretion "'if the jury instructions, as a whole, misled the jury or communicated an incorrect statement of law.'" ***Root***, 293 Wis. 2d 364, ¶13 (citation omitted). Whether a jury instruction accurately states the law applicable to the facts of a given case is an issue we review *de novo*. ***Id.*** "An error is prejudicial if it probably and not merely possibly misled the jury." ***Fischer by Fischer v. Ganju***, 168 Wis. 2d 834, 850, 485 N.W.2d 10 (1992).

A. The trial court erroneously gave WIS JI—CIVIL 410 to the jury.

¶15 As noted, the trial court gave WIS JI—CIVIL 410, the absent witness instruction, based on Speedway's decision not to call as witnesses any individuals who were on duty at the convenience store where Kochanski fell the day of the accident. The instruction provides:

> If a party fails to call a material witness within [its] control, or whom it would be more natural for that party to call than the opposing party, and the party fails to give a satisfactory explanation for not calling the witness, you may infer that the evidence which the witness would give would be unfavorable to the party who failed to call the witness.

Id. Thus the instruction applies to a given case only if the following factors are present: (1) the uncalled witnesses are material and within the party's control, or it would be "more natural" for the party to call those witnesses; and (2) the party fails to satisfactorily explain the witnesses' absence. *See* ***id.*** We are required to narrowly construe whether these factors are present. *See* ***Ballard v. Lumbermens Mut. Cas. Co.***, 33 Wis. 2d 601, 615-16, 148 N.W.2d 65 (1967).

(1) *Kochanski did not sufficiently show that the uncalled witnesses were material and within Speedway's control or that it was "more natural" for Speedway to call the witnesses.*

¶16 We conclude that there was not a sufficient showing that the uncalled witnesses were material. A "material" witness for purposes of the absent witness instruction is one "capable of supplying 'information of strong probative value' for the party's case." *See* ***Thoreson v. Milwaukee & Suburban Transp. Co.***, 56 Wis. 2d 231, 237, 201 N.W.2d 745 (1972) (citation omitted). The trial court determined that the former Speedway employees were material because the jury deserved to know (a) what Speedway's policies were regarding salting the area in snowy weather and (b) whether the area had been salted prior to Kochanski's fall; however, there is simply no evidence in the record that any of the uncalled witnesses had this information. *Cf.* ***id.*** ("We cannot assume the bus passenger was a material witness; he may or may not have seen the accident.") There is additionally no evidence in the record indicating that any of the uncalled witnesses saw Kochanski fall. *See* ***id.*** We cannot, therefore, conclude that they

were "capable of supplying 'information of strong probative value' for [Speedway]'s case." *See* ***id.*** (citation omitted).

¶17 Additionally, there is no evidence in the record that the witnesses were under Speedway's control. Notably, all of the witnesses were listed as "former" employees. Contrary to the trial court's assumption that the witnesses may have been in Speedway's control because, "[f]or all I know, they're currently employed in a different Super America," there is absolutely no indication in the record that any of the uncalled witnesses were working at a different Speedway station at the time of discovery or trial. As Speedway correctly points out, Kochanski sued Speedway as a corporate entity, not an individual convenience store. Speedway certainly would have known if the potential witnesses were currently in its employ in any capacity, and would have amended its interrogatory answers accordingly.

¶18 Furthermore, we are not persuaded that Speedway's interrogatory answers were insufficient to establish that the potential witnesses were no longer under Speedway's control during discovery and trial. The trial court took issue with—as Kochanski now does on appeal—the fact that the information about these witnesses was conveyed via an answer to an interrogatory rather than an affidavit or live testimony. But interrogatory answers are facts of record, given under oath by a party. *See* WIS. STAT. § 804.08(1)(b), (2)(a). In this case, they were read into evidence before the jury, and Kochanski did not object; in fact, it was Kochanski's attorney who offered them into evidence. Therefore, any argument that the answers were insufficient was waived. *See* ***In re Ambac Assurance Corp.***, 2012 WI 22, ¶21, 339 Wis. 2d 48, 810 N.W.2d 450 ("The concept that an issue not raised in [trial] court is deemed waived is one of long standing.").

¶19 Similarly, it was not "more natural" for Speedway to call the witnesses. "Where a relationship exists between one of the parties and the witness, such as a familial or employer-employee relationship, it may be more natural for one party to call the witness than the other." ***Thoreson***, 56 Wis. 2d at 238. However, "where no such relationship or its equivalent exists, no such inference arises." ***Id.*** Thus, "it is improper to give the absent-witness instruction when the witness is equally available to both parties." ***Id.*** As noted, there is no evidence in the record that the potential witnesses were in fact employed by Speedway during discovery or trial. Therefore, they were equally available to both parties, and it was not "more natural" for Speedway to call them. *See* ***id.*** Furthermore, we are not persuaded by the trial court's position that it was more natural for Speedway to call the witnesses because it may have had a "special relationship" based on the fact that the former employees might approach Speedway for a letter of recommendation for future employment or may be drawing a pension from Speedway. This "special relationship" is grounded on assumptions and speculation, not on any evidence in the record. In circumstances such as the instant case where we are commanded to construe the need for the jury instruction narrowly, *see* ***Ballard***, 33 Wis. 2d at 615-16, we simply cannot expand the law to include situations where a "special relationship" *might* exist.

¶20 Moreover, while Kochanski argues that it was "more natural" for Speedway to call the witnesses based on the fact that it was required to show that it adopted and followed reasonable processes and procedures to keep the premises safe, the case it sets forth for this contention makes clear that we look to the nature of the relationship between the party and the witnesses, not the substance of the witnesses' testimony. *See* ***Carr v. Amusement, Inc.***, 47 Wis. 2d 368, 375-76 & n.17, 177 N.W.2d 388 (1970) (holding that absent witness instruction appropriate

where missing witness was party's wife) ("The field of family relationships is another in which the adverse inference from the failure to call an available witness has been freely drawn. Thus, in civil cases the failure to call the spouse of a party to give relevant testimony has frequently been held to permit such an inference.") (citation and internal quotation marks omitted). We conclude that because there was no employer-employee relationship or any similar relationship between Speedway and the potential witnesses at the time of discovery and trial, it was not "more natural" for Speedway to call them.

(2) Kochanski did not sufficiently show that Speedway failed to satisfactorily explain the witnesses' absence.

¶21 Additionally, Kochanski did not sufficiently show that Speedway failed to satisfactorily explain the witnesses' absence. "[T]here must be a showing, before the absent witness instruction is appropriate, that there is a reasonable relationship between the failure to produce the witness and the inference that the testimony, had it been placed before the jury, would have been unfavorable to the party's cause." ***Karl v. Employers Ins. of Wausau***, 78 Wis. 2d 284, 301, 254 N.W.2d 255 (1977). "[T]he [absent witness] instruction is appropriate and should be used only in those cases where the failure to call a witness leads to a reasonable conclusion that the party who would ordinarily call that witness is unwilling to allow the jury to have the full truth." ***Featherly v. Continental Ins. Co.***, 73 Wis. 2d 273, 282, 243 N.W.2d 806 (1976). "A party to a lawsuit does not have the burden, at his peril, of calling every possible witness to a fact, lest his failure to do so will result in an inference against him." ***Ballard***, 33 Wis. 2d at 615.

¶22 This is not a situation where the potential witnesses were the only witnesses to the event or the conditions at the Speedway station when Kochanski

fell. Kochanski himself testified to those things, and Speedway introduced video footage of the incident. We therefore cannot conclude that Speedway's failure to call its former employees "leads to a reasonable conclusion that" it was "unwilling to allow the jury to have the full truth." *See* ***Featherly***, 73 Wis. 2d at 282. For these same reasons, we are not convinced by Kochanski's argument that Speedway was unwilling to give the jury the full truth simply because no witness testified as to its snow-removal policies generally or what steps it took that particular day. Therefore, because the facts of the case do not support the giving of WIS JI—CIVIL 410, the trial court erred in giving the instruction to the jury. *See* ***Root***, 293 Wis. 2d 364, ¶13.

B. The trial court's error prejudiced Speedway.

¶23 We also conclude that the trial court's error was prejudicial. As noted, the absent witness instruction effectively allows jurors to presume that the party who has elected not to call certain witnesses is hiding relevant, adverse information from them. *See, e.g.*, ***Featherly***, 73 Wis. 2d at 282. Kochanski's counsel capitalized on this presumption in closing:

> The law says—and you've taken an oath to follow the law—that if there is a witness that would have been natural for SuperAmerica to call to explain to you what was done on this day, you can infer that had they called on that witness, they would have gotten some unfavorable testimony.
>
> Why didn't [Speedway] call anybody? What would that unfavorable testimony have been? Other evidence that is missing in this case….
>
> Not a single document, and not a single witness. It makes you wonder[,] what's going on? What is it that's being decided at the highest levels of SuperAmerica? How will they defend these cases? Why don't you get to hear the whole story?

¶24 We agree with Speedway that this instruction allowed the jury to presume that Speedway was deliberately hiding relevant, adverse information from them, and that "[s]uch a strong presumption of dishonesty [was] very prejudicial and infect[ed] not only the question of Speedway's negligence, but [also] the entire verdict." Moreover, we do not agree with Kochanski that the fact that Speedway argued that there was no need for witnesses means that the instruction was not prejudicial; in fact, in this circumstance, we think the opposite is true.

¶25 Speedway chose to use the videotape to prove that it was not negligent. It argued that the tape showed that the conditions on the premises were kept up to a reasonably safe standard, and Kochanski fell as a result of his own negligence. No witnesses were necessary to testify as to whether Speedway followed its policies or procedures regarding snow removal in this case because, according to Speedway, the video showed the jurors everything they needed to know. Speedway was not required to locate and subpoena every former employee who may have seen the accident or known something about it. Allowing the jury to presume that Speedway was hiding relevant, adverse information simply because it chose not to expend unnecessary time and resources to locate and subpoena these potential witnesses was erroneous, and that error prejudiced Speedway at trial. *See* ***Root***, 293 Wis. 2d 364, ¶13; ***Horst***, 312 Wis. 2d 421, ¶13. In sum, because the trial erred in giving WIS JI—CIVIL 410, and because that error prejudiced Speedway, we must overturn the verdict and remand the case for a new trial.

¶26 As a final matter, we note that Speedway has brought two additional arguments on appeal. It argues that the verdict should be reversed because it is contrary to the great weight of the evidence and that new trial should be granted in

the interest of justice pursuant to WIS. STAT. § 752.35. However, because we reverse on the jury instruction issue, we need not address those additional arguments here. *See* ***Patrick Fur Farm, Inc. v. United Vaccines, Inc.***, 2005 WI App 190, ¶8 n.1, 286 Wis. 2d 774, 703 N.W.2d 707 (we decide cases on narrowest possible ground).

By the Court.—Order reversed and cause remanded for a new trial.

Not recommended for publication in the official reports.

¶27 FINE, J. (*dissenting*). As the Majority recognizes, a trial court has broad discretion in deciding how to instruct a jury. Here, in light of the following, the trial court determined that, in the words of the missing-witness instruction, "it would be more natural for" Speedway Superamerica, Inc., "to call" those whom it designated as former employees *at the store* (*not former Speedway employees*) where James E. Kochanski fell, "than" it would be for Kochanski:

- Speedway, not Kochanski, placed those employees on its witness list;

- There was no *evidence* (lawyer's representations are not evidence) that those employees were not (a) still employed by Speedway, (b) receiving post-employment remuneration from Speedway, or (c) were otherwise reachable by Speedway;

- Speedway had an interest in persuading the jury that its policies in connection with possible unsafe snow accumulations were not flawed, and, accordingly, those employees would have pertinent and, most likely, direct knowledge about those policies—thus, their testimony was "material";

- Speedway had an interest in persuading the jury that what its employees did at the store the day Kochanski fell was not a cause of his fall—thus, their testimony was "material."

¶28 Significantly, Speedway never explained to the jury *via evidence* why it did not call those employees, even though, under the instruction, the trial court told the jury that it "may infer that the evidence which the witness would have given would be unfavorable to the party who failed to call the witness" *unless* that party gives a "satisfactory explanation" for not calling the witness. The "explanation" must be based in evidence, not, as here, mere rhetoric or argument.

¶29 In my view, the trial court cogently explained why it was giving the missing-witness instruction. It thus, as I see it, did not by any stretch of the imagination erroneously exercise its discretion. Accordingly, I respectfully dissent.