COURT OF APPEALS
DECISION
DATED AND FILED

November 27, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2703 **Cir. Ct. No. 2009CV757**

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

SHANNON D. O'BRIEN,

PLAINTIFF-APPELLANT,

V.

GERMANTOWN MUTUAL INSURANCE COMPANY, WEIGOLD ENTERTAINMENT, LLC, D/B/A THE X BAR, ERIC J. STARCK AND SCOTT A. HAKES,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Chippewa County: RODERICK A. CAMERON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Shannon O'Brien appeals a judgment entered upon a jury verdict finding The X Bar not negligent for injuries O'Brien sustained in a

bar fight with another patron. O'Brien requests a new trial in the interest of justice, asserting that real controversies regarding The X Bar's negligence and the amount of damages for pain and suffering were not fully tried. We affirm.

BACKGROUND[1]

¶2 O'Brien was beaten by Eric Starck in The X Bar's bathroom on February 22, 2008. O'Brien sustained injuries to his face and nose that required several surgeries.

¶3 O'Brien sued The X Bar and its insurer, Germantown Mutual Insurance Company, as well as Starck and his companion at the bar, Scott Hakes. O'Brien alleged that The X Bar and its employees were negligent. He also alleged that the intentional conduct of Starck and Hakes contributed to his injuries.

¶4 Neither Starck nor Hakes answered the complaint, and default judgments were entered against them.[2] The X Bar answered, alleging that O'Brien's conduct may have contributed to his own injuries. The X Bar also alleged that O'Brien's injuries may have been intentionally caused by Starck and Hakes. Because of the default judgments, only O'Brien's claim against The X Bar remained for trial.

[1] O'Brien's statement of facts is generally just a recitation of evidence supporting his claim against The X Bar. On appeal, however, "we view the evidence in the light most favorable to the jury's verdict." ***Reuben v. Koppen***, 2010 WI App 63, ¶19, 324 Wis. 2d 758, 784 N.W.2d 703.

[2] The default judgment against Hakes was vacated after trial and Hakes was dismissed from the case.

¶5 A two-day trial was held in 2009 to determine whether The X Bar was negligent. Witness accounts of the incident varied. Before trial, the circuit court determined that The X Bar would be permitted to introduce evidence that Starck acted in self-defense. It deemed this evidence necessary to properly apportion negligence among the parties. At trial, Starck testified that O'Brien initiated the fight in the bathroom. O'Brien testified that he could not recall the fight. The jury found Starck solely and intentionally caused O'Brien's injuries, and that The X Bar was not negligent. It awarded O'Brien nearly $50,000 for past medical expenses and $20,000 for pain and suffering.

DISCUSSION

¶6 On appeal, O'Brien asserts that the introduction of self-defense evidence "skewed the focus of the trial unfairly," which deprived O'Brien of his day in court. Elsewhere in his brief, he complains that instructing the jury on self-defense "changed the focus of the case from a negligence claim" to a defense of O'Brien's conduct. However, O'Brien fails to further develop the concept of "changed focus." He cites no legal authority supporting "changed focus" as a basis for reversal. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶7 In general, the admissibility of evidence is determined by the judge. ***Christensen v. Economy Fire & Cas. Co.***, 77 Wis. 2d 50, 55, 252 N.W.2d 81 (1977). We will not upset the circuit court's decision unless it erroneously exercised its discretion. ***Id.*** "The term discretion contemplates a process of reasoning which depends on facts that are of record or are reasonably derived by inference from the record and a conclusion based on a logical rationale founded on proper legal standards." ***Id.***

¶8 From what we can tell, O'Brien is not arguing the court erroneously exercised its discretion, as he does not even cite that standard. In fact, the only review standard he cites is found in another section of his brief, in which he discusses the adequacy of pain and suffering damages found at trial. There, O'Brien urges us to exercise our discretionary reversal authority under WIS. STAT. § 752.35 because the real controversy was not fully tried.

¶9 We may order a new trial when the real controversy has not been fully tried without finding the probability of a different result on retrial. ***State v. Hicks***, 202 Wis. 2d 150, 159-60, 549 N.W.2d 435 (1996). A controversy is not fully tried when the jury had before it evidence not properly admitted which significantly clouded a crucial issue. ***Id.*** at 160. "This court approaches a request for a new trial with great caution. We are reluctant to grant a new trial in the interest of justice, and thus we exercise our discretion only in exceptional cases." ***State v. Armstrong***, 2005 WI 119, ¶114, 283 Wis. 2d 639, 700 N.W.2d 98.

¶10 O'Brien argues he is entitled to a new trial for three reasons. First, he contends the self-defense evidence and instruction were not relevant to the issue at trial, namely The X Bar's negligence. Second, he asserts that the evidence and instruction constitute an impermissible collateral attack on the default judgment against Starck. Finally, he maintains that "The X Bar does not have a complaint because, as the negligent tortfeasor, if so found, it is entitled to full indemnity from the intentional tortfeasor, Mr. Starck."

¶11 As should be evident, only one of O'Brien's proffered reasons arguably affected the clarity with which the crucial negligence issue was presented to the jury. But O'Brien has failed to adequately develop his argument that the self-defense evidence and instruction were inappropriate. First, his argument does

not explain what specific testimony he found objectionable or place this evidence in the context of the entire trial. Second, his failure to challenge the admission of the evidence on appeal effectively precludes his argument for reversal in the interest of justice. *See* ***Hicks***, 202 Wis. 2d at 160 (A "controversy may not be fully tried … when the jury had before it *evidence not properly admitted* which so clouded a crucial issue." (Emphasis added)). In essence, O'Brien has failed to find a legal hook upon which to hang his hat. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980) (rejecting as inadequate appellate argument that failed to identify the nature of the witness's testimony, including the offending questions and answers, and to cite adequate legal authority supporting the relevant propositions).

¶12 O'Brien also asserts the jury's damages award of $20,000 for past pain and suffering is patently low. Again, he asks only that we review this issue under our discretionary reversal authority. O'Brien appears to argue the $20,000 award was too low because "this was a pain producing condition," O'Brien was disabled for a number of months, and he had medical bills totaling over $55,000. However, none of this establishes that the real controversy regarding the amount of O'Brien's pain and suffering was not fully tried. We see nothing in this case that warrants exercise of our discretionary reversal authority.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).