COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP568 **Cir. Ct. No. 2007CV1317**

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

DAVID P. GENNRICH,

PLAINTIFF-APPELLANT,

BLUE CROSS OF CALIFORNIA,

INVOLUNTARY-PLAINTIFF,

V.

ZURICH AMERICAN INSURANCE COMPANY, AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY AND GRAND GENEVA, LLC,

DEFENDANTS-RESPONDENTS,

UNITED HEALTHCARE INSURANCE COMPANY, UNITED HEALTHCARE INSURANCE COMPANY, AS PLAN ADMINISTRATOR FOR JEFFERSON WELLS INTERNATIONAL GROUP BENEFIT PLAN, UNITED MEDICAL RESOURCES, AS PLAN ADMINISTRATOR FOR JEFFERSON WELLS INTERNATIONAL GROUP BENEFIT PLAN, AETNA HEALTH INSURANCE COMPANY, METROPOLITAN LIFE INSURANCE COMPANY AND DOES 2 THROUGH 50 AND 53 THROUGH 100, INCLUSIVE,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Walworth County: DAVID M. REDDY, Judge. *Affirmed*.

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 BLANCHARD, J. David P. Gennrich fell from an elevated tee box at a golf course due to the failure of a split rail fence. At a trial on his claims for common law negligence and a violation of the safe place statute, a jury returned a verdict finding that the owner of the golf course, Grand Geneva, LLC, was not negligent with respect to inspection, maintenance, or repairs of the fence, and did not fail to maintain the premises as safe as the nature of its business would reasonably permit. In addition, the jury found that Gennrich fell as a result of his own negligence, and had damages of only $1,801.13 for past health care expenses.

¶2 Gennrich appeals the resulting judgment in favor of Grand Geneva and its insurer, Zurich American Insurance Company, on the ground that the verdict answers are contrary to the great weight of the evidence.[1] Gennrich separately requests that this court exercise its discretion to reverse in the interest of justice. For the following reasons, we disagree that the verdict should be upset and we decline to exercise our discretion to reverse in the interest of justice.

BACKGROUND

¶3 In a prior appeal in this case this court reversed a summary judgment in favor of Grand Geneva. *See* ***Gennrich v. Zurich Am. Ins. Co.***, 2010 WI App

[1] The respondents, Grand Geneva and Zurich, submit a joint brief and their interests are presented as unitary. For ease of reference we refer to "Grand Geneva" only, regardless whether we mean Grand Geneva only or both respondents.

117, 329 Wis. 2d 91, 789 N.W.2d 106. We summarized the pretrial summary judgment record as follows:

> In 2004 David P. Gennrich was golfing at the Highlands Golf Course owned by Grand Geneva, LLC. The fourteenth hole of the course had an elevated tee box. When Gennrich and the rest of his golfing party reached the fourteenth hole, they parked their golf cart on the asphalt path and walked up about five feet of stairs to reach the tee. The top of the stairs is flanked by a split-rail fence on both sides as a golfer walks to the tee box. There were no plants, signs[,] or other obstructions warning golfers not to lean or sit on the fence. The fourteenth hole also did not have a bench or other place for golfers to lean or sit on while waiting to tee off. While Gennrich was waiting for his turn, he leaned against the top rail of the split-rail fence. The fence gave way, and Gennrich fell to the asphalt golf cart path below. Gennrich reported the incident to Grand Geneva, declined medical treatment[,] and finished his round. But, at some later date, he discovered that the fall injured his back. He then sued Grand Geneva in 2007, asserting that Grand Geneva was negligent in maintaining and repairing the fence under the safe place statute, and negligent under common law.

Id., ¶2 (citation and footnote omitted).[2]

¶4 Following remand, after an eight-day trial, the jury answered "no" to both of the following two questions, the first relating to the negligence claim and the second relating to the Safe Place Statute claim: (1) at the time of the accident,

[2] Briefly explaining the Safe Place Statute claim, under WIS. STAT. § 101.11(1) (2009-10), every employer is to provide a place, whether indoors or out, that is safe for employees and for frequenters of that place. "This duty has a higher standard of care than that imposed by common-law negligence." ***Megal v. Green Bay Area Visitor & Convention Bureau, Inc.***, 2004 WI 98, ¶9, 274 Wis. 2d 162, 682 N.W.2d 857 (citation omitted). This court concluded in its prior decision that Grand Geneva, as the owner of a public, for-profit golf course, qualified as an employer and owner of a place of employment with a duty to inspect the fence at issue. *See* ***Gennrich v. Zurich Am. Ins. Co.***, 2010 WI App 117, ¶¶15-19, 329 Wis. 2d 91, 789 N.W.2d 106.

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

was Grand Geneva "negligent with respect to the inspection, maintenance[,] or repair of the fence involved in … Gennrich's accident?"; and (2) was Grand Geneva "negligent in failing to maintain the premises as safe as the nature of its business would reasonably permit?"

¶5 The jury answered "yes" to the following two questions: (1) at the time of the accident, was Gennrich "negligent with respect to his own safety?"; and (2) was Gennrich's negligence "a cause of injury to" him?

¶6 The jury also answered a set of damages questions. Specifically, the jury determined that Gennrich had none of the following damages: past loss of earning capacity; past pain, suffering, and disability; future health care expenses; future loss of earning capacity; or future pain, suffering, and disability. As to past health care expenses, the jury found that $1,801.13 would fairly and reasonably compensate Gennrich.

¶7 Gennrich filed post-trial motions requesting that the court change all of the jury's answers pursuant to WIS. STAT. § 805.14(5)(c) or grant a new trial under WIS. STAT. § 805.15(1). The circuit court denied both motions, concluding that it was "apparent … that the jury found credible the testimony of the defense witnesses."

DISCUSSION

I. CHALLENGE TO JURY VERDICT ANSWERS

A. Standard of Review

¶8 A court may overturn a jury's factual determination only if there is "no credible evidence" to sustain the determination. WIS. STAT. § 805.14(1).[3] "Appellate courts overturn only a clearly erroneous denial of a motion challenging the sufficiency of the evidence. In assessing the sufficiency of the evidence, circuit courts are accorded substantial deference because they are in a better position to decide the weight and relevancy of the evidence presented." ***K & S Tool & Die Corp. v. Perfection Mach. Sales, Inc.***, 2007 WI 70, ¶29, 301 Wis. 2d 109, 732 N.W.2d 792 (citations omitted).

B. Gennrich's Arguments that "No Credible Evidence" Supports the Jury's Verdict Answers

¶9 In exceedingly brief arguments, Gennrich first contends that "no credible evidence" was introduced at trial to support the jury's determinations that

[3] WISCONSIN STAT. § 805.14 provides in relevant part:

> (1) TEST OF SUFFICIENCY OF EVIDENCE. No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.

Grand Geneva was not negligent in inspecting, maintaining, or repairing the fence at issue and that Grand Geneva did not violate the Safe Place Statute.[4]

¶10 In addressing Gennrich's post-trial motions, the circuit court concluded that there was credible evidence to support these verdict answers. Based on evidence we now summarize, we do not upset the court's determination, because the record reflects evidence to support those answers. *See* ***Weber v. White***, 2004 WI 63, ¶17, 272 Wis. 2d 121, 681 N.W.2d 137 (a verdict that survives post-trial motions should not be upset unless "'there is such a complete failure of proof that the verdict must be based on speculation'") (quoting ***Coryell v. Conn***, 88 Wis. 2d 310, 315, 276 N.W.2d 723 (1979)).

¶11 In particular, Grand Geneva's grounds superintendent testified that he and other staff would "check" all the split rail posts on the fence each spring. Similarly, he testified that various members of the course staff checked the posts of the fences "every day," at least in the spring, in advance of the summer season. In addition, the superintendent testified that he would have been aware of any

[4] In what may be intended as an additional argument, Gennrich asserts that Grand Geneva "was liable under [r]es [i]psa [l]oquitur." Gennrich then points to trial transcript pages reflecting a decision by the circuit court to *grant* his request to give the jury the res ipsa loquitur permissive inference instruction embodied in WIS JI—CIVIL 1145. Completely lacking is any explanation as to why we may or must decide that the jury was required to find Grand Geneva liable under this theory. This does not constitute a developed legal argument and we do not address it further. *See* ***Truttschel v. Martin***, 208 Wis. 2d 361, 369, 560 N.W.2d 315 (Ct. App. 1997); ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). We simply observe that, after trial, the circuit court stated that the jury was presented with Gennrich's res ipsa loquitur theory of liability, but "obviously rejected it."

More generally, we note that Gennrich's res ipsa loquitur argument is one of a number of inadequately developed or unsupported arguments that Gennrich makes in his briefs. To the extent that we do not address a particular argument or portion of an argument referenced in Gennrich's briefing, we reject it as undeveloped or raised for the first time in his reply brief.

accidents at the fourteenth tee before Gennrich's fall and that there had been no accidents before Gennrich's fall. While the absence of prior accidents would not, standing alone, be sufficient to support the verdict answers as to Grand Geneva's lack of liability, this evidence adds to the other evidence that the fence was inspected and maintained.

¶12 The above constitutes evidence from which the jury could reasonably infer that Grand Geneva was not negligent in inspecting, maintaining, or repairing fencing on the golf course that, by further reasonable inference, included the particular fence section at issue. It also constitutes evidence from which the jury could reasonably infer that Grand Geneva did not fail to meet its obligation under the Safe Place Statute with respect to the fence section at issue.

¶13 Gennrich essentially asks us to conclude that the grounds superintendent was so effectively and clearly impeached at trial that we must conclude that his testimony was not credible as a matter of law. However, in support of that argument, Gennrich merely cites selective portions of the superintendent's testimony. While those portions of the testimony are arguably favorable to Gennrich, the jury nonetheless could have, and apparently did, credit the material portions of the superintendent's testimony. It is not this court's role to second-guess credibility determinations.

¶14 Undoubtedly, there is other evidence in the record that could have supported contrary findings by the jury as to Grand Geneva's liability, but that is not the test. The test is whether there is any credible evidence that supports the findings the jury made.

¶15 Next Gennrich argues, again very briefly, that there was "no credible evidence that Gennrich was negligent in failing to exercise ordinary care for his

own safety or [that he] caused the accident." (Capitalization and emphasis altered from original.)

¶16 While the circuit court observed in addressing post-trial motions that evidence supporting a finding of negligence by Gennrich "wasn't something that was developed much in this case," the court nevertheless concluded that there was some credible evidence to support this finding. Gennrich fails to provide a sufficient basis to upset that determination.[5]

¶17 Grand Geneva points to credible evidence on this topic: testimony from Helen Dickey, a member of Gennrich's golfing party at the time of the accident. Dickey testified in a deposition offered at trial that she and Gennrich were standing at the elevated tee box, just before the accident, waiting for the two other members of the party to tee off, when the following occurred:

> So I backed up to the fence …. And for some reason I reached out and touched it just to make sure it's safe, …— there was nothing that led me to do that. I just reached, and it really wiggled pretty bad, and I went woo, stop, Helen, don't lean up against that. And so I moved to where the stairs were going down. That's [where] I seem to remember that that fence seemed to be a little more sturdy, so I stayed there and leaned up against that as they were teeing off.

[5] It is not obvious to us why any defect in the jury's answer regarding Gennrich's alleged negligence would matter, given our conclusion that the jury's answers regarding Grand Geneva's lack of liability should be upheld. Gennrich fails to develop an argument that the court would have erred in entering the challenged judgment even if the jury had found that Gennrich was *not* negligent with respect to his own safety in leaning against the fence, given the jury's findings that Grand Geneva was not negligent regarding inspection, maintenance, or repair and not negligent in maintaining the premises as safe as the nature of its business would reasonably permit. *See* ***Hannemann v. Boyson***, 2005 WI 94, ¶57, 282 Wis. 2d 664, 698 N.W.2d 714 ("An error does not require reversal unless it affects the substantial rights of the party seeking to set aside the judgment." (citation omitted)). However, for the reasons explained in the text, we conclude that we are able to easily resolve this issue on the merits.

Dickey further testified that, when she tested the part of the fence that "wiggled pretty bad," a top horizontal member, it "jiggled" "[i]n a very scary way"—"[e]nough that I didn't want to go anywhere near it, that kind of jiggle."

¶18 Grand Geneva argues that Dickey's testimony constituted credible evidence from which the jury could infer that Gennrich acted negligently in leaning against the fence without first inspecting it or testing it in any way. We agree.

¶19 Gennrich argues that "[t]here is no law that required [Gennrich] or [Dickey] to inspect or test the split-rail fence at the 14th tee prior to touching it[,] but to only use reasonable care." It is not clear what Gennrich means to argue. If he is arguing that negligence law establishes a different, lower standard of care when a person is safeguarding him or herself, as opposed to safeguarding others, he is wrong. *See* ***Hofflander v. St. Catherine's Hosp., Inc***., 2003 WI 77, ¶38, 262 Wis. 2d 539, 664 N.W.2d 545 ("This duty of care obligates all persons to exercise ordinary care for their own safety."); *see also* ***Hornback v. Archdiocese of Milwaukee***, 2008 WI 98, ¶22, 313 Wis. 2d 294, 752 N.W.2d 862 (discussing duty of due care to refrain from any act which will cause foreseeable harm, "'even though the nature of that harm and the identity of the harmed person or harmed interest is unknown at the time of the act'") (quoting ***A.E. Inv. Corp. v. Link Builders, Inc.***, 62 Wis. 2d 479, 483, 214 N.W.2d 764 (1974)). If he is arguing that the jury was misled into believing that it was required to find Gennrich negligent because he did not inspect or test the fence as Dickey did before she leaned on it, his argument is too insufficiently developed for us to consider. Such an argument would, at a minimum, have required that Gennrich point to portions of the record showing where Grand Geneva made such an argument in the circuit

court, and where Gennrich objected or advocated for a jury instruction on this point. Gennrich fails in this regard.

¶20 Gennrich's unclear reply effectively concedes the point. The question is whether Dickey's testimony could be considered credible evidence that Gennrich failed to exercise ordinary care, amounting to negligence under the circumstances. It could. The jury was free to conclude from all evidence, including Dickey's testimony, that Gennrich should also have checked the fence before he, in his own words, "casually placed my right hand onto the top rail of the fence and leaned back to my right backside," causing the fence to "g[i]ve immediately."

¶21 Next Gennrich argues that Grand Geneva offered "no credible evidence that the damages found by the jury were adequate to compensate Gennrich," given the evidence offered by Gennrich on this issue at trial. This argument is without merit.[6]

¶22 Bearing in mind that a verdict that survives post-trial motions will not be disturbed on appeal absent a complete failure of proof, we note that, in addressing the post-trial motions, the circuit court explicitly found credible each of three expert witnesses whose testimony supported the defense theory that Gennrich did not sustain past or future loss of earning capacities due to the fall,

[6] Given our conclusion that the jury's liability determinations in this case should not be upset, we could ignore Gennrich's damages argument. *See* ***Mainz v. Lund***, 18 Wis. 2d 633, 645, 119 N.W.2d 334 (1963) ("The awarding of inadequate damages is not in itself grounds for ordering a new trial where a jury has answered other questions in the verdict so as to find no liability on the part of the party charged with negligence."). However, as with the issue of Gennrich's own negligence, we conclude that we are able to easily resolve this issue on the merits.

and that Gennrich's "problems and treatments after the fall were attributable to the progression of his preexisting degenerative disc disease." Gennrich presents this court with no reason to disturb the circuit court findings on this issue or to conclude that the evidence was insufficient to support the jury's findings on damages. As with his other arguments, Gennrich here again effectively asks this court to reweigh the evidence presented at trial and reach a different result from that reached by the jury, and endorsed by the circuit court, on issues of fact and credibility.

¶23 Grand Geneva, in contrast, points to trial evidence that reasonably supports a jury determination that the only damages to which Gennrich was entitled arose from particular medical bills that Gennrich acknowledges totaled $1,801.13, *precisely equaling* the jury's award, from an early stage in his post-accident medical treatments and consultations.

II. REVERSAL IN INTEREST OF JUSTICE

¶24 Gennrich purports to make three subarguments in support of his contention that this court should, in its discretion, grant a new trial pursuant to WIS. STAT. § 752.35.[7] None of these subarguments, considered individually or in

[7] WISCONSIN STAT. § 752.35 provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

combination, persuades us that the real controversy was not fully tried, or that it is probable that justice has for any reason miscarried.

A. "Prejudicial Misconduct" of Defense Counsel

¶25 Gennrich points to a single page of the trial transcript as a basis for this court to conclude that defense counsel engaged in a series of highly unprofessional and prejudicial acts at trial. However, that transcript page reflects only a single objection by Gennrich's attorney, posed during Grand Geneva's closing argument, and that objection was overruled by the court. This subargument has no merit.

B. "Prejudicial abuse of discretion by the trial judge"

¶26 The next subargument, to the extent we can discern its meaning, is also without merit. Gennrich starts by referencing the circuit court's "exclusion of evidence" as resulting in "extreme[] prejudice[]" to Gennrich. However, he then makes a series of brief, disjointed references to what appear to be not only evidentiary rulings, but also rulings about alleged "reprehensible conduct" by defense counsel during trial, and rulings apparently contrary to Gennrich's argument, which we reject above, that the jury verdict was not supported by any credible evidence. We decline to exercise our discretion to grant a new trial based on these fragmentary assertions.

C. Verdict "a miscarriage of justice"

¶27 As a purported final subargument, Gennrich asserts that the jury verdict was inconsistent and perverse. However, this assertion is stated in conclusory terms, without sufficient explanation to constitute a developed legal argument.

CONCLUSION

¶28 For these reasons, we affirm the judgment in favor of Grand Geneva.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.