COURT OF APPEALS
DECISION
DATED AND FILED

March 21, 2017

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 Nos. 2015AP1315
2015AP1565

Cir. Ct. No. 2010CV19924

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

ANDREAS RYDLAND, NICOLE RYDLAND, EMMA RYDLAND AND LANA RYDLAND,

PLAINTIFFS-APPELLANTS,

V.

MARINA CLIFFS ASSOCIATION,

DEFENDANT-RESPONDENT,

TAC PROPERTIES LLC,

DEFENDANT,

STATE FARM FIRE & CASUALTY COMPANY,

INTERVENOR.

ANDREAS RYDLAND, NICOLE RYDLAND, EMMA RYDLAND AND LANA RYDLAND,

PLAINTIFFS,

V.

MARINA CLIFFS ASSOCIATION,

DEFENDANT-APPELLANT,

TAC PROPERTIES LLC,

DEFENDANT,

STATE FARM FIRE & CASUALTY COMPANY,

INTERVENOR-DEFENDANT-RESPONDENT.

APPEALS from orders of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 KESSLER, J. These appeals stem from an action brought by Andreas, Nicole, Emma and Lana Rydland (collectively, "the Rydlands"), in which the Rydlands alleged that the Marina Cliffs Association ("the Association") was negligent in its maintenance and repair of the condominium unit in which the Rydlands resided and that the Association's conduct was in breach of its contract with the Rydlands. A jury found in favor of the Association and further determined that the Rydlands were negligent with respect to the purchase of the condo unit and the maintenance and repair of the atrium area of the unit. The

Rydlands now appeal, alleging that the trial court made several errors with respect to the jury instructions and verdict and erroneously excluded relevant evidence.

¶2 The Association filed an appeal against State Farm Insurance Company ("State Farm") stemming from the trial court's post-verdict decision that State Farm did not have a duty to indemnify or defend the Association under the Association's insurance policy with State Farm during the time period covering the Rydlands' claims.

¶3 We affirm the trial court with respect to both appeals.[1]

BACKGROUND

¶4 In June 2005, the Rydlands purchased a tri-level condominium unit in South Milwaukee. The Rydlands purchased the unit "as is," with the option of conducting an inspection prior to purchase. The Rydlands purchased the property without obtaining an inspection. Upon purchase, the Rydlands received the condominium Declaration and the Association bylaws.

¶5 The Declaration governed the Rydlands' relationship with the Association, specifically describing the boundaries of the condominium units, the common areas, and which party was responsible for the maintenance of each respective area. As relevant to this appeal, the Declaration stated:

> In those units containing an atrium on the second floor serving on the unit being bounded, such boundaries shall be deemed to include such area. The exterior plane of the interior vertical walls of the atrium shall be included in the unit. The entire floor of the atrium and the glass entranceway to the atrium shall also be part of the unit.

[1] The Rydlands and the Association filed separate appeals. We consolidated both appeals on our own motion.

> ….
>
> 7. COMMON and LIMITED COMMON AREAS. The common areas shall include all portions of the Condominium property not included in the unit…. Common areas shall also include all conduits, pipes, ducts, plumbing, wiring, and other facilities for the furnishing of utility service to units and common areas and every portion of a unit which contributes to the support of the buildings and machinery, ducts, pipes, pumps, sump pumps, and other equipment which service the units in common.
>
> ….
>
> 16. MAINTENANCE. The Association shall conduct all work of maintenance, repair, and replacement of Common Areas and facilities and the making of an additions or improvements thereto.

(Some formatting altered.)

¶6 At some point after moving into the unit, the Rydlands noticed dampness inside the unit after it rained. They also noticed water stains on the ceiling of Emma Rydland's (the Rydlands' young daughter) bedroom. In the meantime, Andreas Rydland noticed that his asthma symptoms had become exacerbated since moving into the condo, while Emma developed asthma after moving in. Ultimately, the Rydlands discovered mold in Emma's ceiling. On the advice of Emma's doctor, the Rydlands moved out of the condo in hopes of moving back in once the mold was remediated and the water infiltration issues resolved.

¶7 In November 2010, after moving out, the Rydlands hired James Jendusa, an engineer, to inspect the unit. Jendusa identified two sources of water infiltration: (1) the atrium walls and (2) the roof over the atrium area. According to Jendusa, water got into the condo unit through the atrium roof, which had evidence of water and mold infiltration. Jendusa opined that water leakage in the

atrium walls had been occurring for a number of years, possibly even before the Rydlands purchased the property.

¶8 Repairs were never made to the unit, though the Rydlands continued to make mortgage payments on the property. Ultimately, the Rydlands lost the unit to foreclosure.

¶9 As relevant to this appeal, the Rydlands sued the Association in November 2010, alleging breach of contract and negligence for the Association's alleged failure to maintain and repair the common elements of the condominium unit. State Farm, the Association's insurer, moved to intervene, bifurcate and stay proceedings pending a determination of insurance coverage.

¶10 Three years after litigation commenced, but still prior to the start of trial, State Farm and the Association filed motions *in limine* to limit the testimony of both Jendusa and the Rydlands' other expert, Cassidy Kuchenbecker, to that of their deposition testimony. Specifically, State Farm sought to limit Jendusa's testimony to his opinion that the source of water infiltration was the roof above the atrium and the exterior wall of the atrium area. The Association sought to limit Kuchenbecker's testimony to the fact that he did not offer an opinion as to the source of water infiltration. The trial court granted the motions to limit the experts' testimony, noting that any attempts to offer new opinions as to the source of the water infiltration violated the court's scheduling order, were filed too close to the start of trial, and essentially sought to shift responsibility from the Rydlands, who were responsible for the atrium area, to the Association, who was responsible for the flat roof.

¶11 The matter finally proceeded to trial in January 2015. On the second day of trial, the Rydlands moved the trial court to instruct the jury that the roof structure above the atrium was the Association's responsibility to maintain and repair. The Association and State Farm opposed the motion, arguing that throughout the entire five-year course of litigation, the parties proceeded on the premise that the Rydlands were responsible for the maintenance and repair of the areas within the boundaries of the condo unit, including the atrium roof, while the Association was responsible for the maintenance and repair of the common areas. The defendants pointed out that Andreas Rydland testified in his deposition that he understood the atrium roof was his responsibility. The trial court denied the Rydlands' motion, finding the motion was "too little too late" given the length of the litigation, that the Rydlands' could have brought the motion earlier in the litigation, and that the argument was therefore waived.

¶12 After the close of evidence, the parties submitted their proposed verdict forms. The Rydlands requested that the jury consider whether the Association breached a duty to maintain or repair the "roof of the Ryland's condo." The trial court rejected the Rydland's proposed language, finding it "too general," and instead accepted the defendants' proposed verdict form which asked whether the Association breached a duty to repair or maintain the atrium area. The trial court also accepted the Association's proposed question regarding the cause of the Rydland's damages, which asked: "Was the Marina Cliffs Association['s] breach of a duty to maintain and repair the atrium area of the Rydland's condo a cause of damages to any of the plaintiffs[?]" Likewise, the trial court accepted the Association's proposed question regarding the breach of contract claim. The court stated that its acceptance of the defendants' proposed questions was based upon the evidence presented at trial, specifically, "what was

testified to at trial rather than what was pled." The court agreed with the defendants that the evidence presented at trial centered on the atrium area, rather than the roof of the condo generally. The Rydlands also proposed jury instructions indicating that the structure over the atrium was the responsibility of the Association. The trial court rejected the proposed instruction, finding that it was limited by the evidence in the record.

¶13 The jury found that the Association did not breach a duty to maintain or repair the atrium, nor did the Association breach a contractual obligation to do so. The jury also determined that the Rydlands' negligence was "a cause of [their] damages" and determined that seventy-five percent "of negligence [was] attributable" to them. However, despite determining that the Association did not breach any duties or contractual obligations to the Rydlands, the jury attributed twenty-five percent "of negligence" to the Association.

Post-Verdict Motions

¶14 The Rydlands filed a post-verdict motion asking the trial court to set aside the verdict based upon a number of factors. As relevant to this appeal, the Rydlands argued that: (1) the trial court erroneously failed to give their requested jury instruction regarding the responsibility between the Association and the Rydlands for the atrium area; (2) the trial court failed to question the jury on the material issues of fact pleaded in the Amended Complaint, specifically, whether the Association breached a duty to repair and maintain the common areas of the condo, as opposed to just the atrium area; (3) the trial court erred in limiting Kuchenbecker's testimony to his deposition testimony in which he did not definitively identify a source of water infiltration, rather than allowing him to identify the flat roof as the source of water infiltration; and (4) that the trial court

erred in accepting an inconsistent jury verdict. Specifically, Question Five of the verdict form, which asked: "what percentage of negligence is attributable to each party that you determined to be a cause of Plaintiffs' damages." The jury attributed twenty-five percent negligence to the Association, though the jury previously answered "No" to the only question which asked about the Association's negligence and to the question which asked whether the Association's negligence was the cause of the Rydlands' damages. The trial court entered an order denying the Rydlands' motion.

¶15 State Farm also filed a motion after the verdict, asking the trial court to issue a declaratory judgment stating that State Farm "has no continuing duty to defend or duty to indemnify [the Association] … and dismissing State Farm from [the] case." The trial court granted State Farm's motion. This appeal follows.

DISCUSSION

I. The Rydlands' Appeal

¶16 On appeal, the Rydlands raise the same issues they raised in their post-verdict motion. We address each in turn.

Jury Instructions/Verdict Form

A. The Rydlands' Requested Jury Instruction

¶17 The Rydlands contend that the trial court erroneously denied their request to give a jury instruction "that the Association was responsible for maintaining and repairing the roof structure above the atrium." The basis for the Rydlands' request was their contention that the roof above the atrium area constituted a common area under the Declaration. The trial court rejected the

Rydlands' request, reasoning that the Rydlands should have submitted their argument as a dispositive motion or a motion in *limine* at some point in the five years before the second day of the jury trial.

¶18 "A trial court has wide discretion in framing the special verdict and determining what jury instructions to give." ***Hegarty v. Beauchaine***, 2006 WI App 248, ¶46, 297 Wis. 2d 70, 727 N.W.2d 857 (internal citations omitted). "[B]oth the special verdict form and the jury instructions must fully and fairly inform the jury regarding the applicable principles of law." ***Id.***¶19 Here, the trial court noted that the Rydlands' requested jury instruction carried the effect of a dispositive motion in that it would have toppled the entire defense theory that the roof above the atrium was not a common area. The court noted that throughout the course of the multi-year litigation, the parties proceeded under the established principle that the atrium roof was the responsibility of the unit owners. To grant the Rydlands' request, the court noted, would have affected other possible motions. Moreover, the Rydlands' proposed instruction was not included in their jury instructions filed pursuant to the scheduling order, nor was it included in the instructions filed three days before trial. The trial court did not erroneously exercise its discretion.

B. The Verdict Form Properly Tracked the Evidence

¶20 The Rydlands contend that the trial court erred in choosing a special verdict form that failed to inquire about the "material issues of ultimate fact" alleged in their amended complaint. The material issues of ultimate fact, the Rydlands contend, were whether the Association breached its duty to maintain and repair *the common areas* and whether the Rydlands suffered damages as a result of the alleged breach. The Rydlands contend that the issue was not, as the jury was

asked, whether the Association breached its duty to maintain or repair *the atrium area* of the Rydlands' condo. Rather, the Rydlands proposed a question asking whether the Association failed to maintain or repair the roof above their unit. The court rejected the Rydlands' proposal as being too broad and not in conformity with the evidence, which focused mostly on the atrium area.

¶21 "While issues raised by the pleadings are to be considered in drafting the form of verdict, the trial court is to eliminate from the issues thus raised those that are determined by evidence on the trial by admissions, uncontradicted proof or by failure of proof." ***Dahl v. K-Mart***, 46 Wis. 2d 605, 609, 176 N.W.2d 342 (1970). "It is those issues that remain after this process of elimination that are to go to the jury." ***Id.*** Here, the testimony and proof at the time of the trial were clearly focused on the atrium area as the source of water infiltration. Accordingly, it was reasonable for the trial court to "put to the jury the special question" of whether the Association failed to maintain or repair that particular area. *See* ***id.***

C. Inconsistent Verdict

¶22 The Rydlands also contend that the trial court erred in accepting the jury's inconsistent verdict. Specifically, they contend:

> In Verdict Question No. 5, the jury was asked "what percentage of negligence is attributable to each party that you determined to be a cause of Plaintiffs' damages."… The jury answered this question by attributing 25% of the negligence to the Association. Trouble is, the jury had previously answered "NO" to the only question that it was ever asked regarding the Association's negligence and did not find that the Association was a cause of the Rydlands' damages.

¶23 While we agree that the verdict is indeed inconsistent, we conclude that the Rydlands' waived the right to appeal the inconsistency. "In order to

preserve an objection to the verdict for appeal, a party must make 'a specific objection which brings into focus the nature of the alleged error.'" ***Gosse v. Navistar Int'l Transp. Corp.***, 2000 WI App 8, ¶20, 232 Wis. 2d 163, 605 N.W.2d 896 (Ct. App. 1999) (citation omitted). "Whether the failure to object to the wording of the special verdict form in the trial court constitutes waiver is a legal question" that we review *de novo*. *See* ***LaCombe v. Aurora Med. Grp., Inc.***, 2004 WI App 119, ¶5, 274 Wis. 2d 771, 683 N.W.2d 532.

¶24 We conclude, as did the trial court, that the error the Rydlands complain of lies with the wording of the special verdict form, rather than with the substance of the verdict. "As such, the claimed error would have been apparent at the jury instruction and verdict conferences." ***Id.***, ¶15. The jury clearly determined that the Association was not negligent and did not breach any duty to the Rydlands, as evidenced by its answers to Questions One and Two. In answering Question Five, the jury simply did it as it was told. There were no instructions on the special verdict form for the jury to ignore Question Five if it answered "No" to Questions One and Two. Because the Rydlands did not object to the wording of the special verdict form before the jury received it, they have waived this claim of error.

Kuchenbecker's Testimony

¶25 Finally, the Rydlands contend that the trial court erred in limiting Kuchenbecker's testimony to the opinions he disclosed in his deposition testimony.

¶26 In December 2013, prior to trial, but three years after the commencement of litigation, the trial court held a hearing on the defendants'

motion *in limine* requesting that the trial court limit Kuchenbecker's testimony to his deposition testimony in which he stated that he could not pinpoint the source of the water infiltration. The Rydlands argued that Kuchenbecker's deposition testimony actually pinpointed the flat roof as the source of the water infiltration, while the defendants claimed that Kuchenbecker stated numerous times that he was unsure of the exact infiltration point. The defendants argued that their defense theory and their decision not to retain experts were based, in part, on Kuchenbecker's deposition testimony.

¶27 The trial court granted the motion, noting that Kuchenbecker was deposed in May 2012, a year and a half before the motion hearing, and that "[t]his case is over three years old." The court also stated that "it's clear what [Kuchenbecker] said that the water source was an open-ended question. That he testified he did not know the source location and the defense has proceeded to defend this case and get their experts and other witnesses based upon that deposition."

¶28 A trial court has both statutory and inherent authority to control its docket through a scheduling order, provided that the court first consults with the parties' counsel and any unrepresented party. *See* WIS. STAT. § 802.10(3); ***Hefty v. Strickhouser***, 2008 WI 96, ¶31, 312 Wis. 2d 530, 752 N.W.2d 820. WISCONSIN STAT. § 802.10(3)(f) explicitly states that a scheduling order may address "[t]he limitation, control and scheduling of depositions and discovery, including the identification and disclosures of expert witnesses...."

¶29 The scheduling order in this case required the Rydlands to disclose their expert report by March 29, 2012. Kuchenbecker was deposed on May 17, 2012. Based on his less-than-definitive testimony, the defendants chose not to

retain an expert witness to testify about the source of the water infiltration. In December 2013—a year and a half later—at a hearing on the defendants' motion *in limine*, the Rydlands argued that Kuchenbecker's deposition testimony pinpointed the flat roof as the source of the water infiltration. The trial court's decision to limit Kuchenebecker's testimony to his "open ended" deposition opinion was based primarily on the court's conclusion that allowing Kuchenbecker to offer a more definitive opinion would unnecessarily delay an already drawn-out trial. Allowing Kuchenbecker to testify about the flat roof as the source of water leakage at that late date in the proceedings would have led the defendants to retain an expert and essentially reopen the discovery process, rendering the initial scheduling order meaningless. The trial court was within its discretion to limit Kuchenbecker's testimony for the primary purpose of avoiding further delay in a case that had been pending for several years.

II. The Association's Appeal

¶30 The Association's appeal stems from the trial court's decision to grant State Farm's motion for declaratory relief, in which State Farm sought a ruling that it did not have a duty to indemnify and defend the Association pursuant to a mold exclusion in State Farm's insurance policy to the Association covering the time period of the Rydlands' claims. After the jury returned a verdict finding no liability against the Association, the court granted State Farm's motion. The Association notes that our decision is largely dependent on the outcome of the Rydlands' appeal, in that our affirmance of the trial court in the Rydlands' appeal would render the question of whether State Farm has a duty to indemnify moot.

¶31 The Association raises three issues in its appeal. First, the Association argues that State Farm has a continued duty to defend until all

"arguably covered claims of the plaintiffs have been completely and finally extinguished after appeal." (Capitalization and bolding omitted.) Second, the Association contends that the duty to defend "was to be determined based upon the Rydlands' evidence at trial and not based upon the court's weighing of the evidence and determination of proof." (Capitalization and bolding omitted.) Lastly, the Association contends that "if the judgment in the merits action were reversed, then the declaratory judgment regarding the duty to indemnify likewise must be reversed." (Capitalization and bolding omitted.)

¶32 As to the first issue, State Farm agrees that it has a duty to defend the Association until the "[trial] court's no coverage determination becomes final." (Capitalization and bolding omitted.) Accordingly we need not reach this issue.

¶33 As to the second issue, the Association agrees that if we affirm the issues in the Rydlands' appeal, then "there is no issue regarding State Farm's continuing duty to defend because the case will be concluded." Because we affirm the trial court in the Rydlands' appeal, we need not discuss this issue further. For the same reason, we need not reach the Association's final argument.

¶34 For the foregoing reasons, we affirm the trial court as to both the Rydlands' appeal and the Association's appeal.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.