

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 10, 2009

David R. Schanker
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. 2008AP1802-FT

Cir. Ct. No. 2004CV1753

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**CAPITOL INDEMNITY CORPORATION AND JOSEPH ZALEWSKI, D/B/A
TOLEDO POLKAMOTION,**

PLAINTIFFS-APPELLANTS,

TRAVIS HENDZEL AND TINA HENDZEL,

INTERVENING-PLAINTIFFS,

v.

**SOMPO JAPAN INSURANCE COMPANY OF AMERICA AND KONICA
MINOLTA BUSINESS SOLUTIONS, U.S.A., INC.,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Brown County:
KENDALL M. KELLEY, Judge. *Affirmed.*

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

¶1 PER CURIAM.¹ Capitol Indemnity Corporation appeals a judgment entered on a jury's verdict. Capitol argues the circuit court erroneously exercised its discretion when it granted a motion to exclude evidence. We affirm the judgment.

BACKGROUND

¶2 A fire destroyed a supper club owned by Capitol's insured. The Brown County arson task force concluded the fire originated in the area of a fax machine, power strip, and photocopier. The task force further concluded the fire was accidental, but did not determine the cause. Capitol paid under its policy and hired independent investigators to determine the fire's cause. Capitol's investigators concluded the fire originated from the copier, which was manufactured by Konica Minolta Business Solutions, U.S.A., Inc. Capitol sued Konica to recover the payments Capitol made to its insured.

¶3 During discovery, Konica produced four major incident reports (MIRs) concerning other incidents involving the same model copier. Prior to trial, Konica moved to exclude the MIRs from evidence. The court stated it was neither granting nor denying the motion because it would be premature to do so depending on the trial testimony, but then ruled there could be no mention of the MIRs unless Konica opened the door. However, the court also invited both parties to "raise the issue again if ... you're concerned about it or you want to talk about it outside the presence of the jury...."

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 The MIR evidence was not presented during trial. Ultimately, the jury concluded the copier was not “in a defective condition so as to be unreasonably dangerous to a prospective user.” The jury therefore did not reach the second question, which asked whether the defective condition caused the damages.

DISCUSSION

¶5 The parties dispute whether the MIR evidence was admissible under the rule stated in *Lobermeier v. General Telephone Co.*, 119 Wis. 2d 129, 349 N.W.2d 466 (1984).

Evidence of other accidents or similar occurrences ... under similar conditions and circumstances may be admissible to show the probability of the defect in question, that the injury was caused by the defect and that the person responsible knew or should have known of the existence of the defect.

Id. at 150 (citations omitted). While admission is the general rule, the circuit court may exercise its discretion to exclude the evidence of the prior incident if it is of little probative value. *Id.* at 150-51.

¶6 We do not resolve the admissibility issue, however, because we conclude Capitol forfeited its right to appeal it by failing to file motions after verdict. “[N]o error of the trial court is reviewable as a matter of right on appeal without first moving for a new trial based on [the] error.” *Calero v. Del Chemical Corp.*, 68 Wis. 2d 487, 497, 228 N.W.2d 737 (1975) (citing *Wells v. Dairyland Mut. Ins. Co.*, 274 Wis. 505, 518, 80 N.W.2d 380 (1957)). Rather, “[m]otions after verdict must state with particularity the alleged error so as to ... give [the circuit court] an opportunity to correct it, thereby avoiding a costly and time-consuming appeal.” *Id.* (quoting *Kobelinski v. Milwaukee & Suburb. Transp.*

Corp., 56 Wis. 2d 504, 517, 202 N.W.2d 415 (1972)). Additionally, Capitol does not dispute Konica's assertion of waiver. See *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed admitted).

¶7 Capitol nonetheless asks us to utilize our discretionary authority to review its claimed error and order a new trial in the interests of justice. See *Hartford Ins. Co. v. Wales*, 138 Wis. 2d 508, 510-11, 406 N.W.2d 426 (1987). Capitol asserts we should address the admissibility issue because any motion in the circuit court would have failed and therefore unnecessarily increased the amount and expense of litigation in this case. Capitol argues "the real controversy has not been fully tried" because evidence showing the same model copier had caused other fires is highly relevant to whether the copier had a defect. See WIS. STAT. § 752.35. Capitol further claims the MIR evidence would have bolstered its experts' opinions and could have been used to cross-examine Konica's experts.

¶8 We decline Capitol's invitation to reverse in the interests of justice. Capitol's claim that it would have been futile to bring a motion ignores the circuit court's expressed willingness to reconsider the issue during the course of trial. Capitol does not explain why it failed to pursue the court's offer, nor does it fully develop its arguments. This court does not know what occurred during trial because Capitol failed to provide any facts beyond what occurred at the pretrial discussion. Thus, we do not know whether the "door was opened" or whether the MIR evidence was necessary to effectively cross-examine Konica's experts.

¶9 In any event, we are not convinced the MIR evidence was crucial to the presentation of Capitol's case. The circumstances of the four incidents were only marginally similar to those existing here. Further, the evidence of four prior

incidents over an eight-year period is less than overwhelming given that Konica manufactured over 50,000 copiers of the same model. Also, because the exact cause of failure within the copier could not be discerned in this case, there is no way to directly compare it to the other incidents.

By the Court.—Judgment affirmed.

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

