COURT OF APPEALS
DECISION
DATED AND RELEASED

March 25, 1997

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

NOTICE

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No. 95-3523

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

Cassandra Sherrill Patterson,

Plaintiff-Appellant,

v.

Lynns Waste Paper Co., Frederick Hron and Mattie Hall,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Milwaukee County: GEORGE A. BURNS, JR., Judge. *Affirmed*.

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Cassandra Sherill Patterson appeals from the judgment dismissing her action against Lynns Waste Paper Co., Frederick Hron, and Mattie Hall, and from the trial court's denial of her post-verdict motions. She argues that references on cross-examination to her previous injuries and claims required a mistrial, that the verdict was perverse, and that the jury was improperly selected. Regarding jury selection, Patterson contends

that the trial court erred in three respects: (1) denying her request for an African-American juror on the panel; (2) holding that her constitutional challenge to Milwaukee County's methodology of jury pool selection was untimely and therefore waived; and (3) ruling that two peremptory strikes were race neutral. We reject these arguments and affirm.

I. FACTUAL BACKGROUND

Patterson filed two claims, joined for trial, involving two separate auto accidents occurring nine months apart. In the first accident, on December 16, 1991, Frederick Hron was operating a tractor-trailer of his employer, Lynns Waste Company, and struck the rear of Patterson's vehicle. In the second accident, on September 13, 1992, Patterson's car was at an intersection stopped at a stop sign. Mattie Hall, who also had stopped at the intersection, proceeded into the intersection. When Hall pulled out, an uninsured motorist swerved to avoid hitting her. The uninsured motorist avoided Hall's car, but struck Patterson's. Hall admitted liability. The uninsured motorist is not a party to this action.

Patterson claimed that the first accident caused permanent neck and back injuries and that the second accident aggravated her injuries. A twelve-member jury unanimously found no liability on the part of Hron and awarded no damages for either accident. Additional facts will be discussed in the balance of this opinion.

II. ANALYSIS

A. References To Previous Injuries And Claims

On direct examination, Patterson's counsel asked her if she had ever been "injured in *any* accident" before December 16, 1991. (Emphasis added.) Patterson replied that she "[might] have been injured in an accident in 1980." On cross-examination, counsel for Hron and Lynns Waste Paper Co. ("Hron's counsel") used Patterson's deposition in an effort to establish that Patterson had previously testified that she had no memory of a 1978 automobile

accident in which she had been involved, and that she had filed a worker's compensation claim following an injury resulting in a five-month medical leave from her job at Kohl's Food Store. When Hall's counsel cross-examined Patterson, he asked whether she filed suit for her 1978 accident. The trial court sustained Patterson's objection to this line of inquiry, gave a curative instruction, but denied her motion for mistrial.

Patterson also objected to the mention of prior "claims" and moved for a mistrial. Basing the motion on ***Knight v. Hasler***, 24 Wis.2d 128, 128 N.W.2d 407 (1964), counsel for Patterson argued that references to prior "claims" result in "prejudicial, reversible error and [provide] grounds for a mistrial." The court denied Patterson's motion and gave a curative instruction regarding the worker's compensation questions and answers.

Relying on ***Knight***, Patterson contends that the trial court erred in denying her motion for mistrial. She argues that, under ***Knight***, even a single mention of previous personal injury "claims" during cross-examination, under any circumstance, is "inadmissible, prejudicial and incurable" and mandates a mistrial. Denying Patterson's motion for mistrial, the trial court labeled this argument a "red herring" and factually distinguished ***Knight***: "In [***Knight***], [the judge] allowed indeterminable questions on accidents that had nothing to do with the injury in that accident. These were really impeachment situations." The court also found that, given its cautionary instructions, any prejudice resulting from two references to Patterson's previous claims on cross-examination did not warrant a mistrial. We agree.

In ***Valiga v. National Food Co.***, 58 Wis.2d 232, 206 N.W.2d 377 (1973), the supreme court set forth the standard of review for a motion for mistrial:

> The conduct of a trial is subject to the exercise of sound judicial discretion by the trial court and its determinations will not be disturbed unless rights of the parties have been prejudiced. Likewise, a motion for mistrial is addressed to the sound discretion of the trial court and the [reviewing court] will not intrude in the absence of abuse of such discretion.

Id. at 253-54, 206 N.W.2d at 389 (citation omitted).

Contrary to Patterson's contentions, ***Knight*** does not require a mistrial. In ***Knight***, the trial court overruled the plaintiff's objections, permitted repeated questioning about previous claims, and refused to give a curative instruction. ***Knight***, 24 Wis.2d at 130-33, 128 N.W.2d at 408-10. Here, by contrast, the trial court properly sustained Patterson's objections and promptly gave the jury cautionary instructions. Because the trial court's prompt cautionary instructions protected Patterson from prejudice, we conclude that the trial court reasonably exercised discretion in denying Patterson's motion for mistrial.

B. Perverse Verdict

Patterson argues that the jury verdict is perverse for two reasons. First, she contends that "no evidence" supports the jury's determination that Hron was not liable. Second, she argues that because this determination was "against the great weight of the evidence," the "added element of no damages may have significance." She further urges this court to: (1) use defendants' "prejudicial questions about prior claims" as a "basis for finding prejudice in the record to account for a no-damage no-liability verdict," and (2) conclude that "the award is so unreasonably low that the judicial conscience is shocked" and, therefore, that "the 'any credible evidence' rule of review is not applied." We decline to do so; credible evidence supports the jury's verdict.

In reviewing a challenged jury verdict, we must sustain the verdict if there is "'any credible evidence which under any reasonable view fairly admits of inferences which support the jury's verdict....'" ***Ollhoff v. Peck***, 177 Wis.2d 719, 726, 503 N.W.2d 323, 326 (Ct. App. 1993) (citation omitted). Further, the evidence is considered in the light most favorable to the verdict, especially if the trial court has approved the verdict. *See* ***Meurer v. ITT Gen. Controls***, 90 Wis.2d 438, 450, 280 N.W.2d 156, 162 (1979). Since it is the jury, not the appellate court, that decides the credibility of witnesses and the weight given their testimony, if evidence gives rise to more than one reasonable inference, we must accept the jury's inference. *See* ***id.***

A perverse verdict is "clearly contrary to the evidence," ***Dostal v. Millers Nat'l Ins. Co.***, 137 Wis.2d at 242, 254, 404 N.W.2d 90, 94-95 (Ct. App. 1987) (quoting ***Nelson v. Fisher Well Drilling Co.***, 64 Wis.2d 201, 210, 218 N.W.2d 489, 493 (1974)), one reflecting "highly emotional, inflammatory or immaterial considerations, or an obvious prejudgment with no attempt to be fair." ***Id.*** (citations omitted). When a jury finds a defendant is not liable, the trial court does not review a damage award for inadequacy, but for perversity. ***Hein v. Torgeson***, 58 Wis.2d 9, 19, 205 N.W.2d 408, 414 (1973). In ***Hein***, the supreme court noted the well-established rule that a jury's low damage award is insufficient to prove a perverse verdict: "'[i]f there is any credible evidence which under any reasonable view supports the jury finding *as to damages*, especially when the verdict has the approval of the trial court, this court will not disturb the finding.'" ***Hein***, 58 Wis.2d at 20, 205 N.W.2d at 414 (emphasis added; citation omitted); *see also* ***Ollhoff***, 177 Wis.2d at 727, 503 N.W.2d at 326 (quoting ***Jahnke v. Smith***, 56 Wis.2d 642, 652, 203 N.W.2d 67, 72 (1973) (noting that "[w]here it is apparent that there is no liability in any event, the failure of the jury to find damages does not render the verdict perverse.")) .

Denying Patterson's motions after verdict, the trial court characterized the verdict as one resulting from "a credibility fight" in which Dr. Dahl "decimated" the testimony of Patterson's two principal witnesses: Dr. Angela Hall and Patterson herself. We agree. Considered in the light most favorable to the verdict, the record discloses credible evidence to support the jury's determination that the defendants won that credibility fight.

The record reveals conflicting testimony about the first accident. Patterson testified that when Hron's tractor-trailer entered her lane of traffic, she was unable to move to the right because another vehicle was in the way. She further testified that when Hron's vehicle struck her, she was two car lengths behind a van stopped at a red light. By contrast, Hron testified that he saw no car between his vehicle and the van. Likewise, the van driver testified that there were no vehicles between his van and Hron's vehicle. Hron and the van driver both testified that, after impact, Patterson's vehicle was angled into their lane of traffic. Of particular note, the van driver believed that Patterson attempted to change into his and Hron's lane, giving rise to the inference that Patterson caused the accident when she cut in front of Hron's vehicle.

In addition, as previously discussed, Patterson offered inconsistent statements about her previous accidents. She testified that she could not recall anything about her 1978 accident; she could not recall if she was injured or if she was a driver, passenger, or pedestrian when the accident occurred. Questioned repeatedly, Patterson stated, "I can't recall the accident, so therefore, I can't give you any information on the accident." At a November 17, 1992 deposition taken less than two months after her September 1992 accident, Patterson also testified that other than the December 1991 accident, the 1978 accident was the only other auto accident in which she had ever been involved. She never mentioned the September 1992 accident, even though it had occurred just two months earlier.

In the trial court's view, Patterson's expert, Dr. Angela Hall, a chiropractor, also damaged Patterson's own case in several ways. First, Patterson's counsel referred her to Dr. Hall; Patterson saw her attorney before her health care provider, which, the trial court noted, "is never a big hit with the jury." Second, Dr. Hall was a client of Patterson's counsel; Patterson's counsel had prepared a prenuptial agreement for Dr. Hall and represented Dr. Hall and her husband in a lawsuit. Third, Dr. Hall acknowledged that she has received approximately twenty-five referrals from Patterson's counsel—enough, according to the trial court, to establish bias in the jury's mind. Fourth, Dr. Hall's testimony was "elaborate" and "confusing," and included changes in her ratings of Patterson's permanent disability. After noting that Dr. Hall made "little sense" in asserting that Patterson's neck worsened but that her back improved after the September 1992 accident, the trial court commented on Dr. Hall's contribution to Patterson's case:

> So the whole record, in my opinion, was tainted by ... [counsel's] personal and professional relationship with Dr. Hall [, as well as by] Dr. Hall's massive treatment of this woman in light of Dr. Dahl's opinion as to the de minimus nature of her injuries and Dr. Hall's own testimony. She was not an impressive witness. I don't know how good she is. She may be a good therapist but she was not a good witness.

Testifying for the defendants, Dr. Dahl, a board-certified neurologist and professor at the University of Wisconsin Medical College,

offered the opinion that Patterson was malingering. Based on his examination of Patterson, Dr. Dahl could offer no anatomical or physiological explanation for her complaints; the neurologic examination was normal. Rather, he diagnosed somatoform pain disorder and attributed her complaints to a desire for a profitable litigation result. While Dr. Hall testified that Patterson was permanently disabled, Dr. Dahl assigned a zero per cent permanent disability rating to Patterson. Further, he testified that Patterson did not need post-accident treatment because the symptoms her "mild muscle strain" produced would have resolved within weeks.

Dr. Dahl also questioned Dr. Hall's credibility and competency. Commenting on one of Dr. Hall's reports, Dr. Dahl stated, "Basically this is a very substandard report. It just really didn't have much in line of hard data documented." In Dr. Dahl's opinion, Dr. Hall's own records contained no evidence of permanent injury. Moreover, in his opinion, Dr. Hall did not know how to determine impairment levels.

Given Patterson's inconsistent statements about her previous injuries and her lack of memory about previous accidents, and given the testimony of the other witnesses, the jury reasonably could believe Hron and the van driver's version of the accident rather than Patterson's. Since credible evidence supports the jury's reasonable inference of no liability and no damages, the verdict is not clearly contrary to the evidence. The verdict was not perverse.

D. Jury Selection

1. Request for African-American Venirepersons

Patterson, an African-American, argues that the trial court violated her equal protection rights by denying her request to have African-Americans on the jury. Before trial, Patterson moved for "[a]t least one African-American person [to] be on the impaneled jury." The trial court reserved its ruling. After Hron used a peremptory strike against the only African-American juror, but before voir dire was complete, Patterson asked to be heard in chambers where she again asserted that the lack of African-American jurors violated her equal protection rights. To remedy that "violation," Patterson requested four African-American venirepersons. The trial court denied the request.

Patterson asserts that African-Americans are "entitled to have one of their's [sic] on the jury so that ... racial statements are unlikely to be brought out in a jury room." The Equal Protection Clause, however, does not guarantee that a party's own race will be represented on the jury. ***Brown v. State***, 58 Wis.2d 158, 205 N.W.2d 566 (1973). As the supreme court explained in ***Brown***, the "mere lack of a proportional representation has not been regarded as constitutionally deficient, and indeed, it has been held that an accused has no constitutional right to a jury composed of members, or having even a single member, of his or her class, race or sex." ***Id.*** at 165, 205 N.W.2d at 570-71 (citations omitted).

Additionally, a trial court violates § 756.001(2)(a), STATS.,[1] if it interferes with the process of mandatory random jury selection. ***Oliver v. Heritage Mut. Ins. Co.***, 179 Wis.2d 1, 4, 505 N.W.2d 452, 453 (Ct. App. 1993). In ***Oliver***, an African-American plaintiff in a personal injury action also asked the trial court to order African-American jurors for inclusion as venirepersons. ***Id.*** at 7, 505 N.W.2d at 455. When the random process did not put the only African-American juror on the panel, the trial court granted the plaintiff's request to add the African-American to the panel. ***Id.*** at 8, 505 N.W.2d 455. On review, this court found that although the trial court's motives were of the "highest and

[1] Section 756.001(2)(a), STATS., provides in pertinent part: "[a]ll persons selected for jury service shall be selected at random from a fair cross section of the population of the area served by the court."

purest" kind,[2] the trial court's intrusion into the random process violated both Wisconsin statutory and case law. ***Id.*** at 4, 11, 505 N.W.2d at 453, 456. Consistent with ***Oliver***, the trial court's denial of Patterson's request for African-American jurors was proper.

2. Constitutional Challenge to Jury Pool Selection

Patterson also brings a constitutional challenge to Milwaukee County's method of selecting a jury pool. Patterson, however, failed to raise this challenge until motions after verdict[3] and, therefore, waived this issue. *See* ***Brown***, 58 Wis.2d at 164, 205 N.W.2d at 570 (noting that "it is clear that the right to challenge a jury array as embodied in the jury list is at a time *prior to trial*") (emphasis added).

3. Alleged *Batson* Violations

Patterson also raises equal protection challenges based on two peremptory strikes, one by Hron and one by Hall. Hron struck Ms. Glover, an African-American juror, and Hall struck Ms. Morrisey, a college student majoring in physical therapy. The trial court concluded that there were race-neutral bases for both peremptory strikes. We agree.

To evaluate whether peremptory challenges violate the Equal Protection Clause,[4] we use the three-step analysis under ***Batson v. Kentucky***, 476 U.S. 79 (1986). First, the objecting party must establish a *prima facie* case of purposeful discrimination by showing that the opposing party's peremptory strike was race-based. ***Id.*** at 96-97. Second, if the objecting party establishes a *prima facie* case, the burden shifts to the opposing party to state race-neutral explanations for challenging the particular jurors. ***Batson***, 476 U.S. at 97-98. Third, the trial court must determine if the objecting party met the burden of

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[2] The trial court in ***Oliver*** wanted to "avoid the 'appearance of impropriety.'" ***Oliver v. Heritage Mut. Ins. Co.***, 179 Wis.2d 1, 5-6, 505 N.W.2d 452, 454 (Ct. App. 1993).

[3] As Patterson's brief acknowledges: "*On motions after verdict*, plaintiff challenged the methodology by which the county summons jurors. The methodology *as presented to the court on motions after verdict*, is that the names of jurors are obtained from driver's license records and from ID applications in Milwaukee County." (citations omitted; emphasis added).

[4] U.S. CONST. amend. XIV, § 1.

proving purposeful discrimination. ***Batson***, 476 U.S. at 98. The ***Batson*** rule also applies to peremptory challenges in the civil context. *See* ***Michelle R. v. Joe C.***, 186 Wis.2d 580, 585, 522 N.W.2d 222, 224 (Ct. App. 1994) (citing ***Edmonson v. Leesville Concrete Co.***, 500 U.S. 614, 630 (1991)).

A clearly erroneous standard of review applies on appeal to each prong of the ***Batson*** analysis. ***State v. Lopez***, 173 Wis.2d 724, 729, 496 N.W.2d 617, 619 (Ct. App. 1992). Under the clearly erroneous standard, "[w]here multiple inferences are possible from credible evidence, we must accept those drawn by the trial court. The rationale for applying such a deferential standard is that the determination of discriminatory intent is largely informed by the trial judge's perceptions at voir dire." ***Lopez***, 173 Wis.2d at 729, 496 N.W.2d at 619 (citations omitted). As the United States Supreme Court explained:

> Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in ***Batson***, the finding "largely will turn on evaluation of credibility." In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the [opposing party's] state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."

Hernandez v. New York, 500 U.S. 352, 365 (1991) (citations omitted).

Patterson argues that because Hron used a peremptory challenge against Ms. Glover, perhaps the only African-American on the jury panel, Hron's strike was unconstitutional because it was based solely on race. We disagree. Hron's counsel told the trial court that he struck Ms. Glover not because she was African-American, but because she had recently filed a claim for a soft-tissue whiplash injury similar to the injury Patterson alleged. The trial court commented that a "watchful and alert defense counsel" does not want a

juror "with a history of filing soft tissue law suits because that's what this is and I think [Hron's counsel] has a perfect right to eliminate her, whether she's black or white, when she volunteers that she recently filed a soft tissue case." Thus, the trial court accepted Hron's race-neutral explanation for the peremptory challenge against Ms. Glover and was satisfied that his decision to strike was race-neutral.

Patterson argues that the trial court did not follow the ***Batson*** analysis—that it did not use the factors set forth in ***Batson*** to determine if she had made a *prima facie* showing.[5] As the Supreme Court has explained, however, once the opposing party offers a race-neutral explanation for a peremptory strike, and the trial court rules on the "ultimate question of intentional discrimination, the preliminary issue of whether the [opposing party] had made a *prima facie* showing becomes moot." *See* ***Hernandez***, 500 U.S. at 359. Because we do not find the trial court's evaluation clearly erroneous, we reject Patterson's equal protection challenge to the peremptory strike of Ms. Glover.

Regarding Hall's peremptory strike of Ms. Morrisey, Patterson mischaracterizes the record. Nothing in the record establishes that Ms. Morrisey is African-American. The trial court noted:

> As far as Ms. Morrisey is concerned, my eyesight isn't 20/20 but it's pretty close to it and I am of the opinion Ms. Morrisey is not an African American. [Hall's counsel], whether he's right or wrong, didn't think that she was Afro-American either. His intention to strike her because of her race is clearly not present.

Thus, in failing to establish Ms. Morrisey's race, Patterson could not even meet ***Batson's*** threshold requirement to make the *prima facie* showing that the strike was race-based.

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[5] To determine if the objecting party has met the threshold requirement of establishing a *prima facie* case of purposeful discrimination, the trial court must consider all the circumstances relevant to the opposing party's intent, including: (1) whether a pattern of strikes exists against members of a particular race or gender; (2) whether the opposing party excluded jurors who were "suitable candidates for exclusion;" and (3) questions and statements the opposing party made during voir dire. ***Michelle R. v. Joe C.***, 186 Wis.2d 580, 586, 522 N.W.2d 222, 225 (Ct. App. 1994).

In conclusion, we reject Patterson's arguments and affirm the judgment in favor of the defendants Lynns Waste Paper, Hron, and Hall.

By the Court. – Judgment affirmed.

This opinion will not be published. *See* RULE 809.23 (1)(b)5, STATS.