COURT OF APPEALS
DECISION
DATED AND RELEASED

November 21, 1996

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

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

No. 96-0535

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

DONNA K. BRACKEN,

Plaintiff-Appellant,

UNIFORMED SERVICES BENEFIT PLAN, INC.,

Plaintiff,

v.

DANIEL M. DERSE AND AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Sauk County: VIRGINIA A. WOLFE, Judge. *Affirmed*.

Before Dykman, P.J., Vergeront and Deininger, JJ.

DYKMAN, P.J. Donna Bracken appeals from a judgment dismissing her negligence claim against Daniel Derse and American Family

Mutual Insurance Company, his insurer. The jury found that Derse negligently hit Bracken in the face on May 18, 1992, but the trial court struck the jury's answers in the verdict on the issue of negligence, concluding that the facts only supported a claim of battery, not negligence. Because we conclude that no credible evidence supports the jury's finding that Derse acted negligently, we affirm.

BACKGROUND

On May 18, 1992, Bracken asked Derse if he was going to clean grass clippings off of their joint driveway. A disagreement ensued. Bracken and Derse presented conflicting testimony regarding this disagreement, but it is undisputed that Derse ultimately struck Bracken in the face with his fist. Bracken brought suit against Derse and his insurer, alleging that Derse was negligent in causing her injuries.

Prior to trial, Derse filed revised jury instructions and a revised special verdict, requesting instructions and questions on the issue of battery and omitting instructions and questions on the issue of negligence. At the close of evidence, the court agreed with Derse that this was a battery case and that negligence was not an issue to be submitted to the jury. Bracken saw no reason to submit the case to the jury solely on the issue of battery because Derse did not have insurance coverage for intentional acts. The parties stipulated that both issues would be submitted to the jury.[1]

The jury found that Derse did not commit a battery but did negligently cause Bracken's injuries. The jury attributed sixty percent of the negligence to Derse and the rest to Bracken. After verdict, Derse moved to dismiss the complaint on the grounds that there was no credible evidence on which the jury could have found that Derse was negligent. The trial court agreed, striking the jury's answers on negligence and dismissing Bracken's claim. Bracken appeals.

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[1] In his brief, Derse states that he "expressly reserved the right to object to the inclusion of the negligence questions in motions after verdict and have the matter sorted out by the trial judge at that time." Bracken does not dispute this contention.

TRIAL COURT'S STRIKING OF JURY VERDICT

Bracken argues that the trial court erred in striking the jury's verdict on the issue of negligence. "[W]hen the court changes an answer in the jury's special verdict, or otherwise overturns a jury finding, we defer to the verdict by applying the traditional any-credible-evidence standard." ***Foseid v. State Bank***, 197 Wis.2d 772, 787, 541 N.W.2d 203, 209 (Ct. App. 1995). Thus, "if there is any credible evidence which, under any reasonable view, fairly admits of an inference that supports a jury's finding, that finding may not be overturned." ***Id.*** at 782, 541 N.W.2d at 207.

To maintain a cause of action for negligence, Bracken needed to show a duty of care on the part of the Derse, a breach of that duty, a causal connection between the conduct and the injury, and an actual loss or damage as a result of the injury. *See* ***Rockweit v. Senecal***, 197 Wis.2d 409, 418, 541 N.W.2d 742, 747 (1995). In ***Shannon v. Shannon***, 150 Wis.2d 434, 443-44, 442 N.W.2d 25, 30 (1989), the court provided:

> A person fails to exercise ordinary care when, without intending to do any wrong, he does an act or omits a precaution under circumstances in which a person of ordinary intelligence and prudence ought reasonably to foresee that such act or omission will subject him or his property, or the person or property of another, to an unreasonable risk of injury or damage.

There is no such thing as negligent battery,[2] however. *See* PROSSER & KEETON ON TORTS §§ 9-10 (5th ed. 1984). Intentional torts cannot be confused with negligence. ***Bielski v. Schulze***, 16 Wis.2d 1, 18, 114 N.W.2d 105, 113 (1962). "The difference between intent and negligence, in a legal sense, ordinarily is nothing but the difference in the probability, under the circumstances known to the actor and according to common experience, that a certain consequence or class of consequences will follow from a certain act." ***Falk v. City of***

[2] Battery is the intentional, unprivileged, harmful or offensive touching of a person by another. ***Lestina v. West Bend Mut. Ins. Co.***, 176 Wis.2d 901, 906, 501 N.W.2d 28, 30 (1993).

Whitewater, 65 Wis.2d 83, 86-87, 221 N.W.2d 915, 917 (1974). While negligence involves an act that a person of ordinary intelligence and prudence ought reasonably to foresee will subject another person to injury, battery involves an act which the actor either intends to cause injury or is substantially certain will cause injury. *See* ***McCluskey v. Steinhorst***, 45 Wis.2d 350, 358, 173 N.W.2d 148, 152 (1970) (quoting RESTATEMENT (SECOND) OF TORTS § 8A).

After hearing the testimony of Bracken and Derse, the jury could have drawn two competing inferences regarding Derse's intent in striking Bracken. Neither inference, however, supports the jury's finding that Derse negligently punched Bracken.

Bracken's version of the facts was as follows:

> [W]hen I came back from my son's place, I drove up the driveway. I pulled in here. I came out from behind my car. And I asked Mr. Derse, who is going to clean up the grass clippings, me or him, because I told him I have no problem with it.
>
> That's when he really got upset. He turned around and swung his arms and took big steps, and he says, "This is mine. This is mine. This is mine."
>
> He came right up in front of me. And he says, "I'm sick and tired of you harassing my wife and kids." He says, "I'm going to put a stop to it right now."
>
> He hit me. I didn't know--I went down on my knees, because they had to take gravel out of my hands, and my knees were scratched. I became disoriented when I realized he must have knocked me out.

This testimony does not support an inference that Derse accidentally struck her in the face. If the jury believed Bracken's testimony, it could only conclude that Derse intentionally struck Bracken and either intended to cause harm or was substantially certain that harm would result. *See* ***Smith v. Keller***, 151 Wis.2d 264, 271, 444 N.W.2d 396, 399 (Ct. App. 1989) (concluding

that the act of hitting another person in the face is so certain to cause harm that the actor can be said to have intended the harm). Therefore, Bracken's testimony does not provide any credible evidence on which the jury could have found that Derse negligently caused her injuries.

Derse presented a different view of the facts. Derse testified that he and Bracken were arguing about who should clean off the driveway when Bracken pushed him and he almost fell down. After he regained his balance, Bracken said, "Get off my property," and brought her arms up quickly. Derse thought it was a punch. He then testified as follows:

Q: What did you do?

A: I stepped back and punched.

Q:Was that a conscious effort on your part?

A:Not at all. I had no idea until after it was done that I'd even done it.

Q: Did you intend to strike her?

A:No.

Q:Did you intend to cause any harm to Mrs. Bracken?

A:No.

....

Q:Did you have any control over the blow that you struck?

A:No. I didn't try to punch.

If the jury believed Derse's testimony, it still could not find that Derse acted negligently. RESTATEMENT (SECOND) OF TORTS § 2 cmt. a (1965) provides:

> There cannot be an act without volition. Therefore, a contraction of a person's muscles which is purely a reaction to some outside force, such as a knee jerk or the blinking of the eyelids in defense against an approaching missile, or the convulsive movements of an epileptic, are not acts of that person.

If the jury believed that Derse had no control over his actions and struck Bracken without a conscious effort, it could not find that he acted with volition. Therefore, it could not consider his striking of Bracken an act on which to base a finding of negligence.

Bracken argues that the trial court should not have disregarded the jury's negligence verdict, citing ***Gouger v. Hardtke***, 167 Wis.2d 504, 482 N.W.2d 84 (1992). In ***Gouger***, John Hardtke struck Michael Gouger in the eye with a small piece of soapstone from approximately twenty feet away. ***Id.*** at 515, 482 N.W.2d at 89. The trial court concluded that Hardtke's conduct in throwing a soapstone was substantially certain to result in injury and inferred Hardtke's intent to injure as a matter of law. ***Id.*** at 509-510, 482 N.W.2d at 87.

The supreme court reversed the trial court's determination, concluding:

> The facts in this case do not warrant inferring as a matter of law that Hardtke intended to injure Gouger. The conduct of throwing a piece of soapstone at another person, even with the intent of hitting that person, is not so substantially certain to cause injury that a court may infer an intent to injure.

Id. at 514, 482 N.W.2d at 89. Likewise, Bracken argues that the question of whether Derse intended to injure her is a question for a jury, not the court, to decide.

The facts of this case are distinguishable from the facts of ***Gouger***. While throwing a small piece of soapstone at another person twenty feet away is not substantially certain to cause injury, punching another person in the face

is. This case is similar to ***Smith v. Keller***, 151 Wis.2d 264, 444 N.W.2d 396 (Ct. App. 1989), in which the facts indisputedly showed that Keller expected or intended to hit Smith. ***Id.*** at 267, 444 N.W.2d at 397. As a result, the court concluded that the jury was improperly given special verdict questions on a negligence theory. ***Id.*** The court stated that "[h]itting another person in the face is the type of act which is so certain to cause harm that the person who performed the act can be said to have intended the harm." ***Id.*** at 271, 444 N.W.2d at 399. Likewise, Derse's act of hitting Bracken in the face was so certain to cause injury that it can be said that Derse intended the harm. Therefore, the jury's finding of negligence is not supported by credible evidence, and the trial court did not err in striking the jury's finding that Derse negligently struck Bracken.

REVISED JURY INSTRUCTIONS AND SPECIAL VERDICT

Derse filed revised jury instructions and a revised requested special verdict before trial, requesting instructions and questions on the issue of battery and omitting instructions and questions on the issue of negligence. Bracken argues that the trial court erroneously exercised its discretion in permitting Derse to "change the theory of liability in this case the morning of trial."

The theory of liability in this case—negligence—was Bracken's theory, not Derse's. In his answer, Derse denied that he negligently caused Bracken's injuries. By requesting a special verdict and jury instructions on the issue of battery, Derse was requesting instructions consistent with his answer that he did not act negligently. Contrary to Bracken's allegation, Derse was not changing his pleadings the morning of trial. In fact, Derse appears to have assisted Bracken's case by requesting an instruction on the issue of battery, not an outright dismissal of the case, when Bracken only alleged negligence in her complaint.

Trial courts have wide discretion in deciding what instructions and special verdicts to give. ***Nischke v. Farmers & Merchants Bank & Trust***, 187 Wis.2d 96, 112, 522 N.W.2d 542, 549 (Ct. App. 1994). Generally, instructions need only correctly state the law, and special verdicts need only fairly present the material issues of fact to the jury. ***Id.*** Bracken does not argue that the instructions incorrectly stated the law or that the special verdict did not present

the material issues of fact to the jury fairly. We conclude that the trial court did not erroneously exercise its discretion in instructing the jury on the issue of battery.

MISCARRIAGE OF JUSTICE

Finally, Bracken argues that we should reverse the judgment and reinstate the jury verdict pursuant to our discretionary authority under § 752.35, STATS., because the trial court's decision results in a miscarriage of justice. Since we have already concluded that no credible evidence supported the jury's finding that Derse negligently caused Bracken's injuries, we reject Bracken's argument.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.