COURT OF APPEALS
DECISION
DATED AND FILED

October 21, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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*** **§ 808.10 and RULE 809.62, STATS.**

No. 96-1168

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

JANE L. TRUCKSA,

PLAINTIFF-APPELLANT-
CROSS RESPONDENT,

PRIMECARE HEALTH PLAN, INC.,

PLAINTIFF,

V.

JOSEPH B. SNYDER,
ALLSTATE INSURANCE COMPANY,
AMERICAN FAMILY INSURANCE COMPANY,
BRIAN R. WEBER, PETER R. WEBER
AND RITA J. WEBER,

DEFENDANTS-RESPONDENTS,

FARMERS INSURANCE EXCHANGE,

DEFENDANT-RESPONDENT-
CROSS APPELLANT,

EDWARD M. TRUCKSA,

DEFENDANT-CROSS RESPONDENT.

APPEAL and CROSS-APPEAL from orders of the circuit court for Milwaukee County: THOMAS P. DOHERTY, Judge. *Affirmed.*

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

PER CURIAM. Jane L. Trucksa appeals from a trial court order dismissing Trucksa's negligence claims against Joseph B. Snyder and Allstate Insurance Company, following a grant of summary judgment in favor of Farmers Insurance Exchange. Trucksa claims that the trial court erred by granting summary judgment and argues: (1) there is a jury question as to whether Snyder's negligence was a cause-in-fact of the collision between Trucksa's and Brian R. Weber's vehicles; and (2) public policy considerations do not prevent a finding that Snyder was liable. We conclude that the trial court properly granted summary judgment in favor of Snyder.

Farmers cross-appeals from the portion of the trial court's order denying the remainder of Farmers' summary judgment motion, which related to the Trucksa's insurance policy's underinsurance coverage. Farmers claims that the trial court erred by denying this portion of its motion and argues that, as a matter of law, there could be no underinsured motorist coverage for either Weber's or Trucksa's vehicles. We conclude that the trial court properly denied summary judgment with respect to this issue.

I. BACKGROUND.

On July 30, 1992, Brian R. Weber drove through a stop sign at the intersection of Layton Avenue and 124th Street in Milwaukee and smashed into a vehicle which Edward M. Trucksa was driving, and in which Jane L. Trucksa was a passenger. Prior to the accident, Weber and a passenger had been driving northeast on the I-43 freeway. Joseph B. Snyder was also driving northeast on I-43, which was under construction, at that time. On a portion of the freeway before the Layton Avenue exit, the eastbound traffic lanes were obstructed by orange barrels, leaving only one legal lane of traffic open. As Weber's vehicle entered the construction zone, Weber found himself behind Snyder's vehicle. Snyder testified that Weber began to follow him closely, and that Weber attempted to pass him by driving onto the shoulder of the freeway. Weber testified that, when that happened, Snyder was swerving back and forth, and slowing down and speeding up.

Both vehicles reached the Layton Avenue turnoff, and exited the freeway. The turnoff contained two unobstructed traffic lanes, and as Snyder took the right lane, Weber pulled alongside him in the left lane. While both vehicles were about half-way through the turnoff, and approaching the intersection of Layton Avenue and 124th Street, Weber's passenger gave Snyder the "finger" gesture. Snyder returned the finger gesture, and both Weber and his passenger responded by giving Snyder the finger gesture back. Meanwhile, the Trucksas' vehicle had entered the intersection, which was controlled by stop signs. Mrs. Trucksa testified that, as the Weber and Snyder vehicles approached the intersection, she saw Weber looking at Snyder, instead of the road. Although Snyder stopped at the stop sign, Weber drove through the stop sign into the intersection and smashed into the Trucksas' vehicle.

Mrs. Trucksa suffered serious injuries as a result of the accident, and filed a complaint alleging negligence against Weber, Weber's parents, Mr. Trucksa, and their insurers. Mrs. Trucksa later amended her complaint to include Snyder as a defendant, alleging that his return of the finger gesture was negligence which was a substantial factor in causing the accident. Farmers Insurance Exchange[1] moved for summary judgment, and asked the court to dismiss Snyder as a defendant. The trial court granted that portion of Farmers' motion and dismissed Snyder, finding that his conduct was not a substantial factor in causing the accident and that public policy considerations prevented a finding that Snyder was liable. Mrs. Trucksa now appeals that finding and grant of summary judgment.

Mrs. Trucksa also claimed that Mr. Trucksa's and Weber's vehicles were underinsured motor vehicles under her Farmers insurance policy. Farmers moved for a declaratory summary judgment that Mr. Trucksa's and Weber's vehicles were not underinsured motor vehicles. The court found that according to the Trucksas' original policy's definition, the vehicles were not underinsured, but that according to the policy's definition as modified by a later endorsement, the vehicles were underinsured. The court then found that a jury question existed as to whether the Trucksas received the endorsement prior to the accident and denied this portion of Farmers' motion. Farmers now cross-appeals that finding and denial of summary judgment.

[1] Farmers Insurance Exchange was Edward Trucksa's insurer, and was therefore named as a defendant. Farmers also provided Mrs. Trucksa with uninsured/underinsured motorist coverage. Farmers' motion to dismiss Mrs. Trucksa's claims against Snyder was made in response to Mrs. Trucksa's claim for uninsured/underinsured motorist coverage as a result of Snyder's involvement in the accident.

II. ANALYSIS.

A. Summary Judgment Dismissing Snyder

Trucksa claims that the trial court erred by granting the portion of Farmers' summary judgment motion seeking dismissal of Trucksa's claims against Snyder. The trial court found: (1) as a matter of law, Snyder's actions could not be a "substantial factor" in causing the accident; and (2) public policy considerations precluded the plaintiff from recovering for Snyder's alleged negligence. We conclude that the trial court correctly granted summary judgment as to this issue.

1. Standard of Review

Summary judgment is used to determine whether there are any disputed facts that require a trial, and, if not, whether a party is entitled to judgment as a matter of law. RULE 802.08(2), STATS.; ***U.S. Oil Co. v. Midwest Auto Care Servs., Inc.***, 150 Wis.2d 80, 86, 440 N.W.2d 825, 827 (Ct. App. 1989). Our review of a trial court's grant of summary judgment is *de novo*. *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). We must first determine whether the complaint states a claim. ***Id***. If the complaint states a claim, we must then determine whether "there is no genuine issue as to any material fact" so that a party "is entitled to a judgment as a matter of law." *See* Rule 802.08(2), Stats.; ***Green Spring Farms***, 136 Wis.2d at 315, 401 N.W.2d at 820.

2. Causation

To establish causation, the plaintiff must prove that the defendant's negligence was a "substantial factor" in producing the plaintiff's injury. *See*

Young v. Professionals Ins. Co., 154 Wis.2d 742, 747, 454 N.W.2d 24, 27 (Ct. App. 1990). The defendant's conduct is a "substantial factor" if the conduct would lead the trier of fact, as a reasonable person, to regard it as a cause, using that word in a popular sense. ***Id***. at 748, 454 N.W.2d at 27. Causation is generally a factual question for the jury. *See* ***Morgan v. Pennsylvania Gen. Ins. Co.***, 87 Wis.2d 723, 735-36, 275 N.W.2d 660, 666 (1979). However, if reasonable jurors could not differ as to whether a party's conduct was a substantial factor, the question becomes one for judicial decision, as a matter of law. *See* ***id***.

The trial court granted summary judgment partly because it found that reasonable jurors could not conclude that Snyder's conduct was a substantial factor in causing Trucksa's injuries. For summary judgment purposes, the trial court found that Weber missed the stop sign because he was looking in the direction of Snyder's vehicle. The trial court concluded, however, that there was no evidence that Snyder's giving the finger gesture caused Weber to look at him. Instead, the court found that Weber unilaterally and voluntarily chose to pay attention to Snyder rather than the road, and that Snyder did not do anything that was impossible for Weber to ignore. Therefore, the trial court concluded that no reasonable jury could find that Snyder's action in giving the finger gesture was a "substantial factor" in causing the accident.

We agree with the trial court's conclusion. Weber clearly drove through the stop sign because he was looking at Snyder. Trucksa, however, has failed to present any evidence that Snyder caused Weber to look at him. While it is possible that a driver might be involuntary distracted by extremely intrusive or dangerous conduct by other drivers, the facts show that this was not such a case. Here, Snyder merely made a rude gesture. The gesture was not even necessarily directed at Weber, since it was made in response to a finger gesture by Weber's

passenger. There is no evidence that Snyder obstructed Weber's view, or that Snyder's gesture intruded on Weber's line of vision in a manner that prevented him from seeing the road. To the contrary, the evidence shows that Weber was driving in the lane immediately to the left of Snyder. Therefore, Weber must have voluntarily looked over at Snyder in order to even realize that Snyder was making the finger gesture. Similarly, after Weber realized Snyder was making the finger gesture, nothing external to Weber prevented him from returning his attention to the road.

We acknowledge that Wisconsin courts have held that a passenger who talks to and distracts a driver with conversation can be found causally negligent. *See* ***Vogt v. Chicago, Milwaukee, St. Paul and Pacific R.R. Co.***, 35 Wis.2d 716, 723, 151 N.W.2d 713, 716 (1967). *See also* WIS J I—CIVIL 1047.1 (passenger who distracts driver physically or otherwise is negligent.) However, this case deals with another driver's gesture, not a passenger's distracting conversation. The situations are not analogous. While a driver might be unable to avoid a passenger's intrusive conversation, nothing prevents one driver from ignoring another driver's gesture.

Trucksa also argues that a reasonable jury could have found that Snyder's conduct during the entire sequence of events leading up to the finger gesture exchange was the cause of the accident. Trucksa supports this claim by alleging that Snyder negligently "frustrated and angered" Weber by preventing him from passing on I-43. We disagree with Trucksa. No reasonable jury could find that Snyder acted negligently by attempting to prevent Weber from passing him on the freeway. Snyder was driving in a construction zone, in the only unobstructed legal lane of traffic, and Weber could only have passed Snyder by driving onto the shoulder of the highway. While a reasonable jury could conclude

that Weber's attempt to pass was negligent, Snyder's attempt to prevent Weber's dangerous conduct could not be considered causally negligent with respect to the accident. Even if Snyder negligently "angered and frustrated" Weber by not allowing him to pass, Snyder failed to cause the accident. Weber, whether angry or calm, made a unilateral and voluntary choice not to keep a proper lookout, and no reasonable jury could find otherwise. Therefore, the trial court correctly found that Snyder's actions were not a "substantial factor" in causing the accident.

3. Public Policy

Trucksa also argues that the trial court erred by finding that recovery for Snyder's negligence was precluded on public policy grounds. We disagree. Some claims may be barred by public policy considerations, and the application of those public policy considerations is a function solely for the court. ***Bowen v. Lumbermens Mut. Cas. Co.***, 183 Wis.2d 627, 654, 517 N.W.2d 432, 443 (1994). A trial court may decline to submit negligence and cause-in-fact issues to the jury, and instead, grant summary judgment on public policy grounds. ***Id***. A trial court may grant summary judgment on public policy grounds if: (1) the injury is too remote from the negligence or too wholly out of proportion to the tort-feasor's culpability; (2) in retrospect, it appears too highly extraordinary that the negligence should have brought about the harm; (3) allowance of recovery would place too unreasonable a burden on the tort-feasor; (4) allowance of recovery would open the way for fraudulent claims; or (5) allowance of recovery would enter a field that has no sensible or just stopping point. ***Schlomer v. Perina***, 173 Wis.2d 889, 894, 473 N.W.2d 6, 8-9 (Ct. App. 1991), *aff'd by*, 169 Wis.2d 247, 485 N.W.2d 399 (1992). Here, the trial court found that allowing Trucksa to recover for Snyder's alleged negligence would likely open the way for many fraudulent claims and would enter a field that has no sensible stopping point. We

agree with the trial court's reasoning and also conclude that Trucksa's injuries are too wholly out of proportion to Snyder's culpability, and that it appears too highly extraordinary that Snyder's alleged negligence should have brought about the harm.

The trial court correctly noted that imposition of liability on actors whose rude gestures distracted other driver's attention from the road would likely lead to fraudulent claims. The trial court was correct. If actors like Snyder could be liable for making a gesture, many drivers who had failed to keep a proper lookout would likely concoct rudely gesturing drivers as an excuse for their own negligent conduct. The trial court also noted that there would be no sensible point of defining which "distracting" acts were negligent and which were not. Again, the trial court was correct. As the court stated:

> Would Snyder be negligent if he was exchanging obscene gestures with [a] third party and Weber chose to observe it? Would Snyder also be negligent if he was waving towards Weber because he intended to warn him of an unrelated danger? Would Snyder be negligent if he drove an unusual vehicle or had a disfiguring scar which Weber chose to observe? Could a radio station be liable in negligence for an accident caused by a driver distracted by the broadcast?

Although the trial court went no further, summary judgment was also proper because Trucksa's injuries are too wholly out of proportion to Snyder's culpability, and it appears too highly extraordinary that Snyder's alleged negligence should have caused the accident. While no reasonable person would approve of rude gesturing, finger gesture exchanges are a regular, if unpleasant, reality of driving today. To hold Snyder liable for Trucksa's serious injuries is completely out of proportion to his act of returning a finger gesture, which, although rude, was a minor, inconsequential event. It is also certainly highly extraordinary that Snyder's finger gesture could have caused Trucksa's injuries.

No one expects another driver to completely disregard traffic signs and speed through a stop sign, merely because someone is gesturing at them.

In conclusion, the trial court correctly granted summary judgment in favor of Snyder since no reasonable jury could find that Snyder had caused the accident, and any alleged negligence of Snyder was precluded by public policy considerations.

B. Dismissal of the Remainder of Farmers' Summary Judgment Motion

After dismissing Snyder from the case, the trial court denied the remaining portion of Farmers' motion for summary judgment. The question before the court was whether, under the Trucksa's Farmers insurance policy, Weber and Mr. Trucksa were underinsured motorists. Trucksa claimed that the vehicles were underinsured under the policy, while Farmers disagreed. The Trucksas' original insurance policy defined an underinsured motor vehicle as a vehicle whose liability insurance limits were less than the Trucksas' insurance policy limits. Under this definition, the trial court held, as a matter of law, that neither Weber nor Mr. Trucksa's vehicles were underinsured vehicles. The trial court was correct. Because Weber's and Mr. Trucksa's vehicles' liability insurance limits were not less than the Trucksas' insurance policy limits, those vehicles were not underinsured according to the plain language of the original policy. *See* ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis.2d 808, 811, 456 N.W.2d 597, 599 (1990).[2]

[2] Trucksa also apparently argued that Weber and his parents, who were joined in the lawsuit as sponsors of a minor driver, would both be liable and would have to split the $100,000 of liability insurance, making the liability limits on the Weber's policy for both Weber and his parents $50,000, an amount less than the Trucksas' policy limits. The trial court correctly held that that argument failed, since the Webers, rather than having separate policies, had one unitary policy whose limit was equal to the Trucksas' limit.

Therefore, the court correctly found that, under the original policy language, Trucksa's underinsured motor vehicle insurance did not provide coverage.

However, the court noted that a new endorsement was drafted which contained a materially different definition of the term "underinsured motor vehicle." The new endorsement defined an underinsured motor vehicle as a vehicle whose liability limit was less than the *insured person's damages*. The court correctly held, and there is no dispute, that under the new endorsement terms both Mr. Trucksa's and Weber's vehicles were underinsured motor vehicles. The real issue, therefore, is whether the endorsement was in force at the time of the accident. Trucksa argues that it was in force, while Farmers disagrees.

Trucksa first argues that the endorsement automatically went into effect when it was approved by the insurance commissioner on September 25, 1991, almost a year before the accident occurred. Trucksa's policy contains a provision which reads: "When we broaden coverage during the policy period without charge, the policy will automatically provide the broadened coverage when effective in your state." Trucksa claims that "coverage became effective in the state" on the date of the Wisconsin Insurance Commissioner's "approval," September 25, 1991. Trucksa fails to acknowledge, however, that on September 25, 1991, the Insurance Commissioner only approved a form for endorsements in general, rather than the specific endorsement applicable to her policy. Section 631.20, STATS., requires the Wisconsin Insurance Commissioner to approve all forms before they are used by insurance companies in Wisconsin. A form is defined, for the purposes of Chapters 600 to 655, STATS., as "a policy or application prepared for general use and does not include one specially prepared for use in an individual case." Section 600.03(22), STATS. Therefore, when the Insurance Commissioner approved the form of the endorsement, that approval

applied only to the form's use in general, and did not make the endorsement at issue in the case at bar automatically "effective."

Trucksa next argues that the endorsement was in effect prior to the accident because Mr. Trucksa received a copy of the endorsement before the accident. The Trucksas' insurance policy states that, "No other change or waiver may be made in this policy except by endorsement, new declarations, or new policy issued by us." Therefore, Mr. Trucksa's receipt of the endorsement prior to the accident is relevant evidence to show that Farmers "issued" the endorsement, thereby modifying the policy, prior to the accident. Thus, the ultimate issue is whether Mr. Trucksa actually received the endorsement prior to the accident.

The accident occurred on July 30, 1992, and for the endorsement to have been effective, the Trucksas must have received it prior to that date. The endorsement was dated "3-92" and Mr. Trucksa testified that he received it prior to the accident, sometime in March of 1992. Farmers submitted the affidavit of one of its employees, Chris Rodriguez, who claimed that Farmers only sent endorsements to policy holders along with policy renewal documents, approximately thirty days before an insured's policy renewal date. While the endorsement was dated "3-92," Rodriguez claimed the Trucksas' policy was renewed prior to March, on February 1, and 10, 1992. Rodriguez also stated that Farmers did not begin to send the new endorsement to policy holders until October 1992, well after the accident date. Farmers also submitted certified copies of the Trucksas' policies which failed to include the new endorsement language. Based on the above evidence, Farmers claims that it was "physically impossible" for Trucksa to have received the endorsement prior to the date of the accident, July 30, 1992. We disagree.

The fact that Farmers insists that the endorsement could not have been sent to Mr. Trucksa, because it was not supposed to have been sent, does not mean that the endorsement was *not actually received* by Mr. Trucksa. This court refuses to conclude that it is "physically impossible" that someone employed by Farmers sent the endorsement, which was dated "3-92", to Mr. Trucksa in March 1992, when he claims to have received it. Although a jury might find Farmers' version of events more credible than Trucksa's, we decline to conclude that no reasonable jury could believe Trucksa. Therefore, we conclude that the trial court correctly denied summary judgment with respect to this issue. [3]

By the Court.—Orders affirmed.

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

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[3] Farmers also argues that the parole evidence and best evidence rule bar Mr. Trucksa's testimony concerning his receipt of the new endorsement. These arguments are specious. The parole evidence rule is inapplicable since it is the endorsement which modifies the insurance policy's terms, not Trucksa's testimony. The best evidence rule does not apply since Trucksa did not attempt to orally prove the contents of the endorsement, but merely when he received it.