COURT OF APPEALS
DECISION
DATED AND FILED

September 12, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 98-3085

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

JOSEPH WRECZA AND PATRICIA WRECZA,

PLAINTIFFS-RESPONDENTS,

V.

HAROLD A. PATINO AND GOVERNMENT EMPLOYEES INSURANCE CO.,

DEFENDANTS-APPELLANTS,

DEBRA GREENGRASS AND MILLERS CLASSIFIED INSURANCE COMPANY,

DEFENDANTS-CO-APPELLANTS,

HERITAGE MUTUAL INSURANCE CO. AND BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Harold A. Patino and Debra Greengrass appeal from a judgment entered after a jury found them both negligent in the operation of their respective motor vehicles, which caused personal injury to Joseph Wrecza and loss of consortium to his wife, Patricia.

¶2 Patino claims the trial court erred when it: (1) concluded that the jury's initial verdict was defective; (2) re-instructed the jury; and (3) failed to give a general emergency instruction. Greengrass claims the trial court erred when it: (1) allowed the jury to render an entirely new verdict after the trial court decided the first verdict was partially defective; (2) refused to submit a general emergency instruction; and (3) refused to submit a contributory negligence question as to Wrecza's driving. Because the trial court did not erroneously exercise its discretion when it rejected the requested instructions, and because the other claims were waived, we affirm.

I. BACKGROUND

¶3 At approximately 7:35 a.m. on February 1, 1994, Wrecza was driving to work in the left northbound lane, across the South 16th Street viaduct in Milwaukee. His wife and daughter were passengers in his car. The roads were slippery and traffic was proceeding slower than normal. Greengrass was driving two car lengths behind Wrecza at a speed of 10 to 15 mph. As Wrecza drove north on the viaduct, a vehicle driven by Patino began passing him in the right northbound lane. As the Patino vehicle was in the process of passing Wrecza, it

began to "fishtail," regain control, and then spin in a counterclockwise direction north of Wrecza's car. Patino crossed the centerline, and stopped facing northeast in the left southbound lane of the viaduct.

¶4 To avoid hitting Patino, Wrecza stopped his vehicle in the left northbound lane without incident. In the meantime, reacting to Patino's spin-out, Greengrass applied the brakes on her vehicle, which caused her to fishtail, cross the centerline, and then stop facing in a northwesterly direction in the left southbound lane of the viaduct. She immediately corrected her direction and re-entered the left northbound lane. Subsequently, Greengrass noticed that Wrecza had stopped in the same lane, three car lengths ahead of her. She applied her brakes, but slid into the right rear corner of Wrecza's vehicle. In the meantime, Patino had corrected his position and continued north across the viaduct to the Marquette University Dental School where he was a student. He was not aware of the collision that occurred between the Greengrass and Wrecza vehicles until later in the day.

¶5 Wrecza claimed that he sustained mild traumatic brain injury as a result of the accident and commenced an action against Greengrass and Patino. Trial was to a jury. During the jury instruction conference, both Greengrass and Patino requested that the trial court give to the jury the general emergency instruction, WIS JI—CIVIL 1105A. The trial court denied the request, but did give WIS JI—CIVIL 1280, which addresses the negligence of a driver confronted with conditions that cause a skid. Greengrass requested that the trial court submit a question on Wrecza's contributory negligence. The trial court denied the request on the basis that there was no evidence to support a finding of negligence against Wrecza.

¶6 The jury returned a verdict finding Greengrass causally negligent for the accident, and Patino negligent, but not causally so. The jury did not answer the comparative negligence question. The damage question was divided into subparts. Three jurors dissented in two subparts: the future loss of earning capacity and the past and future pain, suffering and disability. These dissents caused the trial court to declare that the verdict was defective because ten jurors had not agreed on all of the damage questions relating to Wrecza. After an in-chambers conference with counsel to discuss this initial verdict, the trial court re-instructed the jury on the five-sixths requirement, and sent it back to deliberate with a new verdict form.

¶7 When the jury returned its second verdict, it again found Greengrass causally negligent; but, it also found Patino causally negligent. The comparative negligence question was answered, assigning 10% of the fault to Patino and 90% to Greengrass. The jury also changed the award of damages, increasing the amount awarded to Wrecza for pain and suffering from $100,000 to $150,000. This second verdict complied with the five-sixths rule. After polling the jurors in open court, the trial court accepted the second verdict.

¶8 Patino filed motions after verdict requesting that the trial court declare the first verdict valid as to the claims against him. Alternatively, Patino requested a new trial because the trial court erroneously exercised its discretion when it refused to give the requested emergency instruction. Greengrass based her post-verdict motions on the trial court's failure to instruct on the emergency doctrine, failure to submit a question on Wrecza's causal negligence, and allowing the jury to render an entirely new verdict. The trial court denied all of the motions. Judgment was entered on the second verdict. Both Greengrass and Patino now appeal.

II. ANALYSIS

A. Patino: Initial Verdict.

¶9 Patino first claims that the trial court erred when it failed to declare the initial verdict valid as to him. The jury found that, although Patino was negligent in the manner in which he operated his motor vehicle, his conduct was not a cause of the accident. Patino argues therefore that a defect in the jury verdict relating to the damage determinations was irrelevant with respect to him. *See* ***Zintek v. Perchik***, 163 Wis. 2d 439, 471 N.W.2d 522 (Ct. App. 1991), *overruled in part on other grounds by* ***Steinberg v. Jensen***, 194 Wis. 2d 439, 534 N.W.2d 361 (1995). He also claims the trial court erred when it re-instructed the jury. We reject his claims.

¶10 The failure to object during the trial, when an alleged error could have been corrected before the return of the verdict, constitutes a waiver of subsequently posed objections. *See* ***Ollinger v. Grall***, 80 Wis. 2d 213, 223, 258 N.W.2d 693 (1977). Patino argues that waiver did not occur. The record belies his claim. Patino's counsel wanted any re-instruction to focus on what he perceived to be a defect in the damage answers that had dissenters. He never specified that he wanted the verdict accepted as to his client. As succinctly expressed by the trial court when it considered this question in motions after verdict:

> Even assuming this, I could have accepted the verdict as to Patino. It is my view that the defendant waived the right to that verdict by not asking that it be accepted and allowing the jury to be polled. I do not consider a request for certain instructions to the jury constitutes a request that I accept the verdict as to Patino.

The trial court's analysis was correct. It did not err.

B. Greengrass: Initial Verdict.

¶11 Greengrass claims that the trial court erred when it allowed the jury to answer a whole new verdict, instead of directing the jury to reconsider only those answers that were defective. We are not convinced.

¶12 When the trial court received the first verdict on May 12, 1998, it conferred with respective counsel about how to correct what it perceived to be a defective verdict. Our review of the record reveals that counsel for Greengrass first agreed that the verdict was defective. He wanted the trial court to accept the verdict, discharge the jury, and then find that the verdict was defective. He objected twice to re-instructing the jury. After the trial court did re-instruct the jury, counsel for Greengrass objected to the manner in which the "ten jurors must agree" requirement was expressed. The record does not contain any request by Greengrass' counsel for the limiting instruction he now claims ought to have been submitted to the jury. We deem this failure to be a waiver of the objection. *See* ***id.*** There was no trial court error.

C. Emergency Instruction.

¶13 Next, both Patino and Greengrass claim that the trial court erroneously exercised its discretion when it failed to charge the jury with the requested "emergency doctrine" instruction. We are not persuaded.

¶14 A trial court has broad discretion when instructing a jury so long as it fully and fairly informs the jury of the rules and principles of law applicable to the particular case. *See* ***Nowatske v. Osterloh***, 198 Wis. 2d 419, 428, 543 N.W.2d 265 (1996). The trial court "should instruct the jury with due regard to the facts of

the case." ***Id.*** It is error to refuse to instruct on an issue that the evidence raises or to instruct on an issue that the evidence does not support. *See* ***Lutz v. Shelby Mut. Ins. Co.***, 70 Wis. 2d 743, 750, 235 N.W.2d 426 (1975). We must consider the instructions as a whole to determine whether the challenged instruction is erroneous. *See* ***Nowatske***, 198 Wis. 2d at 429. "The instructions are not erroneous if, as a whole, they adequately and properly inform the jury." ***Id.*** If the trial court gives an erroneous instruction or erroneously refuses to give an instruction, a new trial is not warranted unless the error is prejudicial. *See* ***id.*** It is not prejudicial if it appears that the result would not be different had the error not occurred. *See* ***id.*** We are not convinced that the trial court erroneously exercised its discretion for two reasons.

¶15 First, WIS JI—CIVIL 1105A reads:

> Drivers of motor vehicles who are suddenly confronted by an emergency, not brought about or contributed to by their own negligence, and who are compelled to act instantly to avoid collision or injury, are not guilty of negligence if they make such choice of action or inaction as an ordinary prudent person might make if placed in the same position, even though it should afterwards appear not to have been the best or safest course. You will bear in mind, however, that the rule just stated does not apply to any person whose negligence wholly or in part created the emergency. A person is not entitled to the benefit of the emergency rule unless the person is without fault in the creation of the emergency.

¶16 For a party to avail oneself of the doctrine, three conditions must be fulfilled: (1) the party seeking its benefits must be free from negligence which contributed to the creation of the emergency; (2) the time element in which action is required must be short enough to preclude the deliberate and intelligent choice of action; and (3) the element of negligence inquired into must concern

management and control. *See* ***Leckwee v. Gibson***, 90 Wis. 2d 275, 288, 280 N.W.2d 186 (1979). We shall consider the merits of Patino's and Greengrass' claim separately.

¶17 Here, the evidence is uncontroverted that Patino was aware of the fact that, during the winter, there are occasions when reduced driving speed is required due to weather conditions. On February 1, 1994, despite the adverse winter weather conditions, Patino drove north on the 16th Street viaduct at an estimated speed of five miles in excess of the 30-mph speed limit. Prior to spinning out, Patino fishtailed three times in succession. After the first instance of fishtailing, he regained temporary control of his vehicle, but made no effort to reduce his speed. Patino's alleged negligence in the operation of his vehicle involved excessive speed, or driving too fast for conditions. It did not involve management and control.

¶18 As for Greengrass, her claim for application of the emergency doctrine has even less merit. She observed Patino when he initially fishtailed and then regained control. Reacting to Patino while traveling 10 to 15 mph, she applied her brakes, but also began to fishtail, lost control, crossed the centerline, and eventually stopped in the easternmost southbound lane. She observed Patino's car fishtail again and spin out into traffic, requiring Wrecza to stop in his northbound lane of traffic. Waved on by a driver behind her, she re-entered the northbound lane, and proceeded toward the stopped Wrecza vehicle. She had just seen Patino fishtail twice and spinout, and she had fishtailed. She observed Wrecza's stopped vehicle three car lengths ahead of her. She knew the driving conditions were slippery, and that she had trouble stopping when driving between 10 and 15 mph. Nevertheless, she proceeded toward the Wrecza vehicle at approximately 10 mph. Thus, by her negligent operation due to imprudent speed,

she not only contributed to the condition she faced, but was not suddenly confronted with a condition requiring an emergency response because she was already aware of the slippery conditions.

¶19 Because neither Patino nor Greengrass satisfied the requirements for the application of the emergency doctrine, the trial court did not erroneously exercise its discretion in denying their request.

¶20 Second, even if it can be concluded that Patino and Greengrass met the threshold requirements warranting the submission of the general emergency instruction, no prejudice resulted by the trial court's failure to do so. The trial court did not ignore the wintry condition that existed on the South 16th Street viaduct. Reacting to evidence of slippery conditions, the trial court included in its jury instructions a specific instruction on "skidding," which advised the jury how to evaluate the presence of icy conditions in the context of all the other evidence presented at trial.[1] Evidence supports a finding that Patino and Greengrass ignored

[1] This instruction provides:

> Skidding of a motor vehicle may occur without fault of the driver and having begun, it may continue without fault for a considerable space and time. On the other hand, the skidding may have been precipitated by the negligence of the driver, or the driver may have controlled the vehicle negligently after the skid began.
>
> You may consider the driver's knowledge of the road conditions; if the slippery condition appeared suddenly without warning, the driver would be excused from a charge of negligence. On the other hand, where the icy or slippery condition of a road increases the danger of travel, and the driver is, or ought to be, aware of such condition, then the driver is required to exercise a degree of care commensurate with such conditions.
>
> You may consider the speed of the skidding vehicle prior to or at the time of skidding, or the manner in which the driver

(continued)

a specific emergency condition that precipitated this accident and, therefore, the result would not have been different even if the emergency instruction had been given.

D. Greengrass: Contributory Negligence.

¶21 As a final claim of error, Greengrass asserts that the trial court erred by failing to submit to the jury a question on Wrecza's contributory negligence. Wrecza testified that when he saw the Patino vehicle go out of control and start to spin out, he simply came to a stop in his left northbound lane, but did not attempt to pull over to the right hand or curb lane. He stated he felt there was enough room for him to stop and he felt that that was the safest course to take. Greengrass argues that Wrecza negligently failed to maintain a proper lookout for vehicles driving behind him and failed to properly signal that he was coming to a stop. We reject this claim of error.

¶22 A trial court does not commit error if it denies a request for an instruction that the evidence does not support. *See* ***Lutz***, 70 Wis. 2d at 750. During the instruction conference between the parties and the trial court, a discussion took place as to whether any evidence supported Greengrass' request, and whether her contributory negligence claim against Wrecza could withstand a motion to dismiss. The trial court ruled:

> And it's my view what I'm doing is dismissing the claim of contributory negligence. I believe the burden is on the defendants to establish that. And based on the evidence in this case, there is no reasonable view of the evidence and

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controlled the car prior to skidding, or after the skidding commenced, in determining whether the driver was negligent.

WIS JI—CIVIL 1280.

> the inferences which can be drawn from the evidence that would allow a jury to find that Mr. Wrecza was negligent.

¶23 We have searched the record and can find no evidence that Wrecza's rear break lights were not in working order. Greengrass observed that Wrecza had stopped and remained in that position. She saw this after she had stopped her vehicle and then elected to begin driving again in the direction of Wrecza's stopped vehicle. It was Greengrass' burden to produce sufficient evidence to warrant a contributory negligence instruction. Greengrass failed in this regard. There is no credible evidence in the record to support a request for a contributory negligence instruction. Therefore, the trial court did not err.

By the Court.—Judgment affirmed.

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