COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2718 **Cir. Ct. No. 2006CV401**

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

BRENDA S. OPPOR AND SCOTT L. OPPOR,

PLAINTIFFS-APPELLANTS,

V.

GENERAL CASUALTY COMPANY OF WISCONSIN, WEILAND TRUCKING COMPANY, INC. AND HOWARD M. SIEGLE,

DEFENDANTS-RESPONDENTS,

NETWORK HEALTH PLAN AND BALDOR ELECTRIC COMPANY,

DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 NEUBAUER, P.J. Brenda S. Oppor and Scott L. Oppor appeal from a judgment resulting from a jury verdict and an order denying their postverdict motions. The Oppors filed this negligence action against Howard M. Siegle, his employer, and various insurers, after being involved in a rear-end collision with Siegle, who was operating a tractor-trailer for Weiland Trucking Company, Inc., at the time of the accident. The jury's special verdict awarded the Oppors $636,462.77 in damages, but found that Siegle was not negligent in the operation of his vehicle. The trial court denied the Oppors' postverdict motions to modify the jury's negligence verdict as a matter of law or, in the alternative, order a new trial as to liability.

BACKGROUND

¶2 The Oppors filed this action on April 6, 2006, alleging that on April 11, 2003, they were operating their vehicle northbound on U.S. Highway 41 in Winnebago county when Siegle's truck collided with the rear end of their vehicle.[1] The Oppors alleged that a proximate cause of the collision was Siegle's negligence in (1) failing to maintain a proper lookout, (2) driving inattentively, and (3) failing to properly manage and control his vehicle. Finally, the Oppors alleged that as a direct and proximate result of Siegle's negligence they suffered serious injuries. Siegle responded, denying negligence and asserting that the Oppors may have been at fault as well.

[1] Besides Siegle and his employer, Weiland Trucking Company, the Oppors named several insurers as defendants. The Oppors' insurer, General Casualty Company of Wisconsin, is a respondent on appeal, while Network Health Plan and Baldor Electric Company remain defendants in the underlying action.

¶3 The matter proceeded to a four-day jury trial in March 2008. Apart from damages, the primary issue at trial was whether Siegle was negligent in the operation of his vehicle.[2] The Oppors' theory was that Siegle failed to take precautions as traffic backed up over the bridge on Highway 41 and hit the Oppors' stopped vehicle "at highway speed." Siegle maintained that the Oppors' vehicle and the other traffic was not at a complete stop, and that the collision was a "relatively low-speed rear-end impact" occurring as a result of a "chain reaction" or evolving traffic situation caused by vehicles moving in and out of traffic lanes on a busy highway.

¶4 After hearing testimony from both the Oppors and Siegle regarding the circumstances of the accident, the jury was instructed on negligence, including its definition (WIS JI—CIVIL 1005), failure to keep a careful lookout (WIS JI—CIVIL 1055), and failure to maintain management and control of a vehicle, both under ordinary circumstances and when confronted by an emergency (WIS JI—CIVIL 1105, 1105A), and (WIS JI—CIVIL 1112). Following deliberations, the jury returned the following response to the only special verdict question regarding negligence:

> **Question No. 1**: At or before the accident of April 11, 2003, was Howard M. Siegle negligent in the operation of his vehicle?
>
> **Answer**: No

With respect to damages, the jury awarded the Oppors $636,462.77.

[2] The Oppors assert in their statement of facts that the defendants "stipulated in this case that there was no contributory negligence on the part of the Plaintiffs-Appellants." While they fail to provide citation to the record for this stipulation, it is apparent from the trial transcript and special verdict that the Oppors' negligence was not an issue at trial.

¶5 On April 8, 2008, the Oppors filed a motion requesting "an order pursuant to [WIS. STAT. §§ 805.14(5) or 805.15 (2007-08)[3]] finding the jury's verdict should be modified, as a matter of law, as it relates to … Siegle's negligence, and in the alternative, ordering a new trial on the issue of liability." In support of their motion, the Oppors' attorney averred that "the credible evidence adduced at trial indicated that [Siegle] was negligent as to the operation of his vehicle at or before the accident at issue," and that "the jury's finding of no liability … was an error as a matter of law based upon the credible evidence adduced at trial."

¶6 Following a hearing on August 7, 2008, the trial court denied the Oppors' motion. In reaching its determination, the trial court cited at length from Siegle's testimony regarding the circumstances of the accident. The trial court also cited Scott Oppor's testimony that "this all happens at the blink of an instant eye." It reasoned:

> [C]ould a jury logically find no negligence? I think they could for the simple reason that they're saying—or they could believe that this is one of those situations where it happened so quick no one could have reacted in time. So is there any evidence in the record which would support the jury's finding? Yeah, I think there is evidence, and the inferences drawn from that evidence could support the jury's finding, and therefore, I will deny the motion with respect to … changing the verdict answer. I wouldn't do that.

[3] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

The trial court additionally denied the Oppors' request for a new trial on liability in the interest of justice, and found that the verdict was not contrary to the great weight of the evidence. The Oppors appeal.

DISCUSSION

¶7 The Oppors requested that the trial court modify the jury verdict under WIS. STAT. § 805.14(5) or, in the alternative, order a new trial under WIS. STAT. § 805.15. The Oppors argue on appeal that the trial court failed to apply the correct legal standard in considering their motions after verdict.

Motion to Modify Jury's Answer or Order a New Trial on Liability

¶8 Pursuant to WIS. STAT. § 805.14(5)(c), "[a]ny party may move the court to change an answer in the verdict on the ground of insufficiency of the evidence to sustain the answer." A motion to change a jury's special verdict answer challenges the sufficiency of the evidence to sustain the answer. ***Danner v. Auto-Owners Ins.***, 2001 WI 90, ¶72, 245 Wis. 2d 49, 629 N.W.2d 159. When we review a trial court's refusal to direct a verdict or its denial of a motion to change verdict answers, we must affirm if "there is *any* credible evidence to support a jury's verdict, 'even though it be contradicted and the contradictory evidence be stronger and more convincing, nevertheless the verdict ... must stand.'" *See* ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 389-90, 541 N.W.2d 753 (1995) (citation omitted). Motions challenging the sufficiency of evidence to support the verdict or an answer in a verdict are only to be granted if no credible evidence supports the verdict; this standard is more stringent than permitting a new trial in the interest of justice if the verdict is contrary to the great weight and clear preponderance of the evidence. ***Sievert v. American Family***

Mut. Ins. Co., 180 Wis. 2d 426, 433-34, 509 N.W.2d 75 (Ct. App. 1993), *affirmed*, 190 Wis. 2d 623, 528 N.W.2d 413 (1995).

¶9 The Oppors requested the court to modify the jury's answer with respect to Siegle's negligence or, in the alternative, order a new trial on liability. *See* WIS. STAT. §§ 805.14 and 805.15. Finding that the jury's verdict was supported by credible evidence, the trial court denied the Oppors' motion. First, we briefly address the Oppors' argument that the trial court applied the wrong legal standard. The Oppors' argument is based on the trial court's statement that he believed the jury "got it wrong." However, the court went on to state, "this isn't about what I think, plain and simple, it's about what the jury has done and whether what they did was correct." He stated that "the law requires me … to search the record to find any information which will support their verdict." In the end, the court applied the correct legal standard, stating, "So is there any evidence in the record which would support the jury's finding? Yeah, I think there is evidence, and the inferences drawn from that evidence could support the jury's finding." We therefore address the Oppors' argument in terms of sufficiency of evidence.[4]

¶10 The jury's determination of negligence was informed by the jury instructions provided in this case. With respect to negligence, the jury was instructed:

> A person is negligent when he fails to exercise ordinary care. Ordinary care is the care which a reasonable person

[4] We note that the Oppors devote the first section of their brief to the following argument: "Given the jury instructions provided, the jury's finding was clearly erroneous and/or Mr. Siegle should be held negligent as a matter of law." We construe this argument as a challenge to the sufficiency of evidence to support the jury's verdict and address it as such.

> would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, does something or fails to do something that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.

See WIS JI—CIVIL 1005. With respect to lookout, the jury was instructed in part that "[a] driver must use ordinary care to keep a careful lookout ahead and about him or her for the presence or movement of other vehicles … that may be within or approaching the driver's course of travel…. The failure to use ordinary care to keep a careful lookout is negligence." *See* WIS JI—CIVIL 1055. As to the operation of a motor vehicle following another, the jury was instructed that a driver "should not follow another vehicle more closely than is reasonable and prudent" considering speed and location of both vehicles, the amount of traffic, visibility and the condition of the highway. *See* WIS JI—CIVIL 1112.

¶11 Finally, with respect to management and control, the jury was instructed:

> A driver must use ordinary care to keep his or her vehicle under proper management and control so that when danger appears, the driver may stop the vehicle, reduce speed, change course, or take other proper means to avoid injury or damage.
>
> If a driver does not see or become aware of danger in time to take proper means to avoid the accident, the driver is not negligent as to management and control.

See WIS JI—CIVIL 1105. In considering negligence as to management and control in an emergency, the jury was instructed:

> [B]ear in mind that a driver may suddenly be confronted by an emergency, not brought about or contributed to by her or his own negligence. If that happens and the driver is compelled to act instantly to avoid collision, the driver is not negligent if he or she makes a choice of action or

> inaction that an ordinarily prudent person might make if placed in the same position.

See WIS JI—CIVIL 1105A. Like the trial court, we conclude the record contains evidence which, if believed by the jury, would allow it to reach the conclusions it did.

¶12 The only witnesses to testify as to the events surrounding the collision were the Oppors and Siegle. Scott Oppor testified that when he first approached the area of the bridge "there was nothing out of the ordinary." He explained: "I was following a vehicle … in the left lane, and traffic was moving just like it always does…. As we got past the on-ramp, the truck in front [of] me stopped, and I stopped, and we had impact from the rear." Scott described how he came to a complete stop before he was hit: "[I]t was sort of a panic stop, but it wasn't a screeching stop. I had enough time. I saw the lights, hit the brakes, and came to a stop…. [I]t was unexpected because I was on the highway, but it wasn't something that was a[n] emergency braking." When Scott stopped, he was "[a]t least several car lengths behind" the vehicle in front of him. He testified that he looked in the rearview mirror and saw Siegle's semi approaching at "highway speed." He stated that "this all happens at a blink of an instant eye."[5]

¶13 With the exception of his speed at impact, Siegle's testimony did not differ significantly from Scott Oppor's. Siegle testified that when he first saw the Oppors' vehicle, it was "300 feet or more" in front of him, he was driving

[5] While the Oppors contend that this testimony referred only to Siegle's approach in the rearview mirror, the testimony was that "this *all* happens at a blink of an instant eye." (Emphasis added.) From this, a jury could infer that he was referring to the entire incident. *See* ***Richards v. Mendivil***, 200 Wis. 2d 665, 671, 548 N.W.2d 85 (Ct. App. 1996) (in considering a motion to change the jury's answers, the trial court must view the evidence in the light most favorable to the verdict).

approximately fifty to fifty-five miles per hour, and there were no vehicles in between. Siegle testified as to his observations just before the accident:

> We were slowing down, and there [were] cars on the right-hand side … traffic, one car right after another, you know, there was no room to move over or get out of the way or anything like that; and of course, we were all going slower than the 60 miles an hour, the posted speed limit, because of the traffic…. And as I came up to the car … the distance got smaller and we were slowing down and all of a sudden they just stopped, they just—I seen the brake light of a pickup truck ahead of them because he was way higher than them … first, but—so I started jamming on my brakes and we came in together.

Siegle testified that he was "extremely surprised" by the situation but was "already hitting [his] brakes trying to stop." He estimated that he was going "[p]robably like 15, 20 miles an hour" when he struck the back of the Oppors' vehicle.

¶14 In addressing the Oppors' postverdict motion, the trial court determined that there was credible evidence from which the jury could have inferred that Siegle was not negligent in the operation of his vehicle; rather, it was "one of those situations where it happened so quick no one could have reacted in time." While the Oppors contend that "the evidence [was] sufficient to warrant a finding that Siegle was negligent as a matter of law," the jury failed to make such a finding and Wisconsin law does not require it.

¶15 The mere fact that a vehicle collides with another that has just come to a stop is not probative of negligence as a matter of law; rather, it presents an issue of fact for the jury to determine.[6] ***Millonig v. Bakken***, 112 Wis. 2d 445, 457,

[6] We note that in ***Millonig v. Bakken***, 112 Wis. 2d 445, 457, 334 N.W.2d 80 (1983), the supreme court clarified, "We do not conclude in this case, however, that *res ipsa loquitor* is never applicable to a rear-end collision on the highway; but, in the instant case, the inference of negligence is not so clear that a reasonable person could not fail to accept that inference."

334 N.W.2d 80 (1983). In ***Millonig***, our supreme court considered whether a verdict should have been directed finding Bakken, the following driver in a rear-end collision, negligent as a matter of law. ***Id.*** at 451. As in this case, there was no contention that Millonig, the driver of the struck vehicle, was negligent. ***Id.*** at 449. Millonig's counsel asserted that because there was no issue before the jury as to Millonig's negligence, the verdict should be directed, finding that "only Bakken was negligent and that his negligence was ipso facto 100 percent the cause of the collision." ***Id.*** The trial judge withheld ruling on Millonig's motion and the jury found that Bakken was not negligent. ***Id.*** As in this case, Millonig appealed, arguing that "reasonable minds could come to but one conclusion, and that is that Bakken was causally negligent." ***Id.*** at 451-52. Significantly, in rejecting Millonig's argument, the supreme court observed that "the common law does not impose upon anyone an absolute duty to avoid an accident. The common law does not contemplate that all accidents or mishaps must arise as a consequence of fault." ***Id.*** at 452.

¶16 Here, Siegle's testimony indicated that he was indeed maintaining a lookout prior to the accident and he was aware of the conditions ahead of him just prior to the accident. Both Siegle's and Scott Oppor's testimony characterized the the Oppors' braking as sudden, even given the traffic congestion. Scott described the braking as "sort of a panic stop," and Siegle, who was aware of the Oppors and the pickup truck ahead of them, testified that he was "extremely surprised" by the Oppors' braking—"all of a sudden they just stopped." The Oppors stopped "[a]t least several car lengths behind" the vehicle in front of them. We agree with the trial court that from this testimony the jury could have reasonably concluded that

Siegle was not negligent or, as the trial court put it, the incident was a "pure and simple accident" without fault.[7]

¶17 Based on the jury's finding that Siegle was not negligent and our conclusion that there is credible evidence in the record to support the jury's verdict, we uphold the trial court's denial of the Oppors' postverdict motion to change the jury's special verdict answer as to negligence or, in the alternative, order a new trial on liability.

New Trial under WIS. STAT. § 805.15

¶18 We next turn to whether the Oppors are entitled to a new trial because the jury's verdict was contrary to the weight of the evidence. WISCONSIN STAT. § 805.15, governing new trials, provides in relevant part:

> A party may move to set aside a verdict and for a new trial because of errors in the trial, or because the verdict is contrary to law or to the weight of evidence, or because of excessive or inadequate damages, or because of newly-discovered evidence, or in the interest of justice.

A new trial may be granted in the interest of justice when the jury findings are contrary to the great weight and clear preponderance of the evidence, even though the findings are supported by credible evidence. ***Krolikowski v. Chicago & Nw. Transp. Co., Inc.***, 89 Wis. 2d 573, 580, 278 N.W.2d 865 (1979). This court owes great deference to a court's decision granting a new trial because the trial court is

[7] Insofar as the Oppors suggest that the trial court must have erroneously applied the Management and Control—Emergency rule in upholding the jury's no-negligence verdict, we note that it would not have been necessary, given the evidence, to have found an emergency in order to conclude that there was no negligence under the other standards of care. *See, e.g.*, WIS JI—CIVIL 1105 (the Management and Control instruction provides in pertinent part: "If a driver does not see or become aware of danger in time to take proper means to avoid the accident, the driver is not negligent as to management and control.").

in the best position to observe and evaluate the evidence. ***Id.*** at 581. Thus, a decision to grant a new trial in the interest of justice will not be disturbed unless it is clear that the trial court erroneously exercised its discretion. ***Id.*** at 580.

¶19 In denying the Oppors' motion, the trial court reiterated its finding that there was evidence to support the jury's verdict and that verdict was not contrary to the "great weight and clear preponderance" of the evidence.[8] The court also considered the interests of justice. Having correctly stated the law after reciting relevant portions of the trial testimony, we reject the Oppors' contention that the trial court applied an incorrect legal standard in addressing the Oppors' WIS. STAT. § 805.15 postverdict motion.

¶20 In reviewing the relevant trial testimony, it cannot be said that the trial court's ruling regarding the evidence was clearly erroneous. There was testimony from both the Oppors and Siegle as to the circumtances surrounding the collision. The jury's determination that Siegle was not negligent was based on that testimony and based upon its determination as to the degree of care a reasonable person would have exercised in that situation given the requirements of lookout, operation of an automobile following another, and management and

[8] In rendering its decision, the court noted that the twelve-person jury was unanimous in its finding that Siegle was not negligent and that, in addition, the two jurors who were excused from the jury "said they would have done the exact same thing." The Oppors take issue with the court's improper focus "on whether it would be just to undo what the 12 jurors found, instead of focusing on the interest of justice." However, the trial court's decision demonstrates that this was just one consideration in reaching its decision that the jury's verdict was not contrary to the great weight and preponderance of the evidence.

control.[9] That is precisely the jury's function. Like the trial court, we are unable to say that the jury's decision went against the great weight and clear preponderance of the evidence.[10] Because the trial court's decision was not clearly erroneous, we will not disturb it. *See* ***Krolikowski***, 89 Wis. 2d at 580.

Discretionary Reversal

¶21 The Oppors request that this court independently review the record and grant a discretionary reversal under WIS. STAT. § 752.35. Section 752.35 permits an appellate court to reverse a judgment "to accomplish the ends of justice" if "it is probable that justice has for any reason miscarried." The Oppors request a new trial based on a miscarriage of justice. In order to grant a new trial on that ground, we must first find a substantial probability of a different result on retrial. ***Vollmer v. Luety***, 156 Wis. 2d 1, 16, 456 N.W.2d 797 (1990).

¶22 The Oppors contend that it is apparent that the jury misunderstood the interrelationship of the jury instructions because "[u]nder the facts, if Mr. Siegle truly couldn't stop in time to avoid striking the Oppors, he couldn't stop only because of his own failure to maintain a proper lookout or because he failed to maintain a 'reasonable and prudent' distance between automobiles." The

[9] While the Oppors seize on certain aspects of the testimony that might support a finding of negligence, they ignore that a reasonable person could draw a contrary inference. For example, the Oppors cite to Siegle's statement that despite the traffic congestion he was "extremely surprised" when the car came to an abrupt stop in front of him. However, the Oppors ignore Scott's testimony that he also came to "sort of a panic stop" when traffic stopped.

[10] Again, the Oppors cite to the trial court's statement that the jury "got it wrong, plain and simple. I think there's negligence." Based on this the Oppors contend, "As it was clear to the judge that there was negligence on the part of Mr. Siegle, he had the duty to grant the motion to change the verdict answer or, in the alternative, grant a new trial." However, this is not the standard by which the evidence is judged.

Oppors argue that "a new jury would be likely to come to a different conclusion." We disagree. Based on our review of the record, we are unable to find a substantial probability of a different result on retrial. Rather, we agree with the trial court that, given the testimony and instructions, a jury reasonably could have found that Siegle was not negligent in the operation of his vehicle. We therefore decline the Oppors' request for discretionary reversal.

CONCLUSION

¶23 We conclude that the trial court properly exercised its discretion in denying the Oppors' postverdict motions with respect to both their request to modify the jury's verdict answer under WIS. STAT. § 805.14 and their request for a new trial under WIS. STAT. § 805.15. We therefore affirm the trial court's postverdict order.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.