COURT OF APPEALS
DECISION
DATED AND FILED

April 2, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1808 **Cir. Ct. No. 99-CV-183**

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

DANIEL SHOOP,

PLAINTIFF-APPELLANT,

V.

SAMUEL CARRASCO, KNOLL STEEL INC., WESTERN STATES INSURANCE AND BLUE CROSS & BLUE SHIELD, A/K/A HEALTHCARE SERVICE CORP.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

Before Nettesheim, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Daniel Shoop appeals pro se from a judgment awarding him damages as a result of an automobile accident. We affirm.

¶2 Shoop was a passenger in a vehicle driven by Thomas Williamson. Williamson's vehicle collided with a truck driven by Samuel Carrasco when Carrasco failed to stop at the intersection. Williamson was intoxicated at the time of the accident; Shoop suffered serious injuries when he was ejected from Williamson's vehicle. Shoop sued Williamson, Carrasco, Carrasco's employer, Knoll Steel, Inc., and Knoll's insurer, Western States Insurance.[1]

¶3 The jury gave the following verdict: Carrasco 70% causally negligent, Williamson 30% causally negligent, and Shoop 10% causally negligent for riding with an intoxicated driver and 75% negligent for riding without a seat belt.[2] The jury's $450,000 damages award was reduced by Williamson's negligence, Shoop's contributory and seat belt-related negligence, and by the costs incurred by the Carrasco defendants because Shoop had rejected a settlement offer from them in excess of the damages awarded. WIS. STAT. § 807.01. Shoop received a judgment in the amount of $231,894.

¶4 In a postverdict motion, Shoop challenged the sufficiency of the evidence of his and Williamson's negligence.[3] At the postverdict motion hearing, Shoop argued that there was no direct evidence that he knew Williamson had been

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[1] Shoop settled with Williamson before trial.

[2] The circuit court reduced Shoop's seat belt-related negligence to the statutory maximum of 15%. WIS. STAT. § 347.48(g) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[3] Although Shoop's postverdict motion also argued that the court erred in admitting intoxication and blood test evidence in the absence of a proper foundation by the technician who drew the blood and made other challenges to the reliability of the blood test evidence, Shoop abandoned these arguments at the postverdict motion hearing. Therefore, they are waived and we do not address them on appeal. *See* ***First Bank v. H.K.A. Enters., Inc.***, 183 Wis. 2d 418, 426 n.10, 515 N.W.2d 343 (Ct. App. 1994).

drinking, and therefore he could not have been aware of the hazard of riding with Williamson. The court found that the evidence was sufficient to support the jury's verdict. In particular, the court noted that a sheriff's deputy testified at trial that Shoop told him at the accident scene that Williamson had been drinking, and the blood alcohol test results on Williamson exceeded the legal limit for blood alcohol levels. The court found that the jury could have reasonably inferred that Williamson was intoxicated and that his intoxication would have been apparent to Shoop.

¶5 Shoop proceeds pro se on appeal. His appellant's brief is very difficult to decipher. As best we can tell, Shoop argues that there was insufficient evidence of Williamson's intoxication.

¶6 A jury verdict will be sustained if there is any credible evidence to support the verdict. ***Nieuwendorp v. Am. Family Ins. Co.***, 191 Wis. 2d 462, 472, 529 N.W.2d 594 (1995). In order to reverse there must be "such a complete failure of proof that the verdict must have been based on speculation." ***Id.*** (citation omitted). We consider the evidence in the light most favorable to the verdict, and when more than one inference may be drawn from the evidence, we are bound to accept the inference drawn by the jury. ***Id.*** The credibility of the witnesses and the weight to be given to the evidence are for the jury to determine. ***Meurer v. ITT Gen. Controls***, 90 Wis. 2d 438, 450, 280 N.W.2d 156 (1979).

¶7 There was sufficient evidence of Williamson's intoxication. Williamson admitted in his videotaped deposition that he was intoxicated, and a defense toxicologist testified that Williamson had a prohibited blood alcohol concentration which would have impaired Williamson's ability to drive. There was also evidence that an unimpaired driver paying proper attention to the intersection

would have been able to stop his or her vehicle before entering the intersection and colliding with the truck. This evidence supports the jury's determination that Williamson was intoxicated and that his intoxication was causal.

¶8 Shoop argues that the beer cans in the truck were not open and disputes that he and Williamson were drinking in the vehicle. However, this does not negate either Williamson's testimony that he was intoxicated or the other evidence of his intoxication.

¶9 Shoop argues that he has new evidence: (1) his chiropractor's records were altered to delete evidence that he had been in the chiropractor's office on the morning of the accident; (2) Kenosha county redesigned the intersection; and (3) a United States Department of Transportation engineer calculated Williamson's vehicle's stopping distance at less than half that calculated by the defense accident reconstruction expert.

¶10 Shoop's newly discovered evidence arguments are waived because he did not raise them in his postverdict motion in the circuit court. Shoop's postverdict motions focused on the sufficiency of the evidence. Therefore, this issue is waived on appeal. ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983) (we do not consider issues raised for the first time on appeal).

¶11 Shoop raises numerous issues which rely upon evidence not presented at trial and which were not the subject of a postverdict motion. Among these issues

is the condition of the seat belts in Williamson's vehicle.[4] We do not address these issues because our review is confined to the record as it existed before the circuit court. ***State v. Aderhold***, 91 Wis. 2d 306, 314-15, 284 N.W.2d 108 (Ct. App. 1979) (matters which were not presented to the circuit court and made part of the record before that court should not be presented to this court).

¶12 Shoop challenges the admissibility of evidence of Williamson's blood alcohol concentration and offers a March 14, 2001 affidavit of Dr. Lewis Somberg contesting the reliability of the report that Williamson's blood contained .118% ethanol. The affidavit was offered in support of Shoop's motion in limine to bar evidence of Williamson's blood alcohol concentration. The blood alcohol concentration evidence at trial was derived from blood tests performed at the hospital to which Williamson was taken after the accident.

¶13 In a pretrial ruling, the circuit court admitted medical records on the parties' stipulation after Shoop initially argued that evidence of Williamson's blood alcohol concentration should not be admitted. Shoop stipulated to the admissibility of the medical records, and he cannot now argue that the information should have been excluded. ***Siegel v. Leer, Inc.***, 156 Wis. 2d 621, 628, 457 N.W.2d 533 (Ct. App. 1990) (a party may not maintain a position on appeal which is inconsistent with a position taken in the circuit court). The credibility of the evidence and its use

[4] Shoop was found pinned under the wheels of Williamson's vehicle. Shoop told one of his doctors that he was not wearing a seat belt. The defense reconstruction expert opined that Shoop was not wearing a seat belt and was ejected out of the driver's side door as a result of the impact. The passenger's seat belt was in the unused position, and the passenger's side door was intact and closed. The jury could infer that Shoop was not wearing his seat belt. Shoop's seat belt failure argument was not raised during trial, and it will not be considered on appeal.

during the testimony of a defense toxicologist, Patrick Harding, were subject to testing on cross-examination.

¶14 Shoop complains about the performance of his trial attorney. This is not a proper issue on appeal. A litigant does not have the right to the effective assistance of counsel in a civil case. ***Vill. of Big Bend v. Anderson***, 103 Wis. 2d 403, 405, 308 N.W.2d 887 (Ct. App. 1981).

¶15 Shoop complains that the jury did not award him damages for loss of future earning capacity. However, he did not file a postverdict motion challenging this aspect of the verdict. *See* WIS. STAT. § 805.14(5)(c) (a party may move the court to change an answer in the jury's verdict due to insufficient evidence for the answer).[5] Therefore, this issue is waived. ***Segall***, 114 Wis. 2d at 489.

¶16 To the extent Shoop complains that the evidence was insufficient to permit the jury to deny him an award for loss of future earning capacity, we conclude that there is credible evidence supporting the jury's determination. Even though Shoop faced restrictions as a result of his injuries, his vocational consultant testified that Shoop was employable in his wage range, although he could no longer work as a tree trimmer.

¶17 Shoop challenges the exclusion of evidence that he faced neck surgery. The parties stipulated before trial that Shoop would not offer evidence of forthcoming spinal surgery after the court ruled that Shoop had not presented medical evidence that such surgery was in the offing. Having stipulated to the

[5] It is possible that Shoop is also complaining about the jury's award of $10,000 for past lost earnings. However, Shoop did not file a postverdict motion challenging this determination, and this appellate issue is also waived.

exclusion of this evidence, Shoop cannot change course and argue on appeal that the evidence should have been admitted. ***Siegel***, 156 Wis. 2d at 628.[6]

¶18 The respondents seek reasonable attorney's fees and costs incurred in responding to matters which should have been raised first in the circuit court. We decline to award such fees and costs. However, having prevailed on appeal, the respondents may seek their costs under WIS. STAT. RULE 809.25(1).

By the Court.—Judgment affirmed.

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

[6] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").