COURT OF APPEALS
DECISION
DATED AND FILED

July 6, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP738 **Cir. Ct. No. 2007CV623**

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

DEBORAH K. MAYER,

PLAINTIFF-RESPONDENT,

GENERAL CASUALTY,

INVOLUNTARY-PLAINTIFF,

EAU CLAIRE PRESS COMPANY,

INVOLUNTARY-PLAINTIFF-RESPONDENT,

V.

DAVID M. BOWE,

DEFENDANT-APPELLANT,

WISCONSIN AMERICAN MUTUAL INSURANCE COMPANY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Chippewa County: RODERICK A. CAMERON, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. David Bowe appeals a judgment, entered on a jury verdict, awarding Deborah Mayer compensatory and punitive damages arising out of a drunken driving accident. Bowe contends the circuit court erred by granting Mayer summary judgment on his contributory negligence defense and by refusing to bifurcate the trial on Mayer's compensatory and punitive damages claims. He also asserts there was insufficient evidence to support a punitive damages award, and raises a host of issues regarding the conduct of the trial. We conclude that only one of Bowe's arguments merits reversal: there was no expert testimony establishing the cost of future nursing home care. We therefore affirm all parts of the judgment except the award of future medical expenses. We reverse that award and remand to the circuit court to make a reasonable adjustment to the award based on the evidence properly received and before the jury on the issue of future medical expenses.

BACKGROUND

¶2 In December 2005, Bowe, after drinking for four or five hours, drove his vehicle into a ditch. As he attempted to steer the vehicle out of the ditch, he entered oncoming traffic and struck Mayer's car. Mayer sustained severe injuries and was transported to a hospital by helicopter. Bowe had a blood alcohol content of .16 and admitted being intoxicated at the time of the accident. Bowe was convicted of second-offense drunk driving and jailed for eighteen months

with work release privileges. While on work release, Bowe had two drinks and then drove, in violation of his release conditions.

¶3 Mayer filed suit, seeking compensatory and punitive damages. Bowe filed a motion to bifurcate the compensatory and punitive damages claims as two separate, sequential phases of trial before the same jury. The circuit court denied the motion. The parties stipulated to a summary judgment for Mayer on the issues of negligence and causation. The court later granted Mayer summary judgment on Bowe's contributory negligence defense.

¶4 Only compensatory and punitive damages were left for trial. The court admitted evidence of Bowe's conviction and his conduct while on work release. The jury rendered a verdict for Mayer consisting of: $750,000 for future medical expenses; $50,000 for past loss of earnings; $200,000 for future loss of earnings; $1,250,000 for past pain, suffering and disability; $500,000 for future pain, suffering and disability; and $17,588 for out-of-pocket expenses. The jury also determined that Bowe acted in intentional disregard of Mayer's rights and awarded $375,000 in punitive damages.

DISCUSSION

¶5 Bowe first claims that the circuit court improperly granted Mayer summary judgment on his contributory negligence defense. We review a grant of summary judgment de novo. ***Kustelski v. Taylor***, 2003 WI App 194, ¶12, 266 Wis. 2d 940, 669 N.W.2d 780. Summary judgment is appropriate if there are no genuine issues of material fact and if the moving party is entitled to judgment as a

matter of law. WIS. STAT. § 802.08(2).[1] Application of contributory negligence principles to undisputed facts is a matter of law. *See* ***Jankee v. Clark Cnty.***, 2000 WI 64, ¶9, 235 Wis. 2d 700, 612 N.W.2d 297.

¶6 The doctrine of contributory negligence acknowledges that the general duty of ordinary care imposed by Wisconsin law obligates every person to exercise ordinary care for his or her own safety. ***Id.***, ¶53. A person fails to exercise ordinary care for his or her own safety when, without intending to do any harm, he or she does something or fails to do something under circumstances in which a reasonable person would foresee that the action or inaction would subject a person or property to an unreasonable risk of injury or damage. ***Id.*** Thus, when a reasonable person knows or should know that a course of conduct poses substantial, inherent risks to him or her, yet persists in the conduct voluntarily and suffers injury as a result, the person is negligent and will not be permitted to recover from someone who is less negligent. ***Id.***

¶7 Here, we agree with the circuit court that the undisputed evidence demonstrates Mayer was not contributorily negligent. Mayer testified at her deposition that she noticed some lights to the left, not on the road, and wondered what they could be. Mayer did not see Bowe's car enter the ditch. "I couldn't tell what the lights were, so just to be cautious I took my foot off the accelerator and I just kind of proceeded cautiously …." Mayer's car had slowed to approximately five miles per hour under the speed limit when Bowe's car came out of the ditch. Mayer's actions were entirely reasonable under the circumstances. No reasonable

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

person in those circumstances would foresee that additional action was necessary to prevent injury.

¶8 Bowe contends there is a genuine issue of material fact as to whether Mayer acted in accordance with a "duty of lookout." The duty of lookout has two aspects: first, a duty of observation, and second, a duty to exercise reasonable judgment in calculating the position and movement of other vehicles. ***Gleason v. Gillihan***, 32 Wis. 2d 50, 55, 145 N.W.2d 90 (1966); ***Liles v. Employers Mut. Ins. of Wausau***, 126 Wis. 2d 492, 501, 377 N.W.2d 214 (Ct. App. 1985). These duties are merely a subset of the duty to exercise ordinary care for one's own safety. We have already concluded that Mayer acted reasonably as a matter of law.

¶9 Bowe next asserts the circuit court erred in denying his motion to bifurcate Mayer's compensatory and punitive damages claims. Pursuant to WIS. STAT. § 805.05(2), a circuit court may, in its discretion, order a separate trial of any claim "in furtherance of convenience or to avoid prejudice." A discretionary determination will be affirmed if the court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Gaugert v. Duve***, 2001 WI 83, ¶44, 244 Wis. 2d 691, 628 N.W.2d 861.

¶10 The circuit court order denying Bowe's bifurcation motion cited judicial efficiency concerns and adopted by reference the arguments contained in Mayer's opposition brief. Mayer's brief, in turn, argued against two trials because of the anticipated emotional toll on Mayer, the minimal likelihood of prejudice to Bowe, the potential duplication of testimony, and the unnecessary time and expense that would be incurred. These are proper considerations under the

bifurcation statute.[2] Accordingly, the circuit court properly exercised its discretion.

¶11 Bowe further argues that it was error for the circuit court to submit the punitive damages claim to the jury in the first instance. Punitive damages are available if there is evidence that the defendant acted in intentional disregard of the plaintiff's rights. WIS. STAT. § 895.043(3). The plaintiff must show by clear and convincing evidence that the defendant's course of conduct was deliberate, actually disregarded the rights of the plaintiff, and was sufficiently aggravated to warrant punishment by punitive damages. ***Strenke v. Hogner***, 2005 WI 25, ¶¶38, 41, 279 Wis. 2d 52, 694 N.W.2d 296.

¶12 There was sufficient evidence that Bowe was aware that his conduct was substantially certain to cause a disregard of Mayer's rights. Bowe was previously convicted of drunk driving, and had participated in classes that taught the effect of alcohol on driving ability, reaction time, and vision. The classes also discussed how drunken driving could impact others on the road. Despite his earlier conviction and education, Bowe drank for four or five hours before driving home. Even though Bowe used that road each day, he testified he was "pretty messed up" and could not tell north from south. Bowe stated he understood Mayer had the right to safely drive her car on the road, and admitted that he

[2] In his reply brief, Bowe contends that the court erred by considering whether Mayer would have to testify twice. He cites ***Badger Bearing, Inc. v. Drives and Bearings, Inc.***, 111 Wis. 2d 659, 331 N.W.2d 847 (Ct. App. 1983), in support of his argument. However, ***Badger Bearings*** did not consider whether potential emotional distress caused by having a witness repeatedly testify about a painful accident was a consideration bearing on "convenience." Instead, ***Badger Bearings*** considered whether compensatory and punitive damages are separable and, if so, whether the trial court erred in offering a new trial limited to punitive damages. ***Id.*** at 672-74. The distress caused by repeated testimony may be one factor relevant to the bifurcation determination under WIS. STAT. § 805.05(2).

disregarded her right to do so. The circuit court did not err in submitting the punitive damages question to the jury.

¶13 Bowe further argues that the trial court failed to properly instruct the jury regarding the burden of proof applicable to punitive damages. Bowe concedes that the jury was properly instructed regarding the threshold inquiry—whether Bowe acted in intentional disregard of Mayer's rights. Instead, his argument appears to be that the court did not give proper instruction on the question of how much Mayer should be awarded for that intentional disregard.

¶14 Punitive damages are determined differently than compensatory damages. A plaintiff must prove compensatory damages to a reasonable certainty, by the greater weight of credible evidence. *See* ***Ellsworth v. Schelbrock***, 2000 WI 63, ¶17, 235 Wis. 2d 678, 611 N.W.2d 764. However, the fact finder must craft a punitive damages award sufficient to "punish the wrongdoer and to deter the wrongdoer and others from engaging in similar conduct." ***Apex Elecs. Corp. v. Gee***, 217 Wis. 2d 378, 389, 577 N.W.2d 23 (1998). Accordingly, once the plaintiff has shown by clear and convincing evidence that the defendant acted with intentional disregard of his or her rights, the plaintiff need not prove anything other than that he or she is entitled to compensatory damages. We therefore reject Bowe's argument that a separate instruction was necessary regarding the burden of proof applicable to the amount of punitive damages.[3]

[3] Bowe does not argue that the jury was improperly instructed regarding the factors bearing on the amount of punitive damages. *See* ***Boelter v. Tschantz***, 2010 WI App 18, ¶23, 323 Wis. 2d 208, 779 N.W.2d 467.

¶15 Next, Bowe contends that the trial court erred in admitting evidence of Bowe's conviction for second-offense drunken driving. A trial court's decision to admit evidence is a matter within its discretion. ***State v. Jensen***, 2007 WI 26, ¶12, 299 Wis. 2d 267, 727 N.W.2d 518. The trial court reasoned that the effect of admitting Bowe's conviction was limited because Bowe had stipulated to liability. *See* ***Gedlen v. Safran***, 102 Wis. 2d 79, 96, 306 N.W.2d 27 (1981) (criminal conviction may be used to establish the fact of conviction and legal consequences flowing therefrom). The court further determined that admitting the evidence would prevent confusion and speculation among the jury. We conclude the court did not erroneously exercise its discretion in admitting evidence of Bowe's criminal conviction.

¶16 Bowe asserts that admitting evidence of his conviction was tantamount to admitting evidence of his no contest plea. The latter is generally not admissible in a civil action. *See* ***Lee v. Wisconsin State Bd. of Dental Exam'rs***, 29 Wis. 2d 330, 334, 139 N.W.2d 61 (1966). However, it is well-established that a no contest plea is distinguishable from the judgment of conviction that follows. ***Id.***; ***Gedlen***, 102 Wis. 2d at 94-95.

¶17 Bowe next asserts the trial court erred in admitting evidence of his drinking and driving while on work release. Even if the circuit court should have excluded that evidence, erroneous evidentiary decisions are subject to evaluation for harmless error. *See* WIS. STAT. § 805.18(2). The testimony spans approximately a page of a several-hundred page trial transcript. Bowe stressed during the testimony that he had only two mixed drinks, that his blood alcohol content after driving was only .01, and that he "didn't get drunk." Viewing the evidence in the context of the entire trial, its allegedly erroneous admission did not affect Bowe's substantial rights and was harmless.

¶18 Bowe next claims that expert testimony was required on one element of Mayer's damages, future nursing home care. To sustain an award of future health care expenses, two criteria must be met: (1) there must be expert testimony of permanent injuries requiring future medical treatment and the incurring of future medical expenses; and (2) an expert must establish the cost of such medical expenses. ***Weber v. White***, 2004 WI 63, ¶20, 272 Wis. 2d 121, 681 N.W.2d 137**.**

¶19 Here, Mayer's doctor testified that, because of the accident, she would need some type of nursing care five to ten years earlier than she otherwise would have. There is no dispute that this testimony satisfied the first criterion.

¶20 However, there was no expert evidence establishing the cost of the anticipated nursing home care. Mayer attempted to establish the cost of future nursing home care using two public records: a report issued by the state that discussed the cost of private-pay nursing homes in Eau Claire, and a report from Eau Claire County that discussed the cost of assisted living. The trial court concluded that public records were sufficient because nursing home care was not medical treatment. The court was incorrect. "Nursing service is a future medical expense, and such an expense cannot be the subject of speculation. [A]n award for future medical expense cannot be upheld if not supported by expert medical testimony." ***Tills v. Elmbrook Mem'l Hosp.***, 48 Wis. 2d 665, 676, 180 N.W.2d 699 (1970). Because there was no expert testimony regarding the cost of Mayer's anticipated future nursing care, we reverse the award on that element of damages.

¶21 It appears, though, that the jury was not required to separately determine the cost of each element of future medical care; the completed verdict form shows only that the jury awarded a total of $750,000 for *all* of Mayer's future medical expenses. Thus, it is not clear what portion of the future medical

expenses award represents compensation for future nursing home care. We think the best practice in this circumstance is to remand for the trial court to make a reasonable adjustment to the award based on the evidence properly received and before the jury on the issue of future medical expenses.

¶22 Bowe next argues the trial court failed to properly instruct the jury regarding Mayer's out-of-pocket expenses. We disagree. The jury was instructed on compensatory damages generally. Those instructions discussed the burden of proof, the meaning of "credible evidence," and appropriate considerations when determining the measure of damages. Although the trial court did not provide a separate instruction on out-of-pocket expenses, it properly concluded that an award of compensatory damages for a particular out-of-pocket expense was a matter of common sense that did not require additional instruction. There was ample testimony at trial regarding miscellaneous expenses Mayer incurred as a result of the accident; for example, Mayer needed new eyeglasses and shoes. Contrary to Bowe's argument, the jury did not require specific instruction on which costs were appropriate.

¶23 Lastly, Bowe contends the court erred in refusing to grant a mistrial for Mayer's alleged violation of the "golden rule." A "golden rule" argument asks the individual jurors to put themselves in the shoes of the plaintiff and decide what they would want to recover for a particular injury. ***Dostal v. Millers Nat'l Ins. Co.***, 137 Wis. 2d 242, 260, 404 N.W.2d 90 (Ct. App. 1987). Such an argument improperly shifts the jurors' attention from the parties and the evidence before them to matters relating to their own feelings, emotions and biases. ***Id.***

¶24 Bowe's argument is based on Mayer's statement, "None of you would have done this, I bet." In context, Mayer was discussing what amount of

punitive damages would deter similar conduct in the future. Mayer's statement did not place the jury in the shoes of anyone entitled to compensation; it asked the jury to focus on the defendant's conduct in relation to the juror's own notions of right and wrong. This argument did not violate the golden rule.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded for further proceedings. No costs on appeal.

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