COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 2004

Cornelia G. Clark
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 04-0410

Cir. Ct. Nos. 01CV000376
02CV000316

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

MUTUAL SERVICE INSURANCE COMPANIES,

PLAINTIFF,

V.

BRIAN BETTERLEY AND GREAT WEST CASUALTY COMPANY,

DEFENDANTS.

BRIAN BETTERLEY AND PATTY BETTERLEY,

PLAINTIFFS-APPELLANTS,

V.

KELLI COLEMAN AND MSI INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Brian and Patty Betterley appeal a final judgment entered on a jury verdict in favor of Kelli Coleman. The sole issue raised on appeal is whether a new trial should be granted in this personal injury case because the jury's answers to the special verdict questions on negligence cause and damages rendered the verdict inconsistent. Because we conclude the jury's answers, though leaving its precise theory of the case uncertain, are not logically repugnant, the verdict is consistent and a new trial is not required. The judgment is affirmed.

Background

¶2 At about 11:00 p.m. on September 12, 2000, a car driven by Coleman and a fully loaded semi-trailer truck driven by Betterley collided on U.S. Highway 12 in St. Croix County, Wisconsin. Betterley was behind Coleman and both were heading east toward the intersection of Highway 12 and 170th Street. At the time of the accident, Betterley was a professional truck driver; Coleman was a junior in high school who had been driving for about four months. Three passengers were riding in the back of Coleman's car; a fourth passenger was in the front seat. She was driving one of those friends to his car, parked off 170th Street, when the collision occurred.

¶3 Beyond these few uncontested facts, almost every detail of what happened before, during and after the accident was the subject of conflicting testimony. At trial, Coleman and her passengers testified that the semi had been

tailgating them for miles and that its headlights were shining into the car, nearly blinding the passengers and driver. Betterley testified he was following at a proper distance. Coleman and her passengers testified that she slowed as she prepared to turn left onto 170th Street; Coleman thought she turned on her left turn signal but was not certain. Betterley testified that he saw Coleman signal and slow down and then decided to pass Coleman on the right. According to Coleman and her passengers, the semi hit them without warning. According to Betterley, Coleman's car suddenly turned right into his truck.[1] Coleman's car was damaged on the passenger side, although none of the passengers was injured. Betterley's truck suffered some damage on its left side near the driver's door.

¶4 Accident reconstruction experts offered evidence that the collision happened near or in the intersection and that Betterley must have attempted to pass either partly or wholly on the shoulder of the highway.[2] Tire tracks, skid marks, and other physical evidence did not clearly corroborate either Coleman's or Betterley's account of the accident.

¶5 What happened after the collision is also contested. According to his wife, Betterley called her on his cell phone immediately after the accident. Betterley testified that he called home only after he got out of his truck to check for damage. Several of Coleman's friends said they knocked on the truck window to get Betterley's attention and he ignored them. The accident occurred near the home of a young man riding in Coleman's car. He testified that, immediately after

[1] The original accident report indicated that Coleman's car moved right, hitting Betterley's truck.

[2] As the evidence at trial made clear, there was no "other lane" to pass in on the right although the highway widened somewhat near the intersection area.

the accident, he ran to his house, woke his father and brought him to the accident scene.

¶6 Betterley claimed in depositions and at trial that when he first got out of his truck he fell into the door hitting his head and neck because the collision had damaged the step on the driver's side, which he ordinarily used to descend. Coleman, her passengers and the parent present at the scene all testified either that Betterley did not fall when he got out or that they did not see him fall. Betterley also claimed that he fell again, from the back of his truck, when he went to check his load.[3] Several of Coleman's passengers testified they saw some kind of fall or misstep when Betterley went to the back of the truck. No one involved in the accident received medical treatment at the scene and none went to the hospital that evening.

¶7 Betterley did not seek medical attention for several weeks after the accident until, he alleged, he began to lose feeling in his left hand when he drove. He also experienced tingling in his arms and hands. He had had similar symptoms in the past and returned to his chiropractor for treatment. The tingling grew worse, however, and he began to develop pains in his neck as well. Betterley had an MRI, was diagnosed him with carpel tunnel syndrome, and surgically treated for that condition in December 2000.

¶8 Betterley was scheduled to return to work in February 2002, but the neck pain and tingling continued. Betterley eventually had a second MRI and a two-level neck fusion. According to Betterley, that surgery left him limited in

[3] The second fall involved slipping and "land[ing] on my butt," but no damage to his neck or shoulder, according to Betterley's trial testimony.

various ways, including his ability to sit for long periods and to lift weights of over thirty pounds.[4] Betterley alleged diminished income, pain and suffering, and other damages as a result of his injuries.

¶9 In August 2001, Coleman's insurer, Mutual Service Insurance Companies, sued Betterley, alleging that his negligence caused the accident between Coleman and Betterley and that as a result of that accident Coleman suffered bodily injury and property damage. Betterley and his insurer counterclaimed, arguing Coleman's negligence was the cause of the accident and seeking to recover medical and other benefits already paid out to Betterley. After a four-day trial, the jury found that both Coleman and Betterley were negligent, but only Betterley's negligence was "a cause of Betterley's injuries." Betterley filed a motion after verdict for a new trial, arguing the jury's verdict was inconsistent. After a hearing, the trial court denied the motion and entered final judgment. Betterley now appeals.

Discussion

¶10 An inconsistent verdict is a term of art used to describe jury answers that are "logically repugnant to one another." *See* ***Kain v. Bluemound E. Indus. Park, Inc.,*** 2001 WI App 230, ¶40, 248 Wis. 2d 172, 635 N.W.2d 640; *see also* ***Fondell v. Lucky Stores, Inc.***, 85 Wis. 2d 220, 228, 270 N.W.2d 205 (1978). Inconsistency exists when answers cannot be reconciled or cannot be reconciled

[4] Betterley and his employer testified that problems with sitting create difficulties for a long-distance trucker whose earning capacity depends on the speed with which he can deliver a load, find a new load and do a return run. Both men also said that lifting restrictions could damage earning capacity because a trucker who cannot lift can only accept "no touch loads" that pay less.

without eliminating or altering an answer. ***Statz v. Pohl***, 266 Wis. 23, 29, 62 N.W.2d 556 (1954), sets out the typical situations in which inconsistent verdicts arise:

> (1) If the issue of causal negligence is for the jury and the party inquired about is exonerated but the jury in its comparison of negligence erroneously attributes to such party some degree of causal negligence, the verdict is inconsistent, and a new trial must be granted;
> (2) If it be determined that the party inquired about is free from causal negligence as a matter of law and the jury has exonerated him but has also attributed to him some degree of causal negligence, then the court should strike the answer to the question on comparison as surplusage and grant judgment accordingly; and
>
> (3) If the court can find as a matter of law that the party inquired about is guilty of causal negligence and the jury finds that he is not and in the question on comparative negligence attributes to him some degree of causal negligence, the court should change the answers to the questions which inquire as to his conduct from "No" to "Yes" and permit the jury's comparison to stand with judgment accordingly.

We will uphold a jury verdict on review for inconsistency "when the record is such that the jury could have made both of the findings that are claimed to be inconsistent." *See* ***Sharp ex rel. Gordon v. Case Corp.***, 227 Wis. 2d 1, 20, 595 N.W.2d 380 (1999). We also presume that the jury followed the law. ***Frayer v. Lovell***, 190 Wis. 2d 794, 812, 529 N.W.2d 236 (Ct. App. 1995).

¶11 Betterley claims the verdict is inconsistent in one of two ways. He argues first that when the jury found Coleman negligent, it also implicitly found her negligence the "instant and proximate cause of the immediately ensuing two-car accident," which meant, he continues, that her negligence must have been a

cause of Betterley's injuries.[5] Alternatively, Betterley argues that if the jurors believed Coleman's negligent conduct did not cause his injuries, the only consistent answer to the damages question was zero dollars. We disagree.

¶12 Under Wisconsin law negligence and causation are separate inquiries and a finding of cause will not flow automatically from a finding of negligence. *See* ***Fondell***, 85 Wis. 2d at 226. In light of that principle, Betterley's first asserted inconsistency dissolves. There is evidence that Coleman moved out of her lane before the collision. There is also evidence that Betterley tailgated Coleman's car and attempted to pass on the right in an intersection. Based on the record, the jury could have concluded that either the tailgating or the decision to pass on the shoulder or both caused the accident. The jury could thus have found that Coleman was driving negligently without also finding that her negligence caused the collision, which means it could, without inconsistency, have answered "no" to the question of whether Coleman's negligence caused Betterley's injuries. Given the evidence presented of Betterley's past medical conditions and testimony that a second fall occurred after the accident, the jury could even have accepted that Coleman's negligence was a partial cause of the collision, but determined, without inconsistency, that the collision did not cause Betterley's injuries.

¶13 Betterley argues that to be consistent the jury should have answered question six by placing zeros in the spaces designated for damages.[6] Putting

[5] Because the jurors all answered "yes" to question one—"[w]as Kelli Coleman negligent?," the special verdict form required them to answer question two—"[w]as such negligence a cause of Brian Betterley's injuries?" as well. All the jurors but one answered "no" to question two. Questions three and four replaced Coleman's name with Betterley's. The jury answered yes to question three, finding Betterley negligent; in answer to question four, they found his negligence the cause of his injuries.

money values in those spaces does not, however, render the verdict inconsistent. Question six tells the jury to determine what sum of money will compensate Betterley for his injuries and damages in specific areas. The jury was instructed to answer that question "regardless of how they answered any of the previous questions in the verdict." *See* WIS JI—CIVIL 1700. Finally, the trial court also instructed the jury to insert an amount that would compensate the person for the damages "from the accident."

¶14 Based on the question and the instructions, jurors could have treated question six as a species of hypothetical, to which it was required by law to respond. In that case, its answers to questions four and six would not be logically repugnant. Jurors could also have believed that the "accident" referred to in question six was not the collision but another event about which they heard testimony and answered the question as directed. Under those circumstances, the jurors' answers would again not be logically repugnant.

¶15 While the language of the special jury verdict form is arguably ambiguous at several points, Betterley did not object to any of the questions during jury instruction and verdict conferences. Indeed, as the record makes clear, the special verdict form that went to the jury was, in essence, the one that Betterley proposed. Failure to object at the jury instruction or verdict conference stage "constitutes a waiver of any error in the proposed instructions or verdict." *See* WIS. STAT. § 805.13(3) (2001-02); ***LaCombe v. Aurora Med. Group***, 2004 WI App 119, ¶5, 683 N.W.2d 532. As Betterley recognizes, he cannot now object to

[6] The jury filled in dollar amounts for Betterley's past medical and health care expenses, past loss of earnings, and his past pain, suffering and disability. It put zeroes in all the other spaces.

the form of the verdict. But neither can he transform answers to a set of potentially confusing questions into an inconsistent verdict when the jury followed the instructions given to them and evidence in the record supports the jurors' answers. *See* ***Gosse v. Navistar Int'l Transp. Corp.***, 2000 WI App 8, ¶21, 232 Wis. 2d 163, 605 N.W.2d 896.

By the Court.—Judgment affirmed.

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