COURT OF APPEALS
DECISION
DATED AND RELEASED

MAY 29, 1996

No. 95-2810

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

CAROL VAN CLEVE AND KEITH VAN CLEVE, HER HUSBAND,

Plaintiffs-Respondents,

v.

JEFFREY NEHRING AND UNITED STATES FIDELITY AND GUARANTY COMPANY,

Defendants-Appellants,

AMERICAN FAMILY INSURANCE GROUP,

Defendant.

APPEAL from a judgment of the circuit court for Forest County: ROBERT A. KENNEDY, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. This appeal arises from a traffic accident between Carol Van Cleve and Jeffrey Nehring. Nehring's liability was stipulated, and only the damages issue was tried to a jury. The jury returned a verdict

favorable to Carol Van Cleve and her husband, Keith Van Cleve. Nehring and his insurer, United States Fidelity and Guaranty Company, [collectively Nehring] appeal the judgment.

Nehring raises three issues on appeal: (1) whether the trial court erroneously refused to instruct the jury on the use of seat belts; (2) whether the trial court erroneously refused to give the absent witness instruction; and (3) whether Carol failed to meet her burden of proof with regard to future damages.

1. Seat Belt Instruction

A trial court has broad discretion in instructing a jury based on the facts and circumstances of a case. ***Fischer v. Ganju***, 168 Wis.2d 834, 849, 485 N.W.2d 10, 16 (1992). "The term 'discretion' contemplates a process of reasoning which depends on facts that are in the record or reasonably derived by inference from the record and yields a conclusion based on logic and founded on proper legal standards." ***Mullen v. Coolong***, 153 Wis.2d 401, 406, 451 N.W.2d 412, 414 (1990). We sustain the trial court's exercise of discretion if the record reveals a reasonable basis for it. ***Id.***

An instruction should be warranted by the evidence and should not be given where the evidence does not support it. ***Foss v. Town of Kronenwetter,*** 87 Wis.2d 91, 106, 273 N.W.2d 801, 809 (Ct. App. 1978). The instruction should not be used unless there is evidence before the jury that the injuries were caused by failure to use an available safety belt. "[W]here seatbelts are available and there is evidence before the jury indicating causal relationship between the injuries sustained and the failure to use seat belts, it is proper and necessary to instruct the jury in that regard." ***Bentzler v. Braun,*** 34 Wis.2d 362, 387, 149 N.W.2d 626, 640 (1967).

Generally, expert testimony is necessary to establish how the plaintiff's failure to use the belt affected the injuries. ***Holbach v. Classified Ins. Corp.,*** 155 Wis.2d 412, 416, 455 N.W.2d 260, 262 (Ct. App. 1990), held that expert testimony was always necessary to establish a safety belt defense. Generally, "[t]he effect of seat belts in accidents of a particular type at a particular speed is not a question of fact to be determined by the average juror without benefit of

specialized knowledge in the form of expert testimony" (*quoting* ***Austin v. Ford Motor Co.,*** 86 Wis.2d 628, 642, 273 N.W.2d 233, 239 (1979) (emphasis omitted)).

Seat belt negligence relates only to the injuries caused by the failure to use the belt that may have been additional to or beyond those caused by the accident itself. ***Foley v. West Allis,*** 113 Wis.2d 475, 335 N.W.2d 824 (1983). The damages for "incremental injuries [caused by the failure to use a seat belt] can be treated separately for purposes of calculating recoverable damages." ***Id.*** at 485, 335 N.W.2d at 829. Consequently, those who fail to use seat belts would be responsible for the incremental harm caused by the failure to use them.[1]

Nehring claims that the trial court erred by refusing pattern jury instruction WIS J I—CIVIL 1277.[2] It was undisputed that Carol was not wearing a safety belt. Nehring argues that the testimony of Carol's own expert witness, Dr. James Mullen, was sufficient to support the instruction. We conclude that the record supports the trial court's discretionary decision to refuse the instruction.

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[1] In 1987, § 347.48(2m)(g), STATS., was created to provide that failure to wear a safety belt shall not reduce the plaintiff's recovery of damages caused by the failure to wear a safety belt by more than 15%. The statute expressly states that this limitation does not affect the determination of causal negligence in the action.

[2] WIS J I—CIVIL 1277 provides:

> The automobile in which plaintiff was driving was equipped with safety belts. [The verdict] asks whether plaintiff was negligent in failing to use an available safety belt. ...
>
> If you determine that plaintiff was negligent in failing to use an available safety belt, you should answer question ___ which asks whether plaintiff's failure to use the safety belt was a cause of plaintiff's injuries.
>
> If you determine that the failure to use a safety belt was a cause of plaintiff's injuries, you should then determine what percentage of plaintiff's total damages were caused by the failure to wear an available safety belt.

Mullen addressed only briefly the causal relationship between Carol's failure to use her seat belt and her resulting injuries:

> Q. Okay. You also indicated that the accident would have resulted in the low back pain. How would that have resulted from the accident which Carol was involved in?
>
> A. That would be on a continuation of the -- of the acceleration or deacceleration type mechanism with the -- with the trunk and thorax basically being accelerated forward at the time of impact and then backward with rapid acceleration and deacceleration. The fact that she was not wearing her seat belt leaves her at greater risk for -- for being accelerated further forward and then to return backward.
>
> ....
>
> Q. And [not wearing a seat belt] did, in fact, have that affect on her injuries; isn't that correct?
>
> A. It seems to have certainly at least for her lumbar injury, yes.

The trial court rejected the instruction, noting:

> [Mullen] touched on it. It was very brief. No foundation for it. He didn't know for sure what speed the car was going, knows nothing about engineering principles, crash worthiness of vehicles, has no statistics based on injuries with and without seat belts. I believe that subject is more for an engineering type of a person. As I recall he said well, he thought maybe the injuries were increased, at least the lower back ones, because she was not wearing a seat belt. I don't believe that's sufficient within the context of the cases that have discussed it.

The record supports the trial court's exercise of discretion. Mullen's testimony opines that Carol was exposed to "a greater risk" of being accelerated farther forward as a result of not wearing a seat belt. The doctor believed that the lower back injury was the result of a rapid acceleration and deacceleration. The doctor also stated that the lack of the seat belt "seems" to have affected Carol's lumbar injury.

The doctor's testimony does not explain to what extent the lack of a seat belt affected the injuries. It does not appear the questions were given with a degree of reasonable certainty within the area of expertise. On the record before us, asking the jury to assess the extent of lumbar injury based upon the lack of the seat belt would have been asking them to speculate.

Nehring further contends that the appellate court may take judicial notice that failure to wear a safety belt can result in injury. Nehring argues that expert witness testimony is not required to establish a safety belt defense in cases of simple ejection, citing ***Lukowski v. Dankert,*** 184 Wis.2d 142, 515 N.W.2d 883 (1994), and ***Wingad v. John Deere Co.***, 187 Wis.2d 440, 523 N.W.2d 274 (Ct. App. 1994).

These cases are not authority for the proposition advanced. Neither case addresses the standard to be applied to instruct the jury on a seat belt defense. ***Lukowski*** was a review to determine whether an arbitrator manifestly disregarded the law by permitting the defense absent expert testimony. ***Wingad*** addressed whether a trial court erroneously exercised its discretion by rejecting the expert testimony that lack of a seat belt on a tractor that tipped over would have prevented ejection. In any event, this is not a case of simple ejection. In this case, Nehring's vehicle rear-ended Carol's. The trial court's decision is reasonably based on the record before it.

2. Absent Witness Instruction

Nehring requested the absent witness instruction with respect to Dr. Rebecca Niehaus and a chiropractor, Steven Ferch. The trial court refused the instruction on the basis that Niehaus did not have pertinent information about the injuries and that Ferch's record and reports were in evidence.

Nehring argues that the trial court erroneously denied its request for the absent witness instruction, WIS J I—CIVIL 410, which provides:

> If a party fails to call a material witness within its control, or whom it would be more natural for that party to call than the opposing party, and the party fails to give a satisfactory explanation for not calling the witness, then you may infer that the evidence which the witness would give would be unfavorable to the party who failed to call the witness.

A party to a lawsuit does not have the burden, at his peril, to call every possible witness lest failure to do so will result in an inference against him. ***Ballard v. Lumbermens Mut. Cas. Co.***, 33 Wis.2d 601, 615, 148 N.W.2d 65, 73 (1967). "The requirements of the absent material witness instruction should be narrowly construed to be applicable only to those cases where the failure to call a witness leads to a reasonable conclusion that the party is unwilling to allow the jury to have the full truth." ***Id.*** at 615-16, 148 N.W.2d at 73.

Here the record demonstrates a reasonable basis for the trial court's decision. The Van Cleves offered a satisfactory explanation for not calling the two witnesses to which the instruction would have referred. Niehaus saw Carol only one time shortly after the accident and referred her to the hospital emergency room. Ferch, a chiropractor, referred Carol to Mullen, an orthopedic specialist. The medical records of both Niehaus and Ferch were admitted into evidence upon stipulation of the parties. Under these circumstances, it was reasonable for the trial court to refuse the missing witness instruction.

3. Future Damages

Finally, Nehring argues that the evidence is insufficient to support the verdict. Specifically, he argues that there is no proof of Carol's life expectancy and therefore no factual basis to award future damages. The verdict lumped "past and future pain, suffering and disability" into one question and

the jury awarded $27,971.[3] Because the verdict lumped past and future together, we must review the verdict as a whole.

The standard of review of a jury verdict is that it will be sustained

> if there is any credible evidence to support the verdict. ... The credibility of the witnesses and the weight afforded their individual testimony is left to the province of the jury. Where more than one reasonable inference may be drawn from the evidence adduced at trial, this court must accept the inference that was drawn by the jury. It is this court's duty to search for credible evidence to sustain the jury's verdict.

Fehring v. Republic Ins Co., 118 Wis.2d 299, 305-06, 347 N.W.2d 595, 598 (1984), *overruled on other grounds by* ***Dechant v. Monarch Life Ins. Co***., 1996 LEXIS 48 (Wis. May 8, 1996) (citations omitted).

Credible evidence supports the jury's damage award. Carol testified that she was thirty-three years old, married and had three young children. Before the accident, her health was generally good. After Nehring struck her car, she felt lightheaded and disoriented. After being driven home from the accident, she felt tingling and numbness in her arm and shoulder. She went to Rhinelander Medical Clinic where Niehaus was so concerned with her symptoms that she put Carol in a cervical collar, called a rescue squad and sent her to the hospital emergency room. After X-rays confirmed that there were no broken bones, Carol went home, but experienced soreness through the neck, back, chest and shoulder.

Carol's symptoms worsened. She sought chiropractic help, and then saw Mullen, who prescribed medication and physical therapy. At the time of trial, four years after the accident, Carol continued to experience pain and believed her problems were permanent. Housework, driving, crafts and doing things with her children cause pain on a daily basis. She testified that she has

[3] Nehring did not object to the form of the verdict.

constant pain, every minute, and her doctor said there was no more that he could do.

We reject Nehring's argument that the evidence is insufficient for failure to offer proof of Carol's life expectancy. Although plaintiff has the burden of proving future damages, the jury could find that, but for the accident, Carol's health was generally good, and that, at thirty-three years of age, she would expect to have many years ahead of her. Here the jury was not asked a separate specific question relating to future damages. The evidence of record supports the verdict.

By the Court. – Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.