

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**MAY 7, 1996**

**NOTICE**

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 95-3005-FT**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

**AMANDA EARL,**

**Plaintiff-Appellant,**

**v.**

**MILWAUKEE TRANSPORT SERVICE, INC.,  
a domestic corporation, and  
COUNTY OF MILWAUKEE,  
a municipal corporation,**

**Defendants-Respondents.**

APPEAL from a judgment of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Amanda Earl appeals from a judgment dismissing her personal injury claim against Milwaukee Transport Services,

Inc., and Milwaukee County. The trial court granted Milwaukee Transport's motion for a directed verdict after determining that Earl's testimony lacked credibility and that the accident was mechanically impossible. Because the trial court usurped the jury's function as fact finder to make both of these key determinations, we reverse the trial court's judgment and remand the matter for trial.<sup>1</sup>

## BACKGROUND

Earl initiated this lawsuit after allegedly sustaining injuries as she attempted to exit a bus operated by Milwaukee Transport at a stop in front of Milwaukee County Medical Complex. At trial, Earl testified that after waiting for the other passengers to disembark, she slowly exited the bus at the steps across from the driver's seat. She stated that when she was nearly out of the bus, the bus's doors closed on her right hand, arm and shoulder. Earl told the jury that when she attempted to pull her arm out of the door, the door flew open and she fell back onto the bus's steps. Earl testified that the bus began to "crawl" forward. Fearing that she would be run over by the bus, Earl quickly extracted herself from the door.

The medical evidence submitted was spotty and inconsistent. Earl was treated for a slightly swollen hand at the emergency room of Milwaukee County Medical Complex on the day of the accident. Earl was seen five days later by her personal physician, who testified that Earl complained of pain in her right hand but that he did not have objective data to support the existence of an injury. Earl testified to making certain additional doctor and hospital visits for diagnosis and treatment of her shoulder and chest. Hospital records submitted to the jury indicated that although Earl did seek medical care at both Mt. Sinai Hospital and St. Mary's Hospital forty-nine and fifty-one days, respectively, after the accident occurred, these medical records did not reflect the presence of injuries connected to the alleged accident.

The driver operating the bus, Aaron Hicke, testified at trial that the accident alleged by Earl never occurred. Hicke also testified that the bus

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<sup>1</sup> This is an expedited appeal under RULE 809.17, STATS.

allegedly involved was equipped with a safety mechanism, the "interlock system," which "prevents a bus from moving while the doors are open, front or rear." Hicke also testified that this safety system prevents a driver from throttling a bus while the doors of the bus are open.

Thomas J. Igowsky, the Assistant Claims Manager of Milwaukee Transport, testified that this was a "blind" case, meaning a case involving the claim of an accident that was not also reported by the bus driver or anyone else. Although Igowsky testified that it was company policy to issue a tracer immediately to discover the identity of the driver, the tracer in this case was not issued until six months after the bus company received notice of Earl's claim.

Finally, Hattie Garner, a volunteer at Milwaukee County Medical Complex on the day of the alleged accident, testified that Earl requested her to write down the number of the Milwaukee Transport bus pulling away from the curb. Garner told the jury that she also noted the time of day and briefly described the driver as a "white male." Garner stated that Earl appeared to be calm.

At the close of the evidence, Milwaukee Transport moved the trial court for a directed verdict. The trial court took the motion under advisement and submitted the case to the jury. After one and one-half days of deliberations, the jury reported to the trial court that it was deadlocked.<sup>2</sup> The trial court excused the jury, granted the motion for a directed verdict and subsequently entered judgment dismissing Earl's complaint.

#### STANDARD OF REVIEW

The trial court should grant a motion for a directed verdict only "where the evidence is so clear and convincing that a reasonable and impartial jury properly instructed could reach but one conclusion." *Leen v. Butter Co.*, 177 Wis.2d 150, 155, 501 N.W.2d 847, 848 (Ct. App. 1993) (citation omitted). When evaluating the motion, "the evidence must be 'viewed most favorably to

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<sup>2</sup> The jury was deadlocked nine to three in favor of dismissing the lawsuit.

the party against whom the verdict is sought to be directed." *Id.* at 155, 501 N.W.2d at 849 (citation omitted). This court applies the same standard on appeal, tempered by our deference "to the trial court's better ability to assess the evidence." *Id.* (citation omitted). Accordingly, this court will not reverse a trial court determination to grant "a motion for a directed verdict unless the record reveals that the trial court was 'clearly wrong.'" *Id.* (citation omitted).

## DISCUSSION

As a general matter, "the existence of negligence is a question of fact which is to be decided by the jury." *Ceplina v. South Milwaukee School Bd.*, 73 Wis.2d 338, 342, 243 N.W.2d 183, 185 (1976) (footnote omitted). Accordingly, it is for the jury to determine the credibility of witnesses and to draw the ultimate conclusions as to the facts. *American Family Mut. Ins. Co. v. Dobrzynski*, 88 Wis.2d 617, 630, 277 N.W.2d 749, 755 (1979). "[W]hen conflicting evidence is pointed out to the jury, the weight to be given to the conflict and the determination of which version should be believed are matters for the finder of fact to resolve." *Rabata v. Dohner*, 45 Wis.2d 111, 117, 172 N.W.2d 409, 411 (1969).

When the trial court ruled on Milwaukee Transport's motion for a directed verdict, the trial court focused initially on the alleged mechanical impossibility of the accident and then considered Earl's apparent lack of credibility:

THE COURT: The court is going to grant the motion. I think defense counsel has done really an excellent job in terms of summarizing the evidence, and one factor -- certainly an important factor is that it appears that this is something that mechanically simply could not happen. That's a factor.

Another factor is the plaintiff as a witness repeatedly testified contrary to things that were clearly established by the documents in terms of her complaints at the time, in terms of the timing -- timing was grossly off. I don't think the plaintiff is a

dishonest witness, that's a conclusion that somebody could easily come to with all of those conflicts, but she clearly is not a credible witness, and I think you do reach a point where as a matter of law somebody simply is not credible, and you have that here.

So when you put those factors together, I think you do have the basis of the court ruling as a matter of law.

The trial court's remarks disclose that it passed on the credibility of the witnesses and weighed the conflicting evidence to conclude as a matter of law that the accident was a physical or mechanical impossibility. The trial court's remarks disclosed that it failed to take into account the evidence in a light most favorable to Earl and instead fastened on the inconsistencies in Earl's testimony. At the same time, the trial court ignored Earl's testimony that she was initially injured by the door while the bus was stopped at the Milwaukee County Medical Complex bus stop, testimony not inconsistent with evidence of the bus's "interlock system." Because the trial court invaded the province of the jury by judging witness credibility and resolving conflicts in the evidence, the trial court's decision was "clearly wrong" within the meaning of *Leen*. Accordingly, the judgment granting Milwaukee Transport's motion for a directed verdict must be reversed and the matter remanded for a new trial.

*By the Court.*—Judgment reversed and cause remanded with directions.

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