COURT OF APPEALS
DECISION
DATED AND FILED

June 28, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP650 **Cir. Ct. No. 2009CV1000**

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

PAIGE BUSKE,

PLAINTIFF-APPELLANT,

STATE OF WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES, DODGE COUNTY HUMAN SERVICES, AND AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFFS,

V.

KARIE PECKHAM,

DEFENDANT,

DAVID A. MILLER AND AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed*.

Before Sherman and Blanchard, JJ., and Charles P. Dykman, Reserve Judge.

¶1 DYKMAN, J. This is an appeal from a judgment dismissing Paige Buske's motor vehicle negligence claims against American Family Mutual Insurance Company. Buske raises an issue not presented to the circuit court. She asserts that the court erred by responding to a jury question without consulting the parties or their attorneys. We conclude that Buske forfeited the right to raise this issue by failing to make a post-trial motion asserting the alleged error. We elect to address the issue despite Buske's forfeiture. We conclude that the circuit court erred by responding to the jury's question without consulting the parties' attorneys. We also conclude that the error was harmless. We therefore affirm.

FACTS

¶2 Buske sued David Miller, Karie Peckham, and American Family Mutual Insurance Company for personal injuries sustained when she was dragged by a vehicle driven by Miller, but owned by Peckham and insured by American Family. American Family defended the lawsuit against it by asserting that Miller was using Peckham's vehicle without Peckham's permission. The jury found that Miller was using Peckham's vehicle without Peckham's expressed or implied permission. Buske asserts that she is entitled to a new trial because, when the circuit court received the jury's written question: "What's the legal definition of implied permission?", the court wrote back, without consulting with the parties' attorneys: "I cannot define this as a matter of law." Buske did not challenge this alleged error by motion after verdict.

FORFEITURE

¶3 In ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 416-17, 405 N.W.2d 354 (Ct. App. 1987), we concluded: "Initially, we turn to several issues raised at the conclusion of Lyons' brief which we deem waived [forfeited] because they were not raised in the motions after verdict." We repeated this in ***J.K. v. Peters***, 2011 WI App 149, ¶¶25-26, 337 Wis. 2d 504, 808 N.W.2d 141, and explained that the reason for requiring alleged errors to be raised in motions after verdict is to permit trial courts to be given an opportunity to correct errors without costly and time-consuming appeals. ***Id.***, ¶27.

¶4 It is clear that Buske's failure to challenge the circuit court's alleged error in motions after verdict forfeited her issue. Buske claims that this issue was not forfeited because the circuit court did not offer the parties an opportunity to object to the court's answer to the jury's question because they were not present when the court answered the jury's question. That is factually correct, but it evades the question.

¶5 Buske asserts that ***Ollinger v. Grall***, 80 Wis. 2d 213, 223, 258 N.W.2d 693 (1977), holds that failure to object during trial can be corrected before the return of the verdict. Therefore, she argues, since she had no opportunity to object during trial, she did not waive or forfeit her right to raise the issue on appeal. ***Ollinger*** does not help Buske. The issue is not whether there were errors at trial or whether she could have raised her issue at trial. The issue is whether Buske's failure to assert the circuit court's error in motions after verdict forfeits her right to raise the issue on appeal. ***J.K.*** is unequivocal. Buske's failure constitutes a forfeiture. But we have discretion to address forfeited issues, and we

exercise our discretion to do so here. *See* ***State v. Kaczmarski***, 2009 WI App 117, ¶7, 320 Wis. 2d 811, 772 N.W.2d 702.

ANSWER TO JURY'S QUESTION

¶6 Buske begins by arguing that four United States Supreme Court cases require that we reverse and remand for a new trial. However, Buske fails to recognize that holdings of the United States Supreme Court are binding on this court only when they address questions of federal law which govern the dispute before us. *See* ***State v. Gary M.B.***, 2003 WI App 72, ¶11, 261 Wis. 2d 811, 661 N.W.2d 435. We will examine the four Supreme Court cases to see whether they interpret a federal legislative rule or the United States Constitution, before turning to Wisconsin precedent not cited by either party.

¶7 ***Fillippon v. Albion Vein Slate Co.***, 250 U.S. 76, 82 (1919), reversed a civil judgment because the trial judge had answered a jury question in the absence of the parties and their counsel. Buske does not explain the constitutional or legislative rule violation involved in ***Fillippon***, or which rule or constitutional provision the Supreme Court identified. We conclude that ***Fillippon*** may address federal civil procedure but nothing more. We decline to follow it.

¶8 ***Shields v. United States***, 273 U.S. 583 (1927), is a criminal case under the Prohibition Act. The Supreme Court cited ***Fillippon*** for the following: "Where a jury has retired to consider of its verdict, and supplementary instructions are required, either because asked for by the jury or for other reasons, they ought to be given either in the presence of counsel or after notice and an opportunity to be present; and written instructions ought not to be sent to the jury without notice to counsel and an opportunity to object." ***Id.*** at 588. The Court reversed Shields' conviction. ***Id.*** at 589. ***Shields*** gives no constitutional or legislative rule violation

as a basis for its decision. We see no reason to import ***Shields*** into Wisconsin jurisprudence.

¶9 In ***Rogers v. United States***, 422 U.S. 35, 38-40 (1975), the Supreme Court cited ***Fillippon*** and ***Shields***, but did not base its decision on their holdings. Instead, the Court found a violation of Federal Rule of Criminal Procedure 43, which guarantees a defendant in a criminal trial the right to be present "at every stage of the trial including the impaneling of the jury and the return of the verdict." ***Id.*** at 39. Buske has not asserted that Wisconsin has adopted Federal Rule of Criminal Procedure 43 for use in civil trials, and in any event, we are not bound by federal rules of procedure not codifying constitutional principles. *See* ***Weber v. Weber***, 176 Wis. 2d 1085, 1093 n.7, 501 N.W.2d 413 (1993).

¶10 ***Rushen v. Spain***, 464 U.S. 114, 120 n.4 (1983), cited ***Fillippon***, ***Shields***, and ***Rogers***, and concluded that undisclosed instructions from judge to jury violated nonconstitutionally based rules of orderly trial procedure and that violations of Federal Rule of Criminal Procedure 43 can be harmless error. ***Rushen*** says nothing that requires us to consider it to be part of Wisconsin jurisprudence, and we do not.

¶11 Neither party cites ***Rowden v. American Family Insurance Co.***, 48 Wis. 2d 25, 179 N.W.2d 900 (1970). In ***Rowden***, the judge, court reporter, and bailiff went to the jury room for the court to answer questions the jury had asked. Plaintiff's counsel was present, though not in the jury room; defendant's counsel was not present. ***Id.*** at 29. The supreme court concluded that the judge's in-person communication with the jury was error. ***Id.*** at 31. "Unless there is a waiver, the trial court should not communicate in person with the jury in court or in the jury room in the absence of either counsel." ***Id.*** While the judge in Buske's

case did not go to the jury room to communicate with the jury, he did so by memo. The focus in ***Rowden*** was on the communication without counsel present, not the manner of communication.

¶12 We conclude that the circuit court erred by answering the jury's question without consulting with the parties' attorneys.[1] But ***Rowden*** also held: "In this case we think this error was waived by the plaintiff. Beyond that, it was not prejudicial." ***Id.*** at 31. We therefore examine whether Buske was prejudiced by the circuit court's error.

PREJUDICE

¶13 Buske first asserts that a jury instruction which misstates the law is per se prejudicial. Therefore, we first determine whether the circuit court's answer—"I cannot define [implied permission] as a matter of law"—misstated Wisconsin law. We conclude that it did. ***Heaton v. Mountin***, 2000 WI App 45, ¶16, 233 Wis. 2d 154, 607 N.W.2d 322, defines "implied permission" as follows: "Implied permission arises when … it is reasonable to infer the permittee can assume permission was granted by the named insured," citing ARNOLD P. ANDERSON, WISCONSIN INSURANCE LAW 2-14, at § 2.3(a) (4th ed. 1999).[2] The

[1] The supreme court addressed a similar question in ***State v. Gonzalez***, 2011 WI 63, ¶95, 335 Wis. 2d 270, 802 N.W.2d 454, and recommended Principle 15D of the American Bar Association Principles for Juries and Jury Trial as a best practice standard. Principle 15D reads: "When jurors submit a question during deliberations, the court, *in consultation with the parties*, should supply a prompt, complete and responsive answer or should explain to the jurors why it cannot do so." (Emphasis added.)

[2] Although Buske cites a definition of "implied permission" found in BLACK'S LAW DICTIONARY, we do not agree that Black's defines Wisconsin law.

circuit court erred by stating that it could not provide a definition of the phrase "implied permission" as a matter of law.

¶14 Even though the circuit court's instruction was incorrect, Buske is wrong in her belief that this entitles her to a new trial. In ***Hunt v. Clarendon National Insurance Service, Inc.***, 2005 WI App 11, 278 Wis. 2d 439, 691 N.W.2d 904, we explained: "If a jury instruction 'is erroneous and probably misleads the jury, we will reverse because the misstatement constitutes prejudicial error.'" ***Id.***, ¶9 (quoting ***Young v. Professionals Ins. Co.***, 154 Wis. 2d 742, 746, 454 N.W.2d 24 (Ct. App. 1990)). The question therefore becomes whether the erroneous instruction misled the jury.

¶15 We conclude that, given the question and the circuit court's non-answer, there is no probability that the judge's answer misled the jury. All the judge told the jury was that the judge could not provide an answer to the jury's question based on legal principles. The court did not refuse to give a necessary instruction, resulting in the jury not knowing that the defendant owed a different degree of care to the plaintiff. *Cf.* ***Hunt***, 278 Wis. 2d 439, ¶¶15-16 (concluding that it was reversible error for the circuit court to instruct the jury with the general negligence instruction instead of the common carrier instruction).

¶16 The jury in Buske's case was given the following instruction:

> OWNER'S PERMISSION FOR USE OF AUTOMOBILE
>
> If an owner of an automobile gives his or her permission to another to use his or her automobile, that person has the right to use the vehicle as long as he or she does not substantially violate the terms and conditions placed upon its use by the owner.
>
> An owner of an automobile may restrict or limit the length of time or the kind of use to which the automobile is to be put by the person using it.

> If the person, to whom permission was given by the owner, does not obey the restrictions placed upon its use, as those restrictions relate to a period of time, or the purpose for which the car was to be used, and you determine that the use was a substantial deviation from the restrictions placed by the owner at the time permission for its use was granted, then you must find that the use of the car was not within the scope of permission.
>
> As used in this instruction, the term "substantial deviation" means that the person borrowing the car exceeded the scope of the permitted use significantly in a way that was clearly not in the contemplation of the parties at the time permission was initially granted by the owner.
>
> *The limitations, if any, upon the scope or extent of the permission must be determined from the understanding, either express or implied, between the owner and the person using the car. This understanding is to be determined from all of the facts and circumstances surrounding the granting of permission.*
>
> It is for you, the jury, to determine whether under the facts of this case, the owner did restrict the permission given by limiting the time or purpose of such use, and if you find that there were restrictions, whether the user substantially deviated from those restrictions placed upon the car's use by the owner.

WIS JI—CIVIL 3112 (emphasis added). This instruction does not vary in any significant way from the ***Heaton*** instruction Buske now suggests could have been used had the circuit court consulted with both attorneys before answering the jury's question.

¶17 Prejudice is often determined by examining the evidence the jury heard. "In determining whether an error is plain or harmless, the quantum of other evidence properly admitted is relevant. Erroneously admitted evidence may tip the scales in favor of reversal in a close case, even though the same evidence would be harmless in the context of a case demonstrating overwhelming evidence of guilt." ***Virgil v. State***, 84 Wis. 2d 166, 191, 267 N.W.2d 852 (1978).

¶18 Buske has failed to provide us with a transcript of her trial, so we cannot determine whether the evidence is overwhelming or whether this was a close case. Appellate review is limited to the record before the appellate court, and we will assume in the absence of a transcript that every fact essential to the trial court's exercise of discretion is sustained in the record. ***Duhame v. Duhame***, 154 Wis. 2d 258, 269, 453 N.W.2d 149 (Ct. App 1989). The necessity for, the extent of, and the form of reinstruction of a jury rests in the discretion of the trial court. ***Hareng v. Blanke***, 90 Wis. 2d 158, 166, 279 N.W.2d 437 (1979) (citations omitted). Though we have concluded that the circuit court erred by reinstructing the jury without consulting with the parties' attorneys, whether that instruction itself was erroneous is another thing. It is, as we have concluded. But Buske failed to bring the alleged error to the circuit court's attention by way of a motion after verdict, and she has failed to provide a transcript permitting us to examine the strength of American Family's case. We will assume that American Family's case was sufficiently strong that we can conclude that the circuit court's error was harmless.

¶19 The supreme court has also used an outcome-determinative standard to determine prejudice. The circuit court's reinstruction was an erroneous statement of the law. But a new trial will be ordered only if the court's error "affected the substantial rights of the party." WIS. STAT. § 805.18(2) (2009-10). An error affects the substantial rights of the party if it undermines confidence in the outcome. ***State v. Dyess***, 124 Wis. 2d 525, 544-45, 370 N.W.2d 222 (1985). An error undermines confidence in the outcome if there is a reasonable probability the outcome would have been different but for the error. ***Horst v. Deere & Co.***, 2009 WI 75, ¶18, 319 Wis. 2d 147, 769 N.W.2d 536 (citations omitted).

¶20 Because Buske has not filed a transcript of the trial, we do not know what happened at trial. All the jury was told was that the judge could not answer their question as a matter of law. The jury had been instructed that whether Peckham had given Miller permission to use her vehicle must be determined from the understanding, either expressed or implied, between the owner and the person using the car. The word "implied" is commonly used in conversation. "Implication" is also a term that we believe most people have heard or used, and is certainly a term that the jury in its collective deliberations could reach a correct understanding of.

CONCLUSION

¶21 Because there is no reasonable probability that the outcome of this case would have been different had the circuit court consulted with the parties' attorneys before telling the jury that it was not going to answer their question, or had the circuit court reinstructed the jury along the lines of ***Heaton***, the error did not affect Buske's substantial rights. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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