COURT OF APPEALS
DECISION
DATED AND RELEASED

November 15, 1995

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. 94-2492

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

THOMAS W. LANTZ and MARY L. LANTZ, adult residents of the State of Wisconsin, MARGO F. LANTZ, a minor, and JONATHON A. LANTZ, a minor, by their Guardian ad Litem, DAVID H. HUTCHINSON,

Plaintiffs-Appellants,

v.

ROSEMARY CIESLINSKI, an adult resident of the State of Wisconsin, MILWAUKEE GUARDIAN INSURANCE COMPANY, an insurance corporation, JENNIFER C. KIMMET-SOTOS, an adult resident of the State of Wisconsin, ALLSTATE INSURANCE COMPANY, a foreign insurance corporation, VALLEY FORGE INSURANCE COMPANY, a foreign insurance corporation, and BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Reversed and cause remanded*.

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Thomas Lantz, his wife, Mary, and their children, Margo and Jonathon, by their guardian ad litem, appeal from a circuit court judgment dismissing their claims against Rosemary Cieslinski, Jennifer Kimmet-Sotos[1] and various insurers as a result of a collision between Kimmet's vehicle and Lantz's bicycle. We conclude that there was juror misconduct because a juror visited the scene of the accident to develop his own facts about the accident and shared his findings with other jurors. Consequently, we reverse and remand for a new trial.

The automobile-bicycle accident occurred on August 24, 1991, at the intersection of Interlaken Condo Drive and Highway 50 in the Town of Geneva, Walworth County. The circumstances under which the accident occurred were disputed at trial. Lantz testified that he was bicycling on Interlaken and stopped at the intersection before crossing Highway 50. However, Cieslinski, who passed through the intersection immediately before Kimmet and Lantz collided, testified that Lantz did not stop at the intersection. Lantz testified that after he started into the intersection, Cieslinski's vehicle came to a rolling stop at the stop sign directly across from him, proceeded into the intersection, did not signal, made a wide left-hand turn into his lane and headed toward him as if he were "invisible." Cieslinski testified that when she signaled, moved into the intersection and began her turn, Lantz stopped in the lane she was entering. Cieslinski swerved onto the shoulder to get around Lantz and drove away. Cieslinski then saw Lantz bicycle past the median and into the next lane where Kimmet's vehicle hit him. The last thing Lantz remembered before the accident was being confronted by Cieslinski's car.

Kimmet testified that she first saw Cieslinski's vehicle when Kimmet was just west of the intersection. Cieslinski's vehicle swerved in the

[1] During the proceeding, Kimmet-Sotos's name changed to Kimmet. We will refer to her as Kimmet throughout the opinion.

right lane near the shoulder, and Kimmet saw Lantz "balancing or hovering uncertainly to the rear of [Cieslinski's] car." Without looking in Kimmet's direction, Lantz moved forward and rode directly in front of her vehicle. Kimmet believed approximately two to three seconds elapsed from the time she first saw Lantz until she hit him.

The ability of Kimmet and Lantz to observe and avoid each other before the accident was disputed at trial. Lantz testified that while he was stopped at the intersection, he had a clear view across the street and to the east, the direction from which Kimmet was traveling.

Lantz's reconstruction expert, Beldon Rich, testified that Kimmet had four to five seconds to react and avoid the collision. Dennis Skogen, the defense's accident reconstruction expert, testified that there was insufficient physical evidence to permit him to give an opinion regarding the location of the bicycle and two vehicles just prior to the accident and whether Kimmet could have avoided the accident.

The jury apportioned negligence as follows: 25% to Cieslinski, 25% to Kimmet and 50% to Lantz. The jurors awarded substantial damages to Lantz and his family members (hereafter "Lantz"). However, due to the apportionment of negligence, Lantz did not recover any damages. On motions after the verdict, Lantz attempted to impeach the verdict by presenting affidavits regarding juror misconduct. The trial court declined to impeach the verdict and dismissed Lantz's claims. Lantz appeals.

In motions after the verdict, Lantz identified several instances of alleged juror misconduct. We find one incident dispositive on appeal. Juror Cornelison's affidavit stated that during deliberations juror Romano remarked that he had timed himself driving up and down Highway 50 at the accident site and concluded that Lantz had sufficient time to see oncoming traffic. Juror Resch's affidavit stated that Romano had visited the intersection and based

upon his experiments there concluded that Lantz had sufficient time to see oncoming traffic.[2]

At the hearing on Lantz's motions after verdict, Cornelison testified in an offer of proof that all twelve jurors were present when Romano revealed that he had visited the scene and conducted experiments. Resch testified that Romano told the jurors while they were eating dinner that "he went up and down Highway 50, timed himself and he had concluded that the blue car [Kimmet] did not have time to stop and that [Lantz] had a clear view of all oncoming traffic ... and would have had time to cross or would have had time to see the oncoming traffic." She testified that she knew Romano's request for a jury view of the intersection had been denied.

The trial court ruled that Romano's statements did not constitute extraneous and prejudicial information and declined to accept the jurors' posttrial statements for verdict impeachment purposes.

Lantz's attempt to impeach the jury's verdict is governed by § 906.06(2), STATS., which provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any

[2] Other alleged instances of juror misconduct included: (1) a statement by a juror that she had Allstate Insurance and did not want her insurance premium increasing due to a large verdict; (2) a statement by another juror, a drivers' education instructor, regarding the "law" on apportioning negligence; and (3) the statement of another juror that if 50% negligence was attributed to Lantz, he would receive 50% of the damages awarded.

> outside influence was improperly brought to bear upon any juror. Nor may the juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received.

In order to determine whether a party is entitled to a new trial on the ground that jurors were prejudiced by extraneous information, the party must first demonstrate that a juror's testimony is admissible under § 906.06(2), STATS., by establishing that: (1) the juror's testimony concerns extraneous information, not the deliberative process of the jurors;[3] (2) the extraneous information was improperly brought to the jury's attention; and (3) the extraneous information was potentially prejudicial. ***Castaneda v. Pederson,*** 185 Wis.2d 199, 209, 518 N.W.2d 246, 250 (1994).

The trial court must first decide whether to admit or exclude the juror's testimony at a hearing on the motion for a new trial. ***Id.*** at 208-09, 518 N.W.2d at 249-50. Questions regarding the admissibility of evidence are entrusted to the trial court's discretion. *See* ***Gonzalez v. City of Franklin,*** 137 Wis.2d 109, 139, 403 N.W.2d 747, 759 (1987). The exercise of discretion requires a rational reasoning process based on the facts in the record or reasonable inferences from those facts and the correct application of the proper legal standards to those facts. *See* ***Schnetzer v. Schnetzer,*** 174 Wis.2d 458, 463, 497 N.W.2d 772, 774 (Ct. App. 1993).

Here, the trial court ruled that the jurors' affidavits and testimony were inadmissible because Romano's statements did not satisfy the ***Castaneda*** three-pronged test for the admissibility of evidence impeaching a verdict because the statements did not concern potentially prejudicial extraneous information. We conclude that the trial court erred because it did not apply the proper legal standard for "extraneous" information to Romano's statements.

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[3] Section 906.06(2), STATS., prohibits juror testimony regarding statements made during deliberations or about the deliberative processes of the jurors. ***Castaneda v. Pederson,*** 185 Wis.2d 199, 209, 518 N.W.2d 246, 250 (1994).

> "Extraneous" information is information which a juror obtains from a non-evidentiary source, other than the "general wisdom" we expect jurors to possess. It is information "coming from the outside." The term does not extend to statements which simply evince a juror's subjective mental process.

State v. Messelt, 185 Wis.2d 254, 275, 518 N.W.2d 232, 241 (1994) (quoted sources omitted).

It is clear that Romano conveyed extraneous information to one or more jurors. Contrary to the trial court's express instructions, Romano visited the accident scene and gathered information which was not presented as evidence in this case and made his own assessment about the likelihood that Lantz could have avoided the accident.[4] Romano then conveyed this information to one or more jurors.

The special verdict form indicates that Romano was the only dissenter on the special verdict cause questions relating to Kimmet and Cieslinski. It is reasonably possible that he used this extraneous information to assist him in reaching a verdict in this case and in arguing for his views during deliberation. The information Romano gathered and shared with the other jurors is information from a nonevidentiary source which we would not expect the jurors in this case to possess, particularly because there was no jury view and the jurors had been instructed not to investigate the accident scene. Romano's statements did not evince his subjective mental process; they reflected information he gathered outside of the courtroom.

Because Romano inspected the scene to draw his own inferences and made his views known to some or all of the jurors and because this evidence was potentially prejudicial, the affidavits and offer of proof reporting Romano's statements were competent and admissible under § 906.06(2), STATS.

[4] Although the trial court declined to organize a jury view of the intersection, the judge noted that several jurors would probably drive through the intersection on their way home. Recognizing this likelihood, the trial court told the jurors not to make their own investigation at the scene.

Having determined that the trial court erred in excluding evidence that the jurors were exposed to potentially prejudicial extraneous information, we turn to whether it is reasonably possible that the extraneous information would have had a prejudicial effect upon a hypothetical average jury. ***State v. Eison,*** 194 Wis.2d 160, 177, 533 N.W.2d 738, 745 (1995). In assessing the possibility of prejudice, we consider "the nature of the extraneous information, the circumstances under which it was brought to the jury's attention, the nature and character of the [plaintiff's] case and the defense presented at trial, and the connection between the extraneous information and a material issue in the case." ***Id.*** at 179, 533 N.W.2d at 745. We independently review the prejudice issue because such is a question of law. *See* ***id.*** at 178, 533 N.W.2d at 745.

We have already discussed the nature of the extraneous information and the circumstances under which it came to the jury's attention. This case required the jury to assess the negligence of the defendant drivers and the contributory negligence of the plaintiff bicyclist. Contributory negligence was hotly debated and significantly split the jury, according to the numerous affidavits filed in support of Lantz's motions after verdict. Romano's report of his experiment and his view that Lantz could have avoided the accident are connected to a material issue in the case. We conclude that the extraneous information provided by Romano was prejudicial and requires a new trial.

Our holding is supported by recent cases. In ***Castaneda,*** the supreme court ordered a new trial on damages because a juror researched and brought into the jury room information about average medical malpractice awards. ***Castaneda***, 185 Wis.2d at 206-07, 518 N.W.2d at 249. The court found that the jurors' affidavits detailing this occurrence concerned extraneous information, that is, information which was "neither of record nor the `general knowledge' we expect jurors to possess." ***Id.*** at 209, 518 N.W.2d at 250 (quoted source omitted). The ***Castaneda*** court noted that the extent of damages was a material evidentiary issue at trial and the juror's outside information about average medical malpractice awards was irrelevant to the determination of the plaintiff's damages. ***Id.*** at 213-14, 518 N.W.2d at 251-52. Therefore, the verdict was impeached and a new trial on damages was necessary.

In ***Eison***, the court held that a juror provided extraneous information when he brought wrenches to the jury room. *See* ***Eison,*** 194 Wis.2d at 174, 533 N.W.2d at 743. The wrenches were not evidence in the case and the

jurors' experiments with them did not draw upon the general knowledge or wisdom that jurors are expected to bring to their deliberations. ***Id***. at 175, 533 N.W.2d at 744.

In their respondents' brief, Kimmet and her insurer, Allstate, argue that Romano's comments were made while the jurors were dining on pizza shortly after they retired to deliberate. They claim that Romano did not make any further reference to his visit to the scene. The fact that Romano made his comments while the jurors were dining does not detract from the fact that extraneous information was brought to the jury. Romano disregarded a court order regarding visiting the scene and then used information he gained at the scene in deliberating on the case.

Because we reverse and remand for a new trial on the grounds of juror misconduct, we do not address Lantz's other allegations of juror misconduct and request for a new trial because the jury verdict was perverse.

By the Court.—Judgment reversed and cause remanded.

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