COURT OF APPEALS
DECISION
DATED AND RELEASED

July 22, 1997

NOTICE

No. 96-1519

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

CAROLE B. MILLER,
COUNTRY MUTUAL INSURANCE COMPANY AND
MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

PLAINTIFFS-APPELLANTS,

V.

GENERAL MOTORS CORPORATION AND
ROYAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: ARLENE D. CONNORS, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Carole B. Miller appeals from a judgment entered against her in a tort action against General Motors Corporation. The judgment followed a jury verdict granting her no damages. Although Miller's brief is

somewhat unclear, she seems to argue: (1) that the trial court erred by not granting her motion for a new trial on the grounds that the verdict was contrary to the evidence, that the damages were inadequate, or that a new trial is required in the interest of justice, and (2) that this court should exercise its discretionary power of reversal because the real controversy was not tried and justice has miscarried. We affirm.

I. BACKGROUND.

On February 22, 1993, the driver's side door hinge on Miller's 1989 Buick Regal broke and the door fell off. Miller claimed that her wrist was injured by the door and filed a lawsuit against General Motors seeking compensatory and punitive damages. Before trial, Miller accepted an offer from General Motors to stipulate to liability, and in exchange, she dropped her punitive damage claim.

The case was tried before a jury, which returned a verdict awarding Miller no damages. Following the verdict, Miller made a motion for a new trial pursuant to § 805.15(1), STATS., on the grounds that the verdict was contrary to the weight of the evidence, that the damages were inadequate and that a new trial was necessary in the interest of justice. The trial court denied her motion, and judgment was entered in favor of General Motors. This appeal followed.

II. ANALYSIS.

A. Trial court denial of the motion for a new trial.

First, Miller appears to argue that the trial court erred by not granting her motion for a new trial on the grounds that the verdict was contrary to the weight of the evidence, that the damages were inadequate or that a new trial was required in the interest of justice.

1. Standard of Review.

A trial court has the power to set aside a verdict and order a new trial when the verdict is contrary to the weight of the evidence, when the damages are inadequate or when it is necessary in the interest of justice. Section 805.15(1), STATS. We will not reverse a trial court's decision to grant or deny a new trial unless it is clearly an erroneous exercise of discretion. ***Markey v. Hauck***, 73 Wis.2d 165, 171-72, 242 N.W.2d 914, 917 (1976).

2. Trial court finding that verdict was not contrary to the weight of the evidence.

First, Miller argues that the trial court should have granted a new trial because the verdict was contrary to the weight of the evidence. We disagree.

"When there is *any* credible evidence to support a jury's verdict, 'even though it be contradicted and the contradictory evidence be stronger and more convincing, nevertheless the verdict … must stand.'" ***Weiss v. United Fire & Cas. Co***., 197 Wis.2d 365, 389-90, 541 N.W.2d 753, 761-62 (1995) (citations omitted). Here, the evidence supporting the verdict included: (1) Miller's deposition testimony that she did not feel pain for 24 hours, while in her trial testimony she contradicted this and claimed that she did not feel pain for 12 hours; (2) Miller's failure to seek medical attention for her wrist for three weeks; (3) Miller's continuing to drive as much as 4500 miles in connection with her job during those three weeks; (4) testimony from General Motors's expert witness, a physician who examined Miller, contradicting Miller's claims of injury; and (5) Miller's misleading of her own expert witness, which may have greatly damaged Miller's credibility. Thus, because the verdict was not contrary to the

weight of the evidence, the trial court properly denied Miller's request for a new trial.

3. Trial court finding that the damages were adequate.

Next, Miller argues that, assuming the jury found that she was hurt by the door, the damages were inadequate. We disagree.

If the jury found that she was actually injured by the door, Miller's argument might have merit. Credibility and fact finding are the jury's duty and, thus, the verdict reflects that the jury did not believe that Miller was hurt by the door. After examining all of the evidence, the jury apparently concluded that Miller suffered no injuries as a result of the incident, and therefore should receive no damages. Speculation and hope for damages from a new jury are not grounds for a new trial if the amount awarded by the jury was within the realm of reason in view of the evidence. ***Rupp v. Travelers Indem. Co.***, 17 Wis.2d 16, 26, 115 N.W.2d 612, 618 (1962). Because it was within the realm of reason for this jury to conclude that Miller was not injured by the door, it was reasonable to award no damages. Therefore, the trial court properly exercised its discretion by not granting a new trial on the basis of Miller's claim that she received inadequate damages.

4. Trial court's decision not to grant a new trial in the interest of justice.

Finally, Miller argues that the trial court erred by not granting a new trial in the interest of justice. A trial court's ruling on a motion for a new trial in the interest of justice is highly discretionary and will not be reversed on appeal in absence of a showing of an erroneous exercise of discretion. ***Priske v. General Motors Corp.***, 89 Wis.2d 642, 663, 279 N.W.2d 227, 236 (1979). Here, a new

trial is not warranted for the same reasons we concluded that the verdict was not contrary to the weight of the evidence and that the damages were not inadequate. Therefore, because the jury verdict was reasonable given the evidence presented, we conclude the trial court properly exercised its discretion by not granting a new trial in the interest of justice.

B. Court of Appeals' discretionary reversal power.

Second, Miller appears to argue that this court should use its discretionary reversal power because the real controversy was not tried and justice has miscarried.[1] We decline to do so.

1. Standard of Review.

The court of appeals may use its broad discretionary power of reversal under § 751.06, STATS., in two situations: when the real controversy has not been tried, or when justice has miscarried. *See* § 751.06, STATS. In the first situation, an appellate court need not conclude that the outcome would be different on retrial. When the court of appeals reverses because justice has miscarried, however, it must first make a finding of substantial probability of a different result on retrial. ***Vollmer v. Luety***, 156 Wis.2d 1, 19, 456 N.W.2d 797, 805 (1990).

In ***Vollmer***, our supreme court concluded that the statutory power of reversal given to the court of appeals by § 751.06, STATS., was identical to the power of discretionary reversal given to the supreme court by § 752.35, STATS. ***Id.*** at 19, 456 N.W.2d at 805. The court then listed a number of cases in which it

[1] Miller's brief unfortunately conflates and confuses a trial court's power to order a new trial pursuant to § 805.15(1), STATS., with an appellate court's discretionary reversal power pursuant to § 752.35, STATS.

had used its power of reversal because the real controversy had not been tried. The admittedly non-exclusive list included cases involving: (1) evidentiary problems, (2) unobjected-to errors by court or counsel including significant instructional errors, (3) an incomplete or insufficient record, (4) conduct by the attorneys or parties which prevented the jury from fairly considering a crucial issue, (5) evidence which was "confusing to the jury," and (6) the existence of "an abundance of misunderstanding, cross-purposes, and frustration." ***Id.*** at 19-21, 456 N.W.2d at 805-806.

2. Whether the real controversy was tried.

Miller argues that causation was, or should have been, a non-issue because of the stipulation. Nonetheless, liability is not synonymous with causation. General Motors stipulated to liability, they did not stipulate to causation. On the strength of the stipulation, Miller claims to have dismissed an expert witness and decided not to call other witnesses on the issue of causation. General Motors argues that, although it stipulated that it was responsible for any injuries caused by the defective door hinge, it never agreed that the incident actually caused any injuries. In addition, General Motors claims that Miller did argue causation at trial and that the issue was presented to the jury. We agree with General Motors.

While Miller claims she was unable to present the issue of causation to the jury, she did argue causation a number of times at trial. On direct examination, Miller's attorney asked her whether she had hurt her wrist in any kind of accident between the time the door fell off and the following morning, and she replied, "No." Miller's attorney asked her if she had fallen during that time, and she replied, "No." Her attorney asked her if she had any injuries to her wrist,

or falls, during the four weeks from the date of the incident to the date she went to the hospital, and she responded, "No." He asked her if she hurt her wrist during that time playing handball or at work, and she said, "No." Miller's attorney then reminded her that she told the doctors at the hospital that she injured her left wrist when her car door fell off, and the following exchange occurred:

Q. In fact, though, is that what happened?

A. Yes.

Q. You hurt your wrist closing the car door?

A. Yes.

Q. And the door fell off, twisting your wrist?

A. Yes.

Q. Nothing else?

A. No.

Q. You're under oath, you know that?

A. Yes.

Thus, the record reflects Miller's attorney elicited testimony from Miller to establish causation. When General Motors's attorney also brought up the issue of causation on cross-examination, Miller's attorney failed to object. Miller's attorney also played videotaped testimony of Miller's doctor offering an opinion that the injuries were a result of the hinge breaking. Also, the special verdict asked the jury to determine damages that were "a result of this incident," and the jury instruction told the jury that Miller could only recover for damages "sustained as a natural result of the incident." Miller's attorney approved the special verdict and the jury instruction—both of which permitted the jury to consider causation.

Finally, although Miller claims that she would have called other witnesses had she known causation was still an issue, her witnesses would not have helped her argue causation any more effectively than she did at trial. The expert witness she claims she would have called on causation is an engineer who was identified in the pretrial report as someone who would testify regarding the defective nature of the door, rather than causation. Miller also claims she would have called other witnesses to testify that she complained of wrist discomfort soon after the incident. Such testimony, however, would have contradicted Miller's own testimony that she did not feel pain until from between twelve to twenty-four hours after the incident.

Given all of the above, we conclude that the issue of causation was tried. This case is not analogous to any of the examples cited by the supreme court in ***Vollmer,*** and we decline to exercise our power of reversal on the grounds that the real controversy was not tried.

3. Whether there was a miscarriage of justice.

In order for this court to reverse on the ground that there has been a miscarriage of justice, we must make a finding of substantial probability of a different result on retrial. ***Vollmer*****,** 156 Wis.2d at 19, 456 N.W.2d at 805. In this case, for the stated reasons, we affirm the trial court's decision to deny a new trial and conclude that, because the real controversy has been tried, there is substantial probability that the result would be the same on retrial. Therefore, we decline to exercise our discretionary reversal power on the ground that there was a miscarriage of justice.

By the Court.—Judgment affirmed.

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