COURT OF APPEALS
DECISION
DATED AND RELEASED

MARCH 18, 1997

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.

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No. 96-1877

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

Kelly F. Mulder and Henry Mulder,

Plaintiffs-Appellants,

American Family Mutual Insurance Company, a domestic insurance corporation,

Intervening Plaintiff,

v.

MSI Insurance Company, a foreign insurance corporation,

Defendant-Respondent,

Wisconsin Physicians Service Insurance Corporation, a domestic insurance corporation, and the Guardian Life Insurance Company of America, a foreign insurance corporation,

Defendants.

APPEAL from a judgment of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Reversed and cause remanded with directions.*

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

CANE, P.J. Kelly and Henry Mulder appeal a judgment dismissing their negligence claims against MSI Insurance Company and setting their damages in the amount of $104,426.42 for past medical expenses, future non-prescription medications, past loss of income, past and future pain, suffering and disability, and loss of society and companionship. This lawsuit arises from an accident in which a van driven by Harold Schultz, MSI's decedent insured, collided with a car driven by Kelly Mulder when the van's hydraulic brakes failed.

On appeal, the Mulders argue that the court erred when it granted MSI's motion in limine, Schultz was negligent as a matter of law, some of the jury instructions were misleading and erroneous, and the interests of justice require a new trial. The Mulders also request a new trial on the issue of damages. MSI argues that the trial court did not err because there was no proof that the van's nonfunctional emergency brake caused the accident, the jury was properly instructed, the trial was conducted without prejudicial error, and credible and substantial evidence supports the verdict. We conclude that the court erred when it granted the motion in limine, and we reverse and remand with directions for a new trial on the issue of liability.

On September 17, 1993, Schultz drove his van through a stop sign and into the intersection at the bottom of a hill where he collided with the passenger side of the car driven by Kelly Mulder. Mulder sustained personal injuries and damage to her car, and Schultz was thrown from his van and died at the scene.

It was undisputed that the van's hydraulic brakes failed and its emergency brake was inoperable at the time of the accident. Over the Mulders' objection, the court granted MSI's motion in limine, excluding the Mulders' proffered evidence from an auto mechanic who had worked on the Schultz van, that Schultz knew for as long as he owned the van that the parking brake was not functioning, and Schultz declined to have it fixed because of the cost.[1] The jury returned a verdict finding Schultz not negligent and setting the Mulders' total damages at $104,426.42. The Mulders now appeal the judgment.

The dispositive issue on appeal is whether the court erred when it granted MSI's motion in limine.[2] "A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has 'a reasonable basis' and was made 'in accordance with accepted legal standards and in accordance with the facts of record.'" ***Lievrouw v. Roth***, 157 Wis.2d 332, 348, 459 N.W.2d 850, 855 (Ct. App. 1990). Whether discretion was properly exercised is a question of law that we review de novo. *See* ***Seep v. Personnel Comm'n***, 140 Wis.2d 32, 38, 409 N.W.2d 142, 144 (Ct. App. 1987).

The trial court granted the motion in limine because there was no evidence regarding the effect the parking brake would have had, if it were operational, on slowing or controlling the van or avoiding the collision. Additionally, because experts had not performed any mathematical calculations, incorporating such variables as the speeds of the vehicles, the slope of the hill and the weight of the van, the court concluded that if the jurors heard evidence regarding the van's inoperable emergency brake, it would invite

[1] The court had already denied the Mulders' request for the court to find Schultz negligent as a matter of law because he did not comply with § 347.35, STATS., requiring the van to be equipped with an operable emergency brake.

[2] Therefore, we do not resolve all of the remaining issues raised by the parties on appeal. *See* ***State v. Blalock***, 150 Wis.2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground.").

speculation. As stated by the court in reference to its decision to grant the motion in limine,

> Basically, what we have is a situation where two experts looked at it, they haven't done any calculations, apparently, and in their expert opinion they don't think it would have any effect. … So I think the probative value of this testimony [as] to causal negligence is too remote to justify the introduction of the prejudicial effect such testimony would have.

We disagree with the trial court's assessment of the evidence and believe that its concern regarding the effect an operable emergency brake may have had on the accident was not in accordance with relevant legal principles or reasonably based in the record.

We must take two steps to determine whether evidence is admissible. First, the proffered evidence must be relevant. Section 904.02, STATS. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Section 904.01, STATS. Second, relevant evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or other considerations. Section 904.03, STATS.

"In determining a dispute concerning the relevancy of proffered evidence, the question to be resolved is as to whether there is a logical or rational connection between the fact which is sought to be proved and a matter of fact which has been made an issue in the case." ***State v. Alsteen***, 108 Wis.2d 723, 729-30, 324 N.W.2d 426, 429 (1982) (citations omitted). "[A]ny fact which tends to prove a material issue is relevant." ***Id.*** at 730, 324 N.W.2d at 429 (citation omitted). Schultz's negligence in the operation, control and maintenance of his van at the time of the accident was the issue for the jury to decide in this case. "The test for negligence is whether the conduct foreseeably creates an unreasonable risk to others." ***Bittner v. American Honda Motor Co.***, 194 Wis.2d 122,

148, 533 N.W.2d 476, 486 (1995). The proffered evidence that Schultz knowingly drove his van with an inoperable emergency brake has a logical and rational connection to the jury's determination of that issue.

In ***Prunty v. Vandenberg***, 257 Wis. 469, 478, 44 N.W.2d 246, 251 (1950), the evidence was undisputed that the decedent driver in a car accident had "never applied his emergency brake at all, and that the emergency brake was wholly insufficient; and that if he had applied it it would not have brought the truck to a stop at the stop sign." Our supreme court decided the driver was negligent as a matter of law for not operating his vehicle in compliance with the statutory brake requirements of § 85.67, STATS., 1949.[3] Now codified at § 347.35, STATS., the statute provides the following:

> (1) MOTOR VEHICLES. No person shall operate any motor vehicle … upon a highway unless such motor vehicle is equipped with brakes adequate to control the movement of and to stop and hold such vehicle and capable of meeting the performance specifications under s. 347.36. There shall be 2 separate means of applying the brakes, each of which means shall be effective to apply the brakes to at least 2 wheels.
>
> (1a) PARKING BRAKES. Every such vehicle … shall be equipped with parking brakes adequate to hold the vehicle on any grade on which it is operated ….

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[3] According to the statute,

> Every motor vehicle, when operated on a highway, shall be equipped with brakes adequate to control the movement of and to stop and to hold such vehicle, including 2 separate means of applying the brakes, each of which means shall be effective to apply the brakes to at least 2 wheels …. All such brakes shall be maintained in good working order [and] shall be considered efficient if the vehicle can be stopped under normal conditions within 50 feet when traveling at a rate of speed of 20 miles per hour ….

Prunty v. Vandenberg, 257 Wis. 469, 478, 44 N.W.2d 246, 251 (1950) (quoting § 85.67, STATS., 1949).

We recognize that brake failure is not always conclusive evidence of negligence. *See* ***Pollack v. Olson***, 20 Wis.2d 394, 398, 122 N.W.2d 426, 428 (1963) (When defendant's vehicle's foot brakes and emergency brake failed without any prior warning, the question for the jury to determine was whether the brake failure was foreseeable.). However, given the statutory requirement of adequate parking brakes, evidence regarding Schultz's failure to comply is probative as to his negligence.

MSI relies on ***Zillmer v. Miglautsch***, 35 Wis.2d 691, 151 N.W.2d 741 (1967), to support its argument that, absent proof that the nonfunctional mechanical parking brake was causal of the accident, the trial court properly suppressed the evidence. In ***Zillmer***, a jury issue in regard to a motorist's negligence, and management and control of her automobile was presented. ***Id.*** at 701-02, 151 N.W.2d at 746-47. Our supreme court concluded that although the bicyclist struck suddenly by the motorist did not have a bell or other warning device as required by statute, and that alone may have been sufficient to find the bicyclist negligent as a matter of law,

> such negligence was completely irrelevant to the issue presented to the jury and was correctly ignored by the trial judge in his [jury] instructions. Under the facts of this case, where there was concededly no opportunity for signalling [sic] or sounding a bell, the absence of such a device was a factor that was completely extraneous, inapplicable, and immaterial to the true issues of the case.

Id. at 706-07, 151 N.W.2d at 749.

Unlike the circumstances in ***Zillmer***, the connection between the accident caused by Schultz's inability to stop his vehicle at the bottom of a hill and not having a functioning parking brake is not "remote and hazy." *See* ***id.*** at 707, 151 N.W.2d at 749. Had the jury heard this evidence, they could have reasonably attributed fault to Schultz for the accident. Even if we assume that Schultz's hydraulic brakes failed suddenly and unexpectedly, evidence that he knowingly drove his van without a functioning emergency

brake that could have stopped or slowed his van is relevant to the controversy and under a reasonable interpretation of the evidence, arguably causal, and therefore, admissible. *See* ***id.***

We do not decide that Schultz was negligent as a matter of law for failing to comply with § 347.35, STATS. Although the proffered evidence seems to lead to that conclusion, it would be premature for us to decide as a matter of law that Schultz was negligent because the testimony to support that determination was submitted only as an offer of proof that if the auto mechanic were allowed to testify regarding the emergency brake, his testimony would be consistent with his deposition. The evidence was not admitted at trial. Even if the negligence question is answered by the court, causation remains a question of fact for the jury. *See* WIS J I—CIVIL 155.

Next, we must consider whether the probative value of the relevant evidence is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *See* § 904.03, STATS. We recognize that § 904.03 "favors admissibility; if the probative value of the evidence is close or equal in value to its prejudicial effect, the evidence must be admitted." ***State v. Brewer***, 195 Wis.2d 295, 310, 536 N.W.2d 406, 412 (Ct. App. 1995). We are not persuaded that MSI would be unfairly prejudiced by the admission of the evidence.

Next, the Mulders request a new trial on the issue of damages, asserting that the damages award was inadequate and contrary to law and the weight of the evidence. We interpret this as a motion for additur, or in the alternative, a new trial on the issue of damages. The decision whether to grant additur, or to overturn a jury's verdict and grant a new trial, is within the trial court's discretion and will not be disturbed absent an erroneous exercise of discretion. ***Martz v. Trecker***, 193 Wis.2d 588, 594, 535

N.W.2d 57, 59-60 (Ct. App. 1995). A jury verdict will be sustained if there is any credible evidence in the record to support it, especially when the verdict has the trial court's approval. ***Fehring v. Republic Ins. Co.***, 118 Wis.2d 299, 305, 347 N.W.2d 595, 598 (1984), *rev'd on other grounds by* ***DeChant v. Monarch Life Ins. Co.,*** 200 Wis.2d 559, 547 N.W.2d 592 (1996).

The Mulders failed to provide this court with the trial testimony of Kelly Mulder's treating physician, Dr. S. C. Stoddard, and MSI's examining physician, Dr. William DeCesare. "[W]hen an appeal is brought on a partial transcript, the court will assume that every fact essential to sustain the trial judge's exercise of discretion is supported by the record." *See* ***D.L. v. Huebner***, 110 Wis.2d 581, 597, 329 N.W.2d 890, 897 (1983). Because we also assume that every fact essential to sustain the court's decision is supported by the record, the party challenging the sufficiency of the evidence upon a partial transcript is not likely to prevail. *See* ***T.W.S., Inc. v. Nelson***, 150 Wis.2d 251, 255, 440 N.W.2d 833, 835 (Ct. App. 1989). Without reviewing the medical testimony, we cannot conclude that the amount of the damages award was inappropriate. We therefore reject the Mulder's request for a new trial on damages.

Because the suppressed evidence was probative on the issue of Schultz's negligence, and its admission would not unduly prejudice MSI, we conclude that the court erred when it suppressed the evidence. We reverse and remand the case for a new trial on liability consistent with this opinion. Despite Mulder's persuasive argument that the jury was not properly instructed on the issue of liability, we do not address the jury instructions at this time in light of our order for a new trial on the issue of liability.

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

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