

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 30, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 96-3538

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JASON RUSSELL,

PLAINTIFF-APPELLANT,

v.

**WISCONSIN MUTUAL INSURANCE COMPANY
AND KIM BENCKE-MARTI,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Wood County:
DENNIS D. CONWAY, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

DEININGER, J. Jason Russell appeals a judgment awarding him \$7,123.57 in compensatory damages, but no punitive damages, on account of injuries he sustained in an automobile accident. He claims the trial court erred: (1) in bifurcating his claims for compensatory and punitive damages; (2) in

excluding certain evidence at each trial; and (3) in approving the allegedly low compensatory damage verdict and the jury's denial of punitive damages. We conclude that, in each instance, the trial court properly exercised its discretion. Accordingly, we affirm the judgment.

BACKGROUND

Jason Russell injured his foot and back in an automobile collision which occurred when Kim Bencke-Marti made a left-hand turn in front of Russell's car. At the time of the accident, Bencke-Marti had a blood alcohol concentration of .365%. She pleaded guilty to operating a motor vehicle while under the influence of an intoxicant, and was ordered to pay a fine and to undergo twenty-eight days of inpatient alcohol treatment in lieu of jail.

Bencke-Marti admitted liability for the accident, and the only matters in dispute were the amount of compensatory damages and Russell's claim for punitive damages. Before trial, the court denied Russell's motion for submission of a punitive damages question to the jury, and instead, bifurcated the punitive damages claim for trial at a later date. The trial court also ruled that during the trial on compensatory damages, Russell would not be permitted to submit any evidence with regard to "how the accident happened or even how the alcohol—drinking in any form" played a role in the accident. The court also excluded from the first trial photographs showing the damage sustained by the vehicles in the collision.

The jury heard testimony from Russell and the physician who treated his injuries and returned a special verdict of \$5,000 for past and future pain and suffering. The verdict also included \$803 for past medical expenses and \$1,320 for past wage loss, which amounts were inserted by the court prior to submission

of the case to the jury. During the trial on punitive damages, each of the parties testified. Russell attempted to elicit testimony from Bencke-Marti that she had undergone a thirty-day alcohol rehabilitation treatment program some two years prior to the accident. The trial court sustained an objection to the proposed question on the grounds of relevance and because Russell had not made the inquiry during his initial questioning of Bencke-Marti. The jury returned a special verdict finding that Bencke-Marti did not act maliciously toward Russell or with an intentional disregard of his rights. Accordingly, punitive damages were denied.

Russell brought post-verdict motions to set aside the verdicts and for a new trial. As grounds, he cited the bifurcation of the claims, the evidentiary rulings and his contention that the verdicts were “perverse” and against the great weight of the evidence. The court denied the motions and entered judgment on the verdicts, from which Russell appeals.

ANALYSIS

a. Standard of Review

All of the issues Russell raises on this appeal involve discretionary rulings of the trial court: (1) whether to bifurcate claims for trial, *see* § 805.05(2), STATS., and *Zawistowski v. Kissinger*, 160 Wis.2d 292, 295, 466 N.W.2d 664, 665 (Ct. App. 1991); (2) rulings on the admission or exclusion of evidence, *see* Chapter 904, STATS., and *Lievrouw v. Roth*, 157 Wis.2d 332, 348, 459 N.W.2d 850, 855 (Ct. App. 1990); and (3) whether to approve jury verdicts claimed to be inadequate, *see Badger Bearing, Inc. v. Drives and Bearings, Inc.*, 111 Wis.2d 659, 670, 331 N.W.2d 847, 854 (Ct. App. 1983). We will not set aside a discretionary ruling of the trial court if it appears from the record that the court applied the proper legal standards to the facts before it, and through a process of

reasoning, reached a result which a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

To the extent that Russell challenges the jury verdicts themselves, he must convince us that there is no credible evidence which under any reasonable view supports the verdicts, and that the verdicts are so unreasonable that they “shock[] the judicial conscience.” *Brain v. Mann*, 129 Wis.2d 447, 455, 385 N.W.2d 227, 231 (Ct. App. 1986) (citation omitted).

b. Bifurcation of the Compensatory and Punitive Damage Claims

Russell claims that he was denied “a full and fair trial of [his] case” because the compensatory and punitive damage claims were bifurcated for trial. He argues that the court improperly applied § 805.05(2), STATS.,¹ because bifurcation was not necessary to enhance judicial economy. Russell also asserts that his “right to have both issues tried by the same jury was violated,” and that he was prejudiced because the same jury did not hear all the evidence regarding both causation of the accident and the nature and extent of Russell’s injuries.

We are not persuaded by any of Russell’s arguments. Section 805.05(2), STATS., explicitly permits a court to “order a separate trial of any claim” in order to “avoid prejudice,” which is the reason the trial court did so here. At the beginning of the second trial, the court gave the following explanation of its

¹ Section 805.05(2), STATS., provides as follows:

(2) SEPARATE TRIALS. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition or economy, or pursuant to s. 803.04 (2)(b), may order a separate trial of any claim, cross-claim, counterclaim or 3rd party claim, or of any number of claims, always preserving inviolate the right of trial in the mode to which the parties are entitled.

decision to bifurcate the punitive damages claim from the compensatory claim for purposes of trial:

The only purpose of [the evidence of drinking] was to inflame the jury. It has nothing to do with the [compensatory] damages ... if the Court did not bifurcate, the drinking evidence would be admissible to prove compensatory damages because it must be admitted to prove [punitive damages], which it will today, and the Court's limiting function with regard to drinking and compensatory damages would be [in]effective. Therefore, the Court bifurcated the compensatory and punitive aspects of this case.

We conclude that this was a proper exercise of the court's discretionary power to bifurcate claims for trial. *See Zawistowski*, 160 Wis.2d at 300-02, 466 N.W.2d at 667-68.

Russell's right to have both his compensatory damages and his punitive damages claims tried to a jury is not disputed. He was afforded that right. *See* § 805.05(2), STATS. (when separating claims for trial, court must "preserv[e] inviolate the right of trial in the mode to which the parties are entitled"). He cites no authority, however, for the asserted right to have the *same* jury hear both claims, and we are aware of none. *See Badger Bearing, Inc.*, 111 Wis.2d at 673-74, 331 N.W.2d at 855 (punitive damages and compensatory damages are "entirely separable"). We address below the evidentiary rulings which Russell claims prejudiced him during the two trials. To the extent that he argues, however, that he should have been allowed to try the claims together in order to circumvent those unfavorable evidentiary rulings, we disagree. If the trial court's decision to exclude evidence of intoxication and accident causation from the compensatory damages trial was proper, its decision to bifurcate so as to accomplish that result was also proper.

c. Evidentiary Rulings

Russell first complains of the exclusion during the compensatory damages trial of evidence regarding the cause of the accident and Bencke-Marti's intoxication. Section 904.02, STATS., provides that "[e]vidence which is not relevant is not admissible," and § 904.03, STATS., permits the exclusion of even relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice." Here, the trial court concluded that the causation and intoxication evidence was both not relevant to the issue of compensatory damages and prejudicial to Bencke-Marti:

[T]he plaintiff wants to put in that the defendant was drunk. The only issue here involved is damages. The defendant in this case has admitted liability 100 percent, so the only issue involved is the amount of damages. The argument that this is meant to be prejudicial and raise passion I think is legitimate and fair, that it is not necessary that testimony with regard to damages, and the Court would not allow any testimony with regard to how the accident happened or even how the alcohol—drinking in any form.

We conclude that the trial court did not erroneously exercise its discretion in excluding this evidence from the compensatory damages trial, in which the only issues were the nature and extent of Russell's injuries and the appropriate compensation therefor.

Russell also cites as error the trial court's exclusion during the compensatory damages trial of photographs showing the two vehicles following the collision. He claims they were properly admissible to show the force of the collision, thus substantiating medical testimony regarding the severity of Russell's injuries. The trial court apparently excluded the photographs on relevance grounds, saying "I don't think it's necessary," although Bencke-Marti had also argued the photographs were prejudicial.

The supreme court has described the legal principles governing admission of photographs in evidence as follows:

The admission of photographs in evidence is a matter within the trial court's discretion. Photographs should be admitted if they will help the jury gain a better understanding of material facts; they should be excluded if they are not "substantially necessary" to show material facts and will tend to create sympathy or indignation or direct the jury's attention to improper considerations....

....

"While reasonable persons looking at the photographs as a part of a record may have differing opinions in regard to whether they were cumulative, inflammatory, or prejudicial, the judgment is essentially one to be exercised by the trial judge. He, better than anyone else, in light of the evidence, can make the determination that the photographs will assist the jury in a rational and dispassionate determination of the facts."

Sage v. State, 87 Wis.2d 783, 788, 275 N.W.2d 705, 708 (1979) (citations omitted) (quoted source omitted). The photographs in question were admitted at the punitive damages trial, as was evidence regarding the cause of the accident and Bencke-Marti's intoxication. The issue in the first trial had nothing to do with who caused the accident, how it happened, how much force was involved or how damaged the vehicles were. While arguably relevant on the issue of whether Bencke-Marti acted maliciously or intentionally, the photographs and other accident-related evidence did not inform the jury as to the nature and extent of Russell's injuries sustained in the accident. Thus, we conclude that the trial court did not erroneously exercise its discretion in deferring the admission of the photographs until the trial on punitive damages.

Finally, Russell argues that he should have been allowed to put before the jury in the punitive damages trial evidence that Bencke-Marti had previously undergone treatment for alcoholism. He claims that this evidence was

relevant under § 904.04(2), STATS., to show “intent, knowledge, absence of mistake or accident,” because it would show “awareness of respondent’s drinking problem and awareness of what can happen when she drinks and drives.” In support, he cites *Lievrouw*, 157 Wis.2d at 348-50, 459 N.W.2d at 855-56, where we upheld a trial court’s discretionary ruling to admit evidence of a defendant’s prior alcohol-related accident. The plaintiff in *Lievrouw*, as Russell does here, sought punitive damages for an alcohol-related collision in which a person was injured, and we affirmed the trial court’s discretionary decision to admit evidence of the defendant’s prior accident that resulted in the death of a pedestrian.

The trial court’s ruling excluding the evidence of prior treatment for alcoholism was based in part on the timing of Russell’s question. Russell examined Bencke-Marti adversely during his case-in-chief. That questioning was immediately followed by her counsel’s direct examination of her and Russell’s subsequent cross-examination. The question came during the last of these and was objected to in part because the matter of Bencke-Marti’s prior alcohol-related treatment had not been raised in earlier questioning. We conclude that the ruling to deny questioning on the matter was a proper exercise of discretion under § 906.11(2), STATS., which permits a judge to “limit cross-examination with respect to matters not testified to on direct examination.” As the trial court noted, Russell had the opportunity to explore this area during his initial examination of Bencke-Marti, but did not do so.

Moreover, as the trial court noted in its ruling on Russell’s post-verdict motions, Russell did not make an offer of proof as to what the testimony on the issue would have been had the question been permitted. *See* § 901.03(1)(b), STATS., (error may not be predicated upon ruling which excludes evidence unless substance of evidence is made known to judge by offer of proof).

Finally, we agree with Bencke-Marti that the trial court's remarks show that the court also questioned the relevance of testimony regarding prior treatment for alcoholism. Evidence of prior treatment for alcoholism is not the equivalent of a past fatal accident involving intoxication, and even if it were, our holding in *Lievrouw* was not that such prior acts were always admissible, but only that it was within the court's discretion to admit or exclude the same. *Lievrouw*, 157 Wis.2d at 348, 459 N.W.2d at 855. Thus, the trial court's discretionary ruling to exclude the testimony is sustainable on the basis of relevance as well.

In summary, we conclude that none of the evidentiary rulings complained of represent the improper exercise of discretion by the trial court, and none are therefore grounds for the ordering of a new trial on either compensatory or punitive damages.

d. The Jury Verdicts

Section 805.15(1), STATS., permits a party to "move to set aside a verdict and for a new trial because of errors in the trial, or because the verdict is contrary to law or to the weight of the evidence, or because of ... inadequate damages." Russell's post-verdict motions alleged each of these grounds. As we have discussed above, we reject his claims of "errors in the trial." The remainder of Russell's argument is that he was undercompensated for the injuries he sustained and for the wrong Bencke-Marti committed; in essence, he claims that both juries were wrong in reaching the verdicts they did and that the trial court erred in approving them.

We have summarized the respective roles of the jury, the trial court and this court when a verdict is attacked as inadequate as follows:

In reviewing jury awards, this court may not substitute its judgment for that of the jury but, rather, determines whether the awards are within reasonable limits. If there is any credible evidence which under any reasonable view supports the jury finding as to the amount of damages, especially when the verdict has the approval of the trial court, this court will not disturb the finding unless the award is so unreasonably low that it shocks the judicial conscience. Where the trial court approves the damages verdict and provides an analysis of the evidence supporting the verdict, we will set aside the verdict only if there is an evident misuse of discretion.

Brain, 129 Wis.2d at 455, 385 N.W.2d at 231 (citations omitted). And, since the trial court is “better positioned” to decide the weight and relevancy of testimony, we must give substantial deference to a trial court’s ruling on the sufficiency of evidence to support a given verdict; we should not disturb such a ruling unless it is “clearly wrong.” *Cf. Weiss v. United Fire & Cas. Co.*, 197 Wis.2d 365, 388-89, 541 N.W.2d 753, 761 (1995) (discussing trial court’s role in assessing sufficiency of evidence with respect to motions made under § 805.14, STATS.) (quoted source omitted) (citation omitted).

In this case, the trial court analyzed the evidence supporting the jury’s \$5,000 award for compensatory damages as follows:

The Court has reviewed the evidence and, in particular, the only evidence that we are looking at is Dr. Deweerd’s evidence, in which there was a tender swollen foot with a fracture, second metatarsal, and a strained back. On September 18 of 1995, there was pain and suffering during that period of time. By 1-16-96, he had a healed fracture with some soft tissue pain. In July, it was better. Discomfort from time to time and likeliness of coming to resolution was very high. In the future, there may be some discomfort. And that’s all the evidence on that.

Mr. Russell testified that he now takes Advil and Tylenol and ices the foot every other month. He cannot bike as much. He can’t jog as much. He took Vicodin most of October, the month following the accident.

Now, the Court is of the view that these are low damages, but they do not excite the Court in such a fashion as to give the Court the thought that the jury is perverted

[sic]. The juries in Wood County, over the past couple of years, have not been coming down with large verdicts for the plaintiff. This verdict, while it is on the low side, is not perverted [sic] and, therefore, that motion too is denied.

We find no reason to disagree with the trial court's analysis and ruling. The compensatory damages verdict did not shock the trial court's judicial conscience, nor does it ours.

Russell concedes that the second jury was properly instructed regarding the standards for awarding punitive damages under the newly enacted statute applicable to this action. *See* § 895.85, STATS.,² and WIS J I—CIVIL 1707.1. It is not altogether clear whether Russell's attack on the punitive damages verdict is that the jury's verdict is contrary to the weight of the evidence, or whether his claim is that, as a matter of law, a person who drives with a blood alcohol concentration of .365% and causes injury must be found liable for punitive damages. The only question of law presented, however, is whether Russell made a sufficient showing to get his claim for punitive damages before the jury. (The trial court must determine whether the plaintiff has established "a prima facie case for the allowance of punitive damages" prior to submitting a question on punitive damages to the jury. *See* § 895.85(4); *see also Lievrouw*, 157 Wis.2d at 344, 459 N.W.2d at 853-54.) Following the close of evidence in the punitive damages trial, the court took Bencke-Marti's motion for a directed verdict under advisement and submitted the following question to the jury: "Did the defendant act maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff?"

² Section 895.85(3), STATS., provides that a "plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff."

Even though the trial court did not specifically rule on whether Russell had established a prima facie case, its submission of the question was tantamount to a conclusion in Russell's favor of which he cannot now complain.

Thus, Russell's request to re-try his punitive damages claim must be viewed, not as a question of law, but as a claim that the evidence at trial does not support the jury's verdict. Russell again disagrees with the jury's conclusions, and our standard of review is as discussed above. The trial court analyzed the evidence presented during the punitive damages trial as follows:

The jury found that there was—the defendant did not act maliciously toward the plaintiff or with an intentional disregard of the rights of the plaintiff. And malicious is defined, in the instructions, as the result of hatred, ill will, a desire for revenge, or inflicted under circumstances where insult or injury is intended.

There is no evidence, whatsoever, of malice in this case. The parties never knew one another prior to the accident. And so the only real argument, would there have been an intentional disregard of the rights of the plaintiff in some fashion?

And the facts of the case are that Ms. Bencke-Marti had admittedly a very high blood test, .36, and she got in the car. She was going to make a left turn into Hardees and he ran into her. Took the left turn in front of him and he ran into her. That is strictly, to me, a jury question as to whether or not there was an intentional disregard of the rights of the plaintiff. I don't think so. I think there is plenty of evidence whereby the jury could find that just because the lady had too much to drink that is not an intentional disregard.

As with the compensatory damages verdict, we cannot conclude on this record that the trial court's view of the evidence and the jury's findings is erroneous. "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*, 197 Wis.2d at 389-90, 541 N.W.2d at 761-62 (quoted source omitted) (citation omitted).

CONCLUSION

Because we find no merit in Russell's claims of error, and because the jury verdicts are supported by credible evidence, we affirm the judgment awarding compensatory damages of \$7,123.57 and no punitive damages.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

