COURT OF APPEALS DECISION DATED AND FILED

December 15, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 98-3183

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

PEGGY L. BRENNAN,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

COLLEEN A. LAMPEREUR,

DEFENDANT-RESPONDENT,

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

DEFENDANT-RESPONDENT-CROSS-APPELLANT,

THOMAS M. BRENNAN, MILWAUKEE CASUALTY INSURANCE CO., F/K/A MILWAUKEE GUARDIAN INSURANCE, INC., AND KOHLER CO.,

DEFENDANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Peggy L. Brennan appeals from a judgment against Colleen A. Lampereur and her insurer, State Farm Mutual Automobile Insurance Company, for fifty percent of the damages Brennan incurred when the car in which Brennan was a passenger hit a tree one snowy afternoon in Door county. Brennan claims that Lampereur should be held responsible for the negligence of the driver of a vehicle which towed Lampereur's car from a ditch, that she is entitled to prejudgment interest and double costs, and that State Farm provide coverage beyond that determined by the trial court. State Farm cross-appeals from the judgment claiming that Lampereur's passengers could not have been causally negligent and that a new trial on the issue of liability is appropriate. We affirm the trial court's decision to change the jury's verdict so that the driver of the towing vehicle is not Lampereur's servant; on the cross-appeal, we affirm the jury's finding that Lampereur's passengers were negligent; we reverse the judgment as to the conclusion that State Farm does not provide coverage to Lampereur's passengers. On remand, the trial court shall enter a judgment consistent with this opinion.

¶2 Lampereur and her three passengers were returning home on a snowy two-lane highway when the car failed to negotiate an icy curve, left the roadway and entered the ditch on the right side of the road. Shortly after Lampereur's car entered the ditch, a van came along and took the same slippery

path. The van's front end was in the ditch and the rear end remained on the shoulder.

¶3 Lampereur's passengers tried to push her car out of the ditch but could not manage it. A 4x4 vehicle came upon the scene and offered to tow Lampereur's car from the ditch. A strap was attached to Lampereur's car; Lampereur sat in her car to operate the controls and the car was towed from the ditch. The driver of the 4x4 vehicle was never identified. We will refer to this driver as the tow operator.

¶4 Brennan was a passenger in a car driven by her husband, Thomas M. Brennan. As the Brennans' car approached the curve where Lampereur's car had entered the ditch, the Brennans observed vehicles and pedestrians on or near the roadway. Thomas steered to the right and the car went into the same ditch. The Brennans' car hit a tree and Peggy Brennan was injured.

¶5 The jury determined that Lampereur, Thomas Brennan, the tow operator and Lampereur's three passengers were negligent in causing injury to Brennan. The percentage of negligence assigned was 50%, 20%, 15% and 5% each, respectively. The tow operator was found to be Lampereur's servant. On motions after verdict, the trial court changed the jury's answer regarding the master-servant relationship between Lampereur and the tow operator, concluding that there was not credible evidence to support the jury's finding.

¶6 Many of the issues in this appeal hinge on Brennan's argument that the jury's finding should be reinstated.[1] Under § 805.14(1), STATS., a motion to change a jury's answer may not be granted "unless the [trial] court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party." When there is any credible evidence to support a jury's verdict, even if there is other contradictory and more convincing evidence, the verdict must stand. *See* ***Weiss v. United Fire & Cas. Co.***, 197 Wis.2d 365, 390, 541 N.W.2d 753, 761-62 (1995).

¶7 This same standard of review applies both to the trial court and to the appellate court. *See* ***id.*** at 388-89, 541 N.W.2d at 761. However, the trial court "is better positioned to decide the weight and relevancy of the testimony." ***Id.*** at 388, 541 N.W.2d at 761. For that reason, we must give substantial deference to the trial court's assessment of the evidence. *See* ***id.*** at 389, 541 N.W.2d at 761.

¶8 Lampereur testified that the tow operator offered to pull her car from the ditch. The passenger in the 4x4 hooked up the towing strap to Lampereur's car. The passenger stood in the road and gave Lampereur the go ahead sign. As soon as the car was out of the ditch, the passenger unhooked the tow strap and the 4x4 was on its way. Lampereur did not tell the tow operator how to go about

[1] If the negligence of the tow operator is imputed to Lampereur, an issue exists whether the imputed negligence is counted toward making Lampereur jointly and severally liable under § 895.045(1), STATS. If Lampereur is jointly and severally liable for the damages, issues exist of whether the offer of settlement for an amount less than the jury's award was sufficient under § 807.01, STATS., to permit prejudgment interest and double costs, and whether State Farm's limit of liability is twice the $100,000 limit in Lampereur's policy because two separate vehicles were used by Lampereur.

towing her car out of the ditch and she had no knowledge of how to accomplish that result.

¶9 Lampereur's testimony was the only evidence bearing on the question of whether the tow operator was her servant. It is not enough to establish the element of control or right to control essential to the creation of the master-servant relationship. That Lampereur could have refused the offer of help or conditioned it on adequate warning does not create the right to control the towing operation once the service is underway.[2] The service provided took about one minute. The tow operator was a Good Samaritan, and it was a volunteer situation. The trial court recognized this as it expressed misgivings in submitting the master-servant relationship to the jury in the first place. We affirm the trial court's change of answer.

¶10 The next issue raised by Brennan is whether Lampereur's State Farm policy covers the negligence attributed to passengers of Lampereur's car.[3] Before reaching that question, it is appropriate to consider State Farm's cross-appeal with respect to the negligence of the passengers. State Farm argues that there is no credible evidence to support the jury's verdict that Lampereur's passengers were negligent. If Brennan's claim that the passengers were negligent is based only on a duty to warn approaching traffic of the potentially hazardous situation, we would agree with State Farm that the passengers could not be found negligent. *See* ***McNeese v. Pier***, 174 Wis.2d 624, 632, 497 N.W.2d 124, 127 (1993) (generally a person does not breach a duty of exercising reasonable care simply by being

[2] At best these factors provided justification to find Lampereur negligent.

[3] We need not address those issues dependent on the existence of a master-servant relationship between Lampereur and the tow operator. *See supra* note 1.

present at the scene of an accident and has no duty to protect others from hazardous situations).[4]

¶11 However, an additional theory of passenger negligence was that the passengers were in the roadway and the accident occurred as a result of Thomas's evasive action.[5] The Brennans testified that there were people on or near the road. Brennan indicated that in the "split second" before the accident, she saw cars and people moving to her left in the roadway and she worried that their car would hit these people if they did not swerve. Thomas also testified that as they came around the blind curve, he saw cars, people and movement in the roadway. He explained that the road and ditches were narrow, so the cars and people had to be on the road. In his cross-examination, Thomas was adamant that he saw people in the road. He steered to the right to avoid hitting the cars and people.

¶12 State Farm argues that the passengers' testimony establishes that they were standing in the ditch when the Brennans' car was spotted and that they only ran across the road when an emergency presented itself in the form of a car

[4] The jury was instructed that: "Persons who block a highway have a duty to provide an efficient warning to users of the highway approaching the scene." Lampereur's passengers were not persons who blocked a highway and had no independent duty to warn.

[5] The amended complaint alleged that Lampereur's passengers were negligent while using Lampereur's vehicle with permission by failing to provide warning of the towing operation. However, the jury was instructed on a pedestrian's duty to yield the right of way to cars when the pedestrian crosses a roadway at a point other than a marked or unmarked crosswalk. The jury was also instructed that a pedestrian crossing a roadway may be confronted by an emergency and may not be negligent if the pedestrian is compelled to act instantly to avoid collision and is without fault in creating the emergency. The special verdict asked whether each of the passengers was negligent "for being in the roadway at or about the time of the accident." The complaint is deemed amended to conform to the proof at trial. *See* § 802.09(2), STATS.

driving too fast to negotiate the curve.[6] Whether or not the passengers were in the ditch, as they testified, or in the roadway, as the Brennans testified, was a matter for the jury to determine as the ultimate arbiter of credibility. *See* ***O'Connell v. Schrader***, 145 Wis.2d 554, 557, 427 N.W.2d 152, 153 (Ct. App. 1988). There was credible evidence from which the jury could conclude that Lampereur's passengers were positioned in the roadway, that their position contributed to the emergency which hastened them to run across the road, and that Thomas Brennan was forced to take evasive action due to their position and flight.

¶13 State Farm contends that the passengers' negligence was not a substantial factor causing Brennan's injuries because Thomas would have had to swerve to the right to avoid hitting the disabled van. The jury could infer from the evidence that the presence of people on the roadway was a factor in Thomas's decision to take evasive action. We must adhere to the inferences drawn by the jury in determining causation. *See* ***Fondell v. Lucky Stores, Inc.***, 85 Wis.2d 220, 227, 270 N.W.2d 205, 210 (1978).

¶14 Finally, State Farm claims that the verdict is inconsistent because Lampereur's passengers were found negligent but the unnamed pedestrians (who exited from the disabled van) were not. But there was a difference in the evidence of the conduct of the unnamed pedestrians and those of Lampereur's passengers.

[6] A contrary inference arises from the passengers' testimony as well. The passengers acknowledged that they followed Lampereur's car as it was towed from the ditch, albeit only to a certain point, and that they intended to get into the car to be on their way home. The passengers ran when they saw the Brennans' car. Also to be considered was the relative speed in which the passengers reached the opposite side of the road. The jury could infer that the passengers approached the roadway with Lampereur's vehicle and that the passengers knew they were in a dangerous place in the roadway when they started to run across the road. Where more than one inference can be drawn from the evidence, we must accept the inference drawn by the jury. *See* ***Richards v. Mendivil***, 200 Wis.2d 665, 671, 548 N.W.2d 85, 88 (Ct. App. 1996).

Lampereur's passengers were in proximity of the car being towed to the road. They acknowledged that they ran across the road. Other than Thomas's testimony that he thought he saw six or seven people in the roadway, there was no evidence that the unnamed pedestrians also engaged in movement on the roadway. The verdict was not inconsistent based on the lack of clarity with respect to the conduct of the unidentified pedestrians. We reject State Farm's request for a new trial on liability.

¶15 We next consider whether State Farm owes coverage to Lampereur's passengers who were each found to be 5% negligent. The State Farm policy defines an insured person as any other "person while using such a car if its use is within the scope of consent." The trial court held that the passengers' presence on or flight across the road was "so divorced from their prior occupation of that vehicle" so as to not constitute continuing use of Lampereur's car. Whether coverage exists is a question of law which this court decides de novo. *See* ***Kreuser v. Heritage Mut. Ins. Co.***, 158 Wis.2d 166, 171, 461 N.W.2d 806, 808 (Ct. App. 1990).

¶16 The term "using" in an automobile insurance policy is broad and comprehensive and includes conduct which is reasonably consistent with the inherent nature or use of the vehicle. *See* ***Garcia v. Regent Ins. Co.***, 167 Wis.2d 287, 294-95, 481 N.W.2d 660, 663-64 (Ct. App. 1992). The appropriate test here for determining if the former occupants of the vehicle became mere pedestrians is whether they were "vehicle oriented" or "highway oriented" at the time of the accident. *See* ***Kreuser***, 158 Wis.2d at 173, 461 N.W.2d at 808. The vehicle-oriented test considers the nature of the act engaged in at the time of the accident, the intent of the person whose status as a user or pedestrian must be determined, and

whether that person was within the reasonable geographical perimeter of the vehicle. *See* ***id.***

¶17 Lampereur's passengers exited the car after it went into the ditch. They attempted to push it out. When the towing was underway, the passengers were waiting to reenter the car. They were in close proximity to the car as they followed it out of the ditch. This was not an instance where the passengers were walking on the road after having abandoned the car. They intended to reenter the car and continue the drive home.[7] We conclude that the passengers remained vehicle oriented. The necessity to exit Lampereur's car and wait on the road was within the inherent use of the vehicle. State Farm owes coverage for the negligence assigned to each of the three passengers.

¶18 Finally, Brennan argues that State Farm owes coverage to the tow operator because he was using Lampereur's car as he pulled it from the ditch. State Farm contends that Brennan raises this issue for the first time on appeal because it was not raised in her motion after verdict. Brennan concedes that she did not raise the issue in her postverdict motion but that it was an issue argued at trial. Although the issue was discussed at trial, Brennan never moved the trial court to enter judgment against State Farm for coverage of the tow operator as an independent user of Lampereur's car. The issue is waived.

¶19 Even if the issue was not raised, Brennan's argument is underdeveloped. We will not consider an argument that is inadequately briefed. *See* ***Fryer v. Conant***, 159 Wis.2d 739, 746 n.4, 465 N.W.2d 517, 520 (Ct. App.

[7] It was only after Brennan's accident that Lampereur and her passengers realized that Lampereur's car was damaged and could not be driven home.

1990). Further, inasmuch as the tow operator had completed the tow operation when the Brennans' car struck the tree, the tow operator was no longer using Lampereur's car as to give rise to coverage.

¶20 On remand, the trial court shall enter a judgment consistent with our decision that State Farm provide coverage to Lampereur's passengers. No costs to any party on the appeal. The cross-respondents may recover their costs on the cross-appeal.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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