COURT OF APPEALS
DECISION
DATED AND FILED

November 22, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-2511

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

DAVID J. BERG, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF CHRISTOPHER P. BERG, DECEASED, AND KATHLEEN BERG,

PLAINTIFFS-APPELLANTS,

V.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AMERICAN FAMILY MUTUAL INSURANCE COMPANY, AND PATRICIA A. RAILING,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

¶1 ROGGENSACK, J. David Berg, individually and as special administrator of his son's estate, appeals the circuit court judgment dismissing this action after the jury found that the driver of the vehicle which struck and killed his son was not negligent. Because there is credible evidence to support the jury's verdict; the circuit did not erroneously exercise its discretion in its evidentiary rulings or in the giving of the instruction on emergencies, and because we conclude that the real issue was fully tried, we affirm the judgment of the circuit court.

BACKGROUND

¶2 This case arises out of the tragic death of Christopher Berg, a seven-year-old boy, who was struck by a vehicle as he attempted to cross Mulberry Street in Lake Mills on his way to school. The truck which struck him was driven by Patricia Railing, who was also on her way to school. Numerous witnesses testified at trial, several of whom were eyewitnesses to the accident.

¶3 Patricia told the jury that she was traveling northbound on Mulberry, approaching Fargo Street when she saw four school children run into Mulberry. Two went all the way across and two returned to a large group of children standing on the northeast corner of Mulberry and Fargo, waiting to cross. When she saw the children run into the street, she took her foot off the accelerator and applied her brakes, coming almost to a stop. As she continued into the intersection of Mulberry and Fargo, all the children were waiting on the curb. She believed it was safe to proceed because she thought the children were looking at her vehicle and would remain on the curb until she passed. She was wrong. Christopher stepped directly into her path. Her vehicle struck him, and he died from the injuries he sustained.

¶4 Mary Ellen Vogt, one of the eyewitnesses, saw the accident from her front porch, which gave her a clear view of it. She said she saw Christopher dart out into the path of the truck and the truck immediately strike him. It was her opinion that there was no way the truck could have avoided hitting him. She was also sure that Christopher was not struck while he was standing with the group of children who had remained on the curb.

¶5 Another witness, Randy Bollig, testified that Patricia slowed down as she approached the intersection of Mulberry and Fargo, where the children were standing. He observed Patricia's truck from a vehicle which was traveling southbound on Mulberry. Tobias Roloff, who was the driver of the vehicle in which Randy was a passenger, testified that he noticed about a half dozen children standing on the east side of Mulberry at its intersection with Fargo. He saw Patricia's truck slow as it approached the intersection where the children were standing. He said that four of the children attempted to run across Mulberry; two made it safely and two ran back to the east side of the street, where they rejoined the group of children standing on that northeast corner. He said that before the impact, Patricia's vehicle was in the appropriate lane of travel moving in a straight line through the intersection.

¶6 Jennifer Robbins, who was a passenger in Patricia's truck, testified that when some of the children from the east side of Mulberry ran into the street, Patricia "almost came to a stop." She also testified that before proceeding through the intersection, "We kind of communicated between each other. The group, the group of kids looked at us, and we seen them turn their heads and looked at us; and then they sort of backed up." She also said that just as the truck began to pass the children, she saw Christopher step off the curb directly in the truck's path,

about one foot from the front of it. She viewed this from the passenger seat of the truck. Christopher was struck by the right front of the truck.

¶7 The jury returned a verdict finding that Patricia was not negligent. In motions after verdict, the circuit court sustained that finding, and Christopher's father and his estate appeal.

DISCUSSION

Standard of Review.

¶8 Whether there is any credible evidence to support a jury's verdict is a question of law for this court. ***D'Huyvetter v. A.O. Smith Harvestore Prods.***, 164 Wis. 2d 306, 320, 475 N.W.2d 587, 592 (Ct. App. 1991). Additionally, whether there are undisputed facts which would support a finding that Patricia was causally negligent with respect to lookout, as a matter of law, is also a question of law for this court. ***Conery v. Tackmaier***, 34 Wis. 2d 511, 515, 149 N.W.2d 575, 577 (1967).

¶9 We examine the circuit court's decision about whether to admit or deny the admission of evidence under the erroneous exercise of discretion standard. ***State v. Edmunds***, 229 Wis. 2d 67, 74, 598 N.W.2d 290, 294 (Ct. App. 1999). We will uphold a circuit court's discretionary decision if it examined the relevant facts of record, applied the correct legal standard and reached a conclusion that a reasonable judge could reach. ***Id.*** (citation omitted). The specific jury instructions that are given in a case is also a discretionary decision. However, we review *de novo* whether those instructions correctly stated the law that is applicable to the questions presented. ***State v. McCoy***, 143 Wis. 2d 274, 289, 421 N.W.2d 107, 112 (1988); ***Ansani v. Cascade Mountain, Inc.***, 223

Wis. 2d 39, 45, 588 N.W.2d 321, 324 (Ct. App. 1998). And finally, when a request for a new trial in the interest of justice is made by an appellant, we review the record of the circuit court *de novo* to determine whether the real controversy has been tried. ***State v. Johnson***, 149 Wis. 2d 418, 429, 439 N.W.2d 122, 126 (1989).

Negligence.

¶10 The Bergs contend the jury's failure to find Patricia causally negligent in this tragic accident should have been reversed by the circuit court because Patricia was causally negligent, as a matter of law, in regard to lookout. They rely heavily on ***Conery***; ***Lisowski v. Milwaukee Auto. Mut. Ins. Co.***, 17 Wis. 2d 499, 117 N.W.2d 666 (1962); ***Brown v. Travelers Indem. Co.***, 251 Wis. 188, 28 N.W.2d 306 (1947); and ***Binsfeld v. Curran***, 22 Wis. 2d 610, 126 N.W.2d 509 (1964).

¶11 We are not persuaded by the cases cited when they are applied to the facts in this record. For example, in all of those cases, with the exception of ***Binsfeld***, which did not conclude that the defendant was negligent as a matter of law, the defendant did not see the child or the object that his vehicle struck prior to the collision. The courts then reasoned that because the children or animals were within the area where lookout was required, to not see them at all, or until it was too late to avoid them, was sufficient evidence of a failure to maintain a proper lookout. ***Conery***, 34 Wis. 2d at 514, 149 N.W.2d at 577; ***Lisowski***, 17 Wis. 2d at 504-05, 117 N.W.2d at 669; ***Brown***, 251 Wis. at 192-93, 28 N.W.2d at 308. Additionally, while it is true that the Wisconsin Supreme Court has held that a driver of a motor vehicle who approaches a place where children are known to be

present is chargeable with the knowledge that children of tender years do not always exercise mature judgment, this knowledge does not place the driver

> under a higher standard or degree of care approaching absolute liability but rather, when children are present or likely to come into his course of travel, he must exert greater effort in respect to lookout, speed, and management and control of his car to fulfill the duty of exercising ordinary care under such circumstances.

Binsfeld, 22 Wis. 2d at 612, 126 N.W.2d at 511.

¶12 Here, there was ample testimony that Patricia did see the group of children standing by the side of the road; she did see two of the children dart all the way across Mulberry, and she saw two children return to the group at the northeast corner of the intersection. After she made eye contact with the group of children and believed they would remain at the side of the road, she passed. Because she actually saw the children, it cannot be concluded, as a matter of law, that she was negligent in regard to lookout. Rather, negligence turned on whether Patricia exercised proper management and control of her vehicle, just as negligence did in ***Binsfeld.***

¶13 In regard to management and control, there was conflicting testimony. Patricia said she reduced her speed when she saw the children, until she believed they would remain on the curb until she had passed. The reduction in her speed was confirmed by other eyewitnesses. Additionally, the jury heard testimony that Christopher darted out in front of Patricia's truck when it was approximately one foot from him and that her estimated speed was no more than ten miles per hour at that time. However, the jury also heard testimony which estimated her speed at twenty-eight miles per hour. Therefore, negligence was based on which view of the facts the jury believed. And because there was

credible evidence to support the jury's finding that Patricia was not negligent, we cannot overturn its answer to the question which inquired into whether she was negligent.

Evidentiary Rulings.

¶14 The Bergs next assert that the circuit court erred in permitting Sergeant Kathleen Hansen to testify about statements made by witnesses who were very young children, namely, Jessica Widish, Matthew Montony and Grayson Walker. They also maintain the circuit court erred by permitting lay witnesses to testify that, in their opinion, the accident was unavoidable. However, our review of the circuit court's evidentiary decisions shows no error.

1. Hearsay Statements.

¶15 At trial Sergeant Hansen testified about statements made by several children who were in the group with Christopher that morning. She interviewed the first witness about two hours after the accident, but she did not transcribe her notes until five days later. The Bergs maintain those statements are inadmissible hearsay; and therefore, Hansen should not have been permitted to relate them to the jury.

¶16 Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. WIS. STAT. § 908.01(3) (1997-98).[1] Generally, it is not admissible. WIS. STAT. § 908.02. However, there are numerous exceptions to the hearsay rule for statements that would appear to fit within the definition of

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

hearsay. For example, a statement which relates to a startling event made while the declarant was still under the stress or the excitement caused by the event may be admissible, due to the excited utterance exception. WIS. STAT. § 908.03(2). There is also a catch-all exception which includes those statements which arguably fit within the definition of hearsay, but which are reliable for numerous other reasons and are therefore properly admitted into evidence. Section § 908.03(24).

¶17 Here, the circuit court determined that the statements of the children to which evidentiary objections were made were admissible under subsec. (24) because they were "true and trustworthy and reliable." It found they did not have "the indicia in any way of unreliable evidence." The court reasoned that the children were not trying to make up an account of the events which did not fit their recollections because the statements were taken shortly after the accident and some of their statements showed the speaker in a poor light. In deciding to admit their statements, the circuit court carefully reviewed the objections of counsel and applied the correct standard of law while reaching a decision that a reasonable judge could reach. Therefore, we conclude no erroneous exercise of discretion occurred.

2. Lay opinions.

¶18 At trial, Vogt and Bollig testified that in their opinions Patricia could not have stopped in time to avoid hitting Christopher, due to the shortness of time between when Christopher darted out in front of Patricia's truck and the point of impact. The Bergs object to this testimony, maintaining that the witnesses lacked the requisite qualification and foundation to give opinion testimony. Patricia contends that WIS. STAT. § 907.01 permits a lay witness to give his or her opinion. We agree with Patricia.

¶19 A lay witness is not necessarily prohibited from giving his or her opinion in regard to an event. ***Lievrouw v. Roth***, 157 Wis. 2d 332, 351, 459 N.W.2d 850, 856-57 (Ct. App. 1990). A witness may do so if his answer is rationally based on his own perceptions and if it is helpful to the jury's determination of a fact in issue. ***Quinlan v. Coombs***, 105 Wis. 2d 330, 339, 314 N.W.2d 125, 130 (Ct. App. 1981).

¶20 Here, the testimony of Vogt and Bollig met those criteria. The testimony was helpful to determining how close in time were Christopher's step from the curb and his impact with the truck. It was also helpful to an understanding of how fast the truck was traveling at the time of the accident. Vogt and Bollig's statements were based on their perceptions of facts each had individually observed. Therefore, we conclude that the circuit court did not erroneously exercise its discretion in permitting this testimony.

Jury Instruction.

¶21 The Bergs also maintain that the circuit court erred in giving the emergency instruction because Patricia never took any action or inaction in regard to an emergency. They base this argument on Patricia's statement that she didn't see Christopher at the point of impact, but instead believed he had remained with the group of children at the curb as she drove by. The Bergs disagree and rely on ***Menge v. State Farm Mut. Auto. Ins. Co.***, 41 Wis. 2d 578, 164 N.W.2d 495 (1969). We conclude ***Menge*** and the more recent decision in ***Totsky v. Riteway Bus Serv., Inc.***, 2000 WI 29, 233 Wis. 2d 371, 607 N.W.2d 637, are controlling.

¶22 Generally, a circuit court has wide discretion in deciding how to phrase the instructions given to a jury. ***State v. Lenarchick***, 74 Wis. 2d 425, 455, 247 N.W.2d 80, 96 (1976). If the instructions adequately cover the applicable law

and the facts presented to the jury demonstrate they are warranted, there is no erroneous exercise of discretion. ***D'Huyvetter***, 164 Wis. 2d at 334, 475 N.W.2d at 597. ***Menge*** sets forth the framework necessary to support giving the instruction on emergencies. It states that a party is entitled to the instruction if the following three criteria are met:

> (1) The party seeking its benefits must be free from the negligence which contributed to the creation of the emergency;
>
> (2) the time element in which action is required must be short enough to preclude the deliberate and intelligent choice of action; and
>
> (3) the element of negligence inquired into must concern management and control.

Menge, 41 Wis. 2d at 582-83, 164 N.W.2d at 498 (citations omitted).

¶23 Here, the Bergs would have us examine only the second or two before the impact between Christopher and Patricia's vehicle. However, that is not necessarily the controlling time frame. Patricia did see several of the children run into the street, and she saw some of those children return to the curb. In response, she slowed down until she believed that the children who remained on the curb saw her and would remain on the curb until she had passed. Essentially, she concluded the emergency which caused her to slow had passed. But she was wrong; it had not passed. Apparently, Christopher was still intent on immediately joining those children who had successfully crossed the street. Therefore, the question the jury was faced with was whether Patricia reasonably could have managed and controlled her vehicle in a way that would have avoided an accident if another child ran into the street. *See* ***Totsky***, 2000 WI 29 at ¶42.

¶24 The jury heard testimony that when the collision occurred, she had begun to speed up again. However, it also heard testimony that she had made eye contact with the group of children and because Christopher darted out into the street when her truck was only a foot or two from his body, there was no time for her to react and avoid the collision. Therefore, the accident arguably involved management and control, and it arose from a situation arguably not of Patricia's making. When the circuit court gave the instruction, it properly informed the jury that the emergency doctrine does not apply to any person whose negligence created the emergency in whole or in part. Accordingly, we conclude the testimony before the jury permitted the circuit court to give the instruction and no erroneous exercise of its discretion occurred.

New Trial.

¶25 As a last argument, the Bergs contend that they should be afforded a new trial in the interest of justice. We have the power to order a new trial if we determine that the real controversy has not been fully tried, or when a jury has answered questions in a manner that shows prejudice or a perverse verdict. ***Willenkamp v. Keeshin Transp. Sys., Inc.***, 23 Wis. 2d 523, 530, 127 N.W.2d 804, 808 (1964).

¶26 Here, the parties presented sharply conflicting testimony on the issue of negligence. The witnesses provided by the Bergs, particularly their expert witness, Dr. Fox, clearly thought Patricia was negligent. However, the many witnesses to the accident and other experts provided by the defense asserted a view of the events leading up to the accident that supported the jury's verdict. Therefore, we conclude that the matter was fully tried, and we will therefore not grant a new trial. Accordingly, we affirm the judgment of the circuit court.

CONCLUSION

¶27 In conclusion, because there is credible evidence to support the jury's verdict, the circuit did not erroneously exercise its discretion in its evidentiary rulings or in the giving of the instruction on emergencies; and because we conclude that the real issue was fully tried, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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