COURT OF APPEALS
DECISION
DATED AND FILED

October 17, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Nos. 99-2815
99-2816

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

99-2815

JOWANA COLEMAN,

PLAINTIFF-APPELLANT,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF,

V.

ALLSTATE INSURANCE COMPANY AND CARLTON THOMPSON, JR.,

DEFENDANTS-RESPONDENTS.

MARILYN WILSON,

PLAINTIFF,

V.

CARLTON THOMPSON, JR., ALLSTATE INSURANCE CO. AND JOWANA COLEMAN,

DEFENDANTS.

99-2816

MARILYN WILSON,

PLAINTIFF-APPELLANT,

V.

CARLTON THOMPSON, JR. AND JOWANA COLEMAN,

DEFENDANTS-RESPONDENTS.

JOWANA COLEMAN,

PLAINTIFF,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF,

V.

ALLSTATE INSURANCE COMPANY AND CARLTON THOMPSON, JR.,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

APPEAL from judgments of the circuit court for Milwaukee County: VICTOR MANIAN, Judge.[1] *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM.[2] Jowana Coleman appeals from the trial court judgment dismissing her complaint against Carlton Thompson, Jr., and his insurer, Allstate Insurance Company. Her appeal also brings before this court the August 5, 1999 order denying her motion for a new trial. *See* WIS. STAT. § 809.10(4) (1997-98).[3] Marilyn Wilson appeals from the trial court judgments dismissing her complaint against Coleman and Thompson. Her appeal also brings before this court the September 30, 1999 order denying her motion for a new trial in the interest of justice. *See* WIS. STAT. § 809.10(4). We affirm.

BACKGROUND

¶2 On August 2, 1996, motor vehicles driven by Coleman and Thompson collided at an intersection. The impact propelled Thompson's vehicle

[1] Judge Manian presided over various portions of this case; Reserve Judge David V. Jennings, Jr., presided over certain other portions in Judge Manian's absence.

[2] Since the parties, facts, and issues in 99-2815 and 99-2816 are related, and the underlying cases were consolidated at the trial court level, we have consolidated the cases on appeal.

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

into Wilson's vehicle, which was stopped for the traffic signal. Coleman and her insurer, American Family Mutual Insurance Company, sued Thompson and his insurer, Allstate. Coleman contended that Thompson's negligent operation of his vehicle caused the collision with her vehicle. She alleged that she "was permanently and seriously injured, suffered and will suffer great pain of body and mind, was and will be obligated to expend monies for medical care and attendance" and that her "ability to enjoy life was and will be substantially impaired" as a proximate result of Thompson's negligence.

¶3 Wilson sued Thompson and Coleman, contending that their combined negligent behavior caused Thompson's vehicle to strike her vehicle. She alleged that she "lost wages, incurred medical expenses and permanent injuries and damage to her property, and suffered pain" as a result of the collision.[4]

¶4 Based on the parties' stipulation, the trial court consolidated the cases. Wilson's attorney then requested that Wilson's damages-only claim be tried separately, stating that Wilson had "no interest in staying off work to sit thru [sic] a lengthy trial involving liability issues and [Coleman's] damages," and that Wilson was not concerned with "which driver has what percentage of negligence attributed to her [or him], nor even if one driver is totally exonerated." At a pretrial conference, the trial court granted Wilson's motion for a bifurcated trial.

¶5 Following the trial on liability and Coleman's damages, in which Coleman and Thompson each claimed to have had a green light at the time of their collision, the jury found both Coleman and Thompson negligent in the operation

[4] Wilson subsequently amended her complaint, alleging that her insurer, State Farm Mutual Auto Insurance Company, "paid medical benefits to [her] as a result of [the] action and is subrogated to the amount of any and all such payments."

of their vehicles, but found that their negligence did not cause the accident. Coleman moved for a new trial pursuant to WIS. STAT. § 805.15(1).[5] In the alternative, Coleman moved to change the jury's answers concerning liability "to comport with the evidence." After a hearing, the trial court denied the motions and dismissed Coleman's complaint on its merits.

¶6 Thompson and Coleman then moved for dismissal of Wilson's suit against them, contending that because the jury had concluded they were not causally negligent and the trial court had already entered judgment on the verdict, Wilson could not recover damages from either one of them. Following a hearing, the trial court dismissed Wilson's suit. Wilson then moved for a new trial in the interest of justice. After a hearing, the trial court denied the motion.

DISCUSSION

A. Coleman's Appeal

¶7 Coleman contends that the jury's special verdicts were perverse and inconsistent and, therefore, that the trial court erroneously exercised discretion in upholding them. She claims that the jury's answers regarding negligence and causation "cannot be reconciled with the facts of the case" and are "plainly illogical." Contending that the evidence had to point to causal negligence of at least one of the drivers, Coleman declares: "It is clear that the jury simply ignored its duty and rendered an unfair and illogical verdict."

[5] WISCONSIN STAT. § 805.15(1) states, in relevant part: "A party may 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 evidence, or because of excessive or inadequate damages, or because of newly-discovered evidence, or in the interest of justice."

¶8 Perverseness and inconsistency are two distinct concepts. As our supreme court has explained, "[a] verdict is perverse when the jury clearly refuses to follow the direction or instruction of the trial court upon a point of law, or where the verdict reflects highly emotional, inflammatory or immaterial considerations, or an obvious prejudgment with no attempt to be fair." ***Redepenning v. Dore***, 56 Wis. 2d 129, 134, 201 N.W.2d 580 (1972) (footnote omitted). An inconsistent verdict is one in which the jury's answers are "logically repugnant to one another." *See* ***Fondell v. Lucky Stores, Inc.***, 85 Wis. 2d 220, 228, 270 N.W.2d 205 (1978).

¶9 As Thompson correctly notes:

> [The jury received WIS JI—CIVIL 200], which clearly sets forth that the burden of proof on the liability questions is on the party contending that the answer to the question must be "yes[."] That burden is to satisfy the jury to a reasonable certainty by the greater weight of the credible evidence that "yes" should be the answer. That instruction also states that the party having the burden of proof has not met their [sic] burden if the jury has to guess what the answer should be after discussing all evidence related to that particular question.

Thus, Thompson argues:

> The fact that the jury answered ["no" to] both questions 2 and 4 on the verdict [asking whether either his or Coleman's negligence was a cause of the accident] is a clear indication that they did follow the direction and instruction of the trial court as to the law to be applied to the evidence. They were not to guess who had the red light. The parties had not sustained their burden of proof.

Thompson further argues that the verdict answers were "the only finding that the jury could have made if it could not determine who had a red light and who had a green light." He notes that negligence and causation are two distinct concepts and that the jury also received a lookout instruction. He then posits that "[t]he jury could have concluded that both drivers were negligent as to lookout but that this

was not a cause of the collision because the accident was going to occur without regard to lookout if one of the parties runs the red light." In reply, Coleman claims: "If both drivers were negligent as to lookout, that negligence, at least for one of the drivers[,] must have been a ***cause*** of the subject collision." Coleman, however, cites no legal authority specifically supporting this assertion.

¶10 We presume that a jury follows its instructions. *See* ***Frayer v. Lovell,*** 190 Wis. 2d 794, 812, 529 N.W.2d 236 (Ct. App. 1995). Coleman has not overcome this presumption. Additionally, Coleman has failed to show that the verdict "reflects highly emotional, inflammatory or immaterial considerations, or an obvious prejudgment with no attempt to be fair." *See* ***Redepenning***, 56 Wis. 2d at 134. Accordingly, we conclude that the verdict was not perverse. And, since our supreme court has acknowledged that "there is nothing inconsistent or irregular in the form of a verdict wherein the parties are found negligent, but such negligence is not causal of the injuries," ***Fondell***, 85 Wis. 2d at 228, we also conclude that the verdict was not inconsistent.

¶11 In ***Heideman v. American Family Insurance Group***, 163 Wis. 2d 847, 473 N.W.2d 14 (Ct. App. 1991), we explained:

> Our standard of review of a jury verdict is that the verdict will be sustained if there is any credible evidence to support it. Where more than one reasonable inference may be drawn from the evidence adduced at trial, we must accept the inference drawn by the jury. Our duty is to search for credible evidence to sustain the jury's verdict, and we may not search the record for evidence to sustain a verdict the jury could have reached but did not.

Id. at 863-64 (citations omitted).

¶12 On direct examination, Coleman testified that she had a green light as she entered the intersection at a speed of between twenty-five and thirty miles

per hour, that she did not see Thompson's vehicle until she entered the intersection, and that she had no time to swerve or honk her horn prior to the collision. On cross-examination, she testified:

> Q: Just before you entered the intersection … is there anything that blocks your view to the left?
>
> A: No.
>
> Q: So just prior to entering the intersection, if you were to look to your left, you would be able to see the westbound traffic that's coming towards you, correct?
>
> A: Correct.
>
> Q: But you did not see Mr. Thompson's vehicle until it hit you, correct?
>
> A: Correct.
>
> Q: And you did not take any evasive action to steer away or avoid his vehicle, right?
>
> A: No.

¶13 On direct examination, Wilson testified that it did not appear to her as though either Coleman or Thompson was driving at an excessive rate of speed. When asked what happened to Thompson's vehicle after it collided with Coleman's vehicle, she testified: "His vehicle went up in the air. It was upside down, fell on top of my vehicle, so it bounced, it hit the ground and hit my vehicle a second time." On cross-examination, Wilson testified that while her vehicle was stopped, she saw the vehicles of both Coleman and Thompson approaching the intersection, knew they were going to collide before they actually did, and then witnessed their collision. She further testified:

> Q: When you're stopped at your light and you comprehend these vehicles are going to collide, do you hit your horn or in any way try to alert either of the drivers?
>
> A: It was happening too fast.
>
> Q: Okay. You just watched the two vehicles hit?
>
> A: Yes.

Q: While you were stopped at the light, at your red light, did you see any vehicles pass through the intersect[i]on prior to these two vehicles coming to the intersection?

A: No.

Q: Did your vehicle move as a result of being struck by the Thompson vehicle?

A: I have no idea. When the vehicle was in the air and coming at my car, I thought it was coming through the windshield, and I was in fear, I was afraid. I just saw a car coming at me and there was nothing I could do.

¶14 On adverse examination, Thompson testified that he first noticed that his traffic light was green while he was crossing the bridge less than one block away from the intersection. He also testified that at the time of his collision with Coleman, he was traveling between twenty-five and thirty miles per hour. Additionally, he testified:

Q: Your recollection of the accident was that you had a car two lengths in front of you, true?

A: Correct.

Q: That car passed into and through the intersection?

A: Correct.

Q: In that period of time, between the time that that car went through the intersect[i]on, it's your testimony that Ms. Coleman proceeded into the intersection?

A: Correct. That's what I saw. I saw her a few seconds before. Right after the car passed through was when I saw her coming.

Q: Okay. And so it would have been a split second, a few seconds at the most?

A: I saw her in enough time to take evasive action.

Q: And the evasive action you took, you applied your brakes?

A: Correct.

Q: You turned your wheel to the left side?

A: Correct.

Q: You didn't have time to honk your horn, did you?

A: No, I didn't.

> ….
>
> Q: And just prior to the accident, you have no estimation concerning Ms. Coleman's speed, do you?
>
> A: No, I don't.

On redirect examination, Thompson testified that he looked at his traffic light for a second time prior to actually entering the intersection, when he was about a car's length from the crosswalk, and the light was green. He further testified:

> Q: Either of these times that you looked at the light that governed your traffic, was there anything blocking your view of your light?
>
> A: No, there wasn't.
>
> Q: Did the sun get in your eyes or affect your field of vision?
>
> A: Not at all.
>
> ….
>
> Q: There was some questions [sic] about you wearing glasses. Do you wear glasses to drive?
>
> A: No, I don't, not at all.
>
> ….
>
> Q: How much time do you estimate it took you to cover from when you first saw your light to the second time you saw the light, that half block or so?
>
> A: The bridge is fairly short, so it was probably only a few seconds, not really long.
>
> Q: When you entered the intersection, did you see the Coleman vehicle?
>
> ….
>
> A: Yeah.
>
> Q: And what did you do at that time?
>
> A: I just applied the brakes, and the natural reaction was to turn the wheel.

¶15 Clearly, the testimony provides credible evidence to support the jury's special verdict answers; accordingly, we must sustain them. *See* ***Heideman*****,** 163 Wis. 2d at 863.

¶16 Coleman next contends that the trial court's decision to deny her postverdict motion for a new trial, pursuant to WIS. STAT. § 805.15(1), was an erroneous exercise of discretion. She argues that the trial court "failed to provide a decision based on a reasonable consideration of the evidence and failed to lay a proper legal foundation," and she asks us to order a new trial as to liability.

¶17 "The decision whether to grant a new trial is within the trial court's discretion and will not be disturbed absent an erroneous exercise of discretion." ***Douglas-Hanson Co. v. BF Goodrich Co.***, 229 Wis. 2d 132, 150, 598 N.W.2d 262 (Ct. App.), *review granted*, ___ Wis. 2d ___, 604 N.W.2d 570 (1999), *aff'd*, 2000 WI 22, 233 Wis. 2d 276, 607 N.W.2d 621. To sustain the trial court's denial of Coleman's motion for a new trial, we need only to find that the trial court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *See* ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶18 During the hearing on Coleman's postverdict motions, the trial court stated: "Let the record show we had a brief conference in chambers. It was not fruitful; that I indicated, however, to both counsel that I had read the brief [sic], and I must commend both of them on a very thorough, very erudite, and exceptionally well-done brief [sic]." Counsel then made their respective arguments and responded to specific questions asked by the trial court. The trial court ended the hearing with these remarks:

> Well, you've grown hot and cold, as I say. At first blush, it appears in this that the verdict is perverse. At first impression, it appears that the verdict is perverse. I never heard of a case before where they find both drivers negligent but neither causal.
>
> However, I'm confronted with the fact that as brought out as the instructions were given, they did deliberate. They did ask different questions … and they

> could not answer those questions yes. And unfortunately and regretfully, I'm going to have to deny the motion[s], both of them.
>
> Next case. I emphasize regretfully.

Apparently, therefore, the trial court concluded that the jury had determined that the burden of proof had not been met by either Coleman or Thompson. We are satisfied that the trial court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach"; accordingly, we affirm its denial of Coleman's motion for a new trial. *See* ***Loy***, 107 Wis. 2d at 414-15.

B. Wilson's Appeal

¶19 Wilson first contends that the jury verdict is perverse and inconsistent, thus entitling her to a new trial. As noted in our analysis of Coleman's appeal, we have concluded that the verdict was neither perverse nor inconsistent.

¶20 In her brief to this court, however, Wilson, citing the trial court's comments during the hearing on Coleman's postverdict motions, claims that the trial court found the verdict perverse. Wilson has misconstrued the trial court's remarks. Wilson's brief also asserts: "The trial judge found that the verdict was 'incongruous' and thus applied the ruling case law that holds that inconsistency is a red flag signaling perversity." The record does not support Wilson's assertions.[6]

[6] The record reference Wilson provides in support of her claim that the trial court found the verdict "incongruous" is "R. 97 app. 10-13." Record 97 is the transcript of the hearing on Coleman's postverdict motions. The cited pages of Wilson's appendix are actually excerpts from Record 98 (transcript of the hearing in which the trial court decided to dismiss Wilson's suit) and Record 99 (transcript of the hearing in which the trial court denied Wilson's motion for a new trial). Nothing in these excerpts supports Wilson's claim that the trial court found the verdict incongruous or inconsistent.

(continued)

¶21 Wilson next contends that "[t]here is no stipulation wherein [she] consented to the trial proceeding in any manner wherein she was denied the right to participate in voir dire and jury selection." She argues that "[i]t would be ludicrous to assert that [she] consented or agreed to present her case before a jury that was chosen without her participation, which is the situation here, and which was ordered over [her request] to participate in said jury selection."

¶22 Wilson acknowledges that under WIS. STAT. § 807.05, a stipulation is binding when it is "made in writing and subscribed by the party to be bound thereby or the party's attorney." *See* WIS. STAT. § 807.05. Wilson also concedes that the stipulation letter, dated July 9, 1998, and signed by her attorney, meets the statutory criteria for a binding stipulation.

¶23 The stipulation consolidated the trial court cases, and the letter made it clear that one of the purposes of the consolidation was to avoid trying the liability issue twice. Subsequent to the consolidation, Wilson's attorney moved for a separate trial for Wilson's damages-only claim, stating that the liability

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Additionally, Wilson's brief cites ***Fouse v. Persons***, 80 Wis. 2d 390, 259 N.W.2d 92 (1977), as "the ruling case law that holds that inconsistency is a red flag signaling perversity." Wilson is wrong. In ***Fouse***, the supreme court acknowledged:

> [T]he trial court stated its reasons for setting aside the verdict and granting a new trial as follows:
>
> > "[T]he jury failed to follow the Court's instructions in its answers to the damage questions, that the verdict is inconsistent, that the damages awarded are inadequate … and that the verdict is perverse. The Court further concludes that perversity permeates the entire verdict."

Id. at 395. The supreme court went on to note: "Putting together, as the trial court did, the inconsistencies in three of the jury's answers, we find no abuse of discretion in the trial court's finding of perversity." ***Id.*** at 400. Thus, Wilson misstates the holding of ***Fouse***.

We admonish Wilson's appellate counsel for misrepresenting both the trial court's findings and the "ruling case law." *See* SCR 20:3.3(a)(1) (1999) ("A lawyer shall not knowingly … make a false statement of fact or law to a tribunal.").

issues were "unrelated to [Wilson]'s interest." The order granting Wilson's motion was prepared by Wilson's attorney and signed by the trial court on June 21, 1999; it clearly states that Wilson's claim was set for jury trial on September 22, 1999, and that Wilson was to appear as a witness in the liability trial phase of the consolidated action on June 21, 1999. As Thompson correctly notes:

> While [Wilson] is unhappy with the results based upon the jury finding that neither Thompson nor Coleman were causally negligent, she was not denied a right to participate in voir dire and jury selection. She elected not to participate by separating her claim.
>
> ….
>
> … After the separation was ordered …, if Wilson was unhappy, she could have rescinded her request and proceed[ed] with trial as scheduled. Alternatively, she could have petitioned the appellate court at that time, under [WIS. STAT. §§ 808.03(2), 809.50], regarding her preclusion from voir dire and jury selection. She did not do that either. Rather, she herself, through her counsel, prepared the order separating her trial on damages. Now she claims she was denied her right to participate. The facts and the circumstances do not support her claim.

¶24 Thus, the record establishes that Wilson, through her attorney, was directly responsible for her lack of participation in the "selection of the jury which was to and did render a verdict affecting [her] rights." Moreover, we note that Wilson cites no authority for her alleged right to have the same jury empanelled both for the trial on liability and for her damages-only trial. Accordingly, we decline to further consider this argument. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980).

¶25 Next, Wilson contends that "[i]ssue preclusion should not be applied." She appears to be arguing that issue preclusion should not bind her to the jury's liability findings.

¶26 The doctrine of issue preclusion "forecloses relitigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in a prior action and reduced to judgment." *See* ***Jensen v. Milwaukee Mut. Ins. Co.***, 204 Wis. 2d 231, 235, 554 N.W.2d 232 (Ct. App. 1996). Under this doctrine, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *See* ***Montana v. United States***, 440 U.S. 147, 153 (1979). Application of issue preclusion to a particular set of facts presents a question of law which we review independently of the trial court. *See* ***Jensen***, 204 Wis. 2d at 236. Wilson was a party to the cases consolidated for the trial on liability. As a matter of law, issue preclusion does apply to her claim on appeal.

¶27 Finally, Wilson contends that we should grant her a new trial in the interest of justice. She argues that "[t]he unexpected, and incongruous and perverse result that the trial court found to have taken place in this case, should not allow an innocent but injured bystander, to be deprived of her day in court." Once again, however, we note that it was Wilson's own actions, through her attorney, that "deprived [her] of her day in court."

¶28 In our analysis of Coleman's appeal, we discussed our standard of review regarding a trial court's decision whether to grant a new trial; thus, we need not reiterate that standard here. We are convinced that the trial court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach"; thus, the criteria required for this court to sustain the trial court's denial of Wilson's motion for a new trial are satisfied. *See* ***Loy***, 107 Wis. 2d at 414-15. We do note, however, that we have discretionary authority to grant a new trial

pursuant to WIS. STAT. § 752.35.[7] But, as we stated in ***Klink v. Cappelli*****,** 179 Wis. 2d 624, 508 N.W.2d 435 (Ct. App. 1993), "[w]e will not grant a new trial under sec. 752.35 unless we are satisfied that a second trial will produce a different result or the controversy has not been fully tried." ***Id.*** at 635. Wilson has not persuaded us that a new trial would meet the ***Klink*** criteria.

By the Court.—Judgments affirmed.

This opinion will not be published. *See* WIS. STAT. RULE § 809.23(1)(b)5.

[7] WISCONSIN STAT. § 752.35 provides:

> **Discretionary reversal.** In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.