COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-3250

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

DALE G. EISNER AND LORI A. EISNER,

PLAINTIFFS-RESPONDENTS,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY
ROBERT LEAHY AND MIDWEST SECURITY LIFE
INSURANCE COMPANY,

DEFENDANTS,

NORTH AMERICAN SPECIALTY INSURANCE COMPANY,

DEFENDANT-APPELLANT,

BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Oconto County: LARRY JESKE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. North American Specialty Insurance Company appeals from a judgment, entered upon a jury's verdict, awarding Dale and Lori Eisner $182,665.78[1] for personal injuries Dale suffered after being hit by a golf cart driven by Robert Leahy during a golf outing at Sandalwood Golf Course. North American, Sandalwood's insurer, argues that: (1) there was no credible evidence to support the jury's finding that Dale was not negligent with respect to his own safety at the time of the golf cart accident; (2) the jury's $150,000 award for Dale's past and future pain and suffering was excessive; and (3) North American is entitled to an offset or credit for advance payments mistakenly made by American Family Mutual Insurance Company. We reject North American's arguments and affirm the judgment.

BACKGROUND

¶2 On September 15, 1996, Dale and Leahy were co-workers participating in a company golf outing. Both were members of separate four-person teams. After Leahy's team finished its round of golf, Leahy decided to drive his golf cart back onto the course to find Dale. Leahy spotted Dale on the sixteenth fairway and drove the golf cart in that direction, intending to run over Dale's golf ball with the left tires of the cart. Although both men maintain that they attempted to avoid the accident, Leahy's cart hit Dale, breaking his right leg.

[1] This figure includes statutory costs and attorney fees in the amount of $2,994.12.

As a result of the accident, the Eisners sought damages for the personal injuries Dale suffered as a result of the golf cart accident.

¶3 At the time of the accident, Leahy was insured under an American Family homeowner's liability insurance policy. American Family, mistakenly believing that it was the primary insurer liable for Dale's medical bills, wage loss and other potential damages, made advance payments to Dale in the amount of $8,353.72.[2] Prior to trial, American Family and the Eisners entered into an agreement whereby the Eisners agreed that at the close of trial, they would reimburse American Family $4,176.86, representing half of the amount American Family had previously paid. The parties further agreed that in exchange for a release from the case, American Family would assign its interest in the advanced payments to the Eisners. American Family agreed, however, to leave its $300,000 policy "on the table," in the event that the jury's damage award exceeded North American's $1,000,000 policy limit.

¶4 The parties went to trial. A jury found that Dale was not negligent with respect to his own safety at the time of the accident and awarded him $150,000 for his past and future pain, suffering and disability.[3] In motions after verdict, North American argued that the jury's finding that Dale was not negligent with respect to his own safety was contrary to the greater weight of the credible evidence. North American also contended that the jury's $150,000 damage award

[2] The Eisners agreed to pay American Family $4,534.30, which represents one-half of the $9,068.61 American Family previously paid on an advanced basis. Later, American Family discovered that a $714.89 check was never cashed, resulting in a slight adjustment to American Family's overall claim.

[3] The amount of Dale's past medical expenses, $17,281.66, and past wage loss, $12,390, were entered in the verdict by the trial court, resulting in a total verdict of $179,671.66.

was excessive. Finally, North American claimed that it was entitled to an offset or credit for the advance payments American Family had mistakenly made to the Eisners. The court denied the motions and entered judgment consistent with the jury's verdict. This appeal followed.

ANALYSIS

A. CONTRIBUTORY NEGLIGENCE

¶5 North American argues that the trial court erred by denying its motion to change the jury's verdict regarding Dale's contributory negligence. Specifically, North American contends that there is no credible evidence to support the jury's finding that Dale was not negligent with respect to his own safety at the time of the accident.

¶6 On review, we will not upset a jury verdict if there is any credible evidence to support it, "even though it be contradicted and the contradictory evidence be stronger and more convincing." ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 389-90, 541 N.W.2d 753 (1995). Our deference to the verdict is even greater where, as here, the verdict has the trial court's approval. *See* ***York v. National Continental Ins. Co.***, 158 Wis. 2d 486, 493, 463 N.W.2d 364 (Ct. App. 1990). Further, it is this court's obligation "to search for credible evidence that will sustain the verdict, not for evidence to sustain a verdict the jury could have but did not reach." ***Id***.

¶7 With respect to testimony, it is the role of the jury, not an appellate court, to balance the credibility of witnesses and weigh the testimony of those witnesses. *See* ***Morden v. Continental AG***, 2000 WI 51, ¶ 39, 235 Wis. 2d 325, 611 N.W.2d 659. If evidence in the record "gives rise to more than one reasonable

inference," even if that evidence is weaker and less convincing than contradictory evidence, we must "accept the particular inference reached by the jury." ***Id.***

¶8 At trial, Leahy testified that he intended to run over Dale's golf ball with the two left wheels of his golf cart. Leahy further testified that as he approached the sixteenth fairway, he and Dale acknowledged each other. According to Leahy, as he headed for Dale's golf ball, Dale moved into the cart's path, waving his golf club, in an effort to protect his golf ball. When a collision seemed imminent, the two tried to avoid it, though they inadvertently attempted to dodge each other by zig-zagging back and forth at the same time and in the same direction. Leahy ultimately hit Dale with the cart. Leahy testified that he did not blame Dale for the accident.

¶9 Dale testified that as he was taking some practice swings, he saw Leahy approaching from a distance, though he did not pay any attention to him. When he looked up again, Leahy was much closer. Dale recalled waving his club at him and jumping back and forth to avoid a collision, but contrary to Leahy's testimony, Dale denied making any attempt to stand in the path of the cart in order to protect his golf ball. Because the jury could reasonably infer that Dale did nothing more than attempt to move out of the way of Leahy's golf cart, we conclude that the trial court did not err by denying North American's motion to change the jury's verdict regarding Dale's contributory negligence.

B. PAIN AND SUFFERING

¶10 North American contends that the jury's $150,000 award for Dale's past and future pain, suffering and disability is excessive and not supported by the record. The amount awarded for damages rests largely within the jury's discretion. *See* ***Ballard v. Lumbermens Mut. Cas. Co.***, 33 Wis. 2d 601, 605, 148

N.W.2d 65 (1967). A damages award is excessive if it reflects a rate of compensation beyond all reason. *See* ***Peissig v. Wisconsin Gas Co.***, 155 Wis. 2d 686, 703, 456 N.W.2d 348 (1990). Where, as here, one seeks to overturn a jury damage award, "this court may not substitute its judgment for that of the jury but, rather, must determine whether the award is within reasonable limits." ***Mikaelian v. Woyak***, 121 Wis. 2d 581, 592, 360 N.W.2d 706 (Ct. App. 1984). Further, "this court will not interfere with the jury's finding, unless the award is so unreasonably low as to shock the judicial conscience." ***Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp.***, 96 Wis. 2d 314, 340, 291 N.W.2d 825 (1980) (quoting ***Puls v. St. Vincent Hosp.***, 36 Wis. 2d 679, 693, 154 N.W.2d 308 (1967)).

¶11 Here, the jury saw the videotaped deposition testimony of Dr. Donald Wackwitz, Dale's treating physician. With respect to the injury, Wackwitz explained that Dale suffered an angulated tibia fracture. The fracture was comminuted, meaning that the bone fractured into more than two pieces. To assist in the healing process, Wackwitz inserted a rod down the center of Dale's leg. Noting that Dale felt significant pain in the weeks following the accident, Wackwitz explained that such pain is fairly usual "because of the amount of swelling and the amount of trauma that's in the leg." Dale had a second operation in February of 1997 to remove two of the screws holding the rod in place. Throughout the next several months, Dale intermittently saw Wackwitz, complaining of pain at and around the fracture site. The rod was ultimately removed in December of 1997.

¶12 Regarding any residual effects of the injury, the following exchange occurred:

> Q Doctor, do you have an opinion again to a reasonable medical certainty as to whether or not he'll have some

permanent limitations of motion in regard to dorsiflexion in that foot or leg?

A I think he most likely will have some limitations of motion in his ankle that are permanent.

Q Doctor, do you have an opinion as to whether or not he'll have permanent aching at the fracture site, and if so, as to what will be likely or probable to cause that?

A I never know whether aching at the fracture site is absolutely permanent, but it certainly does go on for about five years or so in a tibia fracture. It tends to be aching with weather changes or when he's on his feet for a long period of time. Those are the key[] things that tend to bring it along.

Q So being on his feet and weather changes; is that correct?

A Typically.

Q What about after five years, do some people continue to have aching?

A That's variable. Sometimes people do continue to have aching, sometimes people have less and less symptoms and have it go up to the point where it doesn't hurt.

Q Just depends on how they progress and the patient, the fracture site?

A It's very individual.

Q Doctor, do you have an opinion as to whether or not he's likely to have limping problems after being on the leg longer periods of time with work standing?

A Well, with the length of time that he had for his recovery he did have some substantial weakness in his leg, and the limping that you have that would progress after a day of work would be secondary to weakness. So I'm anticipating that he does have some fatigue weakness for a intermediate term, and at his age I would anticipate that that would last for several years.

Q So that his testimony that he works and at the – toward the end of his workday he gets more pain or limps or favors the leg and if workers, co-workers would testify to that, that would be consistent with what you're telling us?

A Yes. I anticipate that he may still limp toward the end of the day due to fatigue.

¶13 Dale, testifying about the current condition of his leg, stated that it is "constantly hurting." He also noted that he is on his feet at work approximately 70-80% of the time and during these times, his leg hurts. Pain in his leg is further irritated by weather changes. On this record, we conclude that there was credible evidence to support the jury's verdict awarding $150,000 to Dale for his past and future pain, suffering and disability.

C. CREDIT OR OFFSET

¶14 Finally, North American argues that it is entitled to a credit or offset for the advance payments American Family mistakenly made to the Eisners. Because the collateral source rule applies to the facts of this case, we disagree.

¶15 Under the collateral source rule, a plaintiff's recovery will not be reduced by the fact that the medical expenses were paid by some source collateral to the defendant, such as by a beneficial society, by members of the plaintiff's family, by the plaintiff's employer or by an insurance company. *See* ***McLaughlin v. Chicago, M., St. P. & P. R.R.***, 31 Wis. 2d 378, 396, 143 N.W.2d 32 (1966). "The tortfeasor who is legally responsible for causing injury is not relieved of his obligation to the victim simply because the victim had the foresight to arrange, or good fortune to receive, benefits from a collateral source for injuries and expenses." ***Ellsworth v. Schelbrock***, 2000 WI 63, ¶7, 235 Wis. 2d 678, 611 N.W.2d 764.

¶16 Here, American Family mistakenly made payments to Dale on behalf of Leahy, its insured. The two entered into an agreement whereby the Eisners agreed that at the end of trial, they would repay half of what American Family mistakenly paid. It is undisputed that American Family would have had an equitable right to seek reimbursement for the advance payments it made under a

mistake of fact. American Family nevertheless assigned its interest in the payment to the Eisners and agreed to keep their $300,000 policy limits "on the table" in exchange for a release from the case. Because American Family, in exchange for a release from the case, essentially gave up its right to seek reimbursement for the remaining half of its mistaken payments, those payments are akin to a gift from a collateral source and thus, may not be used to offset North American's liability.[4]

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[4] North American argues that if it is not allowed the offset, the Eisners will be unjustly enriched. This court has recognized, however, that the theory behind the collateral source rule is that "this extra source of benefits will either inure to the plaintiff, who will recover twice (once from the tortfeasor and once from the third party) or will inure to the tortfeasor who will 'walk away' from having to pay at all." ***Oliver v. Heritage Mut. Ins. Co***., 179 Wis. 2d 1, 23, 505 N.W.2d 452 (Ct. App. 1993). Given the choice of who will have the windfall, "Wisconsin courts have chosen the plaintiff." ***Id.***