COURT OF APPEALS
DECISION
DATED AND FILED

January 25, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2436

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

LESTER BOWEN,

PLAINTIFF-RESPONDENT,

V.

VILLAGE OF CURTISS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Clark County: JON M. COUNSELL, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] This case arises out of the actions of the Village of Curtiss in cutting down a sign pole next to the parking lot of a hotel and restaurant owned by Lester Bowen. Bowen filed a small claims complaint,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.21(2)(a) (1999-2000).

alleging that the Village cut down a sign pole belonging to him and affixed to his property without permission and without giving any reason. In a trial to a jury, the jury returned a verdict in Bowen's favor, finding he was damaged in the amount of $875. The trial court denied the Village's post-judgment motions and entered judgment on the verdict, together with interest, costs and disbursements for a total of $1,155.90. The Village appeals, contending there was not sufficient evidence to support a finding that Bowen owned the pole and the judgment should therefore be reversed. Alternatively, it argues it is entitled to a new trial because the entire verdict is invalid on two independent grounds: one of the jurors made a handwritten note to one of the questions submitted to the jury; and one of the jurors was acquainted with Bowen and failed to disclose that in voir dire.

¶2 We conclude there was sufficient evidence to support the finding Bowen owned the pole. We also conclude the Village is not entitled to a new trial on either of the alternative grounds asserted. We therefore affirm.

Sufficiency of the Evidence

¶3 The verdict form consisted of five questions, the first of which was: "Did the Village of Curtiss intentionally remove the sign post belonging to Lester Bowen?" The jury answered "yes" to this question. The Village contends there was insufficient evidence to support the finding that the sign pole belonged to Bowen. The court denied the post-verdict motion challenging the verdict on this ground, concluding there was sufficient evidence that Bowen owned the pole.

¶4 The scope of our review of the jury's verdict is a narrow one. A motion challenging the sufficiency of a verdict should not be granted unless the court is satisfied that, considering all of the evidence and reasonable inferences from the evidence in a 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. WIS. STAT. § 805.14(1) (1999-2000).[2] Special deference is given to a jury verdict that is approved by the trial court. ***Kuklinski v. Rodriguez***, 203 Wis. 2d 324, 331, 552 N.W.2d 869 (Ct. App. 1996). Thus, where, as here, the trial court has concluded there is sufficient evidence, the scope of our review is even narrower; the verdict may not be overturned unless "there is such a complete failure of proof that the verdict must be based on speculation." ***Id.***

¶5 Applying this standard, we conclude there was sufficient evidence to support the jury's finding that the sign pole belonged to Bowen. Bowen testified that one of the trustees for the Village and a person who works for the Village "cut down an antique pole of mine." He also testified: "This, here, is a steel antique post about four or five inches across, and they took a cutting torch and cut it off, and at this time, my pole is ruined." A maintenance man employed by the Village was asked: "Were you involved in the taking down of a pole owned by Les Bowen on County Trunk Highway E?" and he answered "Yes." There was also evidence the zoning administrator asked Bowen to paint and clean up the pole and Bowen hired a contractor to do that; Bowen applied for a permit to put up a sign on the pole, and the Village Board's minutes reflect that it approved "the building permits for … Les Bowen—sign on the condition that he abides by the Zoning Ordinance for the Village and movs [sic] the pole back onto his property, east of the sidewalk." A reasonable jury could find based on this evidence that Bowen owned the pole.

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶6 The Village's argument to the contrary is as follows. The Village points to Bowen's testimony that the pole has been there for at least sixty or seventy years, that Bowen did not install it, and that it "was on the highway-right-of way." From this last testimony, the Village argues the pole was not on Bowen's property, and, therefore, asserts the Village, since the pole is not on his property, since he did not install it, and since there was no evidence of purchase, it does not belong to him. While this may be a reasonable inference from the record, we do not agree it is the only one. The fact that Bowen described the property on which the pole stood as "the highway right of way" does not mean the property does not belong to Bowen. It could belong to him, and the right of way could be an easement. Although the minutes of the board meeting may create an inference the pole was not on his property, there were two letters addressed to Bowen from the Village to Bowen in which it described the pole as "on your property."[3] The lack of evidence that Bowen purchased the pole does not require the jury to find he did not own it, given the other evidence before the jury.

Juror's Note

¶7 Question four on the verdict form asked: "Did removal of the sign post seriously interfere with Lester Bowen's right to use and control the sign post?" Under the "yes" answer to question four, the following was written: "5-1. He didn't use it in the last 10 years. He can continue to use it as he did." When the jury returned with its verdict, the court read aloud the verdict questions and

[3] The first was a letter dated August 15, 1997, and the second a letter dated November 4, 1997. Bowen contended he did not receive the November 4, 1997 letter, and the jury may have believed he did not. However, we refer to it in this context not as evidence that Bowen was informed of the contents, but to show that there was evidence from which the jury could infer that Bowen owned the property.

answers. After it read question four, the answer, and the notation, the court asked the foreperson whose notation that was. The foreperson explained that he made the notation, that the "5-1" signified there was one dissent to the answer and the notation explained the dissenter's viewpoint. The court then read question five and the answer and asked if this was the verdict of the jury as the court had read it and the jury answered "yes." The court next asked if the Village counsel or Bowen's counsel wanted the jury polled, and both said "no." Counsel for the Village made no objection or request concerning the notation on the verdict form.

¶8 The court denied the Village's post-verdict motion asking for a new trial on the ground that the notation invalidated the verdict. The court reasoned that the verdict was valid because five of the six jurors agreed with the "yes" answer to question four, and all six agreed to the answers of each of the other questions. When counsel for the Village asserted the court should have given the jury a new verdict form and told them to answer the questions again and not to write on it, the court noted there was no objection to the notation or request for that procedure at the time the verdict was read.

¶9 On appeal the Village argues that the notation shows the jury answered question four perversely and inconsistently with the other questions, and that the notation showed the jury foreperson had reservations, which may have affected the balance of the verdict.[4] We conclude the trial court was correct in concluding the verdict was not invalid due to the notation added to the "yes" answer to question four.

[4] It appears the Village assumes the foreperson was the dissenting juror. That is not evident to us from the record, but this point is immaterial.

¶10 A perverse verdict is one that is clearly contrary to the evidence. ***Fouse v. Persons***, 80 Wis. 2d 390, 396, 259 N.W.2d 92 (1977). The Village does not develop an argument that the "yes" answer of five of the jurors was clearly contrary to the evidence, and we therefore do not consider this argument further.

¶11 While an inconsistency between a jury's answer to one question and its answer to another question may be grounds for a new trial, *see* ***id.*** at 399-400, there is no inconsistency here among the "yes" answers to each of the first four questions and the answer to the fifth question on damages. Rather, the inconsistency is between the way one juror viewed the evidence on one question and the way the other five viewed the evidence on the same question. This is a result contemplated by the statute that permits a five/sixths verdict, WIS. STAT. § 805.09(2), and not, according to any case brought to our attention by the Village, a ground for a new trial.

¶12 There is also nothing in the record to support the Village's contention the foreperson had "reservations" that may have affected the balance of the verdict, nor does the Village provide any case authority to the effect that such reservations, even if shown by the record, would entitle the Village to a new trial. The foreperson explained he made the notation to show the reasoning of the dissenter, and nothing in the notation or the foreperson's explanation calls into question a "yes" vote by five jurors to question four or implicates any other question.

Alleged Failure of Juror to Disclose

¶13 The Village contends Juror Joseph Riser, Jr., knew Bowen but failed to disclose this in voir dire, and the Village asks for a new trial on this ground. At the hearing on this post-verdict motion, the Village presented the testimony of

Andrew Bacha, who said he saw Riser shake Bowen's hand and Bowen's counsel's hand after the trial. Bacha testified that he had no personal knowledge Riser was personally acquainted with Bowen, but he "could get a lot of witnesses that were aware of the fact that Riser worked for Bowen." Bowen testified Riser had never worked for him, that Riser may have come into his restaurant like a lot of other people, but he did not know him. Bowen's wife testified she kept the books and did the payroll for their businesses and to her knowledge none of the Risers were ever employed by the Bowens. Riser did not testify.

¶14 The court found there was no credible evidence that Riser withheld an answer or answered incorrectly on voir dire and no evidence he was biased against the Village, and therefore denied the motion for a new trial.

¶15 In order to be entitled to a new trial based on a claim that a juror gave an incorrect or incomplete response to a question during voir dire, the moving party must demonstrate (1) that the juror incorrectly or incompletely responded to a material question on voir dire; and, if so, (2) that it is more probable than not under the facts and circumstances surrounding the particular case the juror was biased against the moving party. ***State v. Delgado***, 223 Wis. 2d 270, 281, 588 N.W.2d 1 (1999).[5] The decision whether the moving party is entitled to a new trial is committed to the discretion of the trial court. ***Id.*** at 280. A trial court properly exercises its discretion when it reaches a conclusion through the application of logic and the correct legal standards to the relevant facts of record. ***Id.*** We accept the court's findings of fact unless they are clearly erroneous, and findings on actual and inferred bias are findings of fact. ***Id.*** at 281.

[5] We will assume without deciding this test applies in civil as well as criminal proceedings.

¶16 We conclude the trial court properly exercised its discretion in denying the Village's motion for a new trial on this ground. It applied the correct legal standard in a logical manner to the facts of record, and its findings of fact are supported by the record. There is no transcript of the voir dire in the record, and the exact question asked of Riser and the response given were not established in the trial court. For that reason alone, the trial court's finding that Riser did not withhold information or answer incorrectly is not clearly erroneous. Even if we were to assume that the question was one such as "Do any of you know the plaintiff?" and Riser either answered "no" or said nothing in response, based on the evidence presented to the trial court, a finding that Riser did not know Bowen is supported by the record. The trial court chose to believe Bowen's testimony and that of his wife, and Bacha's testimony to the contrary was secondhand.

¶17 Although the Village's failure to meet the first part of the test is fatal to its motion, its failure to meet the second part is an alternative ground for properly denying the motion. The court's finding that there was no evidence of bias is not clearly erroneous. There was no evidence of bias by Riser, unless one considers the handshaking to be evidence of bias, and the court could draw a reasonable inference that it was not.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. § 809.23(1)(b)4.