COURT OF APPEALS
DECISION
DATED AND FILED

August 30, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-2630

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

MELVIN D. PULVER, MARSHA J. PULVER, AND BROOKE A. PULVER, SHAWN P. PULVER, COLE M. PULVER, GRANT G. PULVER, MINORS, BY THEIR GUARDIAN AD LITEM, JIM SCHERNECKER, AND BRADLEY G. PULVER,

PLAINTIFFS-APPELLANTS,

V.

DAVID G. JENNINGS, DANIEL D. JENNINGS, ANN JENNINGS, AND GENERAL CASUALTY COMPANY,

DEFENDANTS-THIRD PARTY PLAINTIFFS-RESPONDENTS,

DEAN HEALTH PLAN,

SUBROGATED DEFENDANT,

STACEY K. MICKELSON AND AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

THIRD-PARTY DEFENDANTS.

APPEAL from a judgment of the circuit court for Columbia County: JAMES MILLER, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman and Deininger, JJ.

¶1 VERGERONT, P.J. Melvin Pulver[1] appeals the judgment entered upon a jury verdict awarding him $9,153 damages plus costs and interest for injuries he sustained in a three-car automobile accident. Pulver contends he is entitled to a new trial because: (1) the jury's findings on negligence and the apportionment of negligence were the result of passion, prejudice, and perversity, and were erroneous as a matter of law; (2) the damages awarded by the jury were inadequate; (3) the trial court erred in submitting the right-of-way instruction and the sudden emergency instruction to the jury; (4) the trial court erred in not permitting him to show a videotape to the jury; (5) the trial court erred in reducing Pulver's award against David Jennings because of Jennings's settlement with Pulver's subrogated health care insurer; and (6) he is entitled to attorney fees and costs because two of the defenses contained in the answer were frivolous.

¶2 We affirm the trial court's judgment. We conclude the evidence was sufficient to support the jury's findings on negligence, the apportionment of negligence and damages; and those findings were not the result of passion, prejudice, and perversity, were not erroneous as a matter of law, and do not entitle Pulver to a new trial. We also conclude the trial court did not err and did properly exercise its discretion in giving the challenged jury instructions and excluding the videotapes. Finally, we conclude the trial court did not violate either the collateral source rule or the principle of subrogation when it took into account Jennings's

[1] Melvin Pulver's wife and children are also plaintiffs and appellants.

payment to the subrogated insurer in calculating the judgment against Jennings. We do not decide whether Pulver is entitled to attorney fees because he did not obtain a ruling on this issue from the trial court.

BACKGROUND

¶3 The accident occurred on a March afternoon when Pulver was driving his Chevrolet Celebrity on East Wisconsin Street in the City of Portage. He was heading east, in the right lane. East Wisconsin Street at that point has four lanes, two in each direction. At the same time Jennings was driving east in the left lane in a pickup truck. As Jennings was approaching the driveway of a Dairy Queen, which was located on the north side of East Wisconsin Street, he noticed a vehicle driven by Stacey Mickelson pull out of the driveway and turn left into the left east-bound lane of East Wisconsin Street, so that her vehicle was traveling ahead of his. At the intersection of East Wisconsin Street and Wauona Trail, which is about 150 feet from the Dairy Queen driveway, Mickelson slowed to a stop so that she could make a left turn onto Wauona Trail. Jennings observed Mickelson's brake lights and applied his brakes; but, realizing he could not stop in time to avoid hitting Mickelson's vehicle, he swerved right. In doing so he hit Pulver's vehicle, causing it to collide with a light pole on the south side of East Wisconsin Street. After Jennings's truck hit Pulver's, it sideswiped Mickelson's vehicle.

¶4 Pulver filed a complaint against Jennings[2] and Jennings's insurer, alleging that Jennings failed to maintain proper management and control of his vehicle, keep a proper lookout, and exercise ordinary care. Pulver also named

[2] Jennings's parents are also defendants and respondents.

Dean Health Plan, Pulver's group health insurance, as a subrogee. Jennings filed a third-party complaint against Mickelson, alleging that her negligence was a substantial factor in causing the collision. Before trial Pulver reached a settlement with Mickelson and her liability insurer, and she did not participate as a party at trial.

¶5 At trial Pulver testified that at the time of the accident the traffic was heavy because it was rush hour. He first noticed Jennings's truck several blocks before the intersection where the accident occurred. He traveled in the same position in relation to the truck—with the window of Pulver's driver's seat just behind the cab of Jennings's truck—for approximately three or four blocks before the accident. They were both traveling the speed limit—thirty five miles per hour. Pulver did not remember seeing Mickelson's vehicle before the accident. Jennings's truck somewhat blocked his view ahead and to the left. Jennings's truck was much higher than Pulver's vehicle. Pulver acknowledged that it was possible he may have been in Jennings's blind spot for those three or four blocks and that Jennings may not have been able to see Pulver. Jennings did not honk his horn before his truck struck Pulver's vehicle. Pulver testified he was not aware that Jennings's truck was going to hit his vehicle until a split second before it did so.

¶6 Jennings testified that when he saw Mickelson's vehicle come out of the driveway, he was about 150 feet away from it. He observed her vehicle bounce a little bit as it came out of the driveway and accelerate a little bit once it turned into the left lane of East Wisconsin Street. He let off the gas as soon as he saw Mickelson's vehicle come into his lane. Jennings assumed Mickelson was going to continue straight on East Wisconsin Street. However, as soon as he saw Michelson's brake lights, he applied his brakes; that is when he knew her vehicle

was stopping instead of continuing. He did not remember seeing a turn signal. He acknowledged that Mickelson came to a gradual stop, not an abrupt stop.

¶7 Jennings testified that approximately ten seconds before the accident, he saw Pulver's vehicle in his rear view mirror. However, Jennings did not observe Pulver's vehicle again before the accident. He did not see Pulver's vehicle in his right-side mirror and he did not see it out of his passenger window before he struck it. Further, he did not look into the right lane and he did not warn Pulver before he swerved right to avoid Mickelson's vehicle.

¶8 On cross-examination Jennings agreed that he was less than 100 feet away from Mickelson's vehicle when he applied his brakes, and that he understood he could stop his truck within 100 feet when traveling at thirty-five miles per hour. He also agreed that he had no idea how far he was from Mickelson's vehicle when he slammed on the brakes. On redirect he testified he did not know exactly how far he was from Mickelson's vehicle when he first applied his brakes nor did he know how long it took to stop his truck at thirty-five miles per hour, and he repeated that he did not have time to stop once Mickelson's brake lights came on.

¶9 Mickelson testified that as she approached East Wisconsin Street from the Dairy Queen driveway, she looked both ways. She had her left blinker on and was waiting to turn left. To her right she saw cars that were "a ways down." She judged she had enough time to pull out in front of them. After she turned left onto East Wisconsin Street and approached the intersection with Wauona Trail, she slowed down to wait for traffic to pass and came to a stop with the front of her car in the middle Wauona Trail. She was sideswiped by Jennings's truck while she was waiting to turn left.

¶10 On direct examination Mickelson testified that, after she turned on her left turn signal while in the Dairy Queen driveway, she probably had it on all the time she was proceeding on East Wisconsin Street. On cross-examination she acknowledged that it was likely that the left turn signal stopped after she turned onto East Wisconsin Street; however, she testified, she turned it on when she was coming to a stop at the Wauona Trail intersection. At her deposition, which opposing counsel read at trial, she testified that she stopped for traffic and then turned on her left turn signal. On direct examination Mickelson testified that she stopped for ten or fifteen seconds, but on cross-examination she acknowledged she was not sure she stopped that long and it could have been for less time.

¶11 The jury's verdict unanimously found Mickelson and Jennings causally negligent; ten jurors found Pulver causally negligent, with two dissenters finding he was not negligent. The jury attributed 60% negligence to Mickelson, 35% to Jennings, and 5% to Pulver. It awarded $5,000 to Pulver for his past medical expenses; $5,400 for past loss of earnings; $20,000 for past and future pain, suffering, and disability; $750 to his wife for loss of society and companionship; and nothing to his children.

¶12 Pulver moved for a new trial on all issues and the court denied the motion. It determined that the settlement reached between Jennings and Dean Heath Plan extinguished the claim for medical expenses paid by Dean Heath Plan and that Jennings was liable for 35% of the other damages awarded by the jury. Accordingly, the court entered judgment for Pulver in the amount of $9,153 plus costs and interest for a total of $11,056.86.

DISCUSSION

Sufficiency of Evidence—Negligence

¶13 We first consider Pulver's challenge to the jury's determination and apportionment of negligence. Pulver argues that as a matter of law neither Pulver nor Mickelson are negligent and Jennings is 100% negligent. He also argues that the jury's verdict on negligence and the apportionment are the result of passion, prejudice, and perversion, and that he is entitled to a new trial on that ground. Both arguments are premised upon his position that the jury's findings on these points are not supported by any evidence. Therefore, we begin by analyzing whether there is sufficient evidence to support the jury's verdict on negligence and the apportionment.

¶14 The scope of our review of a 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).[3] 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.*** (citation omitted).

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

¶15 In assessing the evidence, we bear in mind that it is the role of the jury, and not this court, to balance the credibility of witnesses and the weight given to the testimony of those witnesses. ***Morden v. Continental AG,*** 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. To that end we search the record for evidence that sustains the jury's verdict, not for evidence to support a verdict that the jury could have reached but did not. ***Id.*** If the evidence allows more than one reasonable inference, we accept the one reached by the jury. ***Id.***

¶16 Pulver argues that there is no credible evidence to support the jury's finding that he is 5% negligent.[4] He contends the undisputed evidence is that he operated his vehicle with due care and did not contribute to the cause of the collision. The trial court denied Pulver's post-verdict motion on this ground. It reasoned that, based on the evidence that Pulver maintained the same position next to Jennings's truck knowing that Jennings's truck was subject to traffic entering from alleyways, business locations, and other roadways, the jury could find that Pulver was 5% negligent.

¶17 Viewing the evidence in the light most favorable to the jury's finding and deferring to the trial court's better opportunity to assess the evidence, we conclude that the evidence was sufficient for a reasonable jury to find Pulver 5% casually negligent. Pulver's testimony that he traveled with his driver's window just behind the cab of Jennings's truck for three or four blocks, that Jennings's truck was a lot higher than his car and somewhat blocked his view to the left and ahead, and that he (Pulver) did not see Mickelson's vehicle is

[4] At the close of evidence, Pulver moved the court for a directed verdict on the issue of his contributory negligence, asking that the court to direct an answer of zero, and the court denied the motion.

sufficient for a reasonable jury to conclude that Pulver was negligent in maintaining the position he did in relation to Jennings's truck. Since Pulver testified that he drove this route innumerable times, a reasonable jury could infer that he knew of the driveways on the north side of East Wisconsin Street from which vehicles could turn left onto East Wisconsin Street. Since Pulver testified traffic was heavy, a reasonable jury could decide that Pulver should have anticipated that this would happen. A reasonable jury could also infer that Pulver knew or should have known that, given his position in relation to Jennings's truck, Jennings might not be able to see him. Therefore, a reasonable jury could decide that Pulver did not exercise due care when he maintained a position that did not enable Pulver to see vehicles that were pulling into the left lane in front of the truck next to him, that might prevent the truck driver from seeing Pulver, and that gave the truck no room to move into the right lane.

¶18 Pulver also contends the evidence was insufficient to support a finding of any negligence by Mickelson. In this argument, he relies primarily on the evidence that was favorable to Mickelson and unfavorable to Jennings. However, if we consider the evidence that does support the jury's finding that Mickelson was 60% negligent, drawing all reasonable inferences and accepting all credibility assessments in favor of that finding, we conclude the evidence is sufficient. The jury could choose to believe Jennings's testimony rather than Mickelson's and could choose to resolve the conflicts in Mickelson's testimony against her. If it did, it could have reasonably determined that she was driving fast enough out of the Dairy Queen driveway so that her car "bounced"; she turned left onto East Wisconsin Street in front of Jennings's vehicle causing him to slow down; and she accelerated and then within 150 feet stopped in the middle of the

Wauona Trail/East Wisconsin Street intersection without first turning on her left turn signal. This is an ample evidentiary basis for the jury's verdict on Mickelson.

¶19 Because we conclude there is sufficient evidence to support the jury's verdict on Pulver and Mickelson, we reject Pulver's argument that neither is negligent as a matter of law and his argument that Jennings is 100% negligent as a matter of law. Pulver's argument on Jennings focuses on Jennings's testimony on how far he was from Mickelson when he first applied his brakes, and the distance within which his truck can stop when traveling at thirty-five miles per hour. Pulver argues that Jennings's testimony conflicts with the undisputed physical fact that he left no skid marks, and is so internally contradictory that it does not provide any credible basis on which the jury might properly rely. We disagree. It was for the jury to decide whether Jennings's testimony was truly contradictory or could be reconciled, whether any conflicts or contradictions were the result of lying, mistake, uncertainty, or confusion, and which version to believe if his testimony could not be reconciled. We do not agree that ***Brunke v. Popp***, 21 Wis. 2d 458, 464, 124 N.W.2d 642 (1963), supports Pulver's argument. In ***Brunke***, the supreme court held that a trial court did not erroneously exercise its discretion in granting a new trial because the trial court concluded that the witness's testimony, which formed the basis for the verdict, was "replete with contradictions and intentional falsehoods." ***Id.*** at 464. The trial court did not make that determination here, but instead declined to order a new trial, and we are satisfied that the discrepancies in Jennings's testimony are not such as to require a new trial.

¶20 Similarly, because we conclude there is sufficient evidence to support the jury's verdict on negligence and the apportionment of negligence, we

reject Pulver's argument that these findings were the result of passion, prejudice, and perversion.

Inadequacy of Damages

¶21 Pulver contends that the jury award of $20,000 for his past and future pain and suffering and the $750 awarded to his wife for loss of society and companionship were inadequate and a miscarriage of justice, which entitles him to a new trial under WIS. STAT. § 752.35.[5] The trial court denied Pulver's motion for a new trial on these grounds, concluding that there was no basis for it to substitute its judgment for the jury's with respect to these items of damages. Our review of the record, applying the proper standard of review for jury verdicts and Pulver's cursory argument on this point, do not persuade us that the damages are inadequate.

Jury Instructions

¶22 Pulver challenges the trial court's decision to give WIS JI—CIVIL 1065, "Lookout: Entering or Crossing Through Highway,"[6] because, he asserts,

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[5] 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.

[6] The jury was instructed:

(continued)

there is no evidence that Mickelson was negligent when turning onto East Wisconsin Street. The trial court gave this instruction over Pulver's objection because it determined that there was an issue of fact as to how close Jennings's truck was when Mickelson turned left onto East Wisconsin Street in front of him. In motions after verdict, the trial court specifically referred to Pulver's diagram that showed that Jennings was in the block of the Dairy Queen driveway when Mickelson was entering East Wisconsin Street from that driveway, and the testimony that, after traveling only 150 feet on East Wisconsin Street, Mickelson had to stop for oncoming traffic.

¶23 A trial court has broad discretion when instructing a jury as long as it fully and fairly informs the jury of the rules and principles of law applicable to the particular case. ***Nowatske v. Osterloh***, 198 Wis. 2d 419, 428, 543 N.W.2d 265 (1996). In addition, the court must instruct the jury with due regard to the facts of the case; it is error both to refuse to instruct on an issue that the evidence raises and to instruct on an issue that the evidence does not support. ***Id.*** However, even if a court gives an erroneous instruction or erroneously refuses to give an instruction, a new trial is not warranted unless the party's "substantial rights" are

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> Because of the preference the law gives to traffic on a through highway, a driver entering upon a through highway as Stacey Mickelson was, with respect to lookout, has the duty to look sufficient distances to ascertain that anyone approaching on the through highway cannot reasonably be expected to interfere with the driver's entering upon and turning left onto the through highway before the driver's [sic] proceeds to do so. In addition, the driver must use reasonable judgment in calculating the time required for him or her to enter and reach a proper position on the through highway as well as the distance away and speed of any vehicle seen by him or her to be approaching on the through highway. If the driver fails to use such reasonable judgment, the driver is negligent.

WIS JI—CIVIL 1065.

affected in that there is a reasonable possibility that the error contributed to the outcome. ***Nommensen v. American Continental Ins. Co.***, 2001 WI 112, ¶¶ 51-52, ___ Wis. 2d ___, 629 N.W.2d 301. In deciding whether an instruction should be given based on the evidence in a particular case, the evidence must be viewed in the light most favorable to the person requesting it. ***Lutz v. Shelby Mut. Ins. Co.***, 70 Wis. 2d 743, 754, 235 N.W.2d 426 (1975).

¶24 We conclude the trial court did not err in giving WIS JI—CIVIL 1065 and properly exercised its discretion in doing so. Viewing the evidence in the light most favorable to Jennings, the court could reasonably decide that there was evidence from which a jury could find that Mickelson did not use reasonable judgment in calculating the time required for her to enter and reach a proper position on East Wisconsin Street, or in calculating the distance and speed of Jennings's approaching vehicle.[7]

¶25 Pulver also contends the trial court erred in giving WIS JI—CIVIL 1105A , "Management and Control-Emergency," which provides:

> When considering negligence as to management and control bear in mind that a driver may suddenly be confronted by an emergency, not brought about or contributed to by her or his own negligence. If that happens and the driver is compelled to act instantly to avoid collision, the driver is not negligent if he or she makes such a choice of action or inaction as an ordinarily prudent person might make if placed in the same position.

[7] Pulver also contends the court erred in not defining "approaching" as used in the instruction. However, Jennings responds that Pulver did not request a definition. In his reply brief, Pulver does not provide any citation to the record in which he asked the trial court for a definition on "approaching." We do not see in the transcript of the discussion of this instruction that Pulver did ask for a definition of "approaching." Accordingly, he has waived any claim of error on this point. WIS. STAT. § 805.13(3) (noting grounds for objection must be stated with particularity on the record).

> This is so even if it later appears that her or his choice was not the best or safest course.
>
> This rule does not apply to any person whose negligence wholly or in part created the emergency. A person is not entitled to the benefit of this emergency rule unless he or she is without fault in the creation of the emergency.
>
> This emergency rule is to be considered by you only with respect to your consideration of negligence as to management and control.

There are three requirements for properly giving this instruction: (1) the party seeking the instruction must be free from negligence which contributed to the creation of the emergency; (2) the time element in which action is required must be short enough to preclude deliberate and intelligent choice of action; and (3) the element of negligence being inquired into must concern management and control. ***Totsky v. Riteway Bus Serv., Inc.***, 2000 WI 29, ¶22, 233 Wis. 2d 371, 387, 607 N.W.2d 637 (citations omitted).

¶26 The trial court gave this instruction over Pulver's objection because it decided that there was a factual basis for it: there was evidence that Mickelson did not put her turn signal on before she stopped, and evidence—Jennings's testimony—that he put his brakes on as soon as he saw Mickelson's brake lights but did not have time to stop. In motions after verdict, the court further explained that there was testimony from Jennings that he was 100 feet behind Mickelson when he saw her brake lights, and that he was traveling thirty-five miles per hour. This would mean, the trial court stated, that he was traveling over fifty feet a second and would have less than two seconds to stop or take evasive action.

¶27 Pulver argues that the first and second requirements for giving the emergency instruction were not met because it is undisputed that Jennings was negligent as to effective lookout, braking, and making an unsafe lane deviation,

and that he had enough time to make a deliberate and intelligent choice of action. We disagree. Jennings's testimony provided a basis for the jury to decide that he was maintaining a proper lookout and applied his brakes as soon as he should have in the exercise of ordinary care. The lane deviation is not relevant to the creation of the emergency, but, rather, is the result—under one view of the evidence—of Jennings's reaction to the emergency. And, while Pulver points to evidence that might be a reasonable basis on which a jury could conclude that Jennings had enough time to stop and thus avoid hitting Mickelson's vehicle without swerving into Pulver's lane, that evidence is by no means undisputed. We are satisfied that the trial court properly allowed this instruction.

Exclusion of Videotape

¶28 The medical evidence showed that Pulver suffered from "myofacial pain[,] lumbar spine … i.e. whiplash type of injury" as a result of the accident. Russell Gelfman, M.D., who treated Pulver, explained that this was an injury to the soft tissues of the lower back, the part of the back or spine below the ends of the ribs down to the buttocks. Pulver wanted to show the jury a ten-minute videotape that explained the anatomy of the human body and discussed hyperflexion and hypertension forces on various tendons, intervertebral disks, muscles, and ligaments. Jennings objected.

¶29 The trial court decided not to permit the showing of the videotape. It referred to Dr. Gelfman's testimony at his discovery deposition that the videotape would help to illustrate the three types of conditions that doctors see when injuries result from forces applied to the musculature surrounding the spine, although it might be a little bit simplistic, and his testimony that he did not know for a fact that Pulver suffered from any of the conditions illustrated in the videotape. The

court reasoned that in his trial deposition Dr. Gelfman had testified and been cross-examined on Pulver's injuries, and the proposed videotape would be duplicitous of that testimony and not subject to cross-examination.[8]

¶30 Pulver contends the trial court erred in not permitting him to show the jury the videotape, which, he asserts, explained the injuries Pulver sustained in a way that was more understandable to the jury than the medical evidence and testimony.

¶31 Whether to admit a demonstrative videotape is a decision committed to the trial court's discretion, and we affirm the trial court's decision if it applied the correct law to the facts of record and reached a reasonable result. ***State v. Peterson***, 222 Wis. 2d 449, 453, 588 N.W.2d 84 (Ct. App. 1998).

¶32 We conclude the trial court properly exercised its discretion in deciding not to allow Pulver to show the videotape. The relevant facts for this decision were the contents of the videotape and its relation to Pulver's injuries, in particular, Dr. Gelfman's testimony on the videotape at his discovery deposition. The correct law to apply, as with any evidence, is whether the videotape is relevant, WIS. STAT. §§ 904.01 and 904.02, and, if relevant, whether its probative value is substantially outweighed by the danger of unfair prejudice, by potential for confusing or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. WIS. STAT. § 904.03. The trial court applied the correct law to the facts of record and its conclusion was reasonable. Although the videotape might be an accurate, if simplified, depiction

[8] When Pulver's counsel took Dr. Gelfman's deposition for trial, he did not question Dr. Gelfman about the videotape.

of the three conditions it portrayed, it is not relevant without testimony that Pulver had one of those three conditions. Since Dr. Gelfman testified and was cross-examined on Pulver's injuries, the videotape was at best unnecessary and, at worst, unfairly prejudicial in that it might suggest to the jury that Pulver had the conditions depicted in the videotape.

Medical Expenses—Subrogation

¶33 Dr. Gelfman testified in his trial deposition that the medical expenses reasonably incurred in treating Pulver's injuries resulting from the accident were $5,591. Prior to trial, Dean Health Plan entered into a stipulation with Jennings and his insurer, General Casualty Company of Wisconsin. The stipulation provided that Dean Health Plan made payments to health care providers in the amount of $5,555 for Pulver's injuries,[9] and that its claim based on its subrogated interest was wholly satisfied by the payment of $2,777 from General Casualty.

¶34 Prior to trial, Jennings moved for an order prohibiting Pulver from submitting evidence of any medical expenses that were paid by Dean Health Plan because of the settlement. The trial court ruled that Pulver could introduce evidence of the total amount of his reasonable and necessary medical expenses, and also stated that the amount he could actually collect would be reduced by the amount of Dean Health Plan's subrogated claim. Jennings's counsel indicated that determination of the amount of the subrogated claim could be addressed post-trial,

[9] Pulver contends in his brief that Dean Health Plan paid $5,451.48, but the discrepancy between this figure and the $5,555 in the stipulation does not affect our analysis.

because he was not going to introduce at trial any testimony on what Dean Health Plan paid.

¶35 At trial, in addition to presenting Dr. Gelfman's trial deposition, Pulver testified that he had incurred $5,259.86 in medical expenses, and he submitted an exhibit, which the court admitted, listing those expenses. There was no evidence concerning Dean Health Plan's payments or the stipulation between Dean Health Plan and Jennings. The jury found that $5,000 would fairly and reasonably compensate Pulver for past medical expenses.

¶36 In his motion for a new trial, Pulver asserted that the trial court erred in preventing him from introducing evidence on the medical bills paid by Dean Health Plan. He argued that under the collateral source rule, the amount paid by Pulver's health care insurer is irrelevant to the amount Pulver may recover. In response, Jennings pointed out that the trial court had not prevented Pulver from presenting evidence of his medical bills. Jennings also argued that he was entitled to a credit for the bills Dean Health Plan paid, and that this could be calculated by either one of two methods: The first would be to reduce the $10,903 of the damages for which Jennings was liable (arrived at by multiplying the total damages of $31,150 by 35%, Jennings's percentage of negligence) by Jennings's share of the medical expenses ($5,000 x 35%=$1,750). This method results in a verdict against Jennings of $9,153. The second method would be to multiply 35% by $31,150 and deduct from that product—$10,903—the $2,777 Jennings paid toward the medical expenses in its settlement with Dean Health Plan. This method results in a verdict against Jennings of $8,126.

¶37 The trial court denied Pulver's motion for a new trial on this ground. It stated that it had allowed Pulver to present to the jury evidence of all his medical

expenses and the jury did not hear any evidence on who paid those expenses. After rejecting Pulver's other grounds for a new trial, the court took up the issue of the payments by Dean Health Plan. It concluded that by virtue of Jennings's settlement with Dean Health Plan, Jennings had satisfied the claim for the medical expenses as found by the jury. It therefore adopted the first method proposed by Jennings and concluded that Pulver was entitled to recover $9,153 in damages from Jennings rather than the $10,903.

¶38 On appeal, Pulver renews his argument that the trial court improperly excluded evidence of the medical bills paid by Dean Health Plan, and that under the collateral source rule he is entitled to a full recovery of the reasonable value of the medical treatment he required regardless of whether it was paid by Dean Health Plan. He contends that Dean Health Plan does not have a right of subrogation until he has been made whole; he is not made whole until he recovers the full value of the expenses for his medical treatment; and therefore Jennings and his insurer could not settle with Dean Health Plan and have the verdict reduced by the amount paid to settle the subrogated claim.

¶39 We agree with the trial court and Jennings that the trial court did not prevent Pulver from presenting evidence of all his medical expenses, whether paid by Dean Health Plan or not, and the record reflects that Pulver did so. Therefore, we frame the issue as: did the trial court err in reducing Pulver's recovery from Jennings from $10,903 (35% x the total damages of $31,150) to $9,153? Whether the collateral source rule prevents this reduction, as Jennings asserts, is a question of law, which we review de novo. *See* ***Ellsworth v. Schelbrock***, 2000 WI 63, ¶6, 235 Wis. 2d 678, 611 N.W.2d 764.

¶40 Pulver is correct that in Wisconsin a plaintiff who has been injured by the tortious conduct of another may recover the reasonable value of the medical services rendered. ***Koffman v. Leichtfuss***, 2001 WI 111, ¶27, ___ Wis. 2d ___, 630 N.W.2d 201. However, his analysis of how that principle interacts in this case with the collateral source rule and the principle of subrogation is flawed.

¶41 The collateral source rule prevents any payments made on the plaintiff's behalf or gratuitous benefits received by the plaintiff from inuring to the benefit of the tortfeasor. ***Id.*** at ¶29. This rule is grounded in the policy that, should a windfall arise as the consequence of an outside payment, the party to profit from the collateral source is the person who was injured rather than the person who caused the injury. ***Id.*** In the context of this case, the collateral source rule would not permit a jury to return a verdict of zero for Pulver's medical expenses because Dean Health Plan had paid them. However, that did not happen here. The jury heard no evidence on payments made by Dean Health Plan, and its verdict of $5,000 was its determination of the reasonable value of the medical services rendered Pulver. Since Jennings was determined 35% negligent, he was liable to Pulver for $1,750 of the $5,000 medical expense verdict.

¶42 However, under the principle of subrogation, Dean Health Plan, by virtue of its payment of Pulver's medical expenses, had a right of recovery in an action against the tortfeasor—in this case, Jennings—and is a necessary party in an action against the tortfeasor. ***Id.*** at ¶33. The purpose of subrogation is to ensure that the loss is ultimately placed upon the tortfeasor and to prevent the subrogor—in this case Pulver—from being unjustly enriched by a double recovery—that is, recovery from the subrogated party and recovery from the tortfeasor. ***Id.*** In this case the subrogated party settled its claim against the tortfeasor for less than the full amount of its claim: $2,777. In effect, Jennings

has already paid $2,777 of the reasonable value of the medical services rendered Pulver.

¶43 The collateral source rule does not prohibit a reduction of the $1,750 Jennings is liable to Pulver under the jury's verdict by the amount Jennings has already paid for Pulver's medical expenses. The collateral source rule prevents a reduction in the tortfeasor's obligation because of payments made by another party on the plaintiff's behalf. It does not prevent a reduction in the tortfeasor's obligation based on payments previously made by the tortfeasor.

¶44 Neither does the principle of subrogation prevent the tortfeasor's liability to the plaintiff from being reduced by amounts the tortfeasor has paid to the plaintiff's subrogated health insurer: Dean Health Plan made its own decision about how much it would accept from the person who is ultimately responsible for the loss and was apparently satisfied with $2,777, and the purpose of subrogation is not to benefit the insured by the amount the subrogated insurer has decided to forgo in settlement with the tortfeasor. Pulver's argument is that, under ***Garrity v. Rural Mut. Ins. Co.***, 77 Wis. 2d 537 (1977), and ***Rimes v. State Farm Mut. Ins. Co.***, 106 Wis. 2d 263 (1982), Dean Health Plan could not settle its claim against Jennings because Pulver has not yet been made whole. This argument has no merit. The ***Garrity/Rimes*** rule, based on common law equitable principles, is that (in the absence of contract language to the contrary) a subrogated insurer may not share in the funds its insured recovered from the tortfeasor until the insured has been made whole for its actual loss. ***Garrity***, 77 Wis. 2d at 546-47; ***Rimes***, 106 Wis. 2d at 271-72. By settling with Jennings, Dean Health Plan is not sharing in or reducing the amount that Pulver receives from Jennings to compensate Pulver for his actual loss. The medical expenses for which Jennings is liable are $1,750. However, since Dean Health Plan paid for Pulver's medical expenses, Jennings

owes that to Dean Health Plan, not Pulver, and Jennings has already paid that amount to Dean Health Plan.

¶45 Under Pulver's analysis, he should recover $1,750 in medical expenses from Jennings even though he did not pay for those expenses and even though Jennings has already settled the claim of the party that did pay—Dean Health Plan—by paying $2,777. Nothing in the collateral source rule, the principle of subrogation, or the ***Garrity/Rimes*** cases requires this result. We therefore conclude the trial court did not err in reducing Jennings's liability to Pulver from $10,903 to $9,153.

Attorney Fees

¶46 Pulver contends he is entitled to attorney fees because Jennings asserted two defenses in his complaint—failure to mitigate damages and failure to state a claim upon which relief can be granted—that were frivolous in that Jennings or Jennings's counsel knew or should have known that these defenses were without any reasonable basis. WIS. STAT. § 814.025(3)(b). It is not clear if Pulver is arguing that Jennings should never have pleaded these defenses or should have dropped them sooner.

¶47 At the close of the first day of trial, in a conference outside the presence of the jury, defense counsel stated that he was not pursuing the defense of failure to mitigate damages. Pulver's counsel stated, "It's a firm purpose of plaintiffs to seek frivolous costs and attorney's fees on [that] defense[]. And to withdraw [it] in the middle of the trial after the medical evidence is in and after approximately half the plaintiffs' case is in is taking the hand out of the cookie jar too late." The court responded that it was going to withhold any ruling on the

question of whether the mitigation defense was frivolous and whether Pulver was entitled to attorney fees.

¶48 The following day, after the close of all the evidence, Pulver's counsel moved to dismiss the defense of failure to state a claim for relief, and, in the alternative, moved for a directed verdict. The court stated that the complaint did state a claim but that it was not going to direct a verdict. Pulver's counsel went on to explain that he wanted the defense of failure to state a claim dismissed because he did not want the jury to know about it and he did not want defense counsel to argue about it to the jury. The court agreed that it would be an error for defense counsel to argue that the complaint did not state a claim for relief and it granted the motion to dismiss that defense. Defense counsel then explained that this defense was intended to address the complaint's failure to specifically allege sponsorship, but that point was now moot and of no consequence because it was now known that Jennings's parents were his sponsors. Pulver's counsel registered his disagreement with the defense counsel's remarks, and that concluded the discussion of the failure-to-state-a-claim defense. At the close of the conference, the court asked whether there was anything further before going off the record and Pulver's counsel said, "Nothing from the plaintiff …."

¶49 Pulver has referred us to no point in the record when he renewed his request to the court to find the defense of failure to mitigate damages frivolous or when he asked the court to find that the defense of failure to state a claim was frivolous, and we have not been able to locate either. Pulver does not set out what the trial court ruled on the issue of the frivolousness of these two defenses and we can locate no such ruling. It appears that the court made no such ruling because Pulver did not remind the court that it had withheld a ruling with respect to the

mitigation defense and did not request attorney fees with respect to the failure-to-state-a-claim defense.

¶50 We generally do not review issues that are not raised and ruled on in the trial court. Although we have the discretion to do so in certain situations when the issue presented is a question of law, ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), *superseded by* WIS. STAT. § 895.52 *on other grounds* ***Wilson v. Waukesha County***, 157 Wis. 2d 790, 797, 460 N.W.2d 830 (Ct. App. 1990), that is not the case here. Whether a defense is frivolous under WIS. STAT. § 814.025 presents a mixed question of fact and law, and we defer to the trial court's factual findings on what the attorney knew or should have known unless they are clearly erroneous. ***Kelly v. Clark***, 192 Wis. 2d 633, 646, 531 N.W.2d 455 (Ct. App. 1995). Without the court's findings of fact on those points, we are unable to apply the legal standard to the relevant facts. Therefore, we do not decide this issue.

CONCLUSION

¶51 Pulver contends that the cumulative effect of the trial court error and the perverse findings of the jury entitle him to a new trial on all issues. However, we have concluded that there was sufficient evidence to support the jury findings that Pulver challenges, and we have concluded the trial court did not err. Therefore, Pulver is not entitled to a new trial.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

¶52 DYKMAN, J. (*dissenting*). In Wisconsin, negligence is defined as the breach of a duty of care. It is the duty of each person to exercise ordinary care to refrain from any act which will cause foreseeable harm. ***Ramsden v. Farm Credit Serv.***, 223 Wis. 2d 704, 714, 590 N.W.2d 1 (Ct. App. 1998). Ordinary care is the degree of care which the great mass of mankind ordinarily exercises under the same or similar circumstances. ***Jankee v. Clark County***, 2000 WI 64, ¶53, 235 Wis. 2d 700, 732, 612 N.W.2d 297.

¶53 We give great deference to a jury's verdict, and search the record to find whether there is any credible evidence to sustain the verdict. ***Morden v. Cont'l AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. And where the trial court approves a jury's verdict, we afford special deference, and will not reverse unless the verdict is based on speculation. ***Id.*** at ¶41. But eventually, a case must arise where this test is met. This is that rare case.

¶54 The majority has searched the record and this is the best it can find to support the jury's finding that Pulver was negligent: (1) Pulver traveled with his driver's window just behind the cab of Jenning's truck for three or four blocks, and (2) Jenning's truck was a lot higher than Pulver's car and somewhat blocked his view to the left and ahead. While the majority also cites the fact that Pulver did not see Mickelson's vehicle as evidence of his negligence, that is in reality the same thing as the first two factors. Of course Pulver would not see Mickelson's vehicle if Jenning's truck was taller than his car and blocked his view to the left and ahead. Finally, the majority concludes that Pulver should have anticipated that Jennings would not see him.

¶55 The first two factors are in fact one: traveling to the right of and slightly behind a taller vehicle for three or four blocks. The majority is required to search the record for evidence of Pulver's negligence, but there is no principle of law of which I am aware requiring a reviewing court to ignore undisputed evidence of the conditions existing when the accident occurred. Indeed, ***Jankee*** defines ordinary care as that exercised by the great mass of mankind "under the same or similar circumstances." ***Jankee***, 235 Wis. 2d at ¶53. And the additional, undisputed and relevant evidence is that it was rush hour and the traffic was heavy when Jennings suddenly pulled to the right, striking Pulver's car.

¶56 So the question boils down to this: when traveling in the right lane of a four-lane street, and a taller vehicle appears to the left, what would the great mass of mankind do? It would be helpful if the majority told us what the proper response of the great mass of mankind would be, but it does not. Because Pulver was negligent, under the majority's decision, the great mass of mankind would necessarily do something other than what Pulver did, which was to continue driving. What is it that is so obvious, nearly everyone would do it?

¶57 Without having been told of where Pulver's failure lay, I can only speculate on what he might have done when he first noticed that a taller vehicle was traveling with him and to the left.

¶58 I suppose that Pulver could have accelerated, and thus been to the right and ahead of Jenning's truck when it made its sudden turn to the right. The accident would not have happened, but since the speed limit was thirty-five miles per hour and both Pulver and Jennings were traveling the speed limit, Pulver would have had to exceed the speed limit to avoid being negligent by staying beside Jennings. As we know, speeding is negligence *per se* and illegal. WIS.

STAT. § 346.57(2) (1999-2000). So, by speeding up, Pulver would have traded the majority's negligence, whatever that is, for another form of negligence. And he would have risked a speeding citation. That hardly makes sense, let alone what the great mass of mankind would do under the circumstances.

¶59 Another possibility would have been for Pulver to slow down. Eventually, this would have put Jenning's truck ahead of Pulver's car. But if this is the solution, what is one to do when the vehicle following Jennings was another vehicle taller than Pulver's? Would the great mass of mankind slow down some more? In rush hour traffic? And if a third "too tall" vehicle was third in line behind Jennings, would Pulver have been required to stop to avoid negligence? Would the great mass of mankind following Pulver accept Pulver's slowing down and eventually stopping as the appropriate way to avoid being negligent? Or would following drivers become angry with Pulver, with unfortunate consequences? Should Pulver ignore the possibility of a rear-end collision when he slowed down or stopped in his lane of rush hour traffic? If a rear-end collision occurred, would Pulver be negligent for slowing down? I do not see the great mass of mankind slowing down or stopping.

¶60 The majority believes that a jury could infer that Pulver should have known that Jennings could not see him. That is always a possibility when one drives an automobile. All automobiles come equipped with a "blind spot." Whenever one drives a motor vehicle, one will encounter vehicles with blind spots. There is nothing anyone can do about this phenomenon. What the majority is really saying is that Pulver did not get out of Jenning's way quickly enough. I find no authority requiring him to do that. Indeed, the law is the opposite. In ***DeKeyser v. Milwaukee Automobile Ins. Co.***, 236 Wis. 419, 295 N.W.2d 755 (1941), the court faced the situation of a bus driver in much the same position as

Pulver, though with some advance notice of another driver's negligence. ***Id.*** at 425. The court concluded that a driver may operate his vehicle on the assumption that other drivers will use due care in the operation of theirs. ***Id.*** at 425-26. It was not Pulver's duty to respond quickly to Jennings's sudden turn to the right or to guess that he might do so. It was up to Jennings to change lanes safely.

¶61 Speculating further, one might wonder if the proper response for Pulver, upon discovering Jennings on his left, would have been to turn right into the first driveway or onto a cross street. Would that have been the expected response from the great mass of mankind? And is that what the majority expects of drivers who want to drive using ordinary care? Would it be necessary to get off or stay off the streets to avoid being negligent? This exhausts the possibilities, at least for me, and I am still not convinced that any of these would be what an ordinarily careful driver would do.

¶62 I conclude that the great mass of mankind would react just as Pulver did. Most drivers would not anticipate that an unseen vehicle would enter from the left, and then stop so suddenly that Jennings could only avoid a rear-end collision by turning to the right and striking another vehicle. Most drivers would do what Pulver did when faced with a vehicle taller than his on his left—keep on driving. The hazards of slowing, stopping or turning in rush hour traffic are as great or greater than the chances of a driver such as Mickelson pulling into traffic and then stopping so suddenly that the following driver cannot stop. Though what you cannot see can hurt you, I cannot accept that a driver is negligent for failing to see what cannot be seen. Or, if Pulver could see Mickelson, expecting Pulver to foresee that Jennings would be unable to stop and would instead turn to the right expects too much of drivers, and of courts.

¶63 With hindsight, it is easy enough to conclude that Pulver might have done something other than what he did. But that is not the test. We are to test Pulver's actions against action "the great mass of mankind ordinarily exercises under the same or similar circumstances." Using this test, I conclude that the great mass of mankind would have done exactly as Pulver did—drive the speed limit, and not assume that another driver would suddenly invade one's lane, causing an accident. We even tell juries that "Every user of a highway has the right to assume that every other user of the highway will obey the rules of the road." WIS JI—CIVIL 1030.

¶64 If Pulver's negligence is sustainable, any jury verdict in an automobile accident case is sustainable. Pulver could have anticipated that traffic would be heavy, and that an accident might occur. He could have stayed home. But those are not relevant inquiries. The question is whether the "great mass of mankind" would have operated their vehicles differently than did Pulver. If so, Pulver was negligent. But I cannot see what Pulver did or failed to do that is different from what the great mass of mankind would have done. I therefore conclude that the evidence of Pulver's negligence was insufficient and based on speculation. I would reverse, and remand for a new trial. Accordingly, I respectfully dissent.