COURT OF APPEALS
DECISION
DATED AND FILED

September 21, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 03-2106
04-0343

Cir. Ct. No. 00CV010467

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

ARLENE HART,

PLAINTIFF-APPELLANT,

V.

LINCOLN CONTRACTORS SUPPLY, INC., AND RALPH BURKART,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: THOMAS R. COOPER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Arlene Hart appeals from a judgment entered after a jury rendered a verdict unfavorable to her claim for personal injuries sustained in a three-vehicle intersection accident. She also appeals from orders denying various post-verdict motions.

¶2 Hart claims five instances of error warranting reversal of the judgment of dismissal and granting of a new trial. Those claims of error are: (1) failing to modify the standard emergency instruction to include the four-second rule exclusion; (2) allowing the defense to tell the jury of a settlement between her and a dismissed driver defendant; (3) failing to include in the instruction on damages the correct burden of proof; (4) failing to levy a sanction under WIS. STAT. § 802.05(1) (2001-02)[1] against defense counsel; and (5) failing to grant a new trial after improper communications occurred with members of the jury. Because we resolve each claim in favor of upholding the judgment and orders, we affirm.

BACKGROUND

¶3 On October 6, 1998, Hart was a passenger in a van stopped in the left turn lane of eastbound Lincoln Avenue at South 108th Street in West Allis, Wisconsin. Ralph Burkart, a defendant and an employee of Lincoln Contractors Supply, Inc. (Lincoln), was making a left turn from the northbound left turn lane of 108th Street to proceed west on Lincoln Avenue. At the time, Burkart was hauling a skid loader on a trailer hitched to a pick-up truck for Lincoln. As Burkart was proceeding to make his turn, he was struck by a car going south on 108th Street in the far right lane driven by Amy Paulmier. Lincoln then hit the van in which Hart was riding.

¶4 Hart commenced this action against Paulmier, Burkart and Lincoln alleging they were jointly and severally liable for the injuries that she sustained as

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

a result of the accident. Hart later entered into a ***Pierringer***[2] settlement with Paulmier and her insurer, Continental Insurance Company. Paulmier was dismissed from this action. The case proceeded to a trial by jury. The jury returned its verdict absolving Burkart of any negligence, finding Paulmier 100% causally negligent of the accident and awarded no damages to Hart.

¶5 Hart filed post-verdict motions asking for a new trial, and requesting that answers in the verdict reflecting no negligence on Burkart's part be changed from "No" to "Yes" and reflecting negligence on Paulmier be changed from "Yes" to "No." Hart also requested that the damage question be changed from "0" to "$6,000." The trial court denied the motions and ordered judgment for costs of $3,617.01 in favor of the defendants.

¶6 Hart moved the court to reconsider its denial of the motions. In response, the defendants filed a motion for sanctions against Hart's counsel pursuant to WIS. STAT. § 802.05(1), on the grounds that counsel had knowingly violated WIS. STAT. § 906.06(2). Hart, in turn, filed a motion for sanctions and a motion to strike the defendants' motion for sanctions. The trial court denied all of the motions.

¶7 On August 4, 2003, Hart filed a petition and order to show cause why Burkart should not be held in contempt of court for wrongfully communicating with members of the jury. A hearing was held on the order to show cause on August 12, 2003. Based upon information contained in affidavits, the court expanded the scope of the inquiry as to whether the deliberative process

[2] *See* ***Pierringer v. Hoger***, 21 Wis. 2d 182, 124 N.W.2d 106 (1963).

of the jury had been infected by extraneous prejudicial information. Additional hearings were conducted on September 2, 2003, and November 19, 2003. The trial court found no basis upon which to grant a new trial. Hart now appeals.

DISCUSSION

A. Emergency Instruction.

¶8 Hart claims the trial court erred when it rejected her request to give the jury a modified version of the standard emergency instruction.[3] Based upon a rule acknowledged in ***Vanderkarr v. Bergsma***, 43 Wis. 2d 556, 566, 168 N.W.2d

[3] Hart requested the following instruction:

> 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 by her own negligence. If that happens and the driver is compelled to act instantly to avoid collision, the driver is not negligent if she makes such a choice of action or inaction as an ordinarily prudent person might make if placed in the same position. This is so even if it later appears that her choice was not the best or safest course.
>
> The 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 she is without fault in the creation of the emergency.
>
> Added language per Vanderkarr v. Bergsma 43 W2d 566:
>
> You are instructed that if you find that Amy Paulmier faced an emergency situation which she was not at fault in creating and that she had 5 seconds or less to take action to avoid the collision, you should find that she was not negligent with respect to management and control of her vehicle. The emergency rule is to be considered by you only with respect to your consideration of negligence as to management and control.

(All caps in original omitted).

880 (1969) "where a driver has less than four seconds to act, an emergency is created as a matter of law," and evidence that Paulmier only had two seconds to respond to Burkart's left hand turn, Hart contends Paulmier should have been exonerated from any negligence as a matter of law. We are not persuaded.[4]

Standard of Review

¶9 The trial court has broad discretion when instructing the jury. ***Fischer v. Ganju***, 168 Wis. 2d 834, 849, 485 N.W.2d 10 (1992). A challenge to an allegedly erroneous jury instruction warrants reversal and a new trial only if the

[4] The trial court modified WIS JI—CIVIL 1105A and gave the following emergency instruction:

> Management and control, emergency. When considering negligence as to management and control, bear in mind that a driver may suddenly be confronted by an emergency not brought on or contributed to by his or her own negligence. If that happens, 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. 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.
>
> You are instructed that if you find that either driver faced an emergency situation which he or she was not at fault in creating you should find that he or she was not negligent with respect to management control of the vehicle. The emergency rule is to be considered by you only with respect to your consideration of the negligence as to management and control.

error was prejudicial. ***Lutz v. Shelby Mut. Ins. Co.***, 70 Wis. 2d 743, 750-51, 235 N.W.2d 426 (1975). A prejudicial error is one that probably—not merely possibly—misled the jury. ***Ganju***, 168 Wis. 2d at 850. If we "can determine that the overall meaning communicated by the instruction as a whole was a correct statement of the law, and the instruction comported with the facts of the case at hand, no grounds for reversal exists." ***White v. Leeder*** 149 Wis. 2d 948, 954-55, 440 N.W.2d 557 (1989).

Analysis

¶10 Hart reasons as follows. There was no evidence that Paulmier was speeding, that she ran a red light, or that she was not looking out for traffic. Because she testified she had only two seconds to react to the movement of Burkart's left hand turn to avoid a collision, she fit well within the parameters of the four-second rule exonerating her from negligence as to management and control as a matter of law. Furthermore, because the jury found that Paulmier caused the collision, despite the absence of any evidence showing negligence on her part, failing to give the requested instruction permitted the jury to attribute fault to her, thus rendering the exclusion of the instruction prejudicial.

¶11 The trial court altered the standard emergency instruction to the extent that it inserted the phrase "either driver" before the clause "was faced with an emergency situation." It reached that decision on the basis that "lookout" under the evidence submitted was a disputed issue for the jury to decide.

¶12 From our review of the record, the jury was presented with two scenarios. On the one hand, Paulmier stated that Burkart turned in front of her just as she was about to enter the intersection on an amber light. On the other hand, Burkart stated he entered the intersection on a green-turn arrow and was in the

process of completing his turn when Paulmier slid into the intersection, striking the passenger side of his truck. Either version was plausible, but the jury chose to give more weight to Burkart's version of events. Accordingly, the trial court's emergency instruction comported with the evidentiary facts and was not prejudicial.

B. Introduction of Settlement.

¶13 Hart's second claim of error is based upon the trial court allowing the defendants to introduce evidence that she had settled her claim against Paulmier prior to the commencement of the trial. We reject this claim of error.

¶14 In resolving this issue, we looked for guidance in ***Hareng v. Blanke***, 90 Wis. 2d 158, 168, 279 N.W.2d 437 (1979). ***Hareng*** involved a malpractice action against Dr. Lee Bowden, Northwest General Hospital, Dr. James Blanke and Dr. E. Michael Kourakis. ***Id.*** at 160-62. Prior to trial, Hareng settled with Dr. Bowden and Northwest General. ***Id.*** at 162. During cross-examination, Dr. Blanke's counsel asked Hareng why Dr. Bowden was no longer a party. ***Id.*** at 167. Hareng's counsel objected, but acknowledged that the jury was entitled to know who was sued. ***Id.*** In a chambers conference, the trial court ruled that Dr. Blanke's counsel could elicit information "that by agreement of the parties, Dr. Bowden and the hospital are no longer parties to the action." ***Id.*** Back in the courtroom, Dr. Blanke's counsel asked Hareng whether a mutual agreement had been reached between her and Dr. Bowden. ***Id.*** She responded affirmatively. ***Id.*** There was no objection to the question. ***Id.*** The supreme court stated: "It would appear that there was a clear waiver of the objection when plaintiffs' counsel acquiesced in the court's ruling and also acquiesced in the question and answer in the courtroom." ***Id.*** at 167-68.

¶15 The supreme court further enunciated:

> While public policy provides a limited privilege against disclosure of settlements and offers to settle, the privilege and the exclusion is not absolute. Sec. 904.08, Stats., "does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness…."
>
> It is argued by defendants that the evidence of a prior settlement between Dr. Bowden and the Harengs was admissible to show prejudice on the part of Anne Hareng as a witness because she had a financial interest in playing down the negligence of Dr. Bowden and emphasizing that of Dr. Blanke and Dr. Kourakis. We agree, and we conclude that evidence of a settlement can be used, as in this case, to show possible bias of a witness, although it cannot be used to prove liability or invalidity of a claim at issue.

Id. at 168 (citation and footnote omitted). The circumstances of ***Hareng*** are not unlike those of the case before us. Hart sued Paulmier, Burkart and Lincoln claiming joint and several negligence. Hart then settled with Paulmier by executing a ***Pierringer*** release. The consequence of this disposition is that any causal negligence attributed by the jury to Paulmier would be imputed to Hart, thereby affecting her percentage of recovery. There is no doubt, however, that Hart's theory of the case, based upon an erroneous application of the ***Vanderkarr*** decision, was that Paulmier would be absolved of all negligence because of the emergency doctrine. As aptly stated in respondents' brief: "Under ***Hareng***, Burkart and Lincoln were entitled to introduce evidence of the fact that Hart had claimed Paulmier was negligent and then dismissed her pursuant to a settlement to show that Hart had a financial interest in playing down the negligence of Paulmier and emphasizing the negligence of Burkart." We agree. The trial court did not err in allowing the defense to introduce the fact of the settlement with Paulmier to the

jury to demonstrate potential bias of a witness. Accordingly, this claim of error fails.

C. Burden of Proof Instruction.

¶16 Hart's third claim is that the trial court erred when instructing the jury on the burden of proof to be used in assessing damages. She argues that the phrase "reasonable certainty" should be replaced by the phrase "reasonable probability." She concludes this is so because all of the medical expert's opinions were couched in terms of "reasonable probability." To rule otherwise, argues Hart, is to confuse the jury by rendering distinguishable considerations undistinguishable. We are not convinced.

¶17 In ***Nommensen v. American Continental Insurance Co.***, 2001 WI 112, 246 Wis. 2d 132, 629 N.W.2d 301, Hart's opinion to the contrary notwithstanding, our supreme court was asked to directly address the degrees of certitude a jury must reach in answering verdict questions. ***Id.***, ¶1. Nommensen's proffered solution was to substitute the word "probability" for the word "certainty" in the jury instructions. ***Id.***, ¶3. The court rejected the suggestion and declared: "We think the Wisconsin Civil Jury Instructions Committee was standing on solid ground when it commented that 'The Committee believes the term "reasonable certainty" has been firmly established in our case law and accurately reflects the degree of certitude jurors must reach in answering verdict questions.'" ***Id.***, ¶26 (citation omitted). To accept Hart's suggestion would be to act contrary to the established function of this court, particularly since the supreme court has already ruled on the issue. *See* ***Livesey v. Copps Corp.***, 90 Wis. 2d 577, 581, 280 N.W.2d 339 (Ct. App. 1979). Therefore, we respectfully decline Hart's invitation.

D. Sanctions.

¶18 Hart next claims trial court error in denying her motion to impose sanctions against Burkart's counsel who moved for sanctions against her counsel for moving for reconsideration of the order denying the original motion for a new trial. Burkhart's motion for sanctions claimed that the motion for reconsideration was baseless in law. Hart's counsel countered by seeking sanctions against Burkhart's counsel for filing a baseless motion for sanctions. The trial court, in making its ruling to deny sanctions for moving for reconsideration, did not rule that the motion for reconsideration was baseless. It ruled as a matter of law that "there are no new grounds for reconsideration." Burkhart has not appealed that ruling. Thus, under the ruling, we assume that a basis existed for the motion. Immediately thereafter, Hart claimed that Burkart's motion for sanctions was "baseless" with this statement: "Well, your Honor, she filed a baseless motion for sanctions."

¶19 The trial court disagreed with Hart's claim but did not explicate its reasons. We reject this claim of error for two reasons.

¶20 First, when a trial court, in its discretion, makes a ruling without setting forth the rationale for the ruling, we can review the ruling in several ways, one of which is to review the record to determine whether the record as a whole provides factual and legal support for the action by the trial court. *See* ***Becker v. Zoschke***, 76 Wis. 2d 336, 347, 251 N.W.2d 431 (1977). Here, when the trial court in summary fashion denied the motion by Hart's counsel for sanctions, it apparently overlooked an earlier ruling it had made during the hearing as to the timeliness of the two motions that were filed by the respective parties seeking sanctions. Initially, Hart's counsel raised the timeliness of the motions claiming

that by applying WIS. STAT. §§ 801.15(1)(b), 801.15(4), and 801.15(5)(a), the five-day rule was violated. He furthermore acknowledged that his motion for sanctions was late. The court ruled: "There is no standing for any of these motions…. Arguably, the deadlines were not met." Thus, the court was clearly conscious of the deadline problem. We conclude that when the court tersely denied Hart's motion for sanctions, a reason existed in the record for the denial. Consequently, there was no erroneous exercise of discretion.

¶21 Second, when Hart asked for sanctions, her counsel was not specific in his request. To simply state that a motion for sanctions is "baseless," is conclusory at best. Hart's counsel faults the trial court for not stating the reasons required under the law of WIS. STAT. § 802.05(1) that formed the basis for its ruling. Yet, counsel did not provide any specifics in his motion to provide the court with the opportunity to correctly rule if he had an objection to the ruling. We conclude that sound reason and common sense requires such action by counsel in order to preserve his claim of error.

E. Jury Communication.

¶22 Last, Hart claims trial court error for failing to grant a new trial because of an impermissible communication that occurred with members of the jury on two separate occasions. These instances of communication precipitated Hart filing a petition for an order to show cause and the trial court expanding the scope of inquiry concerning these alleged communications. The first instance concerned a conversation that Burkart was observed having with juror James Ellis in the hallway of the courthouse during a recess. The second instance was the alleged introduction during jury deliberations of the fact that Hart had settled her claim with one of the original defendants, Paulmier, for the sum of $60,000.

Faced with these allegations about improper conduct with a juror and within the jury deliberations, the trial court appropriately conducted a hearing at which considerable testimony was taken.

¶23 We first consider the implications of the Burkart-Ellis conversation. There was no dispute that Burkart violated the trial court's preliminary instructions and spoke with juror Ellis, and that both counsel became aware of the incident. Ellis and Burkart testified as to their recollection of what transpired. The best that can be gleaned from the record is that the conversation was a brief discussion solely about sports. The trial court found as a matter of fact that the conversation was not in any way related to the facts in the case, and it had "no impact whatsoever on the deliberations of the jury." It concluded that if error was committed, it was harmless. Based upon our reading of the record, the trial court did not err.

¶24 We now consider the second form of alleged improper communication with the jury. The basis for this claim of error is the affidavit of Robert Wilkes regarding extraneous information invading the jury deliberations. The court heard Wilkes's testimony. Wilkes was an alternate juror who did not participate in the deliberations. In an affidavit submitted to the court through Hart's counsel, Wilkes averred that James Ellis, a juror, stated during a break that Hart had received $60,000 in settlement. In testimony before the court, he recanted his story that Ellis told him about the settlement, but stated it was an "elderly juror" who told him. By process of elimination, this proved to be either Ellis or the jury foreperson, Ralph Simon. Over the course of several hearings, the court took testimony of all the jurors who deliberated as well as the two alternate jurors.

¶25 In finding facts, the trial court determined that Wilkes had recanted the substance of his affidavit as to with whom he had spoken and whether the dollar amount of any settlement was discussed. It further determined that Wilkes was unable to identify either Ellis or Simon as the "elderly juror" who spoke to him. It found that none of the other jurors who served heard anything remotely resembling the facts set forth in the Wilkes affidavit. Furthermore, Wilkes was only an alternate juror who did not participate in the deliberations. Based upon these findings of fact, the court concluded as a matter of law that nothing prejudicial or extrinsic was introduced into the deliberative process that warranted a new trial. After our meticulous review of the motion hearings, we conclude that the trial court's findings of fact are amply supported by the record and form a reasonably satisfactory basis for the trial court's conclusions of law. Therefore, we reject this claim of error.

By the Court.—Judgment and orders affirmed.

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