COURT OF APPEALS
DECISION
DATED AND FILED

May 12, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2073 **Cir. Ct. No. 2006CV10935**

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

THOMAS DEMARCO,

PLAINTIFF-APPELLANT,

U.S. SPECIALTY INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF,

V.

WEST BEND MUTUAL INSURANCE COMPANY,
SCOTT R. PETERS AND
MARRIOTT CONSTRUCTION, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed*.

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

¶1 CURLEY, P.J. Thomas DeMarco appeals from a judgment in favor of Scott R. Peters, West Bend Mutual Insurance Company, and Marriott Construction, Inc. (collectively referred to as Peters) following a jury trial. DeMarco claims that the trial court erred in denying his motion for a directed verdict and contends that because Peters was negligent as a matter of law, the jury's finding to the contrary was not supported by credible evidence at trial. In addition, DeMarco asserts that the trial court erred when it gave the emergency instruction to the jury. We conclude: (1) the trial court properly denied DeMarco's motion for a directed verdict because there was credible evidence to sustain a finding in favor of Peters; (2) credible evidence likewise supports the jury's verdict; and (3) because DeMarco failed to object to the emergency instruction, pursuant to WIS. STAT. § 805.13(3) (2007-08), he cannot now argue that the trial court erred when it gave that instruction to the jury.[1] Accordingly, we affirm.

I. BACKGROUND.

¶2 This lawsuit arises out of a two-vehicle accident that occurred on August 20, 2004, when a pickup truck operated by Peters rear-ended a semi-tractor operated by DeMarco. The accident occurred near the intersection of North 95th Street and West Brown Deer Road in Brown Deer, Wisconsin. DeMarco's semi-tractor did not have a trailer attached at the time. Peters, however, was hauling a 4500- to 5000-pound skid loader on a trailer. Peters testified that prior to the collision, he was traveling approximately thirty-five miles per hour (the

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

accident occurred in a zone where the posted speed limit was forty-five miles per hour). When the collision occurred, it was mid-day and the weather conditions were dry and sunny.

¶3 According to Peters, two vehicles merged in and out of the far right-hand lane he was traveling in immediately before he saw DeMarco's semi-tractor, which was stopped in the right lane for a vehicle which had pulled over to let passengers out. DeMarco acknowledged seeing a "little white car shoot out from behind [his] truck" prior to the collision. According to Peters, the vehicle directly in front of his truck was an SUV, and as a result, he did not see DeMarco's semi-tractor, which was taller than Peters' truck, until after the two intervening vehicles pulled out of Peters' travel lane.

¶4 Once the vehicles pulled out of his lane, Peters saw DeMarco's stopped semi-tractor two to three seconds prior to the collision. He slammed his brakes prior to impact but was unable to avoid impact.

¶5 DeMarco filed suit against Peters, Peters' employer, Marriott Construction, Inc., and his employer's insurer, West Bend Mutual Insurance Company. The case proceeded to a jury trial, during the course of which DeMarco requested a directed verdict. The trial court denied his request, holding that there was testimony in the record from which the jury could find that there was an emergency situation not brought about by Peters' negligence.

¶6 Consequently, among the instructions provided to the jury was the emergency instruction. The emergency instruction reads:

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 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 a choice of action or inaction that 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.

WIS JI—CIVIL 1105A.[2]

¶7 The jury found that Peters was not negligent. In his motions after verdict, DeMarco sought to have the answers to the special verdict questions

[2] The general jury instruction on management and control was also given to the jury. It provides:

> **MANAGEMENT AND CONTROL**
>
> A driver must use ordinary care to keep his or her vehicle under proper management and control so that when danger appears, the driver may stop the vehicle, reduce speed, change course, or take other proper means to avoid injury or damage.
>
> [If a driver does not see or become aware of danger in time to take proper means to avoid the accident, the driver is not negligent as to management and control.]

WIS JI—CIVIL 1105.

regarding Peters' negligence changed based on his contention that the verdict was not supported by credible evidence. The trial court denied his request, again concluding that there was credible evidence of an emergency situation. DeMarco now appeals. Additional facts are provided in the remainder of the opinion as are relevant.

II. ANALYSIS.

A. The trial court properly denied DeMarco's motion for a directed verdict.

¶8 DeMarco argues that the trial court erred in denying his motion for a directed verdict. When reviewing the denial of a motion for a directed verdict, the standard of review requires us to consider whether, taking into account "all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion was made, there is any credible evidence to sustain a finding in favor of that party." ***Re/Max Realty 100 v. Basso***, 2003 WI App 146, ¶7, 266 Wis. 2d 224, 667 N.W.2d 857. "Except in the clearest of cases, a trial judge should withhold ruling on a directed verdict and permit the question to go to the jury." ***Warren v. American Family Mut. Ins. Co.***, 122 Wis. 2d 381, 384, 361 N.W.2d 724 (Ct. App. 1984). Thus, a directed verdict is appropriate "only where there is no conflicting evidence as to any material issue and the evidence permits only one reasonable inference or conclusion." ***Millonig v. Bakken***, 112 Wis. 2d 445, 451, 334 N.W.2d 80 (1983). The issue of negligence is rarely decided as a matter of law. *See* ***id.***

¶9 DeMarco argues that "Peters was negligent as a matter of law for failing to manage his vehicle's speed and the distance between his vehicle and those in front of him in a manner that would allow him to stop within the distance that he could see in front of him." To support his argument, DeMarco relies on

Lentz v. Northwestern National Casualty Co., 11 Wis. 2d 462, 105 N.W.2d 759 (1960), and ***Schilling v. Gall***, 33 Wis. 2d 14, 146 N.W.2d 390 (1966). In both cases, our supreme court concluded that the emergency instruction was not appropriate based on the negligence of the drivers involved.

¶10 In ***Lentz***, the defendant testified to having poor visibility due to the early morning hours and fogginess on the day of the accident. ***Id.***, 11 Wis. 2d at 464. He did not see a truck parked on the side of the street until he was within twenty-five to thirty feet of it, and at that point, was unable to avoid colliding with it. ***Id.*** Although witnesses testified to the truck's taillights being on, the defendant claimed he did not see them. ***Id.*** The court concluded that the record was clear that "[the defendant] was negligent as a matter of law as to lookout or as to speed, and [as such] it was prejudicial error to instruct the jury as to the emergency rule." ***Id.*** at 464-65.

¶11 In ***Schilling***, an automobile driven by one of the defendants in the case collided with a truck driven by Schilling late one evening. ***Id.***, 33 Wis. 2d at 16. The defendant requested that the emergency instruction be given on his behalf. ***Id.*** at 19. He claimed to have observed the Shilling vehicle 125 feet ahead of him and testified that he was traveling at a moderate speed. ***Id.*** Relying on ***Lentz***, the ***Schilling*** court concluded that the defendant was not entitled to the benefit of the emergency instruction based on its determination that he "was unable to stop his car in the distance that he could see ahead of him and was negligent as a matter of law for that reason." ***Id.***

¶12 DeMarco argues: "[T]he fact is that Peters was traveling too fast, even if under the speed limit, to be able to stop in the 300 to 600 feet he could see in front of him, making him negligent as a matter of law under ***Lentz*** and

Schilling." (Underlining omitted; italics added.) We disagree. First, ***Lentz*** and ***Schilling*** are factually distinguishable as neither involved an intervening emergency or obstruction to the vision of the drivers posed by weaving vehicles as was the situation here.

¶13 Furthermore, while Peters referenced a distance of 300 to 600 feet during his trial testimony, we do not read it to substantiate that Peters could see that distance. Peters' testimony in this regard was as follows:

> [DeMarco's attorney:] Explain for the Jury how the accident occurred.
>
> [Peters:] After travelling westbound on Brown Deer in the right lane—I'm pretty slow. A pretty big vehicle. I'm pretty much open to anybody pulling in front of me. And at the time of the accident, just before it, two cars did pull in front of me doing roughly, I'd say, 50 [miles per hour]. They were pretty fast.
>
> As soon as they pulled out or pulled in, I left off the gas. As soon as they pulled out, that's when I seen the semi stopped. Didn't see any lights. I just slammed on the brakes and that was pretty much it. It went that fast.
>
> [DeMarco's attorney:] So these two cars pulled in front of you shortly before the accident?
>
> [Peters:] Yes.
>
> [DeMarco's attorney:] How shortly?
>
> [Peters:] I'd say right at the stop and go lights—right before them. It was probably, I don't know, feet. I'm guessing 600 feet, 300 feet.
>
> [DeMarco's attorney:] So in 300 feet cars pulled in front of you. When those cars pulled in front of you, did you see that 300 feet away there was a semi that had stopped in traffic?
>
> [Peters:] No. We were in traffic. There were cars even further ahead of me that I wouldn't see. There were cars. I never seen the semi until after these cars pulled out.

Peters later clarified that he had only a few seconds to react to the situation:

> [Peters' attorney:] You said that these two vehicles pulled in front of you and then pulled out. And was it at that moment you first could see the truck?
>
> [Peters:] Yes.
>
> [Peters' attorney:] And how much time went by from that point? From the time you could—these cars got out of your way, you could see the truck, the instant of the accident?
>
> [Peters:] A couple of seconds. Maybe three.

At that point, Peters testified that he considered swerving, but thought that there were cars to his left and was afraid that someone might be on the sidewalk to his right.

¶14 Where there is a factual dispute as to whether a party is free from negligence which contributed to the creation of the emergency, ***Schilling*** provides:

> "If there is a factual dispute as to such negligence and assuming the time element is so short as to make the doctrine otherwise applicable, a person is entitled to the emergency doctrine instruction and it is for the jury to determine its application. *** If, however, it can be held a person was negligent as a matter of law and such negligence contributed to the emergency, then such person is not entitled to the emergency doctrine instruction."

Id., 33 Wis. 2d at 19-20 (citation omitted). Here, the trial court concluded that a factual dispute as to negligence existed in this case when it denied DeMarco's motion for a directed verdict, stating:

> There's testimony in the record from which the jury could, depending upon weight and credibility, all the different evidence that was introduced find that this could constitute an emergency situation that as defined in Jury Instruction 1105-A, that 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 his own negligence.
>
> ….
>
> The fact of the evidence that's been introduced is that Mr. Peters was travelling 35 miles per hour in the far right-hand lan[e] in heavy traffic; that the distance between him—and maybe it was the truck in front of him, that's not real clear as to what was—when he was driving in the right-hand lane where he was in relation to Mr. DeMarco's truck and whether or not he saw it earlier, but he was travelling along at that speed at a distance away from whatever vehicle was immediately in front of him such that two different vehicles, an SUV and a car were able to quickly pass him, pull in front of him which means he was a safe distance away assuming that testimony as being true which I have to for purposes of this motion; that there was a sufficient distance for two vehicles to pull in between him and the vehicle in front of him; that they stayed there for a period of time, somewhere in the range of two to three seconds, were travelling faster than he was; that the SUV was the closer vehicle to him.
>
> As a result of that, he did not see the truck in front of him; that that vehicle blocking his view; that he at least took his foot off the accelerator when they did this, was paying attention; that they each veered out suddenly in front of him and it was not until that second vehicle pulled out that he was able to see that the truck was stopped in front of him.
>
> At that point, he could not veer to the left because of the truck. He didn't believe that he should veer to the right onto the sidewalk in that quick decision in a case there were a—was or were pedestrians at that location. He applied his brakes. He was unable to stop under those circumstances and hit the truck.
>
> There is conflicting evidence … I think under the standards of a motion to [direct the verdict]—for the Court to answer, there are conflicting issues and credibility determinations that the jury must answer….

We agree with the trial court's analysis.

¶15 Having considered "all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion was

made," ***Re/Max Realty 100***, 266 Wis. 2d 224, ¶7, we hold that the trial court was correct in denying DeMarco's motion for a directed verdict.

B. Credible evidence supports the jury's verdict.

¶16 DeMarco goes on to argue that the jury's verdict must be overturned and that he should be granted a new trial because Peters was negligent as a matter of law such that the jury's finding of no negligence as to Peters was contrary to the credible evidence at trial. As with a motion for a directed verdict,

> [a] motion challenging the sufficiency of the evidence to support a verdict may not be granted "unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the 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."

Richards v. Mendivil, 200 Wis. 2d 665, 670, 548 N.W.2d 85 (Ct. App. 1996) (citation omitted). "[I]t is only in the most unusual case that a jury's verdict will be upset." ***Millonig***, 112 Wis. 2d at 451.

¶17 DeMarco points to testimony which he contends supports a finding that Peters created, in part, "any emergency situation" that existed. However, just because there might be evidence that could support a finding to the contrary does not mean we will overturn the jury's verdict. *See* ***D'Huyvetter v. A.O. Smith Harvestore Prods.***, 164 Wis. 2d 306, 320, 475 N.W.2d 587 (Ct. App. 1991) ("We search for credible evidence to sustain the jury's verdict, not for evidence to sustain a verdict the jury could have reached but did not.").

¶18 Credible evidence supporting the jury's verdict has been set forth above. The jury apparently accepted the emergency doctrine in finding no

negligence in the action of Peters. Consequently, DeMarco's argument as to the sufficiency of the evidence to support the jury's verdict fails.

C. Because DeMarco failed to object to the emergency jury instruction, he cannot now argue that the trial court erred when it gave that instruction to the jury.

¶19 DeMarco argues that Peters was negligent as a matter of law and that Peters' negligence contributed to the creation of "any alleged emergency." Consequently, DeMarco contends that "the trial court erred by giving a jury instruction that was not warranted or supported by the evidence of the case." We disagree.

¶20 Before the emergency doctrine will apply, three criteria must be established: (1) "'the party seeking the benefits of the emergency doctrine 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 before the emergency doctrine can apply.'" ***Totsky v. Riteway Bus Serv., Inc.***, 2000 WI 29, ¶22, 233 Wis. 2d 371, 607 N.W.2d 637 (citation omitted).

¶21 First, as to DeMarco's contention that Peters was negligent as a matter of law and that Peters' negligence played a role in creating any emergency, as stated above, we conclude that there was credible evidence to support the jury's finding that Peters was not negligent. Moreover, because DeMarco's attorney

failed to object to the trial court's decision to give the emergency instruction to the jury, the issue is waived.[3]

¶22 WISCONSIN STAT. § 805.13(3) makes clear that where counsel objects to the trial court's proposed instructions, he or she must clearly state the bases for such objection on the record or risk waiver. Section 805.13(3) reads:

> **(3)** INSTRUCTION AND VERDICT CONFERENCE. At the close of the evidence and before arguments to the jury, the court shall conduct a conference with counsel outside the presence of the jury. At the conference, or at such earlier time as the court reasonably directs, counsel may file written motions that the court instruct the jury on the law, and submit verdict questions, as set forth in the motions. The court shall inform counsel on the record of its proposed action on the motions and of the instructions and verdict it proposes to submit. Counsel may object to the proposed instructions or verdict on the grounds of incompleteness or other error, stating the grounds for objection with particularity on the record. *Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict.*

Id. (emphasis added).

¶23 The record reveals that DeMarco waived his right to assert that the trial court erred in giving the emergency instruction. After stating on the record that the trial court and counsel had an informal conference regarding the jury instructions, the trial court listed the instructions it intended to give to the jury.

[3] In using the term "waiver," we are aware of the recently decided case of ***State v. Ndina***, 2009 WI 21, ___ Wis. 2d ___, 761 N.W.2d 612, where our supreme court clarified the distinction between the terms "forfeiture" and "waiver." *See* ***id.***, ¶29 ("Although cases sometimes use the words 'forfeiture' and 'waiver' interchangeably, the two words embody very different legal concepts. 'Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.'") (citation omitted). Although forfeiture may be applicable in this context, we use waiver to be consistent with WIS. STAT. § 805.13(3) and the cases cited.

These instructions included the emergency instruction, WIS JI—CIVIL 1105A. The trial court then inquired whether there was any objection to the instructions it had referenced on the record, to which DeMarco's attorney responded: "No, your Honor." Likewise, when asked whether there were any requests by counsel for additional instructions, DeMarco's attorney again responded: "No, your Honor."

¶24 In an effort to avoid a conclusion that this issue was waived, DeMarco asserts, "the applicability of the emergency doctrine was *presented* to the trial court, which ruled that the emergency doctrine applied." (Emphasis added.) He argues: "DeMarco submitted his proposed verdict where the negligence of Peters would be answer[ed] by the trial court, reflecting his belief that the emergency doctrine did not apply." DeMarco continues: "The circumstances surrounding the trial court's decision to apply the emergency doctrine instruction when DeMarco clearly did not agree to its applicability make it unclear whether DeMarco in fact objected to the emergency doctrine jury instruction at the informal conference held off the record." We are not persuaded.

¶25 *Presenting* an issue to a trial court is not the same as raising a specific objection to a jury instruction as required by WIS. STAT. § 805.13(3). *See* ***Gosse v. Navistar Int'l Transp. Corp.***, 2000 WI App 8, ¶20, 232 Wis. 2d 163, 605 N.W.2d 896 (disagreeing with appellant who argued that no further objection was necessary when the trial court did not accept the proposed special verdict he submitted); ***Frayer v. Lovell***, 190 Wis. 2d 794, 809, 529 N.W.2d 236 (Ct. App. 1995) (finding waiver due to plaintiff's failure to object with particularity on the record to proposed jury instructions even though plaintiff included the instruction at issue in his proposed list of jury instructions submitted to the court). "[T]he failure to object at the jury instruction or verdict conferences, constitutes a waiver of any error in the proposed instructions or verdict. We have no power to review

waived error of this sort." ***LaCombe v. Aurora Med. Group, Inc.***, 2004 WI App 119, ¶5, 274 Wis. 2d 771, 683 N.W.2d 532 (citation and internal quotation marks omitted); *see generally* ***Steinberg v. Jensen***, 204 Wis. 2d 115, 120-21, 553 N.W.2d 820 (Ct. App. 1996) ("If an attorney disagrees with an instruction that the trial court decides to give during an off-the-record conference, the attorney must place an objection to the instruction on the record in order to preserve the issue for appeal.").

¶26 In his reply brief, DeMarco urges this court to exercise its discretion pursuant to WIS. STAT. § 752.35 and reverse the trial court in the interest of justice, regardless of whether DeMarco properly objected to the emergency doctrine instruction on the record. This is not a case where discretionary reversal is warranted as we are not convinced that there has been a miscarriage of justice. *See* ***id.*** ("[I]f 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, [we] may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record….").

¶27 We thus conclude that the trial court was not compelled to direct a verdict against Peters, that the case was tried under correct instructions, and accordingly a reversal in the interest of justice is not warranted.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.