COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP417 **Cir. Ct. No. 2011CV378**

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

JAMES PETERSON,

PLAINTIFF-APPELLANT,

V.

AARIN P. MCLAUGHLIN AND AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

V.

MEDICARE AND WISCONSIN DEPARTMENT OF HEALTH AND HUMAN SERVICES,

INVOLUNTARY-PLAINTIFFS.

APPEAL from an order of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. James Peterson appeals an order denying his motions after verdict and dismissing his complaint against Aarin McLaughlin and McLaughlin's insurer, American Family Mutual Insurance Company. A jury found McLaughlin negligent with respect to a motor vehicle accident that injured Peterson, but it concluded McLaughlin's negligence was not a cause of the accident. Peterson argues there is no credible evidence to support the jury's finding on causation. He also contends the circuit court erred by including him on the special verdict as an individual to whom the jury could apportion negligence. Finally, he argues he is entitled to a new trial under WIS. STAT. § 805.15.[1] We reject Peterson's arguments and affirm.

BACKGROUND

¶2 The accident at issue in this case occurred at the intersection of Golf Road and Royal Drive in Eau Claire. Golf Road runs east-west, and Royal Drive runs north-south. At the intersection with Royal Drive, Golf Road has two lanes of traffic in each direction, along with a central left turn lane.

¶3 It is undisputed that McLaughlin's vehicle was proceeding east on Golf Road in the inner, eastbound lane immediately before the accident. When McLaughlin reached the intersection with Royal Drive, traffic ahead of him was stopped at an intersection further east and was therefore backed up to the intersection with Royal Drive. McLaughlin therefore came to a stop before Royal Drive to avoid blocking the intersection. At the same time, a vehicle operated by Marcia Harycki was stopped in the westbound left turn lane of Golf Road, waiting

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

to turn onto Royal Drive. McLaughlin, who was across the intersection from Harycki, made some kind of hand gesture to her, the precise nature of which is disputed. Harycki then proceeded into the intersection and began turning left onto Royal Drive. As she crossed the outer, eastbound lane of Golf Road, Peterson's moped, which was traveling east in that lane, collided with the side of her vehicle.

¶4 Peterson sued McLaughlin, alleging he was negligent by "waving [Harycki] on to make her left-hand turn[.]" Harycki was not named as a defendant. The case was tried to a jury. The special verdict asked the jury to determine whether Peterson, McLaughlin, and Harycki were negligent, and, if so, whether each driver's negligence was a cause of the accident. The jury determined all three drivers were negligent, but only Harycki's negligence was causal.

¶5 Peterson filed a postverdict motion, asking the court to change the jury's answer on whether McLaughlin's negligence was causal from "no" to "yes" and the jury's answer on whether Peterson was negligent from "yes" to "no." Peterson also sought a new trial under WIS. STAT. § 805.15, arguing the verdict was contrary to law, contrary to the great weight of the evidence, and was based on perversity, prejudice, or bias. The circuit court denied Peterson's motion, and this appeal follows.

DISCUSSION

I. Motion to change the jury's answer that McLaughlin's negligence was not causal

¶6 On appeal, Peterson first argues the circuit court should have changed the jury's answer on whether McLaughlin's negligence was a cause of the accident from "no" to "yes." Any party may move the court to change an answer

in the jury's verdict on the ground that the answer is not supported by sufficient evidence. WIS. STAT. § 805.14(5)(c). However, a court may grant the motion only if there is "no credible evidence" to support the answer. WIS. STAT. § 805.14(1). When we review a circuit court's denial of a motion to change a verdict answer, we must affirm if the answer is supported by any credible evidence, even if contradictory evidence is stronger and more convincing. *See* ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 389-90, 541 N.W.2d 753 (1995).

¶7 Here, ample evidence supports the jury's conclusion that McLaughlin and Harycki were both negligent, but only Harycki's negligence was causal. McLaughlin testified he and Harycki made eye contact while Harycki was waiting to turn left from Golf Road onto Royal Drive. An exchange of hand gestures then took place. Harycki "gave [McLaughlin] a wave acknowledging she was going to turn." McLaughlin "gave [Harycki] a wave acknowledging [he] was not going forward, [he] was allowing her to turn." McLaughlin testified his gesture was intended to convey that he "wasn't going to pull ahead and cut [Harycki] off[.]" He did not intend to convey any information about what other drivers were going to do. McLaughlin testified Harycki made the turn in one fluid movement—that is, she did not stop after clearing his vehicle to see if any traffic was approaching in the outer, eastbound lane of Golf Road.

¶8 Harycki similarly testified that she made eye contact with McLaughlin while she was waiting to turn onto Royal Drive and then exchanged hand gestures with him. Harycki initially testified she interpreted McLaughlin's gesture as meaning "it was okay for [her] to turn[.]" However, she later clarified she believed the gesture meant McLaughlin was "giving [her] … the space to turn. He wasn't going to bring his vehicle forward." She confirmed this interpretation

of McLaughlin's gesture several times throughout her testimony. She also stated she did not interpret McLaughlin's gesture as "making any indication … about what other people on the road were going to be doing."

¶9 Harycki conceded that McLaughlin's truck and the vehicles behind it blocked her view of the outer, eastbound lane of Golf Road while she was waiting to turn left. She also admitted she did not stop after clearing McLaughlin's truck to "see whether or not traffic was coming" in the outer lane, and she "did not wait for the traffic in [that] lane" before completing her turn. She testified she did not see Peterson's moped before the impact. She conceded it was her responsibility as a driver to maintain a proper lookout and proceed with caution when crossing an intersection. She also acknowledged that, regardless of McLaughlin's hand gesture, it was her responsibility to watch for oncoming traffic. She testified she knew she had to follow the rules of the road when driving. Finally, she conceded she knew McLaughlin was not controlling traffic on the day of the accident.

¶10 On this record, a jury could reasonably conclude that McLaughlin was negligent by gesturing to Harycki, but his negligence was not causal. Both McLaughlin and Harycki testified McLaughlin's gesture merely indicated he intended to let Harycki turn in front of him. They agreed the gesture did not convey any information about traffic in the outer, eastbound lane of Golf Road. Harycki accepted sole responsibility for causing the accident, conceding: (1) it was her responsibility to maintain a proper lookout; (2) she could not see the traffic in the outer lane of Golf Road, but she proceeded to turn left anyway; (3) she did not rely on McLaughlin's gesture to tell her anything about the traffic in the outer lane; and (4) she did not stop to see whether there was any traffic in the outer lane before completing her turn. Based on this testimony, a jury could reasonably conclude McLaughlin's conduct was not a substantial factor in causing

the accident. *See* ***Merco Distrib. Corp. v. Commercial Police Alarm Co.***, 84 Wis. 2d 455, 458-59, 267 N.W.2d 652 (1978) ("The test of cause in Wisconsin is whether the defendant's negligence was a substantial factor in contributing to the result.").

¶11 Peterson cites evidence arguably supporting a contrary conclusion. However, a jury's answer must be affirmed if it is supported by any credible evidence. *See* ***Weiss***, 197 Wis. 2d at 389-90. Because credible evidence supports the jury's finding that McLaughlin's negligence was not a cause of the accident, the circuit court properly denied Peterson's motion to change the jury's answer.

II. Inclusion of Peterson on the special verdict

¶12 Peterson next argues the circuit court erred by including him on the special verdict as an individual to whom the jury could apportion negligence. "A circuit court has wide discretion in determining the words and form of a special verdict." ***Gumz v. Northern States Power Co.***, 2007 WI 135, ¶23, 305 Wis. 2d 263, 742 N.W.2d 271. We will not reverse unless the court erroneously exercised its discretion. ***Id.*** "A court erroneously exercises its discretion if the special verdict questions fail to cover all issues of fact or are inconsistent with the law." ***Id.***, ¶24. Our supreme court has held that, "[w]hen apportioning negligence, a jury must have the opportunity to consider the negligence of all parties to the transaction[.]" ***Connar v. West Shore Equip. of Milwaukee, Inc.***, 68 Wis. 2d 42, 44-45, 227 N.W.2d 660 (1975). To include a person on the special verdict, the circuit court need only find there is "evidence of conduct which, if believed by the jury, would constitute negligence on the part of the person[.]" ***Id.*** at 45.

¶13 There was sufficient evidence in this case for a jury to conclude Peterson was negligent. McLaughlin testified that a vehicle turned left from Golf

Road onto Royal Drive moments before Harycki attempted to turn. Despite the presence of this cross-traffic, Peterson proceeded to drive his moped into the side of Harycki's vehicle. A jury could reasonably conclude that, if Peterson had maintained a proper lookout, he would have seen the first car turn, which would have alerted him to the possibility that another car might follow. In addition, McLaughlin testified it sounded as though Peterson accelerated in the seconds before the accident. Accelerating into a busy intersection without regard for cross-traffic indicates a failure to exercise ordinary care. Accordingly, the circuit court did not erroneously exercise its discretion by including Peterson on the special verdict.

¶14 In any event, even if the court erred by including Peterson on the special verdict, Peterson has not shown that the error affected his substantial rights. *See* WIS. STAT. § 805.18(2) (We will not grant a new trial based on an error that did not affect a party's substantial rights.). The jury found Peterson negligent, but it also concluded his negligence was not a cause of the accident. Thus, the court's decision to include Peterson on the special verdict had no effect on the outcome of the case.

III. New trial under WIS. STAT. § 805.15

¶15 Finally, Peterson argues the circuit court should have granted him a new trial, pursuant to WIS. STAT. § 805.15. That statute allows a court to set aside a verdict and grant a new trial "because of errors in the trial, or because the verdict is contrary to law or to the weight of evidence, or because of excessive or inadequate damages, or because of newly-discovered evidence, or in the interest of justice." WIS. STAT. § 805.15(1). Whether to grant a new trial under § 805.15 is a discretionary decision, and we will affirm unless the circuit court erroneously

exercised its discretion. ***Sievert v. American Family Mut. Ins. Co.***, 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct. App. 1993), *aff'd*, 190 Wis. 2d 623, 528 N.W.2d 413 (1995).

¶16 Peterson first argues he is entitled to a new trial because the circuit court included him on the special verdict "even though there was absolutely no direct evidence of anything [Peterson] did or didn't do … that caused or contributed to the accident." We have already concluded the court properly included Peterson on the special verdict. Consequently, Peterson is not entitled to a new trial on this basis.

¶17 Peterson also argues the verdict is contrary to the great weight and clear preponderance of the evidence. He correctly observes that a court may grant a new trial on this basis even if credible evidence supports the jury's findings. *See* ***Krolikowski v. Chicago & Nw. Transp. Co.***, 89 Wis. 2d 573, 580, 278 N.W.2d 865 (1979). However, Peterson has not convinced us the jury's verdict is against the great weight of the evidence.

¶18 Peterson contends McLaughlin's gesture to Harycki must have been a cause of the accident because it "caused [Harycki] to commence her left turn" and the accident occurred "two to three seconds later." We do not agree that this temporal proximity necessarily indicates McLaughlin's conduct was a substantial factor in causing the accident. Harycki admitted she did not interpret McLaughlin's gesture as communicating that the outer lane was free of traffic. McLaughlin similarly testified the only information he intended his gesture to convey was that he did not plan to move his truck forward. Harycki testified it was her responsibility to maintain a proper lookout. She failed to do so by proceeding into the intersection when she could not see whether there were any

vehicles in the outer, eastbound lane and by failing to stop to see whether there was any traffic in the outer lane after she cleared McLaughlin's truck. This evidence amply supports the jury's conclusion that McLaughlin's negligence was not a substantial factor in causing the accident.

¶19 Peterson makes much of the fact that Steven Peterson,[2] a witness to the accident, testified he interpreted McLaughlin's hand gesture as "advising [Harycki] that it was okay to turn[.]" We fail to see how Steven Peterson's interpretation of McLaughlin's gesture is relevant. Harycki clearly testified she did not believe McLaughlin was providing any assurance about the traffic in the outer lane.

¶20 Peterson also emphasizes that, shortly after the accident, Harycki told police McLaughlin "waved [her] through" the intersection. That statement is not necessarily inconsistent with Harycki's trial testimony. Peterson does not point to any evidence that Harycki used the term "waved through" to convey anything different from what she testified to at trial. Simply put, the evidence Peterson cites does not convince us the jury's verdict is contrary to the great weight and clear preponderance of the evidence.

¶21 Lastly, Peterson asserts the jury's verdict is perverse. "A verdict is perverse when the jury clearly refuses to follow the direction or instruction of the trial court upon a point of law, or where the verdict reflects highly emotional, inflammatory or immaterial considerations, or an obvious prejudgment with no attempt to be fair." ***Redepenning v. Dore***, 56 Wis. 2d 129, 134, 201 N.W.2d 580

[2] Peterson is not related to Steven Peterson.

(1972) (footnote omitted). Peterson does not explain how the jury's verdict meets this standard. He does not point to any evidence that the jury refused to follow the circuit court's instructions or based its decision on emotional considerations instead of the facts of record. He has therefore failed to establish he is entitled to a new trial because the jury's verdict is perverse.

By the Court.—Order affirmed.

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