COURT OF APPEALS
DECISION
DATED AND FILED

August 31, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

Nos. 97-2444
97-2089

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

BETTY L. BLUE,

PLAINTIFF-APPELLANT,

V.

FORD MOTOR COMPANY,

DEFENDANT-RESPONDENT,

MEDICARE PART A/UNITED GOVERNMENT SERVICES, MEDICARE PART B/WPS HEALTH INSURANCE, MILLERS CLASSIFIED INSURANCE COMPANY AND PHYSICIANS MUTUAL INSURANCE COMPANY,

DEFENDANTS,

FRED BLUE,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Betty Blue was seriously injured when her Ford Aerostar van rolled backwards down a driveway and hit her. Her husband Fred had parked the van in the driveway before the accident. Fred contended that he had left the van, which had an automatic transmission, in "park," but a police officer at the scene of the accident found the van in "drive." Betty brought an action against Fred and Ford for her injuries. The jury rejected negligence and strict liability claims against Ford, concluded that Fred had been ninety percent negligent for his actions, and concluded that Betty had been ten percent negligent. The jury awarded Betty over four million dollars in damages.

¶2 Betty appeals from the judgment in favor of Ford Motor Company. Fred appeals from the judgment finding him negligent. These cases have been consolidated for disposition. On appeal, many of Betty and Fred's arguments are identical.

¶3 The issues are: (1) whether the trial court erred in limiting the testimony of Betty's expert, Dr. Michael Smith; (2) whether the trial court erred in refusing to give a jury instruction proposed by Betty; (3) whether the trial court erred in allowing certain testimony by Ford's expert witness, General Jerry Curry; (4) whether the trial court erred in limiting Betty's cross-examination of Curry; (5) whether the trial court should have allowed evidence about a recall by Ford; (6) whether Ford was negligent as a matter of law; (7) whether the trial court erred in refusing to grant a new trial in the interest of justice under WIS. STAT. § 805.15

(1997-98);[1] and (8) whether we should grant a new trial in the interest of justice under WIS. STAT. § 752.35. We affirm.

¶4 Betty and Fred first argue that the trial court erred in refusing to allow Betty's expert, Michael Smith, Ph.D., to testify that he believed that the van was unreasonably dangerous. Smith was willing to testify that he believed that the design and manufacturing of the vehicle was defective because Ford had not included an interlock device in the van's design that would prohibit a driver from removing the key from the ignition unless the gear was in park.

¶5 Expert opinion evidence is admissible if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." WIS. STAT. § 907.02. A witness may be qualified as an expert "by knowledge, skill, experience, training, or education." ***Id.*** Whether to admit expert testimony is committed to the sound discretion of the trial court. *See* ***State v. Richardson***, 189 Wis. 2d 418, 424, 525 N.W.2d 378 (Ct. App. 1994).

¶6 The trial court explained:

> I've heard Doctor Smith testify before, I know his credentials and his background. There's no question he's testified numerous times in the past with regard to human factors matters.
>
> ….
>
> But the question here is whether or not it would have been reasonable to engineer [an interlock device] in given all the facts and circumstances around that Ford Aerostar. I know that Doctor Smith is not an automotive engineer, he's an industrial engineer. In fact, most of his

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

> work has [involved] psychological pursuit[s] related to [the] industrial engineering field.
>
> He is much more schooled in the psychology of industrial engineering as opposed to industrial engineering itself.
>
> All right. Again, I think that Doctor Smith does not have the qualifications to testify about the electrical engineering aspect of warning devices from what I know about Doctor Smith at this point.
>
> There is an electrical engineering issue, and probably combined with mechanical engineering issues. He's an industrial engineer with a strong emphasis on the psychological aspects of engineering on people who use products.
>
> And if he isn't able to, in addition to testifying that a warning device would be effective, to testify that a warning device was practical, and was the state of the art and or should have been the state of the art at this particular period of time, he can't testify to those matters.

¶7 The trial court based its decision not to allow the testimony on Dr. Smith's credentials, concluding that it did not believe Smith was qualified to assist the jury in determining whether an interlock device should have been included in the van's design because that was not his area of study. The court's well-explained decision was based on the facts and proper law and, as such, we conclude that there was no misuse of discretion.

¶8 Betty and Fred next argue that the trial court erred by giving the jury the standard instruction for negligence of a manufacturer, WIS JI–CIVIL 3240, rather than the modified instruction Betty had proposed. The standard instruction states:

> 3240 Negligence: Duty of Manufacturer
>
> It is the duty of a manufacturer to exercise ordinary care in the design, construction and manufacture of its product so as to render such product safe for its intended use.

> It is the further duty of the manufacturer, in the exercise of ordinary care, to make all reasonable and adequate tests and inspections of its product so as to guard against any defective condition which would render such product unsafe when used as it is intended to be used. A manufacturer is charged with the knowledge of its own methods of manufacturing its product and the defects in such methods, if any.
>
> Failure of the manufacturer to perform any such duty constitutes negligence.

The instruction Betty proposed provided:

> 3240 Negligence: Duty of Manufacturer (Modified)
>
> It is the duty of a manufacturer to exercise ordinary care in the design, construction, and manufacture of its product, so as to render such product safe for its intended use.
>
> *If a product may create a foreseeable risk or hazard to someone, it becomes the duty of the manufacturer to anticipate such risk or hazard and exercise reasonable care to minimize or lessen such risks or hazards.* (Emphasis added.)

¶9 The trial court has wide latitude in deciding which instructions to give. *See* ***Anderson v. Alfa-Laval Agri, Inc.***, 209 Wis. 2d 337, 344, 564 N.W.2d 788 (Ct. App. 1997). The standard instruction properly states the law and was "sufficiently complete to advise the jury as to the proper legal principles it was to apply." ***Id.*** at 347. While Betty may have preferred an instruction more specifically tailored to her case, the trial court acted within its discretion in refusing to give the modified instruction.

¶10 Betty next argues that the trial court erred in allowing General Jerry Curry, the former head of the National Highway Traffic Safety Administration (NHTSA), to testify to matters outside his personal knowledge. Betty contends he should not have done so because the trial court had not qualified him as an expert

because he was not an engineer. *See* WIS. STAT. § 907.01 (opinion testimony from a lay witness is limited to opinions and inferences that can be drawn from the person's perception). Betty objects to the following testimony:

> You get all this information in front of automotive engineering, then they make an evaluation, is this really a concern. The state recognizes almost everything [in] a motor vehicle is a safety concern. The question is, is it unreasonable risk?
>
> If it's unreasonable, there are a lot of things you do. I will take it to the end. It probably will end up in an examination of some kind.
>
> ….
>
> For example, NHTSA knew that they didn't have a roll away problem because they had provided a parking brake. If you use the parking brakes you don't have a roll away problem. Yet, we were having rollaways and the rollaways were being generated, quite often, with somebody playing with the shift lever.
>
> And the question then became one of not just a theft regulation, but also sort of protecting children or unattended children in a car that might move the lever.
>
> ….
>
> In this particular one I would be the final decision maker as to whether we would do it or not. There was not enough data to show we really had a pressing safety need [to require ignition interlock devices], but it just seemed to be a common sense thing.

¶11 First, we note that Curry *was* allowed to testify about "the structure of [NHTSA], the kinds of undertakings that they are responsible for, the way that rules are promulgated, and decisions are made, and what the rule or decision was" because he had special knowledge about the agency as its former administrative head. Curry was only barred from giving an opinion about whether the Aerostar was defective or unreasonably dangerous without the interlock. Admittedly, Curry came very close to giving such an opinion when he testified that "[t]here was not

enough data to show we really had a pressing safety need, but it just seemed to be a common sense thing" that the interlocks be required. We conclude, however, that his testimony was allowable as part of the explanation of why the NHTSA ultimately chose to require the interlocks and Curry's role in that process as the person responsible for making the ultimate decision.

¶12 Betty next argues that the trial court erred in limiting her cross-examination of Curry. Betty wanted to establish by cross-examination that before NHTSA amended its standards requiring that all new vehicles have interlocks, the Aerostar likely posed an unreasonable risk of accident. The trial court did not, however, prohibit Betty from conducting cross-examination. The court simply advised her that if she began questioning Curry about the fact that NHTSA eventually required that interlocks be placed in vehicles, the court would allow Ford to rehabilitate Curry by asking whether, in his opinion, the vehicle was unreasonably dangerous. Betty's attorney made a strategic choice not to cross-examine. There was no error.

¶13 Fred argues that the trial court should have allowed evidence at trial of a recall by Ford relating to a defect in the Aerostar's transmission shift mechanism. We agree with the trial court that evidence of the recall was not relevant to the issues in this case. Fred claimed he left the vehicle in park, but the police found it in drive. The recall involved vehicles that moved despite having been left in park. Fred and Betty had the problem corrected after receiving the recall notice, and there was absolutely no evidence that the Blues's van had any mechanical problems. Thus, the trial court did not misuse its discretion in concluding that evidence of the recall would be "absolutely misleading" and that "any remote probative value" would be substantially outweighed by the damage of unfair prejudice. *See* WIS. STAT. § 904.03.

¶14 Betty next argues that Ford was negligent as a matter of law for failing to incorporate an ignition interlock system into the vehicle's design. A party is negligent as a matter of law where the proof is so clear and decisive that "there is no room for fair and honest difference of opinion." ***Millonig v. Bakken***, 112 Wis. 2d 445, 451, 334 N.W.2d 80 (1983) (citation omitted). A review of the testimony at trial shows that there certainly was room "for fair and honest difference of opinion" as to whether Ford was negligent in the design of the Aerostar. Thus, we reject Betty's claim that Ford was negligent as a matter of law.

¶15 Betty next argues that the trial court should have granted her motion for a new trial in the interest of justice. *See* WIS. STAT. § 805.15. Because we have rejected Betty and Fred's various claims of error, we conclude that the trial court properly denied the motion for a new trial.

¶16 Finally, Betty asks this court to exercise its power to grant a new trial in the interest of justice under WIS. STAT. § 752.35. We decline to do so.

By the Court.—Judgments affirmed.

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