COURT OF APPEALS
DECISION
DATED AND FILED

June 14, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2047

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

KENNETH C. APPLEGATE,

PLAINTIFF-APPELLANT,

V.

WISCONSIN ELECTRIC POWER COMPANY, F/K/A WISCONSIN NATURAL GAS COMPANY,

DEFENDANT-RESPONDENT,

BADGER MUTUAL INSURANCE COMPANY,

SUBROGATED-PARTY.

APPEAL from orders of the circuit court for Kenosha County: MARY KAY WAGNER-MALLOY, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 BROWN, P.J. Kenneth C. Applegate appeals from an order for judgment on a jury verdict awarding him medical expenses, pain and suffering, and lost wages for injuries he suffered in an automobile collision. He also appeals

from an order denying his motion for a new trial or additur. His first claim is that the trial court erred in not directing a verdict on contributory negligence because the testimony only supported his version of the facts and showed that, as a matter of law, he was confronted with an emergency. This charge fails; the record does not support it. We agree with Applegate on his second contention: the trial court erred in prohibiting the use of a witness's deposition testimony; the defense waived its objection to the form of the question by not objecting at the taking of the deposition. However, the error was harmless, as Applegate's counsel was able to elicit the testimony he sought. We also reject Applegate's remaining claims of error and affirm.

¶2 Factual disputes drive the case and this appeal. What is undisputed is that Applegate crashed into a van driven by Ricky Rodriguez. Rodriguez was responding to a service call for his employer, Wisconsin Natural Gas Company, now known as Wisconsin Electric Power Company (WEPCo). At the time of impact, Rodriguez was stopped and at least partially in the opposite lane. The rest is disputed. According to Rodriguez, he had gradually braked and slowed to a stop while he was looking for a street sign. He admitted being over the center line while stopped. According to Applegate, Rodriguez suddenly appeared in his lane right before impact. Applegate swerved to the left to avoid Rodriguez and the two vehicles hit right front to right front. Applegate's knees were thrust into the dashboard. He was later diagnosed with a torn anterior cruciate ligament (ACL), which he claims was caused by the accident. Applegate sued WEPCo for his medical expenses, pain and suffering, and lost wages.

¶3 The case was tried to a jury. The jury found Applegate forty percent negligent and WEPCo sixty percent negligent. It awarded Applegate $15,900 for past medical expenses, $5000 for past and future pain and suffering and disability,

and $2000 for past lost wages. All the appellate issues have to do with the trial court's conduct of trial. We will relate further details as necessary.

¶4 Applegate's first argument is that the court should have directed a verdict on contributory negligence. Applegate's version of the accident is that he immediately applied his brakes when he saw the van. Pointing out that Rodriguez testified that he was only stopped in the opposite lane for one or two seconds before impact, Applegate contends that his reaction time was less than two seconds. Because of the short reaction time, an emergency was created as a matter of law. *See* ***Vanderkarr v. Bergsma***, 43 Wis. 2d 556, 566, 168 N.W.2d 880 (1969) ("[W]here a driver has less than four seconds to act, an emergency is created as a matter of law."). "Under these circumstances," Applegate claims, "the trial court had no choice but to direct a verdict."

¶5 But according to WEPCo, Rodriguez's testimony shows that Applegate had from six to nine seconds to react. The following exchange took place on defense counsel's direct examination of Rodriguez.

> Q: State whether or not your vehicle was moving or not at the time you were struck by Mr. Applegate?
>
> A: When the impact of the collision occurred I was stopped in the middle of the intersection.
>
> Q: For how long a period of time had you been stopped prior to the time that you were struck?
>
> A: I would guess maybe one or two seconds.
>
> ….
>
> Q: As you proceeded … and you were approaching the intersection, what were you doing?
>
> A: I was looking for the sign ….
>
> Q: … Prior to getting to that point how fast had your vehicle been traveling?
>
> A: I would estimate maybe 40, 45 miles an hour.
>
> Q: And did you reduce your speed?

A: Yes, I did.

Q: And when did you reduce your speed?

A: I would say maybe a quarter mile prior to the intersection.

Q: And what did you reduce your speed to at that point?

A: I reduced it to a complete stop by the time I got to the middle of the intersection.

….

Q: How did you bring your vehicle to a complete stop?

A: I gradually braked until I was at a complete stop.

Applegate's counsel elicited the following on cross-examination.

Q: Now, you said that you were stopped at the time of the impact, correct?

A: Yes.

Q: You were parked there?

A: No.

Q: How long had you stopped there?

A: I would imagine maybe a couple seconds, maybe two, three seconds.

….

Q: You said you gradually braked until you came to a complete stop. From the time that you began your braking to the time that you stopped, how much time elapsed?

A: As just a guess, I would imagine maybe five, six seconds.

WEPCo argues that the above testimony supports the conclusion that Applegate had from six to nine seconds to react: the five or six seconds while Rodriguez was slowing down and the one to three seconds that Rodriguez was stopped in the intersection.

¶6 Applegate testified that he did not see Rodriguez until the time of the impact:

> Q: Now, as you were driving … just prior to this accident the roadway was straight and flat, true?
>
> A: Correct.
>
> ….
>
> Q: And there was no other traffic coming from the other direction, is that true?
>
> A: Right.
>
> Q: The only vehicle that was there was that operated by Mr. Rodriguez, correct?
>
> A: Correct.
>
> Q: And you only saw the vehicle operated by Mr. Rodriguez just before the impact, isn't that true?
>
> A: Yes.
>
> ….
>
> [Applegate is shown a depiction of the accident scene.]
>
> Q: With the exception … that there might have been some ice and snow around, that is a true and accurate configuration of the roadway?
>
> A: Yes, that's it.
>
> Q: Flat as a board?
>
> A: Yes.
>
> ….
>
> Q: Mr. Applegate, it's true, is it not, that the first time you saw the vehicle operated by Mr. Rodriguez was when he was *in your lane*?
>
> A: Yes.

(Emphasis added.)

¶7 When we review the denial of a motion for a directed verdict, we must consider the evidence in the light most favorable to the party against whom the motion was made. *See* ***Warren v. American Family Mut. Ins. Co.***, 122 Wis. 2d 381, 384, 361 N.W.2d 724 (Ct. App. 1984). "A verdict should be directed only when the evidence gives rise to no dispute as to material issues, or when the evidence is so clear and convincing as to reasonably permit unbiased and impartial

minds to come to but one conclusion." ***Tanner v. Shoupe***, 228 Wis. 2d 357, 375-76, 596 N.W.2d 805 (Ct. App. 1999).

¶8 In this case, our standard of review requires us to view the testimony in the light most favorable to WEPCo. Applegate claims in his brief that Rodriguez "suddenly" veered into his lane. But his testimony was that Rodriguez was already in his lane when he first saw Rodriguez one or two seconds before impact. That raises the question about what Applegate was looking at before the collision when the road was, by his own admission, as "flat as a board" with no obstructions. That he did not even see Rodriguez's vehicle until he was practically on top of it suggests to any reasonable juror that Applegate was negligent in his lookout. Applegate bemoans the lookout theory of defense by arguing that it should not matter whether he was negligent in his lookout before the collision if the other vehicle suddenly veered into his lane. But that is the whole problem with Applegate's argument—there is no testimony that the veering was sudden. In fact, the only testimony about the manner in which Rodriguez was moving prior to the collision was Rodriguez's own testimony that he gradually braked. From this, the jury could infer that Rodriguez gradually braked and in doing so crossed the center line. Therefore, Rodriguez was negligent. But Applegate, despite a straightaway, never saw Rodriguez until the last couple seconds. Thus, Applegate was also negligent. The sixty-forty apportionment of negligence was a reasonable conclusion. This was far from a situation where "the evidence gives rise to no dispute as to material issues, or when the evidence is so clear and convincing as to

reasonably permit unbiased and impartial minds to come to but one conclusion." ***Id.*** The trial court properly denied a directed verdict.[1]

¶9 Applegate's next contention is that "it was prejudicial error for the trial court to prohibit impeachment cross-examination of Dr. Stiehl … by refusing to allow reference to his contrary deposition testimony or otherwise cross-examine him on his deposition testimony." Applegate is referring to the following exchange between his counsel and the trial court while counsel was examining Stiehl, WEPCo's expert physician.

> Q: If an individual has his leg straight and somehow really smashes it hard on the dash and the legs get twisted around, he could probably tear the [ACL], true?
>
> MR. FELDBRUEGGE: Objection, vague.
>
> THE COURT: Sustained.
>
> ….
>
> Q: If an individual such as Mr. Applegate had his leg straight applied to the brake and somehow the knee really got smashed hard against the dash and his leg got twisted around, he could probably tear the [ACL]?
>
> MR. FELDBRUEGGE: Objection, vague and assumes facts not in evidence. Improper hypothetical.
>
> THE COURT: I think there are some facts that you cited that have not been testified to.
>
> MR. TECHMEIER: I think this is an occasion where I can read the deposition.
>
> THE COURT: Okay.

[1] Under a subheading, Applegate also argues that "[t]he effect of the court's prejudicial error in failing to initially render a directed verdict in favor of plaintiff-appellant on the issue of comparative negligence was compounded by the testimony of Mr. Rodriguez regarding the pictures and measurements he recently took of the accident scene." Applegate's framing of this issue implies that our decision on the denial of the directed verdict disposes of this claim as well. If, however, Applegate means that the photographs were improperly admitted into evidence, we reject that claim. WEPCo's response that Applegate failed to object to the photographs or testimony regarding the measurements goes unanswered in Applegate's reply brief. Furthermore, WEPCo correctly points out that "the trial court has wide discretion in determining admissibility of evidence." There was no erroneous exercise of discretion here.

> MR. FELDBRUEGGE: Your Honor, he can't read the deposition if the same question in the deposition is objectionable as it is—
>
> THE COURT: That's true.
>
> MR. TECHMEIER: No objection was raised.
>
> MR. FELDBRUEGGE: They don't have to be made at that time.
>
> MR. TECHMEIER: Well, let's see.
>
> THE COURT: It's being made now.
>
> MR. TECHMEIER: Okay.
>
> THE COURT: Same rules of evidence apply to it then as now, but now we have what we have.

¶10 Before addressing this issue, we must say that Applegate overstates his argument. The trial court did not prohibit any reference to Stiehl's testimony nor did it deny Applegate the opportunity to cross-examine Stiehl regarding his deposition testimony. The trial court did, however, sustain an objection that was not preserved when the deposition was taken. WISCONSIN STAT. § 804.07(3)(c)2 (1997-98) says:

> Errors and irregularities occurring at the oral examination in the manner of taking the deposition, *in the form of the questions* or answers, in the oath or affirmation, or in the conduct of the parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are *waived unless seasonable objection thereto is made at the taking of the deposition.*

(Emphasis added.) Defense counsel waived his opportunity to object to the form of the question. The trial court's ruling that waiver did not apply was contrary to law.

¶11 The trial court's error, however, was harmless. Applegate claims that he wanted the testimony in to impeach Stiehl. Applegate says that "Stiehl claimed that striking the knee against the dashboard could not have caused

plaintiff-appellant's ACL injury." We have read the testimony to which Applegate refers. Stiehl did not say the car accident could not have caused the torn ACL. In fact he stated that "it's not impossible." So impeachment was not really an issue. The benefit Applegate would have reaped from the question he tried to ask was testimony that it is possible to get a torn ACL in a car accident. But he eventually got this in.

> Q: There is a way to get an [ACL] tear following a car accident, true?
>
> A: Yes, there is.
>
> Q: And it would take a major twisting event, true?
>
> A: It would take a very substantial event.
>
> Q: And in that event he could—with this twisting event he could probably tear the [ACL], true?
>
> A: In addition to a lot of other things, yes, the [ACL] could be torn.

The damage done by the trial court's erroneous ruling did not prejudice Applegate. Given that Applegate was able to elicit the desired information, there is no reasonable possibility that the error contributed to the jury's verdict. *See* ***Johnson v. Kokemoor***, 188 Wis. 2d 202, 214, 525 N.W.2d 71 (Ct. App. 1994), *rev'd on other grounds*, 199 Wis. 2d 615, 545 N.W.2d 495 (1996). The error was harmless and does not require reversal. *See* ***id.***

¶12 Applegate's third argument is that it was prejudicial error for the trial court to refuse to send medical records to the jury room. The trial court has discretion to decide what exhibits are permitted in the jury room. *See* ***State v. Jensen***, 147 Wis. 2d 240, 259, 432 N.W.2d 913 (1988). The requested records contained extraneous information about which no one had testified at trial. Rather than suggest that the irrelevant information be redacted, Applegate's counsel took an all-or-nothing approach, telling the trial court that he thought the jury should be

"told they're either going to get them or they're not, and my position is they've asked for them, give them all the records." It was reasonable for the trial court to decide that information about ancillary matters not at issue in the trial did not belong in the jury room. There was no erroneous exercise of discretion.

¶13 Applegate also contends that the trial court's interaction with some of the witnesses prejudicially limited their testimony and "created an atmosphere of judicial bias." Specifically, Applegate contends that the trial court improperly restricted the testimony of Town of Mount Pleasant Police Officer Steven Brusko and Applegate's fiancée, Carolyn Kennedy. According to Applegate, the trial court erred in limiting Brusko's testimony about the accident report he filled out at the scene of the collision. Applegate claims the trial court was mistaken in instructing Brusko that he could not look at this accident report. Regarding both Brusko and Kennedy, Applegate argues that the trial court, through comments made to guide the witnesses in how to answer questions, "took on the persona of an advocate for the defense."

¶14 Applegate's accusation of judicial bias is a serious charge and unwarranted in this case. A judge is presumed to be impartial. *See* ***State v. McBride***, 187 Wis. 2d 409, 414, 523 N.W.2d 106 (Ct. App. 1994). "To overcome this presumption, the party asserting judicial bias must show that the judge is biased or prejudiced by a preponderance of the evidence." ***Id.*** at 415. Furthermore, the party asserting bias must show that the judge had actual bias against him or her; it is not enough to show an appearance of bias. *See* ***id.*** at 416. Here, Applegate does not point us to ample evidence to satisfy his heavy burden. The trial court's comments to Brusko and Kennedy did not demonstrate judicial bias.

¶15 Applegate's fifth argument is that he should be granted a new trial in the interests of justice "because of the cumulative effects of the aforementioned prejudicial errors and judicial bias on the jury." On account of our rejection of the underlying claims of error, this claim also fails.

¶16 Applegate also contends that the trial court erred in not finding the verdict perverse. He attacks the jury's conclusions on both the apportionment of negligence and the amount of damages. "Our standard of review of a jury's verdict is severely circumscribed." ***Staehler v. Beuthin***, 206 Wis. 2d 610, 617, 557 N.W.2d 487 (Ct. App. 1996). "On review, we look at the facts in the light most favorable to sustain the verdict and where more than one inference might be drawn from the evidence presented at trial, we are bound to accept the inference drawn by the jury." ***Burch v. American Family Mut. Ins. Co.***, 198 Wis. 2d 465, 474, 543 N.W.2d 277 (1996).

¶17 Both the apportionment of negligence and the award of damages were supported by evidence at Applegate's trial. As discussed above, there was testimony to support the inference that Applegate had the chance to see Rodriguez for several seconds before the collision. The jury apparently found him negligent in his lookout. As to the damages award, there was conflicting evidence about the extent and cause of Applegate's injuries and lost wages. We cannot conclude that the jury's decision was unsupported by the evidence.

¶18 Finally, Applegate argues that the court erred in denying his motion for additur. Whether to grant additur is a decision within the sound discretion of the trial court. *See* ***Martz v. Trecker***, 193 Wis. 2d 588, 594, 535 N.W.2d 57 (Ct. App. 1995). As with Applegate's argument that the verdict was perverse, this argument must fail because there was a reasonable basis for the jury to award the

amount of damages it did. Thus, the trial court did not err in refusing to increase that amount.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.