COURT OF APPEALS
DECISION
DATED AND FILED

May 23, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2720-FT

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

CAROLYN J. BARTOLETTI AND SCOTT BARTOLETTI,

PLAINTIFFS-APPELLANTS,

V.

ALLSTATE INSURANCE COMPANY AND JUDY VAN SISTINE,

DEFENDANTS-RESPONDENTS,

UNUM LIFE INSURANCE COMPANY OF AMERICA AND THE TRAVELERS INSURANCE COMPANY,

DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Brown County: RICHARD J. DIETZ, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Carolyn and Scott Bartoletti (collectively, Bartoletti) appeal a judgment dismissing their complaint against Judy Van Sistine and Allstate Insurance Company and an order denying a new trial in the interest of justice.[1] Bartoletti argues that (1) the evidence fails to support the jury's verdict; (2) the court erroneously instructed the jury; and (3) due to cumulative errors, they are entitled to a new trial in the interest of justice. We affirm the judgment and order.

¶2 This appeal arises out of a motor vehicle collision. In March 1997, Carolyn Bartoletti was driving in the northbound lane of Highway 41 when she lost control of her car and slid into the snow-covered median strip. After about a minute or so, her vehicle was struck by Van Sistine's.

¶3 Van Sistine testified that she was driving her 1988 Mazda pickup truck north on Highway 41. It had radial all-terrain tires. She had four sand bags in the back bed of the truck for added traction. It was a very windy day, and Van Sistine was moving with the traffic at thirty-five miles per hour. It was not snowing and she had not encountered any ice before she turned on the highway. She had not seen any vehicles lose control or in the ditch.

¶4 Van Sistine testified that just past the Mason Street on-ramp, she felt the back end of her vehicle slide to the right. She corrected by turning to the right and pumping her brakes, but fishtailed and slid into the median. As she came into the ditch she first saw Bartoletti's car. She pulled as hard as she could on the steering wheel, but her tires were already in deep snow. Van Sistine hit the trunk

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All statutory references are to the 1997-98 edition.

area of Bartoletti's car and pushed it twenty-five feet north and 180° around. Both cars came to rest in the median.

¶5 Van Sistine testified that she was told by investigating officers that there was black ice on the road. Black ice is transparent and appears as if the roads are clear when there is actually a thin film of ice making the road very slippery. Van Sistine believed she lost control of her truck due to wind and black ice on the road.

¶6 Officer Gregory Steenbock of the Brown County Sheriff's Department testified that he responded to the report of the accident. Both vehicles were in approximately three feet of fluffy snow outside the traveled portion of the roadway. Steenbock estimated that the Mazda truck moved the car twenty-five feet. Weather conditions were terrible that day. It had snowed the day before and the wind was blowing snow across the highway, causing it to become ice-covered and very slippery. The officer believed both vehicles were driving too fast for conditions.

¶7 The jury returned a verdict finding that Van Sistine was not negligent. The trial court denied Bartoletti's post-verdict motions and entered a judgment dismissing her complaint. Bartoletti appeals the judgment.

¶8 Bartoletti argues that no credible evidence supports the verdict and that the trial court should have granted her motion to change the answers to the jury's negligence question from no to yes. We are unpersuaded. 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." WIS. STAT. § 805.14(1). This "standard applies to both the trial court and this court on appeal." ***Richards v. Mendivil***, 200 Wis. 2d 665, 670, 548 N.W.2d 85 (Ct. App. 1996). When there is any credible evidence to support a jury's verdict, "even though it be contradicted and the contradictory evidence be stronger and more convincing, nevertheless the verdict ... must stand." ***Id.*** at 672. "The credibility of witnesses and the weight given to their testimony are matters left to the jury's judgment, and where more than one inference can be drawn from the evidence, the trial court must accept the inference drawn by the jury." ***Id.*** at 671.

¶9 The law does not impose absolute liability upon drivers to avoid accidents; a driver must merely adhere to the common law standard of prudent conduct. *See* ***Millonig v. Bakken***, 112 Wis. 2d 445, 455, 334 N.W.2d 80 (1983). "The common law does not contemplate that all accidents or mishaps must arise as a consequence of fault." ***Id.*** at 452. The fact that a collision occurred does not mandate the finding that someone has been negligent. *See* ***id.*** at 457.

¶10 The evidence supports the inference that Van Sistine acted with reasonable care. She testified that although the weather was bad, she did not see any ice on the road or vehicles in the ditch. The jury could find that black ice existed on the road, a dangerous condition that could not have been seen. Bartoletti herself lost control of her car at the same spot just minutes before. There was testimony that the road was so slippery officers had trouble staying on their feet. It is undisputed that at thirty-five miles per hour, Van Sistine was traveling well below the sixty-five-mile-per-hour speed limit.[2] She testified that

[2] We do not consider matters outside the record. *See* ***Jenkins v. Sabourin***, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981). Nonetheless, assertions in briefs that are not refuted are deemed admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

when she hit the icy spot, she pumped her brakes and attempted to turn the wheel to avoid Bartoletti's vehicle. Viewing the evidence in the light most favorable to the verdict, the evidence does not compel a finding of negligence.

¶11 Bartoletti nevertheless argues that certain facts render Van Sistine's testimony to the effect that she was going thirty-five miles per hour incredible. The determination of credibility and the weight of evidence are within the province of the jury. *See* ***Richards***, 200 Wis. 2d at 671. Its credibility assessments will not be overturned on appeal unless they are inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. *See* ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). Bartoletti fails to demonstrate that Van Sistine's testimony is incredible as a matter of law.

¶12 Next, Bartoletti argues that the trial court erroneously refused the following jury instruction:

> The driver of a motor vehicle should not follow another vehicle more closely than is reasonable and prudent.
>
> In determining whether a driver was following the vehicle ahead more closely than was reasonable and prudent, you should consider the speed and location of both vehicles, the amount of traffic, the condition of the highway, and the visibility at the time.

See WIS JI—CIVIL 1112.

¶13 Bartoletti claims that Van Sistine was unable to see the icy conditions on the road because she was only two car lengths behind another vehicle that blocked her view.[3] Bartoletti bases her argument on Van Sistine's

[3] Bartoletti argued to the trial court that:

(continued)

testimony that she was probably two to three car lengths behind the vehicle in front of her, and that the general rule requires one car length for every ten miles per hour.

¶14 A trial court has wide discretion in deciding what instructions to submit to the jury. *See* ***Anderson v. Alfa-Laval Agri***, 209 Wis. 2d 337, 344, 564 N.W.2d 788 (Ct. App. 1997). It is well recognized that a trial court should not give an instruction where the evidence does not reasonably require it. *See* ***State v. Amundson***, 69 Wis. 2d 554, 564, 230 N.W.2d 775 (1975). The trial court is not required to instruct the jury as to what was not in the record. *See* ***Shelley v. State***, 89 Wis. 2d 263, 286, 278 N.W.2d 251 (Ct. App. 1979).

¶15 Here, the trial court explained its reasons for rejecting the proposed instruction:

> I think that the—the following too closely were it in any way related as a contributing factor to—to the collision between Ms. Van Sistine's car and Ms. Bartoletti's could be appropriate but there—there simply is nothing in the record on it to indicate that she was—she was that close. There's no evidence that I recall that that in any way affected her or created a circumstance where—where that interacted with her losing control of the vehicle when she hit the ice.
>
> Under the circumstances I think that it would be confusing giving the lack of any evidence in the record that it may have been a contributing factor and I'm not going to give it.

> I think that's a factor here whether she reacted to something; the other car or she felt she was getting too close we may never know but I think there's some reasonable inferences that can be drawn on this and when you're driving at that rate that close in this kind of weather that's not appropriate.

¶16 The record supports the court's decision. It fails to demonstrate any evidence demonstrating that Van Sistine could not see the road surface. In fact, Van Sistine's testimony that the road surface did not look icy and that she saw no other vehicles in the ditch was not rebutted. There was no testimony that black ice could be seen at any distance. Thus, there is no evidence that connects Van Sistine's "following distance" behind Bartoletti's car or any other car was a contributing factor to the accident.

¶17 Bartoletti further argues that the trial court erroneously instructed the jury with respect to WIS JI—CIVIL 1320 (Speed: Camouflage).[4] We reject her contentions. The record demonstrates a reasonable basis for WIS JI—CIVIL 1320 Speed: Camouflage.[5] The trial court explained:

> I believe the testimony in this case is uncontroverted … that these were black ice conditions and on that circumstance I think that the instruction is appropriate. … Even [Bartoletti] testified that … she did not see the … icy conditions before she hit it and I think there's testimony in the record from Mr. Bartoletti that—that he didn't notice particularly icy conditions on the way to the hospital … I

[4] Bartoletti also argues that the trial court erred when it instructed the jury with respect to WIS JI—CIVIL 1285 (Speed: Reasonable and Prudent; Reducing Speed). The record shows that she did not object to instruction 1285. Therefore, we do not review this claim of error. *See* WIS. STAT. § 805.13(3).

[5] WISCONSIN JI—CIVIL 1320 reads:

> SPEED: CAMOUFLAGE
>
> This rule, however, does not apply to situations where the object or obstruction ahead, although within the range of the driver's (headlights) (vision), may not reasonably be discovered because it blends with the color of the roadway or surroundings. When I refer to an object or obstruction that may not reasonably be discovered, I mean an object or obstruction that may not be seen by a driver exercising ordinary care with respect to lookout in time to enable the driver to stop before reaching it.

> think it will be the subject of considerable debate in closing argument but I think it's an appropriate instruction.

We conclude that the record and the trial court's reasoning support the instruction.

¶18 Nonetheless, Bartoletti contends that the effect of giving WIS JI—CIVIL 1320 is to relieve Van Sistine of the responsibility to drive based on the conditions of the road, especially because she knew of the weather conditions at the time of the accident. We disagree. The jury instruction does not relieve the driver of responsibility to drive with reasonable care, but permits the jury to consider the circumstances of the case. As our supreme court observed in ***Zoellner v. Kaiser***, 237 Wis. 299, 303, 296 N.W. 611 (1941):

> [I]n every such case it is for the jury to determine whether the object did so blend, or sufficiently blend to prevent a proper lookout from timely disclosing its presence. The question of ultimate fact in such case is, Did the driver fail to use ordinary care as to lookout? The jury might properly have found that the defendant was maintaining a proper lookout upon the evidence before them, had they so inferred, but the inference, whether or not, was for them to draw.

Because the trial court correctly stated the law and the record provides a reasonable basis for its decision, Bartoletti fails to demonstrate error.

¶19 Bartoletti also contends that the trial court erroneously gave the second paragraph of WIS JI—CIVIL 1105.[6] She maintains that it conflicts with the

[6] WISCONSIN JI—CIVIL 1105 reads: MANAGEMENT AND CONTROL

> A driver must exercise 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.]

(continued)

third paragraph of WIS JI—CIVIL 1280,[7] resulting in jury confusion. We are unpersuaded. The second paragraph of instruction 1105, which goes to management and control of the vehicle, merely permits the jury to consider whether the evidence shows that the defendant did not see the danger in time to take effective action to avoid the collision. *See* ***id.*** cmt. The third paragraph of instruction 1280 allows the jury to consider the driver's speed and control, prior to or at the time of the skid. *See* WIS JI—CIVIL 1280 cmt. We reject Bartoletti's suggestion that the two instructions cancel each other out. Rather, they reinforce the idea that the driver is to use ordinary care but is not under a rule of absolute liability. "If the instructions are not erroneous and adequately inform the jury as to the law to be applied, the court's exercise of discretion will be affirmed on appeal." ***Anderson***, 209 Wis. 2d at 345. We are satisfied that the court properly exercised its discretion.

¶20 Bartoletti next complains that the court erred when it gave WIS JI—CIVIL 1280 first and WIS JI—CIVIL 1105 second, which was the opposite order that it said it would. She contends this misled the jury. We are not persuaded. If the court erred with respect to jury instructions, "a new trial will not be ordered unless the court's error was prejudicial." ***Anderson***, 200 Wis. 2d at 345. "An error is prejudicial only if it appears that the result would have been different had the error not occurred." ***Id.*** We conclude that giving the instructions in a different order would not cause the result to be different.

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[7] WISCONSIN JI—CIVIL 1280 reads: "SKIDDING … You may consider the speed of the skidding vehicle prior to or at the time of skidding, or the manner in which the driver controlled the car prior to skidding, or after the skidding commenced, in determining whether the driver was negligent."

¶21 Finally, Bartoletti argues that the cumulative errors in the trial entitle her to a new trial in the interest of justice. We are not persuaded that Bartoletti's assertions demonstrate prejudicial error. We conclude that the trial court properly denied Bartoletti's motion for a new trial in the interest of justice.[8]

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[8] Van Sistine's motion for sanctions for noncompliance with the rules for appellate briefing is denied.