COURT OF APPEALS
DECISION
DATED AND FILED

March 19, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1884 **Cir. Ct. No. 98-CV-502**

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

KENNETH URMAN,

PLAINTIFF-APPELLANT,

V.

BRIAN BARRON, D & J ENTERPRISES, DALE JANSEN, AND CAPITOL INDEMNITY CORP.,

DEFENDANTS-RESPONDENTS.

APPEAL from orders and a judgment of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Reversed and cause remanded with directions*.

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

¶1 PER CURIAM. Kenneth Urman appeals orders and a judgment setting aside a jury verdict, ordering a new trial in the interest of justice and dismissing his claims against D & J Enterprises,[1] Dale Jansen, the Outpost Bar, Capitol Indemnity Corporation and Brian Barron. Urman argues that the trial court erroneously exercised its discretion when it set aside the jury's verdict and ordered a new trial in the interest of justice. We agree. We reverse the orders and judgment and remand for further proceedings consistent with our opinion.[2]

¶2 This case arises out of an altercation at the Outpost Bar, during which Urman sustained a broken jaw, resulting in medical bills totaling $13,300. Urman testified that he arrived at the bar at approximately 3:30 p.m., had beer during his lunch, and consumed four or five more drinks during a card game.[3] Because his friend left, he had no ride home and unsuccessfully attempted to call his girlfriend for a ride. Before the 2 a.m. closing, Urman had one or two shots and one more drink. Urman testified that he was intoxicated, "but not to the point where I didn't know what was going on."

¶3 Barron and his friend, Gary Constant, arrived at the bar at about 11 or 11:30 p.m. Shortly thereafter, there was a brief argument between Urman and Barron at an outdoor picnic table. The bartender broke up the dispute and escorted Urman inside.

---

[1] The order of dismissal refers to D & J Hospitality, Inc. However, the parties refer to D & J Enterprises or D & J Enterprises, Inc.

[2] We have addressed only those arguments that we deem dispositive. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

[3] In his response brief, counsel for D & J Enterprises and Capitol Indemnity states that Urman had "six or seven" drinks during the card game, citing the trial transcript where Urman was asked: "When was it that [his friend] left?" to which Urman replied, "It was about six or seven." In context, it is clear that Urman meant six or seven o'clock.

¶4 The bartender who broke up the argument testified that it did not appear that there had been a fight, and no one complained about being hit or grabbed. Constant testified, however, that he saw Urman grab Barron's shirt. Although Barron claimed Urman grabbed his shirt, Urman denied it. In any event, Barron did not claim to be hurt.

¶5 Barron testified that at the time of the altercation, he was under the legal drinking age.[4] He testified that he brought four beers with him in a cooler. He also testified that he drank a total of five beers on the night in question, having purchased and consumed three at the Outpost Bar.

¶6 After being escorted inside, Urman sat at the bar waiting for the bartender to give him a ride home at closing time. Urman had an additional alcoholic drink while waiting at the bar.[5] Urman testified that approximately two hours later, when the bar closed around 2 or 2:30 a.m., the bar owner directed Urman to wait outside. Urman testified that he expressed his fear that Barron and his friends were waiting outside for him. Nonetheless, Urman was directed to go outside.

¶7 While Urman was waiting outside, Barron approached him from across the street.[6] Barron contends that Urman pushed and swung at him, grazing

[4] Barron testified that at the time of the incident, he was 20 years old. He also testified that he was born on December 5, 1976, and that the incident in question took place on July 21, 1996.

[5] The bartender said that after serving one mixed drink, he mixed Mountain Dew with soda but added no alcohol to Urman's drinks. Urman's testimony whether he realized at the time the drinks contained no alcohol was conflicting. In any event, Urman testified to drinking a total of nine to eleven drinks over an eleven-hour period.

[6] Barron testified that he was returning to the bar to use the bathroom.

him, but leaving him unhurt. Urman claims he merely stepped forward and apologized to Barron, who, unprovoked, punched him in his face. Urman and Barron were the only two witnesses to the altercation. In any event, it is undisputed that Barron deliberately punched Urman in the face, breaking his jaw.

¶8 Urman was required to undergo surgery and have his mouth wired shut for a month. His medical bills totaled $13,300, as found by the court.

¶9 After a two-day trial, the jury returned a verdict finding D & J Enterprises, Inc., the owner of Outpost Bar, causally negligent. It also found that Barron committed a battery to Urman, causing injuries. The jury awarded $14,000 for past health care expenses and $11,000 for pain and suffering. It also awarded punitive damages against Barron in the sum of $15,000.

¶10 The trial court found the interest of justice required the jury's verdict to be set aside and a new trial granted. The court stated that although the verdict "could be supported by some credible evidence, a new trial must be granted because those findings are contrary to the great weight and clear preponderance of the evidence." The court determined that while the verdict answers were not wrong as a matter of law, "taking the whole of the evidence presented during the trial, together with the court's instructions, I am affirmatively convinced that the verdict is contrary to the interests of justice."

¶11 The court explained:

> Specifically, there was minimal if any evidence of intoxication of the defendant, Brian Barron. The testimony indicated that Mr. Barron consumed beer not purchased at the bar earlier in the evening and had purchased only one beer at the bar. The instruction submitted by the Court required that in order to find cause, the jury must find that Mr. Barron consumed alcoholic beverages sold by the bar, that Mr. Barron was intoxicated or his abilities were

> impaired by the consumption of said alcohol, and that the impairment caused by the consumption of alcohol was a substantial factor in causing the injury to the plaintiff. While there may have been minimal evidence to support the jury's finding of causation, this Court concludes that said finding was contrary to the great weight and clear preponderance of the evidence.

¶12 The court found that there was an absence of evidence regarding the bar's "duty to protect and whether the bar had breached its duty." In addition, the court concluded that there was unchallenged evidence that Urman had been consuming alcoholic beverages. The court stated that "[u]nlike the testimony of Mr. Barron and Mr. Constant, [Urman's] recollection of the events of the evening were [sic] scattered." The court observed that there was evidence that Urman "initiated the contact with Mr. Barron." The court stated that while there may be a construction of the evidence that would support the jury's conclusion that Urman was "not negligent," it was contrary to the great weight and clear preponderance of the evidence.

¶13 The court also concluded that the jury awarded excessive damages for medical expenses and that the punitive damage award was unsupported by evidence regarding Barron's ability to pay or "a rational relationship between the award and the actual wrongdoing." As a result, the court ordered a new trial in the interest of justice.

LEGAL STANDARDS

¶14 A new trial may be ordered in the interest of justice under WIS. STAT. § 805.15[7] when the jury findings are contrary to the great weight and clear preponderance of the evidence, even though the findings are supported by credible evidence. ***Krolikowski v. Chicago & Northwestern Transp. Co.***, 89 Wis. 2d 573, 580-82, 278 N.W.2d 865 (1979). "The order granting a new trial in the interest of justice must contain the reasons and bases for the general statement contained therein that the verdict is against the great weight and clear preponderance of the evidence." ***Id.*** at 580. The granting of a new trial is addressed to trial court discretion. ***Id.***

¶15 Ordinarily, appellate review is limited to the reasons specified in the trial court's order. ***Id.*** "[T]his court does not seek to sustain the verdict of the jury

---

[7] WISCONSIN STAT. § 805.15 reads in part:

> **(1)** MOTION. A party may move to set aside a verdict and for 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. Motions under this subsection may be heard as prescribed in s. 807.13. Orders granting a new trial on grounds other than in the interest of justice, need not include a finding that granting a new trial is also in the interest of justice.
>
> **(2)** ORDER. Every order granting a new trial shall specify the grounds therefor. No order granting a new trial shall be valid or effective unless the reasons that prompted the court to make such order are set forth on the record, or in the order or in a written decision. In such order, the court may grant, deny or defer the awarding of costs.

All statutory references are to the 1999-2000 version.

but looks for reasons to sustain the findings and order of the trial judge." ***Id.*** The principles guiding appellate review have been stated as follows:

> It is elementary that in such cases the supreme court does not look for evidence to sustain the jury's findings, but seeks reasons for sustaining the trial court. Essentially, the supreme court usually defers to the trial court's decision because of the trial court's opportunity to observe the trial and evaluate the evidence, and the order is highly discretionary. If one ground relied upon by the trial court in granting a new trial in the interest of justice is correct, this is sufficient to affirm the order of the trial court.

Id. at 580-81 (citation omitted). However, "[t]here is an abuse of discretion if the trial court grounds its decision upon a mistaken view of the evidence or an erroneous view of the law." ***Id.*** at 581.

DISCUSSION

¶16 We conclude that we must reverse the order granting a new trial in the interest of justice because the reasons set forth as prompting the order are not warranted by the evidence. The trial court stated that it granted the new trial on the ground that there was minimal, if any, evidence of Barron's intoxication, finding: "The testimony indicated that Mr. Barron consumed beer not purchased at the bar earlier in the evening and had purchased only one beer at the bar." The record establishes that the trial court's finding is erroneous.

¶17 Barron testified as follows:

> Q. While you were at the Outpost Bar did you consume alcohol that you purchased from the bar?
>
> A. Yes, I did.
>
> Q. How many alcoholic beverages did you purchase?
>
> A. I believe it's three.

> Q. And did you consume all three of those?
>
> A. Yes, I did.
>
> Q. Were you asked for an age identification by the bartender or any bar employee?
>
> A. No, I wasn't.
>
> ….
>
> Q. From nine p.m. until the bar closed you indicated you consumed five beers?
>
> A. Yes, sir.

Because the trial court's finding that Barron bought just one beer from the bar cannot be supported by any version of the testimony, its decision is grounded on a mistaken view of the evidence and results in an erroneous exercise of discretion. *See* ***Krolikowski***, 89 Wis. 2d at 581.

¶18 Also, the record does not warrant the trial court's determination that "[u]nlike the testimony of Mr. Barron and Mr. Constant [his friend], [Urman's] recollection of the events of the evening were [sic] scattered." The court did not identify what testimony of Urman's was scattered. Our review of the record fails to uncover any evidence that would support a total rejection of Urman's testimony. Urman, Constant and Barron all admitted to drinking. Although Constant and Barron had less to drink, they admittedly drank over a shorter period of time. The record fails to support the court's characterization of the testimony.

¶19 For example, Constant said he was unaware of the time that he and Barron arrived at the Outpost.

> Q. Do you have an approximation [as to the time]?
>
> A. Not really. I don't really know.
>
> ….

Q. What were you doing when you saw Ken Urman?

A. I was just outside talking to people.

Q. Where was [Barron] at that point?

A. I don't really know.

Q. Was he anywhere near you and Mr. Urman?

A. He might have been inside. I don't really know.

Q. Did you ever go inside that night?

A. I don't remember it, but I probably did, to go to the bathroom I'm sure.

¶20 Constant also testified that he "really can't recall" where Barron was sitting at the picnic table with him. Constant "really wasn't paying attention much" to conversation between Urman and Barron. When asked how many beers he had between the time he got to the bar and the time he left, he answered, "I really don't know the exact amount." His best recollection was six. When asked if he felt intoxicated, Constant responded: "I don't feel I was. Really I'm sure I was." He agreed that his recollection of the events and times was "fuzzy."

¶21 Also, after Barron testified that he drank five beers on the night in question, counsel asked: "Would it be a fair statement to say that you don't exactly remember the precise number of alcoholic beverages you had that evening?" Barron answered, "Well, the precise numbers, yes, I do not recall."

¶22 In addition, Barron testified that he had no recollection as to how long it took to drink the first beer he brought onto the Outback's premises. He testified that he did not know whether he left Outback before or after the bar closed. When asked whether he punched Urman by swinging sideways or straight on, Barron answered: "I don't recall."

¶23 Because the trial court did not identify what portions of Urman's testimony were "scattered," and our review of the record fails to disclose any material deficiencies, particularly in comparison to Barron's and Constant's testimony, the order granting a new trial is not warranted.

¶24 Barron argues, nonetheless, that the court correctly determined that the evidence of his intoxication was minimal because Urman failed to produce expert testimony regarding the amount of alcohol required to intoxicate a person of Barron's size. He challenges the lack of evidence showing indicators of his intoxication, such as slurred speech or impaired motor ability. We are unpersuaded. Appellate review is "limited to the reasons specified in the trial court's order." ***Krolikowski***, 89 Wis. 2d at 580. Here, the court determined that Barron was not intoxicated because he had purchased just one beer. The court did not mention a lack of expert testimony or the lack of indicators.[8] Consequently, the court's reasoning does not serve as a basis for overturning the jury's verdict against Barron.

¶25 Next, Barron emphasizes the trial court's finding that there was evidence that "Urman initiated the contact with Mr. Barron." Neither the court's opinion nor Barron's brief indicates the legal relevance of this finding. Urman himself testified that when he saw Barron approaching him after the bar closed, Urman stepped forward and apologized. This evidence is consistent with the court's finding and does not justify overturning the jury's verdict that Barron committed battery. With respect to the altercation, Urman and Barron were the

[8] Also, the trial court's findings with respect to Barron's intoxication went to the issue of the bar's liability for negligence, not Barron's liability for battery.

only witnesses. Although Barron testified that Urman pushed and swung first, Urman testified to the contrary. We conclude that the trial court erred when it ruled in effect that Barron's testimony constituted the great weight and clear preponderance of the evidence. This simply was a credibility issue for the jury.

¶26 Barron also argues, without citation to the record, that "all the other witnesses at the trial" contradicted Urman's version of the events. This contention mischaracterizes the record. The court did not make this finding and the record does not support it. There were no witnesses to the altercation causing the injuries except Urman and Barron. Much of Urman's other testimony, concerning amounts he had to drink and the approximate timing of certain events, was undisputed. Because Barron's characterization of the evidence is inaccurate and unsupported by record citation, it is unnecessary to address it further. *See* ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990).

¶27 Next, Barron argues that although the court "did not comment on the numerous attempts to introduce unsubstantiated and inadmissible evidence by Mr. Urman, nor the violation of the court's order on the motion-in-limine," the court no doubt took this into account when overturning the jury's verdict. We reject this argument. First, Barron fails to substantiate his allegations with record citation, a violation of WIS. STAT. RULE 809.19. His argument may be rejected on this basis alone. ***Tam***, 154 Wis. 2d at 291 n.5. Second, appellate review is "limited to the reasons specified in the trial court's order." ***Krolikowski***, 89 Wis. 2d at 580. Because we cannot speculate as to a basis for the court's ruling, this argument fails to support the order.

¶28 Next, Barron argues that the evidence showed that the medical bills were only $13,300. He claims therefore that the excessive damage award of

$14,000 for past medical expenses could in itself serve as a basis for overturning both the liability and damage portions of the verdict, because the excessive award is perverse. We are unpersuaded. Here, the trial court did not find that the verdict was perverse. Accordingly, this ground does not serve as a basis for the court's order.

¶29 In the absence of a finding of perversity or prejudice, WIS. STAT. § 805.15(6) permits the court to reduce the damage award to conform to the evidence and order a new trial if the plaintiff did not accept the reduced award.[9] The court did not explain its reasons for not proceeding according to § 805.15(6). Because § 805.15(6) provides an alternative to ordering a new trial in the event of an excessive verdict, we conclude that the verdict awarding excessive damages of $700 is not a basis upon which to sustain the order for a new trial.

¶30 Next, Barron argues that "there was simply no evidence in the record to support the jury's answers to the questions in the verdict." Barron also contends that the punitive damage award cannot stand because there is no

---

[9] WISCONSIN STAT. § 805.15(6) provides:

> EXCESSIVE OR INADEQUATE VERDICTS. If a trial court determines that a verdict is excessive or inadequate, not due to perversity or prejudice or as a result of error during trial (other than an error as to damages), the court shall determine the amount which as a matter of law is reasonable, and shall order a new trial on the issue of damages, unless within 10 days the party to whom the option is offered elects to accept judgment in the changed amount. If the option is not accepted, the time period for petitioning the court of appeals for leave to appeal the order for a new trial under ss. 808.03(2) and 809.50 commences on the last day of the option period.

evidence of his ability to pay and no rational relationship between his wrongdoing and the award. We reject this argument. The jury was evidently persuaded by Urman's testimony.

¶31 "The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff." WIS. STAT. § 895.85(3). If the plaintiff establishes a prima facie case for the allowance of punitive damages "the plaintiff may introduce evidence of the wealth of a defendant." WIS. STAT. § 895.85(4)(a).

¶32 Barron provides no legal citation for his assertion that proof of ability to pay is a prerequisite for a punitive damage award. He does not develop his argument that a $15,000 punitive damage award is excessive for a battery resulting in a broken jaw and $13,300 in medical bills. Therefore, his argument is rejected. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980).

¶33 D & J Enterprises and Capitol Indemnity argue that the record shows that the jury was confused, as borne out by the excessive medical expense award. We disagree. The record shows that the jury was persuaded by Urman's version of the altercation. Although the jury awarded $700 in excess medical expenses, this amount is not so entirely unrelated to the proofs as to evince perversity or prejudice. Consequently, we reject D & J Enterprises' and Capitol Indemnity's arguments.

CONCLUSION

¶34 In ***Fouse v. Persons***, 80 Wis. 2d 390, 395, 259 N.W.2d 92 (1977), Justice Robert Hansen observed: "In setting aside a jury verdict and ordering a new trial, a trial court has to steer between Scylla and Charybdis." The trial court "cannot simply substitute its judgment for that of the jury or find that a different jury might have reached a different result." ***Id.*** On the other hand, the trial court should "courageously and fearlessly" exercise its power when it is convinced that to enter judgment on a verdict "would result in a miscarriage of justice." ***Id.***

¶35 Here, the reasons advanced by the trial court to set aside the jury's verdict are not warranted by the evidence. On remand, the trial court is directed to reinstate the jury's verdict and enter judgment consistent with the verdict, with the exception of the award for past health care expenses. With respect to the issue of past health care expenses, the trial court is directed to proceed under WIS. STAT. § 805.15(6).

By the Court.—Orders and judgment reversed and cause remanded with directions.

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