COURT OF APPEALS
DECISION
DATED AND FILED

May 18, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP719 **Cir. Ct. No. 2006CV181**

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

TYLER A. BENJAMIN, BY HIS GUARDIAN AD LITEM, D.J. WEIS,

PLAINTIFF-APPELLANT,

V.

WEST BEND MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Lincoln County: JAY R. TLUSTY, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Tyler Benjamin, by his guardian ad litem, appeals from a judgment, entered following a jury trial, dismissing his wrongful death action for the loss of his father, Donald Benjamin. Tyler's complaint alleged his mother, Patricia Benjamin, negligently caused a one-car accident in which both

parents were ejected from the vehicle and killed. The jury, asked in separate questions whether Donald or Patricia was driving at the time of the accident, answered, "No" to each, and also found neither parent negligent. Tyler filed postverdict motions for a new trial in the interest of justice and to amend his complaint. Both were denied.

¶2 On appeal, Tyler contends the circuit court erroneously exercised its discretion when denying his postverdict motions. We conclude the circuit court properly exercised its discretion. Tyler further claims we should order a new trial in the interest of justice. Tyler has not demonstrated a miscarriage of justice warranting exercise of our discretionary review authority.

BACKGROUND

¶3 Tyler's complaint alleged that on December 18, 2005, Patricia negligently caused a one-car accident. The car left the road and flipped, ejecting Patricia and Donald. Both were killed. The complaint further alleged that Patricia was an insured under a policy issued by West Bend. Tyler sought recovery for the loss of society, companionship, and financial support of his father, as well as medical and funeral expenses.

¶4 A jury trial took place over three days. Tyler called mechanical engineer Dennis Skogen, who testified that, based on the position of the seats and other physical evidence at the scene, he believed Patricia was likely the driver and Donald the passenger. West Bend retained Robert Krenz, an expert in engineering mechanics, who testified there was insufficient physical evidence to determine the driver's identity. Tyler and other family members testified Patricia usually drove

the vehicle, but admitted Donald occasionally drove. The jury returned the following special verdict:

> **Question 1:** Was Patricia Benjamin the driver of the P.T. Cruiser at or immediately prior to the time of the accident?
>
> ANSWER: No
>
> **Question 2:** Was Donald Benjamin, Jr. the driver of the P.T. Cruiser at or immediately prior to the time of the accident?
>
> ANSWER: No
>
> **Question 3:** Regardless of how you have answered questions 1 and 2, answer this question: Was Patricia Benjamin negligent at or immediately prior to the time of the accident?
>
> ANSWER: No
>
> **Question 5:** Answer this question regardless of how you have answered any of the previous questions: Was Donald Benjamin, Jr. negligent at or immediately prior to the time of the accident?
>
> ANSWER: No[1]

¶5 On November 18, 2008, Tyler filed a postverdict motion for a new trial in the interest of justice on three grounds. First, he asserted the jury findings were contrary to the great weight and clear preponderance of the evidence. *See* WIS. STAT. § 805.15(1).[2] Second, he claimed the jury verdict was inconsistent as to the driver's identity. Lastly, in Tyler's view, the court should have declared a mistrial because the verdict on the driver's identity represented a deadlocked jury. The circuit court denied the motion after reviewing the jury instructions and the evidence presented at trial.

[1] The remaining special verdict questions are not relevant to this appeal.

[2] WISCONSIN STAT. § 805.15(1) permits a party to "move to set aside a verdict and for a new trial … in the interest of justice." Tyler's brief inaccurately refers to WIS. STAT. § 801.15(1), governing computation of time, as the basis for his motion. We substitute the correct statute here. All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶6 Tyler filed an additional motion on December 23, 2008, to amend the complaint to add a new claim allowing a jury to determine whether an unspecified driver was negligent. Tyler believed that, under his new theory, if either parent was negligent, he was "entitled to recover at least the lower of the two amounts assessed as damages relating to the loss of his parents." The trial court denied the motion, finding it lacked competency to consider it because it was not timely filed. Nevertheless, the trial court also reached the merits of Tyler's motion and found justice did not require the amendment: "[A] strategy was taken by the Plaintiff, the case thoroughly prepared by the attorneys and tried and the jury coming back with its decision unanimously; that decision can clearly be understood based upon the evidence … presented … and the law."[3]

DISCUSSION

1. Did the Circuit Court Properly Deny Tyler's WIS. STAT. § 805.15(1) Motion?

¶7 Tyler first claims the circuit court erred by denying a new trial in the interest of justice because the jury findings are contrary to the great weight and clear preponderance of the evidence. *See* ***Krolikowski v. Chicago & N.W. Transp. Co.***, 89 Wis. 2d 573, 580, 278 N.W.2d 865 (1979). This court owes great deference to a court's decision denying a new trial because the trial court is in the best position to observe and evaluate the evidence. *See* ***Sievert v. American Fam. Mut. Ins. Co.***, 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct. App. 1993). Thus, we will not disturb the circuit court's decision unless the court erroneously exercised

[3] Tyler cites only to his brief's appendix for the trial court's decisions on his motions and has failed to provide citations to the record. His brief therefore does not comply with WIS. STAT. RULE 809.19(1)(d), which requires "a statement of facts relevant to the issues presented for review, with appropriate references to the record."

its discretion. ***Id.*** "Our role is not to seek to sustain the jury's verdict but to look for reasons to sustain the trial court." ***Id.*** We will reverse the trial court only if its decision is based upon a mistaken view of the evidence or an erroneous view of the law. ***Id.***

¶8 The circuit court appropriately exercised its discretion. Reviewing the testimony presented, the court acknowledged that one expert opined Patricia was likely the driver, while the other was not able to reach a conclusion. It noted the testimony of Tyler's family that Patricia often, but not always, drove.[4] In addition, the court recited instructions admonishing the jury that "a guess is not enough to meet the burden of proof." Based on the evidence presented, the court determined the jury could properly find the driver's identity was not sufficiently established. While there was certainly evidence supporting Tyler's theory, we cannot say the circuit court erroneously exercised its discretion in concluding that the jury verdict was not against the great weight and clear preponderance of the evidence.

¶9 The court also properly determined the special verdict was not inconsistent. "An inconsistent verdict is one in which the jury's answers are 'logically repugnant to one another.'" ***Kain v. Bluemound E. Indus. Park, Inc.***, 2001 WI App 230, ¶40, 248 Wis. 2d 172, 635 N.W.2d 640 (quoting ***Fondell v. Lucky Stores, Inc.***, 85 Wis. 2d 220, 228, 270 N.W.2d 205 (1978)). A verdict in

[4] The circuit court's precise words were, "The testimony by the Benjamin family was also supportive that Mrs. Benjamin was the driver, but also was not conclusive that Mrs. Benjamin was the driver on the day of the accident, as Mr. Benjamin had driven the car in the past, although not a regular basis." Tyler asserts we must reverse because the circuit court's use of the word "conclusive" suggests it applied the wrong legal standard. This argument has no merit. The word "conclusive," as used by the circuit court, describes the strength of the testimony, not the legal standard by which the evidence is collectively judged.

which the jury finds an individual's negligence was not causal, and then proceeds to attribute a portion of the responsibility to him or her, is one example of an inconsistent verdict. *See* ***Westfall v. Kottke***, 110 Wis. 2d 86, 93, 328 N.W.2d 481 (1983).

¶10 The special verdict in this case is not inconsistent. With respect to the driver's identity, it is true that, based on the evidence presented, either Patricia or Donald must have been driving. It does not follow that the jury was required to simply select one or the other. Tyler pled and tried the case on the theory that his mother was driving, and he bore the burden of persuasion on that issue. The special verdict does not reflect a finding that no one was driving the vehicle, as Tyler suggests, but instead demonstrates a failure of proof. In the circuit court's words, "The jury can't be required to pick one person over the other as the driver if the jury is not satisfied by the burden of proof required under the law." The circuit court reached the correct legal conclusion and properly denied Tyler's motion.

2. Did the Circuit Court Properly Deny Tyler's Motion to Amend the Pleadings?

¶11 Tyler's motion to amend his pleadings to assert a new claim was filed after the jury trial. Tyler argues the circuit court erred when finding his motion to amend untimely. Citing WIS. STAT. § 802.09(2), Tyler argues "motions to amend the pleadings can be made at any stage of the proceedings, even after judgment is entered." Section 802.09(2), however, governs amendment of the pleadings to conform to the evidence. Here, Tyler did not seek to amend the pleadings to conform to the evidence, but for an entirely new trial on a different theory of the case.

¶12 Instead, WIS. STAT. § 802.09(1) governs Tyler's amendment request: If more than six months have passed since the original complaint was filed, "a party may amend the pleading only by leave of court … and leave shall be freely given at any stage of the action when justice so requires." Whether to allow amendment is a discretionary decision that will be upheld unless the court failed to exercise its discretion, the facts do not support the court's decision, or the court applied the wrong legal standard. ***Wilson v. Tuxen***, 2008 WI App 94, ¶36, 312 Wis. 2d 705, 754 N.W.2d 220.

¶13 Here, the circuit court, citing the factors in ***Mach v. Allison***, 2003 WI App 11, ¶27, 259 Wis. 2d 686, 656 N.W.2d 766, determined justice did not require the amendment.[5] The court emphasized the importance of finality, noting "there were over [two] years of trial preparation and a [three]-day jury trial took place in October of 2008. The Plaintiff chose a strategy and given the uniqueness of this case that strategy did not produce the results that Tyler Benjamin desired." Citing ***Sutter v. DNR***, 69 Wis. 2d 709, 718-19, 233 N.W.2d 391 (1975), and analogizing to the appellate courts' authority to order a new trial in the interest of justice, the circuit court noted the general disfavor with which courts view allowing a losing party to litigate alternative theories in a second trial. The court reiterated its belief that the jury verdicts were sound and merely reflected a failure

[5] The ***Mach*** factors include "[t]he reasons why the party has not acted sooner, the length of time since the filing of the original complaint, the number and nature of prior amendments, … the nature of the proposed amendment[, and] the effect on the defendant." ***Mach v. Allison***, 2003 WI App 11, ¶27, 259 Wis. 2d 686, 656 N.W.2d 766.

of proof. Our review confirms the court properly exercised its discretion when denying Tyler's motion to amend.[6]

3. Is Tyler Entitled to a New Trial In the Interest of Justice Under WIS. STAT. § 752.35?

¶14 Tyler requests we use our discretionary reversal authority to order a new trial under WIS. STAT. § 752.35 because justice has miscarried. "This court approaches a request for a new trial with great caution. We are reluctant to grant a new trial in the interest of justice, and thus we exercise our discretion only in exceptional cases." ***State v. Armstrong***, 2005 WI 119, ¶114, 283 Wis. 2d 639, 700 N.W.2d 98 (citation omitted). "In order to grant a discretionary reversal for a miscarriage of justice, there must be a substantial probability of a different result on retrial." ***State v. Wery***, 2007 WI App 169, ¶21, 304 Wis. 2d 355, 737 N.W.2d 66.

¶15 Tyler argues it is unfair that he cannot recover for the death of one parent where the other was clearly negligent and both were covered by West Bend's policy. However, we cannot be certain that both parents were insured under the West Bend policy because Tyler has failed to include the policy in the

[6] Although Tyler does not raise the issue, we note the circuit court incorrectly concluded Tyler's motions were untimely under WIS. STAT. § 805.16(1). Section 805.16(1), which requires motions after verdict to be filed and served within twenty days after the verdict is rendered, applies only to "trial-related motions—new trial, evidentiary considerations, etc." ***Gorton v. American Cyanamid Co.***, 194 Wis. 2d 203, 230, 533 N.W.2d 746 (1995). Motions to amend the pleadings are not "trial-related," save those made under WIS. STAT. § 802.09(2), which contains its own timeliness provision. Accordingly, WIS. STAT. § 802.09—not § 805.16(1)—governs the timeliness of a motion to amend. However, the circuit court also denied Tyler's motion on its merits, and we conclude the circuit court did not erroneously exercise its discretion when doing so.

appellate record.[7] Instead, he cites his complaint as proof that both Patricia and Donald were insured; but the complaint alleges only that "the defendant, West Bend, had issued a policy of insurance to Donald and Dorothy Benjamin d/b/a Benjamin's Greenery[,] … under which Patricia A. Benjamin was an insured." We cannot conclude there has been a miscarriage of justice from this record.

¶16 Finally, Tyler claims he is entitled to a new trial because "the jury could not have actually answered the negligence questions without first determining whether someone was driving the vehicle at or immediately prior to the accident." We accord substantial deference to the manner in which a trial court frames a special verdict, and presume a jury has followed the trial court's instructions. ***Schwigel v. Kohlmann***, 2002 WI App 121, ¶¶10, 13, 254 Wis. 2d 830, 647 N.W.2d 362. Here, the special verdict instructed the jury to answer the negligence questions regardless of how it answered other questions. We cannot conclude the jury's inability to identify the driver prevented it from properly assessing negligence.

CONCLUSION

¶17 The circuit court properly exercised its discretion in denying Tyler's motions for a new trial in the interest of justice and to amend his pleadings. Moreover, while we acknowledge this case is unusual, Tyler has not demonstrated his entitlement to a new trial on a miscarriage of justice theory.

[7] We have no assurance that the insurance policy was even available to the circuit court, as the parties do not indicate, and our review of the limited appellate record has not revealed, the policy was introduced in evidence or coverage stipulated to below.

By the Court.—Judgment affirmed.

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