COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP2916 **Cir. Ct. No. 2008CV746**

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

JUDITH EMMRICH AND MARK EMMRICH,

PLAINTIFFS-APPELLANTS,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, TERRELL BROWN AND JOHNNY RICHARDSON,

DEFENDANTS-RESPONDENTS,

WISCONSIN PHYSICIANS INSURANCE CORP.,

DEFENDANT.

APPEAL from a judgment of the circuit court for Dane County: AMY SMITH, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. Judith M. Emmrich appeals a judgment entered on a jury's verdict finding Johnny Richardson not negligent in causing the auto accident that occurred when his vehicle collided with Emmrich's vehicle. The dispositive issues we address on appeal are whether the trial court erroneously exercised its discretion by excluding the testimony of three adjustors employed by American Family Mutual Insurance Company, which insured Richardson's vehicle, and whether the court erroneously exercised its discretion in giving WIS JI—CIVIL 1005A, concerning the emergency doctrine. We affirm.

Background

¶2 This case arises from a motor vehicle accident where Johnny Richardson's vehicle struck Judith Emmrich's vehicle, injuring her. When Richardson attempted to stop at an intersection, his vehicle hit a patch of ice on the roadway and slid into the intersection, colliding with Emmrich's vehicle, which in turn collided with a third vehicle.[1] American Family Mutual Insurance Company insured the vehicle Richardson was driving at the time of the accident.

¶3 On the day of the accident, American Family adjustor Sarah Piette[2] contacted Richardson and took a statement from him. Piette recorded Richardson stating that when he "was 15 feet from the stop sign he applied the brakes. Due to poor road conditions he was unable to stop and slid into the intersection." Piette noted in her file two days later: "Note to File: I am accepting 100% liability on our

[1] The collision with the third vehicle is not at issue in this case. However, it is discussed by Emmrich in support of her theory regarding the admissibility of the American Family adjustors' testimony at trial.

[2] Sarah Piette's name changed during the course of this case. However, for ease of reference we refer to her by her name at the time of the collision.

insured to control the injury claim of Judy Emmrich." American Family paid 100% of the property damage for both Emmrich's and the third driver's vehicles.

¶4 Emmrich brought this lawsuit against Richardson and American Family,[3] alleging Richardson was negligent, that his negligence caused the accident, and that she suffered damages to her vehicle and injuries as a result of the accident. After American Family failed to respond to her settlement proposal, Emmrich amended her complaint and included a claim for statutory interest under WIS. STAT. § 628.46 (2009-10)[4] (regarding the timely payment of insurance claims.). American Family moved to bifurcate the statutory interest claim from the other claims and to stay discovery regarding the interest claim on grounds that the claims file contained confidential information related to the investigation of the claim. However, the court denied American Family's motion, and ordered the insurer to produce the claims file.

¶5 During discovery, Emmrich deposed Kieu Truong, the claims adjustor who took over the claims file from Piette, and Truong's and Piette's supervisor, David Williams, regarding the contents of the claims file. Truong testified that Piette interviewed the three drivers involved in the accident and noted in the claims file that American Family "was accepting 100 percent legal liability for this collision." Truong evaluated Piette's investigation into the accident and her conclusions. He testified that he did not disagree with Piette's evaluation of

[3] Hereinafter, we will refer to American Family and Richardson collectively as "Defendants," but will use their individual names as appropriate.

[4] The parties eventually stipulated to a resolution of the WIS. STAT. § 628.46 (2009-10) claim prior to trial, and the court signed an order memorializing the same on March 11, 2010. All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

the claim, including her liability determination. Williams testified that he was aware of Piette's and Truong's conclusion that American Family should accept 100% liability for the accident and that he did not disagree with their conclusion.

¶6 Shortly before trial, American Family filed a motion in limine, seeking to exclude all evidence from its claims file and testimony from its employees regarding the contents of the claims file. American Family also moved to quash the trial subpoenas Emmrich issued to Truong and Williams. The court granted the motion, except with respect to Richardson's statement to Piette on the day of the accident that he began braking 15 feet from the stop sign.

¶7 Emmrich also filed a motion in limine to dismiss Richardson's emergency doctrine defense and to exclude all evidence American Family intended to introduce in support of the defense. Emmrich argued that, because the undisputed facts showed that it was Richardson's own actions that caused the emergency, the emergency doctrine did not apply to him and therefore, the jury should not be instructed on the doctrine. The trial court denied Emmrich's motion in limine and the case proceeded to trial.

¶8 During the jury instruction conference, Emmrich again objected to giving the jury the emergency defense jury instruction, arguing that the evidence presented at trial did not support giving the instruction. The trial court disagreed and read the instruction to the jury.[5] The jury found that neither Richardson nor

[5] The court provided the following instruction to the jury on Management and Control-Emergency:

> When considering negligence as to management and control, bear in mind that a driver may suddenly be confronted by an emergency not brought about or contributed to by her or his own negligence. If that happens and the driver is compelled

(continued)

Emmrich were negligent in causing the accident. Consequently, the jury did not answer the special verdict questions on damages. Emmrich appeals. Additional facts are set forth in the remainder of the opinion where necessary.

Discussion

¶9 We address two issues in this appeal: (1) did the trial court erroneously exercise its discretion in excluding from evidence testimony from Piette, Truong and Williams, regarding Piette's note in the claims file stating "I am accepting 100% liability on our insured to control the injury claim of Judith Emmrich"; and (2) did the court erroneously exercise its discretion in giving the jury the emergency defense jury instruction. We address each issue in turn.

I. EXCLUDING TESTIMONY BY THE CLAIMS ADJUSTORS

¶10 At a hearing in the circuit court on the parties' motions in limine, American Family argued that testimony from claims adjustors Piette and Truong, and from their supervisor Williams, should be excluded because the evidence was

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> to act instantly to avoid collision, the driver is not negligent if he or she makes a choice of action or inaction that an ordinarily prudent person might make if placed in the same position. This is so even if it later appears that her or his choice was not the best or safest course.
>
> This rule does not apply to any person whose negligence wholly or in part created the emergency. A person is not entitled to the benefit of this emergency rule unless he or she is without fault in the creation of the emergency.
>
> This emergency rule is to be considered by you only with respect to your consideration of negligence as to management and control.

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not relevant to the issues in the case, and, in the alternative, because the evidence had low probative value and the probative value was outweighed by the danger of unfair prejudice. Specifically, American Family argued that the evidence would be used by Emmrich to focus the jury's attention on how its claims adjustors analyzed and evaluated the claim, which would distract the jury from the issues in the case regarding whether Richardson was liable for causing the accident and for causing Emmrich's damages.

¶11 Emmrich argued that the evidence was probative of Richardson's liability. Specifically, she argued that Piette's opinion that American Family should accept 100% liability for the claim, and Truong's and Williams's opinions agreeing with Piette's evaluation of the claim, are relevant because these individuals are experts in analyzing and evaluating claims arising out of automobile accidents and their opinions would be probative of whether Richardson was negligent. She also argued that the testimony of the adjustors would be relevant to the emergency doctrine defense, which American Family pled as an affirmative defense on behalf of Richardson. Emmrich argued the evidence was probative because there was evidence that the adjustors were aware of the road conditions at the time of the accident and that the emergency defense is undermined by Piette's note accepting full liability for the claim.

¶12 The trial court excluded the testimony of the American Family claims adjustors on the grounds that, assuming the adjustors were experts, Emmrich failed to name them and file their reports in compliance with the court's scheduling order; that "[s]ome of the information" related to compromise and therefore the evidence was inadmissible under WIS. STAT. § 904.08; and that, under the balancing test prescribed by WIS. STAT. § 904.03, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

¶13 On appeal, Emmrich argues that the trial court erroneously exercised its discretion by excluding the testimony of American Family adjustors Piette, Truong and their supervisor, Williams. Emmrich argues that the testimony of the adjustors is admissible under three theories: (1) Piette's notation and her statements to Richardson and to the other adjustors were "statements of a party opponent" under WIS. STAT. § 908.01(4)(b); (2) the adjustors are experts and that she preserved her right to call Williams as an expert witness in her expert disclosure list; and (3) the testimony was relevant to determining liability, and the probative value of the evidence did not outweigh any danger of unfair prejudice to defendants.

¶14 American Family argues that the trial court properly excluded the testimony by the adjustors regarding Piette's note in the claims file on four grounds: (1) Emmrich failed to designate the adjustors as experts and provide summaries or reports of their testimony as required by the scheduling order and its amendments; (2) the trial court questioned whether the witnesses were in fact actually experts; (3) the statements on liability to third parties appeared to be statements in compromise barred by WIS. STAT. § 904.08; and (4) "the probative value of the testimony was substantially outweighed by the likelihood of unfair prejudice."

¶15 We conclude that the trial court properly exercised its discretion in excluding the testimony on the ground that any probative value of the evidence

was substantially outweighed by the danger of unfair prejudice to Richardson and to American Family, under WIS. STAT. § 904.03.[6]

¶16 We review a circuit court's evidentiary rulings for an erroneous exercise of discretion. ***Marquez v. Mercedes-Benz USA, LLC***, 2012 WI 57, ¶115, 341 Wis. 2d 119, ___N.W.2d ___("A circuit court has broad discretion in determining the relevance and admissibility of proffered evidence.") We affirm a circuit court's exercise of discretion if the court "examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach." ***State v. Walters***, 2004 WI 18, ¶14, 269 Wis. 2d 142, 675 N.W.2d 778.

¶17 Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." WIS. STAT. § 904.03; ***Walters***, 269 Wis. 2d 142, ¶28.

¶18 We first address the probative value of the evidence Emmrich sought to admit. *See* ***State v. Richardson***, 210 Wis. 2d 694, 708, 563 N.W.2d 899 (1997) (we review a circuit court's decision to exclude evidence under WIS. STAT. § 904.03 by first considering the relative probative value of the evidence). As we have explained, at issue is the note found in the claims file written by Piette two

[6] Because we conclude the court properly balanced the probative value of the proffered testimony with the danger of unfair prejudice to the defendants under WIS. STAT. § 904.03 in excluding the testimony, we need not address whether the court properly excluded the evidence as a sanction for violating the court's scheduling order for naming experts and for providing reports from those experts. *See* ***Gross v. Hoffman***, 227 Wis. 296, 299-300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

days after the accident stating that "I am accepting 100% liability on our insured to control the injury claim of Judith Emmrich." Emmrich argues that this note is probative of Richardson's negligence because it was written by an expert, Piette, with years of experience of analyzing and evaluating accident claims such as the one at issue in this case. The note that Emmrich sought to admit through Piette, Truong and Williams is not a statement by Piette that Richardson was negligent, as Emmrich represents. Rather, it is a statement by the adjustor that American Family should accept liability to control Emmrich's injury claim. In other words, properly understood, Piette's note is not an opinion that Richardson was more negligent than Emmrich, but rather an opinion, based on relatively little information, that the insurance company should dispose of the claim by accepting liability. Consequently, the note would have provided the jury with little assistance in determining whether Richardson was negligent and whether the emergency doctrine defense should absolve Richardson of his negligence under the facts of this case.

¶19 We next determine whether the probative value of the evidence Emmrich sought to have admitted was substantially outweighed by the dangers of unfair prejudice, confusion of the issues, or misleading the jury. ***Id.*** at 709. Where the probative value of the evidence is low, "it follows that the level of dangers and considerations needed to substantially outweigh that probative value is correspondingly lower." ***Id.***

¶20 We are satisfied that the trial court reasonably concluded that allowing the admission of the testimony from Piette, Truong, and Williams about Piette's note in the claims file would have resulted in unfair prejudice to Richardson. Unfair prejudice may occur where there is a risk that the jury will misuse evidence offered ostensibly for a limited purpose. *See* 7 DANIEL BLINKA,

WISCONSIN PRACTICE: WISCONSIN EVIDENCE § 403.1, at 117 (2d ed. 2001). Introducing this evidence presented the danger of misleading the jury in determining Richardson's liability based on the opinion of a claims adjuster who has substantial experience in analyzing and evaluating claims. The jury might have confused a recommendation that the claim be settled with an admission of Richardson's negligence.

¶21 The evidence would have also been prejudicial to Richardson's use of the emergency defense doctrine. As American Family argued to the circuit court, allowing Emmrich to explore the contents of the claims file through the testimony of the claims adjustors would change the whole tenor of the trial. Rather than focusing on whether Richardson was negligent in causing the accident or whether he should be absolved of his negligence as a result of the emergency defense, the trial would have focused on the contradictory positions defense counsel would be taking from the American Family claims adjustors. Once the jury learned that Piette recommended accepting full liability, it might not have focused properly on Richardson's testimony that he faced an emergency at the time of the collision.

II. WISCONSIN JI—CIVIL 1105A–MANAGEMENT AND CONTROL–EMERGENCY.

¶22 Emmrich argues that the trial court erred when it gave the jury WIS JI—CIVIL 1105A, the instruction on the emergency defense doctrine. A trial court has broad discretion in deciding whether to give a particular jury instruction. ***Garceau v. Bunnel***, 148 Wis. 2d 146, 151, 434 N.W.2d 794 (Ct. App 1988). "In determining whether an emergency instruction should have been given, we … view the evidence in a light most favorable to the party requesting the instruction." ***Westfall v. Kottke***, 110 Wis. 2d 86, 102, 328 N.W.2d 481 (1983). To warrant the

giving of a jury instruction, the evidence must support the instruction. ***Garceau***, 148 Wis. 2d at 152. We will affirm a court's reading of a jury instruction unless the instruction misled the jury. ***Id.*** at 151.

¶23 "The emergency doctrine excuses an individual for negligence." ***Totsky v. Riteway Bus Serv., Inc.***, 2000 WI 29, ¶22, 233 Wis. 2d 371, 607 N.W.2d 637. For the emergency defense doctrine to apply, three criteria must be met: (1) "'the party seeking the benefits of the emergency doctrine must be free from negligence which contributed to the creation of the emergency'"; (2) "'the time element in which action is required must be short enough to preclude deliberate and intelligent choice of action'"; and (3) "'the element of negligence being inquired into must concern management and control ….[7]'" ***Id.*** (citation omitted and footnote added).

¶24 "The rationale underlying the emergency doctrine is that a person faced with an emergency which his conduct did not create or help to create is not guilty of negligence in the methods he chose, or failed to choose, to avoid the threatened disaster if he is compelled to act instantly without time for reflection." ***Totsky***, 233 Wis. 2d 371, ¶23 (citations omitted).

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[7] The trial court also instructed the jury using WIS JI—CIVIL 1105-Management and Control:

> A driver must use 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 damage [sic—should read "danger"] to take proper means to avoid the accident, the driver is not negligent as to management and control.

¶25 On appeal, Emmrich focuses on the first criteria, and argues that, as a matter of law, the facts did not support a finding that Richardson "faced … an emergency which his conduct did not create or help to create." She further argues that "there is uncontroverted testimony that defendant Richardson's breaking [sic] distance was at last 64 feet too short for conditions." She contends that, because Richardson "fail[ed] to adjust his speed and breaking [sic] distance under known conditions, defendant Richardson's negligence caused the emergency," thus making the emergency of his own creation. We conclude, however, that there was sufficient credible evidence to warrant instructing the jury on the emergency defense.

¶26 Richardson testified that he had begun slowing down from 20-25 miles an hour 30-40 feet from the stop line, that there was ice, but he did not see it until it was too late. Once Richardson realized his vehicle was sliding and would not stop before the intersection, he pumped the brakes and then slammed on the brakes. Richardson also testified that he had told Piette and the police officer on the day of the accident that he had started braking at 15 feet before the stop line; and that he had encountered some slippery conditions prior to the accident.

¶27 The jury also heard expert testimony on safe driving and stopping distances. In addition to testimony from Emmrich's safe driving expert that Richardson had only two seconds to act from the time he slammed his brakes until his vehicle hit Emmrich, defense expert Dennis Skogen testified that, based on the damage to the vehicles, he calculated the speed of impact at 15 miles per hour or less (the speed Richardson had told the officer he was traveling when he slammed on his brakes 15 feet from the intersection). Skogen further opined that, under the circumstances of the accident, Richardson would have been unable to stop his vehicle before it slid into the intersection. The circumstances considered by

Skogen were the law of physics; an individual's reaction time; brake lag; and Richardson's testimony that he was traveling 15 miles per hour when he encountered ice and that he first pumped his brakes and then slammed down on his brakes to avoid sliding into the intersection. Skogen also testified that, even if Richardson had just slammed on his anti-lock brakes and not pumped them, as Richardson testified, he still would not have been able to stop before sliding into the intersection. This testimony was in contrast to Emmrich's safe driving expert who testified that Richardson should not have pumped his anti-lock brakes. Skogen further testified that, if there had been no ice in the roadway, Richardson's slowing and braking 30-40 feet from the intersection would have been sufficient to allow Richardson's vehicle to stop before entering into the intersection.

¶28 From our review of the record, we conclude that there were sufficient disputed and credible facts for the court to give the emergency defense instruction to the jury. *See* ***Gage v. Seal***, 36 Wis. 2d 661, 664-65, 154 N.W.2d 354 (1967). Accordingly, we conclude that the trial court did not err when it gave the jury WIS JI—CIVIL 1105A, the emergency defense instruction.[8]

¶29 For the foregoing reasons, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[8] Emmrich raises two issues on appeal that relate to her damages case. She first argues that the court erroneously exercised its discretion by giving WIS JI—CIVIL 410, regarding the failure to call a witness at trial. Second, she argues that the court erroneously exercised its discretion by excluding from evidence testimony from Dr. James Leonard regarding her future medical expenses. Because we affirm the jury's finding that Richardson was not negligent in causing the accident, we need not address Emmrich's arguments related to her damages case. *See* ***Gross***, 227 Wis. at 299-300.