COURT OF APPEALS
DECISION
DATED AND RELEASED

May 21, 1997

NOTICE

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

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No. 95-3318

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

RONALD C. STEFFENS AND NELDA J. STEFFENS,

PLAINTIFFS-APPELLANTS,

V.

DEL SIEVERT TRUCKING, INC., DAVID PASKIEWICZ, MILWAUKEE MUTUAL INSURANCE COMPANY, SUPER EXCAVATORS, INC., THOMAS N. TENANT, TRANSCONTINENTAL INSURANCE COMPANY AND INTEGRITY MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Ronald C. and Nelda J. Steffens appeal from a judgment dismissing their claims against Del Sievert Trucking, Inc., David Paskiewicz, Super Excavators, Inc., Thomas N. Tenant and their insurers after a jury found Ronald Steffens 100% contributorily negligent for injuries he

sustained when a Del Sievert truck ran over him at a construction site. Steffens' appellate arguments focus on the jury instructions and an evidentiary ruling which he contends led the jury to find him solely negligent in the accident. We affirm the judgment.

In September 1993, Steffens was employed as an inspector on a sewer and water main project. Steffens' duties included checking the location of stakes in the ground and spray painting marks on the ground to guide construction of sewer laterals.

While it is undisputed that Steffens was run over by a Del Sievert truck, driven by Paskiewicz, as it backed down the road at the construction site to deliver a load of stone, the parties offered contradictory theories of the accident. Steffens contends he was at the edge of the road when the truck hit him; the defendants contend that he walked backward onto the road and into the truck's path. Although Steffens was unable to testify regarding the specifics of the accident due to amnesia, a witness testified that the right rear corner of the truck struck Steffens in the back while he was walking backward but still at the edge of the road. Steffens contends that the contractor, Super Excavators, its employee, Tenant (who was allegedly assigned to guide the truck down the road), and the truck driver were negligent in not maintaining a lookout for persons in the road. The truck driver testified that just after he swerved to avoid a mailbox, he was signaled to stop the truck and learned he had run over Steffens. Prior to that point the driver did not realize Steffens was in the vicinity.

The defendants contend that Steffens, who admitted he was aware of the hazards present at a construction site, including moving vehicles, did not exercise ordinary care for his own safety when he walked backward onto an active

road without looking first. Evidence which supported this theory included: (1) Steffens' testimony that construction site workers working near a road should always walk forward into the road to observe approaching traffic and that the presence of construction vehicles makes it unsafe to walk into the road without looking; (2) Steffens' agreement that it would be hard to overlook a truck backing down the road; (3) Steffens and others testified that the truck driver had a blind spot and could not see Steffens; (4) the truck's backup alarm was sounding and its flashers were blinking while it backed down the road;[1] (5) the truck driver testified that he twice checked the road before he began backing the truck; and (6) several witnesses testified that Steffens was in the road when he was hit by the truck.

Steffens argues that the court erroneously gave four instructions that were not warranted by the credible evidence: WIS J I—CIVIL 1030 (Right to assume due care by highway users); WIS J I—CIVIL 1095 (Lookout: Pedestrian); WIS J I—CIVIL 1230 (Right of Way: Pedestrian's Duty: Crossing road at point other than crosswalk); and WIS J I—CIVIL 1250 (Right of Way: Pedestrian's Duty: Standing or loitering on highway). Steffens claims that there was no evidence that he was a pedestrian using, crossing or trying to cross the road and that there was no credible evidence that he was on the road when the truck hit him. He contends that these instructions led the jury to find him solely negligent in the accident. The trial court overruled Steffens' objection on the grounds that competing theories of the accident warranted the instructions.

[1] Tenant and the truck driver testified that Tenant was not actually guiding the truck down the street. Tenant testified (via deposition excerpts) that he gave the truck a wide berth and had his back to the truck when it hit Steffens. The truck driver testified (via deposition excerpts) that he saw Tenant walking down the road with his back to the truck. The driver understood that Tenant was supposed to show him where to dump the stone and did not believe Tenant was guiding him down the road.

Instructing the jury is within the trial court's discretion; the instructions must have their foundation in evidence adduced at trial. *See* ***Wester v. Bruggink***, 190 Wis.2d 308, 322, 527 N.W.2d 373, 379 (Ct. App. 1994). If there are conflicts in the evidence and inconsistent theories of the cause of the event, "instructions encompassing both theories should be given." ***Aetna Cas. & Sur. Co. v. Osborne-McMillan Elevator Co.,*** 26 Wis.2d 292, 305, 132 N.W.2d 510, 516 (1965).

Here, there was conflicting evidence and reasonable inferences as to where Steffens was standing when he was hit by the truck, whether he was a pedestrian within the meaning of the jury instructions, and what the actors were doing at the time of the accident. Accordingly, the court was required to instruct on all theories presented. *See* ***Fischer v. Ganju,*** 168 Wis.2d 834, 856 n.5, 485 N.W.2d 10, 18 (1992).

Steffens next argues that because the truck driver admitted he did not see Steffens and because Tenant was involved in guiding the truck down the road, the trial court should have directed a verdict that the driver and Tenant were negligent as a matter of law for failing to maintain a careful lookout. Although the driver admitted that he did not see Steffens, there was testimony from Steffens and others that a dump truck has a blind spot that prevents seeing obstacles to the rear. The driver testified that he checked the road twice before backing, used his outside mirrors while backing, used the backup alarm and flashers, and proceeded slowly through the site. There was testimony that Tenant was not guiding the truck down the road but merely intended to show the driver where to dump the load once the truck arrived at the dump site.

Negligence is a factual question for the jury. *See* ***Ceplina v. South Milwaukee Sch. Bd.***, 73 Wis.2d 338, 342, 243 N.W.2d 183, 185 (1976). A negligence verdict may be directed only if there is no dispute in the evidence or the evidence admits of only one conclusion. *See* ***Holloway v. K-Mart Corp.,*** 113 Wis.2d 143, 150, 334 N.W.2d 570, 574 (Ct. App. 1983). Here, the evidence was in conflict as to what Tenant was doing shortly before the accident. Therefore, the alleged negligence of Tenant and the driver was appropriately left to the jury as it assessed whether the driver and Tenant maintained a proper lookout and exercised ordinary care for Steffens' safety. *See* ***Fehring v. Republic Ins. Co.,*** 118 Wis.2d 299, 305-06, 347 N.W.2d 595, 598 (1984); *see also* ***Bauer v. Piper Indus., Inc.,*** 154 Wis.2d 758, 763, 454 N.W.2d 28, 30 (Ct. App. 1990) (jury uniquely empowered to determine parties' negligence).

Steffens also challenges an evidentiary ruling. We will uphold the trial court's discretionary evidentiary decision if there is a reasonable basis for it. ***Wester,*** 190 Wis.2d at 317, 527 N.W.2d at 377. The trial court refused to let Steffens introduce Exhibit 14, which are notes of a Super Excavators safety meeting from the week of September 2, 1991, two years before the accident. The standards addressed "Off Highway Motor Vehicles" and stated "[i]f the rear view is obstructed, the vehicle must have a reverse signal alarm that can be heard above surrounding noise, or a signal person to direct the operator while backing up."

Steffens argued that the exhibit was evidence that Super Excavators knew of the dangers involved in backing vehicles at construction sites but dispatched Steffens and the truck to the same area. The trial court excluded the safety meeting notes because they were remote (the document was created nearly two years before the accident) and dealt with off highway vehicles (here, the truck was on an active road when it struck Steffens).

We affirm the trial court's ruling. The safety notes were remote in time, a finding which is not clearly erroneous. *See* § 805.17(2), STATS.; *see also* ***Dahl v. K-Mart,*** 46 Wis.2d 605, 612, 176 N.W.2d 342, 346 (1970) (rejecting evidence on remoteness grounds is within the trial court's discretion). The notes were not relevant because there was evidence of an audible backup alarm prior to the accident,[2] a proper safety standard according to these notes. For that reason, the notes would also have been cumulative, another ground for exclusion. *See* § 904.03, STATS.; *see also* ***Fantin v. Mahnke,*** 113 Wis.2d 92, 96, 334 N.W.2d 564, 567 (Ct. App. 1983) (court may exclude cumulative evidence).

Finally, citing the errors we have rejected, Steffens seeks a new trial in the interests of justice pursuant to § 752.35, STATS. "Larding a final catch-all plea for reversal with arguments that have already been rejected adds nothing." ***State v. Echols,*** 152 Wis.2d 725, 745, 449 N.W.2d 320, 327 (Ct. App. 1989).

By the Court.—Judgment affirmed.

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

[2] The jury was free to infer from the evidence that the alarm was audible and to determine whether Steffens was negligent in not heeding it.