COURT OF APPEALS
DECISION
DATED AND FILED

March 12, 2014

Diane M. Fremgen
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. 2013AP1644 **Cir. Ct. No. 2011CV781**

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

NIKITA WILLEFORD, DAVID WILLEFORD AND KARLA WILLEFORD,

PLAINTIFFS,

V.

CHEROKEE INSURANCE COMPANY, UNIVERSAL AM-CAN LTD, ROBERT E. RIKER, PROGRESSIVE UNIVERSAL INSURANCE COMPANY, TYLER J. KNUTSON AND WEST BEND MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

STATE AUTO INSURANCE COMPANY OF WISCONSIN AND CODY C. OLESON,

DEFENDANTS-APPELLANTS,

NETWORK HEALTH PLAN,

INVOLUNTARY-PLAINTIFF.

APPEAL from an order of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Reversed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. This is a negligence-apportionment case. Cody Oleson and his insurer, State Auto Insurance Company of Wisconsin ("Oleson") appeal from an order granting summary judgment in favor of Robert E. Riker; Riker's employer, Universal Am-Can Ltd.; Universal's insurer, Cherokee Insurance Company; and Tyler Knutson and his insurers, Progressive Universal Insurance Company and West Bend Mutual Insurance Company (all respondents collectively "Knutson"). We agree with Oleson that there was enough evidence from which a jury reasonably could infer that Knutson's negligence was a substantial factor in causing some of Nikita Willeford's injuries. We reverse.

¶2 Oleson's vehicle was involved in two nighttime accidents occurring moments apart. Willeford was an unbelted passenger in the rear seat of Oleson's car during both impacts. The first was between Oleson's vehicle and a semi-truck driven by Riker. The impact caused Oleson's car to spin out, lose its lights, and end up facing into traffic in the opposite lane. Knutson's vehicle approached traveling at fifty-eight or -nine miles per hour (mph). From a quarter- to a half-mile away, Knutson saw the semi on the side of the highway with its headlights on and flashers engaged. Knutson tapped his brakes to disengage the cruise control. He did not otherwise apply the brakes. Knutson did not see Oleson's unlit black vehicle in his lane. Knutson's vehicle struck the left and front left sides of Oleson's car. Knutson suffered a broken ankle and head and ribcage pain.

¶3 The first impact caused Willeford to hit the headrest of the front passenger seat. In the second impact, she felt herself get "tossed around the

backseat." She thought she may have passed out briefly between the two hits. Willeford's cumulative injuries were a broken nose, facial injuries, "a lot of pain," and "quite a few bruises," mainly to her knees and right buttock.

¶4 Knutson moved for summary judgment, arguing that no expert was critical of his driving at the time of the accident and there was no causal connection between the second collision and Willeford's injuries. The court granted Knutson's motion. Oleson appeals.[1]

¶5 A grant of summary judgment is a drastic measure. Whether it should be granted is a question of law that we review de novo. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). In reviewing summary judgment motions, an appellate court applies the standards set forth in WIS. STAT. § 802.08 (2011-12)[2] in the same manner as the circuit court. ***Heck & Paetow Claim Serv., Inc. v. Heck***, 93 Wis. 2d 349, 356, 286 N.W.2d 831 (1980). Summary judgment rarely is appropriate in negligence cases. ***Ceplina v. South Milwaukee Sch. Bd.***, 73 Wis. 2d 338, 342-43, 243 N.W.2d 183 (1976).

¶6 The question of comparative causal negligence likewise rarely is appropriately resolved on summary judgment. *See* ***Hansen v. New Holland N. Am., Inc.***, 215 Wis. 2d 655, 669, 574 N.W.2d 250 (Ct. App. 1997) ("[T]he instances in which a court may rule that, as a matter of law, the plaintiff's negligence exceeds that of defendant are extremely rare."); *see also* ***Phelps v. Physicians Ins. Co. of Wis.***, 2005 WI 85, ¶45, 282 Wis. 2d 69, 698 N.W.2d 643

[1] Knutson does not appeal the denial of a motion for sanctions against Riker and Oleson.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

("The apportionment of comparative negligence is a matter left to the trier of fact.").

¶7 The circuit court concluded, and we agree, that a reasonable jury could find Knutson negligent. His own expert, Robert Wozniak, testified that Knutson was traveling at fifty-seven to fifty-eight mph at impact and that his headlights should have illuminated Oleson's black unlit car from about 200 feet away. It is undisputed that except for tapping the brake to disengage the cruise control, Knutson did not apply the brakes.

¶8 The circuit court then observed that negligence alone was a "so what?" A plaintiff must prove both negligent conduct and that such conduct was a substantial factor in causing the injury. *See* ***Ollman v. Wisconsin Health Care Liab. Ins. Plan***, 178 Wis. 2d 648, 666, 505 N.W.2d 399 (Ct. App. 1993). Several substantial factors may contribute to the same result. ***Morgan v. Pennsylvania Gen. Ins. Co.***, 87 Wis. 2d 723, 735, 275 N.W.2d 660 (1979). The court was bothered by Willeford's inability to recall exactly what happened when she was "tossed around," if she hit a particular part of the car, or if an injury existed after the second impact that did not exist after the first.

¶9 Wozniak opined that all of Willeford's facial injuries resulted from striking the headrest during the first collision and that she did not hit the headrest in the second. He did not address her other injuries. The court concluded that with no "expert testimony from any medical source indicating that [Willeford] could have or did receive any injuries whatsoever from the second impact … I don't believe … there's any causal negligence for the injury." Here we depart from the circuit court's rationale.

¶10 First, the question of causation, whether clear or not, generally is for the jury. ***Wisconsin Acad. of Sci., Arts & Letters v. First Wis. Nat'l Bank of Madison***, 142 Wis. 2d 750, 760, 419 N.W.2d 301 (Ct. App. 1987). A jury need not accept an expert opinion, even if uncontradicted. ***State v. Sarinske***, 91 Wis. 2d 14, 48, 280 N.W.2d 725 (1979). Rather, it may accept all, some, or none of it. *See* ***State v. Owen***, 202 Wis. 2d 620, 634, 551 N.W.2d 50 (Ct. App. 1996).

¶11 Second, "expert testimony is not necessary when the matters to be prove[d] are within the area of common knowledge and lay comprehension." ***Olfe v. Gordon***, 93 Wis. 2d 173, 180, 286 N.W.2d 573 (1980). A jury may apply its common knowledge and day-to-day observations and experience to the evidence "for the purpose of drawing factual inferences therefrom." ***State ex rel. Cholka v. Johnson***, 96 Wis. 2d 704, 713, 292 N.W.2d 835 (1980). Wozniak's report stated that Knutson's vehicle struck Oleson's at a speed of fifty-seven to fifty-eight mph and he testified that the second impact was similar in severity to the first. It is within common knowledge and lay comprehension that an unbelted passenger would get "tossed around." A jury reasonably might infer that the blow to her head in the first impact dazed Willeford, clouding her recollection of events. It also is within a jury's ken that an impact of sufficient force to cause Knutson to suffer a fractured ankle and head and ribcage pain could injure an unbelted passenger in the other vehicle as well.

¶12 We thus reject Knutson's contention that the jury would be forced to speculate as to causation. We conclude that summary judgment was improper.

By the Court.—Order reversed.

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