COURT OF APPEALS
DECISION
DATED AND FILED

April 1, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0175

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

DANIEL J. LENHART, AND MARY E. LENHART,

PLAINTIFFS-APPELLANTS,

V.

ROBERT L. KISTING, LEVEL VALLEY DAIRY COMPANY, TRAVELERS INSURANCE COMPANY AND MILWAUKEE MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Waukesha County: MARIANNE E. BECKER, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Daniel J. and Mary E. Lenhart appeal from a judgment dismissing their action against Robert L. Kisting, his employer, Level Valley Dairy Company, and their insurers following a no negligence jury verdict. The Lenharts sought damages for injuries Daniel sustained in an accident between

his car and a milk tanker driven by Kisting. The Lenharts argue that the trial court erroneously exercised its discretion in permitting coached evidence at trial and in admitting a police officer's diagram of the accident scene. They also claim that the verdict is contrary to the evidence. We affirm the judgment and reject the Lenharts' request for a new trial in the interests of justice.

The accident occurred as Daniel's car and Kisting's milk tanker were traveling in two of three northbound traffic lanes. At issue was what lane of traffic each vehicle was in just prior to impact and which driver invaded the driving lane of the other. Daniel was attempting to pass the tanker and indicated that throughout the pass the tanker was in the far left lane and he was in the center travel lane because the far right lane was a parking or right-turn only lane. Kisting indicated that he had been in the far left lane but had changed to the center lane in advance of the impact with Daniel's car. There were no witnesses to the accident and each side relied on accident reconstruction experts to explain the possible accident scenarios.

It was important to the Lenharts to establish that Kisting was in the process of changing lanes when the impact occurred. They argue that Kisting's attorney improperly coached Kisting during his deposition and at trial with respect to when the lane changed occurred. The following occurred at trial with respect to this claim.

During Kisting's adverse examination, the Lenharts' attorney was using Kisting's deposition testimony to show his orientation for streets and lane configurations. The part of Kisting's deposition eliciting his answer that he had changed lanes by Albert Street (a location close to the point of impact) was read into the record. The Lenharts' attorney then asked Kisting whether the answer

was truthful and "[y]ou didn't tell me in that deposition that you made the turn by Collins Street [a location approximately a block and a half before the point of impact], did you?" Kisting's attorney interposed the following objection: "Objection, Your Honor. At page 18 [of the deposition] he indicated in his testimony they changed lanes a block and a half before the point of impact. Counsel just stated to him that he didn't." The Lenharts objected to what they characterized as an improper volunteered statement by Kisting's attorney interjecting Kisting's deposition testimony that he changed lanes a block and a half before impact. The trial court sustained the Lenharts' objection and noted to Kisting's attorney that clarification could be made later.[1]

Kisting was then asked by the Lenharts' attorney whether he did in fact change lanes in the area of Albert Street. Kisting answered, "I am not going to sit here and give any spot that I changed lanes. I do know it was a block and a half before the impact." The Lenharts moved to strike Kisting's last remark as "volunteered."[2] The trial court ruled that the statement would stand as an answer to counsel's question.

The Lenharts argue that the trial court erroneously exercised its discretion in refusing to strike Kisting's answer when it had sustained an objection

[1] At the end of Kisting's adverse examination, his attorney read a portion of his deposition picking up where the Lenharts had ended regarding the lane change. The portion read included Kisting's testimony that, "All I can tell you is that I changed lanes approximately a block and a half before the point of impact." The trial court allowed the reading of this portion of the deposition as clarification of the earlier testimony.

[2] We read the Lenharts' objection to be that the answer was not responsive to the question asked.

to the "speaking objection"[3] by Kisting's attorney which had suggested the answer. They also claim it was error to admit additional portions of Kisting's deposition into evidence when that testimony was the result of improper coaching. Whether a trial court admits or excludes evidence is a discretionary determination. *See* ***Johnson v. Agoncillo***, 183 Wis.2d 143, 154, 515 N.W.2d 508, 513 (Ct. App. 1994). We will not reverse such a discretionary determination on appeal if it has a reasonable basis and was made in accordance with accepted legal standards and in accordance with the facts of record. *See* ***id.***

We conclude that there was no evidence of improper coaching of Kisting at the deposition. At the deposition, the Lenharts were trying to pin Kisting down as to what street he was near when he changed lanes. Kisting expressed unfamiliarity with the area. An aerial map was looked at and Kisting was asked to put a red "X" on the map marking his lane change. Kisting was confused as to the streets and his attorney interjected points of reference. Even though the parties attempted to work out the confusion over the street names, Kisting was unable to be as precise as the Lenharts wanted. He stated that he had changed lanes a block and a half before impact. This did not translate into coached testimony.

Because the deposition testimony was not coached, it was proper to allow Kisting to read to the jury the additional portion of the transcript for clarification. The Lenharts used the deposition at trial in a piecemeal fashion so it

[3] "Speaking objections do not simply state the basis for the objection but also enumerate the thoughts of the witness's attorney regarding the question, in a form understandable to the witness." RICHARD L. BOLTON ET AL., WISCONSIN DISCOVERY LAW AND PRACTICE § 3.106 at 46 (Wis. State Bar 2d ed. 1997). Speaking objections are disfavored by practitioners and their excessive use may be cause for judicial control. *See* ***Gainer v. Koewler,*** 200 Wis.2d 113, 123-24, 546 N.W.2d 474, 479 (Ct. App. 1996).

was necessary to allow a continuous reading of the testimony related to Kisting's recollection of when he changed lanes. *See* ***State v. Sharp***, 180 Wis.2d 640, 653-54, 511 N.W.2d 316, 322 (Ct. App. 1993) (the rule of completeness requires that a statement be admitted in its entirety when necessary to explain the admitted portion, to place it in context or to avoid misleading the trier of fact). Additionally, the clarification showed that Kisting had given differing versions. Both parties were entitled to highlight the version supporting their respective theory of the case.

We summarily reject the Lenharts' claim that Kisting's trial testimony that he changed lanes a block and a half before impact should have been stricken because his attorney's "speaking objection" suggested the answer. Earlier in his testimony Kisting said that he was watching the traffic and not the street names. His response that he changed lanes a block and a half before impact was an affirmation of his inability to name by street the point where he changed lanes. Moreover, Kisting's answer was responsive to the Lenharts' question which continued to attempt to elicit a street name as the point of the lane change. The trial court properly exercised its discretion in permitting the answer to stand despite sustaining the objection to the "speaking objection."

The Lenharts argue that it was error to admit a police officer's diagram of the accident. The diagram was part of the police officer's report and inadmissible under § 346.73, STATS. However, the police officer testified without objection about his conclusion that the Lenhart vehicle invaded the tanker's lane of traffic. The Lenharts themselves elicited this testimony from the officer. In light of the officer's unobjected-to testimony about the measurements and conclusion contained in the diagram, it was not error to admit the diagram itself. *See* ***Wilder v. Classified Risk Ins. Co.***, 47 Wis.2d 286, 290, 177 N.W.2d 109, 113

(1970). *See also* ***Kenwood Equip., Inc. v. Aetna Ins. Co.***, 48 Wis.2d 472, 480, 180 N.W.2d 750, 755 (1970) (the officer's report relating to a statement by the defendant was received without objection).

Even if error occurred, we agree with the trial court that it was harmless error. Both parties elicited the officer's conclusion about how the accident happened. The diagram was cumulative to that testimony. The diagram and its measurements were utilized and explained by the parties' respective accident reconstruction experts.

The Lenharts claim that there was not sufficient credible evidence for the jury to conclude that the Lenhart vehicle invaded Kisting's lane of traffic. A jury verdict will be sustained if there is any credible evidence to support it. *See* ***Nieuwendorp v. American Family Ins. Co.***, 191 Wis.2d 462, 472, 529 N.W.2d 594, 598 (1995). This is even more true when the trial court gives its explicit approval to the verdict by considering and denying postverdict motions. *See* ***Radford v. J.J.B. Enters., Ltd.***, 163 Wis.2d 534, 543, 472 N.W.2d 790, 794 (Ct. App. 1991). In order to reverse, there must be "'such a complete failure of proof that the verdict must have been based on speculation.'" ***Nieuwendorp***, 191 Wis.2d at 472, 529 N.W.2d at 598 (quoted source omitted). We consider the evidence in the light most favorable to the verdict. *See* ***id.*** It is the duty of this court to search for credible evidence to sustain a jury's verdict and not to search the record for evidence to sustain a verdict the jury could have reached but did not. *See* ***Radford***, 163 Wis.2d at 543, 472 N.W.2d at 794. It is within the jury's province to assess the credibility of witnesses and the weight to be given their testimony. *See* ***id.***

The jury's finding is based on a credibility determination between the two accident reconstruction experts. Although the Lenharts argue at length

that the opinion of Kisting's expert was inherently incredible, evidence is incredible as a matter of law only if it is in conflict with established or conceded facts. *See* ***Haskins v. State***, 97 Wis.2d 408, 425, 294 N.W.2d 25, 36 (1980). The drivers gave conflicting versions of their lane placement and there were no established or conceded facts which rendered the expert testimony incredible. Because more than one inference may be drawn from the evidence, we are bound to accept the inference drawn by the jury. *See* ***Nieuwendorp***, 191 Wis.2d at 472, 529 N.W.2d at 598.

Finally, the Lenharts argue in the alternative that the trial court or this court should grant them a new trial in the interests of justice. A trial court's ruling on a motion for a new trial is highly discretionary and will not be reversed on appeal absent a misuse of discretion. *See* ***Priske v. General Motors Corp.***, 89 Wis.2d 642, 663, 279 N.W.2d 227, 236 (1979). The trial court's authority to grant a new trial is comparable to our authority to grant discretionary reversal under § 752.35, STATS. *See* ***State v. Harp***, 161 Wis.2d 773, 776, 469 N.W.2d 210, 211 (Ct. App. 1991). Thus, the trial court may grant a new trial where the real controversy has not been fully tried or it is probable that justice has for any reason miscarried.

A claim that the jury had before it testimony or evidence which had been improperly admitted and that this material obscured a crucial issue tends to fall under the "'real controversy not fully tried'" category. *See* ***State v. Schumacher***, 144 Wis.2d 388, 400, 424 N.W.2d 672, 676 (1988) (quoted source omitted). The trial court need not find a substantial likelihood of a different result on retrial when it orders a new trial on the grounds that the real controversy was not fully tried. *See* ***Harp***, 161 Wis.2d at 775, 469 N.W.2d at 211. However, in order to reverse under the miscarriage of justice category, the trial court must

conclude that there would be a substantial probability that a different result would be likely on retrial. *See* ***Schumacher***, 144 Wis.2d at 400-01, 424 N.W.2d at 676-77.

The trial court considered and rejected the Lenharts' contention that Kisting's testimony was coached. It found that the jury had heard and considered relevant evidence. Implicit was a finding that a new trial would not produce a different result. The trial court's reasoning reflects a proper exercise of discretion in determining that the real controversy was fully tried and that there was no probability that justice had miscarried.

In support of their request for this court to grant a new trial,[4] the Lenharts argue claims of error which we have rejected. A new trial in the interest of justice is not justified on a combination of non-errors. *See* ***Mentek v. State***, 71 Wis.2d 799, 809, 238 N.W.2d 752, 758 (1976).

By the Court.—Judgment affirmed.

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

[4] The Lenharts also request that this court enter a judgment in their favor on liability. A motion for a directed verdict was not made during trial. The only remedy that this court could afford is to reverse the judgment and order a new trial.