COURT OF APPEALS
DECISION
DATED AND FILED

May 19, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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No. 97-2211

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

ROBERT CHRISTMAN AND MARIA CHRISTMAN,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

ISUZU MOTORS AMERICA, INC.,

DEFENDANT-RESPONDENT-CROSS-APPELLANT,

MANEY INTERNATIONAL OF DULUTH, INC. AND LIBERTY MUTUAL INSURANCE COMPANY,

DEFENDANTS.

GREAT WEST CASUALTY COMPANY AND NORTHWAY CARRIERS, INC.,

PLAINTIFFS,

V.

ISUZU MOTORS AMERICA, INC. AND MANEY INTERNATIONAL OF DULUTH, INC.,

DEFENDANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Douglas County: MICHAEL T. LUCCI, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Robert and Maria Christman appeal a judgment reducing their damage award against Isuzu Motors, Inc., by the 25% contributory negligence that the jury apportioned against Robert. They argue that (1) Robert was not negligent because there is no evidence that he misused the product or failed to protect himself from a known and present danger, and (2) even if he was negligent in some respect, his negligence was not causal as a matter of law.

Isuzu cross-appeals, contending (1) there is no credible evidence to support the verdict but, if there was, the jury's findings nonetheless were against the great weight and clear preponderance of the evidence, requiring a new trial; (2) it is entitled to a new trial because a juror provided extraneous information during deliberations; (3) the trial court committed prejudicial error when it permitted evidence regarding the Christmans' son's medical care and expenses, when the son was not party to the lawsuit; and (4) it is entitled to a new trial in the interest of justice. We affirm the judgment.

Robert was driving his employer's 1992 Isuzu truck northbound on Highway 63 in Bayfield County on his way to Hayward to make a delivery for his employer. The weather conditions were clear and dry, and the highway was essentially straight. His two-year-old son was a passenger in the right front seat.

Robert noticed the truck drifting to the left. He attempted to steer to the right, but found he had no steering. Robert's truck continued moving left, sideswiped a semi-flatbed trailer traveling southbound, and ultimately came to rest off the road in a ditch. Robert testified that he did not apply his brakes until "[j]ust after impact."

The semi driver testified that he did not see Robert attempt to steer out of the way, but saw him leaning toward the front passenger seat. After the accident, Robert told the semi driver that he believed his truck had blown a tire.

The Christmans subsequently brought this action against Isuzu alleging strict liability due to a defect in the truck's steering mechanism. Isuzu contended that the accident was caused not by a defective steering unit, but by Robert's negligence. The trial court determined that contributory negligence is an available defense in a product liability action. The jury returned a verdict apportioning 75% negligence against Isuzu and 25% contributory negligence against Robert. The trial court denied motions after verdict and entered judgment on the verdict.

The Christmans contend that the trial court erroneously submitted the issue of contributory negligence to the jury.[1] They argue that contributory negligence in a strict liability action may be predicated only on a plaintiff's misuse or abnormal use of the product. They contend that because there is no evidence of Robert's improper or abnormal use of the vehicle, the submission of a contributory

[1] Isuzu suggests that Robert waived his objections to the form of the verdict because his counsel appeared to vacillate at the instruction conference with respect to the basis of his objections. Because we reject Robert's challenge on its merits, we do not address the issue of waiver.

negligence question is error. We conclude that the plaintiff's duty in a strict liability action is one of ordinary care and, based on the record, the issue of Robert's contributory negligence was properly submitted for the jury's consideration.

Whether a particular defense is available against a claim is generally a question of law to be reviewed de novo. *See* ***Highlands Ins. Co. v. Continental Cas. Co.***, 64 F.3d 514, 521 (9th Cir. 1995). Many defenses are available in strict liability, including contributory negligence for the purpose of determining the apportionment of negligence by a manufacturer of the allegedly defective product, and the negligent use made thereof by the consumer. ***Powers v. Hunt-Wesson Foods, Inc.***, 64 Wis.2d 532, 536-37, 219 N.W.2d 393, 395-96 (1974). Strict liability in tort does not "impose absolute liability," ***Dippel v. Sciano***, 37 Wis.2d 443, 459-60, 155 N.W.2d 55, 63-64 (1967), but is similar to negligence per se. "Imposition of strict liability protects product users by making their case easier to prove but does not protect them from their own negligence." ***D.L. v. Huebner***, 110 Wis.2d 581, 646, 329 N.W.2d 890, 920 (1983).

Although the Christmans rely on ***Dippel***, it fails to support their contention:

> The defense of contributory negligence is available to the seller. The plaintiff has the duty to use ordinary care to protect himself from known or readily apparent danger. Defenses *among others* that suggest themselves are that the product must be reasonably used for the purpose for which it was intended; abuse or alteration of the product may relieve or limit liability.

Dippel, 37 Wis.2d at 460, 155 N.W.2d at 63-64 (emphasis added). ***Dippel*** observes that strict liability in tort, like negligence per se for violation of a safety

statute, may be considered negligence for the purpose of applying the comparative negligence statute and compared with the causal contributory negligence of the plaintiff. ***Id***. at 461-62, 155 N.W.2d 64-65. The plaintiff's duty is one of "ordinary care." ***Id***. at 460, 155 N.W.2d at 63. Because ***Dippel*** does not attempt to limit the types of contributory negligence that may be considered as a defense in a strict liability action, it does not support Robert's claim.

Austin v. Ford Motor Co., 86 Wis.2d 628, 273 N.W.2d 233 (1979), a wrongful death case involving allegations of a defective seat belt, supports our conclusion. The jury found that the seat belt was in a defective and unreasonably dangerous condition when it left Ford's possession. Additionally, it found that the decedent was negligent in the operation of the vehicle with respect to speed, management and control. ***Id***. at 636, 273 N.W.2d at 236. Our supreme court stated that contributory negligence is a defense in a strict liability case and "a comparison of the negligence of the tortfeasor and of the victim of the tort is appropriate. In a strict liability action for wrongful death, the negligence to be compared is the negligence causative of the death and not the negligence causative of the accident." ***Id***. at 643, 273 N.W.2d at 239.

The Christmans offer no case directly on point, but attempt to bolster their argument by citing the pattern jury instruction, WIS J I--CIVIL 3268.[2] They

[2] WIS J I--CIVIL 3268

STRICT LIABILITY: CONTRIBUTORY NEGLIGENCE: USER

Negligence has been defined as a failure to exercise ordinary care.

The user of a product has the duty to exercise ordinary care for his or her own safety and protection and, to that end, to reasonably use the product for the purpose for which it was intended. If you should find that the user (used the product other

(continued)

claim that the pattern instruction focuses on misuse of the product and failure to protect oneself from a known and apparent danger. Arguably, improper lookout and control may amount to misuse of the product as well as failure to protect oneself from a known and present danger. In any event, the pattern jury instruction is not an exclusive enumeration of the methods by which a person may be contributorily negligent. Jury instructions, while persuasive, are not precedent. *See* ***State v. Gavigan***, 122 Wis.2d 389, 393, 362 N.W.2d 162, 164 (Ct. App. 1984) (The recommendations of the committee are persuasive, not binding, authority to us.).[3]

The record supports submitting the issue of Robert's contributory negligence to the jury. The driver of the semi and his passenger testified they saw that Robert was not looking where he was going. Robert testified that he did not attempt to brake until just after impact. The jury could have believed that even without steering, Robert's improper lookout and lack of braking was a substantial factor in producing his injuries. Although Robert contends that his delayed braking prevented a more severe collision with the semi, it is the jury's function, not this court's, to weigh the evidence and resolve factual issues. *See* ***Sumnicht v. Toyota Motor Sales***, 121 Wis.2d 338, 360, 360 N.W.2d 2, 12 (1984). We

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> than for the purpose for which it was intended) (used the product knowing it to be defective or unreasonably dangerous) (used the product after altering the product so that it could no longer be used as intended) (used the product knowing the product was worn out in such a manner as to render the same unsafe) (failed to follow the directions and warnings as to the use of the product), then you will find the plaintiff negligent. If you are not so satisfied, you will find the plaintiff not negligent.

[3] Robert also cites ***Cota v. Harley Davidson***, 684 P.2d 888, 895-96 (Ariz. App. 1984), and ***Ellithorpe v. Ford Motor Co.***, 503 S.W.2d 516, 521 (Tenn. 1973). Cases from outside our jurisdiction are not binding precedent.

conclude the jury was properly asked to determine whether Robert was negligent with respect to his own safety and whether such negligence was a cause of his injuries.

Next, we turn to Isuzu's cross-appeal. Isuzu argues that Robert failed to introduce any credible evidence to establish that a manufacturing defect existed at the time the truck left Isuzu. We disagree.

In order to support a claim of strict liability, a plaintiff must show that the product was in a defective condition when it left the possession and control of the seller and that it was unreasonably dangerous to the user. ***Dippel***, 37 Wis.2d at 460, 155 N.W.2d at 63. Robert relied on the testimony of his expert witness, Christopher Pearce Wright, a mechanical engineer. Wright testified that he examined the steering unit of the Isuzu truck that Robert was driving and, in his opinion, the steering unit contained a defect that caused a loss of steering control. He described the defect as a cross-threaded adjuster plug, and "[t]he bottom line is that a loosened plug of this sort … would cause loss of control of the vehicle. If the plug were completely gone, the vehicle would be effectively unsteerable." Wright testified that the threads on the plug were damaged and appeared to have been cross-threaded.[4] When cross-threaded, the adjuster plug is not properly aligned so that over a period of time the plug works loose.

Wright offered no opinion to a reasonable degree of engineering certainty that the cross-threading of the adjuster plug occurred at Isuzu. Wright,

[4] Cross-threading was described as something everybody has done: "The threads on something like a light bulb or a jar lid or, you know, an ordinary fastener have to match up with the mating part. [I]f they're not aimed at each other just so, the threads don't match, and when you try and screw 'em down, you can feel a lot of heavy resistance. That means the crest of one thread is going across the crest of another thread, and tends to scrape 'em."

however, testified that, "It would have to have been cross threaded at some point when the plug was assembled to the valve body. There [are] only two places where that could happen, in maintenance and when it was originally made." It was undisputed that the truck was six months old, had approximately twenty-two thousand miles on it, and that no maintenance ever occurred on this particular steering unit after it was manufactured. Additionally, Wright testified: "Cross threading does not occur as a result of an accident. Cross-threading occurs when it's being assembled."

Based on Wright's testimony, the jury could reasonably infer that the adjuster plug was cross-threaded at Isuzu.

> In reviewing a jury's verdict, the test is whether there is any credible evidence in the record on which the jury could have based its decision. The evidence is viewed in the light most favorable to sustain the verdict; we do not look for credible evidence to sustain a verdict the jury could, but did not, reach.

Sumnicht, 121 Wis.2d at 360, 360 N.W.2d at 12. The only other possibility for cross-threading was during maintenance, and that possibility was eliminated by the fact that there was no maintenance performed on the steering system prior to the accident.

Isuzu offers several arguments in support of its contention that no credible evidence supports the finding that the defect existed at the time the truck left Isuzu: (1) Wright had no prior experience designing and manufacturing steering units and was not retained to reconstruct the accident to determine its cause; (2) uncontroverted evidence made attempts to link the cross-threading to Isuzu scientifically and technically impossible; (3) the circumstances of the accident fail to support Wright's theory; and (4) the clear preponderance of the

evidence establishes that the cross-threading could not have occurred at Isuzu. For the reasons that follow, we conclude that these arguments for the most part challenge the weight and credibility of the evidence and are resolved by the application of our standard of review.

Isuzu does not challenge Wright's credentials to offer expert opinion testimony; instead, it appears to argue that his testimony should be given little weight because he has not designed or manufactured steering units and was not an accident reconstructionist. We are unpersuaded. Wright testified that he was a mechanical engineer with an emphasis on mechanical design and stress analysis, and has been involved in stress analysis of crew seating for the space shuttle. When asked if he had previously worked on steering gear engineering issues, he testified that because it involved the condition of threaded connections he had been dealing with them for his "whole professional career" of thirty years.

Isuzu's argument is best directed to the jury, not an appellate court, because we do not assess the weight and credibility of testimony. ***Estate of Wolff v. Weston Town Bd.***, 156 Wis.2d 588, 598, 457 N.W.2d 510, 513-14 (Ct. App. 1990). "The credibility of witnesses and the weight given to their testimony are matters left to the jury's judgment, and where more than one inference can be drawn from the evidence, this court must accept the inference drawn by the jury." ***Roach v. Keane***, 73 Wis.2d 524, 536, 243 N.W.2d 508, 515 (1976). Evidence which is so patently incredible that it conflicts with the course of nature or fully established or conceded facts can be said to be incredible as a matter of law. ***Ferraro v. Koelsch***, 119 Wis.2d 407, 410-11, 413, 350 N.W.2d 735, 736, 738 (Ct. App. 1984), *aff'd*, 124 Wis.2d 154, 368 N.W.2d 666 (1985). We are not persuaded that Wright's testimony is incredible as a matter of law.

Nonetheless, Isuzu argues that it was technically and scientifically impossible to link the cross-threading to Isuzu, because Wright's testified that the adjuster plug could not be cross-threaded by hand, but Isuzu's expert testified the unit was assembled by hand at Isuzu. Isuzu mischaracterizes the testimony. On cross-examination, Wright testified as follows:

> Q. [Counsel]: As we sit here today, do you even know if it's possible to take a new adjuster plug and a new steering unit and cross thread it by hand?
>
> A. Sure.
>
> Q. Do you know if that's impossible?
>
> A. It's easy.
>
> ….
>
> Q. Would you like to try it now?
>
> A. If you've got the tools and the vice, I'd be happy to.
>
> Q. I'm talking about doing it by hand.
>
> A. You can't do it by hand.

Wright testified that he could not cross-thread it by hand; it takes a special wrench to torque it down.

Later in the trial, Isuzu introduced its expert witness who testified:

> Well, the steering units are actually put together and assembled by hand. There is no mass production in this assembly. *Hand tools are used.* There are no air tools. *Wrenches that are used are just common technician-type wrenches, along with a torque wrench,* of course, to set the correct pound loading on bolts and plugs and other areas where the design calls for specific torque ratings. (Emphasis added.)

To the extent any inconsistencies are perceived, the jury was entitled to reconcile them and find that the units are put together not merely "by hand," but also by the use of certain "hand tools," including special wrenches, such as a

torque wrench. Thus, Isuzu's argument, "it is clear that a finding that the adjuster plug was cross-threaded at Isuzu was directly contrary to the uncontroverted fact that the adjuster plug could *not* be cross-threaded by hand and it had been only hand threaded at Isuzu" must be rejected. (Emphasis in the original.)

Isuzu further contends that the circumstances of the accident fail to support Wright's theory. Isuzu argues that according to Wright, the plug would have worked itself out gradually and there would be more play with the steering system, but there was no evidence of steering problems. Isuzu also contends, according to Wright, the plug would have loosened far enough to cause power steering fluid to leak before the steering became inoperative, but there was no evidence of leaks. We are not persuaded. Isuzu's argument does not consider Wright's testimony that he could not assign a time to the leak, "whether it happens at Isuzu or on the road or for that matter in this split second before the accident." He also testified that the adjuster plug could partially back out of the valve body and yet maintain a seal such that there would be no leak. Again, these matters are factual disputes that the jury, not the appellate court, resolves. ***Wolff***, 156 Wis.2d at 598, 457 N.W.2d at 513-14.

In addition, Isuzu argues that eyewitnesses testified that they did not see Robert make any attempt to steer the vehicle before the collision, thus rebutting Robert's testimony that he attempted to steer but was unable to. Isuzu also points to inconsistencies in Robert's testimony. These challenges go to the weight and credibility of the testimony. Because matters of weight and credibility are jury, not trial court functions, these arguments must be rejected. ***Id***. We are not persuaded that the great weight and clear preponderance of the evidence require a reversal.

Next, Isuzu argues that it is entitled to a new trial because the jury improperly considered prejudicial and extraneous evidence. We disagree. Isuzu relies on the affidavits of three jurors. The affidavits stated that during deliberations one of the jurors, who was a certified master mechanic, "came up with new theories to explain how the steering unit … had failed … [and] how the adjuster plug for the subject steering unit might have been improperly assembled at Isuzu." The mechanic juror explained that a steel ball may have become improperly lodged and that the adjuster plug may have been tightened too far. Neither of these theories had been presented at trial.

We conclude that the information was neither extraneous nor prejudicial. Extraneous information is defined as that which is neither of the record nor the general knowledge that jurors are expected to possess. ***Castaneda v. Pederson***, 185 Wis.2d 199, 209, 518 N.W.2d 246, 250 (1994). Jurors are expected to bring their accumulated life experiences in arriving at a verdict. ***State v. Poh***, 116 Wis.2d 510, 518, 343 N.W.2d 108, 113 (1984). Extraneous information, however, is information obtained from non-evidentiary sources, defined as "existing or originating outside or beyond **:** external in origin **:** coming from the outside." ***State v. Shillcutt***, 119 Wis.2d 788, 794, 350 N.W.2d 686, 690 (1984) (quoting *WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY* 807 (unabr. 1976)).

In analyzing this issue, the court must first distinguish between the jury's deliberations or thought processes, and extraneous prejudicial information. Section 906.06(2), STATS. No inquiry may be made with respect to the jury's thought processes. ***State v. Heitkemper***, 196 Wis.2d 218, 225, 538 N.W.2d 561, 564 (Ct. App. 1995). The party challenging the verdict carries the burden to

demonstrate that the information is extraneous, improperly brought to the jury's attention, and prejudicial. ***Poh***, 116 Wis.2d at 520, 343 N.W.2d at 114.

We are unpersuaded that the information was extraneous or prejudicial. Isuzu does not take issue with the trial court's finding that "all of the parties were aware of the juror's background as a vehicle mechanic." The trial court stated: "None of the parties struck him and they obviously assumed he would bring something to their overall discussion of the case which is drawn from his own experience and knowledge." *See* ***Heitkemper***, 196 Wis.2d at 226, 538 N.W.2d at 564 ("The fact that [the juror] happened to be trained in pharmacology does not make his life experiences extraneous."). A pharmacist's use of his own experience and knowledge, for example, did not result in the bringing of outside evidence into the jury room. ***Id***.

Although our conclusion disposes of the issue, we additionally observe that the trial court was correct in its conclusion that the information was not prejudicial. As the trial court pointed out, the observations of the mechanic juror were not connected with the ultimate decision-making process of the jury, because the verdict asked specifically if the adjuster plug had been "cross threaded" at the factory. There was no general inquiry whether the steering unit was defective or failed just prior to the accident. Because the verdict asked specifically whether the adjuster plug had been cross-threaded, any discussion of other potential theories would not have been prejudicial to Isuzu. If the other jurors had been influenced by his "new theories," they would have had to answer the verdict question as to cross-threading "no," thus absolving Isuzu of liability. Because the information was not prejudicial, Isuzu fails to demonstrate reversible error.

Next, Isuzu argues that the trial court erroneously allowed into evidence testimony about unrelated health problems of the Christmans' son. It contends that the evidence had "no connection to the issues in the case and was introduced solely for the purpose of evoking sympathy of the jury." The record fails to support this argument.

Evidentiary issues are addressed to trial court discretion. ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). We must review the record to determine whether it provides a basis for the court's discretionary decision. ***Id***. If the record reveals a reasonable basis for the trial court's discretionary ruling, we do not disturb it on appeal. ***Id***. At trial, Robert testified that his son had a liver and bone marrow transplant, had cancer and lost a kidney. Robert also testified that although the child had to take medicine for the rest of his life, he's "doing good so far."

We conclude that the trial court's decision to permit evidence regarding the son's health condition had a rational basis. Robert's failure to seek employment could be used to support a defense that he failed to mitigate his wage loss, or that he was malingering with respect to his condition. The record reveals that Robert was cross-examined about his failure to seek employment. Robert explained that he failed to seek employment because, due to a loss of earning capacity, his income at a minimum wage job would be offset by the cost of daycare. His wife, now the primary wage earner, works three part-time jobs as a nurse resulting in unusual hours. Robert stayed home to do tasks that his wife usually had done. His wife testified that with her son's condition, it was difficult to place the child in day care; even his grandmother is often afraid to take him.

Robert was entitled to explain that the circumstances of his family, combined with his lost earning capacity, made it unfeasible to seek employment at the present time. We note that testimony emphasizing the child's problems was lacking; although the illnesses were serious, Robert testified that with medicine the child was "doing good" so far. The record reveals a reasonable exercise of discretion.

Finally, Isuzu argues that it is entitled to a new trial in the interest of justice. It contends that each of the claimed errors, as well as their cumulative effect, deprived Isuzu of a fair trial. It contends that the great weight of the evidence is contrary to the jury's findings, and that Robert gave three different versions of the accident.

As we previously discussed, we disagree with Isuzu's characterization of the record. The jury's findings are amply supported by credible evidence. Although Robert initially stated that his tire blew, that he did not have time to steer his vehicle, and that he was unable to steer it back, the jury was entitled to resolve any perceived inconsistencies. The jury could find that immediately after the accident, Robert was unable to determine the cause of his inability to steer, but believed the vehicle responded as if a tire had blown. Further, that he did not have time to steer and was not able to steer is not necessarily inconsistent. If the steering had responded, Robert may have believed that he would have had time to steer the vehicle properly.

Isuzu elaborates by essentially repeating its earlier arguments. We conclude that the interest of justice does not require a new trial.

By the Court.—Judgment affirmed.

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