COURT OF APPEALS
DECISION
DATED AND FILED

June 18, 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.

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.

No. 97-2904

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

LYNELLE V. BUTKUS,

PLAINTIFF-APPELLANT,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
CHASE LUMBER & FUEL COMPANY, INC.,
AND DARRELL J. LIEN,

DEFENDANTS-RESPONDENTS,

MERIDIAN RESOURCE CORPORATION,

DEFENDANT.

APPEAL from a judgment of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

PER CURIAM. Lynelle Butkus appeals from the trial court's judgment awarding her $3783 in a personal injury case. The issues are: (1) whether the trial court should have given the jury an instruction on management and control in an emergency; and (2) whether the jury's award for pain and suffering was unreasonable as a matter of law given the facts of the case. We resolve the issues against Butkus and affirm the trial court.

Butkus commenced this action for injuries she sustained when her automobile hit a pile of lumber that fell from Darrell Lien's truck. The load of lumber weighed about 1500 pounds and was one foot high. Butkus testified that she was driving forty to fifty miles per hour when she suddenly saw the lumber in front of her. Prior to seeing the lumber, she had glanced briefly at her daughter who was riding with her and had looked up at a traffic light. She did not have time to apply her brakes and did not swerve because of other traffic.

Butkus first argues that the trial court should have given the jury an instruction on management and control in an emergency. The jury instruction provides:

> 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 to act instantly to avoid collision, the driver is not negligent if he or she makes such a choice of action or inaction as 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.

WIS J I—CIVIL 1105A (1996).

We conclude that the trial court properly refused to give this instruction to the jury. The instruction on management and control in an emergency does not apply unless the person seeking the benefit of the instruction is without fault in the creation of the emergency. *See* ***Lutz v. Shelby Mut. Ins. Co.***, 70 Wis.2d 743, 754, 235 N.W.2d 426, 432 (1975). Butkus testified that she had glanced at her daughter and looked at the traffic light before she noticed the lumber. If Butkus had been watching the road, she would have had more time to avoid the lumber. Butkus is not entitled to the benefit of this emergency rule because she is not without fault in the creation of the emergency.

Butkus contends that the emergency doctrine applies because this *was* an emergency; there were only seconds between the moment she saw the lumber and her accident. This argument misses the point. Although an emergency situation existed when Butkus returned her attention to the road, the emergency was caused, in part, by the fact that Butkus had not been looking at the road and thus had very little time to react. Because she was not without fault in the creation of the emergency, the instruction should not have been given.

Butkus next argues that the jury's award for pain and suffering was unreasonable as a matter of law. The jury awarded Butkus damages of $2500 for past medical and chiropractic expenses, $1000 for past and future pain and suffering, $360 for lost wages, and $200 for property damage. The trial court entered judgment awarding her $1753 in costs and $2030 in damages, half the damage award, because the jury found her 50% negligent.

We will uphold a jury award if any credible evidence supports it. ***Martz v. Trecker***, 193 Wis.2d 588, 595, 535 N.W.2d 57, 60 (Ct. App. 1995). This court will not interfere with a jury's award unless it "is so unreasonably low as to shock the judicial conscience." ***Puls v. St. Vincent Hosp.***, 36 Wis.2d 679, 693, 154 N.W.2d 308, 316 (1967) (footnote omitted).

Conflicting evidence was presented about Butkus's medical condition. Butkus contended that she was in a lot of pain and that her activities were restricted, but evidence was presented that Butkus had participated in recreational activities arguably inconsistent with an injury as severe as she claimed. Butkus's doctor testified that he believed she had suffered a torn annulus as a result of the accident, but his diagnosis relied primarily on her subjective complaints and the use of a discogram. The defense expert attacked the validity of this test, stating that it could not prove that the injury was caused by the accident. Because the medical evidence could be interpreted to support a finding that Butkus sustained minimal injury, we cannot conclude that the jury's award shocks the judicial conscience.

By the Court.—Judgment affirmed.

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