COURT OF APPEALS
DECISION
DATED AND FILED

July 14, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 97-2971

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

KIMBERLY KIRWIN HOLUM AND THE ESTATE OF KAREN R. KIRWIN,

PLAINTIFFS-APPELLANTS,

DAVID T.I. HOLUM,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

ALEXANDER R. HOLUM,

PLAINTIFF,

V.

GENERAL MOTORS CORPORATION,

DEFENDANT-RESPONDENT-CROSS-APPELLANT,

IRVING L. HOLUM,

DEFENDANT-CO-APPELLANT,

GHI INSURANCE COMPANY,

DEFENDANT-SUBROGEE.

APPEAL and CROSS-APPEAL from judgments of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed in part; reversed in part, and cause remanded with directions.*

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

MYSE, J. Kimberly Kirwin,[1] the Estate of Karen Kirwin, and Irving Holum appeal a judgment dismissing Kimberly's and Karen's Estate's claims against General Motors Corporation (GM) after a jury found that GM's power window system was neither defective nor unreasonably dangerous, and David Holum appeals a judgment offsetting costs awarded to him from GM with costs awarded to GM from Kimberly and Karen's estate. GM cross-appeals the amount of costs initially awarded to David.

The appellants first contend that the trial court erroneously exercised its discretion by refusing to admit evidence offered by the plaintiffs.[2] Because we conclude that the trial court properly exercised its discretion and that any potential evidentiary errors were harmless, we affirm its evidentiary determinations. The appellants next contend that the trial court erred by failing to set aside the jury finding of no damages to either Kimberly or the estate because the verdict was perverse. We conclude, however, that the verdict was not perverse and the finding of no damages does not merit a new trial because the jury concluded that GM was

[1] Kimberly Kirwin Holum and Irving Holum were divorced by the time of the trial, and Kimberly had resumed the use of her former surname.

[2] In this appeal the appellants include all four plaintiffs plus the defendant Irving Holum.

not negligent or strictly liable. We therefore affirm the judgment and the trial court's denial of the plaintiffs' motion to order a new trial.[3]

GM cross-appeals, contending that costs awarded to David pursuant to a settlement were improper because the costs reflected the total amount expended by all four plaintiffs, and should have instead been pro-rated among all the plaintiffs. Because we conclude that David was entitled to the full costs of pursuing his claim without regard to whether the costs benefited the other plaintiffs, and because GM fails to show that the costs were not essential to David's claims, the full award of costs to David is affirmed. Finally, David alleges that the trial court erred by offsetting costs awarded to him from GM with costs awarded to GM from Kimberly and Karen's Estate. Because we agree that these costs could not be offset, that part of the judgment is reversed, and the case is remanded with directions to impose costs only against the unsuccessful plaintiffs.

This appeal involves issues arising from a jury trial which dealt with potential civil liability for the death of four-year-old Karen Kirwin. Karen and her two younger brothers, David and Alexander Holum, were left alone in their father's truck on a cold night when their father stopped at a friend's house to ask a favor. Irwin Holum, the children's father, claimed that he only expected to be away for a minute, and that he did not want to take the time to remove all the children from his truck. He therefore kept them buckled in their seat belts, and left the engine running to heat the truck in his absence.

[3] These parties also claim several errors concerning the potential applicability of punitive damages. Because our decision precludes punitive damages, we need not address these issues.

Irwin's absence took longer than he expected, and about ten minutes later he returned to find Karen caught in the passenger-side power window of his truck. Karen ultimately died from traumatic asphyxia due to pressure exerted on her neck by the window.

Prior to trial, the court excluded evidence of internal procedures at GM for disseminating information of injuries or deaths that involved their products. The court also excluded twenty-three of forty-seven "other similar incidents" offered by the plaintiffs after concluding that they were not sufficiently similar to have any relevance. At trial, the court further denied the plaintiffs' attempts to introduce a study of fatality rates associated with power windows.

The jury returned a verdict of no liability against GM and 100% liability against Irving, and awarded no damages to either Kimberly or the estate. David, who had settled with GM prior to trial, was granted costs, but these costs were offset by costs awarded to GM from Kimberly and the estate.

The Exclusion Of Other Similar Incidents

The appellants first contend that they should have been permitted to introduce all forty-seven of their proposed "other similar incidents." The appellants contend that they sought to introduce these incidents to prove that GM was negligent, to establish that the power windows were an unreasonably dangerous product, and to demonstrate the need for punitive damages.

The law with respect to the admissibility of prior accidents was fully set forth by this court in ***Farrell v. John Deere Co.***, 151 Wis.2d 45, 443 N.W.2d 50 (Ct. App. 1989). There, the court said:

> Evidence of other accidents may be admissible in a products liability case to show the probability of the defect in question, that the injury was caused by the defect and that the person responsible for the defect knew or should have known of its existence. The admissibility of prior accidents is discretionary with the trial court. The evidence may only be admitted where the accidents occurred under conditions and circumstances similar to those of the accident which injured the plaintiff. When the prior accidents are of little probative value, the trial court in its discretion may refuse to admit such evidence. When reviewing evidentiary issues, the question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record.

Id. at 76, 443 N.W.2d at 61 (internal citations omitted).

The appellants argue that the trial court adopted an unduly narrow set of circumstances upon which it determined similarity. We do not agree. The trial court established the following criteria: the accident had to involve a child roughly Karen's age; the power window involved had to have the same or similar design; and the accident had to have occurred while the ignition was on. The plaintiffs did not explain to the trial court why these criteria were inappropriate, or suggest other criteria more appropriate to its claim. We conclude that these criteria are not unreasonable based on the nature of the claim, and therefore the court did not erroneously exercise its discretion.

The appellants further contend that the trial court erred by rejecting both a National Highway Transportation Safety Administration (NHTSA) study of emergency room admissions relating to power window accidents and four accidents that occurred after Karen's death. The trial court refused to admit both the study and the four accidents because all took place after Karen's accident and therefore could not be used to establish notice to GM. The appellants argue that

the trial court erroneously refused to admit the study and the four incidents because they were relevant not to show notice, but rather to show that the power windows were defective and unreasonably dangerous.

The appellants, however, fail to demonstrate how the characteristics of any of the four accidents or the incidents used in the study are sufficiently similar to those surrounding Karen's death. In order to establish a foundation for this evidence, the plaintiffs had to demonstrate such similarity. On appeal, however, with one exception, the appellants do not identify how these accidents occurred, or how they help demonstrate the existence of an unreasonably dangerous product.[4] We therefore affirm the trial court.

Testimony of GM Engineers

The appellants next contend that the trial court erred by precluding the plaintiffs from presenting evidence of GM engineers' knowledge regarding power window accidents and the internal procedures used for advising them of such accidents. Specifically, the appellants contend that such testimony was relevant because it would tend to show that GM was negligent for failing to take necessary action when it learned of accidents involving power windows. This evidentiary ruling is also subject to an erroneous exercise of discretion standard of review. *See* ***Johnson v. Kokemoor***, 199 Wis.2d 615, 635, 545 N.W.2d 495, 503 (1996).

[4] The appellants claim that one of the four accidents occurred under virtually identical circumstances to Karen's death. Without deciding whether there was a proper foundation established for this incident at the trial court level, we conclude that any error in rejecting this incident was harmless in light of the admission of twenty-three other incidents. *See* ***State v. Schirmang***, 210 Wis.2d 324, 332, 565 N.W.2d 225, 229 (Ct. App. 1997) ("Evidentiary errors are subject to a harmless error analysis.").

The jury found that the power window system installed on Irving's truck was neither defective nor unreasonably dangerous. This finding renders moot any error by the trial court in refusing to admit the testimony of the internal procedures at GM. The appellants have identified no case law establishing that a manufacturer is negligent for failing to notify the responsible personnel for injuries caused by a non-defective product.[5] We will not consider arguments unsupported by legal authority. *See* ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980).

Evidence of Post-Accident Design Changes

The appellants contend that the trial court erroneously exercised its discretion by precluding evidence of post-accident design changes to the Cadillac Catera. The appellants argue that such evidence was relevant to prove that the power window system in the truck was defective, that the truck was unreasonably dangerous, and that a safer design was technologically feasible.

As with the claim concerning GM's internal procedures, we need not decide whether the trial court erred by excluding this evidence because any error was harmless. As GM points out, the deposition testimony of Thomas Ankeny, an engineer for GM, was presented to the jury in which Ankeny identified that GM produced a car in Germany with power windows that automatically reversed on

[5] On the contrary, the only proposition that the appellants offer any legal support for is that a manufacturer's failure to take action with respect to a known defect may result in a finding of negligence. For support, the appellants cite to ***Walter v. Cessna Aircraft Co.***, 121 Wis.2d 221, 358 N.W.2d 816, 819 (Ct. App. 1984). Our review of that case, however, did not identify the stated proposition. Rather, the case held that the failure to take remedial action may result in the award of punitive damages. ***Id***. at 227-28, 358 N.W.2d at 820. Nevertheless, we need not decide the issue whether the failure to take remedial action of a known defect constitutes negligence in light of the jury finding that there was no defect.

hitting an object (automatic reverse), that automatic reversing technology was required in Europe for power windows, and that the Cadillac Catera would have such a system in the near future. The appellants have failed to identify how the exclusion of their offered testimony was prejudicial in light of Ankeny's testimony which reflected the identical information.

Whether Jury Findings Reflect a Perverse Verdict Necessitating a New Trial

The appellants next contend that the jury verdict which awarded neither Kimberly nor Karen's estate any damages is perverse. The appellants rely on the fact that Kimberly's claims for lost companionship were sincere and unrefuted, and that there was evidence that Karen would have experienced terror for three to four-and-one-half minutes while being strangled.

A perverse verdict is one which is clearly contrary to the evidence, and where the verdict is perverse it must be set aside and a new trial granted. *See* ***Fouse v. Persons***, 80 Wis.2d 390, 396, 259 N.W.2d 92, 94 (1977). However, "where it is apparent that there is no liability in any event, the failure to find damages does not render the verdict perverse." ***Jahnke v. Smith***, 56 Wis.2d 642, 651-52, 203 N.W.2d 67, 72 (1973).

The jury found that Kimberly and Karen suffered no damages despite the overwhelming evidence that damages had occurred. Nevertheless, the jury also found that GM was not liable. As a result of the finding of no liability

against GM, the trial court did not err by failing to set aside the verdict and ordering a new trial. *See* ***id***.[6]

Whether David was Entitled to All Costs

GM contends on appeal that the trial court erred by permitting David to recover the costs involved in pursuing all four of the plaintiffs' claims. Costs are allowed "of course to the plaintiff upon a recovery." Section 814.01, STATS. The question raised in regard to the awarding of costs presents a matter of statutory interpretation which creates a de novo standard of review. *See* ***Rhiel v. Wisconsin County Mut. Ins. Corp.***, 212 Wis.2d 46, 51, 568 N.W.2d 4, 7 (Ct. App. 1997).

GM contends that the trial court did not require David to prove the portion of costs he incurred in the prosecution of his claims. Rather, GM argues, the trial court erroneously allowed David to recover the costs incurred by all the plaintiffs as a group.

The trial court's award of costs was not erroneous. We see nothing in the language of the costs statute that would preclude a prevailing plaintiff from collecting the costs necessary to pursue his or her claim simply because the same costs were necessary to pursue the claims of other plaintiffs. Section 814.04(2), STATS., permits a prevailing plaintiff to recover all the disbursements and fees necessary to the prosecution of his claim. GM fails to bring to this court's

[6] We note that this appeal only involves claims of error concerning the plaintiffs' case against GM. We therefore do not address whether the verdict was perverse with respect to the claim against Irving as a defendant.

attention any costs that were not necessary to David's claim, and the award of costs is therefore affirmed.[7]

The Offset Of David's Costs With GM's Costs

The appellants' final contention is that the trial court erred by offsetting David's costs with the costs awarded to GM. After David settled, he was awarded $12,313.47 in costs. After the jury concluded that GM was not liable to Kimberly or Karen's estate, their complaint was dismissed and GM was awarded $9,503.64 in costs. The court reduced the costs awarded to David by this amount.

The application of the cost statutes to a set of facts presents a question of law subject to de novo review. *See* ***Sampson v. Logue***, 184 Wis.2d 20, 27, 515 N.W.2d 917, 920 (Ct. App. 1994). If the language of the statute is clear and unambiguous, we must apply that language to the facts of the case. ***State v. Keding***, 214 Wis.2d 362, 367-68, 571 N.W.2d 450, 452 (Ct. App. 1997).

Section 814.03, STATS., allows a defendant to recover costs against a plaintiff "[i]f the plaintiff is not entitled to costs …." The plain language of this statute permits GM to recover costs only against unsuccessful plaintiffs. *See* ***Sampson***, 184 Wis.2d at 27, 515 N.W.2d at 920 (a defendant may recover his or her costs "against each unsuccessful plaintiff in a lawsuit."). Because David was not an unsuccessful plaintiff, the trial court could not assess costs against him.

[7] The fact that David was the only successful plaintiff is essential to our holding. We do not address any issue regarding the apportionment of costs in the event that multiple plaintiffs prevail and are each awarded costs.

The trial court also could not offset the costs awarded to David with the costs awarded to GM. Section 814.035, STATS., permits costs awarded to a plaintiff and defendant to be offset on counterclaims and cross complaints. The plain language of this statute does not permit David's and GM's costs to be offset because GM did not recover against David on a counterclaim or cross complaint. We therefore remand the case with directions to enter costs to GM only against the unsuccessful plaintiffs.

By the Court.—Judgments affirmed in part; reversed in part, and cause remanded with directions. No costs on appeal.

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