COURT OF APPEALS
DECISION
DATED AND FILED

June 2, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3202

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

ROSELLA F. DOLL,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed in part; reversed in part, and cause remanded with directions.*

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

PER CURIAM. Rosella Doll appeals a judgment that applies the revised rule of joint and several liability, § 895.045(1), STATS., effective May 17, 1995, to an action arising out of an automobile accident filed on April 27, 1995.

Rosella argues that the trial court erroneously ruled that her amended complaint, adding a claim of negligence against her late husband, Gerald Doll, did not relate back to her original complaint. Because the amended complaint relates back to the original complaint, § 895.045(1) does not apply.[1] We therefore reverse that portion of the judgment.

American Family Mutual Insurance Company cross-appeals. It argues that based upon insufficient evidence, Gerald, its insured, was not negligent as a matter of law in causing the automobile collision. We conclude that the trial court correctly determined that credible evidence supported the jury's verdict. We therefore affirm in part, reverse in part and remand with directions to enter judgment without applying § 895.045(1), STATS.

On September 6, 1994, Rosella, a passenger in a car driven by her husband, was very seriously injured in a two-car accident. Gerald was killed in the accident. The other car was driven by Ronald Sutton, who failed to stop at a stop sign and collided with the Doll vehicle.

Sutton was insured through Allstate Insurance Company for $100,000 per person. Gerald had an automobile liability policy through American Family, with limits of $250,000 per person. Rosella, whose medical bills alone exceeded $200,000, had no underinsured motorist coverage.

The initial complaint named Sutton, Allstate, American Family and Simplicity Manufacturing, a subrogated employer, as defendants. Rosella alleged

[1] Because this issue is dispositive, it is unnecessary to address the other two issues raised on appeal: that the trial court erroneously ruled her original complaint failed to state a claim of negligence against her late husband, Gerald Doll, and that the retroactive application of § 895.045(1), STATS., violates the due process clause of the federal and state constitutions.

a personal injury claim and, as special administrator of Gerald's estate, alleged a wrongful death claim based upon Sutton's negligence. The complaint alleged that American Family insured Gerald "against liability of the type hereinafter alleged; and that this policy of insurance was in full force and effect at the times material hereto" and "reserved the right to settle and compromise any and all claims resulting from the insured's negligence … and to defend all lawsuits and actions arising from such claims."

The complaint did not again refer to Gerald's negligence. With respect to the facts of the collision, it stated:

> That on or about September 6, 1994, the Plaintiffs, Rosella F. Doll and Gerald E. Doll, deceased, were driving southbound on State Highway 47, Outagamie County, Wisconsin; that at the same time and place, Defendant, Ronald W. Sutton, was traveling westbound on County Highway S, when Defendant, Ronald W. Sutton, negligently operated his motor vehicle and collided with the vehicle driven by Gerald E. Doll, deceased, thereby causing Gerald E. Doll's death and causing injuries to Plaintiff, Rosella F. Doll and damages as hereafter described.

Nonetheless, in its answer, American Family stated: "AS AND FOR A SEPARATE AND AFFIRMATIVE DEFENSE, this answering defendant alleges that Gerald E. Doll was not negligent in the operation of his motor vehicle."

On November 10, 1995, after retaining new counsel, Rosella filed an amended complaint. The amended complaint named the identical parties as defendants, but added a specific allegation that Gerald was negligent in the operation of his vehicle, and that his negligence, along with Sutton's, was a substantial factor and proximate cause of Rosella's injuries.

The trial court ruled that the original complaint failed to state a claim of negligence against Gerald and his liability insurer, American Family, and that the amended complaint did not relate back to the date of the filing of the original complaint. Relying on ***Biggart v. Barstad***, 182 Wis.2d 421, 513 N.W.2d 681 (Ct. App. 1994), the trial court concluded that the original complaint was "at best, ambiguous," thus failing to place American Family on notice of a liability claim under Gerald's policy.

Because the amended complaint was filed after Wisconsin's new law governing joint and several liability, § 895.045(1), STATS., took effect, the trial court applied the new law to Rosella's claim. The effect of the new joint and several liability statute is to limit a defendant whose negligent liability is less than 51% to the percentage of his negligence.[2] This departs from the common law, which permitted a plaintiff to collect the total damages to which she is entitled from any of several joint tortfeasors whose negligence combined to cause her injury. *See* ***Brandner v. Allstate Ins. Co.***, 181 Wis.2d 1058, 1072, 512 N.W.2d 753, 760 (1994).

After trial, the jury apportioned ninety-five percent of the negligence to Sutton, and five percent to Gerald. Rosella moved the trial court to reconsider

[2] Section 895.045, STATS., **Contributory negligence**, provides in part:

> The negligence of the plaintiff shall be measured separately against the negligence of each person found to be causally negligent. The liability of each person found to be causally negligent whose percentage of causal negligence is less than 51% is limited to the percentage of the total causal negligence attributed to that person. A person found to be causally negligent whose percentage of causal negligence is 51% or more shall be jointly and severally liable for the damages allowed.

its application of § 895.045(1), STATS. Her motion was denied and judgment was entered on the verdict.

Rosella argues that under the identity of transaction test set forth in § 802.09(3), STATS., her amended complaint "relates back" to the original complaint.[3] As a result, she contends that the new joint and several liability statute, § 895.045(1), STATS., does not apply. We agree. The issue presents a question of statutory interpretation, a question of law we review de novo. ***State v. Michels***, 141 Wis.2d 81, 87, 414 N.W.2d 311, 313 (Ct. App. 1987).

American Family's contention, that "even where a party is joined initially, a subsequent amendment reciting a new claim for purposes of imposing liability renders 'relation back' impermissible," misstates the law.

> The basic test for whether an amendment should be deemed to relate back is the identity of transaction test, i.e. did the claim or defense asserted in the amended pleading arise out of the same transaction occurrence or event set forth in the original pleading. If this test is satisfied, relation back is presumptively appropriate.

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[3] Section 802.09(3), STATS., governing amendments to pleadings, provides:

> **(3)** RELATION BACK OF AMENDMENTS. If the claim asserted in the amended pleading arose out of the transaction, occurrence, or event set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the filing of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against such party, the party to be brought in by amendment has received such notice of the institution of the action that he or she will not be prejudiced in maintaining a defense on the merits, and knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against such party.

Korkow v. General Cas. Co., 117 Wis.2d 187, 196, 344 N.W.2d 108, 113 (1984).

In this case there is no question that the requirements of § 802.09(3), STATS., are satisfied: because there is alleged but one insured, one accident and one insurance policy with American Family, the claim asserted in the amended pleading arose out of the same occurrence set forth in the original pleading. *See* ***id***. at 197, 344 N.W.2d at 113. We conclude that the identity of transaction test has been met, and relation back is presumptively appropriate.

Nonetheless, our inquiry does not end here. There may be situations where simple compliance with the letter of § 802.09(3), STATS., does not adequately protect a party's rights and therefore "relation back" should not be permitted. ***Id***. at 196-97, 344 N.W.2d at 113. "When unfairness, prejudice, or injustice is asserted, the question for the trial court is whether the party opposing amendment has been given such notice of operative facts which form the basis for the claim as to enable him to prepare a defense or response." ***Id***. at 197, 344 N.W.2d at 113.

In discussing the way we determine whether a party received notice of a claim, we observed that the proper approach

> is to determine whether the adverse party, viewed as a reasonably prudent person, ought to have been able to anticipate or should have expected that the character of the originally pleaded claim might be altered or that other aspects of the conduct, transaction or occurrence set forth in the original pleading might be called into question.

Biggart, 182 Wis.2d at 434 n.5, 513 N.W.2d at 685-86 n.5 (quoting 6A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, § 1497 at 93 (2d ed. 1990)). Thus, under ***Biggart***, and contrary to American Family's

assertions, § 802.09(3), STATS., does not require the original pleadings to unambiguously spell out the amended claim.

Based upon Rosella's original pleading, a reasonably prudent person would have been able to anticipate that the character of the original pleaded claim might be altered to include the allegation of negligence on the part of the driver of the other car. American Family, named as a party in the original complaint, was given notice of the operative facts of the collision. The nature of the collision between two moving vehicles gave rise to a reasonable anticipation that both may have been at fault to some degree. The complaint stated that American Family insured Gerald "against liability of the type hereafter alleged" and reserved the right "to defend all lawsuits and actions arising from such claims." Although American Family dismisses these allegations as "boilerplate," we note that American Family prudently raised as an affirmative defense that Gerald "was not negligent" in the operation of his motor vehicle. We conclude American Family has been "given such notice of the operative facts forming the basis for the claim so that [it] may adequately prepare a defense or response." *See* ***Biggart***, 182 Wis.2d at 434, 513 N.W.2d at 686.

Although American Family places great reliance on ***Biggart***, it does not support its contentions. ***Biggart*** involved two separate accidents, involving three vehicles. First, a car and a milk truck collided. Shortly thereafter, Biggart's truck collided with the rear end of the stationary milk truck. ***Id***. at 425-26, 513 N.W.2d at 682. The milk truck was owned by someone other than its driver. By coincidence, the milk truck and the car were both insured by American Family. ***Id***.

Biggart filed a complaint against the milk truck driver and American Family. ***Id***. at 426, 513 N.W.2d at 682. The complaint alleged negligence on the part of the milk truck driver, and that American Family issued a liability policy covering the driver's negligent acts. ***Id***. The complaint made no mention of the car's involvement, its driver's negligence or his insurance with American Family. ***Id***. The complaint also did not allege that the individual who owned the milk truck was negligent and that he had liability coverage under the same policy as the milk truck driver. ***Id***.

Over a year after the complaint was filed, and four years after the accident, the Biggarts filed an amended complaint adding the allegation that the driver of the car and the owner of the milk truck were causally negligent, and American Family was liable. The trial court found that the amended complaint failed to satisfy § 802.09(3), STATS., and dismissed Biggart's claims against the milk truck owner and the car's driver, based upon the expiration of the statute of limitations.

We affirmed the dismissal of the claim arising out of the car driver's negligence but reversed the dismissal of the claim arising out of the milk truck owner's alleged negligence. We concluded that a review of the amended complaint showed that the "claims against American Family for [the car driver's] negligence [do] not arise from the transactions, occurrences or events in the original complaint within the meaning of § 802.09(3), STATS." ***Id***. at 430, 513 N.W.2d at 684. Further, we noted there "was no indication the original complaint was attempting to set forth facts indicating a larger accident with other negligent actors covered by other insurance policies issued by American Family." ***Id***. at 430-31, 513 N.W.2d at 684.

We reached a contrary result with respect to the claim based upon the milk truck owner's negligence and concluded the amended complaint related back to the original complaint. ***Id***. at 431, 513 N.W.2d at 684. We concluded that a complaint alleging an injury from the negligent operation of the milk truck would put the milk truck's insurer on notice that it was liable under the policy for the negligent use of the truck regardless whether the negligent user was the truck's owner or some other user. ***Id***. at 433, 513 N.W.2d at 685. The original complaint placed American Family on notice that it would be liable for injuries caused by the insured vehicle. ***Id***.

Relying on ***Biggart***, American Family argues that because the amended complaint alleges for the first time the negligence of its insured, its ability to prepare a defense to the claim was prejudiced. The facts supporting the prejudice component in ***Biggart***, however, are missing in this case. Unlike ***Biggart***, there are not two separate policies covering two separate vehicles and three potential insureds.

American Family also argues that its initiation of an investigation within a week of the accident is not conclusive concerning a lack of prejudice, because "the nature, scope and direction of the handling of the claim may well have been different" had Rosella initially asserted a claim against her husband. This argument is unpersuasive because American Family does not identify what it would have done differently in its investigation or handling of the claim.

We conclude that the claim in the amended pleading arose out of the same event set forth in the original pleading, thereby satisfying the basic requirements of § 802.09(3), STATS. The original pleading provided American Family notice of the operative facts which form the basis of the claim, permitting

it to anticipate that the originally pleaded claim might be called into question. Our conclusion is reinforced by American Family having raised the affirmative defense that Gerald was not negligent. As a result, we reverse the ruling that the amended complaint does not relate back to the original pleading, remand the matter and direct the trial court to enter judgment without the application of § 895.045(1), STATS.[4]

Next, we consider American Family's cross-appeal that the evidence fails to support the jury's verdict allocating five percent negligence on the part of Gerald. 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. ***Sumnicht v. Toyota Motor Sales***, 121 Wis.2d 338, 360, 360 N.W.2d 2, 12 (1984). "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." ***Id***.

Credible evidence supports the verdict. Jeffrey Peterson, Rosella's accident reconstruction witness, testified that Gerald was traveling between fifty-five and sixty miles per hour at impact. He stated that the average driver reaction time is about one second. Peterson testified if Gerald would have braked hard and slowed down prior to impact, he could have slowed from fifty-five to sixty miles per hour to twenty-three to twenty-seven miles per hour and completely avoided the accident. He testified that by "avoid" the accident, he meant that the Sutton

[4] The parties do not dispute that § 895.045(1), STATS., does not apply to an action filed before its effective date, May 17, 1995, and that the statute would not apply to the amended claim that relates back to the original pleading filed on April 27, 1995.

vehicle would have passed just in front of the Doll vehicle while the Doll vehicle was still traveling.

In addition to evidence of excessive speed, there was also evidence of improper lookout. Peterson testified that Gerald would have been able to see the Sutton vehicle before it emerged from behind a cornfield. He further testified that had Gerald braked hard at that point he would have completely avoided the accident. Peterson stated that there were no pre-impact skid marks for the Doll vehicle and no evidence that he swerved prior to impact. Peterson's testimony supports the verdict.

American Family argues that the extent to which the mature corn crop obscured visibility was disputed at trial, and that Gerald had only 2.5 seconds after the Sutton vehicle had cleared the corn field to apply his brakes to avoid the collision. American Family points out that its expert witness's testimony differed from that of Peterson's in various respects. It states: "While Doll's inference is one conceivable scenario, it is certainly no more likely, and probably less likely, than the competing inference that Mr. Doll was free from negligence."

This argument is best directed to the jury, not the appellate court, because it is not the function of the latter to assess the weight and credibility of the testimony. ***Id.*** "The credibility of the 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." ***Id***. We are unpersuaded that Peterson's testimony is incredible as a matter of law.

Nonetheless, American Family argues that because Gerald died in the accident, he is entitled to the presumption of having exercised due care.

Although the presumption applies, the presumption does not require a finding of no negligence. It merely permits the jury to presume that Gerald was not negligent unless it finds that the presumption is overcome by other evidence. *See* WIS J I--CIVIL 353. Here, based upon evidence that Gerald was using excessive speed and failed to exercise proper lookout, the jury was entitled to conclude that the presumption had been overcome.

American Family contends that the only issue is one of management and control, and therefore, the emergency doctrine applies as a matter of law. *See* ***Edeler v. O'Brien***, 38 Wis.2d 691, 698-99, 158 N.W.2d 301, 305 (1968). The emergency doctrine relieves a person of liability for his action or non-action when faced with an emergency which his conduct did not create or help to create. ***Hoeft v. Friedel,*** 70 Wis.2d 1022, 1030, 235 N.W.2d 918, 922 (1975). Three prerequisites exist for its application in an automobile negligence case: (1) the party seeking the benefits of the rule must be free from negligence which contributed to the creation of the emergency; (2) the time element in which action is required must be short enough to preclude deliberate and intelligent choice of action; (3) the element of negligence inquired into must concern management and control. ***Id***.

Ordinarily, the application of the emergency rule is a question for the jury. ***Id***.

> To hold that an emergency exists as a matter of law, and thereby remove the issue from the jury, the trial court must conclude that there is no credible evidence which would support a finding that any one of the three prerequisites was not met. Because such a conclusion amounts to a directed verdict for the person faced with the emergency, the court must view the evidence in the light most favorable to the person against whom the verdict is sought to be directed.

Id. (footnote omitted).

American Family argues that here, there is no issue presented other than one relating to management and control after the emergency was created. Failure to reduce speed or take any evasive action when faced with a hazardous situation is properly an element of management and control. ***Leckwee v. Gibson***, 90 Wis.2d 275, 287-88, 280 N.W.2d 186, 191 (1979). However, whether a driver is negligent as to speed and whether that negligence helped create the emergency presents a jury issue. *See* ***Hoeft***, 70 Wis.2d at 1032, 235 N.W.2d at 923. The record contains evidence, however, of negligent lookout and excessive speed, as well as negligent management and control. We must view the evidence in the light most favorable to Rosella's claim. We conclude that there was a sufficient factual dispute as to excessive speed and failure of lookout to submit to the jury the question whether the emergency doctrine relieves the defendant of liability. *See* ***id.*** at 1029-32, 235 N.W.2d at 921-23.

By the Court.—Judgment affirmed in part; reversed in part, and cause remanded with directions. Costs to Doll.

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