COURT OF APPEALS
DECISION
DATED AND FILED

April 9, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0553 **Cir. Ct. No. 99-CV-80**

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

THE ESTATE OF KATRINA L. LYNCH, BY ITS SPECIAL ADMINISTRATOR, KRISTIN A. LYNCH, KRISTIN A. LYNCH, AND KENNETH J. LYNCH,

PLAINTIFFS-APPELLANTS,

PREVEA HEALTH PLAN,

SUBROGATED-PLAINTIFF,

V.

CAROL J. KANE AND WEST BEND MUTUAL INSURANCE CO.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Oconto County: LARRY JESKE, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The estate of Katrina L. Lynch and her parents, Kristin and Kenneth Lynch, appeal from a judgment, entered upon a jury's verdict, dismissing their wrongful death claim against Carol Kane and her insurer, West Bend Mutual Insurance Company. The Lynches argue that the trial court erred by denying their motion in limine to exclude what they claim was impermissible character evidence. We reject the Lynches' argument and affirm the judgment.

BACKGROUND

¶2 Several minutes after sunset on the evening of June 29, 1998, Kane's vehicle struck fourteen-year-old Katrina Lynch as she walked with her friend Amanda Wierzchowski along Oak Orchard Road in Oconto County. It is undisputed that at the time of the accident, Katrina was walking with the flow of westbound traffic, contrary to WIS. STAT. § 346.28(1).[1] Katrina died on July 3 as a result of her injuries.

¶3 The Lynches filed their wrongful death claim in April 1999. In her answer to the Lynches' complaint, Kane asserted as an affirmative defense:

> That the injuries of [Katrina Lynch] were the sole and proximate result of her own negligence including, but not limited to, walking on a public highway in violation of law, failure to maintain a proper lookout, failure to wear reflective or otherwise observable clothing, walking on the wrong side of a public roadway, which made it more difficult for her to observe traffic, and was otherwise negligent with respect to her own safety.

[1] WISCONSIN STAT. § 346.28(1) provides that "[a]ny pedestrian traveling along and upon a highway other than upon a sidewalk shall travel on and along the left side of the highway and upon meeting a vehicle shall, if practicable, move to the extreme outer limit of the traveled portion of the highway." All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

The Lynches thereafter filed a motion in limine to exclude evidence of Katrina's presence, position, conduct or behavior on roadways prior to the accident. The trial court denied the motion. Following a trial, the jury ultimately apportioned 55% causal negligence to Katrina and 45% causal negligence to Kane. Based upon the jury's verdict, the trial court entered judgment dismissing the Lynches' claim against Kane and her insurer. This appeal followed.

ANALYSIS

¶4 The Lynches argue that the trial court erred by denying their motion in limine to exclude what they claim was impermissible character evidence. Although it is undisputed that the Lynches waived this argument by failing to raise it in the trial court, they urge this court to nevertheless exercise its discretionary power of reversal pursuant to WIS. STAT. § 752.35 because justice has miscarried.[2]

¶5 Although we have the discretionary power to reverse judgments in the interests of justice, we exercise an extremely limited review in such appeals. To establish a miscarriage of justice, the Lynches "must convince us 'there is a substantial degree of probability that a new trial would produce a different result.'" ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting ***State v. Caban***, 210 Wis. 2d 597, 611, 563 N.W.2d 501 (1997)).

¶6 The Lynches contend that the trial court erred by admitting what they claim was impermissible character evidence pursuant to WIS. STAT.

[2] Because the Lynches' motion after verdict seeking a new trial was untimely filed, the trial court was deprived of its jurisdiction to hear the matter.

§ 904.04.[3] In the alternative, the Lynches argue that even if properly characterized as habit evidence, testimony relating to prior incidents of Katrina walking on the paved portion of the road should have been excluded as either irrelevant or highly prejudicial. We are not persuaded.

¶7 Whether to admit evidence is addressed to the trial court's discretion. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). An appellate court will sustain an evidentiary ruling if it finds that the circuit court examined the relevant facts, applied a proper standard of law and, using a demonstrative rational process, reached a conclusion that a reasonable judge would reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶8 In denying the Lynches' motion in limine, the trial court noted that Amanda recalled that Katrina was walking either on the grass or just on the edge of the pavement at the time of the accident. To that end, the trial court stated: "If there is eyewitness testimony that in the recent past [Katrina] walked on the paved portion of the road and failed to move off the road for traffic approaching from behind; that the vehicles had to reduce speed and go around her, that testimony may be presented." The court admitted the testimony as relevant to the issue of whether Katrina was walking on or off the road when the accident occurred. The

[3] Pursuant to WIS. STAT. § 904.04, and subject to specified exceptions, evidence of a person's character or character trait is not admissible for the purpose of proving the person acted in conformity with that character or trait.

court further concluded that the proffered evidence was not of character but, rather, habit pursuant to WIS. STAT. § 904.06.[4]

¶9 This court has recognized that character evidence and habit evidence are often confused. *See* ***Steinberg v. Arcilla***, 194 Wis. 2d 759, 766, 535 N.W.2d 444 (Ct. App. 1995). "Character is a generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness." ***Id.*** at 766-67. Habit, however, "denotes one's regular response to a repeated situation." ***Id.*** at 767. For instance:

> [E]vidence that a person regularly looks both ways before she crosses a street would be admissible to prove that she looked both ways before crossing Elm Street on June 15. On the other hand, evidence that a person was safety-conscious and careful would not be admissible to prove that she looked both ways before crossing Elm Street on June 15. The former is evidence of 'habit,' and is admissible under [WIS. STAT. § 904.06]; the latter is evidence of 'character,' and, with exceptions not material here, may not be used to prove that the person acted "in conformity therewith on a particular occasion."

Id. (quoting WIS. STAT. § 904.04(1)). In context of habit evidence, "[t]he precise contours of how frequently and consistently instances of behavior must be multiplied in order to rise to the status of habit cannot be formulated and, as in other areas of relevancy, admissibility depends on the judge's evaluation of the particular facts of the case." ***Steinberg,*** 194 Wis. 2d at 768.

[4] WISCONSIN STAT. § 904.06 provides in relevant part: "[E]vidence of the habit of a person … whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person … on a particular occasion was in conformity with the habit."

¶10 Here, five defense witnesses testified regarding prior incidents in which they had seen Katrina and Amanda walking on the paved portion of the rural roads—at times, refusing to make way for traffic attempting to pass them. There was sufficient testimony for the trial court to characterize the evidence as habit. Further, evidence that Katrina regularly walked on the paved portion of the rural roads is relevant to prove that she was walking on the paved portion of Oak Orchard Road at the time of the accident. Finally, given the dispute regarding Katrina's precise location at the time of the accident, we conclude that the evidence's probative value was not outweighed by unfair prejudice.[5]

¶11 Based upon the foregoing, we are satisfied that there has been no miscarriage of justice. Therefore, we conclude that there is no reason to exercise our discretionary authority under WIS. STAT. § 752.35 to reverse the judgment.

By the Court.—Judgment affirmed.

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

[5] The Lynches, emphasizing that each of the five witnesses was "closely connected to Carol Kane," challenge the accuracy of the various testimonies. The accuracy of the witnesses' testimony, however, goes to its weight, not its admissibility. *See* ***Rollie Johnson Plumbing & Heating Serv. v. State***, 70 Wis. 2d 787, 796, 235 N.W.2d 528 (1975). The evidence is relevant and admissible; the weight of such evidence is for the trier of fact. ***State v. Heidelbach***, 49 Wis. 2d 350, 359, 182 N.W.2d 497 (1971).