COURT OF APPEALS
DECISION
DATED AND FILED

June 25, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2997 **Cir. Ct. No. 98-CV-280**

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

MYRON WIZA,

PLAINTIFF-APPELLANT,

V.

NORTHLAND INSURANCE CO., XYZ INSURANCE CO., AND MARY L. HART,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Chippewa County: THOMAS J. SAZAMA, Judge. *Affirmed*.

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

¶1 CANE, C.J. Myron Wiza appeals from a judgment entered on a jury verdict that found him twenty percent contributorily negligent in a truck accident in which he was injured. The jury found the driver, Mary Hart, eighty percent causally negligent in the accident. On appeal, Wiza asserts three general grounds for reversal. First, he contends the trial court erred when it allowed Hart

to testify regarding her ability to control the truck after Wiza intervened in an attempt to prevent the accident. Second, Wiza argues the trial court erred when it failed to find that the emergency doctrine applied as a matter of law and instructed the jury regarding Wiza's negligence. Finally, Wiza contends these mistakes infected the jury's determination of damages, resulting in a perverse verdict. Wiza seeks a new trial or, in the alternative, a modification of the judgment removing the finding of his contributory negligence. Because the trial court properly allowed Hart's testimony and correctly instructed the jury, and because the jury's verdict is not perverse, we affirm the judgment and order.

STATEMENT OF FACTS

¶2 Hart received her commercial driver's license in July of 1995 and went to work for Wiza as a truck driver. Wiza was an independent driver who owned his own trucks, which he operated through Comdata, a trucking company. Early in the morning hours of October 21, 1995, Wiza and Hart were driving from Sturgeon Bay to Menomonie. He and Hart had been "team driving" the vehicle and Wiza was sleeping on the bunk behind the seats while Hart drove. Hart entered a cloverleaf turn at the intersection of Highways 29 and 124 in Chippewa County at approximately sixty miles per hour, which was forty miles per hour over the posted speed limit. When she realized she had entered the curve too fast, she began braking and yelled to Wiza, who got up and reached for the jake brake. In the process of reaching for the jake brake, Wiza braced himself on the steering wheel. Wiza's and Hart's efforts to stop the semi were unsuccessful and the vehicle rolled over, coming to a stop at the bottom of the curve.

¶3 At trial, Hart testified over Wiza's objection that she believed she could have kept the vehicle upright if Wiza had not grabbed the steering wheel

when he reached for the jake brake. In terms of Wiza's injuries stemming from the accident, Wiza said he returned to work two or three weeks after the accident, but was unable to perform many of the required duties as well as he did before, such as sitting for extended periods of time. In addition, Wiza testified he had experienced health problems prior to the accident with symptoms similar to the ones he claimed he suffered from the accident, including back, hip, and leg pain. Wiza received sporadic treatment for his problems from April 1996 to January 2001, consisting mostly of chiropractic treatment and pain injections. Wiza's treating physician testified Wiza would require future surgery, although Wiza said he would not have surgery. Wiza also testified he had owned his own trucking company since 1997 and no longer leased his trucks through Comdata. The company had turned profits in 1999 and 2000, something Wiza had never done during his prior work in the trucking industry. Wiza said his health problems limited his work to mostly managerial duties.

¶4 The trial court found Hart negligent as a matter of law. However, the court denied Wiza's request to conclude he was faced with an emergency as a matter of law and therefore, not negligent. Instead it submitted the issue to the jury. The court also instructed the jury regarding Wiza's negligence. The jury found both Hart and Wiza causally negligent and apportioned the negligence eighty percent to Hart and twenty percent to Wiza. The jury awarded Wiza $20,000 for past pain and suffering, $4,000 for past lost earning capacity, $1,287 for past medical expenses, and no future damages. Wiza brought a motion for a new trial, which the court denied. He now appeals the judgment and the order denying his post-trial motion.

DISCUSSION

I. Hart's Testimony

¶5 Wiza first argues the trial court improperly allowed Hart to testify that she could have prevented the tractor and trailer from tipping over had Wiza not grabbed the steering wheel. We review a circuit court's decision to admit or exclude evidence under an erroneous exercise of discretion standard. ***Morden v. Continental AG***, 2000 WI 51, ¶81, 235 Wis. 2d 325, 611 N.W.2d 659. We will not upset a circuit court's decision to admit or exclude evidence if the decision has "'a reasonable basis' and was made 'in accordance with accepted legal standards and in accordance with the facts of record.'" ***Lievrouw v. Roth***, 157 Wis. 2d 332, 348, 459 N.W.2d 850 (Ct. App. 1990).

¶6 Before addressing the merits of Wiza's argument, we must first address Hart's claim that Wiza failed to properly preserve his objection at trial. In order for an evidentiary ruling to be raised on appeal, the appealing party must have made a timely objection and state the specific grounds if they are not apparent from the context. WIS. STAT. § 901.03(1)(a).[1] Here, Hart argues Wiza failed to preserve his objection when Hart's counsel initially asked her if she thought she could have prevented the roll-over. Instead, Hart claims, Wiza only objected later, when a similar question was asked.

¶7 We determine Wiza properly preserved his objection. Hart suggests Wiza is precluded from raising this issue on appeal because he failed to object to

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

an earlier question specifically asking whether Wiza's grabbing the steering wheel affected Hart's ability to control the vehicle. We disagree. Wiza objected to Hart's testimony that she could have kept the vehicle upright had Wiza not grabbed the steering wheel. Wiza's counsel objected immediately after this question was asked, arguing the answer would be speculative and self-serving. Wiza properly preserved his objection under WIS. STAT. § 901.03(1)(a).[2]

[2] The relevant portion of Hart's direct examination by her counsel is as follows:

> Q: And did him placing his hand on the steering wheel affect your ability to control—
>
> A: Yes, it did.
>
> Q: — the vehicle?
>
> A: Yes, it did.
>
> Q: In your mind, had he not grabbed the—well, first of all, were you requesting that he somehow assist or grab the wheel or grab the trailer brake?
>
> A: No, I did not.
>
> Q: That was something you as the driver were going to do and were in the process of doing?
>
> A: Yes, I was.
>
> Q: Had he not, Miss Hart, grabbed the wheel, do you believe you could have either controlled the vehicle or at least, at a minimum, kept it from turning over?
>
> A: I believe—
>
> MR. RYBERG: Object as self-serving and speculative, Your Honor.
>
> THE COURT: Overruled. She may answer.
>
> A: I believe I could have at least prevented it from tipping over.

¶8 Wiza argues Hart's testimony was an incredible proposition, self-serving and speculative, but offers no additional support for his claim the trial court erred by admitting it. WISCONSIN STAT. § 907.01 permits lay witnesses to give opinion testimony if the opinion is "rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Hart was driving at the time of the accident. She had been trained as a truck driver. It was within her perception at the time of the accident whether she thought she could have prevented the truck from rolling. In addition, Hart's testimony ultimately addressed whether Wiza was contributorily negligent, a fact in issue. We cannot say the trial court erroneously exercised its discretion by admitting Hart's testimony. Wiza's objections to Hart's testimony being self-serving and incredible are concerned more with weight and credibility rather than admissibility. *See* ***Hennig v. Ahearn***, 230 Wis. 2d 149, 180, 601 N.W.2d 14 (Ct. App. 1999). Weight and credibility are the exclusive province of the jury. *See* ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). Whether Hart's testimony truly reflected her belief she could have stopped the truck or whether it was accurate is not a decision the trial court makes, nor one that we review.

II. Jury Instructions

¶9 Wiza next argues the trial court erred by submitting to the jury the issue of whether an emergency existed along with instructions on Wiza's negligence. Wiza contends he was faced with an emergency as a matter of law, which would have precluded the court from instructing the jury regarding his negligence. Hart responds the emergency doctrine did not apply as a matter of law because there was a factual dispute regarding Wiza's role in creating the emergency. In addition, Hart suggests the emergency doctrine could not apply in

this situation because it only applies to drivers, not passengers. Hart also argues the court properly instructed the jury on Wiza's negligence.

¶10 A trial court has broad discretion in instructing a jury. ***Garceau v. Bunnel***, 148 Wis. 2d 146, 151, 434 N.W.2d 794 (Ct. App. 1988). The appropriateness of a particular instruction, however, turns on a case-by-case review of the evidence. ***Id.*** A court has "a duty to instruct a jury and submit a verdict with due regard to the facts of the case." ***Vogel v. Grant-Lafayette Elec. Coop.***, 201 Wis. 2d 416, 429, 548 N.W.2d 829 (1996). It is error for a court to give an instruction that has no support in the evidence. ***Lutz v. Shelby Mut. Ins. Co.***, 70 Wis. 2d 743, 750, 235 N.W.2d 426 (1975). We will not order a new trial, however, unless the error is prejudicial. ***Id.*** at 750-51. Prejudice will not be found unless we can conclude the instruction probably misled the jury. ***Kuhlman, Inc. v G. Heileman Brew. Co.***, 83 Wis. 2d 749, 756, 266 N.W.2d 382 (1978). We review the instructions as a whole to determine if the jury was properly informed of the law. ***Id.***

A. The emergency doctrine

¶11 The emergency doctrine relieves people of liability for their action or inaction when faced with an emergency that their conduct did not create. ***Hoeft v. Friedel***, 70 Wis. 2d 1022, 1030, 235 N.W.2d 918 (1975). The doctrine has three requirements: (1) the party seeking the benefits of the doctrine 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; and (3) the element of negligence being inquired into must concern management and control. ***Id.***; *see also* WIS JI—CIVIL 1105A. The trial court may conclude the emergency doctrine applies as a matter of law if

the uncontroverted evidence establishes these three elements. ***Garceau***, 148 Wis. 2d at 153. Ordinarily, however, the application of the doctrine is a question for the jury. ***Hoeft***, 70 Wis. 2d at 1030.

¶12 We first address Hart's contention that the emergency doctrine does not apply in this case because Wiza was not driving the vehicle. In support, Hart points to ***Garceau*** and the relevant jury instruction, which both use the word "driver" when discussing the relevant actor. ***Garceau***, 148 Wis. 2d at 152; WIS JI—CIVIL 1105A. In response, Wiza cites ***Lutz***, which uses "person" to describe the relevant actor. ***Lutz***, 70 Wis. 2d at 753-54; *see also* ***Totsky v. Riteway Bus Serv., Inc.***, 2000 WI 29, ¶23, 233 Wis. 2d 371, 607 N.W.2d 637. The court gave a modified version of the standard instruction that allowed the jury to consider the doctrine as it applied to Wiza.[3] We conclude the court properly gave the emergency instruction.

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[3] The court's instruction was as follows:

> 1105A MANAGEMENT AND CONTROL—EMERGENCY
>
> When considering negligence as to management and control, bear in mind that a passenger may suddenly be confronted by an emergency not brought about or contributed to by his or her own negligence.
>
> If that happens and the passenger is compelled to act instantly to avoid collision, the passenger 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. This emergency rule is to be considered by you only with respect to your consideration of negligence as to management and control.

¶13 We reject Hart's contention the emergency doctrine applies only to drivers. The emergency doctrine can apply to anyone facing an emergency, provided the person can prove the necessary elements. "While the emergency rule in Wisconsin has had its greatest development in the area of automobile accident cases, its application is by no means limited to negligence on the road." ***McCrossen v. Nekoosa Edwards Paper Co.***, 59 Wis. 2d 245, 259, 208 N.W.2d 148 (1973). In ***McCrossen***, the supreme court determined the trial court erred by not giving an emergency instruction in a lawsuit arising out of an accident at a paper mill. ***Id.*** at 259-60. The court noted the earliest case applying the doctrine arose out of a railroad yard accident. ***Id.*** at 259. The court said whether the person seeking application of the doctrine is entitled to it is a question of whether his or her negligence contributed to creating the emergency. In such situation, where there is a jury question as to the cause of the emergency and the time element is so short as to make the doctrine otherwise applicable, a party is entitled to the emergency instruction. ***Id.***

¶14 In this case, Wiza argued he was faced with an emergency that he had no part in creating, the time he had to react was very short, and his actions in activating the jake brake and grabbing the steering wheel were related to the vehicle's management and control. Wiza introduced evidence in support of these arguments and claimed he was entitled to an emergency instruction.

¶15 Wiza suggests this evidence was sufficient for the trial court to conclude there was an emergency as a matter of law. We disagree. Determining whether an emergency existed is normally a jury question. The court may only conclude there was an emergency as a matter of law if there is no credible evidence to support a finding that any one of the doctrine's three elements was not met. ***Hoeft***, 70 Wis. 2d at 1030. In this case, there is a dispute about Wiza's

negligence contributing to the accident. Hart contends Wiza contributed to the emergency situation by sleeping while the inexperienced Hart was driving at night on an unfamiliar road and also by grabbing the steering wheel when he reached for the jake brake. Wiza argues his sleeping was a normal part of "team driving" and that the emergency already existed when he awoke, so he was not negligent in contributing to the emergency. "The determination of whether a party's negligence was a factor in producing the emergency … is in many instances, also a jury issue." ***Geis v. Hirth***, 32 Wis. 2d 580, 587, 146 N.W.2d 459 (1966). The trial court properly allowed the jury to resolve the factual disputes over Wiza's negligence.

B. Contributory negligence instructions

¶16 Wiza next argues the court improperly instructed the jury on his negligence. In part, he claims the instructions were improper because the court should have concluded the emergency doctrine applied as a matter of law, which would have precluded any inquiry into his negligence. We have already concluded the emergency issue was properly submitted to the jury. Wiza also contends the instructions given had no basis in the facts and resulted in prejudice.

¶17 Specifically, Wiza takes issue with the trial court giving WIS JI—CIVIL 1047 Contributory Negligence of Guest: Riding with Host; 1047.1 Negligence of Guest: Active: Management and Control; and 1075 Lookout: Guest.[4] WISCONSIN JI—CIVIL 1047 requires passengers to exercise ordinary care

[4] The court gave the following instructions:

1047 CONTRIBUTORY NEGLIGENCE OF GUEST: RIDING WITH HOST

(continued)

A passenger in a motor vehicle has no duty with reference to the manner in which the vehicle is momentarily managed. A passenger may assume that the driver understands and appreciates the control he or she has over the vehicle and that the driver will not operate it in a negligent manner.

However, if the driver, during operation of the vehicle, subjects the passenger to an unreasonable risk of injury and the passenger knows or in the exercise of ordinary care ought to know that the passenger is being exposed to such danger, it then becomes the passenger's duty to use ordinary care for his or her own protection by taking such action open to him or her as a person of ordinary intelligence and prudence would take under the same or similar circumstances.

1047.1 NEGLIGENCE OF GUEST: ACTIVE: MANAGEMENT AND CONTROL

The management and control of a motor vehicle is the duty and responsibility of the driver alone. If a guest passenger, by physical action, interferes with the management and control of the driver, or if the—or if a guest passenger, by any other action, distracts the driver from the driver's duties of management and control, then the guest passenger is negligent as that word previously has been defined for you.

1075 LOOKOUT: GUEST

A guest passenger in a motor vehicle has a duty to exercise ordinary care for his or her own safety. This duty requires a guest to exercise ordinary care in maintaining a proper lookout to warn the driver of any danger of which the guest has reason to believe the driver may not be aware.

A guest passenger, however, is not bound to maintain the same degree of diligence in keeping a lookout as is required of the driver of the vehicle because a passenger does not have the responsibility of operating and controlling the vehicle.

However, the fact that the passenger is not in charge of operating the vehicle does not relieve the passenger from all duty to use care for his or her own safety.

The passenger's duty with respect to lookout is to exercise that care and caution which a person—a person of ordinary intelligence, care and prudence would use while riding in the same passenger seat of the vehicle as the plaintiff and under the same or similar circumstances as exist in this case.

for their own safety if the driver subjects the passenger to an unreasonable risk of injury. WISCONSIN JI—CIVIL 1047.1 requires passengers not to interfere with the driver's management and control. Wiza argues these two instructions are inconsistent because one requires action by the passenger and the other forbids it. We do not agree. Instruction 1047 requires passengers to take ordinary care for their own safety. What is considered ordinary care, and whether Wiza exercised it in this case by grabbing for the jake brake and leaning on the steering wheel, are fact questions for the jury. In addition, instruction 1047.1 must be viewed together with the emergency instruction. While instruction 1047.1 says passengers are negligent when they interfere with the driver's management and control, the emergency instruction removes that negligence if an emergency truly exists. Whether the emergency existed when Wiza woke up or whether it developed after he tried to help Hart was an issue properly left to the jury and one on which the trial court gave the proper instructions.

¶18 Wiza also claims the trial court should not have given WIS JI—CIVIL 1075 Guest: Lookout. He argues he had no lookout duty because he was in the back of the truck sleeping and the instruction's duty would only apply to him if he had been riding in the truck's passenger seat. He points to the language of the instruction, which says "the passenger's duty with respect to lookout is to exercise that care and caution which a person of ordinary intelligence, care and prudence would use while riding in the same passenger seat of the vehicle as the plaintiff and under the same or similar circumstances as exist in this case." WIS JI—CIVIL 1075. Wiza contends because he was not in the truck's passenger seat, he had no lookout duty.

¶19 The language at issue instructs the jury that the duty of lookout for a passenger is what a reasonable person sitting in the same seat as the plaintiff

would have under the circumstances. In this case, Wiza's lookout duty would be that of a reasonable person riding in the truck's bunk. The lookout duty does not end when a passenger sits in the back seat, although this may reduce the passenger's lookout obligation. *See* ***Lampertius v. Chmielewski***, 6 Wis. 2d 555, 559, 95 N.W.2d 435 (1959). The lookout duty can also extend to sleeping passengers, who, if they had been awake and seen the obstacle, would have anticipated that the driver would not properly avoid the obstacle until too late to prevent the collision by action on the passenger's part. ***Id.*** at 559-60. Here, the jury had to determine whether a reasonable passenger in Wiza's situation would have gone to sleep in the back of the truck. Wiza and Hart testified that Hart was a relatively inexperienced truck driver and she was unfamiliar with the intersection, whereas Wiza had been driving for many years and had driven through the accident area in the past. In addition, the accident occurred in the middle of the night. This evidence provided a sufficient basis for the trial court to instruct the jury on Wiza's lookout duty.

III. Perverse verdict

¶20 Finally, Wiza argues the trial court's errors in admitting Hart's testimony and in instructing the jury resulted in a perverse verdict. Because we have determined the trial court did not err in these actions, however, we cannot conclude they resulted in a perverse verdict. *See* ***Spiegel v. Silver Lake Beach Enter's.***, 274 Wis. 439, 451, 80 N.W.2d 401 (1957). Wiza also contends the damages awarded by the jury point to the verdict's perversity. We review a jury's finding under the "any credible evidence" standard. ***Foseid v. State Bank of Cross Plains***, 197 Wis. 2d 772, 782, 541 N.W.2d 203 (Ct. App. 1995). We will uphold the jury's determination if there is any credible evidence to sustain the verdict, and we will not look for evidence to support a verdict the jury did not

reach. ***Id.*** A jury's verdict is perverse if the jury clearly refused to follow the direction or instruction of the trial court on a point of law or the verdict reflects highly emotional, inflammatory, or immaterial considerations. ***Kinship Inspect. Serv., Inc. v. Newcomer***, 231 Wis. 2d 559, 570-71, 605 N.W.2d 579 (Ct. App. 1999).

¶21 Wiza claims the jury's awards of only sixteen percent of his requested medical expenses, $20,000 for past pain and suffering and nothing for future damages are inconsistent and inadequate. He points to ***Fouse v. Persons***, 80 Wis. 2d 390, 259 N.W.2d 92 (1977), in support of his claim. In ***Fouse***, the supreme court upheld the trial court's granting of a new trial after the jury came back with what it considered a perverse verdict. ***Id.*** at 395. The ***Fouse*** jury awarded $1,750 for medical expenses, $1,250 for past lost earnings, $275 for past and future pain and suffering, and $7,725 for future lost earnings. ***Id.*** at 394. The supreme court said the trial court's finding of perversity was proper because the jury heard uncontested evidence that the plaintiff's reasonable medical expenses were $5,400 and he had been out of work for twenty-one months, making the lost wages award of $1,250 inadequate. ***Id.*** at 397-98. Further, the supreme court agreed with the trial court that the award for pain and suffering was inadequate and inconsistent with the award for future lost earnings. ***Id.*** at 399.

¶22 Here, in contrast to ***Fouse***, there is credible evidence to support the challenged damage awards. First, Hart specifically contested Wiza's medical expenses, suggesting the injuries he suffered in the accident would have been resolved in six to eight weeks and most of the approximately $9,000 he requested was for treatment for pre-existing injuries. Further, Wiza's testimony he would not be having surgery for his injuries provided a basis for the jury not to award

future medical expenses, especially if the jury believed Wiza's problems were due to his pre-existing injuries.

¶23 Wiza also suggests the $20,000 past pain and suffering award makes no sense when compared with the other damages and does not really reflect his true pain and suffering. We cannot agree. We again note the testimony regarding Wiza's pre-existing back problems. The jury could have reasonably concluded most of his past pain and suffering, as well as any in the future, would be due to these problems, rather than those suffered in the accident. In addition, Wiza missed approximately three weeks of work after the accident. There is no evidence in the record to suggest the $4,000 for lost earning capacity was inadequate. Furthermore, Wiza's testimony he is making more money in his new business is a sufficient basis for the jury not to award any damage for loss of future earning capacity. We cannot say the jury's verdict was perverse or that a new trial, either on all issues or solely on damages, is required.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.