COURT OF APPEALS
DECISION
DATED AND RELEASED

September 21, 1995

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 93-3139

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

FIL-MOR EXPRESS, INC., NATIONAL AMERICAN INSURANCE COMPANY, and WILLIAM S. TWAITES,

Plaintiffs-Respondents,

v.

GERALD L. RICHARDSON, DAWES TRANSPORT, INC., and VAN LINER INSURANCE COMPANY,

Defendants-Third-Party Plaintiffs-Appellants,

v.

TERRY LYNN GROOMS, M.S. CARRIERS, INC., and LIBERTY MUTUAL INSURANCE COMPANY,

Third-Party Defendants.

APPEAL from a judgment of the circuit court for Jefferson County: JACKIE R. ERWIN, Judge. *Affirmed*.

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

PER CURIAM. Gerald L. Richardson appeals from a judgment entered on a jury verdict.[1] The issues are whether: (1) Richardson is entitled to a new trial on liability; (2) the evidence warranted giving the emergency instruction; (3) William S. Twaites was negligent as a matter of law; (4) the trial court erroneously exercised its discretion in denying a motion to preclude an uncooperative former expert witness from testifying adversely; and (5) there was any credible evidence supporting the jury's award for loss of earning capacity. We conclude that: (1) Richardson is not entitled to a new trial because there was credible evidence supporting the verdict; (2) the evidence warranted giving the emergency instruction; (3) Twaites was not negligent as a matter of law; (4) the trial court properly exercised its discretion in denying a motion to preclude an uncooperative expert from testifying adversely; and (5) there was credible evidence, to the requisite standard of proof, to support the jury's award for loss of earning capacity. Therefore, we affirm.

Twaites sued Richardson for damages he sustained in a multi-vehicle collision which occurred in a dense fog in the dark early morning hours. Richardson was the first driver on the scene. He stopped suddenly, blocking traffic and caused the drivers behind him, including Twaites, to swerve or collide into him. Twaites was the fourth driver on the scene and he testified that he slowed as he drove through some light fog, when "[a]ll of a sudden [he] just hit a big wall of fog" and collided with the others. Richardson denied that he stopped because of the fog, but claimed that he was hit from behind. However, other drivers, including Twaites, testified that when they suddenly met this dense wall of fog, they were forced to slow down. Consequently, the jury was entitled to believe that the sudden, dense fog similarly caused Richardson to brake.

The jury found Richardson 100 percent causally negligent and awarded Twaites about $278,000.[2] The trial court entered judgment on the

[1] Although Richardson's employer, Dawes Transport, Inc., and its insurer, Van Liner Insurance Company, also are defendants-third-party plaintiffs-appellants, for brevity's sake we refer to them collectively as Richardson because their appellate interests are the same.

[2] The jury also awarded $59,381.56 to Fil-Mor Express for its tractor trailer, towing and

verdict. Richardson appeals, specifically on the sufficiency of liability evidence and on the award for loss of earning capacity.

If there is any credible evidence supporting the jury verdict, we will sustain it, particularly if the trial court entered judgment on that verdict. ***Fehring v. Republic Ins. Co.***, 118 Wis.2d 299, 305-06, 347 N.W.2d 595, 598 (1984).

Richardson contends that there was no credible evidence that Twaites was not negligent. We disagree. Twaites testified that he had begun to slow because he had encountered some light fog, when suddenly he hit a "big wall of fog" and within "a second or two" swerved to avoid Richardson's tail lights, hitting another truck. Other drivers testified similarly. In rejecting a similar postverdict challenge, the trial court characterized the testimony as describing the "fog of the century" and "that once [the drivers were] within the bank of fog the collisions occurred almost instantaneously." We conclude that there was credible evidence that Twaites was not negligent.

Richardson contends that the trial court should not have given the emergency instruction. *See* WIS J I—CIVIL 1015. The emergency instruction is proper when three conditions are met:

> (1) The party seeking its benefits must be free from the negligence which contributed to the creation of the emergency; (2) the time element in which action is required must be short enough to preclude the deliberate and intelligent choice of action; and (3) the element of negligence inquired into must concern management and control.

Edeler v. O'Brien, 38 Wis.2d 691, 698, 158 N.W.2d 301, 304 (1968). Whether the first two conditions are met depends upon which version of the facts is believed. There was credible evidence that Twaites was not negligent in

(..continued)
other expenses.

contributing to the emergency and that he only had "a second or two" to avoid the collision. Richardson contends that the instruction should not have been given because Twaites's claimed negligence involved lookout and speed, in addition to management and control. However, the court instructed the jury that the emergency instruction "applied only in regard to the inquiry of negligence as to management and control." The evidence supported the court's decision to give the emergency instruction.

On motions after verdict and on appeal, Richardson contends that the trial court should have found Twaites negligent as a matter of law, despite the jury's finding. This contention is based on Twaites's "concession" that he was travelling too fast for conditions. However, there was credible evidence that the "big wall of fog" appeared suddenly, negating the claimed adverse effect of Twaites's "concession." The court instructed the jury on the reasonable speed appropriate for weather conditions. WIS J I—CIVIL 1285.[3] By instructing the jury, the court acknowledged the disputed evidence. We conclude that the court did not err in refusing to find Twaites negligent as a matter of law, considering Twaites's "concession" in the context of his and the other liability testimony.

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[3] WIS J I—CIVIL 1285 is entitled "Speed: Reasonable and Prudent; Reduced Speed." The trial court instructed the jury that:

> A safety statute provides that no person shall drive a vehicle at a speed greater than is reasonable and prudent under existing conditions. This statute requires that a driver in hazardous circumstances exercise ordinary care to so regulate the vehicle's rate of speed to avoid colliding with any object, person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and using due care.
>
> The statute also provides that a driver must drive at an appropriate reduced speed when special hazards exist with regard to other traffic or by reason of weather or highway conditions.
>
> Appropriate reduced speed as used in this instruction is a relative term and means less than the otherwise lawful speed. An appropriate reduced speed is that speed at which a person of ordinary intelligence and prudence would drive under the same or similar circumstances.

Richardson contends that the trial court erroneously exercised its discretion in allowing plaintiffs to compel an uncooperative accident reconstruction expert, retained by the third-party defendants, to testify.[4] The plaintiffs identified their witnesses as required by the scheduling order, and "reserve[d] the right to call any witnesses named by defendants." The plaintiffs did not identify an accident reconstruction expert, nor did Richardson. This expert was identified by the third-party defendants, and he criticized Richardson's theory of how the accident occurred. Shortly before trial, Richardson settled with the third-party defendants to avoid this expert's criticisms, since plaintiffs had not identified an accident reconstruction expert. However, plaintiffs subpoenaed this expert because he refused to testify voluntarily. At trial, Richardson moved to preclude this testimony, asserting plaintiffs did not identify this expert as required by the scheduling order.[5] Richardson also moved for a mistrial, or at a minimum, an adjournment to rebut this expert's criticisms.

The trial court denied the motions. It ruled that plaintiffs did not violate the scheduling order. It concluded that plaintiffs' reservation of the right to call "any witnesses named by defendants," encompassed those witnesses identified by the third-party defendants. We agree.

The purpose of identifying witnesses is to prevent trial by ambush. It allows the parties to conduct discovery to prepare for trial, or to formulate an informed settlement strategy. Richardson claims prejudice because he strategically elected to settle with the parties who retained an accident reconstruction expert. However, this expert's testimony, albeit critical of Richardson's position, was not unfairly prejudicial. Had Richardson sought to retain an expert to rebut this expert's opinions, he had ample time to do so. Moreover, Richardson knew plaintiffs intended to call this expert before trial, but waited until the middle of trial to attempt to preclude his testimony.

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[4] Richardson sued the second driver who collided with him, his employer and insurer, as third-party defendants.

[5] Richardson cites cases from other jurisdictions which hold that a party may not compel the testimony of an uncooperative expert witness by subpoena. However, that authority is inapt. The trial court based its ruling on plaintiffs' reservation to call an adverse witness, not on their compelling his testimony by subpoena.

Although an adjournment is a common remedy to ameliorate the unfair prejudice resulting from a surprise witness, Richardson already knew this expert's opinions. A mid-trial adjournment would have amounted to an advisory ruling that the trial court would allow this expert's testimony. Richardson is not entitled to an advisory ruling before he decides whether to retain an expert with more favorable opinions.

We agree with the trial court that the plaintiffs' reservation of rights to call any of the defendants' witnesses, included those identified by the third-party defendants. The court also properly exercised its discretion in denying Richardson's motion for a mistrial or an adjournment because he was not surprised that the plaintiffs called this expert, or by the expert's opinions. The only surprise was Richardson's erroneous prediction of the court's ruling.

Richardson challenges the award for loss of earning capacity, contending that the treating physician's opinions were not phrased in terms of a reasonable degree of medical probability. Although certain excerpts of the medical testimony were not phrased according to the requisite legal standard, at the request of counsel, the physician clarified that he held all of his opinions to a reasonable degree of medical probability. The award was based on the medical testimony on the probability of permanence of right buttock pain, which limited Twaites's ability to sit in the cab of his truck after several hours, thereby reducing his earning capacity.

There also was credible evidence from Twaites's employer, Steven J. Pelner, supporting the award. Pelner testified that after long trips, Twaites would exit his truck "gingerly" and walk with a limp.[6] He testified that Twaites had a strong work ethic and was one of the "top producers" who generally drove 3,000 miles per week. Since the accident, Twaites drives less and earns $5,000 less per year than the average "top producer." Twaites's reduced income, multiplied by the number of years of his work-life expectancy, is credible evidence supporting the award for loss of earning capacity.

[6] Richardson asserts that Twaites returned to work without any medical restrictions. However, the award was based on Twaites's inability to work extended hours, for which he would have been paid more.

By the Court.—Judgment affirmed.

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