COURT OF APPEALS
DECISION
DATED AND RELEASED

January 3, 1996

NOTICE

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.

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

No. 94-3147

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

KEVIN J. POK, JERRY J. POK and MARGARET POK, individuals,

Plaintiffs-Respondents,

v.

DAVID E. MC CAULEY, an individual, and WEST BEND MUTUAL INSURANCE COMPANY, a domestic corporation,

Defendants-Appellants,

AETNA LIFE INSURANCE COMPANY, a foreign corporation, and MAYSTEEL CORPORATION, a Wisconsin corporation,

Defendants.

APPEAL from an order of the circuit court for Washington County: LAWRENCE F. WADDICK, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

SNYDER, J. David E. McCauley and West Bend Mutual Insurance Company appeal from the trial court's order denying motions for judgment notwithstanding the verdict and for a new trial. On appeal, McCauley[1] raises eight issues, which are grouped into three categories: evidentiary issues, postverdict motions and jury instructions.

McCauley contends that the following errors occurred with regard to the admissibility of evidence: (1) barring the introduction of evidence of a twenty miles per hour speed limit posted on the road; (2) barring the questioning of the plaintiff, Kevin J. Pok, about his knowledge of the twenty miles per hour speed limit; and (3) barring the questioning of witnesses regarding a reasonable and prudent speed on the road. On motions after verdict, McCauley claims that the trial court erred when it: (4) ordered a new trial on liability; and (5) ordered a new trial on damages, subsequent to a motion for reconsideration. Finally, McCauley appeals three rulings of the trial court with regard to jury instructions. He contends that the trial court erred: (6) when it instructed the jury that the accident occurred on an unposted highway; (7) in giving an instruction on the "duty to stop;" and (8) in improperly commenting on the evidence through the use of the duty to stop jury instruction.

This appeal is brought at the close of a second trial.[2] The jury in the first trial found Pok 100% causally negligent. The trial court determined

[1] McCauley and West Bend Mutual submitted one brief. For brevity's sake, reference to "McCauley" will include both appellants.

[2] McCauley filed for leave to appeal the trial court's nonfinal order granting a new trial. That

that there was not credible evidence to sustain the verdict; specifically, that there was a lack of credible evidence to sustain a finding of no negligence on the part of McCauley.

The accident giving rise to this lawsuit occurred when McCauley pulled out of a private road onto West Lake Drive and into the path of Pok, who was riding a motorcycle. When Pok saw McCauley's truck pull into the intersection, Pok moved toward the center of the road, preparing to go around the front of McCauley's truck. However, instead of stopping when he saw the motorcycle approaching, McCauley continued to pull into the intersection. Pok then attempted to go behind McCauley's truck. Pok was seriously injured when he struck the rear corner of McCauley's vehicle and lost control of his motorcycle.

There was an unauthorized twenty miles per hour speed limit sign present on the town road,[3] several hundred feet before the intersection where the accident occurred. The defense theory concentrated on showing that Pok was traveling at an excessive rate of speed. Evidence concerning the existence of the sign was considered critical by the defense. Because McCauley was unable to substantiate an official adoption of the speed limit, the trial court granted Pok's motion to prohibit any "evidence, verbal or physical, pertaining

(..continued)
request was denied.

[3] It was undisputed that this road was posted with a twenty miles per hour speed limit. However, after conducting a search of Town of West Bend records, the town clerk failed to find a record of the adoption of an ordinance imposing that limit. An affidavit of the town clerk attesting to the failure to find this record makes the posted sign an unauthorized speed limit. *See* § 889.09(1), STATS.

to a 20-mile per hour speed limit sign on West Lake Drive on the date of the accident."

In spite of the trial court's pretrial order, at the first trial defense counsel stated in opening statement, "You're also going to hear testimony that the speed limit out there is 20 or 25 miles an hour." Pok immediately moved for a mistrial, which the trial court did not grant but left the matter open for further consideration. During the first trial numerous in-chambers conferences were called whenever testimony focused on the issue of speed.

The jury found Pok 100% causally negligent and awarded him $115,000 for past and future pain, suffering and disability. The jury also awarded Pok's parents $3000 for past medical expenses. Counsel for the Poks filed a motion for a new trial on the grounds that the jury was prejudiced by defense counsel's opening statement, and that the verdict was contrary to the weight of the evidence. The court ordered that a new trial be held on the issue of liability, stating:

> I am quite concerned of the prejudice that may have been felt to this Jury concerning the speed limit statements of counsel and the attempts during the course of the trial to establish a speed limit other than the 55 miles per hour zone rather than a reasonable and prudent speed; and, therefore, grant plaintiff's Motion for a New Trial solely with respect to the negligence issue.

On motion for reconsideration, Pok requested a new trial on all of the issues. The trial court granted that motion.

At the second trial, the same basic scenario of the accident was presented. Testimony was barred as to any official speed limit on West Lake Drive. Various witnesses, however, were allowed to offer testimony as to a reasonable and prudent speed. At the close of the trial, the jury returned a verdict finding both Pok and McCauley 50% causally negligent. Pok was awarded $15,000 for past and future loss of earning capacity and $150,000 for pain, suffering and future disability. The trial court denied McCauley's postverdict motions and granted Pok's motion for judgment on the verdict.

Evidentiary Issues

McCauley's evidentiary issues all concern the admissibility of evidence pertaining to the speed limit on West Lake Drive. A determination by the trial court concerning the admissibility of evidence is a discretionary decision. ***City of Menomonie v. Evensen Dodge, Inc.,*** 163 Wis.2d 226, 236, 471 N.W.2d 513, 516 (Ct. App. 1991). We ordinarily review a trial court's evidentiary ruling to determine whether the trial court made its discretionary decision in accordance with accepted legal standards. ***Bittner v. American Honda Motor Co.,*** 181 Wis.2d 93, 111, 511 N.W.2d 325, 333 (Ct. App. 1993), *rev'd on other grounds*, 194 Wis.2d 122, 533 N.W.2d 476 (1995). Only if discretion is misused or the court has proceeded upon a mistaken view of the law will this court reverse. *See* ***First Wis. Nat'l Bank v. KSW Invs., Inc.,*** 71 Wis.2d 359, 364, 238 N.W.2d 123, 126 (1976).

It was undisputed that there was a twenty miles per hour sign posted a few hundred feet before the intersection. McCauley sought to

introduce evidence concerning the existence of the sign and to elicit Pok's testimony that he was aware of the posted speed limit. In opposition, Pok submitted an affidavit from Russel Becker, the Town of West Bend clerk. This affidavit stated that a search of town records had failed to show that an ordinance had been adopted making this sign an authorized, official speed limit. *See* § 889.09, STATS.

The trial court determined that this affidavit defeated the common law presumption that public officials comply with the necessary statutory requirements. McCauley argues that just because Becker's affidavit averred that the records were incomplete and poorly kept, this does not mean that the sign was unauthorized.

McCauley's argument is misdirected. Becker's affidavit stated, "[A] search of the records ... revealed no ordinance passed by the Town Board of the Town of West Bend establishing a speed limit on West Lake Drive and ... no record of the Town Board by which it authorized the posting of any speed limit signs on West Lake Drive." Section 889.09(1), STATS., provides in relevant part:

> **Certification of nonfiling. (1)** Whenever any officer to whom the legal custody of any document belongs shall certify ... that the officer has made diligent examination in his or her office for the document, and *that it cannot be found* or that the document had not been filed or recorded ... the certificate shall be presumptive evidence of the fact so certified. [Emphasis added.]

Having determined that the speed limit was unauthorized and not official, the court carefully considered how the testimony regarding Pok's speed should be introduced.[4] The court was concerned that the distinction between an authorized speed limit and an unauthorized sign would be lost on the jury.

The trial court determined that the real issue in this case was what a "reasonable and prudent" speed was on this particular section of West Lake Drive. Any questions concerning the relevance of particular evidence are to be determined by the trial court's exercise of discretion. ***State v. Denny,*** 120 Wis.2d 614, 626, 357 N.W.2d 12, 18 (Ct. App. 1984). If there is a reasonable basis for the trial court's determination, this court will not find a misuse of discretion. ***Id.***

The trial court made a carefully reasoned decision that all testimony regarding speed should refer to a reasonable and prudent speed—not to the unauthorized speed limit. In line with this determination, the trial court prohibited any testimony regarding a posted speed limit or questioning Pok regarding his knowledge of the existence of the posted speed limit. We conclude that these decisions were within the trial court's properly exercised discretion.

McCauley also contends that this ruling prevented witnesses from testifying as to a reasonable and prudent speed on West Lake Drive. Our review of the record does not substantiate that contention.

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[4] This issue was considered at length by the court at several hearings before the first trial, and again before the second trial.

Various witnesses testified as to their belief of what a reasonable and prudent speed would be on West Lake Drive. Defense witness Henry Sauerman testified that he had lived along West Lake Drive for approximately four years and that a safe speed on this stretch of road was "between 20 and 25 miles per hour." Herman Kuhn, an expert witness for the defense, testified that a safe "stopping sight distance" on this road was twenty miles per hour.

The only testimony disallowed was witness opinion that was based entirely on the existence of the sign. We conclude that this was in keeping with the court's earlier determination that reference to an unauthorized speed limit would be prejudicial. McCauley was allowed to present ample evidence that a reasonable and prudent speed would be in the range of twenty to twenty-five miles per hour.

Postverdict Motions

It is well settled that a trial court's decision to grant a new trial will not be disturbed absent a clear showing of a misuse of discretion. ***Larry v. Commercial Union Ins. Co.,*** 88 Wis.2d 728, 733, 277 N.W.2d 821, 823 (1979). On appeal, this court will not look for evidence to support the verdict, but rather for reasons to sustain the trial court's grant of a new trial. ***Id.*** A trial court has wide discretion to order a new trial if the verdict goes against the great weight and clear preponderance of the evidence. ***Id.*** at 734, 277 N.W.2d at 824.

McCauley contends that in ordering a new trial the judge "substituted his judgment for that of the jury" and "failed to accept the jury's

obvious conclusion that Mr. Pok was travelling too fast." We disagree. In granting the motion for a new trial, the trial court stated:

> It is only when there is a lack of credible evidence to sustain the Verdict or a clear showing of prejudice in either the respects of liability or damages that this Court is required to intercede.
>
> There is ... credible evidence to sustain a Jury's consideration of negligence concerning Kevin J. Pok ....
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> ....
>
> One of the real questions is whether there is any credible evidence to sustain a total lack of a finding of any negligence upon [McCauley] ....
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> ....
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> But I believe that the Jury's finding of 100 percent of negligence upon Mr. Pok is indicative of its tainted belief that he had violated a speed limit when the evidence did not establish any speed limit whatsoever.

The trial court's consideration of the jury verdict led to its determination that the jury had improperly concluded that Pok had exceeded a *speed limit*, rather than exceeding a reasonable and prudent speed.

Based upon our review of the record, it was defense counsel's disingenuous attempt to circumvent the court's pretrial order in the first trial that necessitated the second trial. When defense counsel initially referred to the speed limit in his opening statement, a conference in chambers ensued. At that time, the trial court admonished defense counsel:

> [T]his could [have been] very easily avoided by prior Motions in this Court. Why on an Opening Statement? This goes to a very critical area ....
>
> ....
>
> ... Why didn't you do it before we started this case, this trial? You knew, perhaps, what you were going to say. I'm very concerned.

The court then instructed the jury to disregard defense counsel's statement concerning the speed limit. However, as the trial progressed, repeated in-chambers conferences took place whenever the testimony of witnesses concerned Pok's speed.

We conclude that the trial court's decision to grant a new trial on the liability issue was based on a well-reasoned determination that the verdict was not supported by the evidence. The initial error by defense counsel was accentuated by the numerous later conferences. The trial court did not misuse its discretion in granting a new trial on the issue of liability.

McCauley further contends that the trial court erred when, on reconsideration, it awarded a new trial on the issue of damages. A trial court's determination of the scope of a new trial, once ordered, is a question of discretion. ***Pieper v. Neuendorf Transp. Co.,*** 87 Wis.2d 284, 293, 274 N.W.2d 674, 678 (1979). When the court has ordered a new trial on some issues and it appears that other issues might also have been affected, the court may order a full retrial. ***Id.***

In this case, the trial court found the liability portion of the verdict to be perverse and determined on reconsideration that the proper course was to retry the entire case.[5] The court was concerned that the jury made no award to Pok's insurance company for his medical expenses, from which it could be inferred that the jury did not want Pok to benefit in any manner from the payment of medical expenses. There was also concern that the failure to award any amount to Pok for future loss of earning capacity could be construed as punishment. We conclude that the trial court did not misuse its discretion in allowing the issue of damages to be retried.

Jury Instructions

McCauley's final three issues pertain to jury instructions. Framing a verdict is a discretionary decision by the trial court. ***Klink v. Cappelli,*** 179 Wis.2d 624, 630, 508 N.W.2d 435, 437 (Ct. App. 1993). As long as the issues of fact are covered by the verdict, this court will not interfere. ***Id.*** The trial court has discretion to limit any prejudice or misleading effect through its jury instructions. ***State v. Grande,*** 169 Wis.2d 422, 436, 485 N.W.2d 282, 286 (Ct. App. 1992).

McCauley first argues that it was error for the trial court to instruct the jury that West Lake Drive was an unposted highway. At the start of the second trial, in response to a motion by Pok requesting that the jury be

[5] McCauley argues that "[f]urther proof that the damages awarded during the first trial were not perverse ... is found in the verdict from the second trial. The verdicts from the first and second trials are close in the amounts awarded. There is only a difference of $35,000 in the award for pain and suffering and $15,000 in the award for loss of earning capacity."

informed that the speed limit on West Lake Drive was fifty-five miles per hour, the trial court determined that the road was "basically an unposted public highway." This statement was included in the jury instructions, and defense counsel did not object. We deem this issue waived. *See* § 805.13(3), STATS. *See also* ***Gyldenvand v. Schroeder,*** 90 Wis.2d 690, 694, 280 N.W.2d 235, 237 (1979).

McCauley next contends that it was improper to give the jury instruction on the "duty to stop." WIS J I—CIVIL 1065. This instruction was based upon ***Bey v. Transport Indem. Co.,*** 23 Wis.2d 182, 127 N.W.2d 251 (1964), in which a truck exiting an alley failed to stop prior to crossing the sidewalk, although the driver's view of pedestrian traffic approaching from the right was obstructed. The court there stated:

> This court has held that a driver who stops at an intersection and finds his vision, either left or right, obscured by some obstruction must move into a position where he can efficiently observe traffic crossing his path, stop *again,* and make an effective observation in either direction. Failure to act in this manner, is negligence as a matter of law.

Id. at 189, 127 N.W.2d at 255.

McCauley contends that the instruction on the duty to stop was erroneous because the ***Bey*** case was based on a sidewalk ordinance. This argument completely misconstrues the holding of that case. The ***Bey*** case delineates a rule of lookout when a driver is entering a roadway and has an obstructed view. The factor of the sidewalk bore no relationship to the holding in that case. The giving of the duty to stop instruction was therefore a proper exercise of the trial court's discretion in this case.

McCauley also contends that the duty to stop instruction required that the jury adopt Pok's opinion on prudent driving techniques and reject McCauley's opposing opinion. The jury instruction read as follows:

> A driver who stops at an intersection with a through highway and finds his vision obstructed must move into a position where he can efficiently observe traffic crossing his path and stop again to make an effective observation in either direction, *if such can be done safely*.

McCauley's argument completely disregards the fact that the trial court modified the duty to stop instruction by including the final phrase "if such can be done safely." This allowed the defense to make its argument that the curve in West Lake Drive would have made it unsafe for McCauley to stop a second time once he had cleared the obstruction. Furthermore, McCauley's expert witness testified that McCauley could have safely completed his turn and there would not have been an accident if Pok had been traveling at a reasonable rate of speed.

We conclude that this instruction was neutral with respect to the opinion of the defense's expert witness and that it was well fashioned to fit the facts of the case. There was no misuse of discretion.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.