COURT OF APPEALS
DECISION
DATED AND RELEASED

June 19, 1997

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. 97-0380-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

VERONICA REITER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: P. CHARLES JONES, Judge. *Affirmed.*

ROGGENSACK, J.[1] Veronica Reiter appeals a restitution order imposed after her misdemeanor conviction for causing injury to another person by operating a motor vehicle while intoxicated, contrary to § 346.63(2)(a)1., STATS. The order directed her to pay restitution to the victim of an accident. Because we

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

conclude the circuit court did not erroneously exercise its discretion when it directed Reiter to pay $100.00 in lost wages and $1,838.24 in past and future loss of premium rebates which it found were sustained as a result of Reiter's acts, we affirm the order.

BACKGROUND

On April 27, 1995, Veronica Reiter was convicted of a violation of § 346.63(2)(a)1., STATS., causing an injury to another person by operating a motor vehicle while intoxicated. The conviction resulted from an accident which occurred on September 9, 1994, when a vehicle driven by Reiter collided with a vehicle driven by David Sauer, in which his wife, Barbara, was a passenger. The Sauers claimed to have suffered certain monetary losses due to the accident.

On August 9, 1996, the circuit court held a restitution hearing, at Reiter's request. The Sauers missed work in order to attend the hearing and be available to testify, but at Reiter's request no testimony was taken. One exhibit was submitted; briefs were filed and after reviewing the submissions of the parties, the circuit court found the Sauers lost $100.00 in wages as a result of their court appearance. It also found the Sauers had proved a claim for special damages of $1,838.24[2] for five years of premium rebates[3] they would have had the opportunity

[2] The court ordered $410.42 be paid for the rebate loss for 1995, $382.60 for 1996, $400.42 for 1997, $364.80 for 1998 and $280.00 for 1999.

[3] The Sauers were insured with Sentry Insurance under a "Payback Policy" which provided that if they maintained a claim-free driving record for five years, they would receive a cash rebate equal to 50% of their insurance premium. At the date of the accident, the Sauers had been accident free for five years and were therefore entitled to 50% of the premium they had paid for insurance in 1994, or $398.30. Because the accident did not change this status for 1994, the trial court assumed they would receive this payment notwithstanding the accident and its order directs restitution only for the five years subsequent to 1994. Because no party contests the validity of that assumption on appeal, we assume it to be true also.

to receive, but for the accident with Reiter. The court ordered restitution of $1,938.24 for wages, and past and future premium rebates.

On appeal Reiter doesn't dispute the loss of wages or the loss of the opportunity to receive rebates for 1995 and 1996, but rather, she contends that the loss of opportunity to receive rebates for 1997, 1998 and 1999 are not special damages compensable under § 973.20, STATS., because they are too speculative and too remote. She also argues they were not caused by her. We conclude the opportunity to receive rebates is a special damages, appropriately awarded pursuant to § 973.20(5)(a), and that causation has been sufficiently proven. Therefore, we affirm the circuit court's order.

DISCUSSION

Standard of Review.

We review whether the circuit court erred in making the restitution order under the erroneous exercise of discretion standard. ***State v. Behnke***, 203 Wis.2d 43, 57, 553 N.W.2d 265, 272 (Ct. App. 1996). We analyze a discretionary decision to determine whether the circuit court logically interpreted the facts of record and whether it applied the correct legal standard to those facts. ***Id.*** at 58, 553 N.W.2d at 272.

Restitution.

Section 973.20, STATS., governs the terms under which the circuit court is permitted to order restitution following conviction of a crime. It states in relevant part:

> (5) In any case, the restitution order may require that the defendant do one or more of the following:
>
> (a) Pay all special damages, but not general damages, substantiated by evidence in the record, which could be recovered in a civil action against the defendant for his or her conduct in the commission of a crime considered at sentencing.
>
> ….
>
> (14)(a) The burden of demonstrating by the preponderance of the evidence the amount of loss sustained by a victim as a result of a crime considered at sentencing is on the victim.…
>
> (b) … The defendant may assert any defense that he or she could raise in a civil action for the loss sought to be compensated.…

Only special damages are recoverable under § 973.20, STATS. They are those damages which occur as a natural consequence of the wrongful conduct, but not so necessarily foreseeable as to be implied in law. *See* ***Tym v. Ludwig***, 196 Wis.2d 375, 384, 538 N.W.2d 600, 603 (Ct. App. 1995) (citing ***Univest Corp. v. General Split Corp***., 148 Wis.2d 29, 42, 435 N.W.2d 234, 239 (1989)). Special damages may or may not be present as the result of the wrongful act — the proof depends on the factual circumstances of the case at hand. ***State v. Boffer***, 158 Wis.2d 655, 660, 462 N.W.2d 906, 908-09 (Ct. App. 1990).

Damages may not be speculative or conjectural, but neither are they required to be calculated with scientific precision or mathematical certainty. Rather, it is a well established rule that damages, in order to be recoverable, must only be proven with reasonable certainty. ***Caygill v. Ipsen***, 27 Wis.2d 578, 589-90, 135 N.W.2d 284, 290 (1965). Simply because the exact extent of the damages is a matter of uncertainty by reason of the nature of the tort is not a ground for refusing damages. ***White v. Benkowski***, 37 Wis.2d 285, 289, 155 N.W.2d 74, 76 (1967). It is now generally held that the uncertainty which prevents a recovery is

uncertainty as to the fact of any damage and not to its amount and that where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery. All that is required is that the evidence, with such certainty as the nature of the particular case may permit, lay a foundation which will enable the trier of fact to make a fair and reasonable estimate. ***Cutler Cranberry Co. v. Oakdale Elec. Coop.,*** 78 Wis.2d 222, 233, 254 N.W.2d 234, 240 (1977).

It is undisputed that the Sauers had a claim-free driving record for five years prior to the accident with Reiter. The exhibit which described the Sentry Payback Policy stated that a 50% refund for 1997 was $500.53; for 1998, it was $608.10; and for 1999, it was $700.00. Counsel submitted memoranda to the court and apparently the State argued for an order awarding 80% of the amount on the exhibit for 1997, 60% of the exhibit amount for 1998 and 40% for 1999. The circuit court found that request was reasonable and ordered accordingly.

Reiter does not argue that the amounts stated in the exhibit or in the court's order are in error. Rather, she contends all future losses are too speculative and remote because there could be a number of intervening events, such as changes in policy terms, another accident and canceled coverage, which would prevent the recovery set forth in the restitution order. She cites ***Logemann Bros. Co. v. Redlin Browne, S.C.***, 205 Wis.2d 352, 556 N.W.2d 388 (Ct. App. 1996), to support her argument. However, ***Logemann*** does not parse the speculative nature or remoteness of damages; rather, it determines when a claim for malpractice accrues, in an accounting context. ***Id.*** at 358-59, 556 N.W.2d at 391.

Additionally, there is ample support for awarding damages for future losses. *See* ***Behnke***, 203 Wis.2d at 59, 553 N.W.2d at 273 (requiring restitution

payments for the future costs of counseling). Furthermore, the Sauers were required only to prove that Reiter's actions were a substantial factor in producing the damage they sustained. Their burden was not to prove that Reiter's actions were the sole factor that caused their injury. ***Id.*** The Sauers had had a claim-free record for five years before the accident and Reiter changed that record. Regardless of whether there are future accidents, the collision with Reiter is sufficient to prevent them from recovering rebates for the next five years. Therefore, it was a substantial cause of the loss. We conclude the circuit court applied the correct legal standard to sufficient facts of record to sustain the exercise of its discretion. We affirm the order.

CONCLUSION

The trial court based its finding as to causation, and its calculation of the amount of damages due the Sauers for the loss of opportunity for rebates, on sufficient facts of record and it applied the correct law of damages in making the restitution order. Therefore, we affirm.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4., STATS.