

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 28, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0931

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

PATRICIA L. SPENCER,

**PLAINTIFF-APPELLANT-CROSS-
RESPONDENT,**

v.

**SOCIETY INSURANCE, A WISCONSIN INSURANCE
CORPORATION,**

**DEFENDANT-THIRD-
PARTY PLAINTIFF-RESPONDENT,**

**REGAL INSURANCE COMPANY, A FOREIGN INSURANCE
CORPORATION,**

**DEFENDANT-RESPONDENT-CROSS-
APPELLANT,**

v.

KATHLEEN F. JEZESKI,

**THIRD-PARTY DEFENDANT-
RESPONDENT.**

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Forest County: JAMES P. JANSEN, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Patricia Spencer appeals from a personal injury judgment based on several alleged evidentiary errors. Regal Insurance cross-appeals the trial court’s decision to grant Spencer’s attorney a lien on the judgment superior to Regal’s own medical payments lien. We conclude that the challenged evidentiary decisions and the priority given to the liens were within the trial court’s discretion, and therefore affirm both the appeal and cross-appeal.

BACKGROUND

¶2 Spencer was a passenger in an uninsured car that collided with a car being driven by Ken Keepers. Keepers was insured by Society Insurance and Spencer had uninsured motorist coverage from Regal through her boyfriend’s policy. Spencer sought chiropractic and neurological treatment for neck and back injuries following the accident. She continued to work at a friend’s salvage yard on and off for nearly a year, however, her employment was finally terminated because she was physically unable to do the job.

¶3 Following the termination of her employment, Spencer eventually applied for and received social security disability benefits. The disability

determination was based upon Dr. Pat Chan's primary diagnosis of obesity, and a secondary diagnosis of spinal disc disorders. The date of disability, for social security purposes, was deemed to be the date of Spencer's discharge.

¶4 Spencer sued Society and Regal, and the driver of the car in which she was riding was joined as a third party. At trial Spencer testified she was unable to perform her recycling job without pain after the accident. She claimed to have recurring headaches and permanent neck and back pain as a result of the accident. She admitted on cross-examination that she was still able to perform such tasks as gardening, butchering deer and chickens, laundry, and vacuuming.

¶5 Spencer's chiropractor, Patrick Edwards, testified Spencer had inflamed muscle tissue and an osteophyte at the C5-C6 vertebrae when he first saw her two weeks after the accident. Edwards attributed Spencer's problems to the accident, although he conceded on cross-examination that they could have arisen from a degenerative arthritic condition. He treated her until he determined that she would no longer benefit from chiropractic care, but gave no opinion as to the permanency of her complaints.

¶6 Spencer's neurologist, Dr. Ellen Parris, gave a videotaped deposition. Portions of that testimony were admitted into evidence. Parris treated Spencer several months after the accident. She concluded Spencer had residual neck pain from a soft tissue injury, and noted trigger points in her muscles, post-traumatic vascular headaches, and reports of low-back pain. She admitted on cross-examination that Spencer's neck range of motion and back mobility did not appear to be impaired, and that she had not placed any work restrictions on her.

¶7 Independent medical examiner Dr. Gay Anderson testified for the defense. He opined that Spencer had suffered mild soft tissue injuries in the

accident, but concluded there was no permanent disability or limitation on Spencer's ability to work resulting from the accident.

¶8 Although the trial court permitted testimony that Spencer was receiving social security disability benefits, it excluded the report containing Chan's medical diagnosis and any reference to the rules under which the Social Security Administration (SSA) made its award. The trial court also excluded that portion of the Parris deposition in which the neurologist explained why she believed Chan's spinal disc disorder diagnosis related back to the automobile accident.

¶9 A jury determined Keepers was 60% negligent for the collision, while the driver of the car in which Spencer was riding was 40% negligent. The jury awarded Spencer \$8,800 for past medical expenses and pain and suffering, but determined there was no permanent disability resulting from the accident. The trial court gave priority to Spencer's attorney's lien over Regal's stipulated \$1,000 medical lien. Additional facts relevant to the issues raised on appeal will be discussed in more detail below.

STANDARD OF REVIEW

¶10 We review evidentiary determinations under the erroneous exercise of discretion standard. *State v. Sullivan*, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. *Burkes v. Hales*, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991). Even if the trial court has relied upon the wrong rationale, we may affirm the decision if we can determine for ourselves that the facts of record provide a basis for the trial court's decision. *See State v. Gray*, 225 Wis. 2d 39, 51, 590 N.W.2d 918 (1999).

ANALYSIS

Appeal

Social Security Disability Determination

¶11 Exhibit 40 contained a SSA disability benefit determination based on a primary diagnosis of obesity and a secondary diagnosis of spinal disc disorders. The disability award deemed Spencer's disability to have begun at the time she was terminated from her employment, fifteen months after the accident. Spencer sought admission of the medical opinion contained in the SSA report under WIS. STAT. § 908.03(8) (1999-2000).¹

¶12 Spencer argues that the SSA disability determination is a report by a public agency setting forth a factual finding resulting from an investigation made pursuant to authority granted by law, and that Chan's medical opinion qualifies as an exception to the hearsay rule because it was a part of that report. *See Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999) (discussing a presumption of admissibility accorded to agency determination under the analagous federal rule). Assuming that to be true, however, does not end the admissibility analysis.

¶13 Evidence which falls under a hearsay exception may still be excluded if it is irrelevant or if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. WIS. STAT. §§ 904.02 and 904.03. Furthermore, as we noted in *Pophal v. Siverhus*, 168 Wis. 2d 533, 547, 484 N.W.2d 555 (Ct. App. 1992), a written

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

medical opinion may properly be excluded if it “requires explanation or a detailed statement of the judgmental factors upon which the diagnosis or opinion is based.”

¶14 The disability report at issue here did not state whether Chan believed the secondary spinal disc diagnosis alone would make Spencer disabled and did not state whether Chan attributed the disc disorder to the accident. The report’s relevance thus depended upon additional information. Spencer sought to fill those gaps by admission under WIS. STAT. §§ 908.03(6) and 902.03(2) of administrative provisions contained in SSA Code 7240 and 20 CFR § 404.1505, which she believed explained the basis for Chan’s diagnosis and resulting award, and by admission of that portion of Parris’s videotaped deposition in which Parris opined that Chan’s spinal disc diagnosis must have been attributed to the accident. The trial court could reasonably have concluded under *Pophal*, however, that direct testimony from the report’s author was necessary to clarify the report. There was no ruling barring Spencer from directly presenting the testimony of Chan. Therefore, the trial court’s exclusion of the report, the administrative provisions, and the challenged portion of Parris’s deposition was a proper exercise of the court’s discretion.

Nurse’s Note

¶15 Exhibit 39 was a note written by a nurse on the date Anderson performed the independent medical examination. The note indicated that Spencer had complained frequently about her neck. Anderson testified at his deposition that Spencer had not mentioned neck pain when he saw her. Spencer sought to introduce the note to rebut the proposition that she had not complained about neck pain during the independent medical examination, and to show that Anderson had failed to take relevant information from his own medical records into account

when concluding that Spencer had suffered no permanent disability as a result of the accident.

¶16 Anderson provided Spencer with a copy of the note along with all of his other medical records at his deposition, but he did not certify the note's authenticity. Prior to trial Spencer requested an admission that the note was an authentic health record, or, in the alternative, moved to reopen Anderson's deposition to allow the doctor to authenticate the note. The defendants conceded the authenticity of the note as a copy of one of Anderson's medical records both at a pretrial hearing and in a subsequent letter to the court, but opposed admission of the note into evidence on relevancy grounds, except for the limited purpose of rehabilitating Spencer in the event that her statement that she told the nurse about neck pain was challenged on cross-examination.

¶17 At the initial motion hearing the trial court seemed to indicate that it would permit the introduction of the note, without reopening Anderson's deposition, if the note became necessary to rebut an assertion that Spencer had not complained to the nurse about neck pain. It stated, "she's got the foundation. You can handle that without redeposing Dr. Anderson." When the issue came up again, the trial court observed that the note would be "very strong rebuttal" evidence if the defendants asserted that Spencer had never complained of pain to anyone at the clinic during the independent medical examination, but noted it was not necessarily inconsistent for the doctor to say she had not complained to him if she had made a complaint to the nurse. However, ultimately the trial court excluded the note for lack of foundation that Anderson had relied upon it.

¶18 The foundation analysis given by the trial court at the time of its ruling was flawed because it was not necessary to show Anderson relied upon the

note in order to provide a foundation for its admission. *See, e.g., Karl v. Employers Ins.*, 78 Wis. 2d 284, 300, 254 N.W.2d 255 (1977) (allowing rebuttal concerning a portion of an expert's file which the expert had ignored). Spencer had already established prior to trial that the nurse's note was part of Anderson's medical file. *See State v. Hall*, 207 Wis. 2d 54, 73, 557 N.W.2d 778 (1997) (a witness may be presumed to have authenticated a document which he himself has produced). The note also qualified as an exception to the hearsay rule as a statement made for the purpose of medical diagnosis or treatment. WIS. STAT. § 908.03(4).

¶19 Given its prior discussions of the issue, however, it is possible the trial court meant to exclude the note because the note gave no indication that the doctor was present when Spencer made her complaints to the nurse. Because the trial court had correctly observed that the note did not necessarily contradict Anderson's deposition testimony, it could reasonably have concluded that the note did not come within the scope of rebuttal evidence. *See State v. Gershon*, 114 Wis. 2d 8, 13, 337 N.W.2d 460 (Ct. App. 1983) (defining rebuttal evidence as that "which tends to contradict a witness' testimony"). Under this analysis, the note might have been admissible if Spencer had offered it during her case-in-chief, but could have been properly excluded on rebuttal.

¶20 Moreover, even if the note should have been admitted, or if Spencer was misled by the trial court's pretrial comments on the foundation for admitting the note, we are persuaded its exclusion was harmless error. The fact that none of Spencer's treating physicians imposed work restrictions or testified that she had suffered a permanent disability as a result of the accident leaves no reasonable probability that there would have been a different outcome on the question of damages even if the nurse's note had come in.

Psychological Evidence

¶21 Anderson, who was board certified in psychiatry and neurology as well as orthopedics, administered a MMPI psychological test as part of his independent medical examination of Spencer. The defendants chose not to question Anderson about his psychological findings when they deposed him. On cross-examination, however, Spencer questioned Anderson at length about his methodology in scoring the MMPI, and his opinions regarding whether Spencer exhibited signs of somatization or abnormal illness behavior.

¶22 Spencer now claims that all of the psychological testimony should have been excluded because the entire line of questioning was induced by the defendants' failure to give notice that they were abandoning the issue. She cites *Boyle v. Chrysler Corp.*, 177 Wis. 2d 207, 216, 501 N.W.2d 865 (Ct. App. 1993), for the proposition that a medical report made under WIS. STAT. § 804.10(3) is supposed to define the issues for trial, and that when the scope of an adverse medical examiner's opinion is amended, the § 804.10(3) report must be amended as well.

¶23 The first problem with Spencer's theory is that there is no indication that Anderson ever changed his medical opinion. The defendants merely obtained discovery, which they then chose not to use for strategic reasons. They did not attempt to surprise Spencer by eliciting a new theory during the deposition or at trial. In fact Spencer had the opportunity to see that the defendants had not questioned Anderson about psychological factors before beginning her cross-examination.

¶24 Furthermore, Spencer has not directed our attention to any point in the record where she asked the trial court to exclude the psychological evidence,

either as a sanction for failing to update Anderson's IME or for any other reason. We therefore deem any objection to such evidence to be waived. *State v. Hayes*, 167 Wis. 2d 423, 425-26, 481 N.W.2d 699 (Ct. App. 1992).

Cross-Appeal

Priority of Liens

¶25 It was stipulated that Regal paid \$1,000 in medical bills on behalf of Spencer. After the verdict Spencer's counsel moved to enforce an attorney's fee lien. The trial court gave preference to counsel's lien.

¶26 Regal argues the trial court erred in granting an attorney's lien because the provisions of WIS. STAT. §§ 757.36 and 757.37—which allow for an attorney's lien on settlement proceeds—did not apply. Spencer points out, however, that there is a common law basis for granting an attorney's lien that exists independent of the statutory provision. *Weigel v. Grimmert*, 173 Wis. 2d 263, 267, 496 N.W.2d 206 (Ct. App. 1992). Regal has not responded to Spencer's argument that the trial court could properly have granted priority to a common law attorney's lien under general principles of equity. We will therefore not consider the matter further. *Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (an argument to which no response is made may be deemed conceded for purposes of appeal).

By the Court.—Judgment affirmed.

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

