COURT OF APPEALS DECISION DATED AND FILED

March 29, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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. 00-1467

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

ROXANNE MARTINSON,

PLAINTIFF-APPELLANT,

V.

ALLSTATE INDEMNITY COMPANY, AND RUSSELL J. MEDINGER,

DEFENDANTS-RESPONDENTS,

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND MAIL HANDLERS BENEFIT PLAN,

DEFENDANTS.

APPEAL from a judgment of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed.*

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

¶1 VERGERONT, J. In this personal injury case, Roxanne Martinson appeals the judgment entered on the jury's verdict and the trial court's orders denying her postverdict motions and her reconsideration motion. She contends the trial court erroneously exercised its discretion in failing to grant her motion for a new trial because the jury failed to follow the instruction on the collateral source rule and returned a perversely inadequate verdict on her past loss of earnings. We conclude the trial court did not erroneously exercise its discretion. We therefore affirm.

BACKGROUND

¶2 Martinson's complaint alleged she was injured on October 20, 1996, as the result of Russell Medinger's negligence in operating a motor vehicle. She filed a pretrial motion requesting that the court prohibit any reference to "collateral payments, services, benefits or resources ... including but not limited to payments made by health insurance, automobile medical payments coverage and/or Federal Employment Retirement and/or disability payments." The brief in support of the motion did not specify any particular collateral source that Martinson had received. State Farm Mutual Automobile Insurance, Medinger's insurer, opposed the motion. In its brief, State Farm asserted Martinson had been employed as a material handler at Fort McCoy, and she began receiving Federal Employee Retirement System [FERS] disability retirement benefits on November 13, 1997. State Farm offered several rationales for the admission of evidence of the FERS benefits. In reply, Martinson disputed these rationales and argued that evidence of the FERS benefits was inadmissible under the collateral source rule. The court entered an order granting her motion "regarding the collateral source rule," but not specifying any particular collateral payments or benefits.

¶3 The case was tried to a jury on February 1, 2000 through February 4, 2000, but the appellate record of the trial is minimal. The only portion of the trial contained in the record is the transcription of the testimony of an occupational therapist, presented by Martinson, that does not appear to have any relevance to the issue she is raising on appeal. Also included is a list of all the trial exhibits, but the exhibits are not in the record; instead, next to entry for the exhibit list in the record index is the notation "Exhibits will be sent upon request of the Court of Appeals." The parties have both provided the same two exhibits in the appendices to their briefs—exhibits 25 and 32—and refer to them in their briefs. In addition, State Farm has included exhibit 23 in the appendix to its brief, and Martinson does not object to State Farm's inclusion of or reference to this exhibit. Therefore, we will consider these three exhibits as part of the record for the purposes of this appeal. All of them are described in the exhibit list as Martinson's exhibits.

¶4 Exhibit 23 is a copy of Martinson's "Statement of Disability" for her FERS benefits. The statement indicates she applied for benefits on or before August 19, 1997, and gives the date she became disabled as October 20, 1996. Exhibit 25, prepared by Martinson, states that the date of injury was 10/20/96, Martinson's last day of work at Fort McCoy was 11/13/97, and the wage loss was as follows:

10/20/96 to 08/17/97	715 hrs. @ $14.45/hr. =	$10,331.75
08/17/97 to 11/13/97	75.5 hrs.@ $14.64/hr. =	$ 1,105.32
11/13/97 to 02/01/00		$66,758.40
less assumed post-injury capacity		- $38,760.00
	Total	$27,998.40

¶5 Exhibit 32 is a memorandum prepared by a training support officer entitled "Request for Leave Usage" and dated November 13, 1997. The

memorandum states that from October 31, 1996 to November 13, 1997, Martinson used 790.5 hours of leave comprised of these subtotals: 18.5 hours of sick leave, 240 hours of advanced sick leave, 105.75 hours of annual leave, 114 hours holiday leave, and 312.25 hours leave without pay. Attached to exhibit 32 is the breakdown of these hours of leave by the date on which they were used.

¶6 The special verdict returned by the jury made these awards:

> **<u>QUESTION NO. 1</u>:** What sum of money will fairly and reasonably compensate Plaintiff Roxanne Martinson for:

A. Past medical, hospital, treatment and medication expenses:	$ 8,446.85
B. Future medical, hospital, treatment and medication expenses:	$ 0
C. Past loss of earnings:	$ 4,571.34
D. Future loss of earnings:	$ 0
E. Past and future pain, suffering, and disability	$10,000.00

The jury was instructed that "[s]ubdivision C … asks what sum of money will fairly and reasonably compensate … Martinson for her past loss of earning capacity," and that the answer to this subdivision "should be the difference between what … Martinson was reasonably capable of earning at her usual occupation from the date of the accident to the present time had she not been injured and what she was reasonably capable of earning during the period in view of her injuries." The jury was also instructed:

> You may have heard evidence during the statements, documents, questioning of witnesses or in closing arguments that Roxanne Martinson received payments from a collateral source. An example of a collateral source is a payment made by the government retirement or disability insurance.
>
> Under Wisconsin law, the Plaintiff may recover the reasonable value of all items of loss, regardless of whether

> she has or will receive compensation for her damages from a source other than the Defendant. The fact that the Plaintiff may have or have not received payments from a collateral source such as government retirement or other benefits should not be taken into account when you determine any of the items of damages in your deliberations.

¶7 In her postverdict motion, Martinson asked for a new trial on all issues in the interest of justice because the verdict was perverse, and because it was contrary to the court's instructions. She also asked the court to either change the answers or order a new trial on questions 1C, 1D, and 1E. With respect to question 1C, Martinson asked that the court change the answer to $39,435.47 on the grounds that the damages found by the jury for past lost wages was inadequate and as a matter of law, and $39,435.47 was reasonable; or, in the alternative, that the court order a new trial unless State Farm accepted that amount. Among other arguments in support of this request, Martinson contended the jury had deducted payments she received for sick leave, advance sick leave, annual leave, and holiday leave, thereby disregarding the instruction on collateral source. She also argued there was no basis in the evidence for the $4,571.43 award for past loss of earnings because, even if the jury believed the defense expert that Martinson had reached a healing plateau on January 31, 1997, the award would have been $6,325.49. And Martinson contended that the award for medical expenses, which was for treatment through November 1998, was inconsistent with not awarding loss of earnings for the same period.

¶8 The trial court denied Martinson's motion. The court concluded the verdict was not perverse and was supported by credible evidence. The court explained that the trial was primarily a matter of credibility and the jury chose not to believe Martinson was as seriously injured as she claimed. The court

mentioned evidence that she had previous back problems and problems with her supervisor at Fort McCoy, and did not mind being out of that job. With respect to past loss of earnings, the court stated:

> And as to the exact amount of wage loss, you know, I don't know exactly how they came up with the number. I don't believe they came up with it by simply reimbursing her for the unpaid leave. There was also other testimony, oh, it was to the effect that, you shouldn't be working so much because the insurance company will see that or something, and then she was off for a few days. You know, the jury could have deducted some hours. I don't know how they did it, and I don't think that will be known.
>
> Further, you know, I think, frankly, the softball videotape is devastating to a case like this, and I think that had probably a lot of effect on the jury. And the bottom line of all of that is, juries aren't gonna award sums of money like the plaintiff claimed and argued for here unless they believe that the injury has seriously affected the person's life, and there was no real showing of that effect. They went from there in my opinion—and, frankly, in my opinion, to ask them for over $800,000 just insulted them even more and probably resulted in the verdict being lower than it otherwise was (sic).

¶9 Martinson filed a motion asking the court to reconsider the denial of her postverdict motion, focusing on the award for past loss of earnings. She argued that the amount of $4,571.64 could only have been arrived at by multiplying $14.64 by 312.25 hours, the leave without pay. Since the leave without pay was taken beginning December 26, 1996, Martinson contended this meant the jury did not award lost earnings from the date of the injury through December 26, 1996, but only after that date. The only logical explanation for doing this, according to Martinson, is that the jury disregarded the instruction on collateral source and did not award Martinson for the earnings she lost when she was compensated by paid leave of one kind or another. Martinson posited that the jury disregarded the collateral source instruction because it was prejudiced by

evidence that she had filed for bankruptcy or because she was gay. She asked that a new trial be granted on all the issues because of the presumption that perversity with respect to one issue affects the entire verdict. Martinson repeated her earlier arguments that the award for past loss of earnings was inconsistent both with the defense expert's testimony on a January 31, 1997 plateau date and with the jury's award of medical expenses through November 1998.

¶10 The trial court denied the motion for reconsideration, concluding the jury's award was reasonable. The court explained: "As I think I stated before, there is considerable evidence that the plaintiff in this case was a malingerer, and I think that pervaded the jury's verdict, or it well could have."

DISCUSSION

¶11 On appeal, Martinson renews her argument that the jury's award for past loss of earnings was perverse because it does not compensate her for lost wages between the date of the accident and the date unpaid leave began, and this means the jury disregarded the instruction on collateral source. She seeks a new trial on all damages, contending that the entire verdict is suspect as a result of the perverseness in the award of past loss of earnings. The premise of Martinson's argument is that the jury arrived at $4,571.34 by multiplying the hours of unpaid leave—312—(from December 26, 1996 through November 5, 1997) by $14.64.

¶12 State Farm responds that the award of $4,571.34 for past loss of earnings may reflect a compromise, but that the compromise is reasonable. It points out the jury apparently rejected the defense expert's testimony that Martinson needed no medical treatment after January 31, 1997, because it awarded her medical expenses after that date, and, State Farm asserts, the jury was not required to accept his testimony of the plateau date. State Farm calculates that had

the jury compensated Martinson for all hours of work lost before the plateau date at a rate of $14.50 per hour, the past wage loss would be $5,557.00.[1] But State Farm argues the jury did not need to find she was unable to work every day up to their expert's plateau date, pointing to evidence that she had reasons unrelated to her injury in this accident for not working, such as problems with her supervisor and prior injury. State Farm also points out that during most of the time Martinson took unpaid leave, her wage rate was $14.45 per hour, not $14.64, which is the wage rate Martinson claims the jury used. Regardless of the jury's method for calculating the $4,571.34, State Farm concludes, it is a reasonable amount based on the evidence, and the court did not erroneously exercise its discretion in not granting a new trial.

¶13 In reply, Martinson disputes there was evidence of a pre-existing injury that precluded her from working as a material handler for the federal government and refers to medical testimony and to evidence of performance evaluations at trial. She provides citations to her brief to the trial court on the postverdict motion.

¶14 "A verdict is perverse when the jury clearly refuses to follow the direction or instruction of the trial court upon a point of law, or where the verdict reflects highly emotional, inflammatory or immaterial considerations, or an obvious prejudgment with no attempt to be fair." ***Redepenning v. Dore***, 56 Wis. 2d 129, 134, 201 N.W.2d 580 (1972) (footnote omitted). Because the trial court is in a better position than the appellate court to determine whether a verdict is perverse, we do not reverse a trial court's determination unless the trial court

[1] According to exhibit 25, Martinson's rate of pay before August 17, 1997, was $14.45, not $14.50, so the amount for 383.25 hours would be $5,537.96.

erroneously exercised its discretion. ***Id.*** We affirm discretionary decisions when the record shows the trial court considered the relevant facts and reasoned its way to a conclusion that is one a reasonable judge could reach and is consistent with applicable law. ***Burkes v. Hales***, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991). Generally we look for reasons to sustain discretionary decisions. ***Id.*** at 591.

¶15 The trial court in this case did provide a reasoned explanation for its conclusion that the award for loss of earnings was not perverse but was a reasonable determination based on the evidence, and it referred to testimony introduced at trial. Martinson has a different view of what the evidence shows, but she provided us with only a small portion of the trial testimony and only a few of the many exhibits. We are therefore unable to determine whether, as she contends, this award is "perversely inadequate." It is the responsibility of the appellant to provide this court with the record that is necessary for us to review the issues the appellant raises on appeal. ***State Bank of Heartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986). Given an incomplete record, we assume it supports the trial court's exercise of discretion. ***Id.*** Martinson's citation to assertions in her trial court brief is not an adequate substitute for a complete trial transcript and complete exhibits that would permit us to review the trial court's discretionary determination that the evidence supports the verdict on loss of earnings. Martinson has not established the trial court erroneously exercised its discretion in concluding that the award of $4,571.34 was a reasonable one based on the evidence and, therefore, was not so inadequate as to be perverse.

¶16 The lack of a complete record similarly hampers our review of Martinson's contention that the jury did not follow the instruction on collateral source. The instruction mentions "government retirement or disability insurance"

as an example of a collateral source, but not paid sick leave, paid annual leave, or paid holidays. Martinson argues that case law establishes that paid leave and holidays are considered a collateral source,[2] but that is not the issue before us: the issue is whether the trial court erroneously exercised its discretion in not granting a new trial because the jury did not follow the collateral source instruction actually given in this case. It appears from the motion and briefing on Martinson's motion in limine that the focus of the request for a prohibition on mentioning collateral sources was the FERS benefits. We have no record of the jury instruction conference or the instructions Martinson requested, and we therefore do not know whether she asked the jury to be instructed that it should not consider the hours of compensated leave in answering question 1C. However, Martinson's counsel's comments in the hearing on the motion for reconsideration indicate Martinson asked for the collateral source instruction actually given.

¶17 It may be that either the evidence presented to the jury or the argument of counsel made clear that the paid leave and paid holidays, like the retirement and disability benefits, was a collateral source and was not to be considered in answering question 1C, but we are unable to tell that from the record we have. Based only on the instruction actually given, we are not persuaded the jury should have understood that, in determining Martinson's past loss of earning capacity, it was not to consider the amount of paid leave and paid holidays Martinson used. Indeed, exhibit 32, Martinson's own exhibit, suggests the distinction between paid and unpaid leave is a significant one.

[2] Martinson cites ***Ashley v. American Auto. Ins. Co.***, 19 Wis. 2d 17, 119 N.W.2d 359 (1963), in which the court held that when the salary of an injured person is continued during the time of his or her inability to perform services, that is not a ground for a reduction of damages to be paid by the one who caused the injury, and it was error for the trial court to refuse to instruct the jury accordingly.

¶18 Therefore, assuming the jury did consider the hours of paid leave and paid holidays in answering question 1C, we do not agree with Martinson that it is clear from the incomplete record before us that doing so was a failure to follow the court's direction or instruction. For this reason, we are not persuaded the trial court erroneously exercised its discretion in rejecting Martinson's argument that the verdict on past loss of earnings was perverse for failure to follow the instruction.

By the Court.—Judgment affirmed.

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