

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 19, 2002

Cornelia G. Clark
Clerk of Court of Appeals

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.

**Appeal No. 01-1101
STATE OF WISCONSIN**

Cir. Ct. No. 99 CV 2840

**IN COURT OF APPEALS
DISTRICT I**

DANIEL S. STASIEWICZ,

PLAINTIFF-RESPONDENT,

v.

**JUAN PAGAN, JR. AND
ALLSTATE INSURANCE COMPANY,**

DEFENDANTS-APPELLANTS,

**MILWAUKEE DRIVERS HEALTH AND WELFARE
TRUST FUND, MEDICARE PART A UNITED
GOVERNMENT SERVICES AND MEDICARE
PART B WISCONSIN PHYSICIANS SERVICE,**

SUBROGATED PARTIES-DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 WEDEMEYER, P.J. Juan Pagan, Jr. and Allstate Insurance Company (collectively, “Allstate”) appeal from a judgment entered in favor of Daniel S. Stasiewicz. Allstate claims: (1) the trial court erred in failing to dismiss Stasiewicz’s claim for permanent injury; (2) the trial court erred when it refused to grant a new trial; and (3) there is insufficient evidence to support the jury’s future pain and suffering award. Because we resolve each issue in favor of upholding the judgment, we affirm.

I. BACKGROUND

¶2 On June 18, 1996, Stasiewicz was traveling south on 27th Street, Milwaukee, Wisconsin, when his vehicle was struck in the rear by a vehicle operated by Pagan. Pagan was insured by Allstate. As a result of the accident, Stasiewicz lost control of his vehicle, rolled over, and stopped upside-down in a ditch. He sustained a left rib fracture, right thigh sprain, cellulitis of the right knee, and exacerbation of the lucency of the right knee. Nine months before the accident, Stasiewicz had undergone a total right knee replacement.

¶3 On March 30, 1999, Stasiewicz filed this lawsuit. Attorney Gregory Knapp appeared as counsel for the defense. Before filing suit, Stasiewicz provided Allstate with the medical records from Dr. Richard G. Davito and his letter report dated October 12, 1998, as well as the medical records from Dr. John C. Christianson and Dr. Christianson’s letter report dated February 10, 1997.

¶4 Both reports were included by reference when Stasiewicz filed his list of witnesses, special damages, and permanency report on December 10, 1999. Stasiewicz also filed a pretrial report on May 30, 2000, again referencing the two medical reports. The reports themselves were submitted to defense counsel on December 2, 1999, as attachments to Requests to Admit. The scheduling order

provided that all discovery was to be completed by June 1, 2000, and that all pretrial motions were to be filed by May 1, 2000. The final pretrial conference was held on June 8, 2000. Attorney Knapp appeared for the defense and appeared to be ready for the trial, which was to begin on August 28, 2000.

¶5 On August 15, 2000, Stasiewicz's counsel received a letter from Attorney John D. Surma indicating that he would be replacing Attorney Knapp. Attorney Surma also filed a motion in limine asking the court to preclude Stasiewicz from introducing any evidence of permanency. On August 28, 2000, the trial court entertained the untimely motion. Attorney Surma convincingly argued that Stasiewicz had never provided defense counsel with copies of the medical reports of Dr. Christianson and Dr. Davito. Stasiewicz's counsel advised the court that the reports were turned over to Allstate, and were repeatedly included by reference in pretrial documents, that Attorney Knapp never raised this issue, and that Attorney Surma's motion was not timely.

¶6 The trial court did not grant the motion, but instead adjourned the trial to give the defense an opportunity to review the medical reports and conduct additional discovery necessary to rebut the medical reports. A new trial date of October 9, 2000, was set.

¶7 In the interim, the defense hired an expert witness, Dr. Thomas O'Brien, who conducted an independent medical examination and concluded that Stasiewicz did not suffer from any permanent injury.

¶8 On the date the trial was to commence, Stasiewicz brought a motion seeking sanctions for the misrepresentations Attorney Surma made with respect to the medical reports. Stasiewicz provided indisputable proof that the medical reports had been turned over to defense counsel in December 1999. The trial court

was greatly displeased, and decided that it would return the parties to the position each was in prior to the granting of the adjournment. It ruled that the defense should not benefit from using the “fruits” of the misrepresentations. Thus, it precluded the defense from using its newly obtained witness, Dr. O’Brien.

¶9 The case was tried to the jury on damages only. Liability was conceded by Allstate. The jury awarded Stasiewicz \$35,000 in past pain, suffering and disability, and \$41,300 in future pain, suffering and disability. Postverdict motions were denied. Judgment was entered. Allstate now appeals.

II. DISCUSSION

A. *Permanency Claim.*

¶10 Allstate argues that the medical reports turned over to defense counsel and referenced in the record were insufficient to satisfy the requirements of a permanency report. As a result, it contends the trial court should have granted its motion to preclude Stasiewicz’s permanency claim. We are not convinced.

¶11 A trial court’s decision to grant or deny motions to dismiss claims is a discretionary determination. *Eden Stone Co., Inc. v. Oakfield Stone Co., Inc.*, 166 Wis. 2d 105, 112, 479 N.W.2d 557 (Ct. App. 1991). Thus, our review is limited to whether or not the trial court considered the pertinent facts, applied the correct law, and reached a reasonable decision. *Burkes v. Hales*, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991). If the trial court complied with this standard, there was no erroneous exercise of discretion.

¶12 Although, on appeal, Allstate contends this issue is solely about the adequacy of the medical reports, the conduct of defense counsel at trial broadens the issue. Attorney Surma appeared for the defense three weeks before trial, and

filed a motion to preclude Stasiewicz's permanency claim on the basis that Stasiewicz failed to provide defense counsel with any permanency reports. After an adjournment was granted, the trial court learned that Stasiewicz had, in fact, turned over permanency reports in December 1999.

¶13 At this point, Attorney Surma changed his strategy and basis for precluding a permanency claim. Now, he argued that the medical reports were insufficient to sustain a permanency claim. The trial court disagreed. The trial court found that Dr. Davito's report satisfied the minimum requirements to support a permanency claim. Dr. Davito's report referred to the change in lucency of the right knee caused by the accident, and that Stasiewicz was still experiencing pain as a result. On this basis, we cannot hold that the trial court's finding was clearly erroneous. Although the report was brief and did not contain the greater detail of future pain and suffering described by Dr. Davito during trial, it was minimally sufficient to withstand a motion to dismiss the claim.

B. New Trial.

¶14 Allstate next contends that the trial court should have granted its motion for a new trial "for errors committed during trial relating to the exclusion of Dr. O'Brien's testimony and inflammatory misstatements made in the jury's presence." We disagree.

¶15 First, whether or not to admit a witness's testimony is a matter of discretion for the trial court, and will not be reversed on appeal as long as the trial court considered the pertinent facts, applied the correct law, and reached a reasonable conclusion. *Steinbach v. Gustafson*, 177 Wis. 2d 178, 185-86, 502 N.W.2d 156 (Ct. App. 1993). Appellate courts generally look for reasons to sustain discretionary determinations. *Id.*

¶16 Here, the trial court acted within its discretion when it precluded the testimony of Dr. O'Brien. The defense was provided with the reports and notice of Stasiewicz's intent to call his two treating physicians. Despite that, no depositions of the doctors were requested. The defense did not schedule an independent medical examination within the time parameters of the scheduling order. The only reason Dr. O'Brien surfaced in this case at all was because of Attorney Surma's erroneous representations to the trial court that Stasiewicz had never turned over the medical reports. It was not unreasonable, under the circumstances, for the trial court to return the parties to "status quo" before the erroneous representations were made.

¶17 Moreover, Attorney Surma did not seek relief from the court as a result of his late appearance in the case, nor did he suggest that he was unprepared to try the case. In addition, he did not seek extensions from the court on the basis that the first defense counsel failed to adequately prepare the case for trial. He could have, but he did not.

¶18 Second, Allstate contends that Stasiewicz's counsel made the following inflammatory statement during closing argument: "So he [Dr. Davito] came down here as part of his professional obligation and told you what he found, what his findings were and what his opinions were, and remember, they are uncontradicted. The defense had a chance to call -- [.]" Before the statement was finished, the defense objected and, at sidebar, moved for a mistrial. The trial court denied the motion.

¶19 We cannot find that the trial court's ruling in denying the motion was erroneous. First, the statement was not completed. Stasiewicz's counsel did not return to the argument after the sidebar. Second, the defense did have the opportunity to call an expert witness to rebut Stasiewicz's witnesses. But, it

should have done so during the time discovery was contemplated by the scheduling order, or moved for an extension to do so. The defense did neither. Instead, it got an expert only after an adjournment was granted based on false assertions that the defense had never received the plaintiff's medical reports. Third, the jury was instructed that closing argument is not evidence and its decision should be based solely on the evidence. It is presumed the jury followed the instructions. *State v. Smith*, 170 Wis. 2d 701, 719, 490 N.W.2d 40 (Ct. App. 1992).

*C. Insufficient Evidence to Support Future Pain and
Suffering Award.*

¶20 Finally, Allstate claims there is insufficient evidence to support the jury's award for future pain and suffering.¹ We disagree.

¶21 The trial court found: “[I]t is clear in this record that [Dr. Davito] stated to a reasonable degree of medical certainty that this plaintiff's pain, condition of his knee and everything has been altered by this accident.” This finding is supported by the record. The record reflects that Dr. Davito gave opinions to a reasonable degree of medical certainty. He testified that the increased lucency of Stasiewicz's right patellar component was caused by trauma to the knee during the accident, that the knee pain Stasiewicz was experiencing was the result of the increased lucency, that the lucency would not improve without additional surgery, that Stasiewicz had developed an antalgic gait as a

¹ Allstate also argues there is no evidence to support a claim for future medical expenses. However, no claim for future medical expenses was proffered or submitted to the jury. Thus, we need not address this argument.

result of the lucency, and that the medication Stasiewicz can take to treat the knee pain was limited because of Stasiewicz's other medical conditions.

¶22 Allstate ignores this testimony, and instead directs this court to the portions in the record where Dr. Davito testified that additional surgery to correct the lucency was not indicated at the present time, and he could only guess as to "what the future holds for the knee." Allstate also cites the following question and Dr. Davito's answer:

Q: So it is your opinion, no permanent problems as a result of the car accident as of December 19, 1996?

A: That's correct.

When read in context, however, it is clear that the question and answer relate to a single entry in Dr. Davito's medical records. The answer relates to his opinion as of the date of that particular entry. Dr. Davito's entire testimony shows he was of the opinion that Stasiewicz had sustained permanent problems. Any conflict in the testimony should be resolved by the trier of fact. *Fuller v. Riedel*, 159 Wis. 2d 323, 332, 464 N.W.2d 97 (Ct. App. 1990). Here, the record reflects sufficient evidence to support the jury's award of future pain and suffering.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

