

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 29, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2008AP2964

Cir. Ct. No. 2006CV2959

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

ESTATE OF CRAIG LAMB,

PLAINTIFF-APPELLANT,

COMMUNITY LIVING ALLIANCE,

INVOLUNTARY-PLAINTIFF,

v.

**PATRICIA BURKE AND AMERICAN FAMILY MUTUAL INSURANCE
COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County:
MARYANN SUMI, Judge. *Affirmed.*

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

¶1 HIGGINBOTHAM, J. Craig Lamb was riding his scooter¹ in a cross-walk when a motor vehicle being driven by Patricia Burke hit the scooter. Lamb sued Burke alleging her negligence caused his scooter to tip-over, resulting in injuries. The case was tried to a jury, which returned a verdict finding Lamb and Burke jointly negligent in causing the accident and finding that neither party's negligence caused Lamb to suffer any injuries. Nonetheless, the jury awarded Lamb \$354 in damages. Craig Lamb, through his estate,² appeals the judgment entered on the jury's verdict.

¶2 Lamb argues on appeal that the trial court erred when it excluded the police officer's accident report from being admitted as evidence, holding it was inadmissible under WIS. STAT. § 346.73,³ and when the court refused to allow the police officer to testify as to the parties' statements recorded in the report, absent independent recollection. Lamb contends he is entitled to a new trial as a result of the trial court's errors. Assuming without deciding that the trial court erred by not admitting into evidence the police officer's report and by not allowing the officer to testify as to the party's statements recorded in the report, we conclude the errors were harmless, and affirm.

¹ The parties variously use the terms "motorized wheelchair," "wheelchair," "motorized scooter" and "scooter" to describe the type of device on which Lamb was riding at the time of the accident. We will use the term "scooter" in the remainder of this opinion.

² Lamb died after filing of this appeal. Upon the request of the Estate of Craig Lamb, the court has substituted the Estate as the appellant in this case.

³ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Background

¶3 This personal injury action arose out of an automobile accident in which Patricia Burke's vehicle hit Craig Lamb's scooter on September 8, 2003, in the City of Fitchburg. Prior to trial, Burke moved in limine to exclude the police report of the accident pursuant to WIS. STAT. § 346.73(2). The trial court granted the motion. The court, however, allowed the police officer to use the report to refresh her recollection, and prohibited her only from either reading directly from the report or repeating the parties' statements contained within it, unless the officer could independently recollect them.

¶4 A four-day trial was held in July 2008. There was a significant dispute over the events surrounding the accident. Lamb asserted Burke's vehicle hit his scooter, causing the scooter to tip over onto its right side and him to hit the ground on his right side. Burke maintained that her vehicle merely "bump[ed]" Lamb's scooter and that Lamb remained upright and seated on the scooter in front of Burke's vehicle. Burke adamantly denied that a man helped Lamb after the accident and picked up his scooter. Prior to trial, Burke stipulated she was negligent and that her negligence was a cause of the accident. At the conclusion of the trial, the jury reached a unanimous verdict, finding Lamb was contributorily negligent in causing the accident, but that neither party's negligence caused any of Lamb's alleged injuries. The jury awarded Lamb \$354, the cost of his doctor visit the day after the accident, but awarded zero dollars for past pain, suffering and disability.

¶5 Lamb filed a post-verdict motion seeking a new trial based upon the court's exclusion of the police report. The court denied the motion. Lamb appealed. Additional pertinent facts are provided in the discussion section below.

Discussion

¶6 The key issue in this case is whether Burke’s negligence caused Lamb’s injuries. The dispute here centers on a statement Burke allegedly gave to the police officer at the accident scene, which was included in an accident report prepared by the officer eight days after the accident. In her report, the officer wrote that, “Patricia advised she did not observe Lamb crossing in the intersection and struck the side of the [scooter] with the passenger front bumper. *This caused the [scooter] to tip over*, subsequently causing damage to the armrest and lower portion of the [scooter].” (Emphasis added.) Lamb filed a motion in limine seeking to have this report admitted into evidence, or at least to allow the officer to testify from the report regarding Burke’s statement. The court denied the motion on the ground that the report was inadmissible under WIS. STAT. § 346.73. The court also barred the officer from referring to Burke’s statement contained in the report. The court did allow the officer to testify about her own observations of the accident, even if those observations were recorded in the report.

¶7 Lamb makes three arguments concerning the trial court’s order denying his motion in limine. First, he contends the police officer’s accident report was admissible as an admission of a party opponent and that the trial court erred by excluding the report pursuant to WIS. STAT. § 346.73. Second, he contends the court erred in refusing to allow the officer to testify regarding Burke’s statement to the officer once the officer’s recollection was refreshed by the report. Third, Lamb argues that, even if the officer had no independent recollection of Burke’s statement, the officer should have been allowed to present her recorded recollection. Lamb then argues the court’s error in denying his motion in limine was not harmless because Lamb was unable to impeach Burke’s testimony at trial that she did not knock over the scooter when her vehicle hit it,

and that the exclusion of this evidence likely led the jury to find that Burke's negligence did not cause Lamb to suffer any injuries.

¶8 In response, Burke argues that the trial court properly excluded the police officer's accident report pursuant to WIS. STAT. § 346.73; Lamb failed to lay a proper foundation to admit Burke's statements by the officer based on past recollection recorded under WIS. STAT. § 908.03(5); the report was inadmissible hearsay; Burke's statement did not constitute an admission by a party opponent; and, even if the trial court did err, the error was harmless.

¶9 Assuming without deciding that the trial court erred in excluding the police officer's accident report from being admitted into evidence under WIS. STAT. § 346.73, and in barring the officer from testifying from the report regarding Burke's statement taken at the accident scene, we conclude the court's errors were harmless.

¶10 We review a trial court's decision to admit or exclude evidence for an erroneous exercise of discretion. *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. Where evidence is erroneously admitted or excluded we conduct a harmless error analysis to determine whether the error affected the substantial rights of the party. *Id.*, ¶30; *see* WIS. STAT. § 805.18(2). An error affects the substantial rights of a party when there is a "reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." *Martindale*, 246 Wis. 2d 67, ¶32 (citations omitted). Our inquiry requires that we weigh the effect of the improperly excluded evidence against the totality of the credible evidence presented supporting the verdict. *Nowatske v. Osterloh*, 201 Wis. 2d 497, 506-07, 549 N.W.2d 256 (Ct. App. 1996).

¶11 Lamb’s purpose for admitting the police officer’s accident report was to place before the jury Burke’s contemporaneous statement to the officer that Burke had hit the scooter, thereby causing the scooter to tip over. Lamb argued to the trial court, and argues on appeal, that it was impossible for him to prove the accident caused his claimed injuries without evidence that the scooter tipped over. He argues that this evidence was necessary to impeach Burke’s trial testimony that the scooter did not tip over because Lamb had no independent recollection of what happened immediately after he was hit.⁴ Lamb asserts that the exclusion of the officer’s report likely led the jury to believe that Lamb never fell over and therefore he was not injured. In other words, Lamb contends, because the court excluded the admission of Burke’s statement, “the jury did not believe the scooter tipped over” and therefore found that Burke’s negligence was not a cause of Lamb’s injuries. Thus, according to Lamb, the trial court’s exclusion of the accident report, and its barring of the officer’s testimony regarding Burke’s statement to the officer that bumping Lamb’s scooter caused it to tip over, was not harmless error.

¶12 We reject Lamb’s argument for four reasons. First, evidence was presented to the jury that the scooter tipped over. Burke’s alleged statement to the police officer would not have been the only evidence that the scooter tipped over. Lamb testified, without objection on hearsay grounds, that he “blacked out” after Burke’s vehicle hit him and the scooter, but that when he regained awareness, a man told Lamb that he saw Lamb get struck, and that he lifted Lamb and the

⁴ Lamb testified that he blacked out at various times throughout the entire incident, including when the police were present. However, at his doctor’s appointment the next day, Lamb’s physician found that he had not suffered any head injury as a result of the accident.

scooter up, along with Lamb's groceries. Lamb also testified that this man told him that he (this other man) had bent the scooter's right arm back up. Lamb testified that he observed damage on the right side of the scooter, which is consistent with Lamb's contention that the scooter was tipped over on its right side.

¶13 Fitchburg police officer Heather Heiser, who responded to the auto-scooter accident, testified that she observed damage to the right armrest and the lower right side of the scooter, which is consistent with Lamb's testimony regarding damage to the scooter. This testimony strengthened Lamb's contention that Burke's vehicle pushed the scooter over on its right side. Thus, the jury had before it evidence that Burke's vehicle hit and caused Lamb's scooter to tip over.

¶14 Second, Burke's medical experts took into account Lamb's version of how the accident unfolded when they examined him and in rendering their opinions at trial. Indeed, all of Lamb's treating doctors and the physicians who testified at trial assumed the mechanism of injury was the scooter tipping over.

¶15 Third, most of the trial was in essence a battle of the medical experts. The central issue was whether Lamb had suffered new injuries as a result of the accident and/or whether the accident caused an aggravation of pre-existing conditions. Ample evidence was admitted showing that Lamb had pre-existing pathology in his right knee and wrist. In 1986 and 1999, Lamb had major falls, resulting in injuries to his right knee. An MRI taken four months before the accident showed substantial degenerative disease and meniscal tears in his right knee. An MRI taken one month after the accident showed the same degenerative disease and meniscal tears, and failed to reveal any pathology related to the accident.

¶16 With respect to Lamb's right wrist, he complained of constant aching and pain in 2002 and had documented neuropathies in both wrists since 1999. Prior to the accident, Lamb's primary care physician, Dr. Douglas Smith, diagnosed Lamb's wrist problems as "positional overuse" due to the many hours Lamb spent on the computer. There was evidence in the medical records that Lamb self-reported on September 29, 2003, being on the Internet for approximately twelve hours per day. Surgery performed on his right wrist three months after the accident showed substantial degenerative disease. The surgeon's report of that surgery indicated no traumatic injury to the wrist.

¶17 There was also evidence that Lamb had a long history of peripheral neuropathy (diagnosed in 1999), which made it very difficult for him to walk and to maintain his balance. Lamb claimed the accident aggravated his neuropathy, making it more difficult to walk and to maintain his balance. However, David Maiers, Lamb's physical therapist who treated Lamb for alleged balance and walking problems caused by the accident, testified that he had the impression that Lamb had exaggerated or magnified his symptoms. For instance, Maiers observed Lamb behaving very differently in test conditions than in non-test conditions, such as picking up objects from the floor and his postural sway. Maiers also observed Lamb lose his balance in ways that were not consistent with a person who has peripheral neuropathy. For example, Lamb would have the tendency to always fall the same way—backwards—onto a support surface. In Maiers' view, Lamb's loss of balance posterior onto the support surface was "intentional or volitional." He also observed Lamb had less sway when in conversation as opposed to test conditions. Maiers testified that Lamb's test results did not accurately reflect the capabilities of Lamb's nervous system, and that Lamb could maintain his balance

better than he demonstrated. Maiers opined that Lamb was malingering for the purpose of obtaining some secondary gain such as compensation from this lawsuit.

¶18 Lamb further alleged that he injured his left lower back and hip in the accident. However, he also had pre-existing problems in this area of his body and expert evidence was presented that the accident did not cause the lower back pain of which Lamb complained.

¶19 One of Burke's medical experts, Dr. David Solfelt, an orthopedic surgeon, testified that there was no objective medical evidence that the accident caused any of Lamb's claimed injuries, with the minor exception of a minor contusion on the inside of his left knee and to his right wrist. Nor did Dr. Solfelt find it caused aggravation of any pre-existing or underlying conditions of Lamb's right wrist or of either knee.

¶20 Fourth, Lamb had other proof problems. For instance, a neurologist who testified on behalf of Burke opined that Lamb had a narcissistic personality disorder, which included a tendency to embellish his injuries. There are other examples of evidence that impeached Lamb's credibility and raised questions regarding causation. We need not cover that material, however. What is obvious from the evidence adduced at trial is that Lamb's causation problems did not stem in any significant way from not being able to admit into evidence Burke's statement to the police officer that her vehicle caused Lamb's scooter to tip over. Rather, Lamb's proof problems arose primarily from evidence of his substantial history of pre-existing conditions and the lack of objective physical evidence that Lamb's claimed injuries were independent of this history. The lack of objective physical evidence showing the accident caused his claimed physical injuries,

coupled with Lamb's questionable credibility, resulted in a weak causation case. *See Nowatske*, 201 Wis. 2d at 506-07.

¶21 Lamb's final argument is that the jury's insertion of a dollar amount other than zero in the special verdict appears to contradict the jury's finding that neither Burke nor Lamb's negligence caused any of Lamb's alleged injuries. We agree that awarding any amount of damages is seemingly inconsistent with the jury's no causation finding. This inconsistency, however, has no bearing on whether the credible evidence supports the jury's verdict on negligence or whether the exclusion of the accident report affected Lamb's substantial rights. It appears that the jury awarded Lamb for what essentially was the cost of his visit with his primary care physician the day after the accident. To the extent the jury credited Dr. Smith's opinion that Lamb suffered soft tissue injuries in the accident, awarding Lamb the cost of treatment for those injuries the day after the accident makes sense. The focal point of Lamb's case, however, was on the more serious medical issues Lamb had following the accident: his right wrist, left and right knees, his left lower back and hip, and aggravation of his peripheral neuropathy. On these claims, the jury awarded no damages, consistent with its finding that the accident did not cause Lamb's claimed injuries.

¶22 For the foregoing reasons, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

