COURT OF APPEALS
DECISION
DATED AND RELEASED

July 17, 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. 95-3229

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

PAULA L. MOEBIUS,

PLAINTIFF-APPELLANT,

v.

GENERAL CASUALTY INSURANCE CO.,

RESPONDENT-RESPONDENT,

DARYL E. TRESNER,

DEFENDANT-
THIRD PARTY PLAINTIFF,

TERRENCE BYSTOL,

THIRD PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Iowa County: KENT C. HOUCK, Judge. *Affirmed.*

Before Eich, C.J., Roggensack and Deininger, JJ.

PER CURIAM. Paula Moebius appeals from a judgment on her personal injury claim against General Casualty Insurance Company (GCIC) and Daryl Tresner. Although Moebius received a compensatory damage award, she seeks by appeal either a larger award or a new trial. We conclude that she is entitled to neither, and therefore affirm.

Tresner caused an automobile accident in which Moebius suffered injuries. Because Tresner was uninsured at the time, Moebius's insurer, GCIC, paid $1,000 toward her medical expenses, and $1,300 for her collision loss, under the medical pay provision and uninsured motorist coverage in her own policy. GCIC then sued Tresner on its subrogation claim, alleging that he negligently caused the accident. Moebius filed a separate action against GCIC for additional payments under her policy, including additional medical expenses and pain and suffering. She also named Tresner as a defendant.

In its answer, GCIC admitted that Tresner was causally negligent, consistent with its complaint and its own action against him. The actions were consolidated for trial and GCIC and Tresner agreed to joint counsel. The trial court then allowed GCIC to amend its answer to deny Tresner's liability.

At trial, a principal issue concerned Moebius's medical expenses. Although the defendant stipulated to $762 in reasonable and necessary expenses, Moebius introduced evidence of extensive additional treatment after the accident. In response, the defendants introduced evidence that the additional treatment was unrelated to the accident. Included was the testimony of a chiropractor expert witness, Danny Futch, who identified other reasons for the treatment including a pre-existing injury. The trial court denied Moebius's attempt to discredit Futch

with testimony from its chiropractor expert that Futch had a reputation for undertreating patients, performing incomplete evaluations and turning away persons in need of chiropractic treatment. The trial court also denied Moebius's attempt to introduce GCIC's complaint against Tresner, and its original answer, into evidence on the liability question.

The jury subsequently returned a verdict finding Tresner 93% causally negligent, and Moebius 7% causally negligent. Despite the stipulation to at least $762 in reasonable and necessary medical expenses, the jury awarded no money for past medical expenses. It also denied recovery for future medical expenses and awarded $10,000 for pain and suffering. Moebius immediately moved to change the past medical verdict to $762, and the trial court granted that motion. However, on motions after verdict the trial court declined to add $762 to the judgment because GCIC had already paid it. Consequently, the final judgment held GCIC and Tresner jointly and severally liable for Moebius's $9,300 pain and suffering award plus costs, and ordered judgment for GCIC against Tresner for any amounts paid to Moebius under this judgment.[1]

The issues on appeal include: (1) whether the trial court should have allowed GCIC to amend its answer to deny Tresner's liability; (2) whether the trial court should have allowed GCIC's original answer and its complaint against Tresner into evidence; (3) whether the trial court should have awarded a new trial on the damages based on an inconsistent and perverse verdict; (4) whether the trial court should have allowed testimony on Futch's reputation; (5) whether Moebius

[1] Tresner in turn, received judgment against a third individual for any amounts the judgment required him to pay GCIC. The trial court had earlier held that third individual, Terrence Bystol, liable for breaching a contract with Tresner to insure the vehicle he was driving when the accident occurred.

is entitled to judgment for the $762 the trial court added to the verdict; and (6) whether Moebius is entitled to a new trial in the interest of justice.

If the trial court erred by allowing GCIC to amend its answer, and by denying into evidence its original answer and complaint, such errors were harmless. Moebius prevailed on the liability question. We disregard claims of error that do not affect the substantial rights of a party. Section 805.18(2), STATS.[2]

The trial court did not erroneously exercise its discretion by denying a new trial based on an inconsistent verdict. Moebius contends that the verdict was inconsistent because the jury awarded pain and suffering damages yet failed to award any medical expenses despite a stipulation that some existed. However, an apparent inconsistency in the verdict does not require a new trial if there is a reasonable explanation for it. *See* ***Becker v. State Farm Mut. Auto. Ins. Co.***, 141 Wis.2d 804, 820, 416 N.W.2d 906, 913-14 (Ct. App. 1987). Here, the jury was made aware during the trial that GCIC had paid the stipulated expenses, and it may have erroneously considered that fact in deciding on medical expenses. Other than that error, which the trial court immediately corrected, the verdict conformed to the evidence the jury deemed credible, both in the trial court's view and in our view. An inconsistent verdict may be set aside if the jury answers are logically repugnant to one another. ***Fondell v. Lucky Stores, Inc.***, 85 Wis.2d 220, 228, 270 N.W.2d 205, 210 (1978). Under the circumstances here, the jury erred but did not render a logically repugnant verdict.

[2] The statute was recently ordered amended by Wisconsin Supreme Court Order No. 96-08, § 51, eff. July 1, 1997. The change does not affect our analysis.

The trial court properly excluded evidence concerning Dr. Futch's reputation and treatment of his patients. Moebius contends that the evidence was admissible under various statutory provisions allowing testimony regarding a witness's character. However, the proffered evidence concerning Futch did not concern his character, but his competence and credibility. Those were proper subjects for cross-examination, and were, in fact, thoroughly reviewed on cross-examination. We are aware of no authority for the proposition that one may also use one's own expert witness to explore those issues.

Moebius is not entitled to judgment for her medical expenses. Moebius sued GCIC and Tresner and obtained judgment holding them jointly and severally liable for her damages. GCIC had already paid some of those damages before trial, however. Having recovered that portion of her damages once from the defendants she is not now entitled to a double recovery. Additionally, it is undisputed that upon payment of the medical expenses GCIC obtained the right of subrogation. Nothing in the record shows that GCIC ever waived that right or otherwise transferred the medical expenses claim back to Moebius.

Finally, Moebius requests a new trial in the interest of justice based on the accumulated errors and inconsistencies in this case. We conclude that the case was fairly tried with a result that reasonably reflected the evidence and the circumstances. Therefore, a new trial is not warranted in the interest of justice.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5., STATS.