

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 30, 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. 01-1254

Cir. Ct. No. 99-CV-113

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

KARIN PALUMBO,

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

**JACK PALUMBO, MICHAEL PALUMBO, BY HIS GUARDIAN
AD LITEM, ARDELL W. SKOW, AND ANGELA PALUMBO,
BY HER GUARDIAN AD LITEM, ARDELL W. SKOW,**

PLAINTIFFS-RESPONDENTS,

v.

**BRIAN KIDDER, BARBARA STORY AND WILSON MUTUAL
INSURANCE COMPANY,**

**DEFENDANTS-APPELLANTS-CROSS-
RESPONDENTS.**

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Dunn County: WILLIAM C. STEWART, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J. and Peterson, J.

¶1 PER CURIAM. Brian Kidder¹ appeals and Karin Palumbo cross-appeals a judgment awarding Palumbo damages for injuries she suffered in a traffic accident. Kidder argues that the trial court should have granted his motion to change the \$120,000 award for future loss of earning capacity to \$14,400. He also argues that the evidence does not support the \$120,000 figure and that the trial court improperly exercised its discretion when it refused to read the jury a limiting instruction.² Palumbo argues that the court should have granted additur or a new trial because the \$2,500 award for past pain, suffering and disability and the \$7,500 award for future pain, suffering and disability are so low as to shock the judicial conscience. We affirm the judgment.

¶2 Palumbo was injured when Kidder drove his van into the rear of her vehicle. At the time of the accident, she reported no injury. Three days later she consulted with Dr. David Wilhelm, her family doctor, who diagnosed her with "chronic cervical strain" as a result of the accident. Nine months later, after reviewing x-rays and an MRI, Wilhelm concluded that Palumbo suffered degenerative changes to her spine. Wilhelm believed that the accident greatly aggravated a preexisting condition, causing Palumbo increasing pain in her neck

¹ Barbara Story, Kidder's sponsor, and their insurer, Wilson Mutual Insurance Company also appeal the judgment. They will be collectively referred to as "Kidder" in this opinion.

² Kidder's argument challenging the \$120,000 figure and the court's jury instruction are not properly before this court. In his post-verdict motions, Kidder only requested that the court change the answer. He did not request remittitur or a new trial. The remedy for an excessive verdict or an erroneous jury instruction is a new trial. By his failure to request a new trial, Kidder deprived the trial court of an opportunity to correct any error by granting a new trial. Therefore, he forfeits review as a matter of right. *Wells v. Dairyland Mut. Ins. Co.*, 274 Wis. 2d 505, 518, 80 N.W.2d 380 (1957). We review the merits only because it does not affect the outcome of this appeal.

over time. He recommended surgery only as a last resort, fearing that the surgery would affect her ability to perform her work as a dental hygienist. Wilhelm testified that Palumbo will need to modify her work hours and work activities because of the injury. He eventually referred her to an orthopedic surgeon, Dr. Bruce Bartie.

¶3 Bartie agreed that Palumbo had a preexisting degenerative condition that was aggravated by the accident. He opined that Palumbo required cervical fusion surgery and would be able to return to work on a part-time basis within a few weeks but that it would take at least six weeks for her to return on a full-time basis. Bartie believed that successful surgery would allow Palumbo to continue working as a dental hygienist without any difficulty.

¶4 The defense hired Dr. Douglas Becker as an expert witness. He believed that Palumbo's condition preexisted the accident and that she should not do repetitive overhead activities and should not lift more than forty pounds. He opined that she should not have cervical fusion surgery because it would put added strain on the cervical vertebrae above and below the fused vertebrae. He testified that the risks of surgery include infection, non-healing, nerve injury, vocal cord paralysis, esophageal damage, bleeding, postoperative pain and stiffness and "nonunion," which might require that the operation be done again. Becker testified that there was no guarantee that Palumbo's symptoms would get any better and that they might get worse if the surgery were done. If she had the surgery, Becker estimated that she would be off work for approximately three months and would probably have to return to work gradually. He thought it unlikely that she would return to work because the nature of her job is stressful to the neck and would be uncomfortable. Even after surgery, working as a dental hygienist "would not be the best choice in career."

¶5 Palumbo testified at trial, approximately four years after the accident, that she has not missed any work due to pain, but has missed work for doctor appointments and therapy. She continues to water ski in a conservative manner, unlike the “skiing on the edge” that she enjoyed before the accident. Her neck pain has caused her to quit tubing with her children and has interfered with cross-country skiing, playing the piano and assisting her daughter with her homework, as well as vacuuming, working in the kitchen and sitting on bleachers. She ices her neck before she goes to bed and has difficulty sleeping through the night. Her therapeutic exercises have taken up time that she would like to devote to other things. At the time of trial, she had elected to undergo spinal fusion surgery, but would not have the operation until approximately ten months after the trial.

¶6 A jury awarded Palumbo \$30,000 for future medical and healthcare expenses, apparently reflecting its belief that she will have the surgery. It awarded \$120,000 for future loss of earning capacity, \$2,500 for past pain, suffering and disability, and \$7,500 for future pain, suffering and disability.

¶7 A trial court should not change a verdict unless there is no credible evidence to sustain the jury’s finding. *See Bennett v. Larsen Co.*, 118 Wis. 2d 681, 705-06, 348 N.W.2d 540 (1984). The witnesses’ credibility and the weight to be given their testimony are matters left to the jury’s judgment. *Id.* When the trial court has approved the jury’s findings, this court accords special deference to the verdict. *See Kuklinski v. Rodriguez*, 203 Wis. 2d 324, 331, 552 N.W.2d 869 (1996).

¶8 Kidder has not established any basis for changing the award for lost future earnings from \$120,000 to \$14,400. The \$14,400 figure is based on

Becker's calculation of Palumbo's maximum recovery time: Thirty dollars per hour times forty hours and twelve weeks. Several of the figures in that equation were not established with such certainty that the trial court could change the jury's verdict. Thirty dollars per hour did not include Palumbo's fringe benefits. The twelve weeks' recovery time is premised on disputed testimony that Palumbo would recover in three months, and the formula assumes that three months equals twelve weeks, not thirteen weeks. The figure assumes no complications from the surgery and no reduced hours despite Becker's testimony that Palumbo could only return to work on an "as tolerated basis," and Bartie's testimony that she may never return to work as a dental hygienist following the surgery.

¶9 Sufficient evidence supports the \$120,000 award for future loss of earning capacity. The medical experts' testimony included substantially divergent and inconsistent views regarding Palumbo's prognosis and the degree to which she would experience work-related pain after surgery. The jury had the right to accept portions of each of the experts' testimony depending on its assessment of their credibility. *See State v. Toy*, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). The \$120,000 award spread over the expected duration of her employment amounts to only four hours per week. Although the jury's precise methodology is not known, it could reasonably have concluded that Palumbo should return to work on an "as tolerated" basis and reduce her working hours as necessary to alleviate the pain.

¶10 Kidder contends that the evidence did not sufficiently quantify any lost income that Palumbo could expect as a result of her injuries. Proof of lost earning capacity is, by its very nature, somewhat uncertain. *See Fischer v. Cleveland Punch & Shear Works*, 91 Wis. 2d 85, 100, 280 N.W.2d 280 (1979). The jury could reasonably infer from portions of each of the medical witnesses'

evidence that Kidder would be required to reduce her work hours to avoid pain. The \$120,000 figure is not clearly erroneous.

¶11 Kidder's challenge to the jury instruction fails for the same reason. He requested an instruction that would have limited the award for future earnings loss to Palumbo's convalescence period. The proffered instruction would not have correctly stated the law. Because a reasonable view of the evidence includes the prospect of ongoing diminished work hours to avoid pain caused by this accident, it would not have been appropriate for the trial court to assume full recovery after a convalescence period.

¶12 Although the standard of review differs on Palumbo's challenge to the trial court's refusal to order additur or a new trial, her argument also fails because sufficient evidence supports the awards for past and future pain, suffering and disability. The court may not overturn the jury's findings on damages unless the results "shock the judicial conscience." *See Makowski v. Ehlenbach*, 11 Wis. 2d 38, 42, 103 N.W.2d 907 (1960). In the four and one-half years between the accident and the trial date, Palumbo had been able to work despite the pain and also continued recreational activities such as water skiing. Even after she decided to have the surgery, she postponed the surgery for approximately ten months, suggesting that the pain was not particularly intense. We cannot conclude that the \$2,500 award for past pain, suffering and disability shocks this court's conscience.

¶13 Likewise, the \$7,500 award for future pain, suffering and disability is adequately supported by the evidence. The jury may well have found that Palumbo's decision to postpone surgery constituted a failure to mitigate her damages. It could also reasonably find that she would not suffer substantial post-surgery pain if she avoided exacerbating her condition by returning to work too

soon or attempting to work too many hours. The jury awarded Palumbo \$120,000 for lost future earnings. It therefore found that Palumbo would substantially reduce her employment hours to avoid the pain she experienced while working. The jury could reasonably find on the evidence that a reduced work schedule would result in a corresponding reduction in the episodes and intensity of pain Palumbo would experience.

By the Court.—Judgment affirmed. No costs on appeal.

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

