

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 11, 2008

David R. Schanker
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. 2007AP2383

Cir. Ct. No. 2006CV272

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

SHIRLEY A. JARRETT,

PLAINTIFF-APPELLANT,

v.

**KYLE M. WALKER, GEICO INDEMNITY COMPANY AND AMERICAN
FAMILY MUTUAL INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for La Crosse County:
DALE T. PASELL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Shirley Jarrett appeals an order denying her motions after verdict and issuing judgment against her on a personal injury lawsuit. A jury determined that Jarrett did not suffer any injury in an automobile

accident with Kyle Walker. Jarrett challenges the admissibility of testimony from Walker's engineering expert and the sufficiency of the evidence to support the verdict. She further contends that the verdict should be set aside in the interest of justice and for being perverse. For the reasons discussed below, we affirm the judgment.

BACKGROUND

¶2 Jarrett testified that she was a passenger in a vehicle that was struck from behind while stopped at a red light. She said that she was thrown forward and then pulled back by the seat belt so hard that she experienced immediate pain in her head and neck and became nauseated. She sought treatment from her chiropractor the following day, and continued to see the chiropractor and a doctor over the ensuing months for headaches and pain in her neck and shoulder, which she attributed to the accident. She claimed she had incurred \$10,117.68 in medical bills and had to quit her job and reduce a number of other activities as a result of her injuries.

¶3 On cross-examination, the defense brought forth Jarrett's deposition testimony that she actually had to stop some of her activities before the present accident due to chronic lower back pain. During her deposition in September 2006, Jarrett claimed that she had experienced daily headaches that she ranked as 10 on a pain scale from 1 to 10 for about three months after the accident, and that she was still experiencing headaches that she ranked as 10s a couple of times a week. However, her medical records showed that she had complained of a migraine to her chiropractor for the first time in August of 2005, about three months after the accident. In addition, about a year before the accident, Jarrett complained to a doctor, during an independent medical examination for a worker's

compensation claim, about shoulder pain, which the doctor found to be unrelated to her work injury. Jarrett also admitted that she had characterized a prior automobile accident that had pushed the hood of the other car up to its windshield as “moderate,” while she had characterized the instant accident, which resulted in a dented license plate to the other car, as “severe.”

¶4 Jarrett presented deposition excerpts from her chiropractor, Dr. Alan Weber, and her family doctor, Dr. David Olsrud, in lieu of live testimony. Their testimony confirmed that she had sought treatment for headaches and neck problems. However, her own doctor acknowledged that Jarrett’s muscle contraction headaches could have been caused by stress, tension, or physical activities, and that it was possible that her neck strain could have been caused by something other than the accident. The doctor had also reviewed past medical files showing that a psychologist had administered a personality test showing that Jarrett’s “hypochondriasis and hysteria are approaching critical levels,” and that another doctor had found that Jarrett “demonstrated evidence of symptom magnification.”

¶5 Steve Streif was driving the car in which Jarrett was a passenger. He testified that he was stopped at a red light with his foot on the brake when his car was struck from behind, and that he let up on the brake and rolled forward some distance. He took his vehicle to an auto body shop the following day, but there was no damage found.

¶6 Officer Tony LeQue investigated the accident. He noted no damage to Streif’s vehicle and very minor damage to Walker’s vehicle.

¶7 Walker admitted as an adverse witness that he rear-ended Streif’s vehicle while it was stopped at a red light. In his case-in-chief, Walker presented

the testimony of Robert Weber, an associate professor in engineering. Professor Weber deduced from the accident photographs that the trailer hitch on the back of Streif's car caused the small dent on the front of Walker's car and pulled the license plate off as the cars separated. Professor Weber testified to a reasonable degree of engineering certainty that the velocity at impact was no greater than five miles per hour. He offered further opinion that, after some of the force was absorbed and dissipated by the car, the vehicle occupants would have felt an impact from between one and three miles per hour. Professor Weber then testified, over Jarrett's objection, that he was aware of a study that showed that the amount of force involved in a rear-end collision at that speed was comparable to a sneeze or pat on the back. Professor Weber also testified that, given the low impact, Jarrett would have been pushed back into the seat, and then could have rebounded forward off the head rest at most three or four degrees. The seat belt would not have locked up to pull her back unless the velocity of the crash was more than fifteen miles per hour. Further, at an impact of fifteen miles per hour, the trailer hitch would have been more deformed and the bumper more damaged.

DISCUSSION

Expert Testimony

¶8 WISCONSIN STAT. § 907.02 (2005-06)¹ permits the admission of expert testimony when “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” The admissibility of expert testimony lies within the circuit court's discretion, so

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

long as the court examines the relevant facts, applies the correct legal standard, and uses a rational process to reach a reasonable conclusion. *Brown County v. Shannon R.*, 2005 WI 160, ¶37, 286 Wis. 2d 278, 706 N.W.2d 269.

¶9 Jarrett argues that Professor Weber’s testimony about the speed of impact was inadmissible because it was irrelevant, unsupported by sufficient facts, and because it “unfairly implied conclusions” as to whether the accident could have caused Jarrett’s alleged injuries. None of these arguments are persuasive.

¶10 Evidence about the force of impact was highly relevant to judge the credibility of Jarrett’s testimony that the crash was “severe,” and that she had been thrown forward and then pulled back by her seatbelt hard enough to cause intense pain and nausea. The fact that Professor Weber made his calculations about the force of impact based upon photographs rather than viewing the vehicles themselves goes to the weight of his testimony, not its admissibility. Professor Weber’s analogy to other activities that would result in similar force upon the body was well within his area of expertise.

¶11 As to whether Professor Weber’s testimony “unfairly implied conclusions” about Jarrett’s injuries, we observe that Professor Weber did not give any opinion as to whether the force he described would have been sufficient to inflict head, neck, or shoulder injuries such as those Jarrett claimed to have suffered in the accident. Indeed, he did not even discuss the extent of Jarrett’s medical injuries. The jury was entitled to make the inference on its own that the degree of force involved in the accident was insufficient to have caused the degree of injuries that Jarrett claimed to have suffered. The fact that the professor’s testimony may have been very damaging to Jarrett’s case does not mean that it was unfairly prejudicial. If she wanted the jury to draw a different inference than

that suggested by the defense based on the professor's testimony, Jarrett was free to present her own testimony about what degree of force would be necessary to cause soft tissue damage. In short, the circuit court was well within its discretion to admit Professor Weber's testimony.

Sufficiency of the Evidence

¶12 A motion challenging the sufficiency of the evidence to support a verdict will not be granted unless, “considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.” WIS. STAT. § 805.14(1). “[J]urors are not required to base their determinations of the weight and credibility of evidence on the number of witnesses who testify in favor of or against the existence of a disputed fact.” *State v. Lombard*, 2003 WI App 163, ¶20, 266 Wis. 2d 887, 669 N.W.2d 157, *aff'd*, 2004 WI 95, 273 Wis. 2d 538, 684 N.W.2d 103.

¶13 Jarrett essentially asserts that the evidence of her injuries was undisputed because Walker did not present his own medical experts. Walker, however, was not required to present his own medical experts. The burden of proof was upon Jarrett, and the jury was entitled to reject all or part of her testimony or that of her witnesses based on credibility concerns or negative inferences. Thus, the jury could reject Jarrett's claim about the range of motion she went through during the impact, since it conflicted with the impact testimony given by the professor. The jury could reject Jarrett's claim about the degree of her pain, given her past history of symptom magnification and its own inferences about the low level impact. And, the jury could even reject Jarrett's most basic claim that her headaches and neck and shoulder pain were caused by the accident,

given the myriad of symptoms she had reported prior to the accident and the fact that her own doctor could not state with certainty that her current problems were attributable to the accident. In sum, we agree with the circuit court that the verdict was supported by sufficient evidence.

¶14 Given our conclusions that Professor Weber's force-of-impact testimony was properly admitted and that the jury could properly make inferences about the degree of Jarrett's injuries based upon that testimony as well as evidence that Jarrett had a history of exaggerating symptoms, we also reject Jarrett's claims that the verdict was contrary to the weight of the evidence or perverse.

By the Court.—Order affirmed.

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

