COURT OF APPEALS
DECISION
DATED AND RELEASED

February 22, 1996

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-3396

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

PAMELA GISINER,

Plaintiff-Appellant,

v.

TODD C. BOLLENBACH,
CHARLES J. BOLLENBACH,
BEVERLY BOLLENBACH,
AND WEST BEND MUTUAL INSURANCE COMPANY,

Defendants-Respondents,

DANE COUNTY HUMAN SERVICES,
AND U-CARE HMO, INC.,

Subrogated Defendants.

APPEAL from a judgment of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed*.

Before Eich, C.J., Sundby and Vergeront, JJ.

VERGERONT, J. Pamela Gisiner appeals from a judgment awarding her $2,942.73 in a personal injury action she brought against Todd Bollenbach, his parents and their insurer, West Bend Mutual Insurance Company.[1] Gisiner raises three issues: (1) whether the trial court erroneously exercised its discretion in admitting evidence of her use of a controlled substance and involvement in an abusive relationship; (2) whether the trial court erred in denying her motion for additur or, in the alternative, a new trial because the jury awarded inadequate damages; and (3) whether the trial court erred in permitting defense counsel to refer to comments made by members of the jury panel during voir dire in closing arguments. We resolve each issue against Gisiner. Accordingly, we affirm.

BACKGROUND

Pamela Gisiner sustained injuries in a car accident on June 16, 1990, when the vehicle she was riding in was struck from the rear by a vehicle driven by Todd Bollenbach. The vehicle driven by Bollenbach was owned by his parents. Gisiner sued Bollenbach, his parents and West Bend Mutual Insurance, alleging that she sustained injuries in the accident and suffers from neck pain, upper and lower back pain, numbness of the hand and arm, and debilitating migraine headaches. Gisiner alleged that her condition was not greatly improved by medical treatment and made it difficult for her to hold a full-time job. The Bollenbachs conceded liability and the case went to trial on the issue of damages.

Prior to trial, Gisiner brought motions *in limine* to exclude evidence of certain events documented in her medical records and discussed in a written report of a medical evaluation conducted by Dr. Marc Novom, a neurologist retained by the Bollenbachs. Specifically, Gisiner sought to prevent Dr. Novom from testifying about her use of cocaine in April 1987, an abortion that was performed in April 1989, and a physically and emotionally abusive relationship she was involved in with her former boyfriend both before and after the accident. Gisiner contended that the admission of such evidence would have an inflammatory effect on the jury, that the evidence was irrelevant,

[1] Dane County Human Services and U-Care HMO, Inc. are subrogated defendants.

and that its probative value would be substantially outweighed by the danger of unfair prejudice and confusion.

The Bollenbachs opposed the motions, representing that these events were relevant because Dr. Novom would testify at trial to a reasonable degree of medical probability that they were a cause of Gisiner's symptoms.

The trial court granted the motion *in limine* with respect to the abortion. However, with assurances from the Bollenbachs' attorney that Dr. Novom would connect the cocaine use and involvement in an abusive relationship with the symptoms Gisiner was complaining of, the court denied the motions *in limine* with respect to the cocaine use and involvement in an abusive relationship. In an effort to limit the prejudicial effect of the testimony regarding Gisiner's cocaine use, the trial court required that "cocaine" be referred to during the trial as a "controlled substance."

At trial, Dr. Novom testified that he had performed a neurological examination of Gisiner and that such examination "was simply and unequivocally normal." He opined that Gisiner had sustained a temporary self-limited aggravating soft-tissue injury which had resolved itself within five or six months of the accident. Dr. Novom referred to Gisiner's injury as a cervical flexion extension injury. He noted that Gisiner's medical records established that she had experienced low back pain prior to the accident, as well as vascular headaches, and that she had a significant history of psychoemotional upset before and after the accident. He stated that Gisiner's complaint of arm and hand numbness "defies anatomic understanding." He also stated that Gisiner's medical treatment was reasonable and acceptable only through January 1991, and that any treatment rendered thereafter would have no direct relation to the accident.

Contrary to defense counsel's representations at the hearing on the motions *in limine*, Dr. Novom did not testify that Gisiner's use of a controlled substance and her involvement in an abusive relationship were a cause of her symptoms. Rather, Dr. Novom testified that Gisiner's past controlled substance use and involvement in an abusive relationship were indicative of a dependent personality. Dr. Novom stated in various parts of his testimony as follows:

> [T]hose individuals who have [a] history of dependent personality, being in positions abused, using substances ill advisedly, those are the kind of individuals that we find not infrequently may have chronic pain states and those are the kind of people who are largely dependent on medications chronically to reduce their perception of pain, and it shouldn't surprise you that such individuals frequently remain even in long standing dependent relationships with their care takers.
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> ....
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> [I]t helps you understand how the person engages in life's activities and how they respond to the little bumps and irregularities in life.... This is an emotionally immature dependent individual and regrettably she has been in some very troublesome past relationships. That's what tells me that she also is capable of forming again future dependent relationships, and she does.
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> ....
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> So past problems with dependencies, abusive relationships, spill over into the way Ms. Gisiner interacts socially and also it reflects in the ways she exhibits her chronic pain behaviors and in her needs to reduce that.
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> ....
>
> It helps us explain better what she is all about and why she continues to report pain.

Following Dr. Novom's testimony, Gisiner asked for a mistrial and, in the alternative, sought to strike the testimony and requested a curative instruction.[2] Gisiner argued that Dr. Novom had not testified that her use of a

[2] The curative instruction would have advised the jury that testimony regarding Gisiner's use of a controlled substance and involvement in an abusive relationship was improperly admitted and that the jury should not consider it in its deliberations.

controlled substance and involvement in an abusive relationship were a cause of her symptoms, as defense counsel had represented he would, and that this evidence was offered only to show that Gisiner had a bad character.

The trial court denied the motion to strike and the motion for a mistrial, stating that the evidence was not offered as proof of Gisiner's bad character, but as proof of motive under § 904.04(2), STATS. The trial court explained that Dr. Novom had reviewed Gisiner's medical records and relied on the evidence of the abusive relationship and use of a controlled substance to support his opinion, to a reasonable degree of medical probability, that Gisiner had a dependent personality. This dependent personality caused Gisiner to perceive pain in a heightened manner and provided her with a motive to seek unnecessary medical treatment for attention and support. The trial court recognized the potential for prejudice, but concluded that the probative value of the evidence was not outweighed by its prejudicial effect because the court had previously required that all references to "cocaine" during the trial be replaced with the term "controlled substance," and because being the victim of an abusive relationship is not in and of itself prejudicial.

The jury returned a special verdict awarding Gisiner $2,500 for past medical expenses and $2,500 for past and future pain, suffering and disability. The jury did not award any damages for future medical expenses, past lost earnings or future loss of earning capacity. Gisiner's motions after verdict were denied and the trial court awarded judgment on the verdict for $2,942.73 (the jury award of $5,000 less the defendants' taxable costs).

OTHER ACTS EVIDENCE

We first address Gisiner's argument that the trial court erred in admitting evidence of her prior controlled substance use and involvement in an abusive relationship. The admission of evidence is a matter within the trial court's discretion. ***State v. Clark***, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993). We will not disturb an evidentiary ruling where the trial court has exercised its discretion in accordance with accepted legal standards and the facts of record. ***Id.***

In deciding whether to admit other acts evidence, the trial court must apply a two-part test. ***State v. Kuntz***, 160 Wis.2d 722, 746, 467 N.W.2d

531, 540 (1991), *habeas corpus denied sub nom.* ***Kuntz v. McCaughtry***, 806 F. Supp. 1373 (E.D. Wis. 1992). The trial court must first determine whether the evidence is offered for a purpose permissible under § 904.04(2), STATS.[3] ***Id.*** If the trial court finds that it is, the court must then determine whether the probative value of such evidence is substantially outweighed by the danger of unfair prejudice. ***Id.***; § 904.03, STATS. A question implicit within the two-part test is whether the other acts evidence is relevant to an issue in the case. ***State v. Johnson***, 184 Wis.2d 324, 337, 516 N.W.2d 463, 466-67 (Ct. App. 1994).

We conclude the trial court properly determined that Dr. Novom's testimony that Gisiner has a dependent personality, as demonstrated by her prior use of a controlled substance and involvement in an abusive relationship, was admissible to show that Gisiner had a motive to seek treatment beyond that which was medically necessary and reasonable given the nature of her injuries. Dr. Novom's position was that Gisiner had sustained a temporary soft-tissue injury in the car accident that was resolved within approximately six months of the accident, and that Gisiner's medical treatment was reasonable and necessary only for those six months. Gisiner, in contrast, was seeking damages for past medical expenses, future medical expenses, loss of wages, lost future earning capacity, and pain and suffering totaling over $500,000, for symptoms she claimed were on-going and would affect her ability to live and work in the future. Dr. Novom's discussion of Gisiner's dependent personality was offered as an alternative explanation for Gisiner's continued complaints and course of medical treatment. According to Dr. Novom, persons with dependent personalities are more prone to perceive pain in a heightened way, more dependent on medications to reduce their perceptions of pain, and more likely to establish dependent, long-standing relationships with health care providers to satisfy their need for attention and support. This testimony would help explain why Gisiner continues to seek medical treatment for her symptoms

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[3] Section 904.04(2), STATS., provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Although generally used in criminal cases, § 904.04(2), STATS., is also applicable in civil cases. ***Lievrouw v. Roth***, 157 Wis.2d 332, 349, 459 N.W.2d 850, 856 (Ct. App. 1990).

when, in Dr. Novom's view, her soft-tissue injury was resolved within six months of the accident.

The trial court also properly weighed the probative value of Dr. Novom's testimony against the danger of unfair prejudice. In this context, prejudice refers to the potential harm in a jury concluding that, because Gisiner used a controlled substance and was involved in an abusive relationship, she is a bad person with little credibility. While Dr. Novom's testimony was potentially prejudicial for Gisiner, the trial court took appropriate steps to limit any unfair prejudice. First, the trial court ensured that Gisiner's use of cocaine was referred to at trial only as use of a controlled substance. Second, the trial court instructed the jury that it was not to consider the evidence of Gisiner's controlled substance use and involvement in an abusive relationship as evidence that Gisiner is a bad person or is less worthy of credibility.[4] The delivery of a limiting instruction serves to eliminate or minimize the risk of unfair prejudice. ***State v. Parr***, 182 Wis.2d 349, 361, 513 N.W.2d 647, 650 (Ct. App. 1994). Third, the trial court recognized that evidence of being the victim of an abusive relationship is not, in and of itself, prejudicial. In light of the probative value of Dr. Novom's testimony and the trial court's efforts to limit prejudice, we conclude the trial court properly exercised its discretion in admitting the evidence.

INADEQUATE DAMAGES

[4] The instruction provided:

> Evidence has been received in this trial that plaintiff engaged in relationships in which she was abused and that she used a controlled substance. This evidence was received solely because it was part of the basis for opinions reached by defendants' medical expert witness on the issue of the present symptoms presented by plaintiff for medical treatment.
>
> You may not consider this evidence for any purpose other than as a basis for the opinions of defendants' medical expert witness.
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> You may consider this evidence only for the purposes I have described, giving it the weight you determine it deserves. It is not to be used to conclude that plaintiff Pamela Gisiner is a bad person or is less worthy of credibility.

Gisiner argues that the trial court erred in refusing to grant a new trial or change the jury's verdict answer on the amount of damages because the jury's award of $5,000 is "shocking" given the testimony regarding her symptoms and the effect those symptoms have had on her life. We disagree.

The decision whether to grant additur, or to overturn a jury's verdict and grant a new trial, is within the trial court's discretion and will not be disturbed absent an erroneous exercise of discretion. ***Martz v. Trecker***, 193 Wis.2d 588, 594, 535 N.W.2d 57, 59-60 (Ct. App. 1995). A jury verdict will be sustained if there is any credible evidence to support it. ***Fehring v. Republic Ins. Co.***, 118 Wis.2d 299, 305, 347 N.W.2d 595, 598 (1984). This is especially true when the trial court has approved the jury's verdict. ***Id.***

We conclude that the trial court did not erroneously exercise its discretion in denying Gisiner's motion for additur or, in the alternative, a new trial. A review of the record reveals evidence that the vehicle in which Gisiner was a passenger was not seriously damaged in the accident, that Gisiner had a pre-existing history of headaches and back pain, that Gisiner sustained a temporary soft-tissue injury that resolved itself within six months of the accident, that Gisiner's medical treatment was only necessary and reasonable for those six months, that Gisiner has a dependent personality which causes her to perceive pain in a heightened manner and to seek long-standing relationships with health care professionals, and that, in terms of occupation, "what she is doing in the past, that is what she can continue to do." While there was contrary testimony regarding the cause of Gisiner's symptoms, when Gisiner reached her healing plateau, what medical treatment was reasonable and necessary and for how long, and the types of occupational activities she is able to perform, the jury is the arbiter of witness credibility and decides how much probative value to assign to the testimony of the various witnesses. *See* ***Meurer v. ITT Gen. Controls***, 90 Wis.2d 438, 450, 280 N.W.2d 156, 162 (1979). Viewed in the light most favorable to the verdict, *see* ***id.***, there is credible evidence in the record to support the jury's award of $5,000.

CLOSING ARGUMENT

Gisiner contends the trial court erred in denying her motion for a new trial based on the following comment made by defense counsel in her closing argument:

> And you'll recall in jury voir dire that the question that we asked to select all of you, there were people who indicated they had migraine headaches, they had family members. One woman had a husband and a daughter and a mother.

Gisiner argues that defense counsel's comment regarding an answer given by a juror who was struck during voir dire was "an improper comment on specific facts brought to the jury's attention during voir dire, not through evidence." We disagree. Counsel are allowed considerable latitude in closing arguments, with discretion given to the trial court in determining the propriety of the argument. ***State v. Draize***, 88 Wis.2d 445, 454, 276 N.W.2d 784, 789 (1979). While defense counsel did remind the jury that at least one member of the jury panel had indicated during voir dire that she or family members suffered from migraines, she did not refer to any specific statement by any particular juror as evidence. Defense counsel simply made reference to a matter within the common knowledge of the jury--that certain people suffer from migraine headaches on a repetitive basis.

Even if it were error to overrule Gisiner's objection to defense counsel's comment, Gisiner does not offer a sufficient reason why this error warrants a new trial. We will not consider undeveloped arguments. ***State v. Gulrud***, 140 Wis.2d 721, 730, 412 N.W.2d 139, 142-43 (Ct. App. 1987).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

No. 94-3396(D)

SUNDBY, J. (*dissenting*). The issue is whether the trial court should have granted plaintiff's motion to strike defendants' doctor's testimony in which he implied that plaintiff's chronic pain and medicating therefor was a function of her dependent personality. Because he failed to testify to the required degree of medical probability that plaintiff's pain and headaches were not caused by the accident in which she was involved, I conclude that the trial court should have granted plaintiff's motion. I therefore dissent.

The defense theory was that plaintiff's myofacial pain syndrome, mid-back pain and migraine headaches were not caused by the accident in which plaintiff was injured but by plaintiff's drug dependency and her involvement in an abusive relationship. Plaintiff argued that there was no causal relation between plaintiff's one-time use of cocaine in 1987 and her former relationship with an abusive man, and moved the court *in limine* to bar such evidence. Defense counsel argued that defendant's doctor, Marc Novom, a neurologist, would tie these facets of plaintiff's life to her present complaints, especially her migraine headaches.

Counsel represented to the trial court that:

> [Dr. Novom's] opinion is that the headaches are due to her social condition and the stress that has resulted from these things. She is living with other pain. She has lived with a physically abusive man, and she also has conflict stress as a result of dependence on drugs....
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> ....
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> ... [H]e will [express this opinion to a reasonable degree of medical probability]. He feels very strongly about it.... It is a much more logical explanation than when you hear the evidence about the car accident.... The defense has to be able to show that there [are] other explanations which have evolved since the date of the accident, and we have direct medical evidence of those things.

The trial court reviewed Dr. Novom's report and stated that his report did not make any connection between plaintiff's cocaine use, abortion, abusive relationship and her headaches. The court stated: "I don't want all this stuff to come in and then have the doctor not make these connections that you are suggesting ...." Counsel represented that Dr. Novom's opinion was going to be that these incidents are "possible or probable causes of the present symptoms ... she is complaining of." The trial court granted plaintiff's motion *in limine* with regard to the abortion but denied plaintiff's motion with respect to the cocaine use and her abusive relationship with her boyfriend. The court stated:

> *I am relying on the representations of [counsel].* I have questioned her specifically about it, and it would be beyond a question of disappointment if that evidence did not appear in the trial in the face of this argument. This evidence coming in depends on an expert making a connection between the medical history and cause of the current complaints. The jury cannot be permitted to speculate about this. They cannot be permitted to indulge in the negative character type of aspect about this. It is only here, if it is here at all, because of the connection to her current complaints.
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> ....
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> ... It would not be fair to the defense to grant these motions *in limine* when they represent they have an expert witness to connect them and to opine that these are sources or possible sources of today's complaints. The jury needs to evaluate that. The potential for prejudice can be handled and will be handled, if counsel wishes and will assist me in instructions, in prophylactic instructions instructing the jury the purpose for which it is admitted and the

> purpose for which they may not use this evidence, and that would be the way in which we handle the potential for prejudice.

(Emphasis added.)

However, not only was Dr. Novom not able to make a connection between plaintiff's one-instance use of cocaine and her abusive relationship with her chronic headaches but he testified that "[n]o one in the room" could make that connection and the suggestion was "absurd." He testified that it would be "simplistic" to say that past substance abuse was "causative" of her continuing painful state:

No, it is merely a reflection. It is a manifestation of who Pam Gisiner is and what she is constituted and how she has certain dependencies and needs.

> ... [T]here is no reason to conclude otherwise that they wouldn't spill over into every facet, including her chronic pain states, her chronic depression and unhappiness and the way in which she continues to receive medications for her chronic pain condition.
>
> *So it is not a cause*. It helps us understand. It helps us explain better what she is all about and why she continues to report pain.

(Emphasis added.) On direct examination he testified: "It is not a direct causative role."

On cross-examination, Dr. Novom's responses were flippant, demeaning and insulting. He testified that no one in the universe could predict when any patient is going to have a migraine headache: "[I]t is a crapshoot." Dr. Novom was asked the following questions and gave the following answers:

QCan you say today with any certainty that Pam Gisiner over the past several years does not have the neck pain that she complains of?

AAgain, an utterly absurd argument. She says she has neck pain. Who am I to disbelieve her?

QYou offer no opinion about whether she, in fact, has pain or not. Is that correct?

AThere is no physician, there is no person in this room, that can answer that.

To other questions Dr. Novom responded: "Remarkably sagest conclusion"; "That is a terribly fallacious and absurd statement."

He was also asked the following question and gave the following answer:

QCan you testify to a reasonable degree of medical probability that Pam Gisiner would have developed the symptoms she complains of today if the accident would never have happened?

AI don't think anyone can. There is no crystal ball.

When asked whether he examined plaintiff's head for sensation, Dr. Novom answered: "Are you saying did I stick a pin in her head? I doubt it."

He testified that conducting a test to determine if there is any diminished flow of blood in a patient's neck on someone Gisiner's age "is totally absurd." He also said that he did not conduct a complete neurological examination of plaintiff because "[t]here is no such thing as a complete neurological examination ...."

He agreed that it was possible for a person to be permanently physically impaired without objective signs. His report stated that plaintiff had "[c]hronic myofa[]cial pain state of neck and low back." He also diagnosed "mixed tension vascular headache," and that she had both migraine headaches and muscular tension headaches.

He was asked the following questions and gave the following answers:

QAnd your report doesn't say whether those headaches are related to the accident or not. Does it?

AAsk me.

QPardon me.

AYou heard me. Ask me.

QYour report doesn't say that though, does it?

AThat is all that you see there.

This is typical of Dr. Novom's confrontational style in responding to cross-examination.

In his report, Dr. Novom stated: "Dr. Levine's reference to Ms. Gisiner experiencing no prior head, neck or back injur[ies] or complaints *as relates to the June 1990 motor vehicle accident* is patently false." (Emphasis added.) In fact, what Dr. Levine reported was that: "[Plaintiff] had no prior head, neck or back injuries or complaints prior to the June '90 motor vehicle accident." Therefore, Dr. Novom attributed to Dr. Levine a statement as to plaintiff's pre-existing condition exactly opposite of what he had said in his report. He mumpsimystically refused to admit that he was wrong, conceding only that, "What is wrong is the English may be cumbersome."

Although not qualified as a psychiatrist, Dr. Novom stated his opinion as to the significance of plaintiff's dependence on drugs and her relationship with an abusive significant other. He testified:

> I guess I am trying to emphasize that the way we were is the way that we are, and there is no getting away from it. So past problems with dependencies, abusive relationships, spill over into the way Ms. Gisiner interacts socially and also it reflects in the ways in which she exhibits her chronic pain behaviors and in her needs to reduce that.
>
> Dependent people like to orally gratify and to take substances and medications to reduce the feeling of insecurity. That is what is happening here at this time and taking chronic medications even of narcotic variety for a pain condition.

I conclude that defendant's counsel did not deliver on what she promised the trial court. Dr. Novom was unable to testify that plaintiff's headaches and pain were not related to the accident. He did not attempt to tie plaintiff's complaints to drug addiction or a dependent personality, to any degree of medical certainty or probability. *See* ***McGarrity v. Welch Plumbing Co.***, 104 Wis.2d 414, 430, 312 N.W.2d 37, 45 (1981). Dr. Novom's testimony was unfairly prejudicial to the plaintiff because he painted her as a needy, dependent person who would use narcotics to relieve her feelings of dependency. I conclude that the trial court should have granted plaintiff's motion for a mistrial.

For these reasons, I respectfully dissent.