

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 9, 1995

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(1), 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. 95-1206-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JOEL JOHNSON,

Plaintiff-Appellant,

v.

WISCONSIN CENTRAL LTD.,

Defendant-Respondent.

APPEAL from orders of the circuit court for Portage County:
JOHN V. FINN, Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J., and Vergeront, J.

PER CURIAM. Joel Johnson appeals from pretrial orders by which the circuit court (1) denied his motion to depose opposing witness Edward Walkuch and (2) denied his reconsideration motion to permit his own witness, Dr. Charles Wirtz, to testify at trial. Johnson argues that because the circuit court incorrectly exercised its discretion, we should reverse. For the reasons set forth below, we affirm.

I. BACKGROUND

In November 1989, Johnson, a laborer for Wisconsin Central, Ltd., was injured in the face and chest while removing some nuts and bolts from a rail joint. Trial was originally scheduled for December 1993, but was set over until December 1994. At a hearing on January 13, 1994, Johnson moved to compel Wisconsin Central to comply with his discovery requests, specifically, to clarify the subject matter of Walkuch's proposed testimony, and Wisconsin Central moved to limit Johnson's evidence by excluding evidence from Johnson's expert witness, Dr. Wirtz. The court granted both motions. For ease of exposition, we consider each motion separately.

A. Johnson's motion to compel

On March 28, 1994, and April 4, 1994, Wisconsin Central and Johnson respectively submitted proposed orders to the circuit court. Although Wisconsin Central's order failed to reflect the circuit court's January 13, 1994, ruling that it should comply with Johnson's discovery requests, the circuit court signed Wisconsin Central's version of the order on April 15, 1994.

Despite the omission in the signed order, Johnson did not act to remedy the deficiency until September 28, 1994. On that date, Johnson obtained a hearing date of November 21, 1994, on his motion to reconsider and compel compliance with the order of January 13, 1994. At the hearing on November 21, 1994, the court denied Johnson's order to compel as untimely.

B. Wisconsin Central's motion to exclude evidence

At the January 13, 1994, hearing, the circuit court granted Wisconsin Central's motion to exclude the proposed evidence from Dr. Wirtz about Johnson's neck injury. The circuit court ruled that there was insufficient evidence of causal connection between the facial injuries Johnson sustained at the time of the accident and the neck injury, which became apparent only later. At the time the court entered this ruling, however, a deposition of Dr. Wirtz had been scheduled.

On September 28, 1994, Johnson moved the circuit court to reconsider its ruling excluding Dr. Wirtz's testimony. Johnson indicated that Wirtz's deposition had been taken, and that Wirtz's testimony remedied the earlier lack of causal connection between the neck injury and the facial and chest injuries. At the November 21, 1994, hearing on that motion, the court held that admitting Wirtz's testimony would prejudice Wisconsin Central because Wisconsin Central would have to prepare to try the neck injury issue with only a few weeks left to trial.

II. ANALYSIS

A. Motion to compel

Discovery orders lie within the discretion of the trial court. *Earl v. Gulf and Western Mfg. Co.*, 123 Wis.2d 200, 204, 366 N.W.2d 160, 163 (Ct. App. 1985). Here, the circuit court determined that Johnson's September 28, 1994, motion to compel discovery was untimely. This was not error.

On April 15, 1994, the circuit court filed its order purporting to memorialize its January 13, 1994, decision. However, even if the order wrongly omitted the ruling that Wisconsin Central comply with Johnson's discovery requests, Johnson did nothing to remedy the deficiency between April 15, 1994, and September 28, 1994. Having invited the complained-of error by delaying for five months to object, Johnson cannot complain that the court found his motion untimely. *Cf. Soo Line R.R. Co. v. Office of the Comm'r of Transp.*, 170 Wis.2d 543, 557, 489 N.W.2d 672, 678 (Ct. App. 1992).

B. Dr. Wirtz's testimony

Dr. Wirtz would have testified that Johnson's November 1989 face and chest injuries were related to neck injuries later discovered. This testimony is about injury, and is relevant to damages. However, because the jury found no negligence, any error in excluding Wirtz's testimony was harmless. Stated otherwise, where no negligence is found, testimony about injury and damages is irrelevant, and we need not consider this matter further.

By the Court. – Orders affirmed.

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