COURT OF APPEALS
DECISION
DATED AND RELEASED

SEPTEMBER 23, 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. 96-2569

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

KATHLEEN J. LARSON AND PHILLIP B. LARSON,

PLAINTIFFS-RESPONDENTS-
CROSS APPELLANTS,

V.

ARLITA FURLONG AND AMERICAN FAMILY INSURANCE COMPANY,

DEFENDANTS-APPELLANTS-
CROSS RESPONDENTS,

PROGRESSIVE CASUALTY INSURANCE COMPANY,

DEFENDANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Affirmed.*

Before Cane, P.J., Myse and Nolan, JJ.

PER CURIAM. Arlita Furlong and American Family Insurance Company (collectively Furlong) appeal and Kathleen and Phillip Larson cross-appeal a judgment based on a verdict awarding Kathleen Larson $5,300 for injuries she suffered in a traffic accident.[1] The Larsons argue that the trial court erred when it (1) allowed testimony regarding a prior worker's compensation settlement; (2) precluded testimony from their expert witness regarding the contents of a telephone conversation he had with a previous treating chiropractor; (3) gave the jury the *falsus in uno* instruction; and (4) refused to grant an additur.[2] Furlong argues that the trial court erred when it refused to grant a new trial based on newly discovered evidence and when it found the Larsons' case was not frivolous. We affirm the judgment.

Kathleen Larson was struck from behind by Furlong's car and alleged a back injury that resulted in past and future medical expenses, lost wages, pain and suffering and loss of consortium. Furlong admitted liability. Therefore, the focus of the trial was on damages and Larson's preexisting back ailments. The jury awarded Larson $5,300 for past medical expenses, pain and suffering, disability and lost wages. It awarded nothing for future medical expenses, pain and suffering, loss of earning capacity or loss of consortium.

Referring to Larson's attorney's opening statement in which a previous worker's compensation case was mentioned, Furlong's attorney asked

[1] The judgment was adjusted for costs and, except for Furlong's argument that she was entitled to costs because the action was frivolous, neither party challenges the assessment of costs.

[2] The Larsons also argue that the trial court erred when it allowed discovery documents to be added to the record on appeal. We need not review that issue because the additional documents do not affect our decision on any of the issues raised in this court.

Larson whether she made a claim for that injury and whether she was "compensated into the future." Over the objection of her counsel, Larson answered "yes" to these questions. Larson argues that her previous claim and settlement were irrelevant and prejudicial. We conclude that the nature and extent of the previous injury was relevant and Larson was not prejudiced by reference to the settlement.

Larson's claims for past and future damages raise a legitimate question regarding the scope of her previous injuries. The fact that her previous injuries were found to affect her future employment was relevant to the question of damages incurred in this accident. While her settlement of the previous claim is not relevant, we conclude that Larson has showed no prejudice from the admission of that testimony. Larson argues that this evidence was used to impugn her character by suggesting that she made false claims. Nothing in this testimony indicates that the previous case involved a false claim. Larson's credibility was challenged on the basis of her poor memory, evasive answers, the lack of physical evidence of injury or damage to the cars and her failure to seek medical attention until four days after the accident. The fact that she settled the previous claim was not a substantial factor in the trial.[3]

Larson did not properly preserve the issue regarding the trial court's refusal to allow her expert witness to testify regarding the details of a telephone conversation with the chiropractor who treated Larson after her earlier injury.

[3] Much of Larson's argument is premised on the assertion that evidence of the previous claim served only to impeach her testimony and that it was inadmissible under § 906.08(2), STATS., which prevents the use of extrinsic evidence to impeach a witness's credibility. Testimony regarding the nature and scope of Larson's previous injuries was substantively relevant and not merely used for impeachment. The information was presented by cross-examination of Larson, not by extrinsic evidence.

Larson made no offer of proof to establish the content of the telephone conversation. The jury had already been informed that this witness had called the chiropractor and talked to him regarding his abbreviations and handwriting problems. The expert's opinion, based in part on that conversation, and the underlying medical records themselves were allowed into evidence. In the absence of an offer of proof, we are unable to conclude that the trial court's refusal to allow the details of that conversation had any effect on the verdict.

The trial court properly gave the jury the *falsus in uno* instruction. That instruction is appropriate where a witness willfully gives false testimony as to a material fact. Larson argues that it was not appropriate because her testimony reflected only a defect in memory or mistake. *See* ***State v. Williamson***, 84 Wis.2d 370, 394, 267 N.W.2d 337, 348 (1978). The trial court has discretion regarding the jury instructions it gives. *See* ***State v. Amos***, 153 Wis.2d 257, 278, 450 N.W.2d 503, 511 (Ct. App. 1989). Here, a reasonable view of the evidence would support the proposition that Larson lied about her past and current earnings and earning capacity following her worker's compensation claim, as well as her medical treatment and limitations. When coupled with her memory lapses and the lack of damage to the cars, a reasonable argument could be made that Larson lied about many material facts in her testimony. Therefore, the trial court properly instructed the jury. Nothing in the record supports Larson's argument that the jury was confused on the damage question by the *falsus in uno* instruction.

Because the jury's verdict is supported by credible evidence, the trial court properly exercised its discretion when it refused to grant an additur. *See* ***Martz v. Trecker***, 193 Wis.2d 588, 596, 535 N.W.2d 57, 60 (Ct. App. 1995). The damages as found by the jury are not so low as to shock the conscience. *See* ***Johnson v. Misericordia Community Hosp.***, 97 Wis.2d 521, 567, 294 N.W.2d

501, 524 (Ct. App. 1980). Its verdict awarded Larson minimal damages for a minor traffic mishap. The medical records established chiropractic treatment following the accident, but some of the symptoms were not established to be related to any injury sustained in the accident. It was the jury's task to determine whether Larson suffered a new injury or an aggravation of a preexisting injury, and to compensate her only for the treatment that she could establish resulted from this accident. Larson had been told to stop working as a day-care provider after her previous injury. Some of her chiropractic treatments two years after the accident involved pain in her shoulders, neck, chest and radiating down her arms, even though she claimed only a back injury from this accident. She could not persuasively establish that all of the symptoms she suffered were related to this accident rather than her previous back injuries.

After the trial, Furlong received medical records from the State of Maine indicating that Larson received treatment in 1986 for symptoms similar to those she attributes to this accident. Furlong describes the new evidence as proof that Larson lied in her deposition and at trial. The trial court denied Furlong's motion to reopen the case based on newly discovered evidence because Furlong did not establish sufficient diligence in seeking the information before trial. *See* ***John Mohr & Sons, Inc. v. Jahnke***, 55 Wis.2d 402, 406, 198 N.W.2d 363, 366 (1972). The record supports the trial court's decision. Larson signed blank authorization forms allowing the defense to request any medical records it desired. Months before the trial, Larson provided the defense with sufficient information to identify the doctors who treated her in Maine. By exercising reasonable diligence, all of the information contained in the material discovered after the trial could have been discovered before trial.

Citing ***Ambrose v. General Cas.***, 156 Wis.2d 306, 315, 456 N.W.2d 642, 646 (Ct. App. 1990), Furlong argues that she was not entitled to earlier discovery of these medical records because Larson's deposition testimony indicated that she was only treated by this doctor for pregnancies and pediatrics. Furlong contends that there was no basis for requesting these unrelated records under ***Ambrose***. ***Ambrose*** limited the authority of a court to order a plaintiff to sign medical release forms. ***Ambrose*** does not purport to limit a plaintiff's voluntarily relinquishment of any privacy rights. Upon Larson's signing the release forms and providing sufficient information regarding the name and location of her Maine doctors, the law presented no impediment to Furlong's discovery of all of Larson's medical records.

The trial court properly refused to find Larson's action frivolous. Larson recovered some damages as a result of this lawsuit, and we affirm the jury's finding. It is axiomatic that a successful plaintiff has not pursued a claim that was without any reasonable basis in law or equity. *See* § 814.025, STATS. Whether her entire case was based on lies is a matter the jury has already resolved in her favor. Because the medical records received after the verdict do not meet the test for newly discovered evidence, the trial court properly rejected the argument that these documents establish that Larson's case was frivolously commenced or continued.

Finally, Larson argues that Furlong's appeal is frivolous and that this court should award additional costs pursuant to RULE 809.25(3), STATS. We are hard pressed to determine which of the parties has prosecuted the more frivolous appeal. The parties' briefs contain erroneous citations to the record, wholesale extrapolating of arguments from briefs submitted in the trial court without editing for changes in the opposing party's position or the trial court's ruling, argument on

issues that are not raised, and argument based on mischaracterization of the record and opposing counsel's arguments and gross exaggeration of the positions being taken by each. The briefs are unnecessarily vituperative and shed more heat than light. We decline to reward either party by the assessment of costs in this matter.

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

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