COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1153

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

CRAIG LANGSDORF,

PLAINTIFF-APPELLANT,

V.

MICHAEL HOEFFERLE AND VIKING INSURANCE COMPANY OF WISCONSIN,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Price County: DOUGLAS T. FOX, Judge. *Affirmed.*

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

PER CURIAM. Craig Langsdorf appeals a judgment in his automobile accident lawsuit that awarded him damages against Michael Hoefferle and Viking Insurance Company of Wisconsin. His appeal seeks a new trial in an effort to obtain an increase in the damage award. He challenges two trial court

rulings that he believes had the effect of wrongly depressing the jury's damage award: (1) the trial court erroneously used the hearsay rule, in violation of the business record hearsay exception applied in ***Rennick v. Fruehauf Corp.***, 82 Wis.2d 793, 264 N.W.2d 264 (1978), to exclude from substantive evidence a consulting physician's written report that Langsdorf's chiropractor relied on in giving his expert testimony on Langsdorf's damages; and (2) the trial court should have instructed the jury on the effect its comparative negligence allocation would have on Langsdorf's damage recovery. Langsdorf may also be seeking the hearsay report's admission on the legal theory that the chiropractor relied on the report and as a collateral effect, this reliance rendered the report admissible as substantive evidence. *See* § 907.03, STATS. We reject Langsdorf's arguments and therefore affirm the judgment.

First, Langsdorf waived the business record hearsay exception of § 908.03(6), STATS. He did not sufficiently present it to the trial court. Langsdorf briefly cited ***Rennick*** to the trial court, without citing the business record exception itself. He did not supply the trial court a copy of the ***Rennick*** decision or advise the trial court of its underlying rationale. Langsdorf's trial court argument was inadequate to preserve an issue under § 908.03(6). Without the business record exception, the physician's report was inadmissible hearsay. It was an out-of-court statement offered for the truth of the matter asserted. *See* ***State v. Hilleshiem***, 172 Wis.2d 1, 19, 492 N.W.2d 381, 388-89 (Ct. App. 1992). Langsdorf believes the report is probative of the permanency of his injuries We therefore see no erroneous exercise of evidentiary discretion. *See* ***State v. Sorenson***, 143 Wis.2d 226, 240, 421 N.W.2d 77, 82 (1988).

Second, the chiropractor's reliance on the report does not itself as a byproduct make the hearsay admissible for Langsdorf. Langsdorf mistakes his

evidentiary rights in this situation with those held by adverse parties. For example, the chiropractor's reliance may have permitted an adverse party to probe the expert about the report on cross-examination. *See* § 907.05, STATS.; *see also* ***State v. Weber***, 174 Wis.2d 98, 106-08 & n.6, 496 N.W.2d 762, 766-67 & n.6 (Ct. App. 1993). Courts have also allowed adverse parties to introduce such reports, not as substantive evidence, but for the purpose of the expert's impeachment and in the interest of completeness. *See* ***Vinicky v. Midland Mut. Cas. Ins. Co.***, 35 Wis.2d 246, 151 N.W.2d 77 (1967); *see also* ***Korte v. New York, N.H. & H.R. Co.***, 191 F.2d 86 (2d Cir. 1951) (adverse party may introduce hearsay report). Langsdorf, however, as a nonadverse party, must still meet one of the hearsay exceptions in order to introduce the hearsay report as substantive proof. *See* ***Weber***, 174 Wis.2d at 106-08 & n.6, 496 N.W.2d at 766-67 & n.6. He may not bootstrap the report into evidence as an adjunct to his own expert's testimony, in the absence of a showing that the report itself was an admissible business record under ***Rennick***.

Finally, Langsdorf had no right to tell the jury about the effect its comparative negligence allocation would have on Langsdorf's damage award. Juries must make their negligence allocations on the evidence and the parties' relative culpabilities, free of such extraneous information as the allocation's effect on the damage award. *See* ***McGowan v. Story***, 70 Wis.2d 189, 196-98, 234 N.W.2d 325, 328-30 (1975). If the trial court had allowed this information to have a part in the trial, the trial court would have expressly introduced bias, prejudice, and sympathy into the trial, and the verdict would rest in part on such inappropriate factors. *See* ***id***. It would allow the jury to manipulate the apportionment of negligence to achieve a particular result, regardless of the evidence. ***Id***. The Wisconsin Supreme Court has long prohibited such matters,

see ***Ryan v. Rockford Ins. Co.***, 77 Wis. 611, 46 N.W. 885 (1890), and the legislature has never authorized otherwise. In short, Wisconsin's comparative negligence law does not authorize litigants to introduce such material into the trial.

By the Court.—Judgment affirmed.

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