COURT OF APPEALS
DECISION
DATED AND FILED

February 25, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0040 **Cir. Ct. No. 00-CV-000019**

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

LARRY J. BAUER,

PLAINTIFF-APPELLANT,

V.

MERLIN R. CAROTHERS AND AMERICAN STANDARD INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

INDIANA INSURANCE COMPANY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Larry Bauer appeals a judgment dismissing his personal injury claim following a jury verdict finding that the auto accident did not cause his injury. He contends the court submitted a defective verdict and he is entitled to a new trial in the interest of justice. He further claims the trial court made evidentiary errors and the evidence establishes that the auto accident caused his injuries. We reject his arguments and affirm the judgment.

¶2 Bauer brought this action to recover damages for injuries he suffered when the auto in which he was a passenger was rear ended by an auto driven by a drunk driver, Merlin Carothers. Bauer's doctor initially treated him for neck and shoulder pain, but his shoulder pain worsened. After additional tests, a specialist discovered a torn rotator cuff.

¶3 At trial, Dr. Gerald Harris, a biomedical engineer, testified that the amount of force produced by the accident was insufficient to cause a torn rotator cuff. Consistent with this testimony, the jury returned a verdict finding no causal connection between Bauer's torn rotator cuff and the accident. The court entered judgment on the verdict and dismissed the complaint. Bauer appeals.

¶4 Bauer first argues that the trial court submitted a defective verdict because the verdict inquired only about Bauer's rotator cuff injury and failed to address his neck and other injuries. He concedes that he failed to raise a timely objection as required by WIS. STAT. § 805.13(3),[1] but contends he is entitled to a new trial in the interest of justice because the real issue in controversy was not

[1] WISCONSIN STAT. § 805.13(3) provides in part: "Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict." All statutory references are to the 1999-2000 version unless otherwise noted.

fully tried. *See* WIS. STAT. § 752.35. Bauer reasons the real controversy was not fully tried because there was evidence he also received other injuries, such as to his neck. Bauer nonetheless concedes that "the majority of the evidence at [t]rial focused on the rotator cuff," although he also suffered pain and stiffness in his neck radiating to his right shoulder.

¶5 Under WIS. STAT. § 752.35, we have discretionary authority to reverse judgments in the interest of justice when the real controversy was not fully tried or for any reason where justice has miscarried. When the real controversy was not fully tried, there is no requirement that we find a probability of a different result on retrial. ***State v. Watkins***, 2002 WI 101, ¶97, 255 Wis. 2d 265, 647 N.W.2d 244. Our power under this section should be "exercised sparingly and with great caution." *See* ***id.*** at ¶79. Here, the record leaves us unconvinced that we should exercise our discretionary power under § 752.35.

¶6 As Bauer points out, the majority of the evidence at trial focused on the rotator cuff injury. Both the trial court and Bauer's counsel's observations at motions after verdict were consistent with this view. The trial court observed: "[W]e're talking about whether this accident tore his rotator cuff and he may have had some other things with sore neck and everything but the whole thing we tried this case over was the shoulder injury." Bauer's counsel clarified: "Not shoulder, the rotator cuff. That was the primary crux of the case whether the rotator cuff tear was caused by the injury, by the accident." The trial court determined that Bauer had testified to "some stiffness and soreness and so forth, but when all was said and done the whole focus of everything was rotator cuff." At trial, Bauer himself testified that the neck pain "took a couple weeks" and "got better." In light of this record, we are satisfied that the real controversy involved the rotator

cuff injury, which was fully tried and decided by the jury. Consequently, we decline to exercise our discretionary power to reverse in the interest of justice.

¶7 Next, Bauer argues the trial court erroneously rejected evidence showing Carothers' intoxication at the time of the accident. At the motion in limine hearing, Carothers stipulated his negligence caused the accident and accepted Bauer's version of the circumstances of the accident. Defense counsel stated:

> The only dispute, the only issue before this Court is whether this very minor impact accident could have caused a rotator cuff tear and we will be presenting a biomedical engineer to talk about the biomechanics and medical causation question on that and he will accept that there were two hits and he will accept the body position and everything as described by Mr. Bauer himself.

¶8 The court expressed concerned over the relevance of intoxication evidence. The court pointed out that, for purposes of the trial, evidence of the circumstances of the accident would not be in dispute. Given Carothers' concessions, the court inquired what would be the purpose of the evidence of intoxication other than "to hope that the jury decides to punish the guy for drunk driving?" The court determined that due to Carothers' concessions, evidence of intoxication lacked relevance. We agree.

¶9 "Ordinarily, a trial court's decision to admit or exclude evidence is a discretionary determination." ***State v. Donner***, 192 Wis. 2d 305, 311, 531 N.W.2d 369 (Ct. App. 1995). We will not upset the ruling on appeal if the court had a reasonable basis for the ruling and if it was made in accordance with accepted legal standards and in accordance with the facts of record. ***Id.***

¶10 Here, the trial court offered a rational basis for excluding evidence of intoxication. Relevant evidence is that evidence "having any tendency to make the existence of any fact *that is of consequence to the determination* of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01 (emphasis added). The court rationally concluded that because the circumstances of the accident were not in dispute and Carothers' admitted liability, the only issues were causation and damages. Consequently, we agree the proffered evidence was not probative of a fact of consequence.[2]

¶11 Bauer further argues that the trial court erroneously admitted Harris's testimony relating to causation. Bauer contends that Harris's testimony lacked foundation and that Harris was not qualified to interpret x-rays or magnetic resonance imaging. Bauer further complains the witness failed to estimate the speed of the vehicles at the time of impact.

¶12 We conclude that the trial court properly permitted Harris, a biomedical engineer, to give expert opinion testimony. Evidentiary issues are reviewed for a misuse of discretion. *See* ***Donner***, 192 Wis. 2d at 317. Under WIS. STAT. § 907.02, the court may permit expert testimony "[i]f scientific, technical, or other specialized knowledge [would] assist the trier of fact to understand the evidence or to determine a fact in issue."

¶13 Wisconsin law holds that "[a]ny relevant conclusions which are supported by a qualified witness should be received unless there are other reasons

[2] A case on which Bauer relies, ***Abernathy v. Eilertson***, 125 Wis. 2d 572, 373 N.W.2d 85 (Ct. App. 1985), is unpublished, may not be cited, and is not precedent. *See* WIS. STAT. RULE 809.23(3). In any event, it would not apply because the evidence of drunkenness was relevant to punitive damages, not a claim made here.

for exclusion." ***Donner***, 192 Wis. 2d at 316. "Stated otherwise, expert testimony is admissible in Wisconsin if relevant and will be excluded only if the testimony is superfluous or a waste of time." ***Id.***

¶14 The question of an expert witness' qualifications is a matter resting in the sound discretion of the circuit court, and unless it is shown the court misused its discretion, its ruling will stand. ***Id.*** at 317. If the witness is qualified, the next requirement is that the evidence itself be relevant. ***Id.*** Relevancy is satisfied if the evidence assists the trier of fact in understanding the evidence or a fact in issue. ***Id.***

¶15 Harris testified that a biomedical engineer applies engineering principles to biological systems, in this case the human musculoskeletal system. A registered engineer, Harris's qualifications included a B.S. degree in mechanical engineering from the United States Naval Academy and a Ph.D. in biomedical engineering from Marquette University. Harris teaches and performs research at Marquette University and the Medical College of Wisconsin, where he works as the Director of Research and the Department of Orthopaedic Surgery. He also works at the motion analysis lab at the Shriners Hospital in Chicago, dealing with gaits of children, as well as shoulder, elbow and wrist motion. Harris has performed analyses of shoulder, elbow and wrist motion for professional athletes, including a well-known Green Bay Packers quarterback. He also has provided motion analyses for Milwaukee Brewers' pitching staff. Harris has received awards and honors for his research. He testified he also serves as a biomedical litigation consultant for plaintiffs and defense attorneys. Based upon these credentials, the trial court reasonably exercised its discretion in permitting Harris to provide opinion testimony in the area of biomedical engineering.

¶16 Bauer argues that Harris offered no foundation for his opinion that the collision lacked sufficient force to injure Bauer's rotator cuff. We are unpersuaded. Harris testified that he reviewed extensive information regarding the facts of the accident, including Bauer's deposition, insurance company records, investigating officers' reports, medical records, the ambulance report, the emergency room report and the invoice from the auto body repair shop in the sum of $425. Bauer's challenge goes to the weight, not the admissibility, of Harris's testimony. Because Harris is a qualified expert and his testimony is relevant, the court did not err by admitting it.

¶17 Finally, Bauer argues the evidence supports only one probable conclusion, namely, that the accident was the cause of the rotator cuff tear and the other injuries Bauer claimed. In making this argument, Bauer misperceives the function of the appellate court. We do not look for evidence the jury could have relied on to reach a contrary verdict. *See* ***Estate of Dejmal***, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). Rather, we review the record to find evidence that the fact-finder could rely on in reaching its verdict. ***Id.*** The jury is entitled to assess the weight and credibility as it saw fit. *See* ***id.*** Here, Harris testified that the accident produced insufficient force to produce the claimed injury to Bauer's rotator cuff. The jury accepted this testimony and, consequently, its verdict will not be overturned for insufficiency of the evidence.

By the Court.—Judgment affirmed.

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