COURT OF APPEALS
DECISION
DATED AND FILED

January 30, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP521 **Cir. Ct. No. 2010CV392**

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

JULIE A. REDFEARN, CHRIS A. REDFEARN, BAILEY M. REDFEARN AND JOSHUA D. REDFEARN,

PLAINTIFFS-APPELLANTS,

V.

ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Grant County: CRAIG R. DAY, Judge. *Affirmed*.

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Julie Redfearn appeals the judgment in a personal injury lawsuit awarding her $10,000 for past pain and suffering, and dismissing the derivative claims of her husband and children. Redfearn also appeals the order denying her motions after verdict for additur or, in the alternative, a new trial.

Redfearn argues that the circuit court applied the incorrect standard when denying her request for additur. She also claims that the cumulative effect of prejudicial and improper statements at trial warranted a new trial in the interest of justice. We reject these arguments and affirm the judgment and the order.

BACKGROUND

¶2 Redfearn was the driver of a car rear-ended by Jamie Burlison's vehicle. Redfearn filed suit against Burlison and Burlison's insurer, Allstate Property and Casualty Insurance Company, claiming her injuries were "permanent in nature," and seeking damages for past and future pain and suffering. At trial, Allstate did not dispute that Burlison was liable for the collision or that Redfearn sustained a degree of injury in the accident. However, Allstate took the position that Redfearn suffered only temporary injury.

¶3 During opening and closing statements to the jury, Redfearn suggested an award of at least $1.5 million. Allstate suggested the jury award Redfearn $30,000 for past pain and suffering, nothing for future pain and suffering, $5,000 to Redfearn's husband for past loss of consortium, and $1,000 to each child for past loss of society and companionship. The jury returned a verdict of $10,000 for Redfearn's past pain, suffering, disability, and loss of enjoyment of life; nothing for future pain and suffering; and nothing for the family's derivative claims. Redfearn's post-verdict motions for either additur or a new trial were denied after a hearing. This appeal follows.

DISCUSSION

Additur

¶4 A circuit court may grant additur if it "determines that a verdict is … inadequate, not due to perversity or prejudice or as a result of error during trial." WIS. STAT. § 805.15(6) (2011-12).[1] In reviewing a jury award, we may not substitute our judgment for that of the jury and are limited to determining whether the award is within reasonable limits. ***Frayer v. Lovell***, 190 Wis. 2d 794, 813, 529 N.W.2d 236 (Ct. App. 1995). "If there is any credible evidence to support the jury's finding as to the amount of damages, we will not disturb the finding unless the award is so unreasonably low that it shocks the judicial conscience." ***Id.*** Where the circuit court approves the amount of damages, we will set aside the verdict only if an erroneous exercise of discretion is evident. ***Id.***

¶5 Here, Redfearn asserts that the circuit court erroneously exercised its discretion by applying the incorrect standard when determining whether additur was appropriate. We disagree. In determining whether a jury award is excessive or inadequate, the circuit court must view the evidence as a whole in a light most favorable to the verdict. *See* ***Page v. American Family Mut. Ins. Co.***, 42 Wis. 2d 671, 681-82, 168 N.W.2d 65 (1969).

¶6 At the hearing on post-verdict motions, the circuit court acknowledged that it "'should review all the evidence on damages and view the evidence in a light most favorable to the jury verdict,'" adding that it was not

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

permitted to substitute its judgment "for the judgment of the jury if it is within the range of available jury verdicts given the totality of the evidence." (Quoted source omitted.) The court determined:

> Here the jury's verdict plainly was based upon a conclusion by the jury that there was not any component of future pain and suffering. There was evidence in the record to support that finding. Both in [the testimony and opinion of Allstate's expert, Dr. Sridhar Vasudevin] and in the general lay evidence that was presented on cross-examination in respect to the activities, the motorcycle trip and so on which Ms. Redfearn participated in.[2] Certainly, there was ample evidence to contradict the assertion that there is no future pain and suffering. But viewing the evidence in a light favorable to the jury, I cannot conclude that that result was unsupportable.
>
> Similarly, the jury plainly concluded that the claims for loss of society and companionship and for loss of consortium were not supported by the evidence and there was evidence by which those determinations can be sustained. Those are probably not the answers the Court would have given had it been a one person jury of me, but that's not a standard under which I am to look at this.

After further discussion regarding the proper standard to apply when determining whether additur is appropriate, the court added:

> The jury could have, under the circumstances with the testimony of the children, the testimony of Mr. Redfearn, concluded that there was not any appreciable loss of society or companionship here. The mother was engaged with the children, Ms. Redfearn was still active in her relationship with her husband, although there was testimony that he was picking up the additional burdens due to her health. It is again contrary to my opinion, but it

[2] The appellant failed to provide this court with trial testimony of the lay witnesses. It is the appellant's responsibility to ensure that the record is complete, including providing relevant trial transcripts. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993). When the record is incomplete, "we must assume that the missing material supports the trial court's ruling." ***Id.*** at 27.

> doesn't shock my conscience to the degree that I believe I am authorized to upset the jury's decision.
>
> They heard testimony for three days. They deliberated. I don't remember exactly how long, but it wasn't as if they came back in ten minutes leading the Court to think they hadn't thought about it or given it an honest effort.
>
> So, I am going to sustain the jury's verdict in that respect. In terms of [past] pain and suffering, $10,000 is de minimis. But it is the jury's determination of what they found it to be worth. There [was] no evidence of lost earnings, those kind of things.... I guess they just decided that hurting isn't worth that much.
>
> … There is credible evidence to support the verdict, an assessment of general damages is as unquantifiable as we can get and the verdict will not be upset.

¶7 Although Redfearn asserts that the circuit court improperly applied the "any evidence or scintilla" standard, the record belies this claim. The court viewed the evidence as a whole, in a light most favorable to the jury's verdict, and ultimately determined "[t]he verdicts are not against the great weight of the credible evidence." While acknowledging that there was conflicting testimony regarding Redfearn's claim for future pain and suffering, as well as the family's derivative claims, the court properly deferred to the jury as fact finder. The credibility of witnesses and the weight given to their testimony are matters for the jury. ***Bennett v. Larsen Co.***, 118 Wis. 2d 681, 706, 348 N.W.2d 540 (1984).

¶8 With respect to the $10,000 award for past pain and suffering, the circuit court noted there was no evidence of lost earnings and acknowledged the difficulty in quantifying general damages. To the extent Redfearn emphasizes that the jury's award fell below the award suggested by Allstate, the jury was instructed that arguments and opinions of counsel are not evidence, and we presume the jury followed the instructions given. ***Ford Motor Co. v. Lyons***, 137

Wis. 2d 397, 457 n.20, 405 N.W.2d 354 (Ct. App. 1987). Because the record shows that the circuit court properly exercised its discretion when determining the verdict was within reasonable limits and was not contrary to the great weight of the credible evidence, we affirm the denial of Redfearn's motion for additur.

Motion for a New Trial

¶9 Redfearn alternatively argues that the circuit court erroneously denied her WIS. STAT. § 805.15(1) motion for a new trial.[3] We owe great deference to a circuit court's decision denying a new trial because the circuit court is in the best position to observe and evaluate the evidence. *See* ***Sievert v. American Family Mut. Ins. Co.***, 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct. App. 1993). Thus, we will not disturb the circuit court's decision absent an erroneous exercise of discretion. ***Id.***

¶10 Redfearn asserts that the cumulative effect of prejudicial and improper statements at trial warranted a new trial in the interest of justice. Specifically, Redfearn challenges comments Allstate's counsel made during both opening and closing statements, as well as remarks made by Allstate's expert witness. As noted above, Redfearn's counsel suggested an award of at least $1.5 million during opening and closing statements. During his opening statement, Allstate's counsel stated:

[3] WISCONSIN STAT. § 805.15(1) provides, in part:

> A party may move to set aside a verdict and for a new trial because of errors in the trial, or because the verdict is contrary to law or to the weight of evidence, or because of excessive or inadequate damages, or because of newly-discovered evidence, or in the interest of justice.

> There's one reason and one reason alone that [Redfearn]'s attorney in his opening statement used the real dollar figure, one point five million dollars—because this case is about number one, money. And [Redfearn]'s attorney, by offering that amount in his opening statement is trying to sensitize you to asking for that amount later, or more realistically … asking for one point five million dollars now to only ask you later that this is perhaps a one hundred thousand dollar case, two hundred thousand dollar case, three hundred thousand dollar case, etc. It's an old lawyer trick, start high, end low and it will appear that you are reasonable…. You're trying to be sensitized to something for the big punch later. Watch out for it.

¶11 At the end of his opening statement, Allstate's counsel again reiterated that the case was about money, "[a]nd by that opening statement, an awful lot of it." Then, during closing statements, Allstate's counsel stated that he stood by what was said during opening statements, repeating that the case was all about money and the $1.5 million suggestion was "a lawyer trick" used to "sensitize" and "manipulate" the jury in an attempt "to deny justice by enriching, not compensating [Redfearn]." Counsel added: "Make no mistake. [Redfearn's attorney]'s an advocate. He has a vested interest in this case."

¶12 Improper argument by counsel is not presumed to be prejudicial. ***Roeske v. Schmitt***, 266 Wis. 557, 572, 64 N.W.2d 394 (1954). Instead, a new trial based on improper argument of counsel is only warranted if it "affirmatively appear[s] that the remarks operated to the prejudice of the complaining party." ***Wagner v. American Family Mut. Ins. Co.***, 65 Wis. 2d 243, 249-50, 222 N.W.2d 652 (1974). In other words, the circuit court must be convinced that the verdict would have been more favorable to the complaining party but for the improper argument. ***Id.*** at 250.

¶13 As noted above, the jury was instructed that arguments and opinions of counsel are not evidence, and we presume the jury followed the instructions

given. Moreover, as the circuit court concluded, counsel's statements were not "of such a tenor or magnitude to prejudice the jury," especially in the context of the evidence presented. The circuit court attributed the jury verdict to Redfearn's strategic choices at trial—noting that the suggestion of a $1.5 million damage award was a "significant moment in this case." The court recounted that the jury looked "astounded" at counsel's suggestion and, citing the Warshafsky Trial Handbook for Wisconsin Lawyers, the court added that arguing for an excessively high or low award may have the effect of "'putting counsel's own credibility and that of the client in jeopardy by the obvious absurdity of the suggestion.'"

¶14 Further, while Allstate's expert was present at trial and offered his opinion in person, Redfearn made the strategic decision to read portions of her experts' depositions into the record rather than calling them to appear at trial. Redfearn also failed to present any evidence of lost earnings to support a substantial damage amount. Additionally, there was lay witness testimony regarding Redfearn's activities, including a motorcycle trip, and other evidence to support the jury's apparent conclusion that Redfearn remained active in her relationship with her husband and suffered no appreciable loss of society or companionship with her children. Although Redfearn emphasizes contradictory evidence to support her damage claim, the credibility of witnesses and the weight given to their testimony are matters for the jury. ***Bennett***, 118 Wis. 2d at 706. Given the evidence presented, there are no grounds to conclude that counsel's statements prejudiced the verdict.

¶15 Turning to the testimony of Allstate's expert witness, Dr. Sridhar Vasudevin, Redfearn characterizes Vasudevin as "combative and unresponsive when questioned about his potential bias as an expert witness hired by the defense." Redfearn recounts that Vasudevin responded, "[w]ell, I think [counsel],

you're making money here, too[,]" and "[counsel], the jury should know how much money you're making too." The circuit court rejected Redfearn's claim that Vasudevin's comments prejudiced the outcome, noting that Vasudevin's "emotionally loaded" responses were prompted by "emotionally loaded" questions. The court further intimated it was unlikely Redfearn was prejudiced by Vasudevin's testimony as the court "expected the jury to be pretty turned off by [Vasudevin] given his demeanor." In light of the evidence supporting the verdict, as discussed above, we conclude that the challenged statements by both counsel and Vasudevin, even when considered cumulatively, do not warrant a new trial.[4]

By the Court.—Judgment and order affirmed.

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

[4] To the extent Allstate claims Redfearn's arguments should be rejected on procedural grounds, we need not address these claims. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (only dispositive arguments need to be addressed).