

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 30, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1377

Cir. Ct. No. 2011CV16998

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

DEMESHA WOODS,

PLAINTIFF-APPELLANT,

v.

**GREGORY ROUSE, ROUSE TRUCKING AND INTEGRITY MUTUAL
INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
PAUL R. VAN GRUNSVEN, Judge. *Affirmed.*

Before Kessler, Brennan and Bradley, JJ.

¶1 BRADLEY, J. Demesha Woods appeals the dismissal of her personal injury case against Gregory Rouse, Rouse Trucking, and Integrity Mutual Insurance Company after a jury found Rouse's negligence did not cause Woods

any injury. Woods argues the trial court erroneously exercised its discretion when it declined to give the aggravated injury jury instruction, WIS JI—CIVIL 1710.¹ Because the jury found the accident did not cause Woods’s injuries, Woods was not prejudiced by the trial court’s decision; therefore, we affirm.

BACKGROUND

¶2 On July 6, 2010, Woods, who lives in Florida, was in Milwaukee to pick up her brother. She was stopped in her rental car at a traffic light when Rouse, who was driving a company dump truck, rear-ended her. The airbags did not deploy in either vehicle, and the sheriff at the scene reported that Woods said she was okay, and did not have any injuries. Woods’s passenger, Phillip Hull, and Rouse both reported that they were not injured. The sheriff reported the accident as a property damage only accident. The sheriff described the damage to the rear left bumper of Woods’s rental car as moderate. The car was drivable, and returned to the rental car company the next day. The cost to repair the rental car was \$1487.10.

¶3 On August 4, 2010, Woods sought medical care for the first time since the accident. She reported experiencing neck pain and headaches to her

¹ WISCONSIN JI—CIVIL 1710 provides:

AGGRAVATION OF INJURY BECAUSE OF MEDICAL NEGLIGENCE

If (plaintiff) used ordinary care in selecting (doctor) [which (he) (she) did in this case] and (doctor) was negligent and (his) (her) negligence aggravated the (plaintiff)’s injury(ies) (failed to reduce the injury(ies) as much as (it) (they) should have been), (plaintiff)’s damages for personal injuries should be for the entire amount of damages sustained and should not be decreased because of the doctor’s negligence.

chiropractor, Dr. Steven Horowitz, who diagnosed her with accident-related cervical sprain/strain, thoracic sprain/strain, lumbar sprain/strain and cephalgia. On the chiropractic intake form, she indicated that her symptoms began in the past week and she had the same symptoms in 2008.

¶4 Woods also sought treatment with orthopedic surgeon Dr. Gerald Stashak, a pain management specialist, Dr. Mohan Gulati, and a spinal surgeon, Dr. Thomas Roush. Ultimately, Woods had two spinal surgeries performed by Dr. Roush, who opined that Woods's injuries were a result of the car accident.

¶5 In October 2011, Woods sued Rouse, Rouse Trucking and Integrity Mutual Insurance, alleging that Rouse's negligence caused her injuries. Rouse hired orthopedic surgeon, Dr. Stephen Robbins, to do a medical evaluation of Woods. Dr. Robbins' initial opinion was that the accident caused a cervical strain, but there was no evidence of a herniated disc or need for surgical intervention. Dr. Robbins' final opinion, however, was that Woods "did not sustain any injury as a result of the claimed motor vehicle accident of July 6, 2010." His opinion stemmed from the following:

- The car accident was a minor one with "no report of any neck complaints" at the scene.
- Woods "did not seek medical attention for a duration of one month."
- The medical records suggest "her condition is reflective of a pre-existing condition."
- If an injury occurred from the motor vehicle accident, Woods would have sought treatment "within a period of one to two weeks."

- The surgeries related to a pre-existing “discogenic neck pain and are unrelated to the motor vehicle accident.”

¶6 The case was tried to a jury. Dr. Roush testified by video-deposition. He told the jury:

- After examining Woods, he diagnosed her with disc disruption at C3-4 and C4-5, left C5 and 6 radiculopathy, and mechanical mid and low back pain.
- In his opinion, the July 6, 2010 accident was a cause of her cervical problems. This opinion “was based primarily on the objective and subjective tests and her reporting that she had persistent back pain since that accident.”
- He did disc replacement surgery on Woods in February 2011, after which her neurological symptoms resolved, but she had some residual pain.
- He did a rhizotomy to deaden the nerves in August 2012 for the purpose of relieving the residual pain.
- Woods has a permanent injury based on the piece of metal in her neck from the surgery, and will continue to need treatment including medications, therapy and follow-up surgery.

On cross-examination, Dr. Roush said:

- Woods told him she had lower back pain so if she testified in deposition that she did not, that would be new information to him.

- The disc replacement surgery was primarily to “reduce the radicular pain into her left arm.”
- His opinions may be affected based on the truthfulness of his patients and the information they give him.
- He did not have access to Woods’s medical records, he did not see the police report, and he did not know that Rouse and Hull reported the impact was so minor they did not even know an impact had occurred.
- He would expect a patient to have radicular symptoms within the first few weeks after the accident if the accident was the cause of the symptoms.
- The records show Woods specifically denied having any radicular symptoms when Dr. Stashak asked about that type of pain.
- He did not know that Woods reported to Dr. Horowitz that her symptoms started a week before August 4, 2010, that she had the same symptoms in 2008, and that she did not mark neck pain as a complaint.
- He did not know she dislocated her left shoulder in November 2010.
- Her C3-4 disc problem could have preexisted the July 6, 2010 accident, but the C4-5 disc problem was new.
- Woods had good results after treating with him and reported her “pain was tolerable and quite minimal.”

¶7 Woods's expert witness, engineer Dr. John Derosia, testified:

- Rouse's hired expert Robert Krenz's opinion that impact velocity was five miles per hour or less was incorrect.
- In his opinion, the impact "velocity occurred at velocity of between 6 and 12 miles per hour."
- This impact velocity is sufficient to have caused Woods's injuries.

On cross-examination, he conceded:

- In forming his opinions, he completely disregarded Rouse's testimony that it was such a minor accident Rouse did not even know if he had actually made contact with Woods's car.
- If Woods's problems started a week before her August 4, 2010 visit to the chiropractor, the motor vehicle accident did not cause her injuries.
- If Woods had pulled forward an extra twenty-two feet, the accident would not have happened.
- If Woods had her head up against the headrest, it is unlikely she would have been injured.

¶8 Woods testified:

- She had stopped her rental car for a red light at the intersection of Hwy 145 and Fond du Lac Avenue when she saw a truck coming up fast behind her.

- She closed her eyes, folded her hands to pray and did not lean back against the seat.
- When Rouse's truck hit her, it pushed her car out into the intersection and she hit her head on the steering wheel.
- She pulled her car over to the side of the road, got out, and saw a dent on the driver's side rear of the car.
- After the accident, she had extreme headaches in her "upper neck and then like the middle of my neck, my head, in the back." She took some over-the-counter pain medications but nothing helped. She did not go to the doctor because she hoped it would get better.
- The day after the accident, she flew home to Florida where she felt "miserable" with "real bad headaches" and described her neck having pain she had "never experienced" before.
- She had been in a car accident in 2008 and had been treated for back problems.
- Her pain got worse, so on August 4, 2010, she went to chiropractor Dr. Horowitz. The treatment helped for a period of time, but would wear off.
- In mid-September 2010, she also went to see orthopedic surgeon Dr. Stashak because the pain in her neck, lower back and mid back was "getting worse and worsen."
- She also started seeing a pain specialist, Dr. Gulati, who gave her injections that helped but wore off.

- In January 2011, she went to see a spinal surgeon, Dr. Roush, because she felt “[h]orrible” with “pain shooting from my lower -- from my neck on down to my mid back.” Dr. Roush did two surgeries and she felt better.
- Currently, she has good days and bad days, often tied to the weather. She feels better in Florida than in Wisconsin.
- She feels “almost back to normal” every other day in Florida. On the off days, “It’s not as bad as it was, but my neck does stiffen up a little bit.”
- She was not seeing any doctors at the time of trial, but was told she will need to repeat the spinal surgery sometime in the future.

On cross-examination, Woods testified:

- The surgery by Dr. Roush did help her. She acknowledged that at her deposition in October 2012, she testified the surgery did not help her, and her pain was ten on a scale of ten, 98% of the time.
- On the day of the accident, she was stopped at the stoplight for three to five minutes when she saw the truck coming and “braced” herself.
- At her deposition, she said her hands were on the steering wheel and her foot was on the brake at the time of impact, which differs from her trial testimony that her hands were folded in prayer.
- She thought about moving into the intersection when she saw the truck coming up behind her but decided not to even though there was no traffic because she thought she would get a ticket.

- Her head hit the steering wheel because even though she had her seatbelt buckled, she had the strap under her armpit instead of across her shoulder.
- She did not have “any cuts, bumps or bruises” on her head after it hit the steering wheel.
- She thinks her passenger, Phillip Hull, testified her car hardly moved on impact because Hull was a drug user. Hull was not injured in the accident.
- She told the deputy sheriff she had a headache but did not need medical attention.
- She was in a “significant accident” when she was twelve or thirteen years old which injured her left shoulder, and another car accident in 2005 which hurt the left side of her head, and another car accident in 2008, after which she treated with a chiropractor for a back injury.
- When she went to see Dr. Horowitz on August 4, 2010, she wrote on the intake form that her symptoms started “this past week” and she had “the same thing” in 2008.
- When she saw Dr. Stashak, she told him she had lower back issues from the 2008 motor vehicle accident that got better with chiropractic treatment until 2009.
- In November of 2010, she dislocated her shoulder when a man physically attacked her, and she was in a lot of pain at the emergency room.

- She does not remember going to Dr. Stashak's office on September 15, 2010, before her scheduled appointment for "exquisite neck and upper back pain that started last night" as noted in her medical records.
- Her pain has resolved except "every now and then and due to the weather."

¶9 The deputy sheriff, Edwin Miller, who responded to the accident scene was not available to testify at trial, so his deposition was read to the jury. In it, he testified that this was a property damage only accident, all parties told him they were okay, and there were no injuries. He described the damage to Woods's car as moderate because a touch to a bumper can be over \$1000 to repair. Minor damage would be a scratch that "paint can touch it up." Moderate damage "is when there's actual metal bending where a bumper can be pushed in or there can be quarter panel damage or a light can be fixed." He thought Rouse's explanation that he had "tapped" Woods's car was accurate because "when a dump truck hits you, it doesn't have to hit you very fast to cause some damage. So I can't imagine that he was going very, very fast around that corner."

¶10 Woods's chiropractor, Dr. Horowitz, testified by video-deposition. He testified:

- In his opinion, Woods "sustained a partial, permanent impairment to the cervical spine as a result of injuries sustained in the July 6, 2010 motor vehicle accident.
- At Woods's first office visit on August 4, 2010, Woods wrote that her symptoms started during the past week, she had the same

symptoms in 2008, and she did not mark that she had pain in her neck, but marked headaches and low back pain. Although Woods did not mark on the form that she had neck pain, she told Dr. Horowitz that she did.

- Woods did not have any radicular pain (pain in her neck shooting down into her arms).
- Woods told him her lower back was injured in the accident and that she did not have any prior cervical related injuries before the July 6, 2010 accident.
- The chiropractic treatment helped her and he does not have any explanation for why Woods would testify that she got no relief at all from his treatment.
- A certain percentage of the population has asymptomatic bulging discs, and Woods's bulging disc could have been caused by the 2008 motor vehicle accident.

¶11 The jury also heard testimony from the three expert witnesses hired by Rouse: Mr. Robert Krenz, an engineer who does accident reconstruction, Dr. Robert Weber, who has a Ph.D in mechanical engineering, and Dr. Robbins. Krenz reviewed the accident report, photographs of Woods's car, the repair estimate for the vehicle, and the depositions of Woods, Rouse and Hull. He testified that in his opinion, the impact velocity occurred at five miles per hour or less, and explained that impact velocity is "not absolute speed but how the speed is changed." He testified that in accident reconstruction, they "use how the speed of the vehicles change[] to describe the severity, rather than the absolute speeds."

Krenz explained how he reached his opinion based on the damage to Woods's car and the repairs needed:

Well, in this case I have not only the damage that I see to the vehicle, but I have the physical damage in the photographs, but I have the repair estimate. When I look at the photos, I see that the rear bumper bar itself is clean, untouched, undeformed.

And when looking at the repair estimate, lo and behold, there's no call for any type of repair, type of replacement of that bumper bar. That makes sense.

Likewise, when I look at the repair estimate, there is no indication of any repair or replacement of the bumper energy absorber which is consistent with the damage not even occurring to the area behind that, the bumper bar itself.

¶12 Dr. Weber was hired to do the biomechanical analysis. He testified that he did not have Krenz's analysis when he gave a preliminary opinion saying impact velocity could have been ten miles per hour or slightly more. He told the jury that using Krenz's five miles per hour calculation, "the probability of any long-term injuries from this particular impact ... are very, very, very small." Dr. Weber also told the jury about studies using human volunteers where they measure the force in the cervical region from two miles per hour up to ten miles per hour and "none of those individuals had what we call long-term or residual injuries."

¶13 Next, the jury heard the testimony of Dr. Robbins by video-deposition. He testified that he did a medical examination of Woods and initially believed she had a cervical strain from the July 6, 2010 accident that would resolve on its own. According to Dr. Robbins, however, his initial impression did not take into account that Woods did not have pain complaints at the time of the accident, the accident was minor, and she had no radicular symptoms. He testified

that if the accident caused Woods's injury, he would expect her to seek treatment within a week or two, especially if the accident caused a herniated disc requiring surgery. Further, he said when he looked at the "MRI scan, there was no evidence of herniated disc," and any disc bulging on the scan was "clearly preexisting." He also found significant that Woods did not have any radicular pain for at least six weeks after the accident. Dr. Robbins told the jury that in his opinion, Woods did not suffer any injury as a result of the car accident on July 6, 2010. During his cross-examination, Dr. Robbins conceded he had reviewed Woods's medical records from Dr. Horowitz, Dr. Gulati, Dr. Stashak, and Dr. Roush, and he knew that all of these doctors believed Woods had sustained injury from the July 6, 2010 accident. Woods's attorney pointed out that Dr. Robbins had changed his opinion from the accident causing some injury to the accident not causing any injury. Woods's attorney read Dr. Robbins' first report into the record, and vigorously cross-examined Dr. Robbins about changing his opinion—even pointing out that Dr. Robbins' opinion changed only after a phone call and visit from Rouse's attorney asking Dr. Robbins to "take a second look at the accident to make sure" he "really understood what was going on."

¶14 Rouse was the last witness to testify. He told the jury:

- When he came around the corner at the intersection of 145 and Fond du Lac Avenue, he saw Woods's car stopped and he braked. As he got to the intersection, the light turned green and Woods proceeded through the intersection and pulled over to the right.
- He did not realize he had actually been in an accident until he got out of his truck and saw a scratch on her bumper.
- He told the sheriff that he tapped Woods's car.

¶15 During the jury instruction conference, Woods asked the trial court to give WIS JI—CIVIL 1710, the “aggravation of injury because of medical negligence” instruction. The trial court denied the request because the facts did not “lend themselves to giving this instruction” and it thought the instruction “would be incredibly confusing to the jury.” Specifically, the trial court believed the instruction should only be given when there is evidence that the doctor’s treatment *aggravated* the initial injury and it did not believe that was the case here. In other words, the trial court agreed there was evidence that Woods was injured in the accident (from her and her witnesses), but there was no evidence that the subsequent treatment she got from her doctor *aggravated* her initial injury.

¶16 The jury found both Woods and Rouse negligent, but found that Rouse’s negligence did not cause Woods’s injuries. The jury did not award any damages. The trial court denied Woods’s post-verdict motion seeking a new trial based on the trial court’s failure to give WIS JI—CIVIL 1710. The trial court denied the motion on two grounds: (1) the evidence did not warrant the instruction; and (2) failure to give the instruction did not prejudice Woods because the jury found Woods “did not sustain any injury as a result of the accident.” Woods appeals.

DISCUSSION

¶17 Woods asks us to reverse the order for judgment dismissing her case and remand for a new trial because the trial court declined her request to give WIS JI—CIVIL 1710. A trial court “has broad discretion in deciding whether to give a particular jury instruction.” *State v. Fonte*, 2005 WI 77, ¶9, 281 Wis. 2d 654, 698 N.W.2d 594. “A court must exercise its discretion to ‘fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a

reasonable analysis of the evidence.” *Id.* (citation omitted). We will not reverse or order a new trial on a jury instruction error unless the error was prejudicial. *Hanson v. American Family Mut. Ins. Co.*, 2006 WI 97, ¶19, 294 Wis. 2d 149, 716 N.W.2d 866. “An error is prejudicial if it probably and not merely possibly misled the jury.” *Id.* (citations and quotation marks omitted).

¶18 The jury in this case heard competing evidence as to whether Woods was injured at all by the motor vehicle accident. The investigating sheriff testified that no one was injured in the accident, that Woods told him she was not injured, and that she did not need medical help. The jury heard that Woods did not seek any medical treatment for almost one month after the accident, and when she did seek treatment, she told the chiropractor her symptoms just started a week earlier, and were the same symptoms she had in 2008. The jury heard Dr. Robbins give his medical opinion that based on these facts, Woods was not injured in the motor vehicle accident; rather, her subsequent injuries stemmed from a pre-existing condition. The jury also heard testimony suggesting that Woods was injured in the motor vehicle accident. Woods testified that she was immediately injured but did not seek treatment because she hoped the pain would go away. Woods’s expert witnesses all testified that her injuries were caused by the motor vehicle accident. Woods’s attorney cross-examined Dr. Robbins, pointing out his initial report that the accident did cause injury to Woods. Based on all of the evidence, the jury found Rouse’s negligence in rear-ending Woods did not cause her injuries. As the finder of fact, the jury determines the credibility of witnesses and the weight to be given to their testimony, and resolves conflicts in the evidence. *See O’Connell v. Schrader*, 145 Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988) (the jury is the ultimate arbiter of credibility). Here, the jury believed the witnesses who testified

that Woods was not injured in the July 6, 2010 accident and found no causal connection.

¶19 Because the jury found no causation, Woods was not prejudiced by the trial court's decision not to give WIS JI—CIVIL 1710. Had the trial court decided to instruct the jury with the aggravation of injury due to medical malpractice instruction, it would not have changed the outcome. It would not have changed the jury's assessment of the credibility of the witnesses or the weight to give to each witness's testimony. The jury did not believe that Woods was injured in the motor vehicle accident. Therefore, even if the jury had been told Woods's damages should not be decreased based on any medical negligence, it would not have changed the fact that the jury found no causation. If the instruction had been given, it may have prompted the jury to write in dollar amounts for the damage question, but it would not have made the jury change its answer on the cause question.

¶20 Woods argues that giving the instruction would have allowed her to argue that Dr. Robbins changed his opinion in order to circumvent an award of the medical costs associated with Dr. Rouse's surgeries; therefore, not giving the instruction caused her prejudice. We disagree. Woods vigorously cross-examined Dr. Robbins about changing his opinion. Woods's attorney established that Dr. Robbins only changed his opinion after a phone call and a visit by Rouse's attorney. Woods did not need the instruction in order to argue Dr. Robbins' motivation to change his opinion arose out of a desire to support the party who hired him, and the cross-examination showed a zealous effort to challenge Dr. Robbins' credibility. The jury, nonetheless, believed the evidence supporting that Woods was not injured in the accident.

¶21 The jury had sufficient evidence to reach that conclusion. It heard independent testimony from the sheriff, who testified that Woods said she was not hurt and did not need medical attention. Woods’s passenger also did not report injury to the sheriff, and the sheriff reported the accident as a property damage only accident. The jury saw the pictures showing the damage done to Woods’s car as well as the repair estimate and what was needed to repair it. The jury heard evidence that Woods did not seek medical treatment until almost one month after the accident and it heard evidence about Woods’s prior car accidents and an unrelated shoulder dislocation injury that occurred four months after the July 6, 2010 accident. In addition, the jury heard Krenz’s opinion that the impact velocity was five miles per hour or less and Dr. Weber’s opinion that accidents at that speed do not cause the type of injury Woods claimed here. The jury also heard the testimony of Rouse, who said he did not even realize he made impact with Woods’s car. Additionally, the jury heard the cross-examination of Woods’s experts wherein their opinions about a causal connection between the July 6, 2010 accident and Woods’s injury were challenged. Collectively, this evidence convinces us that even if the aggravated injury instruction had been read, it would not have made a difference in the outcome.²

¶22 Finally, Woods asks us to exercise our discretionary authority to reverse under WIS. STAT. § 752.35 (2013-2014), because she argues the trial court’s failure to give WIS JI—CIVIL 1710 prevented the real controversy from

² We note that we do not make a determination as to whether the trial court’s decision to not give the jury instruction was erroneous. We need not reach that issue because we have decided that no prejudice resulted as a result of the trial court’s decision, and we decide cases on the narrowest possible grounds. See *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989).

being tried. *See Vollmer v. Luety*, 156 Wis. 2d 1, 3, 456 N.W.2d 797 (1990). We decline Woods’s request. We will exercise such power “only in exceptional cases.” *Id.* at 11. This is not one of them. As we have seen, the jury found no causation and there is substantial evidence to support that finding.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

