

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 21, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2008AP539

Cir. Ct. No. 2005CV11222

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

PATRICIA RECELY AND THOMAS G. RECELY,

PLAINTIFFS-APPELLANTS,

v.

**RICHARD J. DILLON AND
YELLOW TRANSPORTATION, INC.,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Reversed and cause remanded.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 CURLEY, P.J. Patricia and Thomas Recely appeal the judgment and order denying their postjudgment motions following a bench trial in their suit

for damages emanating out of a traffic accident.¹ Recely submits that the trial court erroneously exercised its discretion by refusing to permit one of his key expert witnesses to testify concerning the cause of his injury and by refusing to allow Recely's attorney the opportunity to make an offer of proof concerning the expert witness's testimony. Additionally, Recely argues that the trial court erred in reducing his award for pain and suffering after finding that Recely did not mitigate his damages because he smoked shortly after his fusion surgery. As a result, Recely seeks a new trial.

¶2 Because the trial court erroneously exercised its discretion when it denied Recely's expert witness the right to testify concerning the cause of his injury, and because the determination undermines this court's confidence in the outcome, we reverse and order a new trial. In addition, because the issue is likely to reoccur at the new trial, we also conclude that the trial court erred when it found Recely failed to mitigate his damages because he began smoking shortly after his fusion surgery.

I. BACKGROUND.

¶3 Recely was involved in a traffic accident on April 10, 2003. He was driving a Ford Taurus westbound on National Avenue in heavy traffic when he stopped for a red light. Richard Dillon, employed by Yellow Transportation, Inc., was also westbound on the same street. He was driving a Ford tractor trailer owned by his employer. When the traffic ahead of Dillon stopped, he was unable

¹ Patricia Recely also sued seeking damages for her loss of society and companionship. Throughout this opinion, we refer to Patricia and Thomas collectively, and Thomas individually, as "Recely."

to stop in time and struck the back of a Ford pickup driven by Joshua Vidal, which was pushed into the rear of Recely's car, causing injuries to Recely.

¶4 As a result of the accident, Recely suffered, among other ailments, back pain which did not subside with time. During the course of treatment, his treating physician took x-rays of Recely's back that revealed he had a pre-existing degenerative back condition which had not caused him any pain before the accident. After treating Recely for approximately three months, his doctor referred him to a pain management specialist. When the pain management doctor was unable to alleviate Recely's back pain, he was sent to see Dr. Arvind Ahuja, a surgeon. On the recommendation of Dr. Ahuja, Recely had fusion surgery in September 2003. The surgery reduced the pain but did not eliminate it.

¶5 Recely sued Dillon and Dillon's employer (collectively referred to as Dillon).² Recely sought damages for pain and suffering, his medical expenses, and his lost wages. He also sought damages for future pain and suffering and for his anticipated future wage loss.

¶6 The parties were unable to resolve the matter. In preparation for trial, Recely and Dillon named witnesses, including expert witnesses. Ultimately, the defendants conceded liability and the case proceeded to a bench trial on the issues of causation and damages. At trial, Recely contended that the "accident exacerbated and accelerated [his] condition beyond its normal progression and required the extensive treatment culminating in spinal fusion surgery." On the other hand, Dillon maintained that the lingering back problem that Recely

² Originally, Recely also named as subrogated defendants his insurance companies which were later dismissed from the case.

experienced was the sole result of the pre-existing condition and was not caused by the accident.

¶7 During the trial, Recely called Dr. N. M. Reddy, a specialist in physical medicine and rehabilitation who had been named as an expert witness, to discuss whether Recely's back pain was the result of the pre-existing condition or the accident. Dr. Reddy was apparently prepared to testify contrary to what Dr. David Rolnick, a defense expert, claimed, which was that the cause of the injury was due to the pre-existing condition. Defense counsel objected and the trial court ultimately sustained the objection, prohibiting Dr. Reddy from testifying regarding the cause of Recely's injury. The trial court explained that Dr. Reddy was unqualified to answer the question because while he sees people who have injuries, he did not have the qualifications to address causation. When Recely's attorney sought to make an offer of proof, the trial court insisted that counsel "move on."

¶8 Following the trial and briefs, the trial court, relying on the testimony of defense witness Dr. Rolnick, who, unlike Dr. Reddy, never actually saw Recely but reviewed all of his medical records, found that the "injury that Mr. Recely suffered was a soft tissue injury, not an aggravation of a pre-existing degenerative condition." As a result, the trial court awarded Recely nothing for either future pain and suffering or future wage loss.

¶9 The trial court also commented about Recely's smoking. The trial court observed that, as a result of Recely's smoking, "the surgery was not as successful as it might have been in that there is—there was testimony about a screw that has—has broken, become dislodged." Indeed, the trial court amplified this fact by stating:

However, one has to bear in mind that Mr. Recely failed to mitigate his damages. He failed to do so because he continued to smoke after the surgery and this has an implication with respect to his ability to recover and the success of the surgery[] and therefore my award for pain and suffering is tempered by his own role with respect to the pain and suffering.

As a result, the trial court awarded Recely only \$25,000 for past pain and suffering. The trial court did, however, award Recely all of his medical expenses, totaling \$192,626.19, and awarded him \$16,000 for his past wage loss. The trial court also awarded Recely's wife \$5000 for loss of society and companionship.

¶10 Following the trial court's oral decision, Recely filed postjudgment motions seeking a new trial, or, in the alternative, seeking to amend the trial court's findings and conclusions. Later, Recely sought to have the trial court recuse itself. The trial court denied all of the motions. This appeal follows.

II. ANALYSIS.

A. The trial court erroneously exercised its discretion when it prohibited Dr. Reddy from testifying about the cause of Recely's injury.

¶11 We review a trial court's decision to admit or exclude evidence using the erroneous exercise of discretion standard. *State v. Walters*, 2004 WI 18, ¶13, 269 Wis. 2d 142, 675 N.W.2d 778. This discretion includes whether a witness is qualified as an expert to offer opinion testimony pursuant to WIS. STAT. § 907.02 (2005-06).³ *State v. Watson*, 227 Wis. 2d 167, 186, 595 N.W.2d 403 (1999); *see also Farrell v. John Deere Co.*, 151 Wis. 2d 45, 70, 443 N.W.2d 50 (Ct. App. 1989), *cited in* 7 DANIEL D. BLINKA, WISCONSIN PRACTICE: EVIDENCE

³ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

§ 702.4, at 487 (2d ed. 2001). “As with other discretionary determinations, this court will uphold a decision to admit or exclude evidence if the [trial] court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion.” *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698.

An erroneous exercise of discretion in admitting or excluding evidence does not necessarily lead to a new trial. The appellate court must conduct a harmless error analysis to determine whether the error “affected the substantial rights of the party.” If the error did not affect the substantial rights of the party, the error is considered harmless.

Id., ¶30 (quoting WIS. STAT. § 805.18(2)).

¶12 “The substantial rights of the parties are affected only if there is a reasonable possibility that the error contributed to the outcome of the case.” *Estate of Hegarty v. Beauchaine*, 2006 WI App 248, ¶152, 297 Wis. 2d 70, 727 N.W.2d 857; *see also* WIS. STAT. §§ 805.18 & 901.03. “If the error at issue is not sufficient to undermine the reviewing court’s confidence in the outcome of the proceeding, the error is harmless.” *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768. Stated otherwise, “[f]or an error to ‘affect the substantial rights’ of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue.” *Id.* (citation omitted).

¶13 The pivotal issue in this case was causation. As noted, Recely contended that his pre-existing degenerative disease was exacerbated and accelerated by the accident. Dillon maintained that the back pain which led to Recely’s spinal fusion was the sole result of his pre-existing condition and that the accident caused only a soft tissue injury that was resolved.

¶14 During the trial, Recely called only Dr. Reddy as a live medical expert witness. The other expert witnesses, consisting of Recely's treating physician, the pain management doctor, and Dr. Ahuja, the surgeon who performed the spinal fusion, had their videotaped depositions played and admitted into evidence. After some preliminary questions, Dillon's attorney objected to Dr. Reddy answering this question, posed by Recely's attorney:

Doctor, assuming that he — Mr. Recely did have pre[-]existing degenerative conditions in his back prior to the accident, do you believe that the trauma of the accident exacerbated and accelerated those degenerative conditions beyond their normal progression?

Dillon's attorney claimed that the question called for an orthopedic or neurosurgical opinion. The trial court then engaged in a colloquy with Dr. Reddy asking him if he believed he was qualified to answer the question. Dr. Reddy assured the court that he was qualified to answer the question, stating:

First of all, I'm a physiatrist, which is a doctor [who] specializes in rehabilitation, and I have seen numerous number[s] of backs and necks. I see, every day, back problems and neck problems and spine problems. And as a matter of fact, I am probably seeing these kinds of cases for 27, 28 years, and I've dealt with [an] enormous number of chronic pain patients, post-surgical, presurgical, managed a lot of these cases, and my education and training and experience, the fact that I teach my residents and my students what I do, I'm certainly very qualified to answer this question, and I feel very comfortable taking a position and giving my opinion.

The court remained unconvinced, and remarked:

See, what I'm hearing from Dr. Reddy is that he deals with people who have already had some kind of a problem that requires his services and/or surgery, and I haven't heard in that answer anything that reflects the causation of the problem. The normal progression of a person's condition such as Mr. Recely. Someone who's

got these conditions. I — I just haven't heard that from him.

Later, the trial court advised Recely's attorney:

THE COURT: But see, this is more of the same. What I'm getting at is that he sees people who have had the problem, and the question you're getting at is what is Mr. Recely's prognosis without the accident. Right?

MR. WILKOSKI: No, I think my question specifically goes to acceleration/exacerbation of a pre[-]existing condition. I think he's highly qualified to respond to that.

THE COURT: Okay. I think we disagree, and I think you should move on.

¶15 In its oral decision, at the conclusion of the trial, the trial court explained why it ruled that Recely's pre-existing condition, and not the motor vehicle accident, was the cause of the spinal fusion.

The plaintiff's experts all concluded that the pain was — that pain that Mr. Recely suffered was an acceleration of an existing degenerative condition.

However, I note that the analysis of causation prompted and offered by Mr. Recely's experts all were consistent with the kind of analysis of causation that a lay person might have concluded, and by that I mean there was this notion that Mr. Recely was asymptomatic before the collision, then there's the collision, then there's the pain and therefore there is causation, and while that is the kind of opinion that a lay person might offer I was a bit disappointed that there wasn't more of an explanation than that, and that is one of the problems that I have with the plaintiff's case.

Further, the trial court stated that it relied on the testimony of a defense expert witness.

The medical expert whom I found to be most persuasive and most credible particularly on the issue of causation was Dr. Rolnick, R-O-L-N-I-C-K, who is the expert that was called by the defense. His emphasis was on

the importance of the patient’s history in determining what the patient was suffering from and what role, if any, the collision had in connection with what Mr. Recely was suffering from, and I found his findings to be persuasive.

¶16 WISCONSIN STAT. § 907.02 authorizes experts to give opinion testimony. Section 907.02 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

¶17 “The qualification of an expert witness to testify on an issue is a preliminary question of fact for the [trial] court to decide under WIS. STAT. § 901.04(1).”⁴ *Martindale*, 246 Wis. 2d 67, ¶45. “The determination of a witness’s qualifications to offer an expert opinion is normally a decision left to the discretion of the [trial] court.” *Id.* However, as noted in *Martindale*, a case with a very similar fact situation,

The [trial] court’s discretion in this determination is unquestionably entitled to substantial deference, and we will uphold a decision to admit or exclude evidence if the [trial] court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion. Nonetheless, our decisions speak of “sound discretion,” “a reasonable conclusion,” and “the essential demands of fairness,”

⁴ WISCONSIN STAT. § 901.04(1) provides:

(1) QUESTIONS OF ADMISSIBILITY GENERALLY. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to sub. (2) and ss. 971.31 (11) and 972.11 (2). In making the determination the judge is bound by the rules of evidence only with respect to privileges and as provided in s. 901.05.

signifying that even evidentiary rulings may be held to account.

See id. (citations omitted).

¶18 Dr. Reddy recited his qualifications. He testified that he was a full-time faculty member at the Medical College of Wisconsin and also practiced medicine. He told the court that he was the medical director of the Curative Care Network and that he specialized in physical medicine and rehabilitation and was board certified in both. He explained that Recely had been sent to him for an evaluation and that he had personally examined him, as well as reviewed his medical records. In response to questioning by the court, Dr. Reddy explained that he was qualified to discuss the cause of Recely's injury.

¶19 Given Dr. Reddy's credentials, and his assessment that he was qualified to answer the causation question, we are satisfied that Dr. Reddy possessed sufficient "knowledge, skill, experience, training [and] education" to give an opinion on what caused Recely's back injury. *See* WIS. STAT. § 907.02. Dr. Reddy, as a physician who has spent his professional life rehabilitating people with serious injuries and severe pain, had knowledge of the mechanisms that caused these injuries and the pain associated with them. Not only was Dr. Reddy qualified to give an expert opinion on Recely's injury, but also he appeared to be the most qualified to do so of the four plaintiff's doctors. Further, it was unfair to prohibit his testimony and then rely on a defense expert witness who never personally examined Recely in determining that the cause of the injury was the pre-existing condition. Under our law, the touchstone was not whether Dr. Reddy was an orthopedic surgeon or a neurosurgeon, as the trial court apparently believed was a prerequisite, but rather, whether he had the experience to address the causation issue. Given the record, we conclude he was qualified to give an

opinion on causation. Thus, Dr. Reddy's testimony would have assisted the trial court in determining the cause of Recely's injury.

¶20 As a result of the prohibition of Dr. Reddy's testimony, Recely's substantial rights were affected as there is a reasonable possibility that the error contributed to the outcome of the action. Here, the trial court discounted Recely's other expert witnesses, who were allowed to testify about causation, and dismissively commented that their opinions were similar to those of what a lay person might have concluded was the cause of the injury. As a consequence, it is quite likely that Dr. Reddy, given his experience, etc., would have provided the missing link that the trial court needed to fairly evaluate the causation issue.⁵

¶21 The primary dispute in this suit was the cause of Recely's injury. The trial court's refusal to allow a key qualified plaintiff's witness to testify as to cause was an erroneous exercise of discretion. This is so because while it is possible that Dr. Reddy's testimony would not have persuaded the trial court on the issue of causation, absent any offer of proof as to what he would have said, we cannot find that the error was harmless. As a result, we reverse the judgment and remand for a new trial.⁶

⁵ In its written decision denying Recely's postjudgment motions, the trial court asserted that Dr. Reddy's testimony on causation would have been cumulative and also claimed that Recely failed to name Dr. Reddy as a causation expert, and, thus, he should not have been allowed to testify on those bases. Neither of these reasons, however, for prohibiting Dr. Reddy's testimony was ever mentioned during the trial. Consequently, we assume that the trial court did not rely on these reasons when making its ruling on the admissibility of Dr. Reddy's causation testimony.

⁶ Recely also asks us to order a new trial because of the trial court's failure to permit him to make an offer of proof. Inasmuch as we have ordered a new trial, we need not discuss this claim. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

B. The trial court erred in finding that Recely failed to mitigate his damages by smoking shortly after surgery.

¶22 Although we have ordered a new trial, we would be remiss if we did not address the trial court's finding that Recely's continued smoking following surgery constituted a failure to mitigate his damages, because this issue will surely arise during the next trial. Recely points out that there was insufficient evidence to support a finding that the surgery was not successful because of his smoking. Recely argues that no expert affirmatively stated that any problem with his recovery was directly related to his smoking habits. Dr. Rolnick opined that smoking entails "a greater risk of failure of fusion," while Dr. Ahuja claimed that smoking "can retard the healing process and prevent that bony fusion," but neither doctor testified that smoking actually caused any problem in Recely's recovery. Indeed, Dr. Ahuja, the surgeon, believed the surgery was successful, while Dr. Rolnick, the defense expert witness, suggested that the fusion may not have been solid.

¶23 Additionally, concerning the broken screw in Recely's back referenced by the trial court in its decision, neither doctor could pin down the cause of it as being the result of smoking. Testimony was presented that normal daily activities could cause a screw to break.

¶24 Dillon never squarely addressed the failure to mitigate damages due to smoking issue, except to say that "the doctrine has no bearing on the plaintiff's award." The record belies that belief. The trial court clearly stated that "Recely failed to mitigate his damages. He failed to do so because he continued to smoke after the surgery ... and therefore my award for pain and suffering is tempered by his own role with respect to the pain and suffering." We agree with Recely, especially in light of the lack of response to his argument, that no evidence

supports the trial court's determination that smoking contributed to his ability to recover or to the success of that recovery. Consequently, this finding was in error.

¶25 For the reasons stated, the judgment and order are reversed and the matter is remanded for a new trial.

By the Court.—Judgment and order reversed and cause remanded.

Not recommended for publication in the official reports.

