

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

January 26, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**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 § 808.10 and RULE 809.62, STATS.

**No. 97-1777**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**MICHAEL D. LAWRENCE AND JEAN LAWRENCE,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**AMERICAN FAMILY MUTUAL  
AUTOMOBILE INSURANCE CO.,**

**SUBROGATED PARTY-PLAINTIFF,**

**BADGER MUTUAL INSURANCE COMPANY,  
HERITAGE MUTUAL INSURANCE COMPANY,  
MICHAEL J. TOBIN AND  
MICHAEL J. TOBIN ENTERPRISES, INC.,  
D/B/A STAR PACKAGING SUPPLIES CO.,**

**DEFENDANTS-RESPONDENTS,**

**HEALTH COST CONTROLS,**

**DEFENDANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Michael D. Lawrence appeals from a judgment against him, after the jury found, in this personal injury lawsuit, that Michael Tobin, the driver of a car which struck Lawrence's truck, was negligent, but that Tobin's negligence did not cause Lawrence's injuries. The jury awarded no monetary damages to Lawrence. Lawrence claims that he was entitled to judgment as a matter of law because the medical evidence he submitted was never countered by defense medical experts. He also contends that he was "unduly prejudiced" and is entitled to a new trial because the trial court erroneously exercised its discretion in permitting the jury to know the specific nature of Lawrence's prior criminal convictions. Finally, Lawrence argues that he is entitled to a new trial because the jury verdict was perverse and contrary to the great weight and clear preponderance of the evidence. Because we conclude that Lawrence was not entitled to judgment as a matter of law; that the trial court properly exercised its discretion in permitting the jury to know the actual crimes of which Lawrence was convicted; and that the verdict was neither contrary to the great weight and clear preponderance of the evidence, nor perverse, we affirm.

## **I. BACKGROUND.**

Lawrence was involved in a car accident on October 15, 1992. He was driving a pick-up truck in the left lane of a one-way street when Tobin, driving a car in front of Lawrence in the other lane, forgot he was on a one-way street and attempted to make a left-hand turn. Tobin struck the truck Lawrence was driving, causing damage to both vehicles. Lawrence claimed at trial to have

first felt tension in his neck shortly after the accident, necessitating his and his passenger's decision to immediately seek emergency medical treatment. Lawrence's complaint of neck pain was first diagnosed as a cervical strain. Later, while under the care of his family doctor, Lawrence was admitted to the hospital after he complained that the pain was worsening. A neurologist was consulted and an MRI revealed a possible small central disc herniation. Lawrence was hospitalized for eight days and released. On October 31, 1992, after Lawrence's repeated complaints of severe neck and back pain, Lawrence was re-admitted to the hospital for another eleven days. Again, after being released, he continued to state that his pain and spasms had worsened and he was hospitalized a third time. Lawrence then sought medical care from another doctor who diagnosed him as having suffered a herniated disc as a result of the accident and performed discectomy surgery on him. Subsequent to this surgery, Lawrence had another discectomy in 1994. Throughout his treatment and hospitalizations he was treated with pain medication, given both orally and intravenously.

Lawrence sued Tobin, claiming that his cervical injury and the resulting hospitalizations were a result of Tobin's negligence. During the discovery process, Lawrence disclosed that he had abused his pain medication after the accident and that he had been convicted of obtaining pain medication by fraud in 1996. Lawrence also divulged that he had been treated for drug and alcohol dependency before the accident and that he had two prior convictions for possession of marijuana. At trial, the respondents pursued a defense that Lawrence was either not seriously injured or not injured at all as a result of the accident, but only pretended to be seriously injured in order to obtain pain medication. In furtherance of this theory, the respondents wanted the jury to know that Lawrence had been treated for drug dependency, and because the criminal

convictions were primarily drug related, they wanted the jury to know the nature of his criminal convictions. The trial court originally ruled that neither evidence of Lawrence's specific criminal convictions nor his drug dependency could be admitted into evidence unless the appellant "opened the door" to these areas of inquiry.

During opening statement, Lawrence's trial counsel made reference to the fact that the accident had caused Lawrence to have a drug relapse. Later he elicited testimony from witnesses who also claimed that the pain resulting from the accident required Lawrence to take pain medication and caused him to have a drug relapse. Lawrence's testimony also referenced his drug relapse. He testified that he had been drug-free until the car accident and that the massive quantities of pain medication required to ease his severe pain caused his relapse and led both to his drug dependency and his eventual conviction for fraudulently procuring pain medication.

Relying on the trial court's earlier decision that evidence of Lawrence's criminal record and drug use would be permitted if Lawrence "opened the door" to this line of inquiry, the respondents renewed their request to be allowed to introduce evidence of Lawrence's criminal convictions and drug dependency. The trial court agreed, ruling that because of the testimony concerning the drug relapse, the issue of Lawrence's drug problems became relevant. The trial court then permitted the respondents to introduce evidence of Lawrence's treatment for drug dependency and his criminal record, including the nature of the convictions.

The jury returned a verdict finding that Tobin was negligent, but that Tobin's negligence did not cause Lawrence's serious injuries. Therefore, the jury

awarded no damages. Lawrence's motions after verdict were denied and this appeal follows.

**Was Lawrence entitled to judgment as a matter of law?**

To be entitled to judgment as a matter of law there must be "no conflicting evidence as to any material issue and the evidence [must] permit[] only one reasonable inference or conclusion." *Millonig v. State*, 112 Wis.2d 445, 451, 334 N.W.2d 80, 83 (1983).

Lawrence asserts that he was entitled to judgment as a matter of law because undisputed facts support his claim. He argues that the jury was required to accept the medical evidence he presented because the defense submitted no medical evidence to refute it. He contends that since no other medical evidence was presented, his proffered medical testimony, establishing that the accident caused his injuries and led to his various hospitalizations and surgeries, is conclusive. Further, he argues that the defense failed to introduce evidence that the injury was not caused by Tobin's negligence.<sup>1</sup> Finally, he also contends that the finding that he was not entitled to an award of damages for his injuries was the result of jury "passion and prejudice." He argues that this court is now required to set aside the jury's verdict and remand for a new trial. We are not persuaded.

Conflicting evidence existed because although the defense did not call any medical experts to the stand, it did discredit the testimony of several of Lawrence's key medical experts. Through cross-examination it was disclosed that not all of Lawrence's treating physicians could connect the accident with his

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<sup>1</sup> Although generally the burden of proof is the plaintiff's, and the defendant has no duty or burden to disprove a claim, we will nonetheless address this issue.

extensive medical problems. The defense also documented that many of Lawrence's treating physicians were unaware of his complete medical history, including his drug dependency. The cross-examination of Lawrence's medical witnesses also raised the specter that some of Lawrence's post-accident medical treatment was either unnecessary or inappropriate. Further damaging Lawrence's case was the introduction of medical records which revealed that several of Lawrence's treating physicians had expressed concerns about Lawrence's "overmagnification of pain and lack of anatomical matchup with the alleged defect," and that Lawrence had been told to seek out psychiatric help before having any additional surgeries, advice that, Lawrence admitted, he disregarded. Lawrence's assertion that his serious injuries were caused by the car accident was further undermined by evidence that Lawrence was involved in additional accidents and similar injuries both before and after the car accident. As an example, the jury learned that Lawrence was treated for a lower back problem while working for a former employer, and that he had gone to the emergency room twice the summer before this accident, including once for an upper back muscle strain. The jury also learned that following the car accident, Lawrence was treated for a work related back injury in June 1993 that prevented him from working for five months, and that he went to the emergency room in September 1995 when he fell and landed on his head.

In support of its assertion that Lawrence was more interested in obtaining pain medication than he was in recovering from his alleged injuries, the defense also introduced evidence that, despite Lawrence's claims that the pain left him able to do "virtually nothing," he was able to complete a construction project on his deck. The jury also heard that Lawrence failed to follow through with a course of physical therapy and that he refused to go to a recommended work

hardening course. Finally, the defense submitted significant evidence concerning Lawrence's credibility. In addition to Lawrence's criminal record, the defense established that Lawrence had used three different aliases in the past and had been convicted of a crime under each of these assumed names. Worse, the defense introduced evidence that Lawrence had a history of lying. Through various documents, the defense showed that Lawrence lied to his doctors, lied on employment applications, lied in his sworn interrogatories and lied in his application for Social Security benefits.

As a result, contrary to Lawrence's argument that the jury was presented with unrefuted testimony concerning the nature and cause of his injuries, much of Lawrence's case was rebutted by credible evidence to the contrary. The respondents introduced evidence that suggested Lawrence suffered no serious injury at the time of the accident, and that his motivation to claim an injury and seek treatment was to obtain prescription drugs. Alternatively, the respondents established that if the jury believed Lawrence did suffer from a serious injury, there were multiple pre- and post-accident causes for it. It is axiomatic that a jury is free to sift through all the conflicting testimony and weigh the evidence and credibility of the witnesses. Here, the jury chose to disregard the medical experts' opinions as to Lawrence's injury and its cause and conclude, as the defense successfully argued, that "Lawrence's claim of neck and back injuries were [sic] either nonexistent, exaggerated or attributable to other causes."

Lawrence also argues that the jury's failure to award any monetary damages was "the result of passion and prejudice." However, the record suggests otherwise. The jury found either that Tobin's negligence did not cause any injury or that his negligence did not cause a serious injury. Thus, when the verdict form asked the jury to decide "what sum of money will fairly and reasonably

compensate Michael Lawrence for his injuries and damages,” the jury correctly determined that Lawrence was entitled to no money. Contrary to Lawrence’s contention that the jury verdict was motivated by passion and prejudice, it appears that the jury surmised that they could not reasonably justify an award of damages either in the absence of any injury at all or any serious injury. Thus, we conclude there was ample evidence in the record to support the jury’s findings as to the questions of cause and damages.

**Did the admission of the facts and circumstances of Lawrence’s criminal convictions unduly prejudice him?**

A trial court’s decision to admit or exclude evidence is discretionary and will not be upset on appeal if the court had “a reasonable basis” for its decision and the decision was made ““in accordance with accepted legal standards and in accordance with the facts of record.”” *State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983) (quoting *State v. Wollman*, 86 Wis.2d 459, 464, 273 N.W.2d 225, 228 (1979)).

Lawrence submits that he is entitled to a new trial because he was “unduly prejudiced” when the trial court permitted the jury to know the nature of his prior criminal convictions. Lawrence argues that the trial court erroneously exercised its discretion when it reversed an earlier ruling which foreclosed the defense from inquiring into the nature of Lawrence’s criminal convictions. We disagree.

Generally, the introduction of a witness’s criminal conviction for the purposes of attacking a witness’s credibility is governed by § 906.09, STATS.<sup>2</sup>

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<sup>2</sup> Section 906.09, STATS., provides:

(continued)

This statute restricts the information a party can admit concerning a witness's criminal record. Ordinarily, the witness can only be asked whether he or she has been convicted of a crime and, if answered in the affirmative, inquiry can only be made as to the number of convictions. *See* § 906.09, STATS.; *see also State v. Sohn*, 193 Wis.2d 346, 353, 535 N.W.2d 1, 3 (Ct. App. 1995) (“The witness may be asked if he or she has ever been convicted of a crime and, if so, how many times. If the witness’s answers are truthful and accurate, then no further inquiry may be made.”). Relying on § 906.09, the trial court first ruled that the defense could only ask if Lawrence had a criminal record and the number of times he had been convicted. However, the trial court cautioned this ruling could change if Lawrence “opened the door” to his drug problems.

Just prior to Lawrence’s taking the witness stand, defense counsel renewed its request to go beyond the standard inquiries set out in § 906.09, STATS. Defense counsel argued that he was entitled to expand his inquiry because

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**Impeachment by evidence of conviction of crime or adjudication of delinquency.** (1) GENERAL RULE. For the

purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or adjudicated delinquent is admissible. The party cross-examining the witness is not concluded by the witness’s answer.

(2) EXCLUSION. Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

(3) ADMISSIBILITY OF CONVICTION OR ADJUDICATION. No question inquiring with respect to a conviction of a crime or an adjudication of delinquency, nor introduction of evidence with respect thereto, shall be permitted until the judge determines pursuant to s. 901.04 whether the evidence should be excluded.

(5) PENDENCY OF APPEAL. The pendency of an appeal therefrom does not render evidence of a conviction or a delinquency adjudication inadmissible. Evidence of the pendency of an appeal is admissible.

Lawrence’s trial counsel had “opened the door” by commenting in his opening statement that one of the devastating effects of the accident on Lawrence was his drug relapse, and by soliciting testimony from several of Lawrence’s witnesses concerning Lawrence’s relapse or overuse of medication. In reversing its earlier ruling, the trial court said, “I think [it] is all relevant to the issue before the jury as to whether he returned to substance abuse and whether it was the accident that caused it, whether it was something other than the accident or that that’s just an excuse to overuse drugs.” Although the trial court referenced no statutory authority for this finding, we conclude that this evidence was admissible under § 904.04, STATS.,<sup>3</sup> which permits a party to submit evidence of other crimes if the

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<sup>3</sup> Section 904.04, STATS., provides:

**Character evidence not admissible to prove conduct; exceptions; other crimes. (1) CHARACTER EVIDENCE GENERALLY.** Evidence of a person’s character or a trait of the person’s character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(a) *Character of accused.* Evidence of a pertinent trait of the accused’s character offered by an accused, or by the prosecution to rebut the same;

(b) *Character of victim.* Except as provided in s. 972.11 (2), evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(c) *Character of witness.* Evidence of the character of a witness, as provided in ss. 906.07, 906.08 and 906.09.

**(2) OTHER CRIMES, WRONGS, OR ACTS.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

evidence will be offered for a purpose other than to “prove the character of a person in order to show that the person acted in conformity therewith.” Section 904.04(2), STATS. When a circuit court fails to set forth its reasoning, appellate courts “independently review the record to determine whether it provides a basis for the trial court’s exercise of discretion.” *Pharr*, 115 Wis.2d at 343, 340 N.W.2d at 502. We determine that the evidence was relevant as it was offered to disprove Lawrence’s claim of an injury by introducing the possibility that his plan and motive, two stated purposes under § 904.04(2), were actually to obtain pain medication by fraudulently reporting a serious neck injury. In light of this fact, we further conclude that its probative value was not substantially outweighed by the danger of unfair prejudice. *See* § 904.03, STATS. Section 904.04(2) permits admission for reasons entirely different than the stated purpose behind the admissibility of evidence of a prior criminal conviction found in § 906.09. This case, like the circumstances that existed in *State v. Ingram*, 204 Wis.2d 177, 554 N.W.2d 833 (Ct. App. 1996), presents adequate reasons for admitting Lawrence’s prior criminal record. Different evidentiary standards apply to evidence of a witness’s criminal history depending upon whether such history is used to challenge credibility or whether it is used as means of proving motive or intent. *See id.* at 187-88, 554 N.W.2d at 837. Here, the evidence rebutted Lawrence’s testimony that he was seriously injured and that he sought hospitalization and medication only to relieve his excessive pain. The evidence provided the jury with an alternate explanation—that Lawrence may have fabricated a serious injury to obtain medication for his ongoing drug dependency. This evidence was not admitted simply to tarnish Lawrence’s credibility—it was used to show that Lawrence’s plan and motive for seeking medical treatment were not as he claimed. Thus, this evidence was permissible. We also conclude that no unfair prejudice resulted from the admission of this evidence as it was pivotal to a determination of

the factual disputes in the case. Consequently, the trial court properly exercised its discretion in admitting the evidence.

**Is Lawrence entitled to a new trial in the interests of justice?**

Finally, citing *Priske v. General Motors Corp.*, 89 Wis.2d 642, 279 N.W.2d 227 (1979), Lawrence argues that even if the jury's findings are supported by credible evidence, a new trial should be granted in the interests of justice when the jury's findings are contrary to the great weight and clear preponderance of the evidence. He also claims the jury verdict was perverse. We disagree.

As noted, Lawrence's testimony was rebutted by the defense. The defense was able to establish that Lawrence possibly suffered no injury at all, or at least no serious injury as a result of what the trial court described as a "relatively minor" accident, and that Lawrence fabricated his serious injury to obtain drugs. His claim that the excessive pain of his injuries led to his drug relapse was also discredited by defense testimony that Lawrence had a long-standing drug problem and that the pain medication obtained as a result of the car accident fed his ongoing need for drugs rather than caused a "relapse." Confidence in Lawrence's version of the events was further eroded by a showing by defense that he had an extensive criminal record and that he previously used different aliases to evade the consequences of his criminal acts. Moreover, the defense showed that Lawrence was an exceptionally poor historian of both his medical history and his prior lawsuits, casting further doubt on his claims. Due to the existence of this credible evidence which significantly weakened Lawrence's claims, we conclude that the jury's verdict was not contrary to the great weight and clear preponderance of the evidence.

Lawrence's next argument is that he is entitled to a new trial based on his assertion that "the jury's findings of no cause and no damages, clearly indicates passion, prejudice and perversity, and result in a miscarriage of justice."

"A verdict is perverse when the jury clearly refuses to follow the direction or instruction of the trial court upon a point of law, or where the verdict reflects highly emotional, inflammatory or immaterial considerations, or an obvious prejudgment with no attempt to be fair." *Redepenning v. Door*, 56 Wis.2d 129, 134, 201 N.W.2d 580, 583 (1972) (footnote omitted). In order for a verdict to be perverse the jury must disobey and ignore the court's instructions to the jury. *See, e.g., id.* Here, the jury did neither. The jury, as instructed, weighed the credibility of the witnesses and concluded that Lawrence did not suffer a serious injury as a result of the accident. Inasmuch as the jury determined that either there was no injury at all or no serious injury requiring medical care or resulting in pain and suffering, the jury was obligated to find that there were no damages. None of the verdict answers reflects a refusal to follow the trial court's instructions. Thus, no perversity has been shown in the jury's verdict.

For the reasons stated, the judgment is affirmed.

*By the Court.*—Judgment affirmed.

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

