COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1169

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

PAUL FOCHS,

PLAINTIFF-RESPONDENT,

V.

JOHN BUCH, D/B/A BUCH TRANSPORTATION, WEST BEND MUTUAL INSURANCE COMPANY AND DANIEL REW,

DEFENDANTS-APPELLANTS,

MENARDS, INC. AND FIREMAN'S FUND INSURANCE COMPANY,

DEFENDANTS,

AETNA LIFE AND CASUALTY COMPANY,

SUBROGATED-NOMINAL-DEFENDANT.

APPEAL from a judgment of the circuit court for Marathon County: RAYMOND F. THUMS, Judge. *Affirmed.*

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

PER CURIAM. John Buch d/b/a Buch Transportation, his insurer and his employee, Daniel Rew, appeal a judgment awarding Paul Fochs money damages for injuries he suffered when a truckload of roof trusses fell on him and broke his back. They argue that they are entitled to a new trial because: (1) Fochs's attorney informed the jury through adverse examination of Buch that his trucking delivery service contract required him to maintain one million dollar liability coverage; (2) the trial court sided with Fochs's counsel in a dispute with a medical witness on whether a drug was a muscle relaxant or a sedative; (3) the trial court included an "informational" special verdict answer informing the jury that Fochs's past medical expenses amounted to $59,218; and (4) in the interest of justice because the true controversy was not fully tried based on the cumulative effect of these errors. We reject these arguments and affirm the judgment.

Fochs was asked by his father to deliver a check to the truckdriver, Rew, when he delivered the roof trusses to a building site. Rew testified that he saw that the load was wobbling and moving as he started to unload it. He did not chain the trusses together before beginning the unloading process even though he had been trained to do so. As the trusses started to lean and ultimately fall off the truck, Rew stood on the ground next to the truck and attempted to hold the trusses on the bed. At that point, he asked Fochs for help. Fochs climbed on the truck's ladder and attempted to assist Rew. Without warning Fochs, Rew let go of the load and dove alongside the truck to protect himself from injury. When the trusses fell off the truck, they threw Fochs to the ground breaking his back.

The jury found the defendants ninety-percent causally negligent. It awarded $316,250 for past and future pain and suffering in addition to the $59,218

past medical expenses and $13,050 past wages which were answered by the court in the special verdict.

During the trial, Fochs's attorney made reference to liability insurance. He first mentioned liability insurance during voir dire when he asked a prospective juror if he knew how liability insurance is defined. The court sustained an objection and instructed counsel to stay away from the issue of insurance, noting that counsel was "treading on pretty thin ground." Then, during adverse examination of Buch, Fochs's attorney asked a series of questions relating to Buch's compliance with the trucking delivery service contract. Counsel asked whether the contract required Buch to carry and provide insurance coverage and, specifically, whether the contract required Buch to provide general liability coverage in the amount of one million dollars. Buch answered "yes" and his counsel immediately objected. At a posttrial hearing, the trial court denied the request for a new trial, noting that the jury's damage award was much lower than the million dollar coverage mentioned during the trial, the award was within the range the trial court had expected and the jury was instructed to disregard liability insurance.

Whether to grant a new trial is committed to the trial court's discretion and its decision will be upheld if the court considered facts of record and its reasoning results in a rational and legally sound decision. *See* ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991). Improper mention of insurance coverage will result in a new trial only if prejudice has resulted. Prejudice cannot be presumed, but must be shown by affirmative evidence. *See* ***Nimmer v. Purtell***, 69 Wis.2d 21, 36, 230 N.W.2d 238, 266 (1975).

The trial court properly exercised its discretion when it denied a new trial based on disclosure of insurance coverage. The reasons recited by the trial court are based on facts of record and a correct view of the law. Buch argues that improper conduct followed by a verdict suggesting prejudice or perversity justifies a new trial. The verdict was not perverse. The award for past and future pain and suffering is reasonably supported by evidence the jury had the right to accept. The jury is presumed to have obeyed the court's instructions to ignore stricken testimony and answer the damage question as if there were no insurance. *See* ***Roehl v. State***, 77 Wis.2d 398, 413, 253 N.W.2d 210, 217 (1977). Nothing in the verdict suggests that its knowledge of liability insurance affected its decision.

One of the issues at trial was whether Fochs's injuries were "in his mind." While exploring that issue, Fochs's treating physician testified that a drug he prescribed was a muscle relaxant. The defense expert testified that while this drug is sold as a muscle relaxant, it is really a sedative that had the effect of reducing Fochs's imaginary fears concerning his back. While examining the defense expert on this opinion, Fochs's attorney began to speak of his personal use of the medication as a muscle relaxant. Defense counsel objected to this "testimony by counsel" and asked that the question be rephrased. The trial court responded "The whole problem is I'm familiar with it too, but go ahead."

Buch contends that the court's statement constituted a "toxic and mortal observation" suggesting to the jury that the objection was overruled because, as a matter of fact, the defense expert was wrong. At the postverdict hearing, the trial court indicated that it made the statement to defuse the situation and move the questioning along. The court noted that it instructed the jury to ignore the judge's demeanor and that it was the sole judge of the witnesses'

credibility. The court concluded that the defense was not prejudiced by the court's statement.

The trial court properly refused to grant a new trial based on its statement that it was familiar with the drug. The statement does not indicate whether the judge considers the drug a muscle relaxant or a sedative. The objection did not relate to whether the doctor's testimony was correct. Rather, it related to the "testimony by counsel." After the trial court made its statement, counsel resumed questioning without referring to his personal experience with the drug. The record does not show that the judge took a position on the credibility of the witness or that the jury disregarded its instruction to decide credibility for itself.

Buch next argues that the trial court should not have informed the jury of the amount it awarded for past medical expenses. Buch contends that this information improperly invited the jury to "engage in some fanciful general damages formula, unfounded in law." The form of the verdict rests in the trial court's discretion, and this court will not interfere with its discretion as long as the issues of fact are covered by appropriate questions. ***Dahl v. K-Mart***, 46 Wis.2d 605, 609, 176 N.W.2d 342, 344 (1970). The form of the verdict submitted constitutes a proper exercise of the court's discretion. There is nothing unusual in the trial court answering special verdict questions as to past medical expenses and past wage loss. The trial court reasoned that its answer should be given to the jury because past medical expenses are relevant to the nature and severity of the injuries sustained and that it is helpful for the jury to know this information when considering pain and suffering. The court instructed the jury that the questions answered by the court should have no bearing on the questions the jury was to

answer. Nothing in the record suggests that the jury improperly used its knowledge of the past medical expenses.

Finally, we conclude that there is no basis for granting a new trial in the interest of justice. The cumulative effect of the "errors" do not support a finding that the real controversy was not fully and fairly tried. The apportionment of negligence is based on a reasonable view of the evidence presented. Although Fochs has substantially recovered from his injuries, the evidence shows that he has suffered a permanent disability that will result in pain for the rest of his life. His multiple hospitalizations and the testimony of numerous lay witnesses regarding his health problems since the accident support the verdict. The jury's findings as to damages are given special weight when they have been approved by the trial court. *See* ***Johnson v. Heintz***, 73 Wis.2d 286, 311, 243 N.W.2d 815, 829-30 (1976). The record does not support the argument that the verdict resulted from passion, prejudice or ignorance.

By the Court.—Judgment affirmed.

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