COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1874 **Cir. Ct. No. 2009CV1126**

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

RICHARD BERG,

PLAINTIFF-APPELLANT,

V.

SECURA INSURANCE, A MUTUAL COMPANY AND MICHAEL S. LAUER,

DEFENDANTS-RESPONDENTS,

WISCONSIN MUNICIPAL MUTUAL INSURANCE COMPANY,

SUBROGATED DEFENDANT.

APPEAL from an order of the circuit court for Eau Claire County: WILLIAM C. STEWART, JR., Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Richard Berg appeals an order denying his motion for a new trial after a jury concluded a car accident between Berg and Michael

Lauer did not cause any injury to Berg. Berg argues the jury's verdict is inconsistent. He also seeks a new trial in the interest of justice, arguing several of the circuit court's evidentiary rulings were erroneous. We reject Berg's arguments and affirm.

BACKGROUND

¶2 On March 9, 2007, Berg was on duty as a deputy sheriff for Eau Claire County. Berg was driving on La Salle Street in Eau Claire. He stopped his vehicle at the intersection of La Salle and Gooder Streets and waited to make a left turn onto Gooder Street. Berg observed the Lauer vehicle approaching him from behind and realized it would not be able to stop in time to avoid a collision. In an attempt to evade the impact, Berg took his foot off of the brake and placed it on the accelerator. His car moved forward slightly, but was nevertheless hit from behind by Lauer's vehicle. Berg estimated Lauer's vehicle was traveling at about twenty miles per hour at the time of the collision and his own vehicle was traveling at about two to five miles per hour. Gary Field, a police officer called to the scene, noted "minor" damage to the rear end of Berg's vehicle and the front end of Lauer's vehicle.

¶3 At trial, there was conflicting testimony about whether Berg reported being injured at the scene of the accident. Lauer testified that, immediately after the accident, Berg denied being injured, said the accident "wasn't serious," and stated, "[I]f I wasn't on duty and didn't have an obligation to call this accident in, because I'm driving a County vehicle, … we could just both go our ways." At trial, Berg denied making these statements and testified he told Field his neck and back were sore after the collision. Field testified Berg reported that he may have been injured, but Field did not observe any injury to Berg.

¶4 Later that day, Berg went to a hospital emergency room, complaining of pain between his shoulder blades. Five days later, Berg was treated by Dr. Jay LaGuardia, a chiropractor. Doctor LaGuardia concluded Berg had suffered a sprain or strain of the cervical and thoracic spine, as well as "ligament instability" in the lower neck. Berg continued to see Dr. LaGuardia until October 24, 2007, when he was released from Dr. LaGuardia's care.

¶5 Berg did not receive any treatment for back pain for the next thirteen months. On November 18, 2008, Berg retained an attorney. On November 24, 2008, he returned to Dr. LaGuardia and once again began treating with Dr. LaGuardia on a regular basis. Berg saw his family physician, Dr. Dale Reid, on August 5, 2009, but did not mention that he had been involved in a car accident. On December 17, 2009, Berg filed suit against Lauer and his insurer, Secura Insurance, alleging Lauer was at fault for the March 9, 2007 collision. On December 30, 2009, Berg returned to Dr. Reid complaining of back pain caused by the collision with Lauer.

¶6 In their answer to Berg's complaint, Lauer and Secura denied liability for the accident. However, shortly before trial, they stipulated that Lauer was at fault. A trial was held on two remaining issues: whether the accident caused any injury to Berg, and the extent of Berg's damages.

¶7 At trial, Dr. LaGuardia testified the accident had caused permanent injury to Berg's upper back and lower neck, which would require six to twelve chiropractic adjustments per year for the rest of Berg's life. Doctor Reid also testified Berg had suffered a muscle tear because of the accident and would require ongoing chiropractic care.

¶8 In support of its theory that Berg was not actually injured in the accident, the defense emphasized that the collision occurred at a relatively low speed and caused only minor property damage. The defense also pointed out that Berg was released from Dr. LaGuardia's care in October 2007 and did not seek further treatment for any injury from the accident until November 24, 2008, six days after Berg retained counsel. Furthermore, the defense noted Berg did not mention the car accident to Dr. Reid until after he filed suit against Lauer. Additionally, the defense pointed out that, before trial, Berg responded to a defense interrogatory by denying any prior injuries. However, at trial, Berg admitted his answer to that interrogatory was untrue because he had been involved in a collision with a semi in 2003 that had injured his low back. Berg admitted he received chiropractic treatment for about one year following the 2003 accident.

¶9 In its closing argument, the defense contended Berg had not proved the collision with Lauer's vehicle caused him any injury. However, defense counsel also stated, "I don't have an objection to somebody getting in an accident and going to be checked out. You know, it's—that's a smart thing to do as far as I'm concerned. I don't have any quibble with people doing that. And Mr. Berg did that. And that's fine." Accordingly, the defense argued Berg's past medical expenses should be somewhere between $553—the cost of Berg's initial emergency room visit—and $2,955.57—the cost of the emergency room visit plus the cost of "get[ting] checked out and get[ting] released … by the chiropractor" between March and October 2007.

¶10 Over Berg's objection, the circuit court submitted a two-question special verdict to the jury. Question 1 asked, "Was the car accident involving Defendant Michael Lauer on March 9, 2007 a cause of injury to Plaintiff Richard Berg?" The jury responded, "No." Question 2 asked:

> Regardless of how you answered any other question, answer this question: What sum of money will fairly and reasonably compensate Plaintiff Richard Berg for the damages, if any, that he sustained as a result of the collision for the following:
>
> (A) Past health care expenses $_____
>
> (B) Future health care expenses $_____
>
> (C) Past pain, suffering, and disability to time of trial $_____
>
> (D) Future pain, suffering, and disability[.] $_____

The jury wrote $1,000 in the blank next to past health care expenses, and entered zeros in the three other blanks.

¶11 Berg moved for a new trial, arguing the jury's verdict was inconsistent because the jury concluded the accident did not cause any injury to Berg, but nevertheless awarded $1,000 for Berg's past medical expenses. Berg also alleged the circuit court erred by admitting evidence of the dates Berg retained his attorney and filed the lawsuit, and by excluding Lauer and Secura's answer to the complaint and responses to certain requests to admit. The court denied Berg's motion.

DISCUSSION

¶12 On appeal, Berg argues he is entitled to a new trial because the jury's verdict was inconsistent. He also seeks a new trial in the interest of justice, based on the circuit court's alleged evidentiary errors. We address each argument in turn.

I. Inconsistent verdict

¶13 "An inconsistent verdict is one in which the jury's answers are 'logically repugnant to one another.'" ***Kain v. Bluemound E. Indus. Park, Inc.***, 2001 WI App 230, ¶40, 248 Wis. 2d 172, 635 N.W.2d 640 (quoting ***Fondell v. Lucky Stores, Inc.***, 85 Wis. 2d 220, 228, 270 N.W.2d 205 (1978)). In other words, "[i]nconsistency exists when [a jury's] answers cannot be reconciled, or cannot be reconciled without eliminating or altering an answer." ***Reuben v. Koppen***, 2010 WI App 63, ¶13, 324 Wis. 2d 758, 784 N.W.2d 703. When reviewing a jury's verdict for inconsistency, we uphold the verdict if, based on the record, "the jury could have made both of the findings that are claimed to be inconsistent." ***Id.*** (citation omitted). When a verdict is inconsistent, "such verdict, if not timely remedied by reconsideration by the jury, must result in a new trial." ***Westfall v. Kottke***, 110 Wis. 2d 86, 98, 328 N.W.2d 481 (1983).

¶14 Berg argues the jury's answers to Questions 1 and 2 of the special verdict are irreconcilable because the jury initially concluded the accident did not cause any injury to Berg, but then awarded him monetary damages for past medical expenses. Berg contends the jury "concluded no cause with respect [to] answer 1; but causation regarding answer 2." We do not agree that the jury's answers are irreconcilable.

¶15 At trial, the defense argued Berg had not been injured in the accident. Ample evidence supported this argument, including the low speed of the crash, the minimal damage to the vehicles, the thirteen-month gap in Berg's chiropractic treatment between October 2007 and November 2008, and Berg's history of back complaints stemming from a previous accident. However, the defense conceded that, even if Berg was not injured in the accident, it was

reasonable for him to see a doctor afterwards to be "checked out" for any injury. Consequently, the defense conceded Berg reasonably incurred past medical expenses between $553 and $2,955.57 when he went to the emergency room on the date of the accident and was subsequently "checked out and … released" by Dr. LaGuardia.

¶16 Accepting the defense's theory, the jury could have reasonably concluded: (1) that the accident did not cause any injury to Berg; and (2) that Berg nevertheless sustained $1,000 in damages as a result of the collision, in the form of past healthcare expenses. These findings are not logically repugnant to one another. *See* ***Kain***, 248 Wis. 2d 172, ¶40.

¶17 Berg argues the jury's findings are necessarily inconsistent because the two questions on the special verdict both pertained to causation, and the jury gave conflicting answers regarding whether the accident caused any injury to Berg. However, the two questions actually contained two distinct inquiries regarding causation. Question 1 asked whether the March 9, 2007 accident was "a cause of *injury*" to Berg. (Emphasis added.) Question 2 pertained to damages, not injury, asking, "What sum of money will fairly and reasonably compensate [Berg] for the *damages*, if any, that he sustained as a result of the collision[?]" (Emphasis added.) Because Question 1 asked whether the accident caused injury to Berg, but Question 2 asked about damages caused by the accident, the jury could logically answer the two questions in the way it did—that is, by concluding that Berg was not *injured* as a result of the accident, but nevertheless suffered $1,000 in *damages* for past medical expenses associated with being "checked out" for injury. The jury's answers can therefore be reconciled with one another and, consequently, the jury's verdict is not inconsistent. *See* ***Reuben***, 324 Wis. 2d 758, ¶13.

II. Interest of justice

¶18 Berg next asks us to grant a new trial in the interest of justice. WISCONSIN STAT. § 752.35[1] permits us to grant a new trial if we are convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried[.]" We exercise our discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶19 Berg argues he is entitled to a new trial because the circuit court erroneously admitted and excluded evidence. We review a circuit court's evidentiary rulings for an erroneous exercise of discretion. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. We will affirm if the court applied the correct law to the facts of record and, using a demonstrated rational process, reached a conclusion a reasonable judge could reach. ***Id.*** Moreover, we will search the record for reasons to sustain the court's exercise of discretion. ***Roy v. St. Lukes Med. Ctr.***, 2007 WI App 218, ¶11, 305 Wis. 2d 658, 741 N.W.2d 256.

¶20 Berg first argues the circuit court erred by admitting the date he retained his attorney and the date he filed suit against Lauer. However, he fails to explain why this evidence was inadmissible. Generally, all relevant evidence is admissible. *See* WIS. STAT. § 904.02. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶21 Here, Berg treated with Dr. LaGuardia from March 2007 until October 2007, when Dr. LaGuardia released him from care. Following his release, Berg did not seek treatment for any injury stemming from the accident for over one year. Then, on November 18, 2008, Berg retained an attorney. Six days after retaining counsel, Berg once again began treatment with Dr. LaGuardia. Berg saw Dr. Reid on August 5, 2009, but he did not mention the car accident to Dr. Reid until December 30, 2009, about two weeks after he sued Lauer. On appeal, Lauer and Secura argue these dates were relevant because they called into question whether Berg sought treatment because of an actual injury or because of a "focus on the lawsuit[.]" Berg does not refute Lauer and Secura's argument that the dates were relevant. Arguments not refuted are deemed conceded. ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶22 Furthermore, Berg does not argue that the admission of this evidence was unfairly prejudicial. *See* WIS. STAT. § 904.03 (relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice). Unfair prejudice occurs where the proffered evidence, if admitted, "would have a tendency to influence the outcome by improper means" or "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." ***State v. Mordica***, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (1992).

¶23 The dates Berg retained his attorney and filed his complaint do not meet this standard. The jury simply heard a timeline of the events, which included these dates, along with the date Berg returned to Dr. LaGuardia for treatment and the date he informed Dr. Reid of his alleged injury. The defense briefly discussed

these dates during its opening statement and closing argument, but it did not overtly argue that the jury should draw any inferences from them. We are not persuaded that the defense's references to these dates influenced the outcome of the trial by improper means, appealed to the jury's sympathies, or caused the jury to base its decision on something other than the evidence. *See* ***id.***

¶24 Berg next argues the circuit court erred by excluding Lauer and Secura's answer to the complaint, which denied that Lauer's negligence caused the accident. Berg contends the answer should have been admitted to allow him to "respond" to evidence regarding the date he retained counsel and the date he filed suit.

¶25 We conclude the circuit court properly exercised its discretion by excluding Lauer and Secura's answer. First, the answer's denial of liability does not "respond" to evidence regarding the retainer date and the date Berg filed his complaint. Those dates go to whether Berg actually sustained an injury in the accident. Lauer and Secura's initial denial of liability has no bearing on the issue of whether Berg sustained an injury. Second, because Lauer and Secura admitted liability for the accident at trial, the answer's denial of liability was not relevant to any issue before the jury. The only remaining issues at trial were whether the accident caused Berg any injury and the amount of Berg's damages. That Lauer and Secura initially denied liability for the accident was not relevant to either of these issues.

¶26 Berg next contends the circuit court erred by excluding Lauer and Secura's responses to three requests to admit. In response to Request No. 1, Lauer and Secura denied that Lauer "failed to exercise reasonable care in the operation of his motor vehicle at and before the accident[.]" Again, given that Lauer and

Secura admitted liability for the accident at trial, their pretrial denial of liability was not relevant to any issue before the jury. Accordingly, the court properly excluded their response to Request No. 1.

¶27 In response to Request No. 2, Lauer and Secura denied that Lauer's negligence was "a proximate cause of the injury received by plaintiff Richard Berg." This response is consistent with Lauer and Secura's position at trial—that is, that the accident did not cause Berg any injury. Thus, even assuming the response to Request No. 2 should have been admitted, the court's failure to do so did not prejudice Berg and was therefore harmless. *See* WIS. STAT. § 805.18(2) (new trial not warranted unless an error "affected the substantial rights of the party seeking … to secure a new trial").

¶28 In response to Request No. 3, Lauer and Secura admitted that Berg "exercised reasonable care at and before the accident[.]" Once again, because liability was not an issue at trial, Lauer and Secura's pretrial admission that Berg exercised reasonable care was not relevant to any issue before the jury. The court therefore properly excluded the response to Request No. 3. Furthermore, because Lauer and Secura's response was consistent with their position at trial, any error in the court's failure to admit the response would have been harmless. *See* ***id.*** Consequently, the circuit court's evidentiary rulings do not warrant a new trial in the interest of justice.

By the Court.—Order affirmed.

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