

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 23, 1998

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. 96-2755

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

**TRACY BERGINZ-GRAEF,
A/K/A TRACY BERGINZ-SMITH,**

PLAINTIFF-APPELLANT,

V.

**STEPHANIE E. LAMON, ALLSTATE INSURANCE
COMPANY, A DOMESTIC CORPORATION,
CROWN PRINCE, INC., A DOMESTIC CORPORATION
AND ITT HARTFORD INSURANCE
GROUP, A FOREIGN CORPORATION,**

DEFENDANTS-RESPONDENTS,

RICHARD C. YELLEN,

DEFENDANT,

**STATE OF WISCONSIN DEPARTMENT OF
HEALTH AND SOCIAL SERVICES,**

NOMINAL-DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: LOUISE M. TESMER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Tracy Berginz-Graef appeals from a judgment entered after a jury awarded her damages in her personal injury lawsuit, which arose from an automobile accident. Berginz-Graef argues that the trial court erred in excluding medical testimony that she suffered from a herniated disc. Berginz-Graef also argues that the damages award was too low, and she requests a new trial on the issue of damages. We reject Berginz-Graef's arguments and affirm.

I. BACKGROUND

On April 17, 1991, Berginz-Graef was injured in an automobile accident involving three other vehicles. Berginz-Graef brought suit against the drivers of two of the other vehicles and their insurance companies, and the employer of one of those two drivers. Prior to trial, the trial court granted a defense motion *in limine* to exclude all evidence regarding the permanency of Berginz-Graef's injuries. This ruling was based upon Berginz-Graef's failure to comply with the trial court's previous order to produce her medical witness for a deposition. Pursuant to its order barring permanency evidence, the trial court excluded medical testimony that Berginz-Graef suffered a herniated disc as a result of the accident. As an additional ground for excluding the testimony, the trial court ruled that the testimony was inadmissible because the medical expert based his opinion on an unreliable medical record.

II. DISCUSSION

Berginz-Graef argues that the trial court erred in excluding medical testimony that she suffered a herniated disc as a result of the accident. She argues that the testimony was admissible under RULE 907.03, STATS., and that the testimony did not violate the trial court's order excluding evidence of the permanency of her injuries.¹ We do not reach the issue of whether the testimony was admissible under RULE 907.03, STATS., because we conclude that the trial court properly excluded the testimony pursuant to its pretrial order barring permanency evidence.² *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (if a decision on one point disposes of an appeal, the appellate court will not decide the other issues raised).

Berginz-Graef argues that the trial court erred in excluding evidence that she suffered a herniated disc from the accident. She does not argue that a herniated disc is not a permanent injury, but, rather, she argues that the jury *would not have known* that a herniated disc is a permanent injury without expert testimony to establish the permanency of a herniated disc, and that, therefore, the medical testimony that she had suffered a herniated disc would not have violated

¹ RULE 907.03, STATS., provides:

Bases of opinion testimony by experts. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

² Berginz-Graef does not challenge the trial court's pretrial order excluding permanency evidence. She argues only that her proffered evidence regarding her herniated disc did not violate that pretrial order.

the pretrial order excluding permanency testimony.³ Additionally, Berginz-Graef asserts that the trial court erred in excluding the following expert medical testimony, which she offered by deposition, regarding the effects of a herniated disc:

Q. And just if you could educate myself and the jury, what effects of these type of injuries have upon an individual regarding their stamina, endurance, ability to exercise? How would that affect an individuals [sic] quality of life?

A. This patient who have—Talk about her back first. Patient who have a slipped disc in the back, their life, their physical activity would become restricted. They really cannot take things that we all take for granted any longer. Things that we can run, jump up and down, bend over to pick up a coin on the floor, bend up to pound a nail on the wall, lift grocery bag, lift heavy object, we do that, take it for granted, we never have to worry about. These people, they have lived with their life that they had before they could do anything before the slipped disc happened, but

³ Berginz-Graef cites *Grassl v. Nelson*, 75 Wis.2d 107, 248 N.W.2d 403 (1977), and *Peterson v. Western Casualty & Surety Co.*, 5 Wis.2d 535, 93 N.W.2d 433 (1958), for the proposition that a jury cannot determine how long an injury will last without expert testimony. The rule stated in both *Grassl* and *Peterson* is derived from *Diemel v. Weirich*, 264 Wis. 265, 58 N.W.2d 651 (1953). In *Diemel*, the injured plaintiff testified that her right leg, which was bruised in a car accident, still bothered her on occasion, and that she had bad headaches twice a week. She did not present expert testimony regarding these conditions. The supreme court held that the plaintiff was not entitled to damages for future pain and suffering based solely upon her own testimony of her subjective injuries, *see id.*, 264 Wis. at 268–269, 58 N.W.2d at 652–653, and stated the law as follows:

“[W]here the injury is subjective in character and of such nature that a layman cannot with reasonable certainty know whether or not there will be future pain and suffering, the courts generally require the introduction of competent expert opinion testimony bearing upon the permanency of such injury or the likelihood that the injured person will endure future pain and suffering before allowing recovery therefor.”

Id., 264 Wis. at 268, 58 N.W.2d at 652 (quoted source omitted). Unlike the injuries at issue in *Diemel*, Berginz-Graef’s herniated disc is not a subjective injury that she sought to establish solely through her own testimony. The medical testimony that she sought to admit would have established that she had an objective injury that her expert was able to observe from her medical records. We therefore find these authorities inapposite.

after the slipped disc they sometimes continue to have the same habit, forget and when they drop a coin they bend over to pick it up and that's when they immediately would be reminded that they cannot do that anymore. The slipped disc would slip out of place, touch the nerve roots, send a jolting pain down to the leg. They cannot go skiing, ice-skating, predispose themselves to falling on the buttock especially or the back.

The trial court concluded that the evidence of Berginz-Graef's herniated disc and its effects violated the pretrial order barring permanency evidence. Berginz-Graef argues that the trial court erred in determining that the proffered evidence reflected that she had suffered permanent injuries.

Trial courts are granted broad discretion in determining whether to admit or exclude proffered evidence. See *State v. Larsen*, 165 Wis.2d 316, 319–320, 477 N.W.2d 87, 88 (Ct. App. 1991). Our review is limited to determining whether the trial court erroneously exercised this discretion. See *id.*, 165 Wis.2d at 320 n.1, 477 N.W.2d at 89 n.1. We will not overturn a trial court's evidentiary ruling unless there was no reasonable basis for it. See *State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983).

As noted, the trial court had excluded all evidence regarding the permanency of Berginz-Graef's injuries, and Berginz-Graef does not challenge that ruling. She argues only that the evidence regarding her herniated disc did not reflect that she had suffered a permanent injury. We disagree. Berginz-Graef's proffered expert testimony regarding the effects of a herniated disc, set out above, indicates that a herniated disc permanently limits the injured person's physical capabilities, and results in pain if the person exceeds those limits. Thus, evidence that Berginz-Graef suffered a herniated disc reveals that she sustained a permanent injury. Berginz-Graef was not entitled to admission of her permanent injury based upon the mere chance that all of the jurors would be ignorant of the permanent

nature of a herniated disc; a permanent injury is a permanent injury regardless of the knowledge of the jurors. Because a herniated disc itself is an injury with permanent effects, the trial court properly exercised discretion in determining that the testimony regarding Berginz-Graef's herniated disc violated the pretrial order barring permanency evidence.

Berginz-Graef also argues that damages awarded by the jury were too low, and that she is entitled to a new trial on the issue of damages. The respondents contend that Berginz-Graef waived her right to challenge the damage award by stipulating that she would “withdraw the issue of the low damage award on appeal” in order to limit the scope of the transcript. They also contend that the appellate record is insufficient to review the damages award. *See State Bank v. Arndt*, 129 Wis.2d 411, 423, 385 N.W.2d 219, 225 (Ct. App. 1986) (an appellant has the duty to ensure that the record is sufficient to review the issues raised on appeal); *Austin v. Ford Motor Co.*, 86 Wis.2d 628, 641, 273 N.W.2d 233, 239 (1979) (in the absence of a transcript, an appellate court will assume every fact essential to sustain the decision below). Berginz-Graef does not refute these arguments; thus, we deem them admitted. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (arguments that are not refuted are deemed admitted). Berginz-Graef is not entitled to a new trial on the issue of damages.

By the Court.—Judgment affirmed.

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

