COURT OF APPEALS
DECISION
DATED AND FILED

September 1, 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. 96-3687

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

JAMES BAKO,

PLAINTIFF-RESPONDENT,

V.

LEADER NATIONAL INSURANCE COMPANY, AND DAVID PAGLIARONI, PERSONAL REPRESENTATIVE OF THE ESTATE OF DOMINIC F. PAGLIARONI,

DEFENDANTS,

UNITED STATES FIDELITY AND GUARANTY COMPANY,

DEFENDANT-RESPONDENT-CROSS-APPELLANT,

V.

GENERAL CASUALTY COMPANY OF WISCONSIN, INC.,

DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

ALUMATIC CORPORATION OF AMERICA, INC.,

DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT,

JOSEPH J. GUTSCHENRITTER, JERICHO TRUCKING CO., INC. AND MILWAUKEE MUTUAL INSURANCE COMPANY,

THIRD-PARTY DEFENDANTS.

APPEAL and CROSS-APPEAL from a judgment and orders of the circuit court for Milwaukee County: RAYMOND E. GIERINGER, Reserve Judge, THOMAS P. DOHERTY and JOHN F. FOLEY, Judges. *Affirmed and reversed.*

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

PER CURIAM. General Casualty Company of Wisconsin, Inc., and its insured, Alumatic Corporation of America, Inc. (collectively "General Casualty"), appeal from a judgment after a jury found Alumatic's employee, Richard Wink, 100% causally negligent for injuries suffered by James Bako following a motor vehicle accident on September 14, 1990. General Casualty claims that: (1) it was entitled to a default judgment for indemnification against United States Fidelity and Guaranty Company (USF&G) because USF&G failed to answer General Casualty's cross-claim; (2) the ***Pierringer*** release entered into between Bako and USF&G should have operated as a dismissal of Bako's claims against General Casualty;[1] (3) the trial court should have answered "Yes" to the

[1] General Casualty seeks reversal of the order approving the ***Pierringer*** release because this order also denied General Casualty's motion to be dismissed. Based on our resolution as set forth in this opinion, we need not address this issue and, consequently, we affirm this order.

negligence and cause questions as to USF&G's employee, Patrick Meshell, before submitting the verdict to the jury; and (4) the trial court erroneously exercised its discretion in allowing the expert testimony of a chiropractor. This appeal is governed by ***Pollack v. Calimag***, 157 Wis.2d 222, 458 N.W.2d 591 (Ct. App. 1990), wherein this court held that Wisconsin's default judgment statute, § 806.02, STATS., is limited to motions by a plaintiff and does not provide authority for a counterclaiming defendant to obtain a default judgment. *See* ***id.*** at 235, 458 N.W.2d at 598. This controlling case disposes of General Casualty's first, second, and third issues as each is dependent on its claim that the trial court should have granted it a default judgment for indemnification.[2] Further, our review demonstrates that the trial court did not erroneously exercise its discretion in allowing the challenged chiropractic evidence. Accordingly, we reject General Casualty's arguments and affirm the judgment.

USF&G cross-appeals asking us to reverse the trial court's order for conditional default judgment entered against it. USF&G claims § 806.02, STATS., does not provide authority for a defendant to obtain default judgment and therefore, the trial court erred. Because we have concluded that the trial court should not have granted the conditional default judgment, we reverse the conditional default judgment order. Because of our disposition, it is not necessary to address the excusable neglect issue raised by USF&G's cross-claim.

I. BACKGROUND

[2] General Casualty argues that USF&G should be precluded from arguing the ***Pollack v. Calimag***, 157 Wis.2d 222, 458 N.W.2d 591 (Ct. App. 1990), case on appeal because it did not argue this case at the trial court level. We reject this argument as the record clearly refutes this contention.

This case arises from two personal injury motor vehicle accidents in which Bako was injured. The first accident was a multi-vehicle collision, occurring on September 14, 1990. Bako was driving a truck owned by his employer, EKG Trucking. He was rear-ended by another EKG truck, which was driven by his co-employee, Meshell. USF&G was EKG's worker's compensation insurer as well as its liability insurer. Meshell's truck was rear-ended by Wink, who was an employee of Alumatic, which was insured by General Casualty. The second accident occurred on October 31, 1990, and involved a vehicle driven by Dominic F. Pagliaroni, who was insured by Leader National Insurance Company. Bako claims that the second accident aggravated injuries he suffered in the first accident.

Bako filed a summons and complaint naming Alumatic and General Casualty as well as Pagliaroni and Leader as defendants. The complaint also named USF&G, solely for its subrogated interest as Bako's worker's compensation insurer. General Casualty filed an answer and cross-claimed against USF&G, as liability insurer for Meshell.[3] USF&G did not file an answer to the cross-claim within the required time period.

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[3] The cross-claim stated in pertinent part:

> That on September 14, 1990, Patrick C. Meshell, an employee of EKG Trucking, while operating one of its vehicles with its permission and within the scope of his employment as a driver for EKG Trucking, was involved in a multi-vehicle collision on Interstate Highway 45 near State Highway 100 in the City of Wauwatosa, Milwaukee County, Wisconsin; that at said time and place Patrick Meshell negligently operated said vehicle, causing it to collide with the rear end of a vehicle being driven by the plaintiff, James R. Bako, causing injuries to the plaintiff as alleged in plaintiff's complaint.
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> ….

(continued)

As a result, on February 16, 1994, General Casualty filed a motion seeking default judgment against USF&G. On February 24, 1994, USF&G filed a motion for enlargement of time to file an answer to the cross-claim and an answer to the cross-claim. On March 2, 1994, the trial court entered an order for judgment, granting General Casualty's motion for default judgment.[4] On March 15, 1994, USF&G filed a motion to vacate the default judgment order. In response, General Casualty filed a motion to strike the answers to the cross-claim and renewed its motion for default judgment. The trial court, by written memorandum dated December 9, 1994, granted General Casualty's motions to strike the answers to the cross-claim and its motion for renewed default judgment. The trial court denied USF&G's motion for extension of time, but granted its motion to vacate the March 2 default judgment order. In its place, the trial court entered a conditional default judgment order, which stated in pertinent part:

> IT IS FURTHER ORDERED that Alumatic's and General Casualty's motion for default judgment is granted. USF&G is deemed to have admitted all allegations in General Casualty's and Alumatic's cross-claims because it failed to answer them. General Casualty's and Alumatic's right for contribution will arise if and only if the fact-finder finds Alumatic and USF&G's insured driver jointly and severally liable. General Casualty's and Alumatic's right for indemnification will arise if and only if the fact-finder finds USF&G's insured driver 100% causally negligent.

> That if upon trial of this action, the defendant, Alumatic Corporation of America, Inc., is found jointly and severally liable with the defendant, United States Fidelity and Guaranty Company, for the injuries of the plaintiff, James Bako, defendant, Alumatic Corporation of America, Inc., will be entitled to contribution and/or indemnification from the defendant, United States Fidelity and Guaranty Company.

[4] The Hon. Thomas P. Doherty entered the initial default judgment order, as well as the December 9, 1994 memorandum decision, and the conditional default judgment order of February 9, 1995.

The case was set for a jury trial. Prior to trial, Bako and USF&G entered into a ***Pierringer*** release for $2,000. General Casualty refused to stipulate to USF&G's dismissal. As a result, a hearing was conducted wherein the trial court approved the ***Pierringer*** release and entered an order dismissing USF&G from the case.[5] The trial court rejected General Casualty's claim that, based on the default judgment order, if USF&G is released, Bako's claim against General Casualty must also be dismissed.

The case was tried in September 1997.[6] The jury found General Casualty's insured, Wink, 100% causally negligent for the September 14 accident and determined that USF&G's insured, Meshell, was not negligent. The jury found 85% of Bako's injuries attributable to the September 14 accident and 15% of his injuries attributable to the October 31 accident. The jury found damages to be $58,870. Bako obtained a judgment against General Casualty for $50,039.50, its proportionate share of the damages, plus costs. General Casualty appeals. USF&G cross-appeals.

[5] The Hon. John F. Foley presided over the hearing and entered the August 19, 1996 order approving the release.

[6] The Hon. Raymond E. Gieringer presided over the jury trial and entered judgment on the verdict.

II. DISCUSSION

A. Default.

The primary issue in this case is whether a default judgment was properly granted and, if so, the effect of that judgment. The decision to grant a default judgment is addressed to the discretion of the trial court, *see* ***Willing v. Porter***, 266 Wis. 428, 429-30, 63 N.W.2d 729, 731 (1954), and should be reversed only if the trial court erroneously exercised its discretion, *see* ***Midwest Developers v. Goma Corp.***, 121 Wis.2d 632, 650, 360 N.W.2d 554, 563 (Ct. App. 1984). The exercise of discretion requires a record of the trial court's "reasoned application of the appropriate legal standard to the relevant facts in the case." ***Hedtcke v. Sentry Ins. Co.***, 109 Wis.2d 461, 471, 326 N.W.2d 727, 732 (1982) (citation omitted).

Based on this court's holding in ***Pollack***, we conclude that the trial court improperly granted General Casualty's motion for default judgment. Section 806.02, STATS., establishes the procedure for default judgments. The statute provides in pertinent part:

> **Default Judgment. (1)** A default judgment may be rendered as provided in subs. (1) to (4) if no issue of law or fact has been joined and if the time for joining issue has expired. Any defendant appearing in an action shall be entitled to notice of motion for judgment.
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> **(2)** After filing the complaint and proof of service of the summons on one or more of the defendants and an affidavit that the defendant is in default for failure to join issue, *the plaintiff may move* for judgment according to the demand of the complaint.…

(Emphasis added.) We interpreted the meaning of this statute in ***Pollack***, where we addressed whether a default judgment may be granted in favor of a defendant when a plaintiff fails to timely answer a counterclaim. *See* ***id.***, 157 Wis.2d at 235, 458 N.W.2d at 598. We held that, according to the plain meaning of this statute, only a plaintiff may move the court for a default judgment. *See* ***id.*** In so holding, we noted: "We make no comment on the logic of a rule limiting default judgment to a plaintiff. But where, as here, the statutory language is unambiguous, we are bound by it and changes in it are for the legislature, not this court." ***Id.*** We decided ***Pollack*** in 1990. The legislature is presumed to act with knowledge of our decision and has not yet amended the statute to provide defendants filing cross-claims or counterclaims with the right to file motions for default.

Based on this authority, General Casualty was not entitled to a default judgment order under § 806.02, STATS. Accordingly, the trial court erred in granting the conditional default judgment order. Therefore, we reverse the conditional default judgment order.

With the exception of the challenge to the expert witness's testimony, General Casualty's remaining arguments are dependent on the existence of a default judgment order. Because we have reversed the default judgment order, it is not necessary to address the additional arguments, which are contingent upon that order. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed).[7]

[7] General Casualty also argues that even if they are not entitled to default judgment under § 806.02, STATS., they are still entitled to judgment pursuant §§ 802.01(2), 802.06(1) and 806.01, STATS. General Casualty claims that they *could have moved* the court for judgment under these sections, instead of the default judgment statute. We reject this argument because General Casualty's suggested reading of these statutes directly conflicts with ***Pollack***, as discussed within the text of this opinion.

B. Expert Witness.

General Casualty also argues that the trial court erroneously exercised its discretion in allowing certain testimony from Matt Dejanovich, a chiropractor, who was a witness for Bako. Essentially, General Casualty claims that Dejanovich should not have been allowed to testify because he did not examine Bako, never interviewed Bako, never reviewed the accident reports and did not have the proper expertise to offer any opinion regarding concussive injuries. The trial court ruled that Dejanovich could testify only as to a general medical theory: whether pain can first surface after a long period of time. The trial court ruled that Dejanovich could not offer any specific opinions as to Bako.

We review this issue with deference to the trial court because its decision to admit or exclude evidence is a discretionary determination that will not be disturbed if it has a reasonable basis and was made in accordance with accepted legal standards after considering the pertinent facts. *See* ***Steinberg v. Arcilla***, 194 Wis.2d 759, 768, 535 N.W.2d 444, 447 (Ct. App. 1995).

General Casualty argued that because Dejanovich only reviewed Bako's medical records, he should not be allowed to testify as an expert witness. The trial court limited Dejanovich's testimony to "his opinion as to whether someone could be hurt and not have pain for ten months." We cannot say that this ruling constituted an erroneous exercise of discretion. One of the principal damage issues at trial involved whether the delayed presentation of Bako's pain could be scientifically explained. Dejanovich offered his opinion of how a person who is involved in an accident may not feel back pain for many months because the process of neurological insult to the nerve tissue takes a period of time to occur. He testified that, even though the trauma to the back occurred at a specific

time, the pain may not surface until some degeneration of the discs in the back takes place. This testimony was helpful to the jury in determining whether Bako's delayed back pain was a result of the accident, *see* ***Maci v. State Farm Fire & Casualty Co.***, 105 Wis.2d 710, 720, 314 N.W.2d 914, 920 (Ct. App. 1981), and therefore, it was not an erroneous exercise of discretion to admit it.

Dejanovich further testified during re-direct that a patient who suffers a concussion may not provide an accurate account of the accident because a concussion can cause various neurological deficits, including loss of memory. General Casualty objected to this testimony, arguing that there was no foundation for Dejanovich to testify regarding concussive injuries. Bako argued that these questions were directly responsive to General Casualty's cross-examination. Whether this chiropractor has the requisite expertise to testify regarding neurological injuries is a close call. Nevertheless, we are bound by a discretionary standard of review. The trial court found Dejanovich was qualified to offer this opinion, and the record reflects he has training in neurology. Therefore, we cannot conclude that admission of this testimony constituted an erroneous exercise of discretion.

By the Court.—Judgment and order affirmed and order reversed.

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