COURT OF APPEALS
DECISION
DATED AND FILED

March 30, 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. 98-2553

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

ADAM G. HINTON,

PLAINTIFF-APPELLANT,

V.

ALLSTATE INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

AARON J. HANKEN,

PLAINTIFF-RESPONDENT,

V.

ADAM G. HINTON,

DEFENDANT-APPELLANT,

ALLSTATE INSURANCE COMPANY,

DEFENDANT.

APPEAL from a judgment and an order of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed.*

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

HOOVER, J. Adam Hinton appeals the trial court's denial of his motion for a new trial or, alternately, to overturn the jury verdict so that he can pursue his underinsured motorist claim. The jury found him to be solely at fault for a vehicular accident. On appeal, Hinton contends the trial court erroneously exercised its discretion by refusing to permit his personal attorney, in addition to counsel appointed by Allstate Insurance Company, to participate in the examination of witnesses during trial. Specifically, Hinton asserts that: (1) his and Allstate's interests were not fully aligned; (2) the Wisconsin Constitution gives Hinton the absolute right to participate with counsel of his choice; and (3) the parties' pretrial adjudicated settlement stipulation contemplated that each party would be permitted to participate in the trial. We conclude that the trial court properly exercised its discretion and, in any event, the error did not affect the trial's outcome. Therefore, we affirm the judgment and order.

BACKGROUND

This case involves a head-on collision between Hinton's and Aaron Hanken's vehicles. Allstate insured Hinton. Hinton retained attorney James Drill to pursue his tort claims against Hanken and his underinsured motorist claim against Allstate. Allstate retained attorney Thomas McCormick to defend Hinton and Allstate against Hanken's claims. Allstate retained separate counsel to defend itself from Hinton's underinsured motorist claim.

At some point the parties entered an agreement, the effect of which was to limit: (1) the jury issues to liability, cause and allocation of fault; (2) Hinton's recovery from Hanken to the amount of liability insurance available if Hanken's negligence exceeds 51%, but allowing Hinton to pursue any UIM claim against Allstate; and (3) Hinton's recovery to $1 from Hanken and Allstate if Hinton's negligence was found to be 51% or more. Subsequently, and before trial, Hanken settled Hinton's claims against him. The claims remaining for trial were Hanken's liability claim against Hinton and Allstate and Hinton's uninsured motorist claim against Allstate.

Neither Hinton nor Hanken recalled the accident, and there were no eyewitnesses. At trial, both sides proceeded on the theory that the other was wholly at fault, relying on their experts' opinions. Immediately before trial, Drill requested that he, in addition to McCormick, be permitted to examine witnesses on Hinton's behalf. The court rejected that request,[1] but reserved its decision regarding whether Drill would be permitted to address the jury in closing arguments.[2] Neither Drill nor anyone from his office appeared after the first day of trial. The jury found Hinton fully at fault.

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[1] The only recorded discussion of this matter was at a motions after verdict hearing:

> MR. DRILL: Only Your Honor that the determination of the rights of Mr. Hinton as the court knows was dependent upon that trial and the jury verdict, and since he was obviously a significant party in interest because all of his rights resulting from that collision were dependent upon that determination, I think that I should not have been denied the opportunity to participate in the examination of witnesses. I understand completely how Your Honor ruled at the time of the trial …[t]hat [we] should not have multiple lawyers questioning witnesses on the same issues.

[2] At a postverdict hearing on Hinton's motions, the trial court stated:

(continued)

Hinton filed a motion for a new trial and in the alternative, to be relieved of the jury's liability determination so that he could pursue his underinsured motorist claim. At the hearing, he argued that his rights should not be dependent upon the outcome of a case in which his lawyer was not permitted to participate. Hinton further intimated that he and Allstate did not share a commonality of interests, but he did not elaborate. The trial court relied on its initial determination that multiple lawyers should not question witnesses on the same issues and denied the motion.

ANALYSIS

Section 805.10, STATS.,[3] provides that no more than one attorney can examine or cross-examine witnesses on a party's behalf unless the trial court orders otherwise. We review a court's decision under this section to determine whether it erroneously exercised its discretion. *See* ***Hochgurtel v. San Felippo***, 78 Wis.2d 70, 87, 253 N.W.2d 526, 533 (1977). We will reverse only if the court erred in exercising its decision, the error affected a substantial right, and the error probably affected the result of the trial. ***Id***. at 88, 253 N.W.2d at 533. We will affirm a trial court's discretionary determination if it examined the relevant facts, applied the proper legal standard, and used a demonstrated rational process to

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> [I]t is clear the record would indicate that the court reserved a ruling on the issue of whether or not Mr. Drill would be allowed to participate in closing arguments until the second day. The court never had to rule on that because Mr. Drill wasn't available and that was understood that he might not be.

[3] Section 805.10, STATS., provides, in pertinent part:

> Examination of witnesses; arguments. Unless the judge otherwise orders, not more than one attorney for each side shall examine or cross-examine a witness and not more than 2 attorneys on each side shall sum up to the jury.

reach a conclusion that a reasonable judge could reach. *See* ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

Hinton contends that the trial court erred by failing to focus on whether he and Allstate had a commonality of interest. He insists they did not because if the jury found Hinton and Hanken equally causally negligent, under the stipulation Allstate would have to pay both liability *and* underinsured benefits. McCormick presented the theory that Hanken was entirely at fault. Hinton contends that if Drill had been permitted to examine witnesses, he would have elicited facts to show both parties were equally negligent. The record, however, does not support Hinton's contention that Drill intended to pursue a course different from McCormick's. We therefore conclude that the trial court properly exercised its discretion.

First, there is no indication in the record that Hinton ever alerted the trial court at or before trial that the parties had an agreement, under the terms of which Hinton's and Allstate's interests were potentially at odds. A trial court does not erroneously exercise its discretion by failing to take into consideration that which is not made known to it. *See, e.g.,* ***Fowler v. Fowler***, 158 Wis.2d 508, 518-19, 463 N.W.2d 370, 373 (Ct. App. 1990). Moreover, Hinton does not assert that had Drill been permitted to cross-examine Hanken's expert, he would have thereby suggested an equal liability theory. Indeed the record seems to belie that Drill would have done so.[4]

[4] The trooper who provided expert reconstruction testimony for Hanken opined that the accident occurred entirely in Hanken's lane. McCormick's cross-examination did not change his opinion. Drill was present at trial the day both experts were examined, and it is apparent he assisted McCormick.

Second, the record does not support Hinton's claim that he would have pursued such a theory at any point in the trial. The liability theory McCormick used depended upon the expert Drill retained.[5] We presume his opinion regarding liability would not have changed simply because the proffering attorney changed. If it would have, then the jury would have been correct in disregarding his opinion. Hinton does not contend that Drill would have presented additional witnesses. Indeed, on appeal Hinton acknowledges that he is not critical of McCormick's "all or nothing" trial approach, but insists that it was in his best interests to advance a theory of shared liability. We fail to see why this is so when Hinton stood to recover the most damages if the jury accepted McCormick's argument and found Hanken entirely at fault.

Third, the only issue at trial was Hinton's liability to Hanken. Although Hinton's underinsured motorist claim would be affected by the outcome of this issue, McCormick, not Drill, was retained to defend Hinton against Hanken's claim. Drill had already settled Hinton's claim against Hanken. Given the posture of the case, we agree with the trial court's decision not to permit Hinton to have multiple attorneys examine witnesses on the liability issue.

Hinton also contends that the trial court violated his constitutional right to counsel under art. I, § 21 of the Wisconsin Constitution, which provides in pertinent part: "In any court of this state, any suitor may prosecute or defend his suit either in his own proper person or by an attorney of the suitor's choice." Presumably Hinton contends that the trial court erred by applying § 805.10,

[5] Drill had retained and used the expert more than 100 times previously. The expert concluded that the accident was entirely Hanken's fault. The expert wrote a report, which Drill presumably saw. Drill had no other designated reconstruction expert.

STATS., to deny Drill the opportunity to examine witnesses. He also asserts that he has an absolute right to counsel of his choice. Moreover, he contends that the trial court prohibited him from prosecuting his claim against Allstate and that his rights were "decided by virtue of the pre-suit Agreement without having had the representation of his own counsel …." We are unpersuaded. The issue for the jury was liability, and McCormick was retained to defend that issue. Hinton does not contend that he rejected McCormick's representation or that McCormick was not the counsel of his choice in connection with that issue. Although the jury determination affected his underinsured motorist claim, that was not the issue before the jury. It affected his claim because he had entered into the pretrial agreement and subsequently settled his claim against Hanken, both done voluntarily and presumably with Drill's advice. He can not now complain that his own actions deprived him of his rights. *See* ***State v. McDonald***, 50 Wis.2d 534, 538, 184 N.W.2d 886, 888 (1981) (choice of strategy is binding).

Hinton next argues that even if a new trial is not warranted, he should be free to pursue his underinsured claim without being bound by the jury's liability determination. He contends that the pretrial agreement contemplated that each party would be represented with respect to their individual claims. The agreement itself does not express that understanding. Even if contemplated, it was Hinton himself who removed his case from the jury by settling his claim against Hanken. Drill represented him in connection with these issues and, we presume, advised of the effect of his actions. We will not now relieve him of the

agreement's terms simply because the jury determination did not turn out to his liking.[6] *See* ***id***.

Even if we were to assume that the court erred in exercising its discretion, that error did not affect the outcome. There was evidence in the record to support a jury determination that both parties were equally at fault. Counsel for Hanken referenced this evidence in his closing argument, but indicated to the jury that he did not subscribe to that position. The jury had before it the very evidence that Hinton claims only Drill would be interested in eliciting. Neither Drill nor anyone else from his office was there to argue that position to the jury, and the court had not ruled they could not. The jury rejected that theory of the collision. Therefore, we conclude that if the court erred, its error did not affect the trial result. Because the trial court properly exercised its discretion, and even if it did not, the error did not affect the trial's result, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[6] He does not request to be relieved of the beneficial aspects of the agreement, such as the limit on his liability to Hanken.