

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 20, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 99-3320

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

CHARLIE TATE, JR.,

**PLAINTIFF-RESPONDENT-
CROSS-APPELLANT,**

**PRIMECARE HEALTH PLAN, INC. AND
LUMBERMENS MUTUAL CASUALTY CO.,**

PLAINTIFFS,

V.

**GENERAL CASUALTY CO. OF WISCONSIN,
PARTICULAR TRANSPORTATION SERVICES, INC.,
AND MILAN L. JAMRYCH,**

**DEFENDANTS-APPELLANTS-
CROSS-RESPONDENTS.**

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL G. MALMSTADT, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

¶1 WEDEMEYER, P.J. General Casualty Co. of Wisconsin, Particular Transportation Services, Inc., and Milan L. Jamrych (collectively, “General Casualty”) appeal from a judgment entered in favor of Charlie Tate, Jr. General Casualty claims: (1) the trial court erroneously exercised its discretion when it excluded evidence about Tate’s subsequent lower back injury and worker’s compensation claim; (2) there was insufficient evidence to allow the jury to award future damages for pain and suffering; and (3) the trial court erroneously exercised its discretion when it excluded evidence of Tate’s cocaine use. General Casualty requests that we order a new trial on damages. Because the trial court did not erroneously exercise its discretion when it excluded the proffered evidence, and because there was sufficient evidence to support the future pain and suffering award, we affirm on the appeal.

¶2 Tate cross-appeals from the judgment, alleging that the trial court erred when it precluded him from presenting a wage loss claim during the trial. Because material issues of fact existed as to whether Tate suffered lost wages as a result of the accident, we reverse on the cross-appeal and remand for a new trial on damages.

I. BACKGROUND

¶3 On June 20, 1995, Tate was a passenger in a car which was struck by a semi-truck driven by Milan Jamrych, an employee of Particular Transportation

Services. Tate was injured in the accident and he sued Jamrych, Particular and General Casualty. A trial was scheduled for July 13, 1999. Tate filed motions in limine, as pertinent to this appeal, seeking to prevent General Casualty from introducing evidence of: (1) a subsequent work-related injury, which occurred in April 1998; (2) prior injuries; and (3) Tate's cocaine use. The trial court ruled that the subsequent work-related injury was not relevant as long as Tate limited his testimony to his physical condition prior to April 1998; that General Casualty could introduce evidence of Tate's prior back injuries; and that Tate's cocaine use could not be introduced because it was highly prejudicial.

¶4 General Casualty moved in limine to dismiss Tate's wage loss claim. Tate intended to present two wage-related claims to the jury. The first was past wage loss, which related to his employment as lead guitarist for the musical group, Mighty Clouds of Joy. His employment with this group commenced on June 1, 1995. Tate claims he was paid in cash. The trial court refused to allow the introduction of this evidence, ruling that Tate had failed to quantify any lost income, failed to establish that he had earned anything before the accident from this employer, and failed to show how the impact of the accident caused a loss of income from this employer.

¶5 Tate's second wage-related claim was for lost earning potential. Tate intended to introduce evidence that, in June 1995, 187 Proof Records in Union City, California offered him a contract to act as a producer for the company, which paid \$56,000 per year. Tate turned down the offer because he was injured in the accident, was receiving treatment for the injuries, and would not be able to fly to California. The trial court refused to allow this claim to be presented to the jury because there was no medical evidence supporting it, such as an opinion that

he was unable to fly, or that he was unable to perform the task encompassed by the job offer.

¶6 The jury returned a verdict in Tate's favor, awarding him \$9,250 for past pain, suffering and disability, and \$24,000 for future pain, suffering and disability. General Casualty filed motions after verdict seeking to change the answer to the future pain and suffering question, seeking a new trial on damages, and alleging that the trial court erred in refusing to admit evidence of Tate's subsequent work-related injury. The trial court denied the motions. Judgment was entered. General Casualty appeals from the judgment, and Tate cross-appeals from the judgment.

II. DISCUSSION

APPEAL

A. Subsequent Injury.

¶7 General Casualty contends that the trial court erroneously exercised its discretion when it excluded evidence of Tate's April 23, 1998 work-related back injury and worker's compensation claim. General Casualty contends that this injury was relevant to adjust any claim for past and future pain and suffering. The trial court excluded the evidence, ruling that admitting multiple injuries would confuse the jury. We cannot conclude that the trial court's decision constituted an erroneous exercise of discretion.

¶8 Whether to admit or exclude evidence is a decision left to the discretion of the trial court. *See Prill v. Hampton*, 154 Wis. 2d 667, 678, 453 N.W.2d 909 (Ct. App. 1990). If the trial court considers the pertinent facts, applies the correct law, and reaches a reasonable conclusion, we will not reverse that

discretionary determination. See *Steinbach v. Gustafson*, 177 Wis. 2d 178, 185-86, 502 N.W.2d 156 (Ct. App. 1993).

¶9 Here, the trial court considered whether to admit the subsequent work-related injury. It ruled:

[I]f we're going to be putting in a previous injury, this injury and a post injury and saying to a jury go upstairs and figure that out ... I don't see how they will. It seems to me what we should do is Mr. Tate should testify as to the condition of his back as of the day before the fall in 1998.

The trial court reasoned that if Tate limited his testimony to his condition before the work-related injury occurred, then the subsequent injury would not be relevant. When ruling on post-verdict motions, the trial court again concluded that admitting the work-related injury would confuse the jury. Thus, the trial court excluded the evidence both because it was not relevant and, even if relevant, its probative value was outweighed by the confusion its admission would cause.

¶10 This decision was reasonable. During his deposition, Tate testified that the work-related injury increased his pain for two months, and then he recovered completely from the work-related injury. Tate was not seeking compensation during this trial for the temporary increase in pain caused by the work-related injury. Thus, it was reasonable for the trial court to exclude the work-related injury as irrelevant. The trial court's alternative reason, that this would confuse the jury, was also reasonable. The jury would hear about Tate's back injury prior to the car accident in 1995, and the aggravation of the pre-existing back problems, which the car accident caused. This was enough for the

jury to try to sort out. Introducing evidence of a subsequent, work-related injury to the back would merely create confusion.¹

B. Future Pain and Suffering.

¶11 Next, General Casualty argues that there was insufficient evidence to submit the question of future pain and suffering to the jury. Specifically, General Casualty contends that because the trial court ruled that Tate should limit his testimony about back pain to the condition he was in prior to April 22, 1998, there was no evidence introduced upon which a jury could base an award of future pain and suffering. We are not persuaded.

¶12 It is undisputed that Tate and his treating physicians limited their testimony to the permanent nature of Tate's back pain up until April 22, 1998, the day before the work-related injury. Tate argues that General Casualty never objected to this issue being submitted to the jury, never moved for a directed verdict on the issue and, therefore, has waived its right to raise it here. *See Bohlman v. American Family Mut. Ins. Co.*, 61 Wis. 2d 718, 724, 214 N.W.2d 52 (1974).

¹ The dissent mischaracterizes both the majority opinion and the trial court's decision with respect to exclusion of the subsequent work-related injury.

As discussed within the majority opinion, the trial court precluded evidence related to the work-related injury *on the condition* that Tate limit his testimony to his physical condition prior to the work-related injury.

Therefore, the jury was only told about Tate's pre-1998 physical condition. Thus, the trial court's decision was not premised upon believing Tate's testimony that the work-related injury was temporary; rather, it was premised on the condition that Tate's evidence be limited to his pre-1998 physical condition. This was not an erroneous exercise of discretion.

¶13 Regardless of whether waiver occurred or not, it is undisputed that one of Tate's treating physicians testified, to a reasonable degree of medical certainty, that the auto accident caused a 3% permanent aggravation of Tate's prior lower back injury. Thus, Tate suffered a *permanent* injury attributable to the accident caused by General Casualty's insured.

A motion challenging the sufficiency of the evidence may not be granted "unless the court is satisfied that, considering all credible evidence in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such a party."

Weiss v. United Fire & Cas. Co., 197 Wis. 2d 365, 388, 541 N.W.2d 753 (1995) (citation omitted).

¶14 The treating physician's testimony about the permanent injury is sufficient credible evidence on which a reasonable jury could base an award for future pain and suffering. In fact, counsel for General Casualty conceded that a permanent injury assumes that the person will suffer from continuous pain throughout his or her lifetime. The jury was entitled to conclude from the physician's permanency testimony that Tate would forever experience pain and suffering as a result of the permanent injury.

C. Cocaine Use.

¶15 General Casualty also complains about the trial court's decision to exclude evidence of Tate's cocaine use. The trial court excluded the evidence because the cocaine use preceded the accident date, and because the evidence would be very prejudicial to Tate. The trial court's evidentiary determination is reviewed under the erroneous exercise of discretion standard. *See Prill*, 154 Wis.

2d at 678. If the trial court considers the pertinent facts, applies the correct law, and reaches a reasonable conclusion, we will not reverse that discretionary determination. See *Steinbach*, 177 Wis. 2d at 185-86.

¶16 We cannot conclude that the trial court erroneously exercised its discretion when it excluded the cocaine evidence. The trial court reviewed the records to determine whether the cocaine use affected Tate's treatment. The trial court found that the cocaine use pre-dated the accident in this case and, therefore, did not affect his treatment. The trial court also considered the expert testimony as to whether cocaine use caused Tate to exaggerate the degree of his pain. The trial court ruled that to instruct the jury in general that people who use cocaine sometimes exaggerate their pain would be highly prejudicial to Tate. Accordingly, the trial court excluded the evidence, provided that Tate did not open the door to the evidence. This was a reasonable determination.

CROSS-APPEAL

¶17 Tate argues that when the trial court refused to allow him to introduce wage loss evidence, in essence, it granted partial summary judgment prematurely. Tate contends that there were issues of material fact as to both his lost wages and loss of earning potential. General Casualty responds that the motion was not a summary judgment motion but, rather, was one challenging certain evidentiary submissions. The record reflects that General Casualty's motion in limine was, in effect, a motion seeking partial summary judgment on the wage loss claim. The motion did not merely seek to preclude certain evidence supporting Tate's wage loss claim; rather, it sought to preclude the wage loss claim altogether.

¶18 In reviewing a grant of summary judgment, we employ a *de novo* review. See ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). The summary judgment methodology is well known and, therefore, need not be repeated here.

¶19 Tate intended to testify that his employment with Mighty Clouds of Joy began on June 1, 1995. He was lead guitarist, and the employment consisted of a trial period of ninety days, during which he would be paid cash. Tate submitted a letter from Zachary Glickman, the manager of the music group, which showed payment from the group for the week of August 27, 1995. Glickman also confirmed Tate's statement that Tate had started working for the group on a trial basis prior to the June 20, 1995 accident. Tate intended to call Glickman as a trial witness. The trial court, however, granted General Casualty's motion precluding introduction of this claim on the basis that Tate failed to sufficiently quantify his loss. Viewing the facts most favorably to Tate, we conclude that the trial court's decision was premature.

¶20 There is a material issue of fact regarding whether Tate suffered wage losses from the musical group as a result of the accident. At a minimum, the trial court should have allowed Tate to present evidence on this claim before taking the issue away from the jury.

¶21 Similarly, the record reflects that Tate intended to present evidence of lost earning potential with 187 Proof Records. Tate would testify that 187 Proof Records offered him a \$56,000 per year producer contract the week after the accident, but he had to reject the offer because he was receiving treatment for accident-related injuries and could not fly. Tate was going to call Terrance Williams, the CEO of 187 Proof Records, as a witness who would confirm the

offer, and Tate's rejection of the offer. The trial court precluded the introduction of this claim on the basis that there was no medical testimony to support the claim. Again, we conclude this decision was premature.

¶22 The record contained Tate's medical records confirming that Tate was receiving treatment for accident-related injuries during the time in question. Further, Tate named his treating physicians, who could have offered a medical opinion as to Tate's ability to travel. Moreover, the trial court's reasoning that Tate could have continued his treatment in California was improper. This credibility issue certainly could have been explored by General Casualty in cross-examination, but should not have been presumed to be true by the trial court during a dispositive motion hearing.

¶23 Accordingly, we reverse on the cross-appeal, and remand the matter for a new trial on the wage loss claims.²

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

² General Casualty argues that the trial court did not err when it granted the motions in limine seeking to preclude the wage loss claims. General Casualty argues that Tate was elusive in providing sufficient evidence on these claims during discovery. Assuming that to be true, General Casualty had several options: (1) move for summary judgment; (2) move in limine to exclude certain evidence; or (3) move for a directed verdict on the wage loss claims at the close of evidence if Tate failed to prove his case. A motion in limine, however, should be limited to evidentiary challenges.

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¶24 SCHUDSON, J. (*concurring in part; dissenting in part*). I agree with the majority on all issues except one: whether the trial court erred in excluding evidence of Tate's lower back injury, suffered in a work-related accident on April 23, 1998, almost three years after the car accident.

¶25 Clearly, evidence of Tate's 1998 injury was relevant to his claim for both past and future damages. As General Casualty explains:

Mr. Tate claimed that he injured his low back in the 6/20/95 accident, and that the injury to his low back was permanent. At trial, Mr. Tate sought compensation for the alleged pain, suffering and disability associated with his low back from the date of the accident through the date of trial, as well as compensation for pain, suffering and disability associated with his low back beyond the date of trial. The fact that Mr. Tate injured his low back on 4/23/98 and complained to his treating physicians that his back pain was increased and that the pain was now going down both of his legs is directly probative of Mr. Tate's claim for past and future pain and suffering.

Tate had the burden to establish that his damages were the result of the 1995 accident. General Casualty, of course, was entitled to counter Tate's evidence with any evidence establishing that Tate's damages derived, in whole or in part, from a subsequent accident. The majority fails to explain how General Casualty could have gained a fair trial without the opportunity to do so.

¶26 The supreme court has directly addressed this rather obvious principle. In *Lautenschlager v. Hamburg*, 41 Wis. 2d 623, 165 N.W.2d 129 (1969), the supreme court declared:

[M]uch if not all of the plaintiff's claim was dependent upon the credence the jury placed upon her recital of subjective symptoms to her physicians and to the jury at trial. Whether she was to be believed, and to what extent, was dependent upon the jury's estimate of her credibility. It would appear that the fact that the plaintiff was involved in another accident which caused fairly substantial property damage, but in which she claimed she was uninjured, would go to the question of her credibility in respect to her assertion that all her injuries were sustained in the 1963 accident and not in the 1957 accident or the 1965 accident.

The mere fact that it was admitted that she had been in an auto accident in 1965 put upon her the duty of persuading the jury that the injuries of 1963 were unaffected or at least not aggravated. The burden of proof, by a preponderance of the evidence, that the injuries were sustained in 1963 and not at some other time was upon the plaintiff. *It appears perfectly proper to this court for a defendant to bring forth evidence of another and subsequent accident involving the same plaintiff when it would not be unlikely that such accident could have, in part at least, occasioned the injuries.*

Id. at 633 (emphasis added). In the instant case, the facts may be even more supportive of General Casualty's position. After all, in *Lautenschlager* the plaintiff maintained that she had been uninjured in her subsequent accident; here, however, Tate concedes that he suffered injury in his subsequent accident.

¶27 Tate responds, and the majority agrees, that the trial court provided a proper discretionary rationale for excluding evidence of the 1998 accident. The court reasoned, implicitly at least, that although Tate's subsequent accident may have exacerbated his injuries, that exacerbated condition lasted only a short time. Thus, the court seemed to say, limiting Tate to a presentation of the evidence *preceding* the 1998 accident would both remove any possible unfairness to General Casualty and, at the same time, spare the jury the potential confusion of dealing with two accidents. General Casualty, however, persuasively replies:

[Tate] argues that "[a] reasonable judge could conclude that a *temporary aggravation* of a permanent back injury ...

was not relevant to the issue of future pain and suffering.” First, this argument is based solely on Mr. Tate’s testimony that the subsequent back injury was “temporary.”

The medical records certainly do not support that testimony. Mr. Tate told Dr. John Watt that, not only was his back pain worse after falling at work, but that he was now experiencing pain down both of his legs, something Mr. Tate had not complained of previously. Mr. Tate also told Dr. Koshnick that the subsequent fall made his back worse, and the last time he saw Dr. Koshnick on 6/3/98 Mr. Tate was still complaining of pain down both of his legs.

(First brackets added; citations omitted).

¶28 General Casualty is correct. The trial court’s ruling was erroneous for at least two reasons: 1) it was premised on the acceptance of Tate’s version of the facts—that the subsequent accident produced only a temporary aggravation of his injuries; and 2) it ignored evidence that some of his pain, beginning as a result of the subsequent accident, continued and affected Tate’s permanent suffering. These were disputed matters for the fact-finder. These were disputed matters that could not be fairly resolved without providing General Casualty the opportunity to offer evidence related to the subsequent accident.

¶29 Therefore, although I agree with the majority’s decision remanding this case for a new trial, I can locate no logical or legal basis for excluding evidence of the subsequent accident from the next trial. Accordingly, I respectfully concur but, on this single issue, respectfully dissent.

