COURT OF APPEALS
DECISION
DATED AND FILED

May 16, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP469 **Cir. Ct. No. 2013CV525**

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

STEVEN P. DRESEL,

PLAINTIFF-APPELLANT,

V.

WILLIAM J. GILES AND AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Eau Claire County: WILLIAM M. GABLER, SR., Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Steven Dresel appeals a judgment, entered upon a jury verdict, awarding $16,000 in damages to Dresel as a result of an automobile accident caused by William Giles. Dresel argues the circuit court erroneously

exercised its discretion by admitting collateral source evidence consisting of testimony regarding a social security disability benefits application, and by denying his request for the court to give the standard causation jury instruction. We reject these arguments and affirm.

BACKGROUND

¶2 Dresel was involved in a low-speed automobile accident with Giles on April 6, 2012. Giles was stopped behind Dresel at a traffic light when he saw Dresel's truck move forward. Giles then took his foot off his vehicle's brake and looked down. Giles's vehicle struck Dresel's truck, bending the truck's bumper. Dresel alleged he sustained neck and back injuries.

¶3 The parties stipulated to Giles's liability, and a trial was held on the issue of damages only. During opening statements, defense counsel referred to a 2001 accident in which Dresel injured his mid-back in an all-terrain vehicle accident. Counsel then stated, "[t]he Social Security Disability benefits were granted," whereupon plaintiff's counsel immediately objected to the statement, citing the collateral source rule. The circuit court overruled the objection after defense counsel stated the evidence would be relevant to the extent of Dresel's claimed injuries as a result of the 2012 accident.

¶4 Dresel introduced into evidence the testimony of his chiropractor, Dr. Angela Prissel. Prissel testified that prior to the 2012 accident, Dresel experienced episodic back pain related to the ATV accident, but that his pain was constant after the 2012 accident. During cross-examination, defense counsel elicited that Prissel had, on January 31, 2013, made a note that Dresel was close to pre-accident status.

¶5 Defense counsel then questioned Prissel regarding her assistance in preparing Dresel's application for social security disability benefits, which occurred on February 24, 2013. Prissel acknowledged that the application for benefits was not specifically associated with Dresel's 2012 accident. Defense counsel questioned Prissel about the work limitations identified in the application and the diagnoses stated on the application, which included a mild degenerative disc disease in the thoracic spine and a rib fracture sustained in the 2001 accident. Plaintiff's counsel briefly addressed these matters during redirect examination.

¶6 At the beginning of the second day of trial, Dresel interposed an additional objection to the social security disability benefits testimony. The circuit court observed that none of the evidence in the case had shown that Dresel received any social security disability benefits, or the amount thereof. The court again rejected Dresel's argument, stating, "The significance and the relevance of that question was that there's an inference arising from it that Mr. Dresel would have applied for Social Security Disability benefits, even in the absence of the … motor vehicle accident." The court later rejected Dresel's request for a jury instruction regarding the collateral source rule.

¶7 Before closing arguments and during the jury instruction conference, Dresel requested that the circuit court give the standard causation instruction, WIS JI—CIVIL 1500 (2006). The circuit court denied this request, accepting defense counsel's argument that the issue was not whether one of multiple events caused a single injury, but rather whether the automobile accident had aggravated any of Dresel's prior injuries. Accordingly, the court gave the following version of WIS JI—CIVIL 1715 (1990):

> The evidence [was] that the plaintiff, Steven Dresel, was previously injured in August of 2001, when an ATV he was

> driving rolled over. If the injuries … the plaintiff received in the collision on April 6, 2012, aggravated any physical condition resulting from the earlier injury, you should allow fair and reasonable compensation for such aggravation. But only to the extent that you find the aggravation to be a natural result of the injuries received in the April 6, 2012[] collision.

¶8 The jury reached a verdict awarding Dresel $16,000, consisting of $6,000 for past pain and suffering and $10,000 for past health care expenses. The jury declined to award any monetary damages for future pain and suffering or future health care expenses. The circuit court denied Dresel's postverdict motions, and Dresel now appeals, asserting he is entitled to a new damages trial based on the improper admission of collateral sources of compensation and the circuit court's refusal to give WIS JI—CIVIL 1500 (2006).

DISCUSSION

I. Collateral source rule

¶9 The collateral source rule "states that benefits an injured person receives from sources that have nothing to do with the tortfeasor may not be used to reduce the tortfeasor's liability to the injured person." ***Leitinger v. DBart, Inc.***, 2007 WI 84, ¶26, 302 Wis. 2d 110, 736 N.W.2d 1. This prohibition on the use of collateral source payments to measure damages also gives rise to a rule of evidence. ***Id.***, ¶30. "As a rule of evidence, the collateral source rule generally precludes introduction of evidence regarding benefits a plaintiff obtained from sources collateral to the tortfeasor. A limited exception has been recognized when the evidence is offered for impeachment purposes." ***Id.*** (footnotes omitted).

¶10 Here, Dresel argues the circuit court erred by allowing the introduction of collateral source benefits through defense counsel's opening

statement and the cross-examination of Dr. Prissel. We review a circuit court's decision to admit or exclude evidence for an erroneous exercise of discretion. ***Weborg v. Jenny***, 2012 WI 67, ¶41, 341 Wis. 2d 668, 816 N.W.2d 191. A circuit court erroneously exercises its discretion if it applies an improper legal standard, which Dresel asserts occurred here. *See* ***id.***

¶11 The evidence introduced at trial was not impermissible collateral source evidence. Prissel's testimony regarding her assistance in preparing the social security disability benefits application did not reference that the application had been granted, that Dresel had received any specific amount of money, or that the diagnoses referenced in the application were even associated with the 2012 automobile accident.[1]

¶12 Additionally, the cross-examination regarding the social security disability benefits application was admissible for impeachment purposes—specifically, allegedly prior inconsistent statements by both Dresel and Prissel. There was conflicting evidence at trial as to whether Dresel had experienced symptoms of his 2001 injuries prior to the 2012 accident. Dresel and Prissel both testified that Dresel's mid-back injury was a result of the 2012 accident.

[1] Dresel argues the jury was allowed to infer the benefits were granted from the beginning of trial, because of the improper opening statement. However, the fact remains that there was no evidence of the amount of any benefits received, and the jury was specifically instructed that the remarks of attorneys are not evidence and should be disregarded if not supported by the facts in evidence. We presume the jury has followed instructions. ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). Dresel's bare argument that "[i]t strains reason to suggest that the jury would simply be able to disregard" defense counsel's opening statement is insufficient to rebut that presumption. In any event, plaintiff's counsel could have pointed out during closing argument that there was no evidence of any social security benefits having been granted.

¶13 The social security disability benefits application, however, did not associate any of Prissel's diagnoses stated in that document specifically with the 2012 accident. Prissel claimed that this omission was because she was only concerned with giving her diagnoses and was not "giving a history on what had happened." However, the lack of causal information on the application, particularly regarding Dresel's back injury, tended to undercut Dresel's and Prissel's testimony that his current injuries were attributable only to the 2012 accident. We reject Dresel's argument that he "never made any assertion that required introduction of collateral source evidence to impeach his credibility."[2]

II. Causation jury instruction

¶14 Dresel also argues the circuit court erred by refusing to give WIS JI—CIVIL 1500 (2006), regarding causation in negligence cases. "A circuit court has broad discretion in deciding whether to give a particular jury instruction." ***Kelly v. Berg***, 2015 WI App 69, ¶15, 365 Wis. 2d 83, 870 N.W.2d 481. If the instructions given adequately cover the law, a trial court does not erroneously exercise that discretion when it refuses to give a requested instruction, even if the proposed instruction is substantively correct. ***Frayer ex rel. Edenhofer v. Lovell***, 190 Wis. 2d 794, 805, 529 N.W.2d 236 (Ct. App. 1995). The court also must "instruct the jury with due regard to the facts of the case, and thus '[i]t is error for the trial court to refuse to instruct on an issue which is raised by the evidence.'" ***Strait v. Crary***, 173 Wis. 2d 377, 382, 496 N.W.2d 634 (Ct. App. 1992) (quoting

[2] Dresel argues the circuit court erred by not giving a jury instruction regarding the collateral source evidence. However, his argument is predicated on the instruction being necessary to cure what he considers the erroneous admission of collateral sources of compensation. We have concluded there was no error in this case.

Liles v. Employers Mut. Ins. of Wausau, 126 Wis. 2d 492, 500, 377 N.W.2d 214 (Ct. App. 1985)). In all events, we will not reverse unless the failure to give the proper instruction had a prejudicial effect. ***Bennett v. Larsen Co.***, 118 Wis. 2d 681, 698, 348 N.W.2d 540 (1984).

¶15 The circuit court did not erroneously exercise its discretion in refusing to give the standard causation jury instruction. The court could reasonably conclude such an instruction was not necessary because there were clearly two events, separated by approximately one decade, each of which produced separate injuries. The court's refusal to give WIS JI—CIVIL 1500 (2006) was not an improper shifting of the burden of proof, requiring Dresel to prove that the 2012 accident was "the" cause of his injuries as opposed to "a substantial factor" in bringing about his injuries. Giles's negligence was undisputed. Rather, the circuit court reasonably concluded the real dispute was whether, and to what extent, the 2012 accident aggravated Dresel's 2001 injuries. The court properly concluded WIS JI—CIVIL 1715 (1990) was the more appropriate instruction. That instruction was sufficient to fairly apprise the jury of the applicable law.[3]

¶16 Dresel contends that Giles cannot have it both ways; he cannot claim the collateral source evidence was admissible to impeach Dresel regarding causation and then argue that causation was not an issue such that WIS JI—CIVIL 1500 (2006) was unnecessary. However, the social security application testimony

[3] We note our task is not to determine whether the circuit court would have properly exercised its discretion had it given WIS JI—CIVIL 1500 (2006), in addition to, or instead of, WIS JI—CIVIL 1715 (1990). Thus, we do not address Dresel's argument, based on ***Fischer v. Ganju***, 168 Wis. 2d 834, 852, 485 N.W.2d 10 (1992), that certain components of the standard causation instruction would also have informed the jury that "various negligent acts and underlying conditions may jointly produce an injury."

tended not to show two potential causes for the same injury but, rather, was relevant to establish a "baseline" from which to measure the degree to which Dresel's preexisting injury had been aggravated. The two exercises of discretion challenged herein—each proper in and of themselves—are not irreconcilable.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16). This opinion may not be cited under RULE 809.23(3)(b) (2015-16).