COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0162-FT

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

JEAN D. WAGNER,

PLAINTIFF-RESPONDENT,

V.

ILLINOIS FOUNDERS INSURANCE CO.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Calumet County: DONALD A. POPPY, Judge. *Affirmed*.

¶1 SNYDER, J.[1] Illinois Founders Insurance Co. (IFIC) appeals from a small claims judgment awarding Jean D. Wagner $5000, plus costs, for injuries received as a result of an automobile accident with IFIC's insured on October 27,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise specified.

1997. IFIC contends that the evidence was insufficient to support the trial court's damages award. We conclude that the evidence was sufficient and affirm the judgment.

¶2 Wagner filed a small claims complaint against IFIC on March 3, 1999, alleging that:

> On October 27, 1997, Plaintiff, Jean D. Wagner, was operating a motor vehicle in a southbound direction on Carpenter Street at or near the intersection with Sylvan Avenue. Also on said date, the Defendant's insured, Erich Griem, was operating a motor vehicle in a westbound direction on Sylvan Avenue, at or near the intersection with Carpenter Street. At said time and place, a collision occurred between the vehicle the Plaintiff was operating and the vehicle which the Defendant's insured was operating thereby causing injuries to the Plaintiff.
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> The Defendant's insured, while being pursued by police officers, failed to stop at the upcoming stop sign which the Plaintiff was proceeding through and did not have a stop sign, thereby causing personal injuries and property damage to the Plaintiff.

¶3 At the court trial on November 17, 1999, IFIC conceded that its insured was 100% responsible for the damages and injuries caused to Wagner by the accident, and the case proceeded to trial on the damages. IFIC did not contest Wagner's property damage deductible and wage loss claims and conceded owing $328 of the claimed medical expenses. The trial court awarded special damages of $250 for Wagner's property damage deductible,[2] $138.52 for wage loss and $482 for medical expenses. The trial court also awarded Wagner damages "for past and

[2] Wagner's auto insurer, American Family Insurance, settled its claim against IFIC for the balance of Wagner's vehicle damages prior to trial.

future pain, suffering, and disability at the figure of $7,000."[3] Judgment was entered against IFIC in the amount of $6167.14.

¶4 IFIC presents the appellate issue as whether "the evidence at trial [was] sufficient to support the trial court's findings, and therefore, its judgment." When a trial court acts as the finder of fact, it is the ultimate arbiter of the weight and credibility of the evidence. *See* ***Village of Big Bend v. Anderson***, 103 Wis. 2d 403, 410, 308 N.W.2d 887 (Ct. App. 1981). We will affirm the trial court's factual findings unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2); ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983).

¶5 We understand IFIC's argument as challenging the opinion testimony of Wagner's medical expert, Dr. James Burwitz, as being insufficient to support Wagner's claim for future pain and suffering. In addition, IFIC suggests that Wagner's pain and suffering relate to a preexisting degenerative condition rather than being caused by the vehicle accident. IFIC contends that Burwitz's medical opinion "has no foundation" but did not object to the admissibility of Wagner's medical evidence at trial.[4] To preserve the right to appeal on a question of admissibility of evidence, an objection to the evidence must be made in a manner sufficient to preserve the issue for appeal, including the specific grounds upon which the objection is made. *See* WIS. STAT. § 901.03(1)(a); ***State v. Peters***, 166 Wis. 2d 168, 174, 479 N.W.2d 198 (Ct. App. 1991). Because IFIC failed to

[3] The trial court reduced the award to the small claims limit of $5000.

[4] Burwitz was deposed on August 4, 1999, and the deposition record was received into evidence as Exhibit 5 without objection by IFIC. The trial court had read the deposition prior to the trial.

preserve an objection to the admission of Wagner's medical evidence, our review is limited to whether the weight and credibility of the evidence support the trial court's findings.

¶6 Burwitz testified that he is a board certified family medical practitioner, that he is Wagner's family doctor, that he saw Wagner about her injury on five separate dates,[5] that he sees a lot of neck or muscle strains in his practice, and that he frequently treats neck spasms. Burwitz opined to a reasonable degree of medical certainty that Wagner "sustained a cervical strain in the motor vehicle accident," that such a strain can be painful, that "the injury most likely will be permanent" causing future intermittent pain in her neck that will get worse with time, and that there is "better than a 50 percent chance" that Wagner will "need some type of medication at least intermittently for the neck pain as well as some physician visits when the neck pain is intolerable." Burwitz supported his prognosis with "the fact that two years have passed and [Wagner] continues to have intermittent problems at this point in time [which] would suggest to me that she's going to have some long-term problems."

¶7 Our supreme court has held that expert medical testimony is required to substantiate an award for future pain and suffering and that the frequency or substantiality of pain relates only to the amount of damages to be awarded, not to whether any award at all is justified. *See* ***Diemel v. Weirich***, 264 Wis. 265, 268-69, 58 N.W.2d 651 (1953). Wagner offered competent medical evidence concerning her past and future pain and suffering as resulting from the October 27,

[5] Wagner saw Burwitz on October 29, 1997; November 21, 1997; September 14, 1998; November 16, 1998; and July 29, 1999. X-rays were taken on November 21, 1997, and November 18, 1998.

1997 motor vehicle accident. IFIC presented no evidence and offered no medical testimony in rebuttal, relying instead upon its cross-examination of Burwitz to challenge the weight and credibility of his medical opinions[6] and to establish an alternative cause for Wagner's pain and suffering. We conclude that IFIC's appeal lacks merit. We will not reexamine factual questions and reach a different conclusion when there is credible, undisputed record evidence to support the conclusion reached by the trier of fact.

¶8 Wagner moves this court for penalties under WIS. STAT. RULE 809.83, claiming that the goal of IFIC in filing this appeal was "to harass, intimidate, punish and delay." An award under RULE 809.83 may be made only if this court finds that the appeal was taken for the purpose of delay. IFIC responds

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[6] IFIC's failure to present medical evidence challenging the merits of a "whiplash" injury does not prevent it from indicating its apparent disdain for Wagner's claim. We remind IFIC and its counsel that compensation for such a neck injury has long been recognized in Wisconsin. *See* ***Erdmann v. Milwaukee Auto. Mut. Ins. Co.***, 20 Wis. 2d 439, 122 N.W.2d 430 (1963); ***Thompson v. Nee***, 12 Wis. 2d 326, 107 N.W.2d 150 (1961). Further, we discern a lack of professional courtesy by IFIC's counsel in questions posed to Burwitz during his deposition:

> Q *Are you the kind of doctor* that refers patients to therapy for whiplash injuries?
>
> A Yes, I do.
>
> ....
>
> Q *Doctor, are you the kind of doctor* that would prescribe prescription medications for a patient with a whiplash injury?
>
> A Yes, I would. (Emphasis added.)

Burwitz had previously established his medical credentials and defense counsel had not challenged Burwitz's qualifications or competency to testify as a medical expert. This court can only surmise that the defense questions were premised upon IFIC's and counsel's personal opinions as to the merits of "whiplash" injury claims and the integrity of members of the medical profession who treat such injuries. We are not interested in the personal opinions of IFIC or of its counsel concerning the merits of such claims and reject the use of such questioning as proper trial court advocacy.

that Wagner's motion should be denied and that it should be awarded costs and fees in defending the motion.

¶9 This appeal was commenced under WIS. STAT. § 805.17(4), which states:

> In actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may be raised on appeal whether or not the party raising the question has objected in the trial court to such findings or moved for new trial.

While § 805.17(4) does not address the merits of an appeal challenging the sufficiency of the evidence, it does allow for this appeal. The appellate record does not disclose any appellate delay attributable to IFIC, and Wagner's motion for WIS. STAT. RULE 809.83 penalties is denied. Costs and fees to IFIC to defend the motion are also denied.

¶10 Because there was sufficient credible evidence to support the trial court's findings of fact and conclusions, the judgment is affirmed. Wagner is awarded costs as the prevailing party under WIS. STAT. RULE 809.25.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.