COURT OF APPEALS
DECISION
DATED AND FILED

November 08, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2065 **Cir. Ct. No. 2001CV7524**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT 1

JO-EL HANSON,

PLAINTIFF-APPELLANT,

HUMANA/EMPLOYERS HEALTH INSURANCE COMPANY,

SUBROGATED-PLAINTIFF,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, KEVIN L. CALDWELL, AND LINDELL MOTORSPORTS, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Milwaukee County: MICHAEL GUOLEE, Judge. *Reversed and cause remanded with directions*.

Before Fine, Curley and Kessler, JJ.

¶1 KESSLER, J. Jo-El Hanson appeals from trial court orders entered following a jury trial that awarded Hanson lesser monetary damages than she sought. Hanson asks this court to order that she receive $78,338.97 in past medical expenses, as opposed to the $25,000 the jury awarded. Hanson also seeks a new trial on the issues of her past and future pain and suffering, and on her loss of earning capacity (collectively, "remaining damages issues"), on grounds that the trial court incorrectly instructed the jury.

¶2 We conclude that when we apply the substantive law previously established by the Wisconsin Supreme Court in ***Fouse v. Persons***, 80 Wis. 2d 390, 259 N.W.2d 92 (1977), and by this court in ***Lievrouw v. Roth***, 157 Wis. 2d 332, 459 N.W.2d 850 (Ct. App. 1990), to the jury's finding that Hanson suffered injury in the accident and to the undisputed fact that Hanson has incurred $78,338.97 in past medical expenses, she is entitled to those damages. Thus, we reverse the trial court's order denying Hanson's post-verdict motion to change the verdict answer and remand with directions to enter judgment for Hanson, awarding her $78,338.97 in past medical expenses, and for further proceedings consistent with this opinion.

¶3 We conclude that the trial court erroneously instructed the jury in a manner inconsistent with ***Fouse*** and ***Lievrouw***. Because the error so infected the verdict as to undermine confidence in the outcome, we reverse and remand for a new trial on the remaining damages issues.[1]

[1] In its response brief, Caldwell asserts that if a new trial is granted, this court should order that one of the defense experts, Dr. Daniel Suberviola, be allowed to testify. Caldwell argues that the trial court erred when it excluded Dr. Suberviola's testimony. Caldwell is asking this court to review the trial court's order with respect to a motion in limine. Such review is not (continued)

BACKGROUND

¶4 This case arises out of an automobile accident. The vehicle driven by Hanson was stopped when it was struck in the rear by a truck owned by defendant Lindell Motorsports, Inc., driven by its employee, Kevin Caldwell, and insured by American Family Mutual Insurance Company (collectively "Caldwell"). Caldwell's speed at the time of impact was approximately five to seven miles per hour. It is undisputed that Caldwell was fully responsible for the accident.

¶5 Hanson developed neck and lower back pain shortly after the accident. Physical therapy helped reduce the pain in her lower back, but not in her neck. Medical tests revealed an acute mild right C5-6 radiculopathy. Hanson was referred to a neurosurgeon who concluded that the pain in Hanson's neck was centered in the C4, C5 and C6 disks in her cervical spine. The doctor recommended, and later performed, surgery on Hanson to remove the C4-5 and C5-6 disks and insert a metal plate in her neck.

¶6 The case proceeded to trial, where liability for the accident was uncontested. The only issues were whether Hanson was injured by the accident, and the extent of those alleged injuries. Caldwell's theory of the case was that the impact could have been great enough to cause a strain, but was not great enough to cause structural damage necessitating surgery. Thus, Caldwell argued, the surgery was unnecessary. In support, Caldwell elicited testimony from its expert, a neurosurgeon, that the surgery was not necessary, and on cross-examination

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possible without a cross-appeal, which Caldwell did not file. *See* WIS. STAT. RULE 809.10. Therefore, we decline to address this argument.

Caldwell's expert stated that it was malpractice to perform unnecessary surgery. However, Caldwell's expert agreed that Hanson acted appropriately in following the referrals she was given, and in following the advice of her doctor who ultimately performed the surgery that Caldwell challenges.

¶7 In its closing argument, Caldwell argued that Hanson's doctor performed unnecessary surgery and that Hanson exaggerated her injuries. Caldwell argued that if the jury believed Hanson was injured, then it should award her "a thousand dollars or two to cover [the] medical expenses to be checked out by a family doctor" and "three, four thousand dollars" for pain, suffering and disability.

¶8 In contrast, Hanson argued that she had been injured, and that the relevant inquiry for the jury when deciding whether to award her damages associated with the surgery was whether she took care in seeking a doctor and following the doctor's advice. Whether Hanson's doctor committed malpractice when he performed what Caldwell believes was unnecessary surgery, Hanson argued, was not an issue relevant to the case.

¶9 Prior to the jury's deliberations, Hanson moved for a directed verdict on the issue of past medical expenses. Hanson argued that the evidence was undisputed that those expenses were incurred as a result of the accident. The trial court denied the motion.

¶10 Hanson also asked the trial court to give a special instruction that Hanson should be awarded all of her past medical expenses and related damages, even if the jury concluded that some of Hanson's damages resulted from malpractice by the doctor for performing unnecessary surgery. The trial court refused to give the instruction.

¶11 The trial court was troubled by the mention of malpractice, and expressed to the parties its belief that a special instruction for the case was necessary. However, when the instruction was given, the trial court added additional language which, Hanson argues, confused the jury and requires a new trial. The accurateness of the given instruction is one of the issues in this appeal.

¶12 The jury was asked to determine the amount of money that would fairly and reasonably compensate Hanson for numerous expenses. The jury returned a verdict awarding damages as follows: past medical expenses—$25,000; past loss of earning capacity—$7250; future medical expenses—$0; past pain, suffering, disability—$15,000; and future pain, suffering, disability—$0. The award for past medical expenses, $25,000, was approximately the amount of Hanson's medical expenses for all of the treatment she received after the accident but before the disputed surgery.

¶13 After the verdict, Hanson moved the trial court to change the: (1) past medical expenses award to approximately $79,123.97;[2] (2) past loss of earning capacity award to $14,500; and (3) past pain, suffering and disability award to $15,000. In the alternative, Hanson sought a new trial on grounds that the verdict was against the great weight and clear preponderance of the evidence. The trial court denied the motions and this appeal followed.

[2] The medical expenses sought post-trial were $79,123.97, but the expenses sought on appeal are $78,338.97. This discrepancy is not explained. In any event, it does not affect our analysis.

DISCUSSION

¶14 Hanson argues that the trial court should have awarded her $78,338.97 in past medical expenses as a matter of law; and that she is entitled to a new trial on the remaining damages issues because the trial court's jury instructions were erroneous. A review of the applicable law on damages will aid our discussion of each of these issues.

A. Applicable law

¶15 Prior to trial, the parties recognized that one of the key issues was whether Hanson was entitled to recover medical expenses and other damages associated with the surgery. The parties provided both written and oral argument on this issue to the trial court. This included a discussion of ***Fouse*** and ***Lievrouw***.

¶16 In ***Fouse***, eerily similar to this case, the plaintiff experienced back pain shortly after being involved in an automobile accident. 80 Wis. 2d at 393. The treating doctor diagnosed a herniated thoracic disk and performed corrective surgery. ***Id.*** In ***Fouse***, as here, the theory of the defense was that the force of the accident was insufficient to herniate a disk, making the surgery unnecessary. ***Id.*** at 394. On the apparent belief that the accident did not cause injuries that required surgery, the jury in ***Fouse***, like the jury here, reduced the award of medical expenses by what it attributed to the surgery the defense claimed was unnecessary. ***Id.*** at 396-97. The trial court in ***Fouse*** set aside the jury award and granted a new trial. The supreme court affirmed, explaining:

> The rule for awarding damages for injuries aggravated by subsequent mistaken medical treatment was established in *Selleck v. Janesville*[, 100 Wis. 157, 164, 75 N.W. 975 (1898)] in 1898, and has been followed since. Assuming that the plaintiff exercised good faith and due care in the selection of his treating physician, an assumption borne out

> by the record in this case, under the *Selleck* rule the defendants are liable for the full amount of damages caused by the aggravation.

Fouse, 157 Wis. 2d at 397-98 (footnotes omitted).

¶17 We have had a more recent occasion to discuss a defense claim, like the one here, that the accident did not cause the injury which resulted from medically improper treatment after the automobile accident. In ***Lievrouw***, we repeated what has been the law in Wisconsin for more than one hundred years when we observed that a defendant who causes injury to another is responsible for any aggravation of that injury that results from improper medical treatment as long as the plaintiff has "exercised good faith and due care" in selecting the treating physician. 157 Wis. 2d at 358 (citation omitted).

B. Past medical expenses

¶18 Based on ***Fouse*** and ***Lievrouw***, Hanson asked the trial court, before the case was submitted to the jury, to answer the special verdict question on past medical expenses, noting that the actual medical expenses incurred were not in dispute. When the jury awarded less than the full amount of past medical expenses sought, Hanson asked the trial court to change the special verdict answer. The trial court denied both motions. On appeal, Hanson argues that the special verdict answer on past medical expenses should be $78,338.97.

¶19 When reviewing the denial of a motion for a directed verdict, the standard of review requires us to consider whether, taking into account "all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion was made, there is any credible evidence to sustain a finding in favor of that party." ***Re/Max Realty 100 v. Basso***, 2003 WI

App 146, ¶7, 266 Wis. 2d 224, 667 N.W.2d 857. The standard is similar when we review a trial court's denial of a motion to change a jury's special verdict answers. "If there is 'any credible evidence which under any reasonable view supports the jury finding especially when the verdict has the approval of the trial court, it should not be disturbed.'" ***Carl v. Spickler Enters., Ltd.***, 165 Wis. 2d 611, 625, 478 N.W.2d 48 (Ct. App. 1991) (citation omitted).

¶20 We conclude that the trial court did not erroneously refuse, prior to trial, to order that Hanson be paid for all of her past medical expenses. One of Caldwell's trial theories was that Hanson had not been injured at all. If the jury agreed, then it would not award Hanson any past medical expenses or other damages. The trial court did not err in allowing this issue to go to the jury.

¶21 However, the jury rejected Caldwell's theory and found that Hanson had been injured. The jury awarded Hanson past medical expenses of $25,000, which is consistent with the medical expenses incurred prior to the surgery. This award is inconsistent with the law that entitles Hanson to all of her medical expenses related to her original injury, provided that she exercised good faith and due care in selecting her treating physician. *See* ***Lievrouw***, 157 Wis. 2d at 358. It was undisputed that Hanson exercised good faith and due care in selecting her treating physician. In addition, the jury found that Hanson was injured in the accident, and Caldwell has not appealed that finding. Applying the law to the jury's findings, Hanson was entitled to all of her past medical expenses. Therefore, the trial court should have granted Hanson's post-verdict motion to change the verdict answer to award her $78,338.97 in past medical expenses. We reverse the trial court's order denying Hanson's post-verdict motion to change the verdict answer and remand with directions to enter judgment for Hanson, awarding her $78,338.97 in past medical expenses.

C. Remaining damages issues

¶22 Having concluded that Hanson is entitled to all of her past medical expenses, we next consider her argument that the jury instructions misstated the applicable law and that, therefore, there should be a new trial on the remaining damages issues. When reviewing a claimed error in jury instructions, we must find that the error affected the substantial rights of a party such that there is a reasonable possibility that the error contributed to the outcome. ***Nommensen v. American Cont'l Ins. Co.***, 2001 WI 112, ¶52, 246 Wis. 2d 132, 629 N.W.2d 301. Misleading instructions that may cause jury confusion are a sufficient basis for a new trial. ***Magestro v. North Star Envtl. Const.***, 2002 WI App 182, ¶17, 256 Wis. 2d 744, 649 N.W.2d 722. Because we conclude that the jury instructions were erroneous and that the error affected Hanson's substantial rights, we reverse and remand for a new trial on the remaining damages issues.

¶23 At issue are jury instructions that the trial court gave, and refused to give. First, Hanson asked the trial court for a modification of WIS JI—CIVIL 1710, which addresses causation in the context of intervening inappropriate medical treatment.[3] The modified version Hanson proposed reads:

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[3] WISCONSIN JI—CIVIL 1710 provides:

> **AGGRAVATION OF INJURY BECAUSE OF MEDICAL NEGLIGENCE**
>
> If (plaintiff) used ordinary care in selecting (doctor) [which (he) (she) did in this case] and (doctor) was negligent and (his) (her) negligence aggravated the (plaintiff)'s injury(ies) (failed to reduce the injury(ies) as much as (it) (they) should have been), (plaintiff)'s damages for personal injuries should be for the entire amount of damages sustained and should not be decreased because of the doctor's negligence.

> There is no dispute in this case that the plaintiff's car was stopped and was struck in the rear by the truck of the defendant, Mr. Caldwell. However, the defendants contend that the force of the impact was not of a magnitude sufficient to cause injuries that required the operation done by [plaintiff's doctor], a neurosurgeon.
>
> The defendants have offered proof that the operation was not only unnecessary but that it was malpractice for [plaintiff's doctor] to have done it.
>
> I instruct you that the law of Wisconsin is that if the plaintiff uses ordinary care in selecting her doctors (which I find she did in this case – to be given only if the court makes such a finding) and that a treating doctor was negligent and that that negligence aggravated the plaintiff's injury or caused new or unnecessary injuries, plaintiff is entitled to damages for personal injury for the entire amount of the damages she sustained and should not be decreased because of the doctor's negligence. Unnecessary surgery qualifies [a]s an act of medical negligence; therefore, in reaching your decision, you need not decide whether the surgery that Ms. Hanson underwent was or was not necessary.

¶24 The trial court refused to give this instruction and insisted that "malpractice" was not a part of the case even though Caldwell's expert expressed the opinion that Hanson's doctor committed malpractice by performing unnecessary surgery. The trial court proposed an alternative special instruction on damages and causation that was based on WIS JI—CIVIL 1710, (aggravation of injury because of medical negligence), and WIS JI—CIVIL 1500 (cause). The trial court gave this instruction, but then added additional language from the bench, much of which is italicized below. The trial court instructed the jury:

> One of the issues in this case for you to decide is whether the medical procedure, treatments used by her treating doctor related to any injuries she received in the accident. Were the injuries treated by her doctor a part of any original injuries and are the natural probable consequences of the defendant's negligence and are these normal incidents of medical care necessitated by the defendant's negligence. If there is a causal connection between the accident and the treatment she received and her damages,

> your answer to this question on damages for personal injury should be the entire amount of damages sustained and not—and should not be decreased because [] the defense's doctor questioned the procedure used by the plaintiff's treating doctor. I think that is a very important comment.
>
> Now, there's been talk here about malpractice law, and I've told you *there is no issue of malpractice in this case. It is a difference of opinion as to whether or not the injuries were caused by the accident. It's a superfluous matter* about one doctor talking about what another doctor should have done. *It is improper in this case as far as I am concerned and should not be considered by you.* Any reduction should be—would be—any reduction would be contrary to long, established principles that a defendant who causes injury is responsible for any aggravation that results from improper—the alleged improper medical treatment for that injury as long as the plaintiff has exercised good faith and due care in selecting the treating physician. The evidence in this case indicates that the plaintiff used ordinary care in selecting her treating doctor. So what does that basically say? It says, she went to her doctor, the doctor used a procedure, the procedures were done and they followed. *If you relate them to the accident, those injuries, she should receive the entire amount of damages she sustained for that, those procedures*.

(Emphasis added.)

¶25 By telling the jury that it could not consider the doctor's alleged malpractice, and at the same time telling the jury it must find that all treatments were related to the accident, the trial court let the jury decide that the treatment it concluded was unnecessary was not "caused" by the accident, and was therefore not compensable. That is not the law in Wisconsin. The inconsistent instructions given by the trial court had the effect of allowing the jury to ignore the established rule of law applicable to this case as described in ***Lievrouw*** and ***Fouse***. The entire thrust of Caldwell's closing argument was that the surgery performed on Hanson was unnecessary surgery and thus the costs of the surgery, and any additional injury that resulted from the surgery, were not caused by the accident, even though

the surgery was done by the doctor whom, as the trial court instructed, Hanson used ordinary care in selecting. In effect, the trial court told the jury that regardless of whether the surgery was unnecessary, they could not award the cost of the surgery unless the jury "relate[d] them to the accident, those injuries." As we have previously explained, that portion of the instruction misstates long-established law that must be applied to the facts of this case.

¶26 The trial court's correct statement in an earlier part of the instruction—namely that any reduction of damages because of intervening "improper medical treatment" would be improper—came immediately after the trial court improperly characterized the defense claim that the surgery was unnecessary. The trial court told the jury "there is no issue of malpractice in this case. It is a difference of opinion as to whether or not the injuries were caused by the accident." But malpractice was in fact an issue in the case, and it came from the testimony of a defense expert.

¶27 When the doctor is selected in good faith, as ***Fouse*** and ***Lievrouw*** have explained, responsibility for improper or even unnecessary treatment for an injury received in an accident cannot be avoided by claiming the accident did not "cause" the later treatment. In contrast, the cumulative effect of the jury instruction in this case was to leave the jurors with the impression that if they believed Hanson's doctor did unnecessary surgery, then the cost of that surgery, and the pain, suffering and wage loss related to it, were not "caused by" or "related to" the accident.

¶28 We conclude that the instructions were erroneous and confusing, and that error contributed to the outcome of the case. Inappropriate medical care, or unnecessary care, which the defense doctor opined was malpractice, was definitely

an issue in the case. The failure to clearly, and consistently, instruct the jury on the impact of that issue, as required by ***Fouse*** and ***Lievrouw***, gave the jury an incomplete and thus inaccurate statement of the law.

D. Necessity of a new trial

¶29 We have concluded that error occurred. A new trial shall not be granted unless the trial court made an erroneous ruling and the ruling affected the substantial rights of the parties. ***Martindale v. Ripp***, 2001 WI 113, ¶31, 246 Wis. 2d 67, 629 N.W.2d 698; *see also* WIS. STAT. § 805.18(2).[4] The substantial rights of the parties are affected only if there is a reasonable possibility that the error contributed to the outcome of the case. ***Id.***, ¶32. "A reasonable possibility of a different outcome is a possibility sufficient to 'undermine confidence in the outcome.'" ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768 (citation omitted). "If the error at issue is not sufficient to undermine the reviewing court's confidence in the outcome of the proceeding, the error is harmless." ***Id.***

¶30 After review of the record, we conclude that based on the error in the instructions, there is a reasonable possibility of a different outcome with respect to

[4] WISCONSIN STAT. § 805.18(2) provides:

> No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of selection or misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

the remaining damages issues. The jury obviously found that Hanson had been injured in the accident, because it awarded $25,000 in past medical expenses—those incurred prior to the surgery. The actual amounts awarded for the remaining damages also appear to be related to damages incurred prior to the surgery. What these damages should have been, had the jury taken into account damages after the surgery, is disputed (unlike the amount for all past medical expenses, which was undisputed).

¶31 We are convinced that the erroneous instruction affected the awards for the remaining damages. We conclude that the inconsistent and erroneous instructions in this case probably caused jury confusion and probably affected the substantial rights of Hanson with respect to the damage questions in the special verdict. Consequently, we remand for a new trial on the remaining damages issues.[5]

By the Court.—Orders reversed and cause remanded with directions.

Not recommended for publication in the official reports.

[5] We have concluded that the jury was not instructed properly, and that a new trial is warranted. However, we decline to prescribe specific jury instructions that must be given. The jury must be instructed consistent with the established law, as discussed in this opinion.