COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1510 **Cir. Ct. No. 2006CV627**

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

KEITH D. HACH,

PLAINTIFF-RESPONDENT,

U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES,

INVOLUNTARY PLAINTIFF,

V.

AMERICAN FAMILY MUTUAL INS. CO.,

DEFENDANT-APPELLANT,

PORFIRIO ENCISO-ANTONIO,

DEFENDANT.

APPEAL from a judgment of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Reversed and cause remanded*.

Before Dykman, P.J., Higginbotham and Bridge, JJ.

¶1 PER CURIAM. American Family Mutual Insurance Company appeals from a judgment in a personal injury action, arguing that the circuit court erred by directing the verdict regarding past medical expenses pursuant to ***Hanson v. American Family Mutual Insurance Co.***, 2006 WI 97, 294 Wis. 2d 149, 716 N.W.2d 866. We agree and reverse and remand for a new trial on damages.

Factual Background

¶2 Keith Hach was rear-ended by an uninsured vehicle driven by Porfirio Enciso-Antonio. At the time of the accident, Hach had uninsured motorist coverage through American Family. The parties stipulated Enciso-Antonio was the sole cause of the accident. Consequently, the jury considered only damage issues.

¶3 At trial, Hach asserted neck and shoulder injuries, supported by the testimony of his treating orthopedic surgeon, Dr. Stephen Grindel. According to Dr. Grindel, the accident aggravated a pre-existing degenerative shoulder condition, resulting in permanent pain symptoms. With respect to the neck injury, Dr. Grindel stated that it was a temporary issue which resolved within three to four months after the accident:

> Q: Okay. How about his neck and back, some of those other aches and pains you talked about? Do you have any history from either the medical records reviewed or Mr. Hach as to whether or not those issues were consistent with an automobile accident?
>
> A: My practice pertains primarily to the shoulder and down, but we do discuss neck with that in particular because there is a lot of overlap between symptoms in the neck and the shoulder.
>
> And we do ask questions, and in reviewing the past records, it's clear that he had strains to all those areas,

> and those seemed to resolve by three or four months after the—the injury.

Dr. Grindel also testified that the past medical expenses totaling $17,697.58 were reasonable and necessary as a result of the accident.

¶4 The defense offered the testimony of two expert witnesses, Dr. James Steil and Dr. Gerald Harris. Dr. Steil opined that any symptoms Hach suffered after the motor vehicle accident were a temporary aggravation of pre-existing, degenerative conditions that resolved within approximately three months. Dr. Steil stated:

> When I examined him, he was fifty-four years old, been involved in a rear ending accident on March 21 of 2004 here in Kenosha. And after I examined him, my conclusions were that he may have had some symptomatic injury immediately after this accident and could have been treated for three months after this accident. But it was a relatively minor injury and I do not believe that treatment after that point probably was related to this accident.

¶5 Dr. Steil also opined that any medical expenses beyond three months would not be accident related. He also testified that Hach's claimed past medical expenses included treatment for unrelated carpal tunnel syndrome, as well as a cervical spine MRI, and associated office visits after the conceded three- to four-month healing period.

¶6 Dr. Harris completed a biomechanical evaluation of the forces involved in the accident to ascertain whether they were consistent with Hach's claimed injuries. Regarding the alleged neck injury, Dr. Harris stated, "other than transient pain and stiffness, there's no biomechanical evidence that there would be a neck injury." Dr. Harris explained, "Two or three days of transient pain and stiffness has been the upper end of what's been reported with human subject testings." With regard to the shoulder, Dr. Harris indicated he saw evidence of

over-use, arthritis and degeneration of the shoulder. These pre-existing conditions, together with the lack of complaints of shoulder pain following the accident, led Dr. Harris to state, "it removes the shoulder as being related to this motor vehicle accident, in my opinion." Dr. Harris specifically concluded in part as follows:

> Q: In summary, Doctor, can you just provide the jury with a general statement of what your conclusions and opinions overall with respect to your analysis in this case are?
>
> A: Yes. That the alleged injuries of Mr. Hach are not causally related to the motor vehicle accident of March 21st, 2004. While some transient pain and stiffness might occur, the biomechanics of bodily contact are not sufficient to produce the injuries alleged.

¶7 At the conclusion of the evidence, Hach moved for a directed verdict regarding past medical expenses, relying upon ***Hanson***. Hach argued ***Hanson*** established that if a plaintiff "is injured … and the plaintiff uses reasonable and ordinary care in selecting his doctors, that the plaintiff is entitled, as a matter of law, to the amount of his past medical bills." The court agreed with Hach's interpretation of ***Hanson***, although it indicated, "I don't necessarily agree with ***Hanson***'s analysis." The court granted the motion and inserted claimed medical expenses totaling $17,697.58 into the special verdict.

¶8 American Family subsequently moved for a mistrial, which the court denied. The jury returned a verdict awarding $5,000 for past pain, suffering and disability; $20,000 for future pain, suffering and disability; and $20,000 for future medical expenses, in addition to the inserted past medical expenses of $17,697.58. In motions after verdict, American Family sought a new trial pursuant to WIS. STAT. § 805.15(1), which the court denied. This appeal follows.

Standard of Review

¶9 In determining whether the circuit court erred by inserting the amount of claimed past medical expenses into the special verdict, we must consider the evidence in the light most favorable to the party against whom the verdict was directed. *See* ***Koczka v. Hardware Dealers Mut. Fire Ins. Co.***, 29 Wis. 2d 395, 398, 138 N.W.2d 737 (1966). A verdict should be directed only where there is no conflicting evidence as to any material issue and only one reasonable inference or conclusion may be reached. *See* ***Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp.***, 96 Wis. 2d 314, 336, 291 N.W.2d 825 (1980).

Discussion

¶10 In ***Hanson***, our supreme court reiterated the rule for awarding damages for injuries aggravated by subsequent medical malpractice or mistake. ***Hanson***, 294 Wis. 2d 149, ¶25. This rule was first established more than one hundred years ago in ***Selleck v. City of Janesville***, 100 Wis. 157, 164, 75 N.W. 975 (1898), and has been followed since. *See* ***Fouse v. Persons***, 80 Wis. 2d 390, 397, 259 N.W.2d 92 (1977). As the ***Hanson*** court explained:

> The ***Selleck*** rule has been a part of Wisconsin case law since 1898. This rule essentially states that when a tortfeasor causes an injury to another person who then undergoes unnecessary medical treatment of those injuries despite having exercised ordinary care in selecting her doctor, the tortfeasor is responsible for all of that person's damages arising from any mistaken or unnecessary surgery.[1]

[1] The ***Hanson*** court also relied upon ***Butzow v. Wausau Memorial Hospital***, 51 Wis. 2d 281, 285-86, 187 N.W.2d 349 (1971). *See* ***Hanson v. American Family Mut. Ins. Co.***, 2006 WI 97, ¶20 & n.4, 294 Wis. 2d 149, 716 N.W.2d 866. The ***Butzow*** court cited the RESTATEMENT (continued)

Hanson, 294 Wis. 2d 149, ¶20.

¶11 Here, the circuit court interpreted ***Hanson*** to require payment of past medical bills as a matter of law once American Family conceded there was "some injury or problems" and Hach used reasonable care in selecting his doctors. The court stated:

> [T]he way I read it is once you've got across-the-board indication we concur there was some injury or problems there as a result of the accident, the person still gets treatment after that, it seems to say causation is no longer an issue.

¶12 We conclude the circuit court erred by expanding ***Hanson*** to relieve a plaintiff from proving causation when "some" injury is conceded.[2] Although ***Hanson*** requires a tortfeasor to pay for unnecessary or negligent treatment if reasonable care is used in selecting medical providers, ***Hanson*** did not expand the ***Selleck*** rule to eliminate the requirement that claimed past medical expenses be related to the accident.

(SECOND) OF TORTS § 457 (1965), which is entitled "Additional Harm Resulting From Efforts to Mitigate Harm Caused by Negligence." *See* ***Hanson***, 294 Wis. 2d 149, ¶20 n.4. "As stated in ***Butzow***, this doctrine was adopted by Wisconsin in ***Selleck*** [***v. City of Janesville***, 100 Wis. 157, 164, 75 N.W. 975 (1898)]," and provides:

> If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner.

See ***Hanson***, 294 Wis. 2d 149, ¶20 n.4.

[2] Hach contends in his brief that "[t]he supreme court [in ***Hanson***] rejected the idea that the ***Selleck*** rule only applies to cases involving medical malpractice that occurs after the accident." Hach provides no citation in support of this contention. We will not address arguments unsupported by legal authority. *See* ***Kruczek v. DWD***, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286.

¶13 Indeed, one of the defendants' arguments at trial in ***Hanson*** was that the surgery was not causally related to the accident. ***Id.***, ¶25. In that regard, our supreme court stated: "The important questions are whether the surgery arose from an initial injury *that itself was caused by the accident* and whether Hanson used ordinary care in selecting her physician." ***Id.*** (emphasis added). As the court also stated:

> Dr. Lloyd may have misdiagnosed those injuries, but they were the reason she was treated. Dr. Pawl even admitted as such. Because Hanson used ordinary care in selecting her physician and that physician subsequently performed an allegedly unnecessary surgery, *although one still arising from the original injury caused by Caldwell*, the defendants are responsible for the expense of the surgery, consistent with the ***Selleck*** rule.

Id., ¶27 (emphasis added).

¶14 In ***Hanson***, the supreme court noted that we affirmed the circuit court's refusal to grant a pre-verdict motion for past medical expenses. *See* ***id.***, ¶13. The supreme court observed that the jury had determined Hanson's unnecessary surgery was causally related to the accident. ***Id.***, ¶¶25-27. The plaintiff was entitled to all of her past medical expenses only after the ***Selleck*** rule was applied to the jury's findings. ***Id.***

¶15 In her concurrence, Chief Justice Abrahamson also recognized a distinction in ***Hanson*** related to the causal link between the past medical expenses and the additional treatment arising from the original injuries:

> The defendants may have also tried to advance a second theory, that is, that the surgery, necessary or not, was performed not to treat the injuries Hanson, the plaintiff, sustained in the collision at issue, but, rather, to treat an injury Hanson sustained at some other time. This theory, however, was not well developed by the defendants

> and was blended with the argument that the surgery was simply unnecessary….
>
> We are thus left with a muddled defense and a muddled record. I am therefore satisfied that the majority opinion correctly concludes that on the record before the court, the ***Selleck*** rule applies ….

Id., ¶¶47-48 (Abrahamson, C.J., concurring).

¶16 Here, causation was disputed on a variety of grounds. American Family conceded some level of injury, but disputed the full extent of the past medical expenses.[3] By way of example, Dr. Harris stated the alleged shoulder injury was unrelated to the motor vehicle accident. Rather, he saw evidence of over-use, arthritis and degeneration of the shoulder, together with a lack of complaints of shoulder pain following the accident. Dr. Harris summarized his opinions as follows: "the alleged injuries of Mr. Hach are not causally related to the motor vehicle accident on March 21st, 2004. While some transient pain and stiffness might occur, the biomechanics of bodily contact are not sufficient to produce the injuries alleged."[4] In addition, Dr. Steil testified that certain claimed

[3] American Family argued during Hach's motion for directed verdict that the jury was entitled to conclude from Dr. Harris' testimony that Hach's claimed shoulder injuries were not caused by the motor vehicle accident but, rather, were sustained at some other time. On appeal, Hach insists Harris had "many credibility problems" and reargues the evidence on appeal as if restating closing arguments. As mentioned previously, we review the evidence in the context of a directed verdict in the light most favorable to American Family as the nonmoving party. *See* ***Koczka v. Hardware Dealers Mut. Fire Ins. Co.***, 29 Wis. 2d 395, 398, 138 N.W.2d 737 (1966); ***Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp.***, 96 Wis. 2d 314, 336, 291 N.W.2d 825 (1980). Hach further argues if there is any credible evidence to support the verdict it must be sustained. However, this appeal involves neither a challenge to the sufficiency of the evidence nor a motion to change a jury's verdict answer.

[4] We note that Hach argued for the jury to be instructed on WIS JI—CIVIL 1720, which states that a jury cannot award any damages for any pre-existing conditions except insofar as the jury is satisfied that the condition has been activated by the injuries received in the accident. Any ailment or injury the plaintiff may have had, or has, or may later have, which is not the natural result of the injuries received in the accident is not to be considered in assessing damages. *See* WIS JI—CIVIL 1720.

medical expenses, including treatment for carpal tunnel, among other things, were unrelated to the injuries caused by the accident.

¶17 When construed in a light most favorable to American Family, a fair view of the evidence adequately raised a factual issue as to whether the claimed past medical expenses arose from the original injuries suffered in the accident. The jury was entitled to award less than the full amount of past medical expenses sought by Hach. This issue should not have been resolved by directed verdict.

¶18 Accordingly, we cannot sustain the circuit court's insertion of the claimed medical expenses into the special verdict. The court having improperly inserted into the verdict the claimed past medical expenses of $17,697.58 without submitting the issue to the jury, there will have to be a new trial on damages. *See* ***Koczka***, 29 Wis. 2d at 399.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.