COURT OF APPEALS
DECISION
DATED AND FILED

April 5, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1275 **Cir. Ct. No. 2008CV886**

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

SANDRA J. FROSETH AND MICHAEL FROSETH,

PLAINTIFFS-APPELLANTS,

V.

ALLIED PROPERTY & CASUALTY INSURANCE COMPANY, A NATIONWIDE COMPANY, A/K/A NATIONWIDE INSURANCE COMPANY OF AMERICA AND MICHAEL R. BRENIZER,

DEFENDANTS-RESPONDENTS,

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND MERIDIAN RESOURCE COMPANY, LLC,

SUBROGATED DEFENDANTS.

APPEAL from a judgment of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Reversed and cause remanded*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Sandra and Michael Froseth appeal the judgment entered in their personal injury action against Michael Brenizer. The Froseths argue the circuit court erroneously excluded reference to the substantial factor test in the jury instructions. The Froseths further contend that Brenizer's offer of judgment was deficient, thereby precluding a costs award, because the lump-sum offer failed to separate Michael's derivative claim from Sandra's claims. We agree with both arguments and reverse.[1]

BACKGROUND

¶2 Sandra was injured while driving when Brenizer turned his vehicle in front of her. Sandra sued for her injuries, and Michael sued for loss of society, services, and companionship. Brenizer conceded liability. However, Sandra had been injured in two prior automobile accidents and the parties disputed whether some of Sandra's injuries were preexisting. Damages were decided at a jury trial.

¶3 Sandra presented evidence that she suffered new injuries to her neck and right foot and ankle, and permanent aggravations of existing injuries to her mid- and lower back. The prior lower back injury had resolved by the time of the most recent accident, but the prior mid-back injury was permanent. Both of Sandra's medical experts opined she could not work more than three and one-half days per week. Brenizer's medical expert conceded Sandra had permanent restrictions resulting from the accident. However, he testified that some of the

[1] The Froseths present two additional arguments on appeal, but we need not resolve them because we reverse on other grounds. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).

foot injuries were preexisting and that there was no need for future medical treatment related to the accident.

¶4 The Froseths requested that the court give a modified version of the cause instruction, WIS JI—CIVIL 1500 (2006), which sets forth the substantial factor test. Because Brenizer conceded liability, the court concluded that instruction was unnecessary. However, the court decided to give the jury an aggravation instruction, using a modified version of WIS JI—CIVIL 1720 (1992). The Froseths requested that the court add the substantial factor test to that instruction. The court's instruction was as follows, with the Froseths' proposed, but not utilized, language in brackets:

> In answering the damage questions, you cannot award any damages for any pre-existing conditions or ailments except insofar as you are satisfied that the pre-existing conditions or ailments have been aggravated by the injuries received in the accident on October 21, 2005. [The test is not the cause, but a cause, meaning that the accident was a substantial factor in causing the aggravation of the pre-existing condition.] If you find that the plaintiff had pre-existing conditions or ailments before the accident but that such pre-existing conditions or ailments were aggravated because of the injuries received in the accident, then you should include an amount which will fairly and reasonably compensate Sandra Froseth for such damages Mrs. Froseth suffered as a result of such aggravation of the condition.
>
> Any ailment or disability that the plaintiff may have had, or has, or may later have, which is not the natural result of the injuries received in this accident, is not to be considered by you in assessing damages. *You cannot award damages for any condition which has resulted, or will result, from the natural progress of the pre-existing disease or ailment or from consequences which are attributable to causes other than the accident.*
>
> If the plaintiff was more susceptible to serious results from the injuries received in this accident by reason of pre-existing conditions or ailments and that [sic] the resulting damages have been increased because of this condition, this should not prevent you from awarding damages to the

> extent of any increase and to the extent such damages were actually sustained as a natural result of the accident.
>
> The evidence shows that the plaintiff was previously injured in two other car accidents. If the injuries of the plaintiff received in the accident on October 21, 2005 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 accident.

(Emphasis added.)

¶5 The jury awarded Sandra damages for past medical expenses, wage loss, and pain and suffering, but awarded her zero damages for future losses in all three categories. The jury awarded Michael no damages on his derivative claim. The special verdict form did not ask the jury to specify which physical injuries it was awarding damages for. Following the circuit court's denial of their postverdict motions, the Froseths now appeal.

DISCUSSION

Jury instructions

¶6 "A [circuit] court has wide discretion as to the instructions it will give a jury in any particular case." ***Anderson v. Alfa-Laval Agri, Inc.***, 209 Wis. 2d 337, 344, 564 N.W.2d 788 (Ct. App. 1997), *abrogated in part by* ***Nommensen v. American Cont'l Ins. Co.***, 2001 WI 112, ¶52 n.6, 246 Wis. 2d 132, 629 N.W.2d 301. Instructions must fully and fairly inform the jury as to the applicable principles of law. ***Id.*** at 345. If the "instructions adequately advise the jury as to the law it is to apply, the court has the discretion to decline to give other instructions even though they may properly state the law to be applied." ***Id.*** "The instructions given are to be considered in their totality to determine whether they properly state the law." ***Id.*** If an instruction is erroneous or the court erroneously

refused to give a proper instruction, a new trial is required if there is a "reasonable possibility that the error contributed to the outcome …." ***Nommensen***, 246 Wis. 2d 132, ¶52.

¶7 Focusing on the second sentence of the instruction's second paragraph, the Froseths argue the instruction is inconsistent with the substantial factor test for causation. They contend the instruction led the jury to believe the accident must have been *the* cause of Sandra's aggravation injuries, rather than *a* cause.

¶8 Brenizer, for his part, fails to respond with any meaningful argument to assist us in evaluating the Froseths' contention. He recites a few legal principles and then asserts the court's instruction was proper, without addressing any specifics of this case. He then sets forth an improper legal standard:

> Even if an instruction is erroneous or the trial court erroneously refused to give a proper instruction, a new trial will not be ordered unless the trial court's error was prejudicial.
>
> ... An error is prejudicial if it appears that a different result would have been reached had there been no error. This requires that a different result is probable, not just a mere possibility.

(Internal citations and quotation marks omitted.) Brenizer takes this language from ***Anderson***, 209 Wis. 2d at 345, which cites ***Nowatske v. Osterloh***, 198 Wis. 2d 419, 429, 543 N.W.2d 265 (1996). Our supreme court rejected that ***Nowatske*** prejudice standard in ***Nommensen***, 246 Wis. 2d 132, ¶52 n.6.

¶9 Next, Brenizer suggests, without elaboration or citation to legal authority, that it would have been improper to give the "liability causation" instruction because "liability and causation were not an issue." He then seeks,

apparently, to mislead us with his citation of the pattern jury instruction, citing it as: "**Liability Causation Jury Instruction: 1500 – Cause**." In fact, that instruction is simply titled, "CAUSE," and does not reference "liability." WIS JI—CIVIL 1500 (2006). Brenizer concludes his argument by referring us to his brief's appendix and asserting, "The trial court's reasoning for its ruling on the jury instructions is clearly set forth in the transcript ...."

¶10 When considering the issue, the circuit court observed, "So what the jury has to decide is if [Sandra] has an aggravation, whether the aggravation was caused by this accident and not related to some other factor because there's a lot of argument about that. I think that's also true of the consortium claim." After a few additional comments by counsel, concluding with Brenizer's counsel's observance that there was no cause question on the verdict form, the court ruled: "Yeah, I'd have to fiddle with that too much. I think the instructions as drafted are just fine."

¶11 Upon careful consideration and review, we conclude the court's instruction, taken as a whole and considered in the absence of a substantial factor instruction, was potentially confusing and failed to accurately convey the law. A reasonable interpretation of the court's instruction would be that damages could only be awarded for aggravation if the aggravation was caused solely by the accident. This would be contrary to Wisconsin's deeply rooted substantial factor test. *See* ***Clark v. Leisure Vehicles, Inc.***, 96 Wis. 2d 607, 617-18, 292 N.W.2d 630 (1980) (listing cases). "It is well-settled in Wisconsin that when evidence supports a number of contributing causes, the charge and the verdict should recognize that possibility and it is error to confine the causation question to a single cause." ***Reserve Supply Co. v. Viner***, 9 Wis. 2d 530, 532, 101 N.W.2d 663 (1960). As in ***Reserve Supply***, we conclude the error was "prejudicial," because, as recognized by the circuit court, there were other potential causes of aggravation.

Id. at 533. There is a reasonable possibility that the error contributed to the outcome, and the Froseths are therefore entitled to a new trial.

Brenizer's offer of judgment

¶12 Brenizer served the Froseths with a single, lump-sum offer of judgment.[2] We agree with the Froseths that the offer's failure to specify separate sums for Sandra and Michael forecloses Brenizer's right to recover costs under WIS. STAT. § 807.01(1).[3]

¶13 The application of WIS. STAT. § 807.01(1) to the facts of this case presents a question of law that we decide without deference to the circuit court's determination. ***Staehler v. Beuthin***, 206 Wis. 2d 610, 624, 557 N.W.2d 487 (Ct. App. 1997). The validity of an offer of judgment under § 807.01 depends on whether it allows the offeree to "fully and fairly evaluate the offer from his or her own perspective." ***Id.*** at 624-25. "It is the obligation of the party making the offer to do so in clear and unambiguous terms, with any ambiguity in the offer being construed against the drafter." ***Id.*** at 625.

¶14 In ***Bockin v. Farmers Insurance Exchange***, 2006 WI App 220, ¶¶3-6, 12, 14, 296 Wis. 2d 694, 723 N.W.2d 741, a lump-sum offer of judgment was made to a minor plaintiff, but it would have released a medical expense claim belonging to the child's mother. The court held that because the minor and parent

[2] Because we have already resolved the Froseths' appeal on other grounds, we question whether we need to address this issue. However, we do so because the issue might arise again if the Froseths again fail to recover more than the amount specified in Brenizer's offer of judgment.

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

had separate claims, the minor could not fully and fairly evaluate the offer. ***Id.***, ¶¶12, 18-19. A similar situation is present here. Sandra has a claim for personal injury and Michael has a separate claim for loss of society, services, and companionship. *See* ***Arnold v. Shawano Co. Agric. Soc'y***, 106 Wis. 2d 464, 469, 317 N.W.2d 161 (Ct. App. 1982) ("A spouse's action for loss of consortium for an injury to the other spouse is a separate cause of action that never belonged to the other spouse."). Because Brenizer's offer of judgment failed to differentiate between Michael's and Sandra's separate claims, neither could fully and fairly evaluate the offer from his or her own perspective. Therefore, the offer is invalid and the circuit court's award of costs must be reversed.

By the Court.—Judgment reversed and cause remanded.

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