COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2482 **Cir. Ct. No. 2011CV1200**

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

CHAD W. PREBISH,

PLAINTIFF-APPELLANT,

V.

BRISTOL WEST INSURANCE COMPANY AND GARY R. WOLD,

DEFENDANTS-RESPONDENTS,

AMERICAN STANDARD INSURANCE COMPANY OF WISCONSIN,

DEFENDANT.

APPEAL from a judgment of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Modified and, as modified, affirmed*.

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. A jury awarded Chad Prebish $177,750 in personal injury damages, including $51,500 for future medical expenses. Prebish appeals,

arguing the circuit court should have changed the jury's answer to the special verdict question on future medical expenses to $105,590. We conclude credible evidence supports the jury's answer. We modify the judgment to correct a mathematical error and, as modified, affirm.[1]

BACKGROUND

¶2 On September 14, 2010, Prebish was struck by a vehicle operated by Gary Wold while walking through the American Legion parking lot in Somerset, Wisconsin. Prebish sued Wold and his insurer, Bristol West Insurance Company (collectively, Wold). The case was tried to a jury in May 2013. Wold's liability was uncontested, and the only issues for trial were the nature and extent of Prebish's injuries and the amount of his damages. Prebish alleged he suffered a serious and permanent back injury in the accident, whereas Wold asserted the accident caused only temporary injuries and any ongoing symptoms were the result of a preexisting condition.

¶3 At trial, Prebish denied any history of significant low back problems prior to the September 14, 2010 accident. However, Wold presented medical records indicating that, on July 16, 2010, Prebish told a treating physician he had suffered from chronic back pain for twelve years. That physician prescribed the anti-inflammatory medication naproxen for Prebish's back pain and also instructed him to take Tylenol Arthritis as needed. Prebish conceded on cross-examination

[1] According to the special verdict, the jury awarded Prebish damages totaling $177,750. However, the circuit court's judgment awarded Prebish only $177,250 in damages, plus costs and disbursements. This discrepancy appears to be the result of a mathematical error. We therefore modify the judgment to award Prebish $177,750 in damages, plus costs and disbursements.

that he had spoken to "a number of doctors" before September 2010 who advised him to lose weight to alleviate his low back pain.

¶4 Prebish also conceded he injured his back at work on September 1, 2010—about two weeks before the accident with Wold—when he attempted to lift a motorcycle weighing between 500 and 1,000 pounds. He sought medical treatment at the New Richmond Clinic within a few hours of the injury and was prescribed Vicodin and Flexeril, a muscle relaxant. He was also given work restrictions that prevented him from carrying more than ten pounds on a frequent basis and lifting more than twenty pounds.

¶5 Prebish returned to the New Richmond Clinic on September 8, 2010, and reported he still had "quite a bit" of low back pain that was not relieved by his current medications. He was prescribed an oral steroid to reduce pain and swelling. He was also advised to seek chiropractic treatment or physical therapy. At Prebish's request, his work restrictions were extended until September 18, 2010. On cross-examination, Prebish conceded he took Vicodin for his low back pain several hours before the accident with Wold.

¶6 In support of his claim for future medical expenses, Prebish presented the testimony of orthopedic surgeon Bruce Bartie. Bartie testified he treated Prebish on four occasions between December 23, 2010, and December 4,

2012. He opined the accident with Wold permanently aggravated a previously asymptomatic spondylolisthesis at the L4-5 level of Prebish's spine.[2]

¶7 Bartie testified he initially attempted to treat Prebish's back pain with physical therapy and an exercise program to strengthen Prebish's core muscles. However, this conservative treatment failed to produce any significant improvement in Prebish's condition. Consequently, Bartie opined Prebish would need surgery to treat his low back pain—specifically, a posterior instrumented fusion at the L4-5 level. To minimize the potential for complications, Bartie testified he would not perform that procedure unless Prebish lost about 100 pounds. Bartie therefore testified Prebish would need to enroll in a presurgery supervised weight loss program. He also testified Prebish would require postsurgery physical therapy.

¶8 On cross-examination, Bartie conceded he was concerned at times that Prebish was not complying with the physical therapy and exercise programs he recommended. Bartie also conceded he had not reviewed Prebish's medical records from Stillwater Medical Group, the New Richmond Clinic, or the Lakeview Hospital emergency room, where Prebish was treated immediately following the accident. Thus, Bartie was unaware that Prebish did not report any back pain when seen in the emergency room. He was also unaware that Prebish had reported a twelve-year history of back pain to another physician in July 2010.

[2] Spondylolisthesis is "a condition in which one of the bones of the spine (vertebrae) slips out of place onto the vertebra below it." *See* Spondylolisthesis, http://my.clevelandclinic.org/disorders/back_pain/hic_spondylolisthesis.aspx (last visited Oct. 8, 2014). Bartie testified spondylolisthesis occurs in about five percent of the population, and the vast majority of those patients are asymptomatic.

Prebish had told Bartie his history of back pain was limited to sporadic mid- or upper-back pain for about five years before the accident.

¶9 Bartie testified he did not believe Prebish's workplace injury on September 1, 2010, was particularly significant to his current low back complaints. However, Bartie conceded on cross-examination he did not know precisely how the workplace injury occurred. He was also unaware that Prebish was still taking Vicodin for back pain caused by the workplace injury on the date of the accident with Wold. Bartie could not rule out the possibility that the workplace injury aggravated Prebish's preexisting spondylolisthesis.

¶10 Prebish relied on the testimony of Ann Endy, a registered nurse and certified life care planner, to establish the cost of the surgery and associated medical care recommended by Bartie. Endy opined a presurgery weight loss program would cost Prebish $1,808, and the surgery and subsequent physical therapy would cost $104,788, for a total of $105,590. Endy conceded these numbers were based in part on average costs and did not represent the actual cost of Prebish's future medical care.

¶11 Neurologist Bruce Idelkope testified for the defense. Idelkope testified he performed an independent medical examination of Prebish, which included a physical examination on January 17, 2013, and a review of Prebish's medical records from Lakeview Hospital, Stillwater Medical Group, the New Richmond Clinic, and St. Croix Orthopedics—Bartie's practice group. Based on this information, Idelkope opined the accident with Wold temporarily aggravated Prebish's preexisting low back condition, but any symptoms caused by the accident resolved by March 1, 2011. Idelkope testified Prebish's current complaints of low back pain and lower extremity pain were caused by muscle

tightness in his back irritating nerves, which was a chronic problem that had existed for years before the accident.

¶12 Idelkope agreed with Bartie that Prebish had a preexisting spondylolisthesis at the L4-5 level. However, he did not agree that Prebish's current symptoms were caused by aggravation of the spondylolisthesis during the accident with Wold. Idelkope explained that if the spondylolisthesis had been aggravated at that time, he would have expected "the nerve would be involved right away. … The sciatica would emerge immediately." Idelkope noted Prebish did not complain of low back pain or nerve pain when he was seen the day after the accident. Idelkope further opined any future medical treatment Prebish needed was unrelated to the accident with Wold. However, regardless of causation, Idelkope recommended that Prebish lose weight and strengthen his core muscles to alleviate his symptoms.

¶13 The jury returned a special verdict awarding Prebish $177,750 in damages, including $51,500 for future medical expenses. Prebish filed a postverdict motion asking the circuit court to change the jury's answer to the special verdict question on future medical expenses to $105,590. Prebish argued that, having concluded he was entitled to future medical expenses, the jury was required to award him $105,590—the amount testified to by Endy—because there was no other credible evidence in the record as to the cost of his future medical care.

¶14 The circuit court denied Prebish's motion, concluding the jury's award of future medical expenses was supported by credible evidence. The court explained the jury could have reasonably rejected Bartie's and Endy's opinions because Bartie "did not have complete familiarity with [Prebish's] medical

history" and Endy "used average cost figures in arriving at her estimate of $105,590.00." The court also noted there is no requirement that a jury award the full amount sought by a plaintiff. Prebish now appeals.

DISCUSSION

¶15 A motion to change an answer in a jury verdict challenges the sufficiency of the evidence to support the verdict. WIS. STAT. § 805.14(5)(c);[3] ***State v. Michael J.W.***, 210 Wis. 2d 132, 143, 565 N.W.2d 179 (Ct. App. 1997). When considering a motion to change a jury's answer, we view the evidence in the light most favorable to the verdict and affirm if the verdict is supported by any credible evidence. WIS. STAT. § 805.14(1); ***Richards v. Mendivil***, 200 Wis. 2d 665, 671, 548 N.W.2d 85 (Ct. App. 1996). We search the record for credible evidence that sustains the verdict, and if the evidence gives rise to more than one reasonable inference, we accept the inference the jury reached. ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. Moreover, when the circuit court has upheld the jury's findings on a motion after verdict, we will not overturn the verdict unless "'there is such a complete failure of proof that the verdict must be based on speculation.'" ***Kubichek v. Kotecki***, 2011 WI App 32, ¶14, 332 Wis. 2d 522, 796 N.W.2d 858 (quoting ***Coryell v. Conn***, 88 Wis. 2d 310, 315, 276 N.W.2d 723 (1979)).

¶16 To recover future medical expenses, a plaintiff must present expert testimony that he or she sustained injuries requiring future medical treatment, as well as expert testimony regarding the cost of the treatment. ***Weber v. White***,

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

2004 WI 63, ¶20, 272 Wis. 2d 121, 681 N.W.2d 137. Because the jury awarded him *some* future medical expenses, Prebish argues it must have determined he sustained injuries requiring future medical treatment as a result of the accident with Wold. Prebish asserts Endy's estimate of $105,590 was the only evidence in the record regarding the cost of that future medical care. Accordingly, Prebish argues the jury was required to award him $105,590, and the award of $51,500 is not supported by any credible evidence.

¶17 We disagree. Prebish's argument rests on the false premise that the jury was required to award the full amount he sought for future medical expenses absent specific evidence of another amount. Prebish does not cite any authority in support of that proposition. To the contrary, in ***Lautenschlager v. Hamburg***, 41 Wis. 2d 623, 630, 165 N.W.2d 129 (1969), our supreme court affirmed a jury verdict awarding the plaintiff $1,000 for past medical expenses, even though the plaintiff had submitted medical bills totaling $1,562. The court explained that some of the plaintiff's medical bills had been admitted into evidence "with little or no testimony to support the necessity for the services in relation to the injuries sustained" in the underlying accident. ***Id.*** The court reasoned, "The mere fact that medical expenses were incurred by a plaintiff does not compel a finding of compensability." ***Id.*** Quoting a previous case, the court stated medical expenses "'are recoverable as part of compensatory damages to the extent of the amount reasonably and necessarily paid or incurred for … treatment.'" ***Id.*** (quoted source omitted). A jury "'is not required to return an award to compensate for the exact amount expended by the person seeking recovery.'" ***Id.*** (quoted source omitted).

¶18 Here, credible evidence supports the jury's decision to award Prebish only $51,500 in future medical expenses, instead of the $105,590 testified to by Endy. The jury could have reasonably accepted Bartie's opinion that

Prebish's symptoms would require future surgery. However, given the evidence regarding Prebish's history of chronic back pain, as well as the workplace injury on September 1, 2010, the jury could also have reasonably rejected Bartie's opinion that Prebish's symptoms were related exclusively to the accident with Wold. A jury "is not bound by the opinion of an expert[,]" ***State v. Kienitz***, 227 Wis. 2d 423, 438, 597 N.W.2d 712 (1999), and may accept certain portions of an expert's testimony while rejecting others, ***State v. Owen***, 202 Wis. 2d 620, 634, 551 N.W.2d 50 (Ct. App. 1996).

¶19 If the jury determined some of Prebish's symptoms were due to his preexisting back condition instead of the accident with Wold, it could have reasonably declined to award him the full cost of the surgery and associated medical care Bartie recommended. The jury was instructed:

> In answering the damage question subdivisions, you cannot award any damages for any pre-existing disease, condition, or ailment *except insofar as you are satisfied that the disease, condition, or ailment has been aggravated by the injuries received in the accident on September 14, 2010*. If you find that [Prebish] had a pre-existing disease or condition which was dormant before the accident but that such disease or condition was aggravated because of the injuries received in the accident, then you should include an amount which will fairly and reasonably compensate [Prebish] for such damages [he] suffered *as a result of such aggravation of the condition.*
>
> Any ailment or disability that [Prebish] 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.*

(Emphasis added.) *See* WIS JI—CIVIL 1720 (1992). Thus, if the jury determined Prebish suffered from a preexisting back condition, it was to award him damages

only to the extent the accident with Wold *aggravated* the preexisting condition. Based on the evidence before it, the jury could have reasonably determined Prebish would have required future medical care to treat his preexisting low back pain even without the accident with Wold. Accordingly, the jury could have reasonably determined only some of Prebish's future medical costs were related to the accident's aggravation of his preexisting condition.

¶20 Further, as the circuit court noted, the jury could have concluded Endy's testimony was unreliable because it was based on average costs and did not represent the actual cost of Prebish's future medical care. In addition, based on Bartie's testimony that he was concerned Prebish had not complied with recommended physical therapy and exercise programs in the past, the jury could have reasonably questioned whether Prebish would be able to lose the weight necessary to undergo the spinal fusion surgery. The jury could also have reasonably determined the cost of the presurgery weight loss program was unrelated to the accident. All of these considerations support the jury's decision to award Prebish only $51,500 in future medical expenses, instead of the $105,590 he requested. "The law does not require mathematical certainty to determine future health care expenses." ***Weber***, 272 Wis. 2d 121, ¶30.

¶21 Citing ***Lagerstrom v. Myrtle Werth Hospital-Mayo Health System***, 2005 WI 124, 285 Wis. 2d 1, 700 N.W.2d 201, Prebish argues Wisconsin courts have previously adjusted jury awards in circumstances similar to those present in this case. In ***Lagerstrom***, a jury found that the defendants' negligence caused the plaintiff's husband's death. ***Id.***, ¶90. The jury awarded the plaintiff various damages but declined to award funeral expenses. ***Id.***, ¶20. On appeal, our supreme court held the circuit court should have changed the jury's answer to the

funeral expense question from $0 to $7,610 because it was undisputed the plaintiff incurred funeral expenses in that amount. ***Id.***, ¶¶97-98.

¶22 ***Lagerstrom*** is inapposite in three respects. First, in ***Lagerstrom***, the defendants "implicitly conceded" during trial that the funeral expenses incurred by the plaintiff were reasonable. ***Id.***, ¶97. Wold never conceded the future medical expenses Endy testified to were reasonable. Second, the disputed amount in ***Lagerstrom*** was a finite cost for a funeral that had already taken place, rather than an estimate for future medical care. Third, there was no question in ***Lagerstrom*** that the funeral expenses were causally related to the defendants' negligence. In contrast, Wold aggressively disputed Prebish's claim that his current symptoms were related to the accident, and there was significant evidence suggesting Prebish's symptoms were due to a preexisting condition.

¶23 Prebish also relies on ***Danner v. Auto-Owners Insurance***, 2001 WI 90, 245 Wis. 2d 49, 629 N.W.2d 159, in support of his argument that the circuit court should have changed the jury's future medical expense award. In ***Danner***, a jury found that the plaintiffs' insurer acted in bad faith when it denied the plaintiffs' claim. ***Id.***, ¶38. The jury awarded the plaintiffs $125,000 in attorney fees incurred in the bad faith action, but it did not award any attorney fees for the underlying claim. ***Id.*** The circuit court changed the jury's attorney fee awards to $142,967.10 for the bad faith claim and $81,012.97 for the underlying claim. ***Id.***, ¶39. Our supreme court affirmed, reasoning $142,967.10 was the only amount entered into evidence at trial regarding the attorney fees incurred in the bad faith action, and there was no credible evidence supporting the jury's failure to award attorney fees on the underlying claim. ***Id.***, ¶¶76-79.

¶24 ***Danner*** relied on case law allowing plaintiffs "to recover for all detriment proximately resulting from the insurer's bad faith, which includes … those attorney's fees that were incurred to obtain the policy benefits[.]" ***Id.***, ¶79 (quoting ***DeChant v. Monarch Life Ins. Co.***, 200 Wis. 2d 559, 572-73, 547 N.W.2d 592 (1996)). The attorney fees were therefore compensable as a matter of law once the jury determined the insurer committed bad faith and the insurer failed to dispute the reasonableness of the fees. In contrast, the present case involves an award of future medical expenses, which must be supported by expert testimony as to both the necessity of future medical care and its cost. *See* ***Weber***, 272 Wis. 2d 121, ¶20. Wold vigorously disputed the necessity of the future medical care recommended by Bartie, and he also challenged Endy's testimony regarding the cost of that care. ***Danner*** is therefore inapposite.

¶25 For the foregoing reasons, we reject Prebish's argument that the circuit court was required to change the jury's answer to the future medical expense question to $105,590 simply because that was the only specific amount presented to the jury. If Prebish were correct, juries would not be permitted to award expenses in any amounts other than those offered by the parties. Prebish does not cite any legal authority in support of that proposition. Where, as here, there were significant questions regarding the cause of Prebish's symptoms and the foundation for Endy's cost estimate, the law provides that the jury was free to select a number it thought would fairly compensate Prebish, based on the evidence before it. Credible evidence supports the jury's decision to award Prebish $51,500 in future medical expenses, and we cannot say "'there is such a complete failure of proof that the verdict must be based on speculation.'" ***Kubichek***, 332 Wis. 2d 522, ¶14 (quoting ***Coryell***, 88 Wis. 2d at 315).

By the Court.—Judgment modified and, as modified, affirmed.

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