COURT OF APPEALS
DECISION
DATED AND FILED

November 3, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP2487 **Cir. Ct. No. 2011CV16035**

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

ACUITY, A MUTUAL INSURANCE COMPANY,

PLAINTIFF,

V.

BRYAN MICHALAK,

DEFENDANT.

ROBYN J. SWANTZ,

INTERVENING PLAINTIFF-APPELLANT,

UNITED HEALTHCARE OF WISCONSIN, INC.,

INVOLUNTARY-PLAINTIFF,

V.

BRYAN MICHALAK,

DEFENDANT,

ACUITY, A MUTUAL INSURANCE COMPANY AND WISCONSIN ELECTRICAL EMPLOYEES HEALTH AND WELFARE PLAN,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: GLENN H. YAMAHIRO, Judge. *Affirmed*.

Before Kloppenburg, P.J, Sherman, and Blanchard, JJ.

¶1 PER CURIAM. Robyn Swantz suffered a foot injury in a motor vehicle accident and, as a result, made a claim for insurance coverage against Acuity. At a jury trial, the only contested issue was the amount of Swantz's damages for future expenses arising from the injury. The jury awarded Swantz damages at a level far less than that requested by Swantz.

¶2 In this appeal, Swantz seeks a new trial, arguing that the circuit court erred in allowing the jury to consider evidence offered by Acuity of Swantz's alleged failure to mitigate damages. The evidence involved a course of medical treatment recommended by an Acuity-retained physician, which Swantz did not follow. Acuity contended at trial that Swantz should have availed herself of the recommended treatment, which would cost less than the course of treatment that she had followed and planned to continue to follow under the advice of her treating physicians. We conclude that the court correctly applied controlling legal precedent regarding the role of juries in personal injury cases in deciding whether injured persons have acted reasonably in accepting or rejecting recommendations to submit to particular medical procedures that would allegedly mitigate their damages. Accordingly, we affirm.

BACKGROUND

¶3 It is undisputed that Swantz's foot was injured in a vehicle collision and that Acuity is liable for damages resulting from this injury. The sole issue in dispute is the circuit court's decision to deny Swantz's motion in limine on the topic of her alleged failure to mitigate damages, which we now summarize.

¶4 In the motion in limine, Swantz objected to the court allowing the testimony of Dr. John Krebsbach, whom she anticipated that Acuity would call as a damages mitigation witness. Dr. Krebsbach had been retained by Acuity to conduct an "independent medical examination" of Swantz. Swantz represented that Dr. Krebsbach was prepared to testify that Swantz could obtain relief by undergoing radio frequency ablation, which involves heating and effectively deadening a nerve, in an attempt to block pain signals from the nerve to the brain. Swantz characterized Dr. Krebsbach as testifying that "there are no guarantees that the procedure will work and that the procedure is not without potential complication." In contrast, Swantz contended, her two treating physicians "have not recommended she undergo that treatment and have specifically testified that the procedure could make matters worse" for Swantz. Instead, the treating physicians recommended that she continue to use an expensive prescribed analgesic cream.

¶5 Swantz argued that it would be unreasonable to expect her to undergo the ablation procedure recommended by Dr. Krebsbach and only reasonable to expect her to "follow the recommendations of her own physician[s] rather than the insurance company's physician[] [whom] she does not know personally." On these grounds, Swantz sought an order barring "all arguments and instructions regarding the duty to mitigate personal injury damages."

¶6 In response, Acuity submitted, in part, that Dr. Krebsbach, a foot and ankle surgeon, proposed to first treat Swantz's nerve symptoms with an injection of an analgesic mixed with cortisone into what appeared to be the problem nerve, and if the injection eliminated the pain, then to follow up with a radio frequency ablation of the identified problem nerve to "cut off any signal from the nerve to Swantz's brain, blocking any pain." Dr. Krebsbach's position was that, if the injection did not identify the problem nerve, then no ablation should be performed. Acuity submitted that Swantz's treating physicians agreed that the injection would be part of a reasonable course of treatment, but did not agree that ablation should be performed under the circumstances described by Dr. Krebsbach.

¶7 Acuity argued that jurors "should have the opportunity to consider all of the available treatment plans available to Swantz and then decide whether Swantz has properly mitigated her damages," relying on authority that included ***Lobermeier v. General Telephone Co.***, 119 Wis. 2d 129, 349 N.W.2d 466 (1984).

¶8 The circuit court denied Swantz's motion, concluding that her position was contrary to "settled" Wisconsin law that plaintiffs have a duty to mitigate personal injury damages, and that the standard mitigation of damages instruction, WIS JI—CIVIL 1730, "will adequately address" the jury's understanding of the applicable legal standards. "[T]he jury will be in a position to make that assessment based upon the three doctors that are lined up [the two treating physicians and the Acuity-retained physician], and whatever else the [parties] decide to introduce and submit …."

¶9 All three physicians testified at trial, and the jury was given WIS JI—CIVIL 1730, discussed below. The jury returned a verdict awarding Swantz much less than the $450,000 she requested. The circuit court, relying in part on

Lobermeier, denied Swantz's motions after verdict for a new trial or to change the damages answer on the verdict form to $450,000.

DISCUSSION

¶10 Swantz's sole argument on appeal is that in a personal injury case the duty of the injured person to use ordinary care to mitigate damages by submitting to recommended medical treatment "should apply only to those treatment modalities recommended by" the injured person's treating physicians. Therefore, Swantz contends, the circuit court should have determined that the testimony of Dr. Krebsbach was "irrelevant" and "prejudicial," and that his testimony could not support a conclusion that she failed to make a reasonable decision that would have mitigated damages. We conclude that Swantz's argument conflicts with ***Lobermeier***, which directs in clear terms that juries are to resolve disputes as to whether a decision not to follow a treatment recommendation was reasonable.

¶11 A motion for a new trial on the ground of prejudicial extraneous information typically requires the circuit court to make various evidentiary, factual, and legal determinations, and we apply different standards of review to these determinations depending on their nature. *See* ***Manke v. Physicians Ins. Co. of Wis.***, 2006 WI App 50, ¶17, 289 Wis. 2d 750, 712 N.W.2d 40. However, in this case, we resolve the single issue raised on appeal based on our interpretation of case law addressing the admissibility of alleged failure-to-mitigate evidence, which is a question of law that we review de novo. *See* ***id.***, ¶¶19, 21. We need not, and do not, express any view as to whether the circuit court's decision to deny Swantz's request for a new trial could be affirmed as an exercise of the court's discretion. *See* ***id.***, ¶17.

¶12 We now summarize ***Lobermeier*** in some detail. The personal injury at issue was to an eardrum. ***Lobermeier***, 119 Wis. 2d at 133. One of Lobermeier's treating physicians performed surgery on the injured ear, but a second treating physician subsequently opined that Lobermeier needed additional surgery, because the initial surgery had resulted in dangerous complications. ***Id.*** at 133-34, 143. Lobermeier declined to submit to the additional surgery. ***Id.*** at 144, 149. The defendant sought to have Lobermeier examined by a physician hired by the defendant, so that the physician could testify about "the damage to the plaintiff if [the recommended] second surgery were not performed and the improvement in hearing that probably would result if further surgical procedures were undertaken." ***Id.*** at 143-44. The circuit court believed that the additional surgery presented "a risk of further harm or death." ***Id.*** at 144.

¶13 On these facts, the circuit court granted a motion by Lobermeier to prevent an examination by the defendant's physician. ***Id.*** at 143. The court further ruled that deposition testimony of Lobermeier's second treating physician could not be introduced at trial on the topic of the "risks for or against future surgery." ***Id.*** at 144. Because Lobermeier faced a risk of further harm if he submitted to the additional surgery, "the jury had nothing to weigh in respect to further mitigation of damages by reason of not having further surgery." ***Id.*** Based on this reasoning, the circuit court barred all evidence on the alleged failure-to-mitigate topic, and instructed the jury that Lobermeier's "damages are not to be diminished because he did not have a second operation." ***Id.***

¶14 On review, our supreme court remanded for a retrial on damages, concluding that the circuit court erred when it declined to allow the mitigation "question to go to the jury, rejected evidence on the point, and ruled as a matter of law that the plaintiff's damages were not to be diminished for the failure to have

surgery." ***Id.*** at 149-50. The court held that it was error for the circuit court to "exclude[] surgery from the general rule" that defendants may attempt to show failure to mitigate damages, and that the circuit court's position was not justified by its views that the additional surgery presented hazards, might not improve Lobermeier's condition, and might not be within his means. ***Id.***

¶15 In support of these conclusions, the supreme court canvassed prior Wisconsin authority and persuasive authority, and then summarized in the following pertinent terms "Wisconsin law on mitigation of damages in tort actions":

> An injured party is obligated to exercise that care usually exercised by a person of ordinary intelligence and prudence, under the same or similar circumstances; to seek medical or surgical treatment; and to submit to and undergo recommended surgical or medical treatment, within a reasonable time, which is not hazardous and is reasonably within his means, to minimize his damages. The injured party is not *required* to submit to surgery or medical treatment but is only required to submit to those treatments to which the "reasonable person" would have submitted. Although the injured party is not required to undergo recommended treatment, a tortfeasor is not expected to pay for disability or pain if medical treatment could reasonably correct the ailment.

Lobermeier, 119 Wis. 2d at 149 (emphasis in original). The court explained that this approach rests in part on the notion that "the proper period of time for which damages or future pain and suffering or other disability are awarded cannot be in excess of that *reasonably* required to effect a cure.'" ***Id.*** at 147 (quoting ***Casimere v. Herman***, 28 Wis. 2d 437, 447, 137 N.W.2d 73 (1965) (emphasis in ***Lobermeier***); *see also* ***Hargrove v. Peterson***, 65 Wis. 2d 118, 123-26, 221 N.W.2d 875 (1974) (rejecting argument that duty to mitigate instruction was inappropriate because the recommended surgery would have occurred in the future, and

therefore was a speculative proposition; issue is "what is reasonable in the [injured person's] acceptance or rejection of elective surgery to mitigate damages") (citing WIS JI—CIVIL, Part II, 1730, Duty to Mitigate).

¶16 Central to the issue raised in the instant appeal, the court made a categorical statement that the question of whether an injured party has exercised the requisite level of care to mitigate damages in the manner described above is a question "of fact for the jury—what was a reasonable course of conduct, under the circumstances, to mitigate the injuries or damages." ***Lobermeier***, 119 Wis. 2d at 145.

¶17 Moreover, this categorical statement came in the course of discussion that appears to treat it as a rule that permits no exceptions. The court explicitly addressed the difficulty that courts face in attempting to draw a line as to whether a proposed procedure might be considered too hazardous to qualify as admissible failure-to-mitigate evidence, and the court resolved the difficulty by calling this a jury question. *See* ***id.*** More specifically, the court first quoted an authority for the proposition that courts "'seem to hold as a matter of law that a refusal to undergo'" a potentially dangerous operation "'is not a ground for reducing damages.'" ***Id.*** (quoting McCormick, DAMAGES (hornbook series, 1935), sec. 36, p. 136). The court followed this with a further observation, from the same authority, that "as surgical science progresses and becomes more predictable, reasonable conduct in the future may require that the advice of physicians be followed even in respect to serious operations." ***Lobermeier***, 119 Wis. 2d at 145. The court then stated:

> We conclude that Wisconsin law has set its course midway between these two extremes. The question is one of fact for the jury—what was a reasonable course of

> conduct, under the circumstances, to mitigate the injuries or damages.

Id. To recap, the "two extremes" identified by the court were: (1) taking away from the jury the affirmative defense of mitigation of damages when there are potential serious risks or dangers to the injured person from undergoing the recommended procedure; and (2) given advances in medicine, instructing juries that injured persons must in all cases follow any recommended procedure if it could result in reduced damages. Instead of following either of these "extremes," ***Lobermeier*** dictates that juries are to resolve these fact-based issues.

¶18 Turning to the topic of jury instructions, the ***Lobermeier*** court reaffirmed its earlier approval of what was then designated "WIS. JI—CIVIL, Part II, 1930, Duty to Mitigate." ***Id.*** at 147-48 (citing ***Hargrove***, 65 Wis. 2d 118, 123-24). The language of WIS. JI—CIVIL, Part II, 1930 matches in substance the language in the instruction given by the circuit court in the instant case, which is the current mitigation of damages instruction, WIS JI—CIVIL 1730.[1]

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[1] The jury in this case was given the current mitigation of damages instruction, WIS JI—CIVIL 1730:

> A person who has been injured must use ordinary care to mitigate or lessen her damages. This duty to mitigate damages requires an injured person to use ordinary care to seek medical and surgical treatment, and to submit to and undergo recommended medical or surgical treatment within a reasonable time to avoid or minimize any damages from physical injuries.
>
> Ordinary care is the degree of care usually exercised by a person of ordinary intelligence and prudence under the same or similar circumstances.

(continued)

¶19 With that background, we clarify by noting arguments that Swantz does not make on appeal. Swantz does not dispute that WIS JI—CIVIL 1730 is an accurate statement of the law, and does not point to any modification to the language of WIS JI—CIVIL 1730, or any other instruction, that she asked the circuit court to give in order to alert the jury to any aspect of Dr. Krebsbach's testimony that could be misleading or confusing under applicable legal standards. She does not argue that there was insufficient evidence upon which the jury could have found that she was aware of Dr. Krebsbach's recommended course of treatment during the pertinent time period. And, Swantz does not suggest that she moved to preclude Dr. Krebsbach's testimony on the grounds that it would not assist the jury in understanding the evidence or determining a fact in issue, that Dr. Krebsbach was not qualified as an expert by knowledge, skill, experience, training, or education, or that his testimony was not based upon sufficient facts or

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> …. An injured person is only required to submit to those medical or surgical treatments to which a reasonable person would have submitted. A person is not required to undergo treatment if it will not improve her condition.
>
> Also, a person is not required to undergo treatment if treatment is … unreasonably dangerous or is not reasonably within his or her means.
>
> In determining damages, you should keep in mind this duty of Robyn Swantz to use ordinary care to mitigate damages. If you find that Ms. Swantz did not do so, you should not include in your answer to this damage question any amount for consequences of the injury which reasonably could have been avoided.
>
> The burden of proof on this issue is on the defendant to satisfy you to a reasonable certainty by the greater weight of the credible evidence that Robyn Swantz did not use ordinary care in mitigating damages.

data, or was not the product of reliable principles and methods. *See* WIS. STAT. § 907.02 (2013-14).[2]

¶20 Instead, Swantz argues solely that jurors should not be permitted to "second guess the patient" about a decision to decline to follow a procedure that has been recommended by a physician hired by the defendant, and not recommended by a treating physician. We conclude that this argument is contrary to the categorical statement in ***Lobermeier*** that the mitigation issue presents a question "of fact for the jury—what was a reasonable course of conduct, under the circumstances, to mitigate the injuries or damages." *See* ***Lobermeier***, 119 Wis. 2d at 145. As summarized above, ***Lobermeier*** effectively instructs that the question of whether it was unreasonable for Swantz not to follow Dr. Krebsbach's recommended course of treatment was a jury question. Swantz cites to no passage in ***Lobermeier*** itself, or in any other Wisconsin authority, suggesting that the categorical statement in ***Lobermeier*** contains an implied exception when the medical recommendation originates from an expert retained by the opposing party. That is, Swantz provides no authority for the proposition that the rule explained and stated unambiguously in ***Lobermeier*** should be qualified by an exception that the testimony of a physician retained by a defendant cannot reasonably be credited in this context.

¶21 While the supreme court in ***Lobermeier*** did not highlight the decision of the circuit court in that case to deny the defense request to allow the defense-retained physician to examine Lobermeier, the court's discussion implies

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

a view that, under a proper approach, the circuit court would have permitted the examination and then likely allowed the defense-retained physician to testify to an alleged failure to mitigate so that a jury could determine whether a "reasonable person" would have undergone the surgery. *See* ***id.*** at 143, 149.

¶22 Swantz attempts to relitigate in this court her position on the mitigation issue at trial, which is a misdirected effort. She argues that no "'reasonable person' would follow the treatment recommendations of someone who wasn't her treating physician." For example, Swantz contrasts the purported credibility of one of her treating physicians ("one of the foremost experts in orthopedic foot surgery") with the purported credibility of Dr. Krebsbach ("some DME [defense medical examiner] doctor"), inviting us to make a credibility determination that we cannot make. *See* ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. It is the same with her related argument that, after $40,000 had already been spent on largely unsuccessful foot injury treatments, "along comes a defense doctor who claims he can fix [her foot pain] for a mere $3,000."

¶23 Swantz refers to persuasive authority from Illinois courts, but she concedes that Wisconsin courts have not "gone so far as to articulate" adoption of what may be the standard in Illinois. While we have not conducted extensive independent research into Illinois law on the topic, under this apparent standard the question of an alleged failure-to-mitigate in the personal injury context is to be taken from the jury when a court determines that "the proposed treatment *could* result in an aggravation of the existing condition or the development of an additional condition of ill health, or if the prospect for improved health is slight." *See* ***Hall v. Dumitru***, 250 Ill. App. 3d 759, 765 (1993) (emphasis added). Given the discussion in ***Lobermeier*** that we summarize at length above, including the

court's discussion of a Wisconsin jury instruction that has not changed in substance since the time of ***Lobermeier***, we conclude that use of this apparent Illinois standard in Wisconsin would need to originate from our supreme court.

¶24 Swantz makes brief reference to a federal district court opinion allowing the plaintiff to have a third party monitor an examination of the plaintiff conducted by a psychiatrist hired by the defendant, for what Swantz contends is the "extremely important" proposition that an expert hired by an opposing party "cannot be considered a neutral in the case." *See* ***Zabkowicz v. West Bend Co.***, 585 F. Supp. 635, 636 (E.D. Wis. 1984). Swantz's notion is that, because Dr. Krebsbach was not "neutral" in this case, his testimony was unfairly prejudicial on the mitigation issue. However, the question here is not whether Dr. Krebsbach could have rendered an opinion that was colored by bias arising from the source of his compensation. Potential bias was certainly a possibility that Swantz was entitled to address at trial. However, under ***Lobermeier***, this would be only one potential consideration for the jury in determining whether it was reasonable for Swantz to reject Dr. Krebsbach's recommendation, in light of all admissible evidence produced by the parties.

By the Court.—Order affirmed.

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