COURT OF APPEALS
DECISION
DATED AND FILED

March 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP540 **Cir. Ct. No. 2009CV1001**

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

YVETTE J. DEFLORIAN,

PLAINTIFF-APPELLANT,

V.

DEBBRA L. JANISIN, IMT INSURANCE COMPANY AND REGENT INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

MEGA LIFE AND HEALTH INSURANCE CO.,

DEFENDANT.

APPEAL from a judgment of the circuit court for Eau Claire County: WILLIAM M. GABLER, SR., Judge. *Affirmed.*

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

¶1 PER CURIAM. Yvette DeFlorian appeals a judgment, entered upon a jury's verdict, awarding her a total of $58,400.59 for past and future health care expenses, and past pain, suffering and disability. DeFlorian argues the trial court erred by denying her motions to set aside the verdict and grant a new trial based on jury instruction errors. We reject DeFlorian's arguments and affirm the judgment.

BACKGROUND

¶2 This case arises out of a three-car accident. A vehicle driven by Debbra Janisin struck Gerald Wood's stopped vehicle, pushing Wood's vehicle into DeFlorian's stopped vehicle. DeFlorian filed suit against Janisin and her insurer, IMT Insurance Company (collectively, "Janisin"), alleging she was injured as a result of the accident caused by Janisin's negligence. DeFlorian also sought to recover under her own policy's underinsured motorist provision. After a trial, the jury awarded DeFlorian a total of $58,400.59 for past and future health care expenses, and past pain, suffering and disability. The court denied DeFlorian's motion to set aside the verdict and grant a new trial based on her claim of jury instruction errors. Judgment was entered upon the jury's verdict and this appeal follows.

DISCUSSION

¶3 DeFlorian argues the court erred when instructing the jury. Generally, "a trial court has broad discretion when instructing a jury." ***White v. Leeder***, 149 Wis. 2d 948, 954, 440 N.W.2d 557 (1989). If the jury instructions fully and fairly explain the relevant law, there are no grounds for reversal. ***Green v. Smith & Nephew AHP, Inc.***, 2001 WI 109, ¶25, 245 Wis. 2d 772, 629 N.W.2d 727. The question of whether the jury instructions accurately state the law is a

question of law that this court reviews independently. ***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 v. American Cont'l Ins. Co.***, 2001 WI 112, ¶52, 246 Wis. 2d 132, 629 N.W.2d 301. "A reasonable possibility of a different outcome is a possibility sufficient to undermine confidence in the outcome." ***Id.***

¶4 First, DeFlorian contends the court erred by refusing to instruct the jury on cause. DeFlorian initially requested a special verdict that included a negligence question, a cause question and damage questions. Janisin conceded she was negligent and that her negligence caused injury to DeFlorian. DeFlorian consequently proposed a special verdict in which the court would answer "yes" to both the negligence and cause questions. DeFlorian nevertheless asked the court to also issue the jury a modified version of the cause instruction. DeFlorian's proposed cause instruction provided:

> In answering the damage questions, you must decide whether Debbra L. Janisin's negligence was a cause of injuries to Yvette DeFlorian. These questions do not ask about "the cause" but rather "a cause" because an injury may have more than one cause. Someone's negligence caused the injury if it was a substantial factor in producing the injury. An injury may be caused by several substantial factors. To be a substantial factor and "a cause" of the Plaintiff's injuries, the negligence need not be the sole factor nor even the primary factor in causing the injury but must have such an effect in producing injury as to regard it as a cause in the popular sense.

¶5 Because Janisin disputed only the nature and extent of DeFlorian's injuries, the court determined the verdict would consist of only the damage

questions.[1] In denying DeFlorian's request for the cause instruction, the court indicated that because there was no doubt DeFlorian sustained an injury or that the accident was "a cause" of her injury, instructing the jury "on any aspect of causation would, not only be superfluous, but it would be confusing to the jury." The court determined that the matter in dispute was "the nature and extent of the injury," and the rules the jury had to apply in determining the nature and extent were fully set forth in the existing instructions. DeFlorian provides no authority suggesting that a cause instruction is necessary when there is no cause question on the verdict. We conclude the court properly exercised its discretion when denying DeFlorian's request to instruct the jury on a question it was not charged with deciding.

¶6 Second, DeFlorian contends the trial court erred by giving the instruction on aggravation of a pre-existing condition when expert testimony did not support the instruction. It is error to instruct on an issue that the evidence does not support. ***D.L. by Friederichs v. Huebner***, 110 Wis. 2d 581, 624, 329 N.W.2d 890 (1983). Here, however, one expert testified that an MRI of DeFlorian's hip showed "a degenerative process that existed prior to this accident." Another expert testified that DeFlorian's hip had a "pincer impingement"—a congenital abnormality that predated the accident. The expert confirmed that someone with a pincer impingement such as DeFlorian's would be "more susceptible to injury from a lesser trauma than someone who did not have that preexisting degenerative condition." Based on this testimony, the court properly concluded there was

[1] To the extent DeFlorian challenges the form of the verdict that was ultimately submitted, she does not adequately develop her argument. We will not address issues that are neither briefed nor adequately developed. *See* ***Techworks, LLC v. Wille***, 2009 WI App 101, ¶27, 318 Wis. 2d 488, 770 N.W.2d 727.

evidence that permitted the jury to infer the accident aggravated a degenerative hip condition. We therefore reject DeFlorian's claim that the court erred by giving an instruction on aggravation of a pre-existing condition.

¶7 DeFlorian alternatively argues the court erred by refusing to give her proposed modified instruction on aggravation of a pre-existing condition. DeFlorian's proposed instruction stated:

> The evidence in this case has shown that Yvette DeFlorian had a femoroacetabulum impingement which the doctor described as a pincer type impingement. The testimony was that this was a congenital abnormality and that as Yvette DeFlorian grew, one of the bones which forms her hip joint grew into an unusual shape. You have received evidence that a person who has a pincer type impingement can be totally symptom free and remain symptom free in the absence of a trauma. You have received evidence that a person who has a pincer type impingement like Yvette DeFlorian has is more susceptible to injury to the hip from a lesser trauma than it would take to injure someone who does not have a pincer impingement.
>
> Because Yvette DeFlorian's congenital pincer impingement was a pre-existing condition, the "thin-skull" common law rule applies to the damages in this case.
>
> If you find that Yvette DeFlorian had a pre-existing congenital abnormality of her hip which was dormant before the accident but that such pre-existing condition was aggravated because of the injuries received in the accident, then you should include an amount which will fairly and reasonably compensate Yvette DeFlorian for the damage she suffered as a result of the aggravation of the condition. If Yvette DeFlorian was more susceptible to serious results from the injuries received in this accident by reason of that pre-existing congenital abnormality of her hip and that the resulting damages to her 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 that such damages were actually sustained as a natural result of the injuries sustained in the accident.

¶8 The court rejected DeFlorian's proposed instruction, concluding it was "too detailed" and turned the court into an advocate. The court added that the proposed instruction would require it to address the jury on fact issues and introduce concepts, such as the "thin skull" concept, which would only confuse the jury. Because the standard instruction on aggravation of a pre-existing condition fully and fairly explained the relevant law, the court properly rejected the modified instruction DeFlorian proposed.

¶9 Even assuming the court erred with respect to either the cause or aggravation instructions, DeFlorian has not shown a reasonable possibility that the claimed errors, either separately or together, contributed to the outcome. Because she was awarded over $23,000 in past health care expenses and $21,000 in future health care expenses, DeFlorian concedes that the jury "obviously believed" she sustained some injury to her right hip. DeFlorian nevertheless contends:

> Had the jury been instructed on cause, had they been instructed on the substantial factor test in Wisconsin, and had they not been led to believe that the case was based upon a claim of aggravation of a pre-existing condition, the jury awards would likely have been substantially larger than they were.

DeFlorian's mere speculation that the jury's award would "likely" have been larger is not enough to undermine our confidence in the outcome. *See* ***Nommensen***, 246 Wis. 2d 132, ¶52.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).