COURT OF APPEALS
DECISION
DATED AND FILED

June 22, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-1998

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

ELIZABETH D. SWENSON,

PLAINTIFF-RESPONDENT,

STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, WISCONSIN PHYSICIANS SERVICE INSURANCE CORPORATION, A WISCONSIN INSURANCE CORPORATION, BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN, A WISCONSIN INSURANCE CORPORATION, OSCAR MAYER, A FOOD DIVISION OF KRAFT FOODS, INC.,

INVOLUNTARY-PLAINTIFFS-RESPONDENTS,

V.

WAL-MART STORES, INC., DELAWARE, A/K/A WAL-MART STORES, INC., A DELAWARE BUSINESS CORPORATION, AND NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Wal-Mart Stores, Inc. and its insurer appeal from a judgment in this personal injury action by Elizabeth Swenson. There are three issues. First, whether Swenson has a claim for damages for anxiety about future consequences from her injury; second, whether certain evidence was properly admitted; and third, whether the damage award was excessive. We affirm on all issues.

¶2 Swenson's claim arose from an incident at a Wal-Mart store in 1994. A handrail in a handicapped restroom pulled away from the wall, causing her to fall to the floor. Wal-Mart admitted liability, and the trial was on damages only.

¶3 Some of Swenson's medical history before the incident is material to the appeal. Swenson suffers from an ongoing condition which causes cysts to form in her spine. In 1987 Swenson underwent a spinal fusion which included the insertion of rods in her back. In 1991 Dr. Whiffen proposed that the rods be removed to help obtain accurate diagnostic images. The rods were removed, and over the next several months Swenson's back weakened and eventually collapsed. Later in 1991 Dr. Zdeblick inserted new rods, which remained in Swenson's back on the date of the Wal-Mart incident. After Swenson's fall she experienced pain that Dr. Zdeblick said might be relieved by removal of the rods. The rods were removed in late 1994.

¶4 Part of Swenson's claim against Wal-Mart sought damages for her pain and suffering in the form of her ongoing anxiety that, without the rods, her

spine may again collapse. Wal-Mart argues that evidence of Swenson's fear of spinal collapse should not have been admitted because the evidence did not satisfy a two-part test described in ***Brantner v. Jenson***, 121 Wis. 2d 658, 668, 360 N.W.2d 529 (1985). However, we do not read ***Brantner*** to establish a test that the trial court applies to determine whether evidence is admissible. Rather, the test is a description of what a plaintiff must prove to the fact finder in order to recover damages.

¶5 In ***Brantner*** the court addressed a question of first impression, namely, what standard should be adopted to determine when damages may be recovered for mental distress or fear of future harm arising from a negligently caused physical injury. *See* ***id.*** at 668 (court of appeals recognized that no Wisconsin case adopts such a standard). The supreme court described the two-part test adopted in this court's ***Brantner*** opinion. ***Id***. The supreme court did not clearly adopt that test itself, but it did appear to regard it as a reasonable statement of law. *See* ***id***. at 669. The test, as described by the supreme court, sets forth two elements which a plaintiff "must establish by a preponderance of the evidence to prove that he or she is reasonably certain to endure mental distress as a consequence of the injury." ***Id***. at 668.

¶6 Wal-Mart erroneously argues that this test should be applied to determine whether certain evidence of Swenson's anxiety about future adverse consequences from her fall is admissible. Wal-Mart's confusion may arise from statements in ***Brantner*** which could be read as casting the issue in terms of whether certain testimony by the plaintiff and a surgeon was admissible. *See, e.g.,* ***Brantner***, 121 Wis. 2d at 660-61, 669-70. However, the supreme court expressly rejected the parties' description of the issue as an evidentiary one. ***Id***. at 660. Instead, it stated the issue was "whether the possible harmful consequences about

which they testified are as a matter of substantive law entitled to consideration by the fact finder in the award of compensable damages." ***Id***. at 660-61.

¶7 In other words, the question of first impression before the supreme court was whether there existed a legal theory of damages to which the testimony was relevant. Evidence is not relevant unless it is directed to a fact "of consequence to the determination of the action." WIS. STAT. § 904.01 (1997-98).[1] Without a legal theory allowing damages for additional anxiety or worry about future adverse consequences, evidence of anxiety would not be relevant because it is not directed to a fact "of consequence." In discussing whether the evidence was "admissible," the supreme court's focus was on what theory the evidence was admissible for, and not on any evidentiary issue of admissibility. The ***Brantner*** opinion established the legal theory of damages, but it did not establish any threshold test which evidence of such a claim must meet to be admissible.

¶8 Based on this analysis of ***Brantner***, we must now consider how to address Wal-Mart's argument on appeal. The argument is aimed at showing how the evidence failed to satisfy the ***Brantner*** test. Because that test is concerned with what a plaintiff must prove to establish a claim, we regard Wal-Mart's argument as going to whether Swenson sufficiently proved her claim. In other words, Wal-Mart is arguing that the evidence is insufficient to support the verdict.

¶9 In viewing the argument this way, however, we quickly run into a different problem. The verdict asked the jury to set a single dollar amount for future pain, suffering, disability and disfigurement. The jury instruction defined

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

these terms to include "physical pain, worry, distress, embarrassment, and humiliation." The jury did not provide a financial breakdown of these separate components. In closing argument Swenson's attorney sought damages for chronic pain and scarring from surgery, in addition to future worry.

¶10 On appeal Wal-Mart does not argue that an award for chronic pain and scarring would be unsupported by the evidence. Because the verdict does not include a separate dollar figure for each component of the pain and suffering damages, we do not know whether the jury's award was for only one of the components, or for some combination of them. The jury may not have made any award for Swenson's future worry at all. Therefore, even if we were to agree that an award for worry is not supported by the evidence, we would be unable to determine whether that conclusion affects the actual amount awarded. In view of this inability to grant relief, we do not consider this issue further.

¶11 As a second argument, Wal-Mart argues that certain testimony by Swenson about things Dr. Whiffen said in 1991 was inadmissible hearsay. Swenson responds that Wal-Mart waived the argument by failing to object to the evidence at trial. Wal-Mart replies that it did not waive the objection because it objected during a discussion with the court shortly before trial, and in its trial brief and post-verdict motions. However, as a factual matter, we note that Wal-Mart did not actually "object" during the pretrial discussion with the court. Wal-Mart's counsel noted the issue, and then said: "So that's probably [a] hearsay objection that will come up during trial, in trial. I don't think you have to rule in advance. At least it's there, Judge, and we will be making that objection." This is merely a statement of intent to object in the future.

¶12 In addition, Wal-Mart offers no support for the proposition that an objection before or after trial is sufficient to satisfy WIS. STAT. § 901.03(1)(a) which provides that error may not be predicated upon a ruling which admits evidence unless "a timely objection or motion to strike appears of record, stating the specific ground of objection." We have read that provision to require an objection "when the evidence was offered." ***Chitwood v. A.O. Smith Harvestore Prod., Inc.***, 170 Wis. 2d 622, 636, 489 N.W.2d 697 (Ct. App. 1992). We conclude the issue was waived.

¶13 However, we also reject Wal-Mart's position on the merits. The testimony did not present Dr. Whiffen's statements for the truth of the matters asserted in them. *See* WIS. STAT. § 908.01(3). Wal-Mart appears to concede that the statements were not offered for their truth, but were instead offered because they turned out to be false. This concession is apparent in Wal-Mart's argument that the statements were admitted for their truth "or lack thereof." However, Wal-Mart's addition of that phrase to the statutory rule is not supported by any citation to case law or other authority.

¶14 Finally, Wal-Mart argues that the trial court erroneously exercised its discretion by denying Wal-Mart's motion to reduce the damage award for pain and suffering. In response, Swenson notes that although Wal-Mart now seeks reduction of the awards for both past and future injuries, in the trial court Wal-Mart sought reduction of only the damages for only past injuries. Indeed, at the post-trial hearing, Wal-Mart expressly disavowed that it sought a reduction of damages for future injuries. Wal-Mart does not dispute this point. We do not ordinarily address issues for the first time on appeal, and we decline to further discuss the award for damages for future injuries. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980).

¶15 As to the award for past pain and suffering, we conclude the court did not erroneously exercise its discretion. The award was for $115,000. It was reasonably based on the pain Swenson experienced between the bathroom fall and the surgery to remove the rods; various aspects of the surgery to remove the rods; and evidence of Swenson's past fear of spinal collapse from 1994 to the trial.

By the Court.—Judgment affirmed.

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