COURT OF APPEALS
DECISION
DATED AND FILED

August 2, 2006

Cornelia G. Clark
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. 2005AP2701 **Cir. Ct. No. 2002CV933**

STATE OF WISCONSIN **IN COURT OF APPEALS**

DISTRICT II

GREGORY S. REMSZA, DARLENE REMSZA, MORGAN REMSZA, A MINOR BY HER GUARDIAN AD LITEM, PATRICK C. MILLER, JORDAN REMSZA, A MINOR BY HIS GUARDIAN AD LITEM, PATRICK C. MILLER, AND JACOB REMSZA, A MINOR BY HIS GUARDIAN AD LITEM, PATRICK C. MILLER,

PLAINTIFFS-APPELLANTS,

MIDWEST SECURITY INSURANCE COMPANY, WEA INSURANCE COMPANY AND SENTRY INSURANCE COMPANY,

SUBROGATED-PLAINTIFFS,

V.

ACUITY A MUTUAL INSURANCE COMPANY AND SHADY LANE GREENHOUSES,

DEFENDANTS-RESPONDENTS,

DONALD S. HANSON,

DEFENDANT.

APPEAL from an order of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Reversed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 NETTESHEIM, J. Gregory S. Remsza was injured in a motor vehicle accident and won a jury verdict in his favor. Nonetheless, he appeals. He challenges the portion of the award for past medical expenses, which reflected the amounts actually paid to his medical providers by himself or his health insurers, not the amounts actually billed. On appeal, Remsza challenges the trial court's pretrial ruling allowing the defendant, Acuity a Mutual Insurance Company, to introduce evidence of the actual payments made by Remsza and his health insurers to Remsza's health care providers on the question of the reasonable value of the medical services. The issue on appeal is whether the collateral source rule bars the evidence of the amounts actually paid. In keeping with the recent decision in ***Leitinger v. Van Buren Management Inc.***, 2006 WI App 146, No. 2005AP2030, we hold that the collateral source rule bars the evidence. We reverse the trial court's ruling allowing the challenged evidence.

BACKGROUND

¶2 Remsza was injured when the vehicle he was driving was struck by a truck driven by Donald S. Hanson, owned by Hanson's employer, Shady Lane Greenhouses, and insured by Acuity. Remsza subsequently received treatment from a number of health care providers for his injuries. The providers of these

services billed three different health insurers $163,075.48.[1] Pursuant to negotiated contracts with the various providers, the insurers paid $121,695.75. Before trial, Acuity stipulated that Hanson was 100% causally negligent, leaving damages as the only issue. Since the necessity of Remsza's medical services was established either by stipulation or expert testimony, the issue narrowed to the reasonableness of the medical bills.

¶3 Prior to trial, Acuity declined to stipulate that the amounts billed by Remsza's medical providers were reasonable. Instead, Acuity contended that the billed amounts were "fantasy billing[s]" and that the amount of the actual payments to the providers was relevant to the question of reasonableness. In response, Remsza filed a motion in limine seeking to preclude Acuity from presenting evidence of the amounts Remsza himself or his insurers had paid to the health care providers. Remsza contended that using the amounts actually paid as evidence of the reasonableness of the medical charges flouted the collateral source rule. The trial court denied Remsza's motion in limine.

¶4 In light of the trial court's ruling, the parties then entered into an unusual agreement, which the trial court summed up in a postverdict ruling:

> Remsza sued Acuity for injuries suffered in an automobile accident. Acuity stipulated to liability, but went to trial on the issues of damages. The jury trial resolved all issues of damages except for the amount recoverable for medical bills. In a motion in limine heard prior to the commencement of testimony in this case, the court allowed Acuity to use the amount the insurance company paid to satisfy the medical bills in order to challenge the reasonableness of the amounts billed by the medical

[1] The health insurers' subrogation rights are not at issue on this appeal.

> provider. The insurance company had paid approximately $40,000 less than the actual amount billed.
>
> This court made clear in its ruling that Remsza did have the right to seek recovery for the reasonable value of the medical services and that the court's ruling did not limit Remsza's damages to the amounts actually paid by the insurance company to satisfy his medical bills.
>
> The parties then stipulated that the amount of damages, and this relates to medical bills themselves, would be the amount actually paid *subject to Remsza's right to file a motion after verdict. The stipulation included a provision that if the court reversed its prior evidentiary ruling, the parties would then agree to increase the damages for medical bills to the amount billed.* (Emphasis added.)

In addition to the trial court's summation of the parties' agreement, the parties' appellate briefs also indicate that the agreement entitled Remsza to take an appeal of the trial court's postverdict ruling if adverse to him.[2]

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[2] The parties' briefs indicate that their agreement is set out in their stipulation and the accompanying trial court order. However, the Stipulation and Order, set out below, says nothing about: (1) allowing the trial court to decide the damage question regarding Remsza's past medical expenses; (2) allowing Remsza to renew his challenge to the trial court's motion in limine ruling by a postverdict motion or taking an appeal, if necessary; or (3) the consequences of a trial court or appellate ruling on the issue. We can only assume that somewhere in the record the parties broadened their stipulation to include the matters set out in their respective appellate briefs and as summarized by the trial court. We will address the appellate issue on that assumption.

> The text of the Stipulation and Order reads in its entirety:
>
> IT IS HEREBY, stipulated by and between the parties as follows:
>
> 1. That, the parties have reached a settlement of all claims other than the claims set forth below in this Stipulation.
>
> 2. That the amount paid for medical expenses is $121,695.75.
>
> 3. That the amount billed for medical expense is $163,075.48.
>
> 4. That ACUITY, A Mutual Insurance Company, Shady Lane Greenhouses and Donald S. Hanson (hereafter "defendants") did not stipulate to the amount billed as reasonable.

(continued)

¶5 The appellate record does not include a transcript of the ensuing two-day jury trial. However, the record does include an exhibit list showing that various medical bills were introduced into evidence. In addition, the record includes deposition transcripts, admitted at trial, of two treating physicians who testified that their charges were reasonable. Moreover, it appears from the parties' appellate briefs that, other than introducing the evidence of the actual payments, Acuity did not present any evidence, expert or otherwise, establishing that the actual payments represented reasonable value of the medical services provided.

¶6 The jury awarded Remsza $700,000 for future medical expenses, past and future loss of earning capacity, past and future pain, suffering and disability, and loss of society and companionship. As to past medical expenses, the verdict read, "Answered by the Court." Acuity has satisfied the verdict and has additionally paid Remsza for his past medical services in the amount actually billed by his medical providers per the parties' agreement.

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5. The defendants maintain that the amount paid is relevant to the determination of what is a reasonable charge for medical bills.

6. Plaintiffs maintain that the amount paid for medical bills is irrelevant to determining the reasonable amount for medical services and that this evidence should not be presented.

[Dates and signatures of attorneys]

ORDER

Upon the above and foregoing Stipulation,

IT IS HEREBY ORDERED:

1. That, the terms and conditions of the Stipulation are accepted and are the Order of the court.

SO ORDERED.

¶7 Remsza then pursued his options under the parties' agreement by bringing a postverdict motion challenging the trial court's pretrial in limine ruling allowing Acuity to introduce evidence of the amounts actually paid to Remsza's health care providers. Remsza argued that under ***Koffman v. Leichtfuss***, 2001 WI 111, ¶30, 246 Wis. 2d 31, 630 N.W.2d 201, the collateral source rule allowed him to seek recovery of the reasonable value of the medical services without consideration of the amounts actually paid by himself or the health insurers. The trial court disagreed, reading ***Koffman*** as enunciating a narrow evidentiary ruling limited to situations where the parties have stipulated to the reasonableness of the medical bills, making the amount paid irrelevant. The court denied Remsza's motion and entered a "final order"[3] dismissing all claims. Remsza now appeals.

DISCUSSION

Possible Waiver of Right to Appeal

¶8 Before taking up the merits of the appeal, we address a matter we have considered on our own motion. Pursuant to the parties' agreement, Remsza was permitted both to accept payment for the past medical expenses and to preserve for appeal the trial court's adverse evidentiary ruling. Determining whether the parties' agreement represents a carefully focused strategy or a "have-your-cake-and-eat-it-too" approach at first gave us pause. Although Acuity raises no waiver or jurisdictional objection, we briefly discuss whether Remsza has

[3] The notice of appeal recites that Remsza is appealing from the "Order … entered on August 9, 2005 … in which the trial court denied the plaintiffs' motion after verdict and entered judgment." This leaves us perplexed. Although this case went to trial and resulted in a verdict, no judgment appears of record and the final order does not direct the entry of judgment. Instead, it simply denies Remsza's postverdict motion and then dismisses all claims with prejudice.

waived his right to appeal by stipulating to the entry of the order and accepting payment thereunder, and whether we have jurisdiction to address the appeal. *See* ***State ex rel. Teaching Assistants Ass'n v. University of Wisconsin-Madison,*** 96 Wis. 2d 492, 495, 292 N.W.2d 657 (Ct. App. 1980) (observing that courts are required to observe the limits of their powers and may inquire into their jurisdiction over an action, even if neither party raises the question).

¶9 We are not obliged to review nonfinal or conditional orders or judgments because to do so contravenes our general policy against the piecemeal disposal of litigation. ***Cascade Mountain, Inc. v. Capitol Indem. Corp.***, 212 Wis. 2d 265, 268, 569 N.W.2d 45 (Ct. App. 1997) (per curiam). In ***Cascade Mountain***, the appellant had stipulated to a conditional judgment providing that, if the summary judgment dismissing some of its claims was reversed on appeal, the parties could litigate a claim which they could have tried previously but chose not to. ***Id.*** at 269. We concluded that by doing so, the appellant had waived the right to appeal. ***Id.*** at 266-67. Here, however, Remsza is not seeking to resolve an issue by appeal that he opted to forego.

¶10 We also have said that a party waives the right to appeal an adverse ruling after stipulating to be bound by whatever judgment was entered upon a trial, ***Auer Park Corp. v. Derynda,*** 230 Wis. 2d 317, 320, 322, 601 N.W.2d 841 (Ct. App. 1999), and have questioned a party's ability to preserve by stipulation the right to appeal even if the party does not acquiesce to the court's ruling. *See* ***Deborah S.S. v. Yogesh N.G.***, 175 Wis. 2d 436, 438 n.2, 499 N.W.2d 272 (Ct. App. 1993). The guiding principle is that a party may not take an appeal after voluntarily accepting a benefit which is dependent upon the part of the judgment attacked on appeal. *See* ***Riley v. Lawson***, 210 Wis. 2d 478, 488, 565 N.W.2d 266 (Ct. App. 1997). The supreme court has explained that this general rule means

that a party waives its right to appeal when he or she "accepts the fruit of a judgment to which he or she may not be entitled" if the appeal is successful. ***Stevens Constr. Corp. v. Draper Hall, Inc.***, 73 Wis. 2d 104, 111, 242 N.W.2d 893 (1976). Where the appeal is confined to liability for the balance claimed, however, the appellant does not waive his or her right to review by accepting the partial amount provided for in the judgment appealed from. ***Id.*** *See also* 5 AM. JUR. 2D *Appellate Review* § 631 (1995) (stating that if the benefit which the appellant has accepted cannot possibly be negatively affected, he or she is not precluded from appealing).

¶11 Here, Remsza challenged the collateral source evidence from the start. He then stipulated to a stated amount of damages subject to the opportunity to challenge and possibly increase that award postverdict, should the evidentiary ruling be overturned. That situation is much different than one where a party enters a stipulation, agrees to be bound by it, accepts a benefit flowing from it, and then appeals.

¶12 Any lingering concerns we might have had were laid to rest by our supreme court in a discussion about this very issue in an opinion released on July 13, 2006. In ***Lassa v. Rongstad***, 2006 WI 105, No. 2004AP377, Lassa brought a defamation suit against Rongstad and others. ***Id.***, ¶2. The parties stipulated that Lassa would dismiss her claim with prejudice and Rongstad would consent to a judgment against him under which Rongstad agreed to pay $65,000 in attorney fees and forfeitures for failing to comply with discovery orders. ***Id.***, ¶¶2, 26. When Rongstad appealed the judgment adopting the settlement agreement, the supreme court first addressed why, if the parties had agreed to dismiss the underlying defamation claim, the court had jurisdiction over the appeal at all. ***Id.***, ¶28. The "straightforward" reason, the court said, was that Rongstad was

aggrieved by the final judgment entered upon the parties' stipulation. ***Id.***, ¶28. The sanctions imposed by the stipulation arose from orders already in place at the time the parties agreed to settle. ***Id.***, ¶¶28-29. Rongstad challenged the validity of the sanctions based on a claim of privilege. ***Id.***, ¶30. The court recognized that, while it did not need to reach the merits of the defamation claim, the orders imposing the sanctions were properly before it as part of the appeal from the final judgment entered on the parties' settlement agreement. ***Id.***, ¶¶29, 33.

¶13 That closely reflects the situation here. We are not faced with the merits of the personal injury case, and Remsza is aggrieved by the final judgment entered upon the parties' stipulation. Remsza's appeal challenges orders stemming from evidentiary rulings, at least one of which (the motion in limine) had been determined before the parties entered their stipulation. His appeal from the final judgment brings before this court all prior nonfinal rulings adverse to him. *See* WIS. STAT. RULE 809.10(4) (2003-04).[4] Furthermore, the parties' agreement and the judgment entered upon it do not implicate "manufactured issues" because, regardless of the outcome of the appeal, the stipulation is structured such that no further litigation between Remsza and Acuity is anticipated. *See* ***Lassa***, 2006 WI 105, ¶35 and n.12. Accordingly, we conclude that Remsza has not waived his appellate rights and that we may decide the appeal.

[4] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Collateral Source Rule

¶14 The parties do not dispute that in this personal injury action Remsza was entitled to seek recovery for the reasonable value of the medical services rendered to him as a result of the accident. Rather, the dispute is whether the collateral source rule barred evidence of the actual payments made to Remsza's health care providers.

¶15 The trial court allowed Acuity to challenge the reasonableness of the amounts billed by the medical providers via the evidence of the amounts actually paid to those providers by Remsza himself or by his various insurers. Remsza asserts that this was error because it offends the fundamental principles of the collateral source rule. We begin our analysis by pointing out what Acuity is *not* arguing. Acuity does not contend that, as a matter of *law*, the amount actually paid dictates the reasonableness of the medical expenses or represents a limit on such expenses. Rather, Acuity simply argues that the evidence was admissible to assist the trier of fact[5] on the factual question of the reasonableness of the claimed medical expenses.

¶16 Under the collateral source rule, the amount of damages awarded to a person injured because of another's tortious conduct is not reduced when the injured party receives compensation from another source, such as insurance. ***Ellsworth v. Schelbrock***, 2000 WI 63, ¶1, 235 Wis. 2d 678, 611 N.W.2d 764. The

[5] Acuity argues on appeal that "a jury" was entitled to consider the amounts paid. But as noted earlier, the parties removed the past medical expenses question from the jury and had it answered by the court. But this does not change our holding. The question is the admissibility of the disputed evidence, regardless of whether a jury or the court served as the trier of fact on the question.

collateral source rule is part of a policy that seeks to deter negligent conduct by placing on the tortfeasor the wrongful conduct's full cost, not the injured party's net loss. ***Id.***, ¶¶7-8. Whether the collateral source rule applies in a particular case is a question of law that we review independently, aided by the analysis of the trial court. ***Paulson v. Allstate Ins. Co.***, 2003 WI 99, ¶19, 263 Wis. 2d 520, 665 N.W.2d 744.

¶17 This case is squarely governed by the very recently decided ***Leitinger*** case, a decision not available to the trial court at the time it made the challenged pretrial and post trial rulings. There, as here, the parties to a personal injury action stipulated to various facts, leaving for trial only the issue of damages. ***Leitinger***, 2006 WI App 146, ¶1. The trial court permitted the defendants to introduce evidence of the medical expenses actually paid, as opposed to the amounts billed, so as to demonstrate unreasonableness of the billed expenses. ***Id.*** The court of appeals reversed, holding that the amount paid for a plaintiff's medical treatment by a collateral source, such as a health insurance carrier, is inadmissible for that purpose. ***Id.***, ¶19.

¶18 Like Remsza, ***Leitinger*** relied heavily on ***Koffman***. ***Leitinger***, 2006 WI App 146, ¶¶13-17. The ***Koffman*** court observed that the modern health care system employs myriad health care finance arrangements, which often include negotiated discounts between health care providers and insurers. ***Koffman***, 246 Wis. 2d 31, ¶21. Pursuant to these agreements, an insurer's liability for the medical expenses billed to its insured often is satisfied at discounted rates, with the remainder being "written off" by the health care provider. ***Id.*** The amount actually paid may or may not reflect the reasonable value of the treatment rendered. ***Id.***, ¶27. Recovery must be for the value of the services, not for the expenditures actually made or obligations incurred. ***Id.***; ***Leitinger***, 2006 WI App

146, ¶15. Accordingly, the fact finder should not be allowed to consider the actual amount paid by outside sources, including insurers. ***Leitinger***, 2006 WI App 146, ¶17.

¶19 ***Leitinger*** also dooms Acuity's remaining arguments. Acuity contends that the ***Koffman*** ruling barring collateral source evidence is limited to instances where, as in ***Koffman***, the parties have stipulated that the amount billed for the medical services was reasonable. ***Leitinger*** rejected a similar argument, noting that "the [***Koffman***] court did not decide the case on that basis." ***Leitinger***, 2006 WI App 146, ¶15.

¶20 Next, Acuity argues that ***Lagerstrom v. Myrtle Werth Hospital-Mayo Health Sys.***, 2005 WI 124, ¶27, 285 Wis. 2d 1, 700 N.W.2d 201, a medical malpractice case, supports its argument that the collateral source rule did not bar the evidence in this case. However, ***Leitinger*** also rejected this argument, clarifying that the introduction of the collateral source evidence in ***Lagerstrom*** was proper only because WIS. STAT. § 893.55(7) expressly allows for collateral source evidence. ***Leitinger***, 2006 WI App 146, ¶11. No such statute or other authority abrogates the collateral source rule in other types of personal injury cases.

¶21 Finally, Acuity argues that it needs to introduce the amounts actually paid to counter what it believes are the inherently unreasonable amounts billed. The defendant in ***Leitinger*** unsuccessfully launched a similar argument. ***Id.***, at ¶18. The court replied:

> [W]hile a health insurance provider may negotiate discounted rates with a health care provider, that negotiated rate is not evidence of the reasonable value of those medical services for purposes of determining damages in a tort claim. Consequently, a defendant must produce some

> competent evidence *other than* what the insurance company paid upon which to base its argument that the amount billed was not the reasonable value of the services.… For instance, [a defendant] could … offer[] expert testimony as to reasonable value of the medical services provided in support of its argument that the amount billed for the medical services was not the reasonable value of the services.

Id.[6]

¶22 Based on ***Leitinger***, we reverse the trial court's ruling and subsequent order.[7]

By the Court.—Order reversed.

Not recommended for publication in the official reports.

[6] We also note the incongruity produced by Acuity's argument: a plaintiff such as Remsza is required to produce competent evidence of the reasonableness of the medical expenses, but a defendant such as Acuity need only produce evidence of the actual payments without accompanying evidence of reasonableness.

[7] The parties' unusual agreement in this case has also given us pause as to the wording of our mandate. Ordinarily, our reversal would be accompanied by a remand for entry of an amended judgment awarding Remsza the additional medical expenses per the parties' agreement. But as we have noted, there is no judgment in this case. Instead, the final order simply memorializes the trial court's denial of Remsza's postverdict motion and then dismisses all claims with prejudice. The order does not award Remsza any damages.

Without an original judgment, we obviously cannot direct the entry of an amended judgment. Nor, as an appellate court, do we have the authority to enter an original judgment. We therefore confine our mandate to a straight reversal of the final order, and we leave it to the parties to implement our ruling under their agreement.