04AP2065

SUPREME COURT
STATE OF WISCONSIN

JO-EL HANSON,

Plaintiff-Appellant,

and

HUMANA/EMPLOYERS HEALTH INSURANCE COMPANY,

Subrogated Plaintiff,

vs.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, KEVIN L. CALDWELL, and LINDELL MOTORSPORTS, INC.,

Defendants-Respondents-Petitioners.

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District: I
Appeal No. 2004AP002065
Circuit Court Case No. 2001CV007524

BRIEF AND APPENDIX OF DEFENDANTS-RESPONDENTS-PETITIONERS

On Review of the November 8, 2005 Decision
of the Court of Appeals, District I

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ISSUE ON REVIEW

If a doctor retained by the defense testifies that a plaintiff's post-accident surgery was both unrelated to the accident and medically unnecessary, is the plaintiff entitled to recover for that surgery anyway as a matter of law under Wis. J.I. Civil-Number 1710, notwithstanding a jury determination that the surgery was not necessitated by the tortfeasor's negligence?

Answered by the Trial Court: No.

Answered by the Court of Appeals: Yes.

Alternate Statement of the Issue

In an auto accident case, for a defendant to be liable for a treating doctor's alleged malpractice, must the malpractice have occurred in the course *of* medical treatment that was itself causally related to the accident?

Answered by the Trial Court: Yes.

Answered by the Court of Appeals: No.

I. INTRODUCTION

It is settled Wisconsin law that in personal injury cases a defendant is liable for an aggravation of injuries caused by a treating doctor's malpractice. Wisconsin Civil Jury Instruction 1710 embodies this principle:

> If the plaintiff used ordinary care in selecting a doctor and the doctor was negligent and his negligence aggravated plaintiff's injuries, plaintiff's damages for personal injuries should be for the entire amount of damages sustained and should not be decreased because of the doctor's negligence.

(Wisconsin J.I.-Civil Number 1710; App., p. 15)

This broadening of a defendant's liability is based upon a *quid pro quo*, namely, the malpractice must occur during treatment of an injury which was *itself* sustained in the accident. The comments to instruction 1710 state this directly:

> This instruction is to be used in cases where there is at issue the aggravation of damages because of subsequent negligent medical treatment of injuries *sustained in the accident.*

(Id.; emphasis added) An example applying this rule is as follows. A plaintiff is rear-ended and breaks her arm as a result. She goes to the hospital and because the doctor improperly applied a cast, the arm has to be amputated. No question; the rear-ending defendant is responsible for the amputation. However, a critical prerequisite to liability

here is that the malpractice occurred during treatment of injuries related to the accident. It is this causal nexus, and this alone, that justifies the extension of the original tortfeasor's liability.

The case at bar turns this legal principle on its head. The plaintiff Jo-El Hanson's vehicle was contacted in the rear by a vehicle driven by the defendant Kevin Caldwell. About six months after the accident Hanson had spinal surgery by James Lloyd, M.D. A doctor consulted by the defense, Ronald Pawl, M.D., testified that the surgery was unrelated to the accident and medically unnecessary. He further testified that the surgery itself was properly done. Thus, the factual situation presented in the case at bar is the exact opposite of the aforesaid "broken arm" scenario which so perfectly illustrates the application of instruction 1710. Here, Dr. Pawl testified that the medical treatment at issue - the spinal surgery - was unrelated to the accident, in contrast to the casting of the broken arm which was clearly related to the accident. Furthermore, Pawl testified that the surgery itself was performed satisfactorily, in contrast to the treatment for the broken arm which involved improper casting and subsequent amputation.

Despite these clear and persuasive contrasts which seemingly take this Hanson case out of the 1710 realm, the court of appeals held that because Pawl testified that the surgery was not medically necessary, he basically accused Lloyd of malpractice, with the result that the defendants were responsible for the entire cost and consequences of the surgery *as a matter of law*. This result was reached notwithstanding a jury verdict which concluded that the surgery was indeed unrelated to the accident.

The petitioners respectfully submit that if this is indeed how instruction 1710 should be interpreted in Wisconsin, that interpretation should come from the Wisconsin Supreme Court. The fact situation in the case at bar is common; a low velocity impact/rear-end accident with subsequent medical treatment dubiously related to the accident. If defendants can be held liable for that treatment simply because the consulting doctor testified that the treatment was medically unnecessary, the Wisconsin defense bar needs to know that.

II. STATEMENT OF THE CASE

A. Nature of the Case/Procedural History /Trial Court Disposition

This is a personal injury case arising out of an automobile accident on June 22, 2000. The plaintiff Jo-El

Hanson alleged spinal injury as a result of the accident, for which she underwent surgery on February 6, 2001. This lawsuit was filed on August 13, 2001.

The main issue in the case was whether Hanson could recover money damages for her spinal surgery. The case was tried to a jury between February 2, 2004 and February 5, 2004. The jury reached a verdict which did not include compensation for the surgery.

The plaintiff filed motions after verdict which were denied on March 22, 2004. On August 19, 2004 judgment for the plaintiff, based on the verdict, was entered in the amount of $52,317.85. The defendants paid this money into court by order of May 2, 2005.

This appeal was filed on August 2, 2004. The court of appeals issued a written decision dated November 8, 2005 basically setting aside the jury verdict and ordering that compensation for the surgery be allowed as a matter of law. Respondents filed a petition for supreme court review of this decision on December 2, 2005, and the petition was granted by order of this court dated January 20, 2006.

III. STATEMENT OF FACTS

Again, the automobile accident at issue occurred on June 22, 2000. Jo-El Hanson's vehicle was contacted in the rear by a vehicle driven by the defendant Kevin Caldwell.

Photos of the resulting property damage indicate a minor impact. (Rec. 112, Exhs. 12, 14, and 15; App., pp. 19-25) The repair of Hanson's vehicle cost "about $792", $400 of which was for parts. (Rec. 119, p. 91) According to Caldwell there was no damage to his vehicle other than a cosmetic "light scuff" (rec. 119, p. 32) to the plastic bumper (rec. 120, p. 148) which was not repaired. (Rec. 120, p. 150)

Caldwell initially estimated the impact speed at less than five miles per hour (rec. 119, p. 29) but admitted that it could have been five to seven miles per hour. (Rec. 119, p. 30) A medical doctor/biomechanical engineer called by the defense at trial, Alfred Bowles, estimated the impact speed at less than five miles per hour. (Rec. 120, p. 44) By contrast, Hanson separately told two doctors before suit that she was struck at 35 miles per hour (rec. 119, pp. 88-89) and 55 miles per hour. (Rec. 119, p. 89)

At the accident scene Caldwell twice asked Hanson if she was "okay" and she said yes. (Rec. 119, p. 26) She did not appear to be shaken up. (Rec. 119, p. 26) Hanson admitted telling both the police and Caldwell that she was not injured in the accident. (Rec. 119, p. 62) She testified at trial that she sustained no scrapes, cuts, or bruises (rec. 119, pp. 91-92) and could recall no contact

between her body and the vehicle's interior. (Rec. 119, p. 90) By contrast she told a doctor before suit that she sustained "major tissue damage". (Rec. 119, p. 92)

The plaintiff underwent cervical spinal surgery by a neurosurgeon, James Lloyd, on February 6, 2001, about six months after the accident. Prior to the surgery a consulting neurologist (Lynn Ma) stated that a post-accident cervical MRI "provided reassurance which revealed no surgical indication". (Rec. 119, p. 172) Lloyd admitted that Ma was "very helpful and very astute in her diagnosis and treatment". (Rec. 119, p. 143) Lloyd also admitted that prior to his surgery a consulting neurosurgeon, Daniel Suberviola, found no evidence of surgical spine pathology, and did not recommend surgery. (Rec. 119, p. 236) Suberviola's January 31, 2002 report stating these opinions was in Lloyd's medical chart. (Rec. 119, p. 235)

Hanson testified that the surgery "sort of" improved her pain (rec. 119, p. 113) but that she was still having the same symptoms after surgery that she had before surgery. (Rec. 119, pp. 112-114) At trial Lloyd testified that the surgery was necessary (rec. 119, p. 160) and he related the surgery and associated expenses to the accident. (Rec. 119, pp. 165-66)

Lloyd went on to testify about a concept known as

"somatization" whereby people develop symptoms from psychological abnormalities with no organic cause. (Rec. 119, pp. 217-218) He confirmed that on several occasions before the accident Hanson sought treatment for her complaints of pain, and her healthcare providers could not find a cause for that pain. (Rec. 119, pp. 219-221) Lloyd testified that these types of observations by a doctor would be enough to consider whether somatization was operating in a patient. (Rec. 119, p. 221)

The consulting neurosurgeon alluded to above, Daniel Suberviola, testified by video deposition for presentation at trial that he was consulted by one of Hanson's treating physicians to give a second opinion on the issue of whether Hanson was a candidate for a cervical fusion after the accident. (Rec. 112, Ex. 24, p.11) He was consulted before this lawsuit was filed (rec. 112, Ex. 24, p. 10), and not at the request of any lawyer. After examining Hanson and considering her diagnostic tests including an MRI, discogram, and EMG studies, Suberviola felt that Hanson had no significant spinal disease or pathology. (Rec. 112, Ex. 24, p. 22) He did not recommend surgery. (Rec. 112, Ex. 24, pp. 22-23)

Hanson filed a motion *in limine* to exclude Suberviola's testimony at trial. The trial court granted this motion

(rec. 116, pp. 45-49), indicating that the type of testimony that defendants were offering through Suberviola should come from a defense expert, not a consulting doctor. (Rec. 116, pp. 48, lines 19-22) Petitioners challenged this ruling on appeal but the court of appeals held that the issue could not be reviewed because petitioners did not file a cross-appeal. (Decision, pp. 2-3, fn 1; App., p. 2-3) Petitioners do not challenge this holding now.[1] In effect, the court of appeals' ruling that Hanson is entitled to recover her surgical expenses as a matter of law based on instruction 1710 renders Suberviola's testimony moot.

The aforesaid medical doctor/biomechanical engineer, Alfred Bowles, testified for the defense at trial that the forces in the accident were insufficient to create the need

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[1] Nonetheless, the holding appears to be wrong. As stated in Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin*, Ch. 8, p. 3 (3d ed. 2002): "A respondent need not file a cross-appeal to obtain review of certain issues. A cross-appeal is essential only to the extent that the respondent seeks modification or reversal of a judgment or order. If the respondent simply seeks to have the appellate court correct trial court errors which, if corrected, would support the order or judgment, a cross-appeal is unnecessary. *State v. Alles*, 106 Wis. 2d 368, 392-94, 316 N.W.2d 378 (1982)". The petitioners herein (respondents in the court of appeals) are not now, nor ever have, sought modification or reversal of the trial court judgment, and the alleged error excluding Suberviola, if corrected, would only have supported the judgment. No cross-appeal was necessary. *See also* Wis. Stats. §809.10(2)(b).

for plaintiff's spinal surgery. (Rec. 120, pp. 46-47)

Defendants' last witness was Ronald Pawl, a neurosurgeon who examined the plaintiff at defendants' request. In the court of appeals' decision, the representation is twice made that Pawl testified that the treating physician Lloyd committed malpractice. The court indicated that Pawl "stated that it was malpractice to perform unnecessary surgery" (Decision, pp. 3-4; App., p. 3-4) and "expressed the opinion that Hanson's doctor committed malpractice by performing unnecessary surgery" (Decision, p. 10; App., p. 10). However, this is Dr. Pawl's actual quoted trial testimony on the subject:

BY RESPONDENT'S COUNSEL (MR. PARLEE):

Q And doctor, to a reasonable degree of medical certainty, given all the data you have reviewed in this case, including the medical records, the radiological films, test results, deposition transcripts, was Ms. Hanson's cervical fusion and related treatment caused by the accident on June 22 of 2000?

A No.

Q Did that accident in any way render the fusion and related treatment medically necessary?

A No, absolutely not.

Q Do you feel that the surgery on Ms. Hanson was in and of itself medically necessary?

A No, I do not. I do not feel it was necessary.

(Rec. 112, Ex. 41A, p. 61)

BY APPELLANT'S COUNSEL (MR. WARSHAFSKY)

Q You think that Dr. Lloyd committed malpractice, isn't that true?

A I didn't review it to the extent of answering that question, but there is no question in my mind it is my opinion that that surgery was not indicated.

Q If a doctor does surgery that's clearly not indicated, isn't it malpractice?

MR. PARLEE: I object in that calls for a legal conclusion. It is also irrelevant to the case.

BY THE WITNESS:

A It can be malpractice, but it is not necessarily malpractice.

BY MR. WARSHAFSKY:

Q Do you think Dr. Lloyd was negligent, or incompetent, or what?

A No, I think he did a very good job on the surgery.

Q A good job on the surgery. Do you think he was incompetent doing the surgery to start with?

A No, if he were incompetent he wouldn't have done a good job with the surgery.

Q Do you think he was incompetent in his diagnosis that led him to do surgery?

A Yes, I clearly disagree with that, yes.

(Rec. 112, Ex. 41A, pp. 62-63)

Dr. Pawl never directly testified that Lloyd committed malpractice. He stated only that performing unnecessary surgery can be but is not necessarily malpractice. It is noteworthy that Lloyd himself testified that the surgery was in fact necessary (rec. 119, p. 160), and causally related to the accident. (Rec. 119, pp. 65-66)

The plaintiff basically tried this case on a medical malpractice theory, seeking recovery under instruction 1710. Plaintiff's counsel stated at the instruction conference that "This was never a two theory case. It was always a one theory case of incompetent or ineffective care or malpractice or however one puts it". (Rec. 128, p. 4) Referring to the trial testimony, the trial court stated that "plaintiff spent a lot of time talking about malpractice". (Rec. 128, p. 11) Plaintiff's closing argument took 26 transcript pages (rec. 121, pp. 6-26), half of which were devoted to arguing a malpractice theory of recovery. (Rec. 121, pp. 11-20)

In the court of appeals' decision the comment is made that "one of Caldwell's trial theories was that Hanson had not been injured at all". (Decision, p. 8; App., p. 8) In fact the opposite is true. This is what defense counsel told the jury on closing:

> American Family and Mr. Caldwell are ***not saying*** it as impossible that she could

> have been injured in this accident. That's ***not*** what we're saying. It was all these allegations about Dr. Bowles and Dr. Pawl that they're handmaidens of the defense. You know that they will just say anything you pay them for. Well, if that were the case, we didn't get much for our money because both Pawl and Bowles said, we are ***not saying*** that it's impossible that she could have been injured. All Dr. Bowles said, it is from a biomechanical standpoint impossible that the could have had any structural damage causing surgery. It may be your judgment as a jury that she had some temporary soft tissue discomfort as a result of the accident. We are ***not saying***, we are ***not trying to claim*** that's impossible. But if that's the case, her damages should be limited accordingly.

(Rec. 121, pp. 45-46; emphasis added)

In the court of appeals' decision the representation is also made that "the thrust of Caldwell's closing argument was that the surgery performed on Hanson was unnecessary surgery . . . ." (Decision, p. 9; App., p. 9) A review of the transcript shows that defense counsel never made this argument. (*See* Rec. 121, pp. 26-47) The word "unnecessary" never appears in defendants' closing. (Id.) The defense simply argued six discreet points showing that there was no pathology in plaintiff's spine, and that therefore "the overwhelming avalanche of credible evidence in the case indicates that there is no causal relationship between this automobile accident and the surgery that she had months

later". (Rec. 121, p. 29)

At the instruction conference plaintiff submitted a modified version of Wis. J.I.-Civil No. 1710, quoted in the court of appeals' decision. (Decision, p. 10; App., P. 10) After an extensive discussion with counsel concerning the competing factors and considerations (rec. 128, pp. 3-14), the trial court gave a custom instruction which emphasized that the damages awarded could not be reduced because a treating physician committed malpractice. (Rec. 128, pp. 30-32; App., pp. 16-18) Defense counsel objected to any instruction on malpractice, but stated that if one was given, the court's version was satisfactory. (Rec. 128, p. 9)

The court of appeals ruled that the trial court's instruction was confusing. (Decision, p. 12; App., p. 12) However, since the court ruled that under Pawl's testimony alone plaintiff was entitled to recover for the surgery as a matter of law, the instruction given to the jury on this issue was arguably moot.

The jury returned a verdict awarding the following damages:

a.	past medical expenses	$25,000
b.	past loss of earning capacity	$ 7,250
c.	future medical expense	$ 0

d.	past pain, suffering and disability	$15,000
e.	future pain, suffering and disability	$ 0

The total verdict of $47,250 was within defendants' $100,000.00 insurance policy limit (Rec. 112, Ex. 16).

Plaintiff brought motions after verdict, asking the trial court to award, pursuant to instruction 1710, all medical expenses ($78,338.97) related to the surgery as a matter of law, or order a new trial (Rec. 193). These motions were denied. (Rec. 99) Judgment was entered in the amount of $52,317.85 plus interest (rec. 105), which defendants paid into court. This appeal followed, with a decision rendered November 8, 2005. (App., pp. 1-15). The court of appeals ruled that plaintiff was entitled to recover for the spinal surgery as a matter of law pursuant to instruction 1710 and interpretive case law.

IV. ARGUMENT

A. FOR PUBLIC POLICY REASONS, A DEFENDANT MUST BE ABLE TO ARGUE AT TRIAL THAT UNNECESSARY MEDICAL TREATMENT IS NOT A PROPER ITEM OF DAMAGE, WITHOUT THE RISK THAT HE OR SHE WILL BE HELD RESPONSIBLE FOR THE TREATMENT UNDER A MALPRACTICE THEORY

Jury instruction 1710 regulates a defendant's liability for post-accident medical malpractice. The comments to instruction 1710 directly state:

> This instruction is to be used in cases where there is at issue the aggravation of damages because of subsequent negligent medical treatment of injuries *sustained in the accident*.

(App., p. 15; emphasis added).

It is clear that before an argument can be made that a plaintiff is entitled to damages due to aggravation of injury because of medical malpractice, the allegedly negligent medical treatment must arise out of injury related to the accident. The appellant argued at trial that she was merely following her doctor's advice in undergoing the surgery Dr. Lloyd proposed, and she should therefore be compensated for the surgery on that basis alone as a matter of law. This argument may make sense in a case where the doctor was performing surgery that resulted from the tortfeasor's negligence, and the surgery was itself negligently performed. However, the argument does not apply where the surgery was not related to the tortfeasor's negligence in the first instance.

If appellant's theory was taken to its logical conclusion, a defendant could never avoid paying medical expenses incurred by a plaintiff, as long as some doctor said they were incurred as a result of the original accident. As long as the plaintiff had carefully chosen her doctor (virtually always the case) and the doctor testified

that the treatment was necessary as a result of the accident, the plaintiff could always recover associated medical expenses, *because defense arguments that the treatment was unnecessary would be met with the argument that unnecessary treatment is a form of medical malpractice for which the plaintiff is entitled to recover anyway under instruction 1710.* Certainly, that was not the intent of 1710 or the interpretive common law as it has developed. While there is a place for this argument, it is in cases which involve medical treatment for injury caused by an accident, but which was negligently performed. In this case, for example, if the respondents agreed, or the jury concluded, that the surgery performed by Dr. Lloyd was causally related to the accident, and Dr. Lloyd negligently performed that surgery which further caused appellant to become a paraplegic, she could argue for recovery of those additional damages under the medical malpractice instruction. However, that scenario is 180 degrees different from the case at bar. Here, the defense consultant testified that the surgery was *not* caused by the accident, and *was* properly performed. Simply stated, these facts do not fit the prerequisites for application of 1710.

The court of appeals stated "When the doctor is selected in good faith, as *Fouse* and *Lievrouw* have

explained, responsibility for improper *or even unnecessary* treatment for an injury received in an accident cannot be avoided by claiming the accident did not "cause" the later treatment". (Decision, p. 12; App., p. 12; emphasis added) The petitioners hope this is not a proper statement of Wisconsin law. In the case at bar the treatment was unnecessary *because the plaintiff sustained no injury in the accident which required the treatment*. Recovery by the plaintiff under these circumstances is the near moral equivalent of recovering for no injury at all.

Instruction 1710, in and of itself, extends a tortfeasor's liability beyond normal principles of tort recovery. There is no direct causal connection between a tortfeasor's negligence in driving an automobile and a doctor's negligence in treating a patient. A defendant can control his driving behavior, but he can't control the education, training, and competence of plaintiff's treating physicians. Nonetheless, under 1710, a defendant is held liable for subsequent malpractice on public policy grounds. However, there is a *quid pro quo* for this extension of liability; the malpractice must arise out of medical treatment for an injury that was itself related to the accident. If this *quid pro quo* is ignored, the public policy considerations shift the other way. The recovery

becomes too remote from the negligence, too wholly out of proportion to the defendant's culpability, too bereft of a just or sensible stopping point, and too burdensome on the tortfeasor. See Stephenson v. Universal Metrix, Inc., 251 Wis. 2d 171, 197-98, 641 N.W.2d 158 (2002).

Furthermore, recovery without the injury/accident connection is "likely to open the way to fraudulent claims". Id. What incentive does a doctor or chiropractor have to reasonably curtail treatment for an accident if those doctors become secure in the knowledge that even if their treatment is criticized as "unnecessary" in court, they will recover for it anyway as a matter of law? That is exactly what happened with Dr. Lloyd in the case at bar. If the court of appeals' decision is affirmed, Hanson recovers over $50,000 in medical expense for a surgery that three other doctors - Ma, Suberviola, and Pawl - concluded was unnecessary and therefore unrelated to the accident. The just and equitable solution to this problem is not for Ms. Hanson to recover the surgical expense from Mr. Caldwell, but rather for Dr. Lloyd to waive payment on his bill. This is a matter to be resolved between Lloyd, Hanson, and her health insurers, one of which is a party to this case. It should not be an issue between Hanson and Caldwell.

At some point the equities must shift back to the

defendant, and that point was clearly reached in the case at bar. If the court of appeals' decision becomes settled law, it is not unreasonable to conclude that the decision will encourage unnecessary medical treatment, especially among treating physicians who have an intimate connection with the tort recovery system.

B. LIEVROUW AND FOUSE DO NOT REQUIRE THAT ALL MEDICAL EXPENSES INCURRED AFTER AN ACCIDENT BE AWARDED AS DAMAGES AS A MATTER OF LAW

The court of appeals' decision relies heavily upon Fouse v. Persons, 80 Wis. 2d 390, 259 N.W.2d 92 (1977) and Lievrouw v. Roth, 157 Wis. 2d 332, 459 N.W.2d 850 (Wis. App. 1990).

Lievrouw does not establish that a court should award past medical expenses as a matter of law in a case where there is an allegation of unnecessary treatment. In Lievrouw, on direct examination by defense counsel, a defense expert indicated that the plaintiff would have had a better recovery if he had been treated *earlier* and *differently* by his physicians. Lievrouw at 357; emphasis added. By contrast to the case at bar, in Lievrouw there was no allegation of unnecessary treatment, and there was certainly no ruling by the trial court setting aside a jury verdict and awarding medical expenses as a matter of law

based on such an allegation.

Similarly, Fouse does not mandate that a trial court award all past medical expenses as a matter of law in a case where an allegation of unnecessary medical treatment is made. Although a new trial was awarded in Fouse when the jury awarded the plaintiff only a portion of his past medical expenses, the court determined that the amount awarded by the jury had "no rational relationship to the evidence presented concerning those expenses". Fouse at 397. In Fouse, the court also noted that no instruction was given regarding aggravation of injury by medical negligence. In the present case, such an instruction was given, and there clearly was a "rational relationship" between the evidence and the jury award for past medical expense. The court of appeals itself stated that the award for that expense "was approximately the amount of Hanson's medical expenses for all of the treatment that she received after the accident but before the disputed surgery" (decision, p. 5, App., p. 5), and was "consistent with the medical expenses incurred prior to the surgery". (Decision, p. 8, App., p. 8) The plaintiff herself "wholeheartedly" agreed that the verdict indicated that the jury "parsed out" the surgery related expenses. (Rec. 122, p. 8) This "rational relationship" between the evidence and the verdict clearly

distinguishes Fouse from the case at bar.

C. THE PLAINTIFF INAPPROPRIATELY ATTEMPTED TO TRANSFORM THIS AUTOMOBILE ACCIDENT CASE INTO A MEDICAL MALPRACTICE CASE BY USING THE "AGGRAVATION OF INJURY" THEORY OFFENSIVELY RATHER THEN DEFENSIVELY

1. Jury Instruction 1710 Was Intended Only To Cure Defense Abuses, Not Create A Malpractice Cause of Action

The undersigned has read every Wisconsin case cited within, and dealing with, Wisconsin J.I.-Civil Number 1710. Without exception, these cases define a narrow and specific role for this instruction; it is intended to cure inappropriate arguments *by the defense* that a plaintiff's damages should be *reduced* because a doctor treating the plaintiff for accident related injuries committed malpractice.

In the case at bar the *plaintiff*, not the defense, attempted to use instruction 1710 *offensively*, to *increase* her damages through an alleged medical malpractice theory. This attempt was directly contrary to the limited purpose of 1710 to prevent the defense from using a malpractice theory to decrease a plaintiff's damages.

Unless the defense alone interjects an inappropriate argument that a treating physician committed malpractice,

the plaintiff has no standing to even request, much less obtain, a 1710-based instruction at trial. It is the defense that must interject this issue; to allow the plaintiff to do so *sua sponte* creates the risk that the trial will degenerate into a mini-trial on medical malpractice. This is exactly what the plaintiff attempted to do in the case at bar, and to some extent, despite the trial court's legitimate protests to the contrary, the plaintiff succeeded.

Under the court of appeals' decision the strategy of the plaintiffs' bar in prosecuting low velocity impact cases will radically shift. Instead of simply arguing that injury is possible with minor impact, plaintiffs' counsel will instead endeavor to cross-examine any consulting physicians into admitting that the post-accident medical procedure in question was unnecessary. Armed with that admission, counsel will then attempt to re-cast the entire theory of the case as one sounding in medical malpractice in an attempt to recover under instruction 1710 what the plaintiff could not recover under a straight tort/causation theory. That is exactly what the plaintiff attempted in the case at bar, but it is not the intent behind instruction 1710 and interpretive case law.

2. The Defense Never Implicated 1710 By Suggesting That Dr. Lloyd Committed Malpractice; It Was The Plaintiff That Did This

It is imperative that the Wisconsin Supreme Court understand the exact context which supposedly gave rise to the malpractice issue. This is set forth in the trial transcript for the defense neurosurgeon Ronald Pawl's video testimony. (Rec. 112, Exh. 41A) At the tail end of Pawl's testimony, defense counsel elicited the following testimony:

> Q And Doctor, to a reasonable degree of medical certainty, given all the data you have reviewed in this case, including the medical records, the radiological films, test results, deposition transcripts, was Ms. Hanson's cervical fusion and related treatment caused by the automobile accident on June 22nd of 2000?
>
> A No.
>
> Q Did that accident in any way render the fusion and related treatment medically necessary?
>
> A No, absolutely not.
>
> Q Do you feel that the surgery on Ms. Hanson was in and of itself medically necessary?
>
> A No. I do not feel it was necessary.
>
> MR. PARLEE: That's all I have.

(Rec. 112, Exh. 41A, p. 61) This testimony was not intended to create any inference or suggestion that the treating surgeon Lloyd committed malpractice. The question about

medical necessity *was only intended to bolster the defendants' causation defense*. Pawl testified that the *accident* did not render Hanson's fusion medically necessary. Clearly, that opinion is significantly bolstered and strengthened by Pawl's further opinion that the surgery was not medically necessary *at all*, i.e., *nothing*, including the accident, justified the surgery. If *nothing* justified the surgery, i.e., there was *no* pathology whatsoever in the plaintiff's spine that gave rise to the need for surgery, clearly, by the stronger reasoning, the accident didn't cause the surgery. This is entirely legitimate questioning and argument by the defense. It was intended solely to strengthen defendants' causation defense, the primary issue in the trial. This was explained in detail to the trial court in opposition to giving any 1710-based instruction at all to the jury. (Rec. 128, p. 10)

Immediately after the above-quoted testimony, plaintiff's counsel, not defense counsel, explicitly raised the specter of malpractice. Indeed, defense counsel objected to this testimony as irrelevant:

EXAMINATION BY MR. WARSHAFSKY:

Q You think that Dr. Lloyd committed malpractice, isn't that true?

A I didn't review it to the extent of answering that question, but there is no question in my mind it is my opinion

that the surgery was not indicated.

Q If a doctor does surgery that's clearly not indicated, isn't that malpractice?

MR. PARLEE: I object in that calls for a legal conclusion. It is also irrelevant to the case.

BY THE WITNESS:

A It can be malpractice, but it is not necessarily malpractice.

(Rec. 112, Exh. 41A, pp. 62-63)

The plaintiff raised this malpractice issue, not the defense. As argued above, the plaintiff's conscious and intentional effort to interject a malpractice issue into this lawsuit violated the spirit, letter, and intent of instruction 1710. That instruction was only intended to curb inappropriate defense arguments that plaintiff's damages should be reduced because of malpractice, something the defense never argued in this case. Instead, the plaintiff inappropriately attempted to turn the logic of 1710 on its head by trying to create a malpractice issue where none existed. This caused the trial, at several points, to come dangerously close to a "mini-trial" on malpractice, something the court very legitimately tried to limit and "rein in".

It should be emphasized that if the court of appeals' decision is affirmed, plaintiffs would not have to rely solely on defense IME doctors to create a malpractice theory

of recovery. For example, in the case at bar, the consulting neurosurgeon Suberviola and neurologist Ma both concluded - outside the litigation context - that the surgery was not medically indicated. Even if the defense doctor Pawl had never testified, the plaintiff could have used Suberviola and Ma to attempt malpractice recovery under the parameters defined by the court of appeals. These are doctors who had a traditional physician/patient relationship with Hanson. But indeed, why stop there? Theoretically, plaintiff's counsel could have gotten Lloyd himself to admit that " . . . well, in retrospect, maybe the surgery was unnecessary", thus paving the way for 1710-based recovery. Remarkably, plaintiff's counsel in fact asked Lloyd at trial if he (Lloyd) committed malpractice. Lloyd declined to comment (rec. 119, p. 60), thus "keeping the door open" on the issue. This kind of litigation game-playing strongly counsels for re-affirmation of the rule that 1710 should be used only to curb defense abuses, not manufacture a malpractice theory of recovery.

D. THE USE OF A MEDICAL MALPRACTICE INSTRUCTION IN THIS CASE HAD THE INAPPROPRIATE EFFECT OF PUNISHING THE DEFENDANTS BECAUSE THEIR CAUSATION DEFENSE WAS "TOO STRONG"

As quoted above, Pawl testified not only that the accident did not necessitate the spinal surgery, but that

nothing necessitated the surgery, i.e., it was not medically necessary. This strengthened defendants' causation defense; if *nothing* necessitated the surgery, it was even more likely that the accident didn't cause it.

By contrast, consider the situation where a plaintiff had degenerative spinal arthritis or some other chronic condition that *did* render the surgery medically necessary, and Pawl admitted as such. This would have weakened defendants' causation defense because it would have opened the door to an argument that the accident aggravated a pre-existing condition like arthritis to such an extent that it required surgery. However, that was not the situation in the case at bar; there was no evidence at trial that plaintiff had any pre-accident spinal pathology aggravated by the accident.

Therefore, the defense was placed in an extremely ironic position. If the evidence on causation was *weaker* for the defense, i.e., if there was *some* medical basis for the surgery, like degenerative arthritis, which could have been aggravated by the accident, Pawl never would have been able to testify that the surgery was unnecessary and apparently, as a consequence, no malpractice argument would have been made by the plaintiff. Thus, the defense in effect was punished with a 1710-based malpractice

instruction because the causation defense was "too strong". Had it been weaker - had there been *some* medical basis for the surgery like arthritis which was potentially aggravated by the accident, the plaintiff would have had no basis on which to raise her malpractice issue.

This could not be the intent behind 1710. It could not be the intent of that legal authority to punish a defendant because his or her causation defense is *so strong* (a complete absence of evidence justifying surgery) that malpractice is suggested for which the plaintiff can recover notwithstanding lack of causation.

E. THE INSTRUCTION GIVEN BY THE TRIAL COURT WAS A PROPER STATEMENT OF WISCONSIN LAW AS IT APPLIED TO THIS CASE

This was not an easy trial for Judge Goulee to preside over. As plaintiff's counsel indicated in his closing, he pursued this as a dual theory case (rec. 121, p. 11), one sounding in traditional automobile accident law, and one sounding in medical malpractice. The defense consistently objected to the pursuit of a malpractice theory. (See Rec. 119, pp. 159-160; Rec. 112, Ex. 41A, pp. 62-63; Rec. 128, p. 9) Judge Goulee had to reconcile the warring factions. At times his exasperation was evident. (See Rec. 128, pp. 6-7)

He did the best he could on the 1710-based instruction.

If he can be faulted for the instruction, the fault lies in perhaps saying too much. Indeed, the instruction given by the trial court incorporates all of the provisions of pattern instruction 1710 and then incorporates, in detail, every major legal principle set forth in every case mentioned under the comments to 1710, including and especially the Lievrouw and Butzow cases. From the standpoint of included content the custom instruction is superior to the rather perfunctory pattern instruction.

The chief criticism by the court of appeals is that Judge Guolee emphasized to the jury that this was not a malpractice case. In fact, Judge Guolee was correct. This was not a malpractice case. No doctor was a party.

The plaintiff agreed. Her counsel twice told the jury on closing that "this case is not about malpractice" (rec. 121, p. 9) and "I agree with the judge privately and publicly on this, malpractice is not a part of this case". (Rec. 121, p. 12) Judge Guolee's comments in the instruction to this effect were legitimately intended to prevent the jury from mistaking this case for a true malpractice case wherein the jury's sole task is to decide whether a doctor's conduct fell below a standard of care.

The custom instruction, while correctly advising the jury that this was not a malpractice case, also instructed

them that if the plaintiff used care in selecting her doctor, the jury could not reduce its award because a defense doctor criticized a treating physician's treatment for injuries related to the accident. This is the gravamen of 1710 and a correct statement of the law. The court noted that according to the evidence, Hanson did use ordinary care in selecting her doctor, thus relieving the jury from having to decide that issue. However, the instruction went on to indicate that the jury should only award plaintiff damages for medical procedures which were necessitated by the accident. (Rec. 128, p. 32) Again, that is a proper statement of Wisconsin law.

As this court is well aware, a trial court has broad discretion with jury instructions. Garceau v. Bunnell, 148 Wis. 2d 146, 151, 434 N.W.2d 794 (Ct. App. 1988). A court instructs the jury on the applicable law and assists the jury in making a reasonable analysis of the evidence. Id. "The appropriateness of a particular instruction, however, turns on a case-by-case review of the evidence". Id. A court errs when it refuses to instruct on an issue raised by the evidence or instructs on an issue that has no support in the evidence. Lutz v. Shelby Mut. Ins. Co., 70 Wis. 2d 743, 750, 235 N.W.2d 426 (1975).

A challenge to an allegedly erroneous jury instruction

warrants reversal and a new trial only if the error was prejudicial. Macherey v. Home Ins. Co., 184 Wis. 2d 1, 13-14, 516 N.W.2d 434 (Ct. App. 1994) (citation omitted). An error is prejudicial if it probably and not merely possibly misled the jury. Id. If the overall meaning communicated by the instructions was a correct statement of the law, no grounds for reversal exists. Id.

Petitioners did not believe at trial, and do not believe now, that a 1710-based malpractice instruction was applicable to this case. The plaintiff attempted to make it applicable by inappropriately trying to create a malpractice issue where none existed. If this court concludes that no such instruction was warranted, the reading of it to the jury was harmless error because the instruction could only have increased plaintiff's recovery from what she was entitled to recover without the instruction, not decreased it. On the other hand, if this court concludes that a 1710-based instruction was necessary, petitioners submit that the overall meaning of the instruction was a correct statement of Wisconsin law.

CONCLUSION

Lawsuits of this nature have real consequences, emotional and otherwise, for the litigants. This is true

for defendants as well as plaintiffs.

Kevin Caldwell hit the rear of Jo-El Hanson's vehicle in June, 2000. The accident barely rose to the level of a "fender bender". Hanson declined any injury. Caldwell left the scene thinking it was over. Four years later, he sat through a trial in which three doctors and a jury of his peers concluded that the plaintiff's post-accident surgery was unnecessary and unrelated to the accident. He heard the plaintiff's own doctor testify that she has a tendency to fabricate and exaggerate physical symptoms. Yet, six years after the accident Caldwell finds himself potentially liable - in part personally - for that very surgery. It is difficult to explain this kind of result to a layperson. Indeed, it is difficult for a hardened trial lawyer to understand.

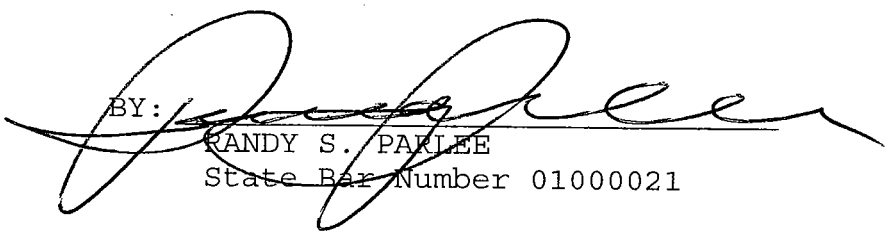
Ms. Hanson had her day in court. In comparison to the evidence which justified it, she recovered a substantial amount of money. She can hardly complain of "injustice" in any concrete sense. The same cannot be said for Mr. Caldwell.

Reinstatement of the jury verdict is warranted under the technical legal arguments set forth above. However, notwithstanding those arguments, reinstatement is also

warranted in the interests of justice pursuant to Wis. Stats. §751.06.

RESPECTFULLY SUBMITTED:

PETERSON, JOHNSON & MURRAY, S.C.
Attorneys for Defendants-
Respondents-Petitioners



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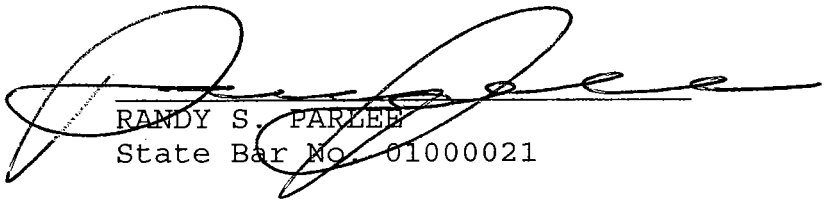
FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c), Stats., for a brief produced using the following font:

Monospaced font; 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 33 pages.

Dated February 10, 2006.

PETERSON, JOHNSON & MURRAY, S.C.



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APPENDIX

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COURT OF APPEALS DECISION

COURT OF APPEALS
DECISION
DATED AND FILED

November 08, 2005

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. 2004AP2065

Cir. Ct. No. 2001CV7524

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT 1

JO-EL HANSON,

PLAINTIFF-APPELLANT,

HUMANA/EMPLOYERS HEALTH INSURANCE COMPANY,

SUBROGATED-PLAINTIFF,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, KEVIN L. CALDWELL, AND LINDELL MOTORSPORTS, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Milwaukee County: MICHAEL GUOLEE, Judge. *Reversed and cause remanded with directions.*

Before Fine, Curley and Kessler, JJ.

¶1 KESSLER, J. Jo-El Hanson appeals from trial court orders entered following a jury trial that awarded Hanson lesser monetary damages than she sought. Hanson asks this court to order that she receive $78,338.97 in past medical expenses, as opposed to the $25,000 the jury awarded. Hanson also seeks a new trial on the issues of her past and future pain and suffering, and on her loss of earning capacity (collectively, "remaining damages issues"), on grounds that the trial court incorrectly instructed the jury.

¶2 We conclude that when we apply the substantive law previously established by the Wisconsin Supreme Court in ***Fouse v. Persons***, 80 Wis. 2d 390, 259 N.W.2d 92 (1977), and by this court in ***Lievrouw v. Roth***, 157 Wis. 2d 332, 459 N.W.2d 850 (Ct. App. 1990), to the jury's finding that Hanson suffered injury in the accident and to the undisputed fact that Hanson has incurred $78,338.97 in past medical expenses, she is entitled to those damages. Thus, we reverse the trial court's order denying Hanson's post-verdict motion to change the verdict answer and remand with directions to enter judgment for Hanson, awarding her $78,338.97 in past medical expenses, and for further proceedings consistent with this opinion.

¶3 We conclude that the trial court erroneously instructed the jury in a manner inconsistent with ***Fouse*** and ***Lievrouw***. Because the error so infected the verdict as to undermine confidence in the outcome, we reverse and remand for a new trial on the remaining damages issues.[1]

---

[1] In its response brief, Caldwell asserts that if a new trial is granted, this court should order that one of the defense experts, Dr. Daniel Suberviola, be allowed to testify. Caldwell argues that the trial court erred when it excluded Dr. Suberviola's testimony. Caldwell is asking this court to review the trial court's order with respect to a motion in limine. Such review is not (continued)

BACKGROUND

¶4 This case arises out of an automobile accident. The vehicle driven by Hanson was stopped when it was struck in the rear by a truck owned by defendant Lindell Motorsports, Inc., driven by its employee, Kevin Caldwell, and insured by American Family Mutual Insurance Company (collectively "Caldwell"). Caldwell's speed at the time of impact was approximately five to seven miles per hour. It is undisputed that Caldwell was fully responsible for the accident.

¶5 Hanson developed neck and lower back pain shortly after the accident. Physical therapy helped reduce the pain in her lower back, but not in her neck. Medical tests revealed an acute mild right C5-6 radiculopathy. Hanson was referred to a neurosurgeon who concluded that the pain in Hanson's neck was centered in the C4, C5 and C6 disks in her cervical spine. The doctor recommended, and later performed, surgery on Hanson to remove the C4-5 and C5-6 disks and insert a metal plate in her neck.

¶6 The case proceeded to trial, where liability for the accident was uncontested. The only issues were whether Hanson was injured by the accident, and the extent of those alleged injuries. Caldwell's theory of the case was that the impact could have been great enough to cause a strain, but was not great enough to cause structural damage necessitating surgery. Thus, Caldwell argued, the surgery was unnecessary. In support, Caldwell elicited testimony from its expert, a neurosurgeon, that the surgery was not necessary, and on cross-examination

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possible without a cross-appeal, which Caldwell did not file. *See* WIS. STAT. RULE 809.10. Therefore, we decline to address this argument.

Caldwell's expert stated that it was malpractice to perform unnecessary surgery. However, Caldwell's expert agreed that Hanson acted appropriately in following the referrals she was given, and in following the advice of her doctor who ultimately performed the surgery that Caldwell challenges.

¶7 In its closing argument, Caldwell argued that Hanson's doctor performed unnecessary surgery and that Hanson exaggerated her injuries. Caldwell argued that if the jury believed Hanson was injured, then it should award her "a thousand dollars or two to cover [the] medical expenses to be checked out by a family doctor" and "three, four thousand dollars" for pain, suffering and disability.

¶8 In contrast, Hanson argued that she had been injured, and that the relevant inquiry for the jury when deciding whether to award her damages associated with the surgery was whether she took care in seeking a doctor and following the doctor's advice. Whether Hanson's doctor committed malpractice when he performed what Caldwell believes was unnecessary surgery, Hanson argued, was not an issue relevant to the case.

¶9 Prior to the jury's deliberations, Hanson moved for a directed verdict on the issue of past medical expenses. Hanson argued that the evidence was undisputed that those expenses were incurred as a result of the accident. The trial court denied the motion.

¶10 Hanson also asked the trial court to give a special instruction that Hanson should be awarded all of her past medical expenses and related damages, even if the jury concluded that some of Hanson's damages resulted from malpractice by the doctor for performing unnecessary surgery. The trial court refused to give the instruction.

¶11 The trial court was troubled by the mention of malpractice, and expressed to the parties its belief that a special instruction for the case was necessary. However, when the instruction was given, the trial court added additional language which, Hanson argues, confused the jury and requires a new trial. The accurateness of the given instruction is one of the issues in this appeal.

¶12 The jury was asked to determine the amount of money that would fairly and reasonably compensate Hanson for numerous expenses. The jury returned a verdict awarding damages as follows: past medical expenses—$25,000; past loss of earning capacity—$7250; future medical expenses—$0; past pain, suffering, disability—$15,000; and future pain, suffering, disability—$0. The award for past medical expenses, $25,000, was approximately the amount of Hanson's medical expenses for all of the treatment she received after the accident but before the disputed surgery.

¶13 After the verdict, Hanson moved the trial court to change the: (1) past medical expenses award to approximately $79,123.97;[2] (2) past loss of earning capacity award to $14,500; and (3) past pain, suffering and disability award to $15,000. In the alternative, Hanson sought a new trial on grounds that the verdict was against the great weight and clear preponderance of the evidence. The trial court denied the motions and this appeal followed.

[2] The medical expenses sought post-trial were $79,123.97, but the expenses sought on appeal are $78,338.97. This discrepancy is not explained. In any event, it does not affect our analysis.

DISCUSSION

¶14 Hanson argues that the trial court should have awarded her $78,338.97 in past medical expenses as a matter of law; and that she is entitled to a new trial on the remaining damages issues because the trial court's jury instructions were erroneous. A review of the applicable law on damages will aid our discussion of each of these issues.

A. Applicable law

¶15 Prior to trial, the parties recognized that one of the key issues was whether Hanson was entitled to recover medical expenses and other damages associated with the surgery. The parties provided both written and oral argument on this issue to the trial court. This included a discussion of ***Fouse*** and ***Lievrouw***.

¶16 In ***Fouse***, eerily similar to this case, the plaintiff experienced back pain shortly after being involved in an automobile accident. 80 Wis. 2d at 393. The treating doctor diagnosed a herniated thoracic disk and performed corrective surgery. ***Id.*** In ***Fouse***, as here, the theory of the defense was that the force of the accident was insufficient to herniate a disk, making the surgery unnecessary. ***Id.*** at 394. On the apparent belief that the accident did not cause injuries that required surgery, the jury in ***Fouse***, like the jury here, reduced the award of medical expenses by what it attributed to the surgery the defense claimed was unnecessary. ***Id.*** at 396-97. The trial court in ***Fouse*** set aside the jury award and granted a new trial. The supreme court affirmed, explaining:

> The rule for awarding damages for injuries aggravated by subsequent mistaken medical treatment was established in *Selleck v. Janesville*[, 100 Wis. 157, 164, 75 N.W. 975 (1898)] in 1898, and has been followed since. Assuming that the plaintiff exercised good faith and due care in the selection of his treating physician, an assumption borne out

> by the record in this case, under the *Selleck* rule the defendants are liable for the full amount of damages caused by the aggravation.

Fouse, 157 Wis. 2d at 397-98 (footnotes omitted).

¶17 We have had a more recent occasion to discuss a defense claim, like the one here, that the accident did not cause the injury which resulted from medically improper treatment after the automobile accident. In ***Lievrouw***, we repeated what has been the law in Wisconsin for more than one hundred years when we observed that a defendant who causes injury to another is responsible for any aggravation of that injury that results from improper medical treatment as long as the plaintiff has "exercised good faith and due care" in selecting the treating physician. 157 Wis. 2d at 358 (citation omitted).

B. Past medical expenses

¶18 Based on ***Fouse*** and ***Lievrouw***, Hanson asked the trial court, before the case was submitted to the jury, to answer the special verdict question on past medical expenses, noting that the actual medical expenses incurred were not in dispute. When the jury awarded less than the full amount of past medical expenses sought, Hanson asked the trial court to change the special verdict answer. The trial court denied both motions. On appeal, Hanson argues that the special verdict answer on past medical expenses should be $78,338.97.

¶19 When reviewing the denial of a motion for a directed verdict, the standard of review requires us to consider whether, taking into account "all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion was made, there is any credible evidence to sustain a finding in favor of that party." ***Re/Max Realty 100 v. Basso***, 2003 WI

App 146, ¶7, 266 Wis. 2d 224, 667 N.W.2d 857. The standard is similar when we review a trial court's denial of a motion to change a jury's special verdict answers. "If there is 'any credible evidence which under any reasonable view supports the jury finding especially when the verdict has the approval of the trial court, it should not be disturbed.'" ***Carl v. Spickler Enters., Ltd.***, 165 Wis. 2d 611, 625, 478 N.W.2d 48 (Ct. App. 1991) (citation omitted).

¶20 We conclude that the trial court did not erroneously refuse, prior to trial, to order that Hanson be paid for all of her past medical expenses. One of Caldwell's trial theories was that Hanson had not been injured at all. If the jury agreed, then it would not award Hanson any past medical expenses or other damages. The trial court did not err in allowing this issue to go to the jury.

¶21 However, the jury rejected Caldwell's theory and found that Hanson had been injured. The jury awarded Hanson past medical expenses of $25,000, which is consistent with the medical expenses incurred prior to the surgery. This award is inconsistent with the law that entitles Hanson to all of her medical expenses related to her original injury, provided that she exercised good faith and due care in selecting her treating physician. *See* ***Lievrouw***, 157 Wis. 2d at 358. It was undisputed that Hanson exercised good faith and due care in selecting her treating physician. In addition, the jury found that Hanson was injured in the accident, and Caldwell has not appealed that finding. Applying the law to the jury's findings, Hanson was entitled to all of her past medical expenses. Therefore, the trial court should have granted Hanson's post-verdict motion to change the verdict answer to award her $78,338.97 in past medical expenses. We reverse the trial court's order denying Hanson's post-verdict motion to change the verdict answer and remand with directions to enter judgment for Hanson, awarding her $78,338.97 in past medical expenses.

C. Remaining damages issues

¶22 Having concluded that Hanson is entitled to all of her past medical expenses, we next consider her argument that the jury instructions misstated the applicable law and that, therefore, there should be a new trial on the remaining damages issues. When reviewing a claimed error in jury instructions, we must find that the error affected the substantial rights of a party such that 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. Misleading instructions that may cause jury confusion are a sufficient basis for a new trial. ***Magestro v. North Star Envtl. Const.***, 2002 WI App 182, ¶17, 256 Wis. 2d 744, 649 N.W.2d 722. Because we conclude that the jury instructions were erroneous and that the error affected Hanson's substantial rights, we reverse and remand for a new trial on the remaining damages issues.

¶23 At issue are jury instructions that the trial court gave, and refused to give. First, Hanson asked the trial court for a modification of WIS JI—CIVIL 1710, which addresses causation in the context of intervening inappropriate medical treatment.[3] The modified version Hanson proposed reads:

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[3] WISCONSIN JI—CIVIL 1710 provides:

> **AGGRAVATION OF INJURY BECAUSE OF MEDICAL NEGLIGENCE**
>
> If (plaintiff) used ordinary care in selecting (doctor) [which (he) (she) did in this case] and (doctor) was negligent and (his) (her) negligence aggravated the (plaintiff)'s injury(ies) (failed to reduce the injury(ies) as much as (it) (they) should have been), (plaintiff)'s damages for personal injuries should be for the entire amount of damages sustained and should not be decreased because of the doctor's negligence.

> There is no dispute in this case that the plaintiff's car was stopped and was struck in the rear by the truck of the defendant, Mr. Caldwell. However, the defendants contend that the force of the impact was not of a magnitude sufficient to cause injuries that required the operation done by [plaintiff's doctor], a neurosurgeon.
>
> The defendants have offered proof that the operation was not only unnecessary but that it was malpractice for [plaintiff's doctor] to have done it.
>
> I instruct you that the law of Wisconsin is that if the plaintiff uses ordinary care in selecting her doctors (which I find she did in this case – to be given only if the court makes such a finding) and that a treating doctor was negligent and that that negligence aggravated the plaintiff's injury or caused new or unnecessary injuries, plaintiff is entitled to damages for personal injury for the entire amount of the damages she sustained and should not be decreased because of the doctor's negligence. Unnecessary surgery qualifies [a]s an act of medical negligence; therefore, in reaching your decision, you need not decide whether the surgery that Ms. Hanson underwent was or was not necessary.

¶24 The trial court refused to give this instruction and insisted that "malpractice" was not a part of the case even though Caldwell's expert expressed the opinion that Hanson's doctor committed malpractice by performing unnecessary surgery. The trial court proposed an alternative special instruction on damages and causation that was based on WIS JI—CIVIL 1710, (aggravation of injury because of medical negligence), and WIS JI—CIVIL 1500 (cause). The trial court gave this instruction, but then added additional language from the bench, much of which is italicized below. The trial court instructed the jury:

> One of the issues in this case for you to decide is whether the medical procedure, treatments used by her treating doctor related to any injuries she received in the accident. Were the injuries treated by her doctor a part of any original injuries and are the natural probable consequences of the defendant's negligence and are these normal incidents of medical care necessitated by the defendant's negligence. If there is a causal connection between the accident and the treatment she received and her damages,

> your answer to this question on damages for personal injury should be the entire amount of damages sustained and not—and should not be decreased because [] the defense's doctor questioned the procedure used by the plaintiff's treating doctor. I think that is a very important comment.
>
> Now, there's been talk here about malpractice law, and I've told you *there is no issue of malpractice in this case. It is a difference of opinion as to whether or not the injuries were caused by the accident. It's a superfluous matter* about one doctor talking about what another doctor should have done. *It is improper in this case as far as I am concerned and should not be considered by you.* Any reduction should be—would be—any reduction would be contrary to long, established principles that a defendant who causes injury is responsible for any aggravation that results from improper—the alleged improper medical treatment for that injury as long as the plaintiff has exercised good faith and due care in selecting the treating physician. The evidence in this case indicates that the plaintiff used ordinary care in selecting her treating doctor. So what does that basically say? It says, she went to her doctor, the doctor used a procedure, the procedures were done and they followed. *If you relate them to the accident, those injuries, she should receive the entire amount of damages she sustained for that, those procedures.*

(Emphasis added.)

¶25 By telling the jury that it could not consider the doctor's alleged malpractice, and at the same time telling the jury it must find that all treatments were related to the accident, the trial court let the jury decide that the treatment it concluded was unnecessary was not "caused" by the accident, and was therefore not compensable. That is not the law in Wisconsin. The inconsistent instructions given by the trial court had the effect of allowing the jury to ignore the established rule of law applicable to this case as described in ***Lievrouw*** and ***Fouse***. The entire thrust of Caldwell's closing argument was that the surgery performed on Hanson was unnecessary surgery and thus the costs of the surgery, and any additional injury that resulted from the surgery, were not caused by the accident, even though

the surgery was done by the doctor whom, as the trial court instructed, Hanson used ordinary care in selecting. In effect, the trial court told the jury that regardless of whether the surgery was unnecessary, they could not award the cost of the surgery unless the jury "relate[d] them to the accident, those injuries." As we have previously explained, that portion of the instruction misstates long-established law that must be applied to the facts of this case.

¶26 The trial court's correct statement in an earlier part of the instruction—namely that any reduction of damages because of intervening "improper medical treatment" would be improper—came immediately after the trial court improperly characterized the defense claim that the surgery was unnecessary. The trial court told the jury "there is no issue of malpractice in this case. It is a difference of opinion as to whether or not the injuries were caused by the accident." But malpractice was in fact an issue in the case, and it came from the testimony of a defense expert.

¶27 When the doctor is selected in good faith, as ***Fouse*** and ***Lievrouw*** have explained, responsibility for improper or even unnecessary treatment for an injury received in an accident cannot be avoided by claiming the accident did not "cause" the later treatment. In contrast, the cumulative effect of the jury instruction in this case was to leave the jurors with the impression that if they believed Hanson's doctor did unnecessary surgery, then the cost of that surgery, and the pain, suffering and wage loss related to it, were not "caused by" or "related to" the accident.

¶28 We conclude that the instructions were erroneous and confusing, and that error contributed to the outcome of the case. Inappropriate medical care, or unnecessary care, which the defense doctor opined was malpractice, was definitely

an issue in the case. The failure to clearly, and consistently, instruct the jury on the impact of that issue, as required by ***Fouse*** and ***Lievrouw***, gave the jury an incomplete and thus inaccurate statement of the law.

D. Necessity of a new trial

¶29 We have concluded that error occurred. A new trial shall not be granted unless the trial court made an erroneous ruling and the ruling affected the substantial rights of the parties. ***Martindale v. Ripp***, 2001 WI 113, ¶31, 246 Wis. 2d 67, 629 N.W.2d 698; *see also* WIS. STAT. § 805.18(2).[4] The substantial rights of the parties are affected only if there is a reasonable possibility that the error contributed to the outcome of the case. ***Id.***, ¶32. "A reasonable possibility of a different outcome is a possibility sufficient to 'undermine confidence in the outcome.'" ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768 (citation omitted). "If the error at issue is not sufficient to undermine the reviewing court's confidence in the outcome of the proceeding, the error is harmless." ***Id.***

¶30 After review of the record, we conclude that based on the error in the instructions, there is a reasonable possibility of a different outcome with respect to

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[4] WISCONSIN STAT. § 805.18(2) provides:

> No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of selection or misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

the remaining damages issues. The jury obviously found that Hanson had been injured in the accident, because it awarded $25,000 in past medical expenses—those incurred prior to the surgery. The actual amounts awarded for the remaining damages also appear to be related to damages incurred prior to the surgery. What these damages should have been, had the jury taken into account damages after the surgery, is disputed (unlike the amount for all past medical expenses, which was undisputed).

¶31 We are convinced that the erroneous instruction affected the awards for the remaining damages. We conclude that the inconsistent and erroneous instructions in this case probably caused jury confusion and probably affected the substantial rights of Hanson with respect to the damage questions in the special verdict. Consequently, we remand for a new trial on the remaining damages issues.[5]

By the Court.—Orders reversed and cause remanded with directions.

Not recommended for publication in the official reports.

[5] We have concluded that the jury was not instructed properly, and that a new trial is warranted. However, we decline to prescribe specific jury instructions that must be given. The jury must be instructed consistent with the established law, as discussed in this opinion.

WISCONSIN J.I.-CIVIL NUMBER 1710

1710 AGGRAVATION OF INJURY BECAUSE OF MEDICAL NEGLIGENCE

If (plaintiff) used ordinary care in selecting (doctor) [which (he) (she) did in this case] and (doctor) was negligent and (his) (her) negligence aggravated the (plaintiff)'s injury(ies) (failed to reduce the injury(ies) as much as (it) (they) should have been), (plaintiff)'s damages for personal injuries should be for the entire amount of damages sustained and should not be decreased because of the doctor's negligence.

COMMENT

This instruction was approved in 1960 and revised in 1983, 1991, and 1998. The comment was updated in 1991 and 1998.

This instruction is to be used in cases where there is at issue the aggravation of damages because of subsequent negligent medical treatment of injuries sustained in the accident.

Fouse v. Persons, 80 Wis.2d 390, 397-98, 259 N.W.2d 92 (1977); Butzow v. Wausau Memorial Hosp., 51 Wis.2d 281, 289, 187 N.W.2d 349 (1971); Johnson v. Heintz, 73 Wis.2d 286, 243 N.W.2d 815 (1976); Selleck v. Janesville, 100 Wis. 157, 164, 75 N.W. 975 (1898). See also Spencer v. ILHR Dept., 55 Wis.2d 525, 532, 200 N.W.2d 611 (1972); 22 Am. Jur. 2d Damages § 113 (1965).

This instruction conveys to the jury the "long-established principle that a defendant who causes injury is responsible for any aggravation that results from improper medical treatment, as long as the plaintiff has 'exercised good faith and due care' in selecting his or her treating physicians." Lievrouw v. Roth, 157 Wis.2d 332, 459 N.W.2d 850 (Ct. App. 1990).

The principle that a tortfeasor is liable for the consequences of negligence of a physician whose treatment aggravated the original injury is based upon the reasoning that the additional harm is either (1) part of the original injury, (2) the nature and probable consequence of the tortfeasor's original negligence, or (3) the normal incidence of medical care necessitated by the tortfeasor's original negligence. Butzow, supra at 285-86.

In Butzow, the court refused to accept the argument that a negligent doctor who aggravates the original injury is liable for the damage directly caused by the original tortfeasor. Liability of the doctor is limited solely to damages resulting from his own negligence and only to that extent is there joint and several liability between the doctor and the original tortfeasor. The original tortfeasor and the subsequent negligent doctor, even though the doctor's negligence aggravates the original injury, are not joint tortfeasors although they have joint liability in part. However, such joint liability does not give rise to any right of contribution. Butzow, supra at 287.

The phrase "not diminished" comes from Selleck v. Janesville, supra.

CUSTOM TRIAL COURT INSTRUCTION

qualifications and credibility of the experts and the reasons and facts supporting their opinion.

Now those are the general instructions as we call, boiler plate instructions. We give them in just about every case because they are general instructions that the jury should use. But now, we are going to get down into some more substantive instructions, and the amount that you answer in the damage question is for you to determine from the evidence. What the attorneys ask for in their arguments is not a measure of damages. The opinions or conclusions of counsel as to what damages should be awarded should not influence you unless it is sustained by the evidence. Examine the evidence carefully, dispassionately and determine your evidence -- your answers from the evidence in this case.

Now, the first instruction I'm going to give you is on damages and causation. You must determine whether the defendant, Kevin L. Caldwell's, negligence caused the injuries allegedly suffered by the plaintiff, Jo-El Hanson. The defendant's negligence caused the injuries if it was a substantial factor in producing the injuries.

One of the issues in this case for you to

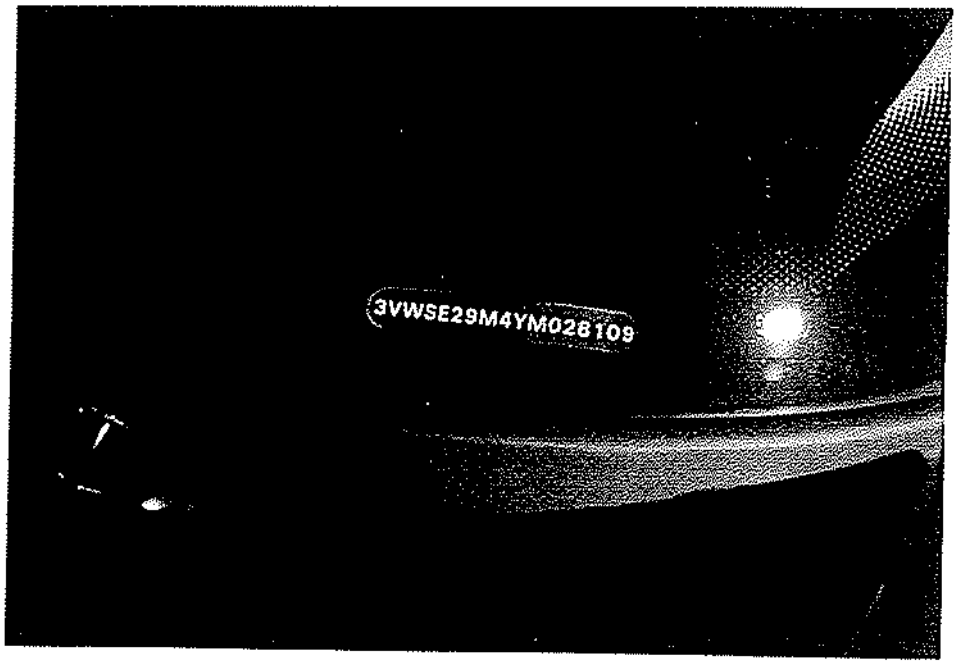
decide is whether the medical procedure, treatments used by her treating doctor related to any injuries she received in the accident. Were the injuries treated by her doctor a part of any original injuries and are the natural probable consequences of the defendant's negligence and are these normal incidents of medical care necessitated by the defendant's negligence. If there is a causal connection between the accident and the treatment she received and her damages, your answer to this question on damages for personal injury should be the entire amount of damages sustained and not -- and should not be decreased because of the defense's doctor questioned the procedure used by the plaintiff's treating doctor. I think that is a very important comment.

Now, there's been talk here about malpractice law, and I've told you there is no issue of malpractice in this case. It is a difference of opinion as to whether or not the injuries were caused by the accident. It's a superfluous matter about one doctor talking about what another doctor should have done. It is improper in this case as far as I am concerned and should not be considered by you. Any reduction should be -- would be -- any reduction would be contrary to long, established principles

that a defendant who causes injury is responsible for any aggravation that results from improper -- the alleged improper medical treatment for that injury as long as the plaintiff has exercised good faith and due care in selecting the treating physician. The evidence in this case indicates that the plaintiff used ordinary care in selecting her treating doctor. So what does that basically say? It says, she went to her doctor, the doctor used a procedure, the procedures were done and they followed. If you relate them to the accident, those injuries, she should receive the entire amount of damages she sustained for that, those procedures.

All right. You know, we forgot one thing here gentlemen, and sometimes we have to do it. We don't have a mortality table here at all. I believe we have future damages, and I guess, I don't know if I have one here. Normally we -- normally, we put in the record the mortality table. I guess it slipped up at this point. Anytime you have future damages, we have to have some gauge of how long a person is going to live. I'm going to let you use your common sense. A mortality table just gives us averages. In other words, some agency says, well, we looked at all people like white males, white females, black males,

PROPERTY DAMAGE PHOTOS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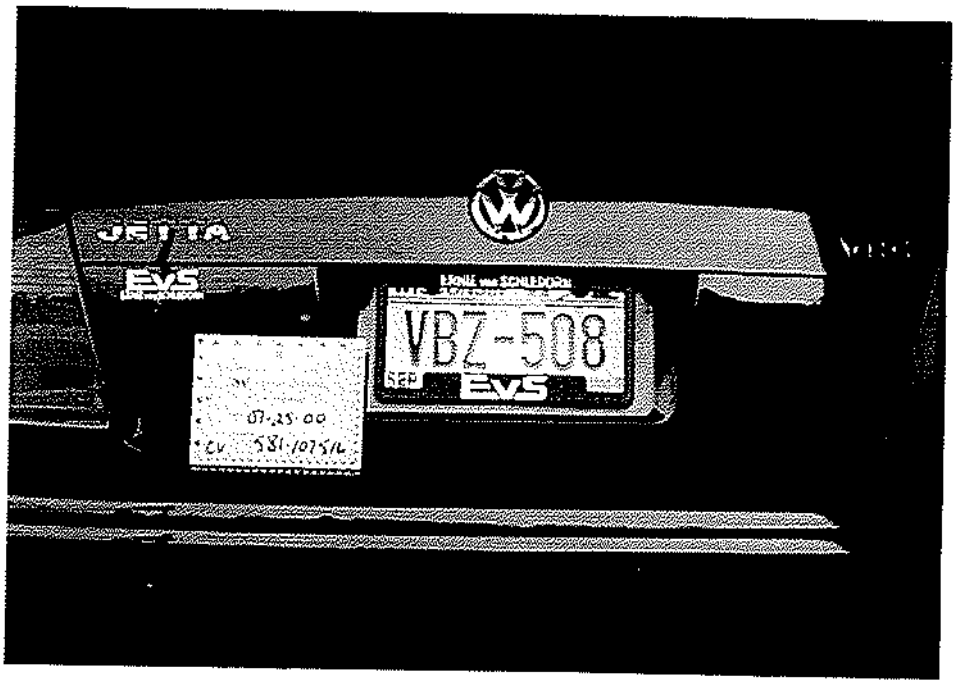
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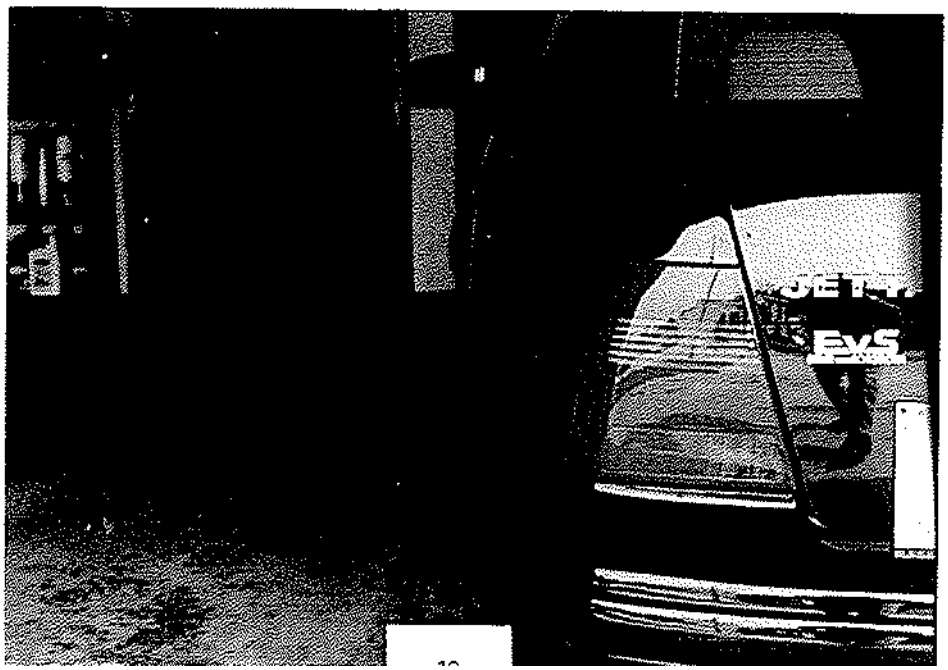
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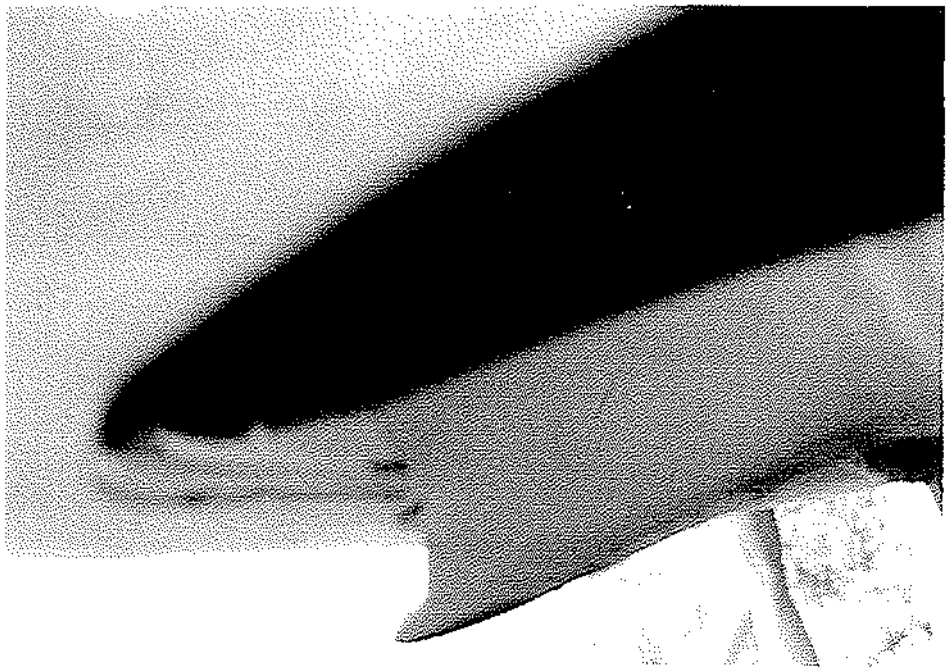


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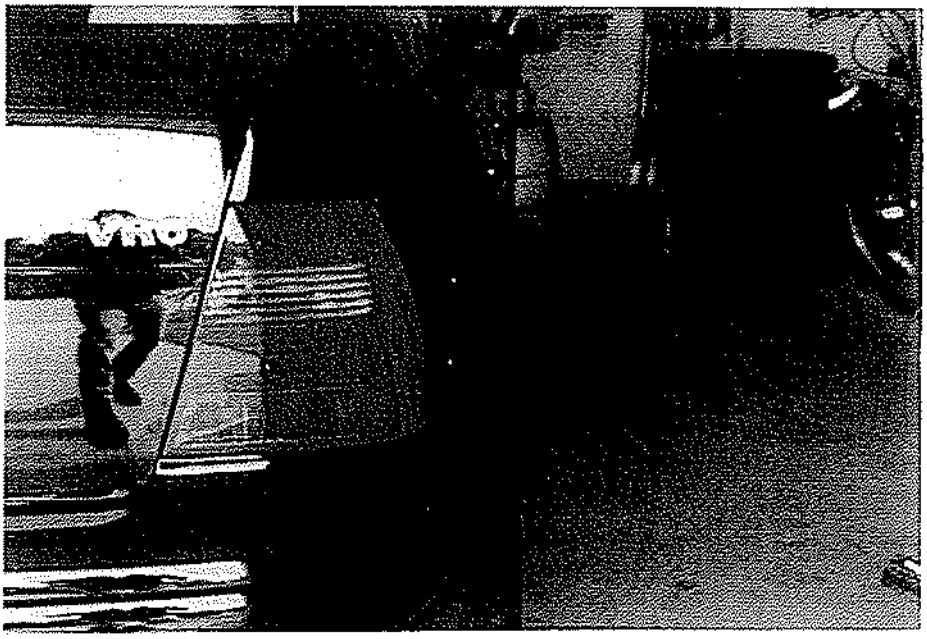

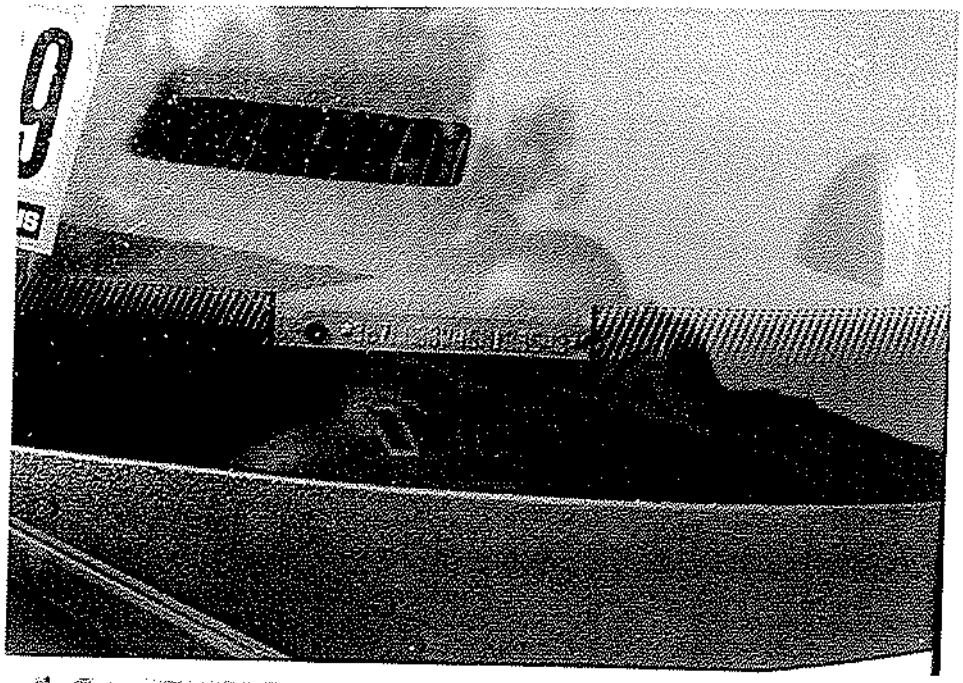


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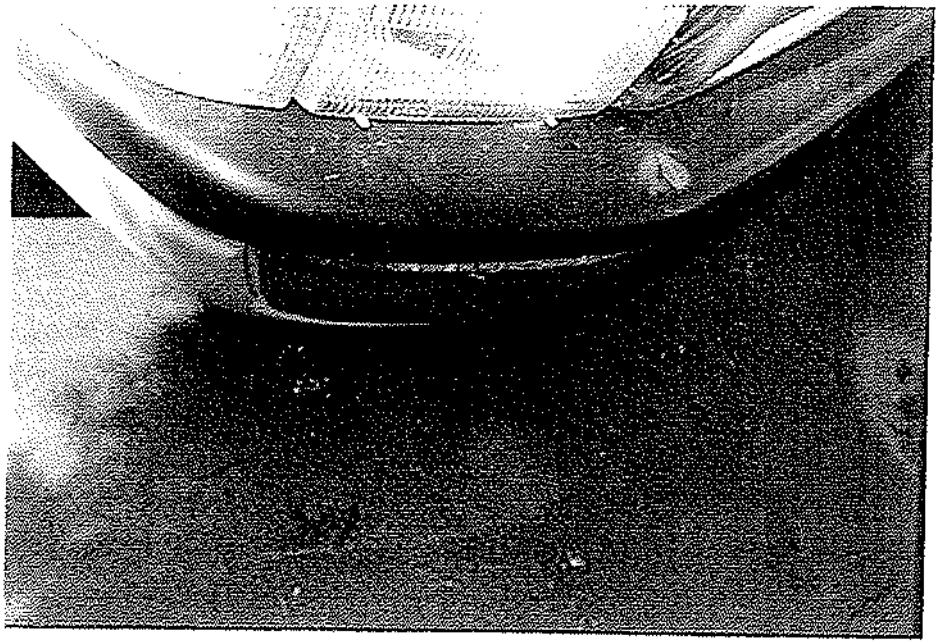

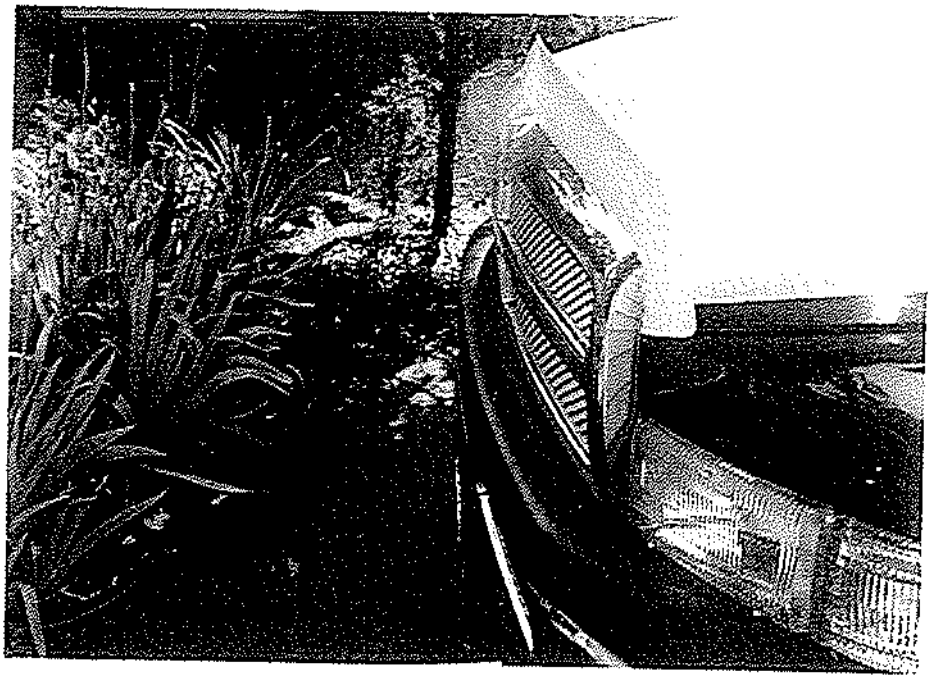

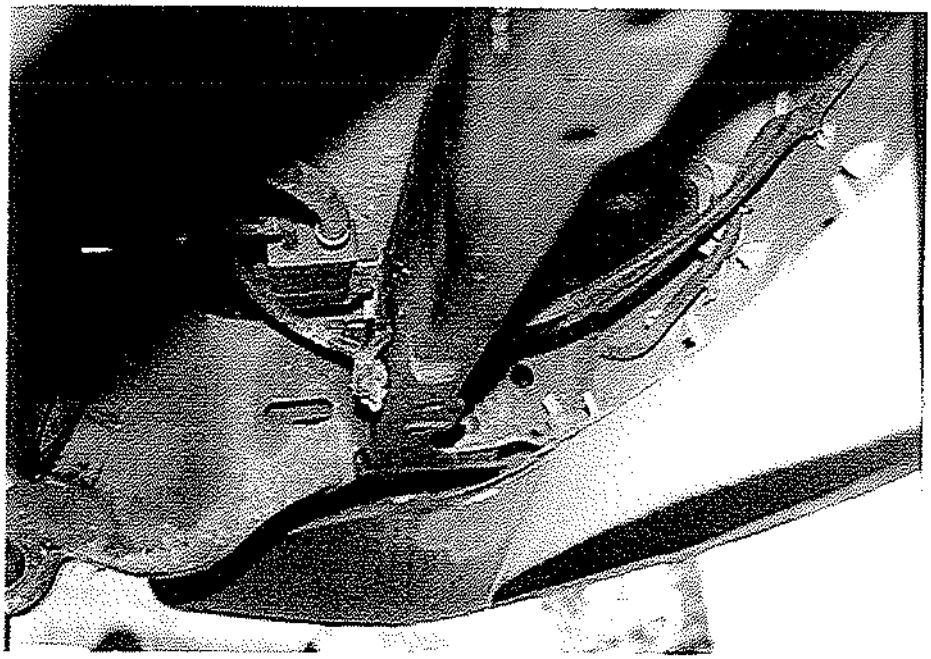

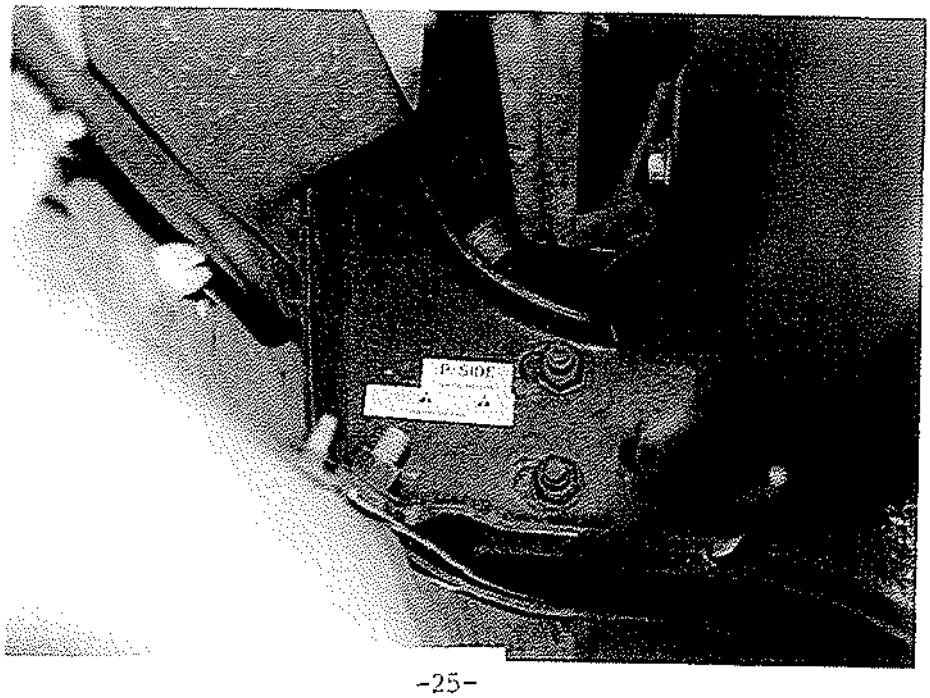
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CERTIFICATION REQUIRED
BY SEC. 809.19(2)(b), Wis. Stat.

I hereby certify that filed with this brief as a part of this brief, is an appendix that complies with s. 809.19(2)(a) that contains:

1. A table of contents;

2. Relevant trial court record entries;

3. The findings or opinion of the trial court; and

4. Portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated at Milwaukee, Wisconsin this 10th day of February, 2006.

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Respondents-Petitioners

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SUPREME COURT
STATE OF WISCONSIN

JO-EL HANSON,

Plaintiff-Appellant,

and

HUMANA/EMPLOYERS HEALTH INSURANCE COMPANY,

Subrogated Plaintiff,

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, KEVIN L. CALDWELL, and LINDELL MOTORSPORTS, INC.,

Defendants-Respondents-Petitioners.

District: 1
App. No. 2004AP002065

Circuit Court Case
No. 2001CV007524

RESPONSE BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

On Review of the November 8, 2005 Decision
Of the Court of Appeals, District I

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TABLE OF AUTHORITIES

WISCONSIN CASES

OTHER AUTHORITIES

ISSUES PRESENTED FOR REVIEW

We submit that Petitioners' listing of the "issue on review" or "alternate statement of the issue" are both inaccurate, based on the facts of this case.

We submit that the issues presented for review are as follows:

1. **IS A DEFENDANT WHO CAUSES INJURY TO ANOTHER RESPONSIBLE FOR ANY AGGRAVATION OF THAT INJURY THAT RESULTS FROM IMPROPER MEDICAL TREATMENT AS LONG AS THE PLAINTIFF HAS EXERCISED GOOD FAITH AND DUE CARE IN SELECTING THE TREATING PHYSICIAN?** (Plaintiff's good faith is undisputed in this case.)

The trial court answered in the negative, but the Court of Appeals reversed.

This is a question of law, which the Supreme Court reviews *de novo.*

2. **DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR BY INSTRUCTING THE JURY THAT IT COULD NOT CONSIDER THE PLAINTIFF'S TREATING DOCTOR'S ALLEGED MALPRACTICE, AND AT THE SAME TIME TELLING THE JURY THAT IT MUST FIND THAT ALL TREATMENTS WERE RELATED TO THE ACCIDENT?**

Answered in the negative by the trial court. The Court of Appeals reversed, holding that this was prejudicial error.

This is a discretionary decision that an appellate court must uphold, absent a finding of erroneous misuse of discretion.

3. **IS A NEW TRIAL ON THE REMAINING DAMAGE ISSUES WARRANTED BECAUSE OF THE ERRONEOUS INSTRUCTION, WHERE THERE'S A REASONABLE**

POSSIBILITY OF A DIFFERENT OUTCOME WITH RESPECT TO THOSE ISSUES?

It was answered in the negative by the trial court, but reversed by the Court of Appeals.

This presents a question of law which the Supreme Court reviews *de novo*.

ARGUMENT

I. PLAINTIFF'S INJURIES AROSE OUT OF THE ACCIDENT IN QUESTION, WHICH LED TO THE REFERRAL TO DR. LLOYD, WHOSE ALLEGED MALPRACTICE AGGRAVATED HER INJURIES.

The portions of Petitioners' Brief labeled "Introduction" and "Statement of Facts" are mislabeled, because most of the 13 pages devoted to those categories are actually argument.

The alleged facts set forth from p. 4 of their Brief up to the first full paragraph on p. 6 of are irrelevant, as are the photographs of the vehicle damage in their appendix, the Court of Appeals having stated at page 8 of their opinion that ". . . the jury found that Hanson was injured in the accident, and Caldwell has not appealed that finding."

How the accident happened is not an issue in this appeal, but we would add parenthetically that there was considerable dispute as to just how hard the impact was.

The Petitioners argue, at p. 15 of their Brief, that for a plaintiff to be entitled to damages due to aggravation of injury because of medical malpractice, the negligent medical treatment must arise out of injury related to the accident, and, at p. 17, that "the malpractice must arise out of medical treatment for an injury that was itself related to the accident."

The Petitioners fail to acknowledge that it is undisputed that the plaintiff was referred to Dr. Lloyd by her family doctor, Dr. Saydel, primarily because an electromyogram done by Dr. Ma showed evidence of

an acute mild right C5-6 radiculopathy (R. 119-pp. 75-76). Dr. Lloyd may have misdiagnosed those injuries, but they were the reason she was treated by him.

Petitioners' own expert witness, Dr. Pawl, testified as follows:

Q It is quite consistent for a person to have some injury at the time of an accident and then be worse the next day, is that correct?

A Yes, that can happen.

Q And Ms. Hanson went to the doctor the next day, is that correct?

A Yes, she did.

Q Then in terms of those first ten days, on the 24th she had pain in her ribs, her whole body. On the 26th, she called and said she couldn't sleep. On the 28th – these are all of June, 2000 – "Painful to do anything, in the neck, back, missed work, right low ribs tender," and she was told to stay off work by Dr. Saydel, and to be referred to Dr. Yoder, who is a pain specialist.

Do you see anything wrong with the medical treatment she was getting then?

A No, no. (R. 112, Ex. 41A, pp. 79-80)

Q You do agree, do you not, that what precipitated Ms. Hanson going to the doctor (Dr. Lloyd) to start with was the accident?

A Yes, that's right. (R. 112, Ex. 41A, p. 70)

Dr. Pawl also acknowledged, and it was undisputed, that the plaintiff had no prior neck injury, testifying as follows:

Q Now, is there anything in that description that Mr. Parlee put into the record for this jury that in any way indicates that she had any prior neck injury?

A No, there is no note in there that said she had a neck injury prior. (R. 112, Ex. 41A, p. 77)

The Court of Appeals recognized how similar the fact situation in *Fouse v. Persons*, 80 Wis. 2d 390, 259 N.W.2d 92 (1977), was to the instant case, stating at pp. 6-7 as follows:

> In *Fouse*, eerily similar to this case, the plaintiff experienced back pain shortly after being involved in an automobile accident. 80 Wis. 2d at 393. The treating doctor diagnosed a herniated thoracic disk and performed corrective surgery. *Id.* In *Fouse*, as here, the theory of the defense was that the force of the accident was insufficient to herniate a disk, making the surgery unnecessary. *Id.* at 394. On the apparent belief that the accident did not cause injuries that required surgery, the jury in *Fouse*, like the jury here, reduced the award of medical expenses by what it attributed to the surgery the defense claimed was unnecessary. *Id.* at 396-97. The trial court in *Fouse* set aside the jury award and granted a new trial. The supreme court affirmed, explaining:
>
> > The rule for awarding damages of injuries aggravated by subsequent mistaken medical treatment was established in *Selleck v. Janesville*[, 100 Wis. 157, 164, 75 .W. 975 (1989)] in 1898, and has been followed since. Assuming that the plaintiff exercised good faith and due care in the selection of his treating physician, an assumption borne out by the record in this case, under the *Selleck* rule the defendants are liable for the full amount of damages caused by the aggravation.

Fouse, 157 Wis. 2d at 397-98 (footnotes omitted).

The Petitioners state at page i of their Brief that *Lievrouw v. Roth*, 157 Wis. 2d 332, 459 N.W.2d 850 (Ct. App. 1990), and *Fouse* do not require

that all medical expenses incurred after an accident be awarded as damages as a matter of law. Of course not. There must be competent evidence that the plaintiff was in fact injured in the accident, that the treatment she sought for the injuries was reasonable and done in good faith, and that the negligent or mistaken treatment aggravated the injuries sustained in the accident.

Petitioners' argument at p. 20 of their Brief, which attempts to distinguish the *Fouse* case from the instant case, makes no sense at all and displays a misunderstanding of the *Fouse* decision.

II. CONTRARY TO PETITIONER'S ARGUMENT, DEFENDANTS HAVE NUMEROUS DEFENSES BASED ON UNNECESSARY OR UNRELATED MEDICAL TREATMENT.

The Petitioners claim, at pp. 15-17 of their Brief, that if this Court affirms the Court of Appeals defendants will have no way to avoid paying any medical expenses incurred by a plaintiff after an accident.

Defendants have and will continue to have numerous defenses based on unnecessary or unrelated treatment. They can argue, as they often do, that the treatment was a result of a preexisting condition or some subsequent event, not the accident in question.

They can argue that an injured plaintiff is exaggerating her symptoms and that therefore the treatment she sought was not done in good faith. This is a very common defense.

They can argue, as they often do, that the plaintiff sustained no injury in the accident in question. They did so in this case, counsel's claim to the contrary notwithstanding.

The Petitioners state at pp. 11-12 of their Brief that:

> In the court of appeals' decision the comment is made that "one of Caldwell's trial theories was that Hanson had not been injured at all." (Decision, p. 8; App., p. 8) In fact the opposite is true.

They then cite a portion of their closing argument in which they conceded that she might have sustained injuries in the accident.

The Court of Appeals was <u>not</u> mistaken. Immediately before the portion of their closing argument they cite in their Brief, counsel for the Petitioners argued as follows:

> . . . There is significant doubt in this case as to whether Ms. Hanson was injured at all in this accident, whether she sustained any injury whatsoever in this accident. If that is your judgment, then every question on the verdict is answered 0 because she sustained no injuries from this automobile accident. . . . (R. 121, p. 45)

If the jury had accepted this argument, they would have been justified in awarding no damages whatsoever to the plaintiff.

The Petitioners' argument that the defense of unnecessary medical treatment would always be met with a claim that unnecessary treatment is a form of medical malpractice for which the plaintiff is entitled to recover grossly exaggerates the ramifications of the Court of Appeals' Decision in this case.

A defendant's expert witness labeling alleged unnecessary treatment as medical malpractice is quite rare. Doctors simply don't casually accuse other doctors of malpractice. A claim that this will lead to fraudulent medical treatment simply has no basis in fact.

Fouse was decided in 1977 and *Lievrouw* in 1990 so that including the instant case there are three appellate decisions directly involving this particular issue in 29 years.

Finally, defendants claiming plaintiff's injuries were aggravated by a treating doctor's malpractice can also implead that doctor as a third party defendant. In this case, the Petitioners chose not to do so even though Dr. Pawl rendered his opinion concerning Dr. Lloyd's malpractice in a deposition over one year before the trial.

III. WIS. JI-CIVIL 1710 IS APPLICABLE WHENEVER THERE IS COMPETENT MEDICAL TESTIMONY THAT A PLAINTIFF'S ACCIDENT INJURIES HAVE BEEN AGGRAVATED BY MISTAKEN OR NEGLIGENT MEDICAL TREATMENT.

Petitioners' argument attempts to limit the application of Wisconsin law and the principle embodied therein to a fact situation where necessary surgery was performed negligently, so as not to include unnecessary surgery performed mistakenly or as a result of malpractice. Their argument has no support in any Wisconsin appellate decision.

Petitioners argue that Wis. JI-Civil 1710 is not to be used by a plaintiff "offensively," but only has a limited purpose to prevent the defense from using a malpractice theory to decrease a plaintiff's damages.

There is nothing in 1710 that says that, nor is there any Wisconsin case that sets forth such a confusing and imprecise rule.

The comment to 1710 states that "this instruction is to be used in cases where there is at issue the aggravation of damages because of subsequent negligent treatment of injuries sustained in the accident," exactly the fact situation in this case.

Counsel for the Petitioners asserts, at p. 21 of their Brief, that he has read every Wisconsin case referenced in Wis. JI-Civil 1710 and claims that without exception these cases define the narrow and specific role for this instruction.

While we commend counsel's diligence in reading all these cases, we submit that his claim in fact strengthens and supports our position in this case because if he has in fact read all those decisions, he has found nothing in any of them to cite in support of his "offensive-defensive" argument.

22 AmJur 2d Damages, cited in Wis. JI 1710, now at §246, p. 231, footnote 4, cites the *Fouse* case and states as follows:

> Generally, where a person has suffered personal injury by another's negligence, the tortfeasor is liable for any additional harm and expense caused the injured person by the negligence, mistake, or lack of skill of the attending physician or surgeon . . . .

IV. DR. PAWL'S TESTIMONY SUPPORTED AN INFERENCE OF MALPRACTICE BY DR. LLOYD.

The Petitioners argue that the testimony elicited from their neurosurgical witness, Dr. Pawl, was not intended to create any inference or suggestion that the treating surgeon, Dr. Lloyd, committed malpractice.

Whatever their intention was, Dr. Pawl's testimony, alleging malpractice by Dr. Lloyd, can be summarized as follows:

If a doctor performs surgery that is clearly not indicated it can be malpractice. (R. 112, Ex. 41A, pp. 62-63) Dr. Lloyd performed surgery on a normal cervical spine. (R. 112, Ex. 41A, p. 50) He was incompetent in reaching the diagnosis that led him to do the surgery. (R. 112, Ex. 41A, p. 63) Dr. Lloyd committed an assault on the plaintiff. (R. 119-pp. 159-160) A proper investigation was not undertaken in her case to accurately determine the cause of her injuries, which was the fault of Dr. Lloyd. (R. 112, Ex. 41A, p. 69) Plaintiff was not negligent and did nothing wrong in following her doctor's advice. (R. 112, Ex. 41A, p. 68)

Although the Petitioners argue that "Dr. Pawl never directly testified that Dr. Lloyd committed malpractice," (Petitioners' Brief, p. 11) the inference to be drawn from his testimony was unmistakable.

In the *Lievrouw* case, the court stated at p. 357 as follows:

> Dr. William J. LaJoie, an expert retained by Roth and Classified, testified in response to questions asked by defense counsel that Lievrouw would have had a better recovery if he had been treated earlier and differently by his physicians, even though, when asked by Lievrouw's counsel, he told the jury that he was not accusing them of medical malpractice. At Lievrouw's request, the trial court gave the following pattern jury instruction:

> If the plaintiff's injuries were aggravated or not diminished as much as they otherwise should have been as a result of the negligence or mistake of his doctor, and if the plaintiff exercised ordinary care in selecting the doctor, which he did in this case, then your answer to the question on damages for personal injuries should be for the entire damages sustained by Dennis Lievrouw and should not be decreased because of the doctor's negligence.

See Wis. JI-Civil 1710. Roth and Classified claim this was error because there was no expert testimony that any of Lievrouw's treating physicians were guilty of malpractice. We disagree. (Emphasis added)

> Dr. LaJoie's testimony was designed to leave the jury with the impression that part of Lievrouw's injuries were caused by his treating physicians and not by the accident. If believed, this testimony could have led the jury to reduce the award of compensatory damages to Lievrouw accordingly. Such a reduction would have been contrary to the long-established principle that a defendant who causes injury is responsible for any aggravation that results from improper medical treatment, as long as the plaintiff has "exercised good faith and due care" in selecting his or her treating physicians. *See Fouse v. Persons*, 80 Wis. 2d 390, 397-398, 259 N.W.2d 92, 95 (1977). The trial court's instruction set matters right. It was not error. (Emphasis added.)

The Petitioners cite no language from either *Lievrouw* or *Fouse* in support of their argument because there simply is none. Both decisions strongly support our position in this case and the Court of Appeals' Decision.

V. IT IS IRRELEVANT WHETHER DR. PAWL'S TESTIMONY WAS ELICITED ON DIRECT EXAMINATION, CROSS EXAMI-NATION, OR THROUGH QUESTIONING BY THE COURT.

The Petitioners argue that there was something inappropriate about the cross examination of Dr. Pawl in which his opinion that Dr. Lloyd committed malpractice was elicited.

They argue that "the defense never implicated 1710 by suggesting that Dr. Lloyd committed malpractice; it was the plaintiff that did this."

It was not the plaintiff that "did this," it was their own expert witness, Dr. Pawl, who "did this." It is irrelevant whether Dr. Pawl's opinions as to Dr. Lloyd's malpractice and unnecessary surgery were rendered during direct examination, cross examination, or in response to questions by the court. Dr. Pawl's testimony was certainly competent evidence on this question. Once again, Petitioners cite nothing in any appellate decision or legal treatise in support of their argument.

Are the Petitioners seriously arguing that plaintiff's counsel cannot cross examine their medical expert with regard to his opinion as to whether the plaintiff's treating physician aggravated her injuries by committing malpractice? If so, the argument is certainly specious and the *Lievrouw* and *Fouse* decisions would be rendered meaningless.

VI. DR. SUBERVIOLA'S TESTIMONY WAS SUPERFLUOUS; HE AGREED WITH DR. PAWL THAT THE PLAINTIFF ACTED IN GOOD FAITH IN AGREEING TO DR. LLOYD'S SURGERY.

The Petitioners have peripherally commented on the trial court's decision which granted plaintiff's motion *in limine* to preclude Dr. Suberviola's testimony as superfluous. Dr. Suberviola was consulted by the

plaintiff for a second opinion before she agreed to the surgery by Dr. Lloyd and he testified at his deposition that he didn't feel surgery was warranted.

Although he did not think the surgery would benefit the plaintiff, he agreed with Dr. Pawl that the plaintiff had acted in good faith. Dr. Suberviola testified as follows:

> Q And Dr. Lloyd -- she saw Dr. Lloyd, then she saw you, and then she went back to Dr. Lloyd, and she had to make a decision?
>
> A Right.
>
> Q And the decision she made was to rely upon Dr. Lloyd, who had been treating her and to whom she'd been sent by her family doctor. Would you have any criticism of that?
>
> A Of course not.
>
> Q Would you say that that's some kind of carelessness or negligence to rely upon her doctor's advice?
>
> A Of course not. (R. 112, Ex. 24, pp. 57-58)

Based on those questions and answers, Dr. Suberviola's testimony would have been superfluous. So long as the plaintiff underwent the surgery as a result of injuries that caused her to be referred to Dr. Lloyd, which Dr. Suberviola acknowledged as did Dr. Pawl, she was entitled to all of her damages resulting from that surgery.

VII. THE COURT OF APPEALS RECOGNIZED THAT THE TRIAL COURT'S INSTRUCTION, BASED ON 1710, WAS CONFUSING AND CONVOLUTED, ALLOWING THE JURY TO IGNORE THE ESTABLISHED LAW SET FORTH IN *LIEVROUW* AND *FOUSE.*

The Court of Appeals correctly held that the trial court's instruction, based partly on Wis. JI-Civil 1710, was erroneous and not the law in Wisconsin.

During the instruction conference, the court stated as follows:

> Number one, did the accident cause whatever problem she is complaining about now? That is the problem. Unfortunately, the defense doctor and who knows what the jury is going to do, spent a lot of time talking about that he didn't agree with this operation. Now, if he would have kept solely to the fact that he just didn't agree that any damages or any problem she had or these doctors may have found were caused by the accident would have been fine. But he was nit-picking about this and that and he wouldn't have done that, he wouldn't use that test. Well, I don't know. It's interesting, but it just is his opinion and I am going to give the jury an instruction about that. The expert evidence is given to them to help them, but they may not – they need not follow it. So I drafted an instruction, not using the boiler plate instruction, because -- but malpractice and aggravation, that just emphasizes an issue not in this case. (emphasis added) (R. 128-p. 11-12)

Clearly, aggravation and malpractice were extremely important issues in this case, based on Dr. Pawl's testimony.

The Court of Appeals, at pp. 10-11 of their Decision, reviewed the confusing and convoluted instruction given by the trial court and held as follows:

> By telling the jury that it could not consider the doctor's alleged malpractice, and at the same time telling the jury it must find that all treatments were related to the accident, the trial court let the jury decide that the treatment it concluded was unnecessary was not "caused" by the accident, and was therefore not compensable. That is not the law in Wisconsin. The inconsistent instructions given by the trial court had the effect of allowing the jury to ignore the established rule of law applicable to this case as described in *Lievrouw* and *Fouse*. The entire thrust of Caldwell's closing argument was that the surgery performed on Hanson was

unnecessary surgery and thus the costs of the surgery, and any additional injury that resulted from the surgery, were not caused by the accident, even though the surgery was done by the doctor whom, as the trial court instructed, Hanson used ordinary care in selecting. In effect, the trial court told the jury that regardless of whether the surgery was unnecessary, they could not award the cost of the surgery unless the jury "related[d] them to the accident, those injuries." As we have previously explained, that portion of the instruction misstates long-established law that must be applied to the facts of this case.

The trial court's correct statement in an earlier part of the instruction – namely that any reduction of damages because of intervening "improper medical treatment" would be improper – came immediately after the trial court improperly characterized the defense claim that the surgery was unnecessary. The trial court told the jury "there is no issue of malpractice in this case. It is a difference of opinion as to whether or not the injuries were caused by the accident." But malpractice was in fact an issue in the case, and it came from the testimony of a defense expert. (Court of Appeals Decision, pp. 11-12.) (Emphasis added)

The Plaintiff-Appellant had requested the following instruction:

Wis. JI 1710 (as modified)

There is no dispute in this case that the plaintiff's car was stopped and was struck in the rear by the truck of the defendant, Mr. Caldwell. However, the defendants contend that the force of the impact was not of a magnitude sufficient to cause injuries that required the operation done by Dr. James Lloyd, a neurosurgeon.

The defendants have offered proof that the operation was not only unnecessary but that it was malpractice for Dr. Lloyd to have done it.

I instruct you that the law of Wisconsin is that if the plaintiff uses ordinary care in selecting her doctors (which I find she did in this case – to be given only if the court makes such a finding) and that a treating doctor was negligent and that that negligence aggravated the plaintiff's injury or caused new or unnecessary injuries, plaintiff is entitled to damages for personal injury for

> the entire amount of the damages she sustained and should not be decreased because of the doctor's negligence. Unnecessary surgery qualifies as an act of medical negligence; therefore, in reaching your decision, you need not decide whether the surgery that Ms. Hanson underwent was or was not necessary (R. 126-p. 4).

The Court of Appeals' Decision implicitly acknowledges that the requested instruction was a proper statement of Wisconsin law and should have been given.

The Petitioners state, at p. 13 of their Brief, that ". . . since the court ruled that under Pawl's testimony alone plaintiff was entitled to recover for the surgery as a matter of law, the instruction given to the jury on this issue was arguably moot."

Clearly, the issue is not moot. The jury, in answering the remaining damage questions dealing with past and future pain and suffering, and loss of earning capacity, did not take into consideration the fact that plaintiff underwent a cervical fusion that resulted in permanent injury. They awarded her nothing for any pain, suffering and disability or loss of earning capacity caused by the fusion. The Court of Appeals recognized this when they stated at pp. 13-14 of their Decision as follows:

> After review of the record, we conclude that based on the error in the instructions, there is a reasonable possibility of a different outcome with respect to the remaining damages issues. The jury obviously found that Hanson had been injured in the accident, because it awarded $25,000 in past medical expenses – those incurred prior to the surgery. The actual amounts awarded for the remaining damages also appear to be related to damages incurred prior to the surgery. What these damages should have been, had the jury taken into account damages after the surgery, is disputed (unlike the amount for all past medical expenses, which was undisputed).

We are convinced that the erroneous instruction affected the awards for the remaining damages. We conclude that the inconsistent and erroneous instructions in this case probably caused jury confusion and probably affected the substantial rights of Hanson with respect to the damage questions in the special verdict. Consequently, we remand for a new trial on the remaining damage issues.

CONCLUSION

The facts of this case relevant to this appeal can be summarized as follows:

1. The plaintiff sustained injuries in the accident in question. Both of the Petitioners' experts so testified, and the jury so found.

2. Her initial medical treatment, which would have included all of the doctors prior to her seeing Dr. Lloyd was reasonable, as corroborated in Dr. Pawl's testimony.

3. It was undisputed that the $78,338.97 in medical expenses were reasonable charges for the services rendered.

4. It was because of injuries sustained in the accident that she was referred to Dr. Lloyd, acknowledged by Dr. Pawl.

5. It was undisputed in this case that she acted in good faith in her selection of doctors, testified to by both Dr. Pawl and Dr. Suberviola.

6. The surgery performed on her neck was either necessitated by the accident in question, according to Dr. Lloyd, or, according to Dr. Pawl, was performed unnecessarily by Dr. Lloyd on a normal neck because of a negligent diagnosis by him, resulting in permanent injury to the plaintiff.

The *Fouse* and *Lievrouw* cases strongly support the Plaintiff-Appellant's position in this case. In fact, if the plaintiff had to invent two decisions to lend support to her argument, it would be difficult to come up with two decisions more favorable than *Fouse* and *Lievrouw*.

In their Brief to the Court of Appeals, in their Petition for Review to this Court, and in their Brief to this Court to which we now respond, the Petitioners cite no direct language from either *Fouse* or *Lievrouw* to support their position, because there is none.

In fact, in their Brief to this Court, it should be noted that there is no citation of any direct language from any Wisconsin appellate decision or legal treatise to support their arguments in this case.

The Petitioners' Brief, at pp. 31-33, includes a "Conclusion" that we submit is improper, inappropriate and rather melodramatic. They would not be allowed to make this argument to a jury. It is a none too subtle request that this Court's decision in this case should be affected by sympathy for poor Mr. Caldwell, who had an unpleasant time sitting through the trial, which resulted from his negligence.

Jo-El Hanson asks this Court for no sympathy, simply the application of long-standing Wisconsin law to the facts of her case.

Respectfully submitted this 7th day of March, 2006.

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CERTIFICATION

I hereby certify that this Appellate Brief conforms to the rules contained in sec. 809.19(b) and (c) for a brief produced with a proportional serif font. The length of this Brief is 4,517 words.

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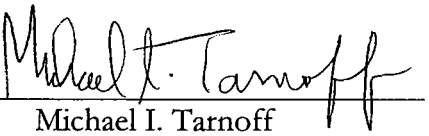
By: 

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CERTIFICATION OF MAILING

I hereby certify that on March 7, 2006, an original and twenty two (22) copies of the Response Brief and Appendix of Plaintiff-Appellant were served by postage paid first class U.S. mail deposited at Milwaukee, Wisconsin, upon Ms. Cornelia Clark, Wisconsin Supreme Court, P. O. Box 1688, Madison, WI 53701-1688, and three (3) copies upon all counsel of record as follows:

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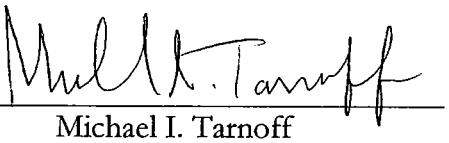
By: 

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SUPREME COURT
STATE OF WISCONSIN

JO-EL HANSON,

Plaintiff-Appellant,

and

HUMANA/EMPLOYERS HEALTH INSURANCE COMPANY,

Subrogated Plaintiff,

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, KEVIN L. CALDWELL, and LINDELL MOTORSPORTS, INC.,

Defendants-Respondents-Petitioners.

District: 1
App. No. 2004AP002065

Circuit Court Case
No. 2001CV007524

APPENDIX TO RESPONSE BRIEF OF PLAINTIFF-APPELLANT

On Review of the November 8, 2005 Decision
Of the Court of Appeals, District I

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TRIAL COURT'S DECISION ON MOTIONS AFTER VERDICT

THE COURT:

Let me deal with motion after verdict. You know, parties have their theory of why they want to pursue on a case, attorneys, and I try to respect those theories and attempt to allow them to put their theories in. But the Court has another duty. It is a duty to the jury, and a duty to the case on all and a duty to the law. So what this Court attempts to do during a trial is allow them to put in their theory as best they can and to try their case with their own ability as best they can. But then the court has to, in fact, try to guide the jury in its duty, and I do that through instructions and verdicts and sometimes in ruling on evidence. But I am there to guide the jury in what their real duty is. I think I did that in this case. Reasonable minds may differ. Plaintiff may have one theory how this case should have been tried, how the jury should have been instructed. Defense may have another theory how this case should have been tried, how the jury should have been instructed. But someone has to make the determination, and I made it. So reasonable minds may differ, but the Court, I believe was fully apprised of the law on the issues.

I always love it when attorneys say "With all due respect, your Honor." Well, thank you for doing that, but, you know, you have your theory, and you believe certain things; I believe something else. But it is like a basketball game I guess. The referee calls the fouls and the partisans disagree with the call. But someone has to make the call. So with all due respect to you, I attempted to do that. So the Court was fully apprised of the law on the issues, and this Court made rulings, gave instructions, and developed a verdict for the jury and submitted the case, allowed the attorneys to try the case.

I might say the record is clear. I tried to rein them in because we are going far afield as I said. I got somewhat upset with some of the attorneys by hammering at issues I thought were a waste of this jury's time, or cause this Court to make precurative instructions. So I was trying to rein them in in that regard and there was some problems with that. But in general, I think the parties tried a good case. They put their theories forward. And

this Court instructed the jury and drafted a verdict. But I believe it is consistent with the facts and the law.

The Court believes its rulings were appropriate and proper at the time and believes at this time that they were proper under the facts of the law at this time. So I see no reason for this Court to reject this verdict, or to change this verdict, or to grant a new trial based on what went on during the trial. I think it was well-tried and well-monitored by this Court. And the jury submitted a verdict that is sustainable under the facts and the law, and as a statement of their position how they see the facts and how they follow the judge's instruction on the law. What better can we do? And again, reasonable minds may differ but that's what it's all about.

So the Court will deny any changing of this verdict in any way, granting a new trial. And you have what is the final results of the trial. Whether you like it or not is up to you, and you can determine what you do from this point. And if in fact there is a possibility I made a mistake, the Court of Appeals will be more than happy to tell me, and I will be more than happy to receive instructions on how better to try this case or any other case under these facts.

Thank you, gentlemen. Defense, draft an order consistent with the Court's finding denying the motion to change the verdict. And we will see what happens next. Thank you.

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

JO-EL HANSON,

Plaintiff,

v. Case No. 01-CV-007524

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, KEVIN L. CALDWELL, and LINDELL MOTORSPORTS, INC.,

Defendants.

SPECIAL VERDICT

QUESTION NO. 1:

What sum of money will fairly and reasonably compensate the plaintiff, Jo-El Hanson, for damages she has sustained as a result of her injuries in the accident of June 22, 2000, for the following:

A. Past medical expenses; $ 25,000.-

B. Past loss of earning capacity; $ 7,250.-

C. Future medical expenses; $ 0.-

D. Past pain, suffering, disability; $ 15,000.-

E. Future pain, suffering, disability; $ 0.-

Dated this 5th day of February, 2004, at Milwaukee, Wisconsin.

Jeffery Haws
Foreperson

DISSENTING JUROR(S):	QUESTION NO.:
Larry G. Gandy	1, 2, 4
Norman J Leary	1, 2, 4.

SUPREME COURT
STATE OF WISCONSIN

JO-EL HANSON,

Plaintiff-Appellant,

and

HUMANA/EMPLOYERS HEALTH INSURANCE COMPANY,

Subrogated Plaintiff,

vs.

District: I
Appeal No. 2004AP002065
Circuit Court Case No. 2001CV007524

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, KEVIN L. CALDWELL, and LINDELL MOTORSPORTS, INC.,

Defendants-Respondents-Petitioners.

REPLY BRIEF DEFENDANTS-RESPONDENTS-PETITIONERS

On Review of the November 8, 2005 Decision
of the Court of Appeals, District I

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I. UNDER TRADITIONAL RULES OF TORT CAUSATION, UNNECESSARY MEDICAL TREATMENT, BY DEFINITION, HAS NO CAUSAL RELATIONSHIP TO THE TORTFEASOR'S NEGLIGENCE, THE ACCIDENT, OR ANY MEDICAL TREATMENT ITSELF CAUSALLY RELATED TO THE ACCIDENT

The defense doctor Pawl testified that Hanson's surgery was both unrelated to the accident and medically unnecessary. To some extent this testimony is redundant; if a medical procedure is medically unnecessary, *ipso facto* it is not causally related to the accident. By definition, treatment which is medically unnecessary bears no causal connection to anything outside the doctor/patient relationship. It has no causal connection to the defendant's negligence, no causal connection to the accident, and no causal connection to any treatment which was itself related to the accident.

The jury concluded that the plaintiff sustained a temporary soft-tissue strain or sprain in the accident. The plaintiff characterizes the subsequent surgery as an "aggravation" of the soft-tissue injury. That characterization - which is a prerequisite to the applicability of instruction 1710 - is conceptually and empirically false. If the surgery was medically unnecessary, i.e., if the surgery had no causal medical justification whatsoever, then it could not have constituted an "aggravation" of the soft-tissue injury or any other injury.

The plaintiff states that "it was because of injury sustained in the accident that she was referred to Dr. Lloyd". (Plaintiff's brief, p. 18) This begs the question; what injury sustained in the accident? The plaintiff answered that question on page three of her brief:

> . . . it is undisputed that the plaintiff was referred to [the neurosurgeon] Dr. Lloyd by her family doctor, Dr. Saydel, primarily because an electromyogram done by Dr. Ma showed evidence of an acute mild right C5-6 radiculopathy (R. 119 - pp. 75-76).

(Plaintiff's brief, pp. 3-4) The plaintiff fails to mention, however, that the trial court record is entirely bereft of any evidence that Dr. Ma or Dr. Saydel related this mild radiculopathy to the accident, or posed it as a justification for the surgery. Indeed, Ma's diagnostic work-up "provided reassurance which revealed no surgical indication". (Rec. 119, p. 172) The consulting neurosurgeon Suberviola - whose testimony was excluded from this case for reasons which remain incomprehensible - was of the same opinion. (Rec. 112, Ex. 24, pp. 22-23)

The plaintiff is arguing that she should recover for the surgery merely because Saydel referred her to the neurosurgeon Lloyd. This argument is without merit for the simple reason that Saydel did not base his referral on any medical condition causally related to the accident.

Referring to the "mild right C5-6 radiculopathy" detected by Ma, plaintiff alleges that "Lloyd may have misdiagnosed these injuries, but they were the reason she [Hanson] was treated by him". (Plaintiff's brief, pp. 3-4) No doctor associated with this case - Lloyd, Ma, Saydel, Suberviola, or Pawl - "misdiagnosed" the radiculopathy or even challenged that finding. It was conceded by the defense. Lloyd actually complimented Ma's diagnostic skill, stating that she was "very helpful and very astute in her diagnosis and treatment". (Rec. 119, p. 143)

There was no "misdiagnosis" in this case, and no malpractice based on any misdiagnosis; there was only a surgery bearing absolutely no causal relationship to the accident at issue. Even if the radiculopathy was the reason plaintiff was treated by Lloyd, neither Ma, Saydel, Suberviola, nor Pawl causally connected that radiculopathy to the accident.

The argument here by the plaintiff reduces to an absurdity. It is analogous to the following scenario. A man breaks his leg in a car accident. While treating the leg a doctor discovers venous thrombosis unrelated to the accident. The doctor refers the man to a vascular specialist who treats the thrombosis. Later, the man sues over the accident and seeks recovery for the thrombosis

expenses "because the accident was the reason I was referred to the vascular specialist". The fallacy here is self-evident.

The Am Jur section relied upon by the plaintiff places the issue of 1710's applicability squarely within a traditional causal framework:

> The issue whether a tortfeasor who causes personal injury is civilly liable to the person injured for the consequences of negligence, mistake, or lack of skill on the part of the physician or surgeon who treats the original injury, is basically one of proximate cause. The question is whether the aggravation of the original injury, or a subsequent additional injury, by improper medical or surgical treatment, is a natural and probable consequence of the original tortfeasor's negligence, or whether the negligence, mistake, or lack of skill of the attending physician or surgeon is an independent superceding cause.

22 Am Jur 2d, §288, p. 237[1]. The commentary to 1710 is likewise:

> The principle that a tortfeasor is liable for the consequences of negligence of a physician whose treatment aggravated the original injury is based upon the reasoning that the

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[1] The plaintiff's citation to this section - number 246 at p. 231 - appears to be wrong. It bears noting that in Wisconsin the concept of intervening or superseding cause is "another way of saying the negligence is too remote from the injury to impose liability". Morgan v. Pennsylvania Gen. Ins. Co., 87 Wis. 2d 723, 738, 275 N.W.2d 660 (1979).

> additional harm is either (1) part of the original injury, (2) the natural and probable consequence of the tortfeasor's original negligence, or (3) the normal incidence of medical care necessitated by the tortfeasor's original negligence.

Wis. J.I.-Civil No. 1710, commentary, citing Buetzow v. Wausau Memorial Hospital, 51 Wis. 2d 281, 289, 187 N.W.2d 349 (1971).

To the defense bar, the truly disturbing aspect of the court of appeals' decision is this statement:

> When the doctor is selected in good faith, as ***Fouse*** and ***Lievrouw*** have explained, responsibility for improper *or even unnecessary* treatment for an injury received in the accident *cannot be avoided by claiming the accident did not "cause" the later treatment.*

(Decision, p. 12; emphasis added) This ruling, literally, takes instruction 1710 outside the traditional tort causal framework defined by both Am Jur and the Buetzow case. If the Wisconsin Supreme Court does not want to accept this rather dramatic departure from traditional principles of tort causation, a simple solution is at hand; require that compensation for post-accident medical negligence arise out of treatment which was itself causally related to the accident. Indeed, the commentary to 1710 already states this:

> This instruction is to be used in cases where there is at issue the aggravation of damages because of subsequent

negligent medical treatment of injuries *sustained in the accident.*

Wis. JI-Civil No. 1710, commentary (emphasis added).

II. THE COURT OF APPEALS' DECISION WILL ENCOURAGE SHARP LITIGATION PRACTICES

The Wisconsin Supreme Court is uniquely sensitive to the impact of abstract legal holdings on the practical administration of justice. In that regard, defendants respectfully submit that the court of appeals' ruling encourages litigation game-playing and sharp practices.

Note first the following statement in plaintiff's brief: "A defendants' expert witness labeling alleged unnecessary treatment as medical malpractice is quite rare". (Plaintiff's brief, p. 8) Defendants agree with that statement. However, it ignores the fact that under the court of appeals' decision, unnecessary medical treatment is itself a species of medical malpractice as a matter of law. The court had to conclude this because again, as argued in defendants' initial brief (p. 25) Dr. Pawl never directly testified that the neurosurgeon Lloyd committed malpractice. At trial the plaintiff's requested 1710 instruction, contrary to Pawl's trial testimony (defendant's brief, p. 10) also equated unnecessary medical treatment with malpractice. Quoting the instruction: "Unnecessary surgery qualifies as an act of medical negligence." (Rec. 125, p.

4; Plaintiff's brief, p. 16)

While doctors rarely accuse each other of malpractice, they frequently express expert opinions that such and such medical treatment was unnecessary. Indeed, it is a rare personal injury case wherein a doctor called by the defense (treating or consulting) does *not* express the opinion that certain medical treatment was unnecessary.

Under the court of appeals' decision the expression of such an opinion is fraught with peril. With that one magic word alone - "unnecessary" - the defendant risks being shackled with liability for the entire panoply of alleged medical expense dubiously related to the accident. What is a defense lawyer to do? Encourage the doctor not to express any opinion on medical necessity even though it bolsters the defense arguments on lack-of-causation? Encourage the doctor to hide his opinions if asked about medical necessity, and state only that the expenses were unrelated to the accident?

On the plaintiff's side, the court of appeals ruling has the ironic and perverse effect of encouraging plaintiff's counsel to support, or at least not refute, an allegation that a doctor treating his or her client committed malpractice. This in fact occurred in the case at bar. Plaintiff's counsel asked Lloyd at trial if he (Lloyd)

committed malpractice. Wouldn't virtually all doctors if asked this question rise up in righteous indignation and vociferously exclaim "no"? Remarkably, Lloyd declined to comment on whether he committed malpractice (rec. 119, p. 60) thus "keeping the door open" on the issue. It is difficult to imagine that this witness was not coached on this testimony prior to taking the stand.

Litigation game-playing of this nature, on both sides of the fence, argues toward reversal of the court of appeals' decision.

The plaintiff suggests that the defense can avoid the risk of delving into the "unnecessary treatment" realm by arguing simply "that an injured plaintiff is exaggerating her symptoms and that therefore the treatment she sought was not done in good faith. This is a very common defense." (Plaintiff's brief, p. 6) This suggestion ignores the fact that defendants *did* argue that the plaintiff was exaggerating her symptoms. Indeed, Lloyd himself admitted that plaintiff evinced a pattern of seeking medical care for symptoms having no apparent cause. (See Defendants' brief, pp. 6-7) Unfortunately, under the court of appeals' decision, this testimony was rendered moot by the holding that defendants are liable for unnecessary medical expenses as a matter of law. Plaintiff's suggested "cure" for the

defense quandary here precisely supports defendants' argument that the court of appeals' decision backs defendants into a strategical corner on causation from which there is no escape.

Furthermore, the court of appeals' decision leads inexorably in the direction of creating a mini-trial on malpractice and thereby confusing the issues, misleading the jury, causing undue delay, and wasting time, things that the evidentiary code seeks to avoid. See Wis. Stats. §904.03. The trial of the case at bar constituted a classic example of what happens when a case gets sidetracked toward issues and evidence collateral to the main case. The plaintiff, literally, tried this case as a medical malpractice case, not an automobile accident case. (See Defendants' brief, p. 11; Rec. 128, p. 4) These efforts exasperated Judge Guolee, who desperately tried to keep the case "on track". If the court of appeals' decision becomes law, the internecine sparring evident at the trial of this Hanson case will become commonplace. The reason for this is simple. Low velocity impact cases - a category into which the case at bar definitely fits - are notoriously difficult for plaintiffs to win, largely because for the plaintiff to prevail, the jury often has to ignore the laws of physics. The court of appeals' decision encourages plaintiffs to

sidestep or abandon traditional notions of injury causation and instead pursue the case by trying to pin a malpractice label on one of the consulting or treating doctors. Medical malpractice litigation *per se* is complex and difficult; the risk of interjecting this difficulty and complexity into standard automobile cases should be approached and evaluated with extreme caution.

CONCLUSION

For the reasons stated above, it is respectfully requested that the court of appeals' decision be reversed and the trial court verdict be reinstated.

RESPECTFULLY SUBMITTED:

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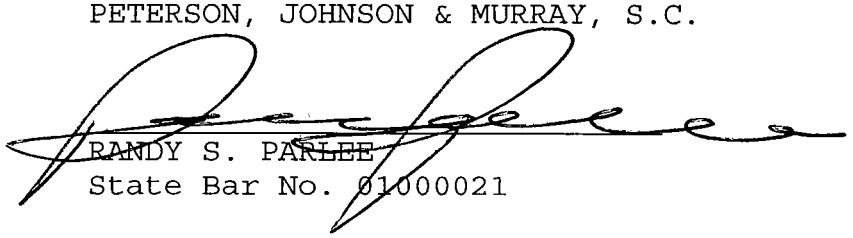
FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c), Stats., for a brief produced using the following font:

Monospaced font; 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 10 pages.

Dated March 15, 2006.

PETERSON, JOHNSON & MURRAY, S.C.



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STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2004-AP-2065

JO-EL HANSON,

Plaintiff-Appellant,

and

HUMANA/EMPLOYERS HEALTH INSURANCE COMPANY,

Subrogated Plaintiff,

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
KEVIN L. CALDWELL, and
LINDELL MOTORSPORTS, INC.,

Defendants-Respondents-Petitioners.

ON REVIEW OF THE NOVEMBER 8, 2005 DECISION OF
THE WISCONSIN COURT OF APPEALS, DISTRICT I

BRIEF OF AMICUS CURIAE, THE WISCONSIN ACADEMY OF TRIAL LAWYERS

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STATEMENT OF INTEREST

The Wisconsin Academy of Trial Lawyers ("WATL") is a voluntary bar association dedicated to securing and protecting the rights of injured persons and promoting the fair, prompt, and efficient administration of justice in the State of Wisconsin. Through its Amicus Curiae Brief Committee, WATL submits non-party briefs to assist courts in addressing important issues of law that affect the rights of injured individuals to obtain just redress by means of the civil court system. The present appeal bears directly on WATL's organizational objectives.

ARGUMENT

As the Wisconsin Court of Appeals correctly acknowledged in this case, Wisconsin law has consistently recognized for more than a century the rule first enunciated by this Court in Selleck v. City of Janesville, 100 Wis. 157, 163-64, 75 N.W. 975 (1898): When a tortfeasor causes injuries to another person who subsequently suffers "mistaken" or "improper" medical treatment of those injuries despite having exercised good faith and reasonable care in selecting his or her treating health care provider, the tortfeasor is responsible for all of that person's injuries and damages, including those injuries and damages arising from the mistaken or improper medical

treatment. Hanson v. American Family Mut. Ins. Co., Appeal No. 2004-AP-2065, unpublished slip op., ¶¶ 16-17 (Wis. Ct. App. Nov. 8, 2005); see also, e.g., Fouse v. Persons, 80 Wis. 2d 390, 397-98, 259 N.W.2d 92 (1977); Butzow v. Wausau Mem'l Hosp., 51 Wis. 2d 281, 285-86, 187 N.W.2d 349 (1971); Stiger v. Industrial Comm'n, 220 Wis. 653, 657-58, 265 N.W. 678 (1936); Lakeside Bridge & Steel Co. v. Pugh, 206 Wis. 62, 66, 238 N.W. 872 (1931); Pawlak v. Hayes, 162 Wis. 503, 507, 156 N.W. 464 (1916); Lievrouw v. Roth, 157 Wis. 2d 332, 357-58, 459 N.W.2d 850 (Ct. App. 1990); Wis. J.I.—Civil 1710 ("Aggravation of Injury Because of Medical Negligence").

The Selleck rule is premised upon the simple recognition of the fact that the injuries and damages arising from the mistaken or improper medical treatment would not have occurred but for the original injuries caused by the tortfeasor. See, e.g., Hooyman v. Reeve, 168 Wis. 420, 423-24, 170 N.W. 282 (1919); Selleck, 100 Wis. at 163-64. As this Court has explained:

> The principle that a tortfeasor is liable for the consequences of negligence of a physician whose treatment aggravated the original injury is based upon the reasoning that the additional harm is either (1) a part of the original injury, (2) the natural and probable consequence of the tortfeasor's original negligence, or (3) the normal

> incidence of medical care necessitated by the tortfeasor's original negligence.

Butzow, 51 Wis. 2d at 285-86 (quotations omitted).[1] In other words, the injuries and damages arising from the mistaken or improper medical treatment are part of the "chain of causation" that began with the tortfeasor's negligence.

The Selleck rule is consistent with the law of every other jurisdiction to have considered the issue. See generally, e.g., V. Woerner, Annotation, Civil Liability of One Causing Personal Injury for Consequences of Negligence, Mistake, or Lack of Skill of Physician or Surgeon, 100 A.L.R.2d 808 (1965) (updated 2006) (citing supporting cases from dozens of jurisdictions); Restatement (Second) of Torts § 457 (citing supporting cases from dozens of jurisdictions); see also, e.g., Lakeside Bridge, 206 Wis. at 66 ("Appellant's contention that the employer is not liable for the aggravated damages caused by the

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[1] As explained in the Restatement (Second) of Torts § 457 cmt. b (1965) (updated 2006):

> [T]here is a risk involved in the human fallibility of physicians, surgeons, nurses, and hospital staffs which is inherent in the necessity of seeking their services. If the actor knows that his negligence may result in harm sufficiently severe to require such services, he should also recognize this as a risk involved in the other's forced submission to such services, and having put the other in a position to require them, the actor is responsible for any additional injury resulting from the other's exposure to this risk.

malpractice of the physician and surgeon is contrary to virtually all the authorities of the country . . . .").

Despite these well-rooted legal and logical underpinnings, the petitioners in this case plead to this Court, without citing a single supporting authority, to abandon the Selleck rule. WATL respectfully submits that this Court should reject the petitioners' plea.

First, the petitioners argue that the Selleck rule applies only when the tortfeasor claims that the injuries and damages at issue arise from "malpractice." However, the law is clear that a claim of malpractice—be it by the injured person or the tortfeasor, and be it raised on direct examination, cross-examination, or otherwise—is not necessary to invoke the Selleck rule. The Selleck rule applies to any "mistaken medical treatment," Fouse, 80 Wis. 2d at 397, or "improper medical treatment," Lievrouw, 157 Wis. 2d at 358, "even though no malpractice is suggested." Stiger, 220 Wis. at 657.

Pursuant to this law, a tortfeasor may not sidestep the Selleck rule merely by instructing his or her expert witnesses to avoid uttering the word "malpractice." The Wisconsin Court of Appeals held as much in Lievrouw, 157 Wis. 2d at 357-58. In Lievrouw, the defense argued that the Selleck rule was

inapplicable "because there was no expert testimony that any of [the plaintiff's] treating physicians were guilty of malpractice." Id. at 357. The court rejected this argument, explaining:

> [The defense expert's] testimony was designed to leave the jury with the impression that part of [the plaintiff's] injuries were caused by his treating physicians and not by the accident. If believed, this testimony could have led the jury to reduce the award of compensatory damages to [the plaintiff] accordingly. Such a reduction would have been contrary to the long-established principle that a defendant who causes injury is responsible for any aggravation that results from improper medical treatment, as long as the plaintiff has "exercised good faith and due care" in selecting his or her treating physicians.

Id. at 358 (quoting Fouse, 80 Wis. 2d at 397). "Malpractice" or not, any suggestion that injuries and damages arise from mistaken or improper medical treatment is improper and, under the Selleck rule, should be precluded at trial. Id.

Second, the petitioners argue that the Selleck rule applies only to injuries and damages arising from the negligent performance of "proper" treatment (i.e., incorrectly performing necessary treatment), not to injuries and damages arising from the negligent performance of "improper" treatment (i.e., correctly performing unnecessary treatment). This argument defies logic and the law.

By definition, mistaken or improper medical treatment never is "proper" treatment. It is irrelevant whether the mistaken or improper medical treatment consists of the incorrect

performance of necessary treatment or the correct performance of unnecessary treatment. The cause for the treatment is the same—the tortfeasor's negligence injured another person. And the result of the treatment is the same—the injured person suffers additional injuries and damages.

For these reasons, Wisconsin law has consistently recognized that, so long as the mistaken or improper medical treatment is intended to treat the original injuries caused by the tortfeasor, the Selleck rule permits an injured person to recover from the tortfeasor injuries and damages arising from the correct performance of unnecessary treatment as well as from the incorrect performance of necessary treatment. Fouse, 80 Wis. 2d at 397-98 (holding that the Selleck rule applies to the correct performance of unnecessary treatment)[2]; Spencer v. DILHR, 55 Wis. 2d 525, 532, 200 N.W.2d 611 (1972) (holding that the Selleck rule applies the correct performance of unnecessary treatment: "[I]s [the claimant] to be faulted because he chose to follow erroneous medical advice? We do not think so, as long as he did so in good faith."); Honthaners Rests., Inc. v. LIRC, 2000 WI App 273, ¶ 15, 240 Wis. 2d 234, 621

[2] As the Wisconsin Court of Appeals correctly noted, Fouse is "eerily similar to this case" with regard to both its facts and the arguments made by the defense. Hanson, unpublished slip op. at ¶ 16.

N.W.2d 660 (holding that the Selleck rule applies "as long as the claimant engaged in the unnecessary and unreasonable treatment in good faith").

As with the Selleck rule itself, this law is consistent with the law of every jurisdiction to have considered the issue. See, e.g., Drummond v. Delaware Transit Corp., 365 F. Supp. 2d 581, 589-90 (D. Del. 2005) (holding that the tortfeasor is liable for any injuries and damages arising from unnecessary surgery intended to treat the original injuries caused by the tortfeasor); O'Quinn v. Alston, 104 So. 653, 654-55 (Ala. 1925) (holding the same); Ponder v. Cartmell, 784 S.W.2d 758, 760-61 (Ark. 1990) (holding the same); Edwards v. Sisler, 691 N.E.2d 1252, 1253-1255 (Ind. Ct. App. 1998) (holding the same); Sumrall v. Sumrall, 612 So. 2d 1010, 1015 (La. Ct. App. 1993) (holding the same); Underwood-Gary v. Mathews, 785 A.2d 708, 712-13 (Md. 2001) (holding the same); Carter v. Shirley, 488 N.E.2d 16, 20-21 (Mass. App. Ct. 1986) (holding the same); Restatement (Second) of Torts § 457 cmt. c., illus. 1 ("A's negligence causes B serious harm. B is taken to a hospital. The surgeon improperly diagnoses his case and performs an unnecessary operation, or, after proper diagnosis, performs a necessary operation carelessly.

A's negligence is a legal cause of the additional harm which B sustains.").

Third, the petitioners argue that the Selleck rule opens the door for fraudulent claims. But contrary to the petitioners' argument, the rule does not open the door to fraudulent claims. Rather, it closes the door to frivolous defenses.

The Selleck rule incorporates a continuing duty for the injured person to exercise good faith and reasonable care in continuing to treat with his or her health care provider. If the tortfeasor can show that the injured person has not done so (which the petitioners did not do in this case), thus incurring injuries and damages for mistaken or improper medical treatment, the tortfeasor is free to argue as much at trial in an attempt to reduce his or her liability.[3] But so long as the injured person continues to exercise good faith and reasonable care in continuing to treat with his or her health care provider, the tortfeasor may not attempt to fault the injured person for heeding the health care provider's advice.

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[3] Similarly, if the tortfeasor can show that the injured person's medical treatment was not intended to treat the original injuries caused by the tortfeasor (which the petitioners also did not do in this case), but rather a preexisting or other injury unrelated to the tortfeasor's negligence, the tortfeasor is free to argue as much at trial in an attempt to reduce or eliminate his or her liability.

If the Selleck rule were abandoned, tortfeasors would have a very strong incentive to frivolously contend through hired-gun "independent" medical examiners or other defense experts that, even when it is undisputed that a tortfeasor's negligence caused injuries to another person, all or a majority of those injuries and damages are the result of mistaken or improper medical treatment. See Restatement (Second) of Torts § 457 cmt. b. This would spawn an additional level of litigation and its concomitant costs and delay in many, if not most, personal injury cases.

Moreover, this would spawn an additional level of largely unnecessary defensive medicine and its concomitant costs and consumption of health care resources. To ensure that they could recover for their medical treatment, injured persons would need to constantly seek second opinions to ensure that, despite any good faith and other reasonable care that they have taken to ensure otherwise, their treating health care providers are not providing mistaken or improper medical treatment.

The Selleck rule mitigates these risks. Under the Selleck rule, if a tortfeasor truly believes a treating health care provider is providing unnecessary or otherwise mistaken or improper medical treatment, the tortfeasor is free to pursue an action

against that health care provider. By leaving the burden and costs of prosecution on the tortfeasor to do so, the Selleck rule helps ensure that tortfeasors will not lightly make claims of unnecessary or otherwise mistaken or improper medical treatment. See id.

Finally, the petitioners argue that the Selleck rule "just isn't fair." The petitioners lard their briefs with irrelevant disputed "facts," inviting this Court to abandon over a century of precedent. But in doing so, the petitioners never acknowledge that the allegedly mistaken or improper medical treatment at issue in this case would not have occurred but for the original injuries caused by their negligence. This Court should reject the petitioners' invitation.

In this case, it is undisputed:

- That "[t]he fact situation in the case at bar is common" (Pet'r Br. at 3);
- That the jury found that the plaintiff suffered a spinal injury (Id. at 13-14);
- That "there was no evidence that [the] plaintiff had any pre-accident spinal pathology aggravated by the accident" (Id. at 27);
- That the plaintiff exercised good faith and reasonable care in selecting his or her treating health care provider; and

- That the surgery the plaintiff underwent was intended to treat the original spinal injuries caused by the petitioners (Id. at 11).

Under these circumstances, the petitioners' "causation defense" was not "too strong" as they suggest. Instead, pursuant to the Selleck rule, the "defense" was wholly improper. The petitioners should not have been permitted to suggest at trial that the plaintiff erred in following her health care provider's advice.

CONCLUSION

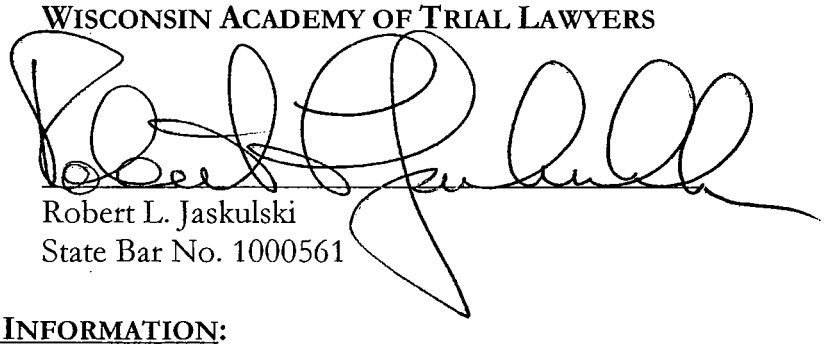
Citing only an unsupported "parade of horribles" that have not come to light in the last 100-plus years during which the Selleck rule has been the law, the petitioners request that this Court profoundly rewrite Wisconsin law. This Court should refuse the petitioners' request. Accord Ferdon v. Wisconsin Patients Comp. Fund, 2005 WI 125, ¶ 177, 284 Wis. 2d 573, 701 N.W.2d 440 (rejecting as unpersuasive an unsupported "the sky is falling" argument).

The Selleck rule has promoted the fair, prompt, and efficient administration of justice in the State of Wisconsin for more than a century. The petitioners have cited nothing warranting this Court to abandon this rule. Accordingly, WATL respectfully submits that this Court should affirm the continuing

vitality of the Selleck rule and affirm the November 8, 2005 decision of the Wisconsin Court of Appeals.

Dated in Milwaukee, Wisconsin this 7th day of April, 2006.

WISCONSIN ACADEMY OF TRIAL LAWYERS



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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 12 pages and 2,221 words.

Dated in Milwaukee, Wisconsin this 7th day of April, 2006.

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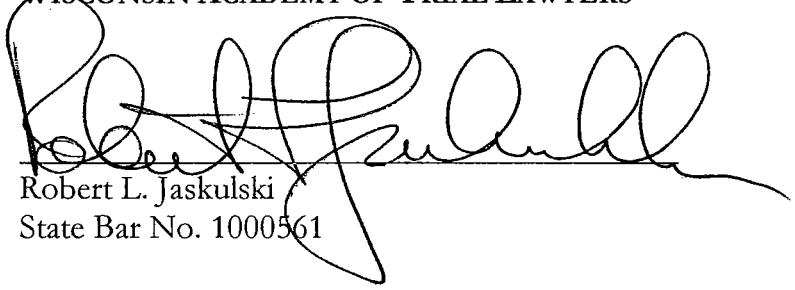

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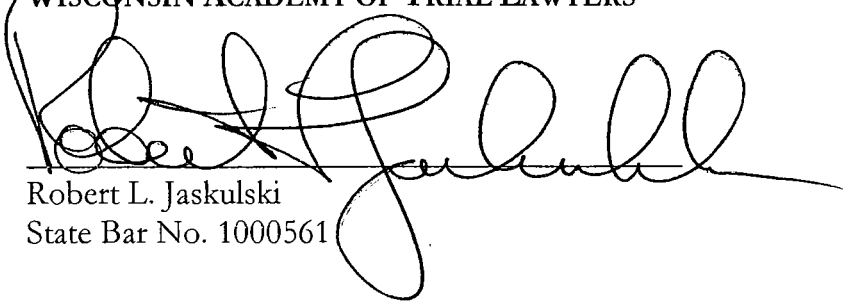

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SUPREME COURT
STATE OF WISCONSIN

JO-EL HANSON,

Plaintiff-Appellant,

and

HUMANA/EMPLOYERS HEALTH INSURANCE COMPANY,

Subrogated Plaintiff,

vs.

District: I
Appeal No. 2004AP002065
Circuit Court Case No. 2001CV007524

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, KEVIN L. CALDWELL, and LINDELL MOTORSPORTS, INC.,

Defendants-Respondents-Petitioners.

DEFENDANTS-RESPONDENTS' BRIEF IN RESPONSE TO BRIEF OF THE WISCONSIN ACADEMY OF TRIAL LAWYERS

On Review of the November 8, 2005 Decision
of the Court of Appeals, District I

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ARGUMENT

I. Defendants Are Not Requesting This Court To Abandon The "Selleck" Rule or Any Legal Authority Interpreting Jury Instruction 1710

WATL states that a defendant's liability for medical malpractice, described as the "Selleck" Rule, is "well-rooted" and ubiquitous. (WATL Brief, p. 4) WATL states that defendants "plead to the court. . . to abandon the Selleck rule". (Id.) The first statement is correct. The second is not.

Defendants are not asking this court to overrule Selleck, instruction 1710, or any case law interpreting it. A defendant's liability for medical malpractice under 1710 reflects a public policy determination that extends the causal liability of a tortfeasor to "negligent medical treatment of injuries *sustained in the accident*". (Comments, Wisconsin J.I.-Civil No. 1710, emphasis added) Far from asking that this principle be abandoned, defendants are asking that it be affirmed. However, in so affirming, defendants also ask this court to distinguish the facts of this Hanson case from other cases preceding, and interpreting, 1710. Defendants argue that to not do so will result in an extension of a defendant's liability that is too remote from the defendant's negligence, too remote from the defendant's culpability, and bereft of a just and

sensible stopping point.

WATL applies a "but for" test to determine a tortfeasor's liability for medical malpractice (WATL Brief, p. 2) because that malpractice is part of the "chain of causation that began with a tortfeasor's negligence". (Id., p. 3) The proper test, however, is not "but for" or scientific causation, but proximate or legal causation, tempered by public policy considerations. "But for" a defendant's negligence causing an accident, a plaintiff could legitimately argue, from a strictly empirical perspective, for a plethora of negative consequences such as not getting into a better college, delay in finding a spouse, etc. However, what is empirically provable and what is legally compensable are two entirely different things.

Two cases relied upon by WATL and cited in the comments to 1710, Selleck and Spencer, precisely illustrate the central point advanced by defendants. For a defendant to be liable for post-accident malpractice, the malpractice must itself arise out of treatment causally related to the accident. Selleck involved an ankle dislocation, and the malpractice allegation was that the treating physician failed "to reduce the dislocation of her ankle at the proper time". Selleck, 100 Wis. 2d at 158. It was uncontroverted

that the plaintiff's accident (a fall on a sidewalk) caused the original dislocation. In Spencer, the claimant suffered a knee fracture from a work related accident, and the alleged negligence was that treatment of the knee by arthrodesis was unnecessary or unreasonable. Spencer, 55 Wis. 2d at 532. It was uncontroverted that the claimant's work accident caused his original knee fracture.

By contrast, in the case at bar, four physicians - a family doctor (Saydel), a neurosurgeon consulted by Saydel (Suberviola), a neurologist (Ma), and a neurosurgeon consulted by the defense (Pawl) - examined the plaintiff and found no spinal pathology causally related to the accident. Furthermore, none of these doctors found any pathology warranting spinal surgery. Lastly, a jury hearing all of the evidence concluded that the surgery was not causally related to the accident[1]. It is the defendants' position that these facts distinguish this Hanson case from Selleck and Spencer.

The secondary sources cited by WATL are in accord with

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[1] WATL states that "the jury found that the plaintiff suffered a spinal injury". (WATL Brief, p. 10) This statement is false; in fact, the jury concluded the opposite. The jury's award for pre-surgical damages encompassed only plaintiff's subjective complaints of muscular, soft-tissue injury. Again, there was never any evidence in this case of pathology to the spine caused by the accident.

defendants' position. See *Restatement (Second) of Torts*, §457, Comment E (1965)("Nor is [the tortfeasor] liable for harm resulting from negligent treatment of a disease or injury which is not due to the actor's negligence . . . .); Annotation, *Civil Liability of One Causing Personal Injury for Consequences of Negligence, Mistake, or Lack of Skill of Physician or Surgeon*, 100 ALR 2d 808, 819-20 (1965) (setting a limitation on the "Selleck" rule with "unskillfulness or negligence of a physician or surgeon having no causal connection with the original injury".)

There is case law to the same effect. See Shemman v. American Steamship Company, 89 Mich. App. 656, 672, 280 N.W.2d 852 (1979)(". . . from the evidence defendants sought to introduce, the jury could conclude that the injury has not caused any disc pathology and that the alleged malpractice was not causally related to the original injury. In other words, it was defendant's contention that there was a break in the chain of causation".); Payne v. Hall, 136 N.M. 380, 386, ¶15, 98 P.3d 1030 (2004)([The plaintiff] equates the need for additional medical treatment with 'injury'. We disagree with plaintiff's reasoning and do not interpret *Lewis* and *Lujan* as abolishing a plaintiff's burden to prove that a defendant caused an original injury before a

court may impose liability as a matter of law on that defendant for any enhanced injuries").

II. If WATLs' Position Is Taken To Its Logical Conclusion, The Determination On Causation Will Be Made By Parties Having A Personal Interest In The Verdict

WATL states that "so long as the mistaken or improper medical treatment is *intended* to treat the original injuries caused by the tortfeasor", recovery for improper or unnecessary treatment is appropriate. (WATL Brief, p. 6; emphasis added) This begs the question; intended by whom? Practically speaking, this intent could come from only two sources; either the plaintiff or the doctor who supposedly committed the malpractice. Each has an obvious self-interest in the case; the plaintiff to maximize the verdict, and the doctor to get his or her bill paid. Thus, under WATL's conception of the law, no matter how causally remote a particular medical procedure is from an accident, all that is required to make the necessary causal connection warranting recovery is for either the plaintiff or her doctor to testify that they "intended" to get the treatment for accident related injuries. The actual, empirical, medical, *factual* connection is irrelevant; the causal determination turns on the subjective intent of the doctor

and patient, two people with a distinctly personal interest in the outcome of the litigation.

Defendants hope this is not the law in Wisconsin. Defendants hope that the causation determination under 1710 does not reduce to a level this trivial, this bereft of inquiry into the substantive empirical connection between accident and injury. To affirm a rule of this nature is to open the way for collusion between doctor and patient, i.e., to open the way for fraudulent claims. By making the test for causation subjective rather than objective, WATL's rule also compromises the ability of defendants to mount an effective medical defense.

WATL states ". . . it is undisputed . . . that the surgery the plaintiff underwent was intended to treat the original spinal injuries caused by the petitioners". (WATL Brief, p. 11) This is simply not true. As discussed above, defendants argued vociferously at trial - through four medical witnesses - that the accident caused no injury at all to plaintiff's spine. Defendants never stipulated that the plaintiff or her doctor "intended" to treat any injury with the surgery. Indeed, defendants adduced evidence from three doctors (Ma, Suberviola, and Pawl) who ruled out a causal connection between the surgery and injury to the spine. These efforts would be essentially mooted if the

causal determination was to rest on the doctor's and patient's testimony as to their intent regarding the surgery.

III. The Defendants Conceded That Plaintiff Used Ordinary Care In Selecting Her Doctor, But Did Not Concede That She Acted In Good Faith

WATL states, correctly, that a plaintiff is entitled to the "Selleck" rule if she used reasonable care in selecting her doctor (as instruction 1710 itself states) *and* if she followed the doctor's advice "in good faith" (as stated in Spencer, 55 Wis. 2d at 532). WATL states, incorrectly, that " . . . it is undisputed . . . that the plaintiff exercised good faith and reasonable care in selecting his (sic) or her treating health care provider". (WATL Brief, p. 10) At trial the court told the jury "the evidence in this case indicates that the plaintiff used ordinary care in selecting her treating doctor". (Rec. 128, p. 32; Defendants' Appendix, p. 18). However, the court *never* instructed the jury that Hanson used good faith in following the surgeon Lloyd's advice, and the defendants certainly never stipulated to that.

In fact, the defense argued at trial that Hanson lacked good faith in following Lloyd's advice. Ironically, the

evidence for this argument was conceded by Lloyd, and came through him. Lloyd testified about a concept known as "somatization" whereby people develop symptoms from psychological abnormalities with no organic cause. (Rec. 119, pp. 217-218) He confirmed that on several occasions before the accident Hanson sought treatment for her complaints of pain, and her health care providers could not find a cause for that pain. (Rec. 119, pp. 219-221) Lloyd testified that these types of observations by a doctor would be enough to consider whether somatization was operating in a patient. (Rec. 119, p. 221)

Defendants submit that this evidence contradicts the contention that Hanson followed Lloyd's advice "in good faith". A patient who fabricates symptoms for psychological reasons - whether consciously or unconsciously - is not acting in good faith. Indeed, this phenomenon is the antithesis of good faith.

The somatization exhibited by the plaintiff supported the defendants' position at trial that no 1710-based instruction should have been given to the jury in the first instance. (Rec. 128, p. 9)

IV. The Negative Fallout From The Court Of Appeals' Decision Is Already Apparent At The Circuit Court Level

WATL criticizes defendants for arguing that "the sky is

falling" and citing "an unsupported 'parade of horribles'". (WATL Brief, p. 11)

Apparently, WATL has not reviewed defendants' Affidavit Supplementing Petition For Review. That affidavit includes Allstate Insurance Company's motions after verdict in the Milwaukee County Circuit Court case of Golden v. Ross, number 04-CV-007162. In Golden a circuit court, after receiving a copy of the Hanson court of appeals' decision "hot off the press", found it necessary to instruct the jury that it must award all medical expenses claimed by the plaintiff, essentially because the treating doctor ordered them. The court stated to counsel "that may be tough for the defense, but that appears to be the law, so I don't know how we get around that". The defendants in this Hanson case could not have imagined a more perfect illustration of why the Court of Appeals' decision will have - indeed, already has had - a negative impact on the administration of justice in this state.

The sky is not falling, and there is no "parade of horribles". There is, however, a Court of Appeals' decision which expands traditional motions of tort causation beyond the point justified by sound public policy. The defendants respectfully request the Wisconsin Supreme Court to reverse

that decision and restore the trial court verdict.

RESPECTFULLY SUBMITTED:

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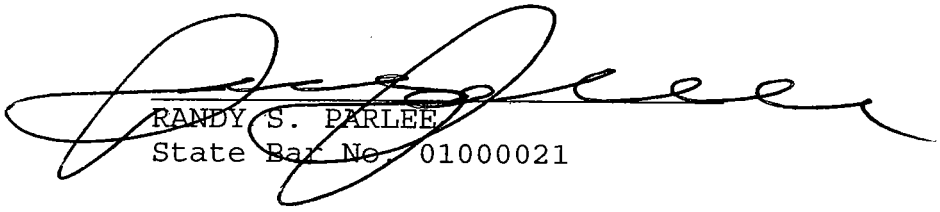

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