



**WISCONSIN SUPREME COURT
TUESDAY, APRIL 25, 2006
10:45 a.m.**

04AP2065 Jo-El Hanson v. American Family Mutual Insurance Company

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed an order of the Milwaukee County Circuit Court, Judge Michael Guolee presiding.

This is a personal injury case arising out of a car crash. The woman who was injured sought medical treatments, including a surgery that allegedly was not medically necessary. The Supreme Court is expected to clarify whether there is a difference between unnecessary surgery and surgery that is badly performed for purposes of allowing the accident victim to recover compensation for medical expenses.

Here is the background: On June 22, 2000, Jo-El Hanson's car was rear-ended. Her vehicle was stopped at the time, and the other vehicle was moving between five and seven miles per hour. Hanson developed neck and lower back pain. While physical therapy helped the low back pain, it did not reduce the neck pain. About six months after the collision, she underwent spinal surgery that was admittedly well-done but allegedly medically unnecessary. The surgery tripled Hanson's medical expenses, raising them from \$25,000 to more than \$78,000.

At trial, the liability of the man whose car struck Hanson's was uncontested. The only issues were whether Hanson was injured in the crash and the extent of her injuries. American Family maintained that the speed was not sufficient to cause injuries requiring surgery, and presented the testimony of an expert witness (a neurosurgeon) who said that the surgery was not medically necessary. Hanson's attorney, on the other hand, argued that Hanson should not be penalized for having followed medical advice that she thought was sound. The attorney then engaged the expert in an exchange about whether unnecessary surgery amounts to malpractice:

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

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

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: ...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 on 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.

Before the case went to the jury, the trial court gave the jury a standard instruction but added the following admonition:

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.

The jury declined to award Hanson the money she sought to cover the surgery. She received the approximately \$25,000 for medical expenses that accrued prior to the disputed operation. She sought a new trial, which was denied, and then filed an appeal based in part upon the judge's instruction to the jury.

Hanson won in the Court of Appeals. That court applied caselaw¹ from a case with a very similar set of facts and concluded that, if an accident victim exercises good faith and due care in selecting a physician, but receives improper medical treatment, the defendant insurer is liable for the full amount of damages that result from the treatment. The Court of Appeals further concluded that Hanson deserved a new trial, because the trial court erroneously instructed the jury to ignore the malpractice issue after the expert witness had testified that performing unnecessary surgery might constitute malpractice.

Now, American Family has come to the Supreme Court, where it argues that the Court of Appeals' ruling, if allowed to stand, will encourage plaintiffs to turn personal injury cases into medical malpractice matters in order to secure coverage for medical procedures that are unrelated to the original incident.

¹ Fouse v. Persons, 80 Wis. 2d 390, 259 N.W.2d 92 (1977)