COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1993 **Cir. Ct. No. 2013CV212**

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

RITA R. HELGERSON,

PLAINTIFF-APPELLANT,

V.

WAL-MART STORES, INC., KELLY HAUGE D/B/A KELLY HAUGE EXCAVATING AND ACUITY, A MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

UNITED STATES CENTERS FOR MEDICARE & MEDICAID SERVICES AND BLUE CROSS BLUE SHIELD OF WISCONSIN D/B/A ANTHEM BLUE CROSS AND BLUE SHIELD,

DEFENDANTS.

APPEAL from an order of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Rita Helgerson appeals a stipulated dismissal of her personal injury action. We affirm.

¶2 The jury awarded Helgerson $30,000 for future medical and health care expenses. In response to a defense motion after verdict, the circuit court reduced that award to $0 on the ground that the evidence failed to establish to a reasonable certainty that future surgery would occur. After that decision, the parties entered a stipulation stating that the defendants had paid the remaining damages, and that the parties were agreeing to dismiss the case, "subject only to the plaintiff's right to appeal from the Dismissal Order and the court's Order on Motions After Verdict." The court signed that dismissal order, from which Helgerson appeals.

¶3 The legal test on a motion to change a verdict answer is that the motion may be granted only if, "considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party." WIS. STAT. § 805.14(1), (5)(c) (2013-14).[1]

¶4 As to future medical expenses, the jury was instructed with a version of WIS JI—CIVIL 1758:

> If you are satisfied that the plaintiff will require health care services in the future for injuries sustained as a result of the fall, you will insert as your answer to this subdivision the sum of money you find will reasonably and necessarily be incurred in the future to care for the plaintiff.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶5 The circuit court reduced the verdict because it concluded that the surgery on which the $30,000 award for future expenses was based was not reasonably certain to occur. Helgerson testified during the trial that she did not have plans for future treatment other than with a chiropractor.

¶6 On appeal, both sides rely partly on what they assert case law does or does not require, as a general matter, to prove future medical expenses. Such law might be relevant if the parties were disputing whether the jury was properly instructed on the law regarding damages. But neither party explains why this case law is relevant to the issue now before us, which is whether the evidence was sufficient to support the $30,000 damages award in light of the instructions actually given.

¶7 To the extent the case law the parties discuss includes legal concepts that were not provided to the jury in the form of jury instructions, we decline to consider them. If we were to consider such case law now we would, in effect, be modifying the apparently unobjected-to instructions and then speculating about the damages answers the jury *could* have given if it had been instructed differently. Therefore, we confine ourselves to measuring the sufficiency of the evidence in light of how a jury would reasonably understand the instructions that the jury received.

¶8 On appeal, Helgerson does not point to any evidence that the future surgery was likely to occur. Instead, she describes only evidence showing that the surgery was a medically reasonable option that was available to her. We conclude that this was not sufficient to meet the test provided in the instructions actually given.

¶9 The instructions required Helgerson to prove that she "*will* require health care services in the future" and to prove the sum that "*will* reasonably and necessarily be incurred in the future" (emphasis added). A jury would understand the use of the word "will" as requiring the plaintiff to prove something more than the mere possibility of her using health care services in the future, and more than the mere possibility of paying for that health care.

¶10 For purposes of this opinion, we need not specify what level of certainty a jury would understand this language to require because Helgerson points to no evidence that suggests any more than the medical availability of, and possibility of, this surgery. She cites no evidence that the surgery is medically required for her well-being or that she wants or intends to have it. Therefore, the verdict answer on this question was properly changed to $0.

¶11 Helgerson may also be raising a second issue. She points out that during closing argument her attorney argued that, if the jury provided compensation for future surgery, the jury could award a lower amount for future pain and suffering. Helgerson argues that, because the jury gave compensation for the future surgery expenses, "it can be presumed this item of damages [negatively] influenced the pain and suffering damages."

¶12 However, Helgerson does not follow up by actually asking for any relief based on the possibility that her pain and suffering damages were negatively affected. Moreover, she does not explain how this argument relates to the relief she does seek, reversal of the circuit court's decision to reduce the future medical and health care award to $0. Helgerson may be suggesting that it was unjust for the circuit court to reduce the surgery award without also raising the pain and suffering award. However, if that is her argument, we have no basis in the record

to draw that conclusion or provide relief. The verdict form did not ask the jury to provide separate pain and suffering amounts, depending on whether she has the surgery. Therefore, the circuit court had no way of knowing whether the jury did, in fact, make the trade-off Helgerson describes or, if it did, what numerical adjustment the circuit court could have made to deal with the issue.

By the Court.—Order affirmed.

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