COURT OF APPEALS
DECISION
DATED AND FILED

February 27, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP658 **Cir. Ct. No. 2004CV7162**

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

ERIC T. GOLDEN,

PLAINTIFF-RESPONDENT,

V.

KATHLEEN MITCHELL AND WARNEL ROSS,

DEFENDANTS,

ALLSTATE INSURANCE COMPANY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 KESSLER, J. Allstate Insurance Company appeals from a jury verdict finding that Plaintiff Eric Golden was entitled to all of the medical

expenses he incurred after being injured in an automobile accident caused by Wardell Ross (improperly designated as "Warnel Ross" in the caption) while Ross was operating a vehicle owned by Kathleen Mitchell and insured by Allstate. Allstate claims that the trial court erred when it provided a supplemental instruction to the jury after the parties had completed their closing arguments and did not give the parties an opportunity to review the proposed instruction or to argue to the jury regarding the instruction before the jury deliberated. Because we conclude that the trial court was obligated to give the jury a supplemental instruction after it received the court of appeals' opinion reversing this trial court's ruling in an earlier case, which involved the same type of circumstances present in the instant case, and because we conclude that any error relating to inadequate opportunity for counsel to argue to the court or jury was harmless, we affirm.

BACKGROUND

¶2 On August 26, 2001, Ross, while operating a motor vehicle owned by Mitchell, collided with a vehicle being driven by Golden. Defendant Allstate is the insurer of Mitchell's automobile.

¶3 Golden was taken by ambulance to St. Michael's Hospital where he was treated in the emergency room for soft tissue injuries. Golden was released with instructions not to return to work until he had seen a doctor. Two days after the accident, Golden was seen by Dr. Raymond Janusz, a chiropractor. Golden testified that he was referred to Dr. Janusz by a family friend; Golden's medical records, maintained by Dr. Janusz, indicate that Golden was referred to Dr. Janusz by an attorney. Golden was treated by Dr. Janusz from August 28, 2001 through April 15, 2002.

¶4 The parties stipulated to Defendants' liability. Ross and Mitchell were dismissed from the present lawsuit prior to trial. A trial on damages only was conducted on November 7 and 8, 2005.

¶5 At trial, Golden claimed damages of $17,089.70 for past medical expenses, primarily resulting from his treatment by Dr. Janusz. Allstate's expert expressed the medical opinion that Dr. Janusz over-treated Golden and that only the emergency room treatment Golden received immediately after the accident on August 26, 2001, and chiropractic care received through November 2001, or a total of $8,430.00, were caused by the accident.

¶6 At the conclusion of the evidentiary portion of the trial, the trial court conducted an instruction and verdict conference. Prior to trial, Golden had not submitted any proposed jury instructions. Allstate submitted standard jury instructions describing the requirement that Plaintiff's treatment be reasonable and necessary to treat the injury caused by the Defendant's negligence. The trial court instructed the jury and the parties gave their closing arguments.

¶7 After Allstate had given its closing argument, but before Golden had given any rebuttal,[1] the trial court excused the jury. The court then brought to the parties' attention an unpublished decision by the court of appeals which the court had just received. The court of appeals decision reversed this court's decision in a case which the court considered closely analogous to the present case.

[1] Ultimately, Golden waived rebuttal. Neither party spoke to the jury after the trial court gave the supplemental instruction.

¶8 The decision the trial court reviewed during closing arguments was ***Hanson v. American Family Mutual Insurance Co.***, No. 2004AP2065, unpublished slip op. (WI App Nov. 8, 2005), *aff'd*, 2006 WI 97, 294 Wis. 2d 149, 716 N.W.2d 866 (***Hanson I***). The trial court informed the parties that it intended to give a supplemental instruction to the jury based upon its understanding of the ***Hanson I*** decision. Following the trial court's discussion of its proposed supplemental jury instruction, Golden moved for a directed verdict on medical expenses in the amount of $15,254.25 as charged by Dr. Janusz. The trial court reserved ruling on the motion. Allstate argued that its lack of ability to review the decision before the trial court gave the supplemental instruction to the jury was unfair and stated its objection to the proposed supplemental instruction as presented orally by the trial court to the parties. The trial court then re-called the jury and gave the following instruction:

> Ladies and gentlemen, I have to give you another instruction. As they say, it is hot off the press. As I am sitting up here reading the law, I came across a case, and I have to read the instruction. It happened to be one of my cases. And it's on the issue that we are involved with here.
>
> One of the issues in this case for you to decide is whether the medical procedure treatment used by his treating doctor related to the injuries he received in the accident. Were the injuries treated by his doctor a part of the original injuries, and thus, a natural consequence, a probable consequence of the defendant's negligence? And are these normal incident to medical care and necessitated by the defendant's negligence? If there is a causal connection between the accident and the treatment he received in his damages, you are to answer the question on damages for personal injuries. It should be the entire amount of the damages sustained, medical, and should not be decreased because the defendant's doctor, defense's doctor questioned the procedure used by the plaintiff's treating doctor. In other words, if a person goes to a doctor, if they follow the doctor, if the doctor is doing what's right or wrong, the plaintiff shouldn't suffer for that. And that seems to be the theory of defense – that the doctor shouldn't have done all these treatments. Somebody has to

> pay these bills I guess. Whether the doctor didn't do it, that's what the law says, okay. So that's my instruction to you now. And we will see what happens. All right. Five minutes, please.

¶9 The jury returned a verdict awarding $17,089.79 for past medical expenses; $6080 for past wage loss; and $4420 for past pain, suffering and disability. Allstate moved the trial court for a new trial pursuant to WIS. STAT. § 805.15 (2003-04).[2] After a hearing, the trial court denied the motion for a new trial. Allstate appealed. Additional facts will be provided as necessary.

DISCUSSION

¶10 In evaluating whether to grant a new trial pursuant to WIS. STAT. § 805.15,[3] we must determine first whether the trial court erred in instructing the

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

[3] WISCONSIN STAT. § 805.15 states, in pertinent part:

> **(1)** MOTION. A party may move to set aside a verdict and for a new trial because of errors in the trial, or because the verdict is contrary to law or to the weight of evidence, or because of excessive or inadequate damages, or because of newly-discovered evidence, or in the interest of justice…. Orders granting a new trial on grounds other than in the interest of justice, need not include a finding that granting a new trial is also in the interest of justice.
>
> ….
>
> **(5)** APPEAL. If the court denies a motion for judgment notwithstanding the verdict, or a motion to change answer and render judgment in accordance with the answer so changed, or a renewed motion for directed verdict, the party who prevailed on that motion may, as appellee, assert for the first time, grounds which entitle the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict or motion to change answer and render judgment in accordance with the answer so changed, or a renewed motion for directed verdict. If the

(continued)

jury, as claimed by Allstate, and if so, we must then determine if "the error has affected the substantial rights of the party." WIS. STAT. § 805.18(2);[4] ***Martindale v. Ripp***, 2001 WI 113, ¶31, 246 Wis. 2d 67, 629 N.W.2d 698. "For an error 'to affect the substantial rights' of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." ***Martindale***, 246 Wis. 2d 67, ¶32 (citations omitted). "A reasonable possibility of a different outcome is a possibility sufficient to 'undermine confidence in the outcome.'" ***Id.*** (quoting ***State v. Dyess***, 124 Wis. 2d 525, 544-45, 370 N.W.2d 22 (1985)). "Misleading instructions … which 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.

¶11 Allstate argues that the trial court's supplemental jury instruction, based upon its reading of ***Hanson I***, was erroneous because: (1) the procedure used by the trial court was fundamentally unfair in that the defense had no opportunity to meaningfully comment on or evaluate the instruction before it went to the jury; (2) the instruction was not an accurate summary of the law in that it

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> appellate court reverses the judgment, nothing in this section precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

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

> 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.

did not inform the jury that Golden needed to have used good faith and ordinary care in the selection of his health care provider; and (3) should the appellate court find that the trial court's jury instruction was an accurate summary of the law, this finding would "eliminate the longstanding legal requirement that a plaintiff must prove his treatment was necessitated by the accident and that the amount billed for that treatment was reasonable."

¶12 Golden argues that the trial court's jury instruction was consistent with over one hundred years of precedent, which was reaffirmed by the Wisconsin Supreme Court in its affirmance of the ***Hanson I*** court of appeals decision on which the trial court based its jury instruction in this case. *See* ***Hanson v. American Family Mut. Ins. Co.***, 2006 WI 97, 294 Wis. 2d 149, 716 N.W.2d 866 (***Hanson II***). Golden further argues that since both parties were affected equally by the timing of the instruction, and because the jury instruction was a supplemental instruction, to be used by the jury in conjunction with the rest of the instructions given, and because the ***Hanson I*** decision was simply a restatement of longstanding precedent, giving the jury instruction was not error. Finally, Golden argues that Allstate should be precluded from raising the issue of ordinary or due care in the selection of a physician in that it did not raise such an issue before the trial court.[5]

[5] In its reply brief, Allstate responds to this argument by claiming that it could not have raised in its post-verdict motions the failure of the trial court to include good faith and ordinary care in its jury instruction because that was not yet the law as the ***Hanson I*** decision upon which the trial court was relying was unpublished. Allstate misstates the effect of ***Hanson I***. The ***Hanson I*** appellate decision merely reaffirmed *existing legal precedent*. Accordingly, the trial court was merely using existing precedent in adding the supplemental jury instruction. Because the jury instruction was based upon existing precedent, Allstate could have argued this issue before the trial court. However, we elect to address this issue in our decision. *Cf.* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980) (appellate courts generally do not review issues raised for the first time on appeal).

¶13 In the court of appeals decision in ***Hanson I***, we cited the Wisconsin Supreme Court case of ***Fouse v. Persons***, 80 Wis. 2d 390, 259 N.W.2d 92 (1977), and the court of appeals decision in ***Lievrouw v. Roth***, 157 Wis. 2d 332, 459 N.W.2d 850 (Ct. App. 1990), for the rule of law that a plaintiff is entitled to all medical expenses related to the plaintiff's original injury, provided that the plaintiff exercised good faith and due care in selecting a treating physician. ***Hanson I***, No. 2004AP2065, unpublished slip op. ¶21. In ***Hanson I***, a plaintiff injured in a motor vehicle accident sued the tortfeasor and his insurer. ***Id.***, ¶4. The defendant's medical expert testified that a surgery recommended and performed by the plaintiff's physician was unnecessary to treat the injuries resulting from the accident, and further expressed the opinion that the physician's recommendation of surgery was possibly malpractice. ***Id.***, ¶¶6-7. The jury awarded medical expenses only up through the time that the alleged unnecessary surgery was performed. ***Id.***, ¶12. The trial court, the same trial court which presided over the present case, denied the plaintiff's motion to set aside the verdict, denying the plaintiff's contention that malpractice was present in the case, and plaintiff appealed. ***Id.***, ¶13.

¶14 The court of appeals held that the trial court should have found that malpractice was alleged in the defendant's case and should have instructed the jury on the law in ***Fouse*** and ***Lievrouw*** 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." ***Hanson I***, No. 2004AP2065, unpublished slip op. ¶17 (quoting ***Lievrouw***, 157 Wis. 2d at 358).

¶15 The Wisconsin Supreme Court, in ***Hanson II***, affirmed, noting that the rule set forth in ***Fouse*** and ***Lievrouw*** was first enunciated in ***Selleck v.***

Janesville, 100 Wis. 157, 163, 75 N.W. 975 (1898), and remains the law in Wisconsin. Consequently, the jury must be instructed on that law when allegations of improper medical treatment or malpractice are present in a personal injury case. ***Hanson II***, 294 Wis. 2d 149, ¶¶21-24.

A. Was the procedure fundamentally unfair?

¶16 Allstate argues that the procedure by which the trial court introduced and provided the supplemental jury instruction was fundamentally unfair. Allstate first argues that this is so because it never had an opportunity to review the ***Hanson I*** decision prior to the supplemental instruction based upon it being given to the jury, and because the jury instruction was given after the defense had completed its closing argument. Allstate goes on to argue that the trial court's procedure was fundamentally unfair because (1) the timing of the instruction unfairly prejudiced Allstate and assisted Golden; (2) the jury instruction did not accurately state the law; and (3) the wording of the instruction was inflammatory.

¶17 Golden argues that there was no prejudice to the defendant because the parties were treated equally, *i.e.*, neither had an opportunity to read the ***Hanson I*** decision or the supplemental jury instruction before the trial court instructed the jury.

1. Timing and opportunity to be heard

¶18 In this case, the trial court received in the mail, which it read during closing arguments, a decision, *i.e.*, ***Hanson I***, in which the court recognized a strikingly similar fact pattern to that currently before it. While the timing was unfortunate, the trial court correctly concluded that it was required to apply the law described in ***Fouse*** and ***Lievrouw*** under the facts in the present case. The

court discussed its conclusion with all parties prior to instructing the jury on the law. Rather than submit the case to the jury with the already given, but inadequate, instructions, and believing that not giving the supplemental instruction would most likely cause the jury verdict to be reversed on appeal, the trial court excused the jury. After the court described the decision, Plaintiff's attorney moved for an award, as a matter of law, of all damages relating to the medical services provided by the chiropractor. The court reserved ruling on the motion. Defendant's counsel argued for an opportunity to review the case, which the court denied. Defendant's counsel then lodged an objection to *any* subsequent instructions to the jury. The court then re-called the jury and gave a supplemental instruction based upon the precedent described in the court of appeals decision it had just read, which reiterated settled law dating from 1898, and summarized in the ***Fouse*** (1977) and ***Lievrouw*** (1990) decisions. In the unusual circumstances here, we conclude that the trial court's conduct was not fundamentally unfair.[6]

2. Summary of the law

¶19 Allstate argues that the court's instruction to the jury was an inaccurate summary of the law because it did not also instruct[7] that the plaintiff is entitled to all medical expenses incurred *only if the plaintiff exercised good faith and due or ordinary care in choosing the treating doctor*. Golden responds that this was a *supplemental* instruction and, therefore, the jury was to consider it in

[6] While we conclude in this case that the trial court did not err in giving the instruction to the jury, it would be appropriate in the future for a trial court to provide all parties with an opportunity to discuss the language of an instruction, even a supplemental instruction, before it is given to the jury.

[7] The court had already instructed, both initially and in the supplemental instruction, that the jury must find that all injury was caused by the defendant's negligence.

addition to all of the other instructions, which required the jury to "find the damages suffered … to have a causal relationship arising from the accident." Further, Golden argues that the supplemental instruction correctly stated the law.

¶20 "The trial court has broad discretion when instructing a jury." ***Fischer v. Ganju***, 168 Wis. 2d 834, 849, 485 N.W.2d 10 (1992). We will not reverse a trial court's decision to give an instruction absent an erroneous exercise of discretion. ***Arents v. ANR Pipeline Co.***, 2005 WI App 61, ¶42, 281 Wis. 2d 173, 696 N.W.2d 194 (citation omitted). "We affirm the [trial] court's choice of jury instructions if the instructions accurately state the law and comport with the facts of record." ***K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc.***, 2006 WI App 148, ¶33, ___ Wis. 2d ___, 720 N.W.2d 507. However, "[e]ven if we conclude that an instruction is in error, we do not reverse for a new trial unless the error was prejudicial." ***Id.*** "'An error is prejudicial if it probably and not merely possibly misled the jury. If the overall meaning communicated by the instructions was a correct statement of the law, no grounds for reversal exist.'" ***Id.*** (quoting ***Fischer***, 168 Wis. 2d at 849-50 (citations omitted)).

¶21 In determining whether an error in instructions is prejudicial, "[w]e must examine the instructions given in their totality and determine whether these instructions sufficiently advised the jury as to the proper legal principles they were to apply to the facts of this case." ***Anderson v. Alfa-Laval Agri, Inc.***, 209 Wis. 2d 337, 347, 564 N.W.2d 788 (Ct. App. 1997). In so doing, we must examine whether the jury had sufficient evidence before it to support its award of damages. ***Id.*** at 348.

¶22 The Wisconsin Supreme Court, in its affirmance of ***Hanson I***, held that legal precedent, beginning with ***Selleck***, decided in 1898, and through its

reaffirmance in ***Fouse*** in 1977 and ***Lievrouw*** in 1990, established that when expert testimony is presented which may leave the impression that a treating doctor may have committed malpractice (such as over-treating an injury or ordering unnecessary tests as was alleged in this case), the jury should be instructed that this "alleged malpractice" should not be considered by the jury as allowing it to reduce the amount of medical expenses it awards to the plaintiff. ***Hanson II***, 294 Wis. 2d 149, ¶¶37-39. The court explained it is 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.***, ¶34 (quoting ***Lievrouw***, 157 Wis. 2d at 358).

¶23 The trial court realized, after reading our decision in ***Hanson I***, that on the evidence presented during the trial in which it was presently presiding, a supplemental jury instruction was necessary, based upon longstanding precedent as set forth in ***Selleck***, ***Fouse*** and ***Lievrouw***. The court, acting on this realization, excused the jury after the defense's closing argument in order to notify the parties of this need for a supplemental instruction and of the fact that it intended to give a jury instruction based upon the ***Hanson I*** decision. The court correctly set forth what precedent required and gave counsel an opportunity to be heard regarding the law as the court presented it to the parties in its discussion. The trial court then recalled the jury and gave the supplemental instruction. Unfortunately, the trial court did not include in its instruction the language requiring that a jury must find that a plaintiff used good faith and ordinary care in selecting his or her health care provider. This was an error. Accordingly, we must determine whether the error probably misled the jury and was, therefore, prejudicial, entitling Allstate to a new trial.

¶24 In Wisconsin, appellate courts "will sustain a jury verdict if there is any credible evidence to support it." ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659. If, under any reasonable view, credible evidence exists which supports the jury's finding, we will not overturn the finding. ***Id.***

> In applying this narrow standard of review, this court considers the evidence in a light most favorable to the jury's determination. We do so because it is the role of the jury, not an appellate court, to balance the credibility of witnesses and the weight given to the testimony of those witnesses. To that end, appellate courts search the record for credible evidence that sustains the jury's verdict, not for evidence to support a verdict that the jury could have reached but did not. If we find that there is "any credible evidence in the record on which the jury could have based its decision," we will affirm that verdict.… This court will uphold the jury verdict "even though [the evidence] be contradicted and the contradictory evidence be stronger and more convincing."

Id., ¶39 (citations omitted). This standard of review is even more stringent when the trial court has approved the jury verdict. ***Id.***, ¶40. If the jury had sufficient evidence before it to conclude, on the basis of the totality of the instructions provided to it by the trial court, that all the medical expenses Golden incurred were as a consequence of his injury caused by Ross, then we cannot conclude that a different result is probable if the trial court had included the missed language. *See* ***Anderson***, 209 Wis. 2d at 348.

¶25 Here, the jury heard Golden testify that he had selected a chiropractor who was recommended by a family friend and whose office was located only a few miles from his residence. The jury also heard that the medical

record maintained by the chiropractor noted that the referral came from an attorney.[8]

¶26 In addition to the supplemental instruction given by the trial court, the court also instructed the jury regarding: (1) arguments and objections of counsel, WIS JI—CIVIL 110 and 115; (2) the need to treat defendant as if had no insurance, WIS JI—CIVIL 125; (3) ignoring the demeanor of the judge, WIS JI—CIVIL 120; (4) expert testimony, WIS JI—CIVIL 260; (5) credibility of the witnesses and weight of the evidence, WIS JI—CIVIL 215; (6) burden of proof, WIS JI—CIVIL 202; (7) personal injury damages, WIS JI—CIVIL 1756, 1760, 1766; (8) special verdict questions, WIS JI—CIVIL 145; and (9) five-sixths verdict, WIS JI—CIVIL 180. The record supports a jury finding that Golden used good faith and ordinary care in selecting a health care provider because the jury could find that he went to a chiropractor recommended by either a family friend or by his previous attorney, and the chiropractor's office was located conveniently to Golden's residence. It does not appear to be disputed that Golden followed the course of treatment recommended by his chiropractor. Allstate does not dispute that the treatment occurred, but based its defense on the claim that the treatment was not necessary to the injury sustained in the accident. Because, based on this record, the jury could have found the facts required by ***Selleck*** and its progeny, the jury award of all his medical expenses must be sustained.

[8] Allstate appears to suggest that an attorney referral of a client to a physician is evidence of bad faith on the part of the client who follows his or her attorney's advice. A finding of lack of good faith based upon nothing more than a client selecting a physician because of a referral from the client's attorney would be such a blanket indictment of the entire legal profession as to be of questionable sustainability.

¶27 The jury was also specifically instructed that it should award only "the sum of money you find has reasonably and necessarily been incurred from the date of the accident up to this time for the care and treatment of the injuries sustained by [Golden] *as a result of the accident*." WIS JI—CIVIL 1756 (emphasis added). Allstate argued vigorously throughout the trial and in closing argument that much of the treatment Golden received was not for injuries sustained in this accident. Thus the jury could have found (but did not) that some or all of the treatment Golden received was not caused by the injury he sustained in the accident, but was caused instead by his employment or his being overweight, as Allstate argued. Under all of the instructions given by the trial court, the jury could have determined that some of the treatment was not for injury caused by the accident, therefore we must uphold the jury verdict. *See* ***Morden***, 235 Wis. 2d 325, ¶¶38-39; ***Anderson***, 209 Wis. 2d at 347-48.

3. Inflammatory language

¶28 Allstate argues that the trial court's use of the language "hot off the press" and "if the doctor is doing what's right or wrong, the plaintiff shouldn't suffer for that. And that seems to be the theory of defense – that the doctor shouldn't have done all these treatments. Somebody has to pay these bills I guess," was inflammatory. Further, Allstate claims that the trial court's reference to the need for a new instruction based upon a decision by the court of appeals relating to an earlier case before the same judge, "unduly emphasized" the instruction in the minds of the jury, thereby substantially affecting Allstate's rights.

¶29 As noted above, while the timing of the instruction was unfortunate, once the court became aware of an applicable legal analysis, *not* instructing the

jury consistent with ***Hanson I*** would have been improper. The trial court properly explained to the jury why the jury was receiving the supplemental instruction. The court's use of colloquial phrases in explaining the circumstances hardly rises to the level of unfair prejudice or inflaming the passions of the jurors. Essentially, the court told the jury that it was receiving the instruction because the need for the instruction was not apparent to the court or the parties when the rest of the instructions were given. Nothing in the language of the supplemental instruction suggests that the jury should ignore the other instructions it was given. Nothing in the supplemental instruction told the jury that it should award medical expenses for treatment if the treatment was not causally related to the injury Golden suffered in the accident. Contrary to Allstate's assertions, the court correctly stated:

> One of the issues in this case for you to decide is whether the medical procedure treatment used by his treating doctor related to the injuries he received in the accident. Were the injuries treated by his doctor a part of the original injuries, and thus, a natural consequence, a probable consequence of the defendant's negligence? And are these normal incident to medical care and necessitated by the defendant's negligence? If there is a causal connection between the accident and the treatment he received in his damages, you are to answer the question on damages for personal injuries.

Nothing in the instruction precluded the jury from evaluating the evidence and determining whether any treatment was because of an injury Golden suffered in his employment or because he was overweight, instead of being a result of the accident.

B. Allowing this decision to stand will have "far-reaching detrimental consequences"

¶30 Allstate argues that "far-reaching detrimental consequences" will result if the law which began in 1898 in this state (***Selleck***) and was reaffirmed in

1977 (***Fouse***) and 1990 (***Lievrouw***) continues to be applied in this case. We disagree. ***Selleck*** and its progeny are longstanding precedent in Wisconsin. The trial court's decision to apply the law as set forth in ***Selleck***, ***Fouse*** and ***Lievrouw*** merely continues the legal *status quo* in personal injury actions where there are allegations by the tortfeasor of unnecessary treatment or malpractice against health care providers.

C. Is a new trial necessary?

¶31 Finally, Allstate argues that the combination of the timing of the instruction and the omission of an instruction specifically requiring good faith and ordinary care in selecting a health care provider contributed to the outcome of the trial, to the detriment of Allstate.

¶32 Golden responds that even if the jury instruction misstated the law, it was harmless error. The jury could have reasonably found on the evidence before it both that the Plaintiff used good faith and ordinary care in selecting his chiropractor, and all of the treatment was for the injury Golden received in the accident. Consequently, no substantial rights of Allstate were affected, and no new trial is appropriate.

¶33 As noted above, in determining whether to grant a new trial under WIS. STAT. § 805.15, an appellate court must first determine whether the trial court erred when it instructed the jury and if so, whether "the error affected the substantial rights of the party," such that there is a possibility "sufficient to undermine confidence in the outcome" of the trial. ***Martindale***, 246 Wis. 2d 67, ¶¶31-32 (citation omitted). As we have previously noted, the trial court did not specifically instruct the jury that Plaintiff must act in good faith and with ordinary care when he selected his health care providers in order to require the tortfeasor to

pay all medical expenses associated with that care, even if the jury found that some treatment was not required by the injury. As we explained above, this error was harmless because the totality of the instructions given to the jury, as well as the record in this case—including both Golden's testimony and the medical records[9]—establish that the jury could have awarded all of Golden's medical expenses because the jury could have found they were all related to the injury he sustained in the accident. The jury was not required to believe Allstate's medical expert. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990) (the question of witness credibility is for the jury). Accordingly, we affirm the trial court's denial of Allstate's motion for a new trial.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[9] Dr. Janusz's records contained different referral information than Golden's testimony. The jury is the sole arbiter of credibility and conflicting testimony. ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990).

¶34 FINE, J. (*dissenting*). There are two issues presented by this appeal: (1) assuming chiropractic malpractice, is the defendant responsible for damages that the alleged malpractice caused the plaintiff, and, if so, (2) does that liability encompass chiropractic bills that are not reasonable? I agree with the Majority that under ***Hanson v. American Family Mutual Insurance Co.***, 2006 WI 97, ¶¶20–30, 294 Wis. 2d 149, ___, 716 N.W.2d 866, 871–874, the answer to the first question is "yes."

¶35 Neither ***Hanson*** nor common sense, however, says that a defendant must pay bills submitted by a physician or a chiropractor that are not reasonable. As we have recently recognized:

> "The general rule is that a plaintiff who has been injured by the tortious conduct of the defendant is entitled to recover the reasonable value of medical and nursing services reasonably required by the injury. This is a recovery for their value and not for the expenditures actually made or obligations incurred."

Leitinger v. Van Buren Mgmt., Inc., 2006 WI App 146, ¶12, ___ Wis. 2d ___, ___, 720 N.W.2d 152, 156 (quoted source omitted), *review granted*, 2006 WI 126, ___ Wis. 2d ___, 724 N.W.2d 202 (No. 2005AP2030). Although, as the Majority points out, the trial court here initially told the jury that it should only award "money you find has reasonably and necessarily been incurred … by [Golden] as a result of the accident," Majority, ¶27, that instruction was nullified and superseded by the trial court's supplemental instruction, which told the jury that, in effect, "[s]omebody has to pay these bills I guess," whether they were reasonable or not, Majority, ¶8. Further, the trial court did not permit the defendants to argue that the

bills, although incurred, were not reasonable (which is an issue different than whether the services reflected by those bills were necessary).

¶36 Under the Majority's holding, if Janusz had submitted bills seeking payment of one-million dollars (or more), the defendants would have to pay those bills without being able to have a jury first assess whether those bills were reasonable. Accordingly, I respectfully dissent and would remand for a new trial, limited to whether Janusz's bills were reasonable charges for what he did.