COURT OF APPEALS
DECISION
DATED AND FILED

January 19, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP304 **Cir. Ct. No. 2008CV302**

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

CONNIE L. SCHWIBINGER,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

CARL SCHWIBINGER,

PLAINTIFF,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, AETNA US HEALTHCARE AND UNITED HEALTHCARE INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFFS,

V.

STATE FARM MUTUAL AUTOMOBILE INSURANCE, CHRISTOPHER S. KAMIN AND ABC 1-5 INSURANCE COMPANIES, AS-OF-YET UNIDENTIFIED INSURANCE CORPORATIONS,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. A jury found that Christopher Kamin's negligence caused Connie Schwibinger's injuries and that $71,000 would fairly compensate her. Schwibinger contends the trial court's denial of her motion to amend the scheduling order precluded her from fully presenting her case and that, under ***Hanson v. American Family Mutual Insurance Company***, 2006 WI 97, 294 Wis. 2d 149, 716 N.W.2d 866, she was entitled as a matter of law to a directed verdict for the full extent of her damages. Kamin and State Farm Mutual Automobile Insurance Company (collectively, "Kamin") cross-appeal from the order denying Kamin's motions after verdict regarding the sufficiency of the evidence supporting Schwibinger's claimed losses. We affirm the judgment and order in all respects.

¶2 In April 2005, Schwibinger suffered whiplash in a motor vehicle accident caused when Kamin ran a red light. Liability was stipulated. Schwibinger first sought medical attention five days later. She exhibited normal range of motion, reported no significant pain and declined x-rays. Five weeks later, she saw chiropractor Dr. Daniel Francis for complaints of neck pain and continued treating with him for the next fifty-four months. She also saw physiatrist Dr. Steven Santino for several months, an orthopedic surgeon, a general practitioner and a radiologist. Only Drs. Francis and Santino testified at trial.

¶3 At the time of the accident, Schwibinger was employed as an assembler at the Kohler Company where she had worked for about sixteen years.

Kohler required its employees to work overtime whenever the need existed, which frequently was the case. Her doctors periodically ordered work restrictions and, due to the overtime policy combined with the ordered limitations, she did not work for much of 2007. In April 2008, Dr. Santino okayed her return to work without any restrictions. Dr. Francis approved eight-hour days, five days a week but with no overtime. Kohler accommodated the various restrictions until June 27, 2009 when Schwibinger was permanently laid off through a mutually signed separation agreement. The three-day trial was scheduled to begin on August 25.

¶4 Schwibinger then sought to add a claim for future loss of earning capacity but she had not named a vocational expert on that claim. Since the deadline for designating experts, filing their reports and itemizing damages was long past, Schwibinger moved to amend the scheduling order to name additional witnesses and to adjourn the trial on grounds that her recent, unforeseeable termination provided good cause. Kamin opposed the motion, arguing that Schwibinger should have anticipated the possibility of a layoff due to her ongoing work restrictions. He also filed a motion in limine to completely strike her claim for future loss of earning capacity.

¶5 The court requested evidence from Kohler explaining the reason for Schwibinger's separation from the company. Schwibinger filed an affidavit from Kohler attorney John Pawley. The affidavit stated that Schwibinger had been "permanently laid off from Kohler" on June 27, 2009 and that:

> 4. Ms. Schwibinger could not have been involuntarily laid off at that time due to lack of work because she had enough seniority to remain working.
>
> 5. Ms. Schwibinger's work restrictions impeded her ability to complete all aspects of her job.

> 6. Ms. Schwibinger was not released to return to work without restrictions.
>
> 7. Therefore, a Separation Agreement was drafted and executed.

¶6 The court concluded that Pawley's somewhat "equivocal" affidavit was insufficient to determine that Schwibinger's job loss resulted from her inability to perform her particular job duties. Concluding that Schwibinger could not present a claim for future loss of earning capacity without the requisite foundation and a vocational expert, the court denied her motion and granted Kamin's motion in limine to bar any claim for future loss of earning capacity. The court denied Schwibinger's motion to reconsider.

¶7 At trial, Dr. Francis testified at length about his chiropractic treatments, that in June 2006 he expected Schwibinger would reach one-hundred-percent healing by the end of July and that she was under no work restrictions whatsoever until April of 2007. Dr. Santino testified by video deposition that he first saw Schwibinger in October 2007, providing acupuncture, Lidoderm patches, a TENS unit, biofeedback and herbal anti-inflammatory preparations for her subjective complaints of neck pain. He testified that an April 2008 MRI showed only arthritic changes consistent with aging so he approved her return to work with no restrictions, which made Schwibinger upset. Dr. Santino advised her to have a functional capacity evaluation which would provide objective evidence of what she was or was not physically capable of doing. Schwibinger did not pursue that recommendation. Dr. Santino last saw Schwibinger in July 2008.

¶8 Schwibinger presented claims for past and future medical expenses; past and future pain, suffering, disability and loss of enjoyment of life; and past wage loss. Her claim for $25,569.96 in past medical expenses was supported by

the testimony of Drs. Francis and Santino. The parties stipulated pretrial to the reasonableness, but not the necessity, of the charges. Kamin's expert, chiropractor Dr. Gregory Whitcomb, opined that Schwibinger's subjective reports of pain were uncorroborated by objective evidence of injury and did not support the necessity of Dr. Francis' "substantially excessive" treatments.

¶9 At the close of evidence, the court denied Schwibinger's request to give a modified version of WIS JI—CIVIL 1710, "Aggravation of Injury Because of Medical Negligence." She argued that, under ***Hanson***, she was entitled to recoup from Kamin all of her expenses regardless of their necessity because they arose from her treatment for the injury and she used ordinary care in selecting her doctors. *See* ***Hanson***, 294 Wis. 2d 149, ¶3. The court declined to give the instruction, reasoning that ***Hanson*** seems to apply only where malpractice on the part of the treating doctor is alleged, and it found no such issue raised here.

¶10 The jury determined that Kamin's negligence was a cause of Schwibinger's injuries and awarded $20,000 for past medical expenses; $10,000 for past pain and suffering; $35,000 for past loss of earning capacity; $1000 for future medical expenses; and $5000 for future pain and suffering. She had sought $25,569.96 in past medical expenses and $69,791.61 in past lost wages.

¶11 Postverdict, Schwibinger moved for additur, arguing that the verdict was inadequate as a matter of law. She contended that because her doctors' testimonies established that all treatment and work restrictions were related to the accident, the jury's verdict for special damages should be directed for the full amount of damages claimed. Kamin moved for remittitur, on grounds that the past medical expenses and past loss of earning capacity awards the jury made were

unsupported by any credible evidence. The court denied both motions. Schwibinger appeals and Kamin cross-appeals.

APPEAL

¶12 Schwibinger first contends the trial court's denial of her motion to amend the scheduling order to add a vocational expert and its refusal to allow any claim for future loss of earning capacity was an erroneous exercise of its discretion because the action prevented a fair presentation of her case. *See* ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 162 Wis. 2d 296, 310, 470 N.W.2d 873 (1991). A trial court has broad discretion in deciding how to respond to untimely motions to amend scheduling orders because that broad discretion is essential to the court's ability to manage its calendar. ***Teff v. Unity Health Plans Ins. Corp.***, 2003 WI App 115, ¶29, 265 Wis. 2d 703, 666 N.W.2d 38.

¶13 Schwibinger contended it was necessary to amend the scheduling order because she had no claim before becoming unemployed and in order to properly support her claim an expert would be required as well as a functional capacity evaluation. The trial court's refusal to grant Schwibinger's motion so close to trial was well within its discretion. The trial court was not swayed by Schwibinger's late-stage desire for a functional capacity evaluation when she declined that advice from Dr. Santino, her own doctor, over a year earlier.

¶14 The court also was not persuaded as to the reason for her recent unemployment. As early as July 2007, Dr. Francis took Schwibinger fully off work as "totally incapacitated." In January 2008, Schwibinger wrote a letter to Mary Dekker, Kohler's medical claims coordinator, stating that she was "led to

believe by [Dekker's] conversation that my time at Kohler is limited."[1] At her deposition, Schwibinger acknowledged that in January 2009 she was "concerned" that she might not be continuing long-term in her employment at Kohler, and testified that by February 2009 she was "very concerned" and discussed her possible options with the union. She clearly might have anticipated a possible future loss of earning claim before she actually lost her job.

¶15 Furthermore, before making its decision on amending the scheduling order, the court required Schwibinger to provide verification from Kohler of the reason for her layoff. Schwibinger submitted the Pawley affidavit. The affidavit did not clarify, however, that her layoff was due to her injuries because the reference to a "Separation Agreement" hinted at a negotiated parting. The latter scenario was further suggested in a June 15, 2009 document that references Schwibinger's "request for a permanent voluntary lay-off." Despite the parties' acknowledgement that a Separation Agreement was executed, and the trial court's stated interest in seeing it, it was never provided to the court. For all of the above reasons, we conclude that the court's decision fell within the boundaries of its broad authority to manage its calendar.

¶16 Schwibinger next contends that the jury's awards for past medical expenses and past loss of earning capacity were arbitrary and completely unsupported by any evidence presented at trial such that the trial court erroneously denied her motion for additur.

[1] Schwibinger testified at her deposition that her husband actually wrote the letter but it was sent under Schwibinger's signature.

¶17 In reviewing a jury award, we may not substitute our judgment for the jury's; rather, we determine whether the award is within reasonable limits. ***Brain v. Mann***, 129 Wis. 2d 447, 455, 385 N.W.2d 227 (Ct. App. 1986). If there is any credible evidence which under any reasonable view supports the award, we will not disturb the finding unless it is so unreasonably low that it shocks the judicial conscience. ***Id.*** When the verdict has the approval of the trial court, we will set aside the verdict only for an evident misuse of discretion. *See* ***id.***

¶18 Schwibinger contends that the jury award should have been $25,569.96 for medical expenses and $69,791.61 for past loss of earning capacity. She argues that, regardless of Dr. Whitcomb's opinion that Dr. Francis' chiropractic treatment was "substantially excessive," Kamin is liable for all of her damages, including amounts for unnecessary treatment and any resulting damages because when a tortfeasor causes injury to a person who, after exercising ordinary care in selecting a doctor, undergoes unnecessary medical treatment for those injuries, the tortfeasor is responsible for all of that person's damages arising from any mistaken or unnecessary treatment. *See* ***Hanson***, 294 Wis. 2d 149, ¶20.

¶19 We decline to address this issue within the framework of ***Hanson***. Schwibinger herself testified at trial that she had a fractured clavicle, bilateral carpal tunnel syndrome and a multi-year history of "headache syndrome" that predated the 2005 accident. The three doctors besides her chiropractor and physiatrist did not testify as to the necessity of the treatment they rendered. By awarding Schwibinger $20,000 out of the approximately $25,000 she sought for medical expenses, the jury awarded her a recovery for what it reasonably could infer were damages caused by the negligence of Kamin.

¶20 We likewise decline to consider Schwibinger's past wage loss claim under ***Hanson***. Her past loss of earning capacity has nothing to do with whether her treatment was necessary. Furthermore, the jury was asked to consider her past loss of earning capacity, not loss of wages. Schwibinger's loss of earning capacity resulted from work restrictions that, for the most part, kept her from working overtime, not from working entirely. Kamin presented evidence that her loss of earning capacity—the overtime from which she was restricted—was, at most, about $15,000. By contrast, the nearly $70,000 she sought represented lost wages—pay for the time she did not work, despite being cleared to. The jury awarded her $35,000. It was a matter for the jury to decide.

CROSS-APPEAL

¶21 Kamin argued on motions after verdict that the evidence was insufficient to support the jury awards for past medical and chiropractic expenses and the loss of earning capacity. The trial court disagreed, as do we.

¶22 A motion challenging the sufficiency of the evidence as a matter of law shall not be granted "unless the court is satisfied that, 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) (2007-08). We apply this same test upon review, ***American Family Mutual Insurance Co. v. Dobrzynski***, 88 Wis. 2d 617, 624, 277 N.W.2d 749 (1979), and overturn the trial court's decision only if it is "clearly wrong," ***Haase v. Badger Mining Corp.***, 2004 WI 97, ¶17, 274 Wis. 2d 143, 682 N.W.2d 389.

¶23 The parties stipulated to the reasonableness of the medical and chiropractic charges but not to their necessity. Medical records and bills and the

reports of Drs. Francis and Santino were entered into evidence. Dr. Francis testified at length that the care he rendered and restrictions he ordered were related to Schwibinger's 2005 accident. Similarly, Dr. Santino testified that his treatment was necessary and related to her injuries from the accident. There is credible evidence in the record to support the jury's award of past medical expenses.

¶24 Kamin next asserts that, while there exists credible evidence to support some award for past loss of earning capacity damages, there exists none to support the $35,000 award the jury did make. Kamin argues that Schwibinger was restricted, for the most part, only from working overtime and should not be compensated for wages she missed while staying off work altogether.

¶25 Damages for impaired earning capacity generally are arrived at by comparing what the injured party was capable of earning before and after the injury. ***Klink v. Cappelli***, 179 Wis. 2d 624, 630, 508 N.W.2d 435 (Ct. App. 1993). The trial court found that Kohler required employees to work overtime, which Schwibinger's restrictions precluded her from doing, such that the only reasonable inference the jury could draw was that she could not work as before due to the accident. The jury evidently believed that Schwibinger was entitled to something more than pay only for the overtime from which she was restricted but something less than the significant amount of time that she did not work. This determination takes into account the evidence presented of Kohler's work requirements, the doctors' restrictions and Dr. Whitcomb's opinion that her course of treatment was excessive. The trial court's decision is not "clearly wrong."

¶26 No costs to either party.

By the Court.—Judgment and order affirmed.

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