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Wisconsin Supreme Court Rules Plaintiffs Entitled to Receive "Phantom Damages"

by Andrew C. Cook

In a recent decision, the Wisconsin Supreme Court has added to the growing list of cases that allow plaintiffs to recover "phantom damages" in personal injury actions for past medical expenses that were written off by the medical provider and never paid by the plaintiff or his or her insurer.

In a unanimous decision, *Orlowski v. State Farm Mutual Auto. Ins. Co.*[1] held that the collateral source rule precludes the defendant from introducing evidence of the amount actually paid for medical services in cases involving an underinsured motorist claim.

Based on the *Orlowski* decision, and the previous line of Wisconsin Supreme Court cases, plaintiffs in personal injury cases are entitled to the full amount of past medical expenses—even those amounts that were written off by the medical provider as a result of contractual agreements between medical providers and health insurers. These damages are often referred to by courts as "phantom damages"[2] because no one ever paid the medical expenses, yet the plaintiff receives the full price billed by the medical provider.

Typically, a plaintiff's health insurer has negotiated rates with the health care provider. The health care provider submits a bill for the full price, but due to these reduced contractual rates, the health insurer pays less than the full price originally billed by the medical provider. However, as the court held in *Orlowski*, the defendant must pay the full sticker price even though it was not the amount actually paid to the medical provider.

Part I begins with a discussion of previous Wisconsin Supreme Court decisions applying the collateral source rule in personal injury cases where the plaintiff's medical expenses were written off by the medical provider. Part II concludes by discussing the Wisconsin Supreme Court's latest decision in *Orlowski*, which extends the collateral source rule to underinsured motorist claims.

I. Previous Wisconsin Supreme Court Decisions Establishing Phantom Damages

A. *Ellsworth v. Schelbrock* (2000)—Medical Assistance

The first of the cases allowing plaintiffs to recover the full amount of medical

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Arkansas Supreme Court Clarifies Standard for Awarding Punitive Damages

by William S.W. Chang

On December 8, 2011, the Supreme Court of Arkansas affirmed a jury's award of approximately $5.98 million in compensatory damages and $42 million in punitive damages against a developer of genetically modified rice found to have negligently allowed the rice to contaminate the national rice supply.[1] Specifically, the court held that (1) the statutory cap on punitive damages was unconstitutional under the state constitution, (2) the economic-loss doctrine did not bar the claims,

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2d 956, 959 (Fla. 2004); Haselden v. Davis, 353 S.C. 481, 487 (2003).

3 2000 WI 63.

4 *Id.* ¶ 7 (citing Am. Standard Ins. Co. v. Cleveland, 124 Wis. 2d 258, 264 (Ct. App. 1985)).

5 *Id.* ¶ 29 (quoting Hanif v. Hous. Auth. of Yolo County, 246 Cal. Rptr. 192, 195-96 (1988).

6 2001 WI 111.

7 *Id.* ¶ 31.

8 *Id.*

9 *Id.* ¶ 69.

10 2007 WI 84.

11 *Id.* ¶ 7.

12 *Id.* ¶ 96.

13 Orlowski v. State Farm Mut. Ins. Co., 2012 WI 21, ¶ 4.

14 *Id.* ¶ 18.

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(3) the trial court did not abuse its discretion by admitting expert testimony on future damages, and (4) the developer failed to preserve its argument that the punitive damages were grossly excessive.

FACTS

In the 1990s, Defendants-Appellants Bayer CropScience LP; Bayer CropScience Holding, Inc.; Bayer CropScience AG; Bayer AG; and Bayer BioScience NV (collectively "Bayer") or its corporate predecessors developed a strain of long-grain rice that was genetically modified to be resistant to a Bayer herbicide.[2] In August 2006, the U.S. Department of Agriculture discovered trace amounts of the genetically modified rice (LLRice 601) in the domestic long-grain rice supply and in a popular long-grain rice seed known as Cheniere.[3] The next year, the USDA discovered a second strain of the rice (LLRice 604) in another variety of long-grain rice known as Clearfield 131.[4] Neither the USDA nor any foreign government had authorized that genetically modified rice for human consumption.[5]

In response, the USDA immediately banned the use and sale of Cheniere and Clearfield 131 for the 2007-2008 crop year.[6] It also granted regulatory approval of LLRice 601 in November 2006.[7] But those steps were not enough to prevent importers of U.S. long-grain rice from imposing significant restrictions on or outright banning the importation of U.S. rice.[8] That resulted in a significant drop in U.S. rice exports from 2005 to 2008—a decline that significantly impacted domestic rice farmers who export over half of their long-grain rice.[9]

PROCEDURAL HISTORY

A group of rice farmers sued Bayer in the Arkansas Circuit Court in August 2006.[10] The farmers alleged that Bayer was negligent for not taking sufficient precautions to prevent its genetically modified rice from contaminating the domestic rice supply.[11] They also alleged that Bayer knew that U.S. rice farmers depended on exports for more than half of their crops and that any contamination by genetically modified rice would cause a sharp decline in international demand for U.S. rice.[12] The farmers alleged that Bayer recklessly and wantonly disregarded those natural and probable consequences.[13] Accordingly, they requested compensatory as well as punitive damages.[14]

This appeal concerned the circuit court's ruling on four motions. First, the circuit court denied Bayer's motion in limine to exclude the testimony of the rice farmers' damages expert.[15] Bayer argued that the expert's projection of future damages using past damages was speculative.[16]

Second, the court denied Bayer's motion for summary judgment, which sought to preclude recovery of economic loss in tort actions.[17] Under the economic-loss doctrine, a plaintiff cannot recover for purely economic loss absent personal injury or injury to his or her property.[18]

Third, the court granted the farmers' motion to declare that the statutory cap on punitive damages (Ark. Code Ann. § 16-55-208) is unconstitutional under article 4, section 2, and article 5, section 32 of the Arkansas Constitution.[19] Those provisions respectively set forth the state separation-of-powers doctrine and the ability of the state legislature to limit the amount that one can recover for injuries resulting in death or for injuries to person or property.[20]

Fourth, the court denied Bayer's motion for a directed verdict on punitive damages.[21] The court found sufficient evidence that Bayer knew or should have known the probable consequences of its conduct and Bayer maliciously or recklessly disregarded those consequences.[22]

The jury found that Bayer was negligent.[23] It awarded $5,975,605 in compensatory damages and $42 million in punitive damages.[24] Bayer timely filed motions for a judgment notwithstanding the verdict, a new trial, and a remittitur.[25] In its motion for a new trial and a remittitur, Bayer contended that the punitive-damages award was

unconstitutional under Arkansas law and the federal constitution.[26] Bayer also asked for reconsideration of the four rulings set forth above.[27] The court denied all of those motions.[28]

THE ARKANSAS SUPREME COURT'S DECISION

The Arkansas Supreme Court affirmed on direct appeal. The court first addressed the constitutionality of section 16-55-208—the statutory cap on punitive damages—under article 5, section 32 of the Arkansas Constitution.[29] That constitutional provision states, in relevant part, "The General Assembly shall have power to enact laws prescribing the amount of compensation to be paid by employers for injuries to or death of employees, and to whom said payment shall be made . . . . Provided that otherwise no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property . . . ."[30] According to Bayer, the prohibition on laws limiting the "amount to be recovered" applies only to compensatory (and not punitive) damages.[31]

The court rejected that interpretation, explaining that "[a]lthough compensatory and punitive damages serve differing purposes, an award of punitive damages is nonetheless an integral part of 'the amount recovered for injuries resulting in death or for injuries to persons or property.'"[32] In addition, the court reiterated that article 5, section 32 allows the state legislature to limit tort liability "*only* where there is an employment relationship between the parties."[33] Thus, the court held "that section 16-55-208 is unconstitutional under article 5, section 32 as it limits the amount of recovery outside the employment relationship."[34]

Next, the court addressed the economic-loss doctrine. The doctrine may bar certain tort claims in three general circumstances:

> (1) when the loss is the subject matter of a contract; (2) when there is a claim against a manufacturer of a defective product where the defect results in damage only to the product and not to the person or to other property; and (3) when the parties are contractual strangers and there is no accompanying claim for damages to a person or property.[35]

The doctrine does not, however, preclude recovery for economic losses when there is also injury to the plaintiff's person or property.[36] The court had not addressed whether the doctrine applies to negligence cases and did not do so in this case because it found evidence of physical harm to the rice farmers' lands, crops, and equipment.[37]

The court then evaluated the circuit court's ruling admitting the expert testimony on damages. The court applied the framework under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* ,[38] which the court had adopted in *Farm Bureau Mutual Insurance Co. of Arkansas v. Foote*.[39] The expert testimony at issue relied on past damages to project future damages—a methodology that Bayer argued was too speculative.[40]

The court rejected that argument, explaining that damages need not "be determined with exactness" when "the cause and existence of damages have been established by the evidence."[41] Moreover, the court underscored that Bayer did not contend that the expert's methods "are unreliable."[42] Thus, "Bayer's criticisms go to the weight but not to the admissibility of [the] opinions."[43]

Bayer's arguments regarding punitive damages were also unavailing. First, quoting *National By-Products, Inc. v. Searcy House Moving Co.*,[44] Bayer argued that punitive damages are available only when the defendant acts "with absence of *all* care."[45] In Bayer's view, it exercised as least some care in handling the genetically modified rice—e.g., it instructed those handling the rice about containment measures.[46] The court rejected the notion that exercising a modicum of care, standing alone, could immunize a defendant from punitive damages.[47] Moreover, the court clarified that the "critical inquiry is whether a party likely knew or ought to have known, in light of the surrounding circumstances, that his conduct would naturally or probably result in injury, and that he continued such conduct in reckless disregard of the consequences from which malice could be inferred."[48] Bayer did not challenge the jury's findings under that standard.[49]

Second, Bayer argued that the punitive-damages award was excessive under state law and the Federal Constitution.[50] But the court did not reach those issues after concluding that Bayer had failed to preserve them for appeal.[51] Specifically, Bayer had raised the argument only in its post-trial motion for a new trial and a remittitur.[52] The motion was automatically "deemed" denied after the circuit court failed to rule on it within the thirty-day window under Rule 4(b)(1) of the Arkansas Civil Rules of Appellate Procedure.[53] Bayer did not specify in its notice of appeal that it was also appealing that "deemed-denial of the motion for a new trial and remittitur," and therefore, it had not preserved the issues in that motion.[54]

In her concurrence, Justice Baker explained that the court should not have reached the constitutional issue regarding the statutory cap.[55] In Justice Baker's view, the circuit court's failure to issue a written opinion and its conclusory oral ruling from the bench—"the Court finds

that the statute is unconstitutional"—was "not enough to preserve a constitutional matter for appeal."[56]

IMPLICATIONS

In *Bayer*, the Arkansas Supreme Court reiterated its long-standing interpretation of article 5, section 32 of the Arkansas Constitution: the General Assembly may not limit tort liability *unless* there is an employment relationship between the parties. But in doing so, the court stressed that "there is a presumption of validity attending every consideration of a statute's constitutionality; every act carries a strong presumption of constitutionality, and before an act will be held unconstitutional, the incompatibility between it and the constitution must be clear."[57] Moreover, the court made clear that, when interpreting the constitution, its "task is to read the laws as they are written and interpret them in accordance with established principles of constitutional construction."[58] And, indeed, the court's interpretation was grounded in the constitutional text: "The General Assembly shall have power to enact laws prescribing the amount of compensation to be paid by *employers* for injuries to or death of *employees*."[59]

This decision also resolves an ambiguity regarding the requirements for awarding punitive damages under Arkansas law—one that the Eighth Circuit had identified in *In re Aircraft Accident at Little Rock, Arkansas on June 1, 1999*.[60] The Eighth Circuit had noted that it is unclear

> whether acting with an "absence of all care" is merely an illustrative example of the requisite disposition or whether an "absence of all care" is a requirement for awarding punitive damages. The language associating an "absence of all care" with "wantonness and conscious indifference to the consequences" has neither been expressly repudiated by Arkansas courts nor has it appeared in the Arkansas Supreme Court's most recent discussion of the requirements for awarding punitive damages.[61]

Bayer puts that question to rest—it rejects the absence-of-all-care standard in favor of a standard that examines what the defendant knew or should have known and how the defendant acted (or did not act) on such knowledge in light of all the circumstances.

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Endnotes

1 Bayer Cropscience LP v. Schafer, 2011 WL 6091323, at *1 (Ark. Dec. 8, 2011).

2 *Id*. at *2.

3 *Id*. at *3.

4 *Id*.

5 *Id*.

6 *Id*.

7 *Id*. at *4.

8 *Id*.

9 *Id*. at *2, 4.

10 *Id*. at *4.

11 *Id*. at *5.

12 *Id*.

13 *Id*.

14 *Id*.

15 *Id*.

16 *Id*.

17 *Id*.

18 *Id*. at *5-6.

19 *Id*. at *6.

20 *Id*.

21 *Id*. at *7.

22 *Id*.

23 *Id*.

24 *Id*. at *7-8.

25 *Id*. at *8.

26 *Id*.

27 *Id*.

28 *Id*.

29 *Id*. at *10.

30 *Id*. at *11 (emphasis omitted).

31 *Id*. at *11-12.

32 *Id*. at *12-13.

33 *Id*. at *12 (citation and internal quotation marks omitted, emphasis added).

34 *Id*. at *13. Because the court concluded that the statutory cap is unconstitutional under article 5, section 32, it did not address whether section 16-55-208 is also unconstitutional under the separation-of-powers provision.

35 *Id*. at *15 (citation omitted).

36 *Id*.

37 *Id*.

38 509 U.S. 579 (1993).

39 14 S.W.3d 512 (2000).

40 *Id*. at *19.

41 *Id*. at *18 (citation omitted).

42 *Id*. at *19.

43 *Id.* at *20.

44 731 S.W.2d 194, 195-96 (Ark. 1987).

45 *Id*. at *20 (emphasis added).

46 *Id*.

47 *Id*. at *21.

48 *Id*. at *21-22.

49 *Id*. at *22.

50 *Id*. at *22.

51 *Id*. at *23.

52 *Id*.

53 *Id*.

54 *Id*. at *24.

55 *Id*. at *24 (Baker, J., concurring).

56 *Id.* at *24-25.

57 *Id*. at *10 (majority op.) (citation omitted).

58 *Id*. (citation omitted).

59 Ark. Const. art. 5, § 32 (emphases added).

60 351 F.3d 874 (8th Cir. 2003).

61 *Id*. at 878.