

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 5, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2006AP2601

Cir. Ct. No. 2005CV6880

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

VJERANA HARASIC,

PLAINTIFF-APPELLANT,

v.

BOSTON STORE HAIR SALON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
PATRICIA D. MCMAHON, Judge. *Reversed and cause remanded.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 CURLEY, P.J. Vjerana Harasic, *pro se*, appeals the order granting summary judgment to Boston Store Hair Salon (Boston Store).¹ Harasic argues

¹ Harasic failed to file a timely response to Boston Store's motion for summary judgment, but the trial court nevertheless considered her late filings in arriving at its decision. We, too, have considered Harasic's untimely submissions filed in response to the motion for summary judgment in arriving at our decision.

that the trial court erred when it determined that: (1) Harasic failed to establish any negligence on the part of the two hair stylists who dyed her hair; (2) Harasic failed to submit medical proof that their actions caused her condition; and (3) Harasic did not establish any damages.² Because Harasic's submissions, which included her affidavit, a letter and a report signed by a master barber, and a deposition transcript of a doctor who had previously treated her for depression, were sufficient to show that there are genuine issues for trial as to causal negligence on the part of the stylists and as to damages, we reverse the grant of summary judgment and remand.

I. BACKGROUND.

¶2 On September 1, 2004, Harasic went to Boston Store to get her hair colored. Harasic contends that she was trying to lighten her hair after having it colored at another salon and following an unsuccessful attempt to wash that hair coloring away with Palmolive dish soap. According to Harasic, she was told by Boston Store hair stylist Lori Buchmann that it would not be a problem to add highlights to her hair. Harasic further contends that she made it clear to Buchmann that no bleach should be used on her hair because she had had bad reactions to bleach in the past. Harasic claims that, in response, Buchmann told her she would use a "very gentle" lightener that contained 5% chamomile.

¶3 Harasic alleges that she complained of scalp irritation to Buchmann more than once during the process, and that after about twenty minutes with the

² Harasic also argues that Boston Store's motion for summary judgment was filed outside the eight-month window of WIS. STAT. § 802.08 (2003-04). However, because the motion for summary judgment was filed "within the time set in a scheduling order," we conclude that the motion was timely. Sec. 802.08(1).

lightener in her hair, she began to experience scalp numbness and her face began to itch. At that point, Harasic claims to have asked Buchmann if the lightener contained bleach, and she contends that Buchmann confirmed that it did. After Buchmann washed out the bleach product and finished the coloring process, Harasic left the salon, only to come back after inspecting her hair in a nearby mirror and seeing scalp irritation. Harasic alleges that upon returning, an esthetician, Ruth Paine, looked at her scalp and noticed severe irritation and gave her aloe to apply to her scalp.

¶4 Contrary to Harasic's version of these events, Buchmann stated at her deposition that she never heard Harasic say that she suffered from any past reactions. Additionally, Paine stated at her deposition that she remembered giving Harasic aloe to take home with her because Harasic complained that her scalp was irritated, but Paine could not recall actually seeing any irritation.

¶5 The next day, September 2, 2004, Harasic returned to the salon and was given a refund for the previous day's coloring and an appointment with stylist Dawn Rowhani for later that day. When Harasic returned for the appointment, Rowhani discussed with her what hair treatments Harasic wanted, and they decided she would receive another coloring service. Harasic claims that the subsequent coloring service further irritated and stained her scalp and left her hair damaged. She also alleges that after the two visits, her scalp was numb and she suffered from throbbing headaches in excess of one week thereafter.

¶6 Two days later, on September 4, 2004, Harasic visited David Foley, a stylist and master barber at a different hair salon. He noticed that her "hair was in very poor condition and had extreme amounts of breakage." He "concluded that there was obvious chemical damage ... [which] [i]n most cases [is] caused by

over p[roc]essing.” Alternatives were discussed, but Foley determined that deep conditioning would not return the hair to its original state, and he told Harasic that “the quickest way out of this ‘bad hair’ situation” was to shave her head. After shaving her head, Foley “found extreme amounts of color pigment on [her] actual scalp,” and he determined that “there seemed to have been a reaction causing irritation.” Foley recommended that she return when her scalp’s irritation subsided for assistance in removing tint. She returned three days later, on September 7, 2004. At that time, her head was shaved again on Foley’s recommendation and she also received help removing the tint from her scalp.

¶7 As an expert for Harasic, Foley opined that “a consultation should have occurred and a patch test given to prevent [the reaction].” Foley also offered that, in his expert opinion, it is industry standard

to have a consultation with every new client who is having a chemical treatment, or clients who have some suspicious hair or scalp problems. In this consultation[,] questions are asked that concern the history of any chemical services, problems with any chemical service in the past and any reactions. If at the time there is any doubt in the operators [sic] mind they should perform a patch test.... A patch test could have indicated a reaction....

¶8 In addition to the physical damages alleged, Harasic claims the September 2004 incidents led her to become depressed and have thoughts of suicide. To substantiate these claims, Harasic relied on a psychiatrist, Robert Loiben, M.D., who provided information about her mental condition. Dr. Loiben stated that he treated Harasic three times from a period starting January 28, 2004, through March 31, 2004. At that time, he diagnosed her as suffering from recurrent major depression and prescribed medication that Harasic responded to; she was feeling and functioning better by March 31, 2004. He indicated that Harasic expressed no suicidal thoughts while she was under his care.

¶9 Dr. Loiben did not have any contact with Harasic following the events of September 2004 until he received a subpoena from her in June 2006. Although he had not performed any direct examination, Dr. Loiben concluded that “to a reasonable degree of medical probability Ms. Harasic suffered from depression after losing her hair in September of 2004.” He based this determination on what Harasic told him in a telephone conversation two days before the June 14, 2006 deposition. In that conversation, Harasic indicated that she had lost her hair in September 2004 and that she believed she had suffered from depression afterwards. Dr. Loiben indicated that “[a] person who has or has history of recurrent major depression would be more vulnerable to stressors, that [sic] including loss of their hair.”

¶10 Boston Store filed a motion for summary judgment on July 12, 2006, on the grounds that Harasic could not establish negligence, cause, or damages. At the motion hearing, the trial court concluded that expert testimony was required to establish the negligence, cause, and damages Harasic claimed, and that Harasic’s expert testimony was inadequate to establish these three elements. Harasic appeals.

II. ANALYSIS.

¶11 Our summary judgment methodology is well-known. We first must determine whether a claim for relief is set forth in the pleadings. *Baumeister v. Automated Prods., Inc.*, 2004 WI 148, ¶12, 277 Wis. 2d 21, 690 N.W.2d 1. After we have determined that a claim has been stated, we next examine the moving party’s affidavits and other proof to determine “whether a prima facie case for summary judgment has been established.” *Id.* A prima facie case is one in which the “moving [party] must show a defense which would defeat the [non-moving,

opposing party].” *Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980), *abrogated on other grounds by Olstad v. Microsoft Corp.*, 2005 WI 121, 284 Wis. 2d 224, 700 N.W.2d 139. If the moving party established a prima facie case, we must then determine whether the opposing party has demonstrated “that there are disputed material facts, or undisputed material facts from which reasonable alternative inferences could be drawn,” which entitle the party opposing summary judgment to a trial. *Baumeister*, 277 Wis. 2d 21, ¶12.

¶12 Summary judgment is properly granted if no genuine issue of material fact is in dispute and the moving party is entitled to judgment as a matter of law. *Dempich v. Pekin Ins. Co.*, 2006 WI App 24, ¶8, 289 Wis. 2d 477, 710 N.W.2d 691, *review denied*, 2006 WI 108, 292 Wis. 2d 410, 718 N.W.2d 724. An appellate court reviews a grant of summary judgment *de novo*, and applies the same standards and methodology as the trial court. *Raymaker v. American Family Mut. Ins. Co.*, 2006 WI App 117, ¶10, 293 Wis. 2d 392, 718 N.W.2d 154, *review denied*, 2006 WI 126, 297 Wis. 2d 320, 724 N.W.2d 204.

¶13 We now apply the methodology to the materials presented. Harasic’s amended complaint and her submissions in response to the summary judgment motion allege that the two hair stylists employed by Boston Store were negligent in their treatment of her. She claims that the first hair coloring treatment she received was improperly applied, and that she advised the stylist of her sensitivity to bleach but the stylist disregarded her warning and used a bleach product on her scalp. She contends that another employee, upon seeing her hair, applied aloe to it. Harasic averred that immediately after the first of the two treatments she “was made sick, suffering severe headaches and numbness of the scalp.” Also, she stated that she “start[ed] exhibiting signs of severe depression.” Harasic claimed that she went for a second treatment to correct the color, and this

employee negligently applied a dark brown color which penetrated her scalp and severely damaged her hair, resulting in her hair having to be shaved on two occasions. After these problems, her amended complaint states that “the plaintiff suffered severe headaches and scalp numbness, the plaintiff suffered severe mental anguish, wanting at times to kill herself.... The plaintiff, who is a computer consultant and was between contracts, believed she was discriminated against due to her baldness, and therefore suffered a loss of income.”

¶14 In support of her suit, Harasic submitted an affidavit outlining her negligent treatment and its effects on her, and she submitted a letter and report from Foley, the master barber she saw after the disastrous color treatments at Boston Store, which supported her account of what her scalp and hair looked like, and also explained the industry standards. As noted, Foley wrote in his report that it is industry standard

to have a consultation with every new client who is having a chemical treatment, or clients who have some suspicious hair or scalp problems. In this consultation[,] questions are asked that concern the history of any chemical services, problems with any chemical service in the past and any reactions. If at the time there is any doubt in the operators [sic] mind they should perform a patch test.... A patch test could have indicated a reaction....

With respect to Harasic’s hair, Foley wrote: “To my observation and experience[, I] concluded that there was obvious chemical damage. In most cases caused by over p[roc]essing which in turn, causes the hair to become weak, brittle and in this case lacking elasticity displaying breakage.” Further, he stated that the treatment of Harasic failed to comport with industry standards in other respects. Foley indicated that it was industry standard to give a patch test to a client for each of the following reasons: (1) if the hair is in compromised state; (2) if the scalp shows signs of irritation; (3) if the client had any past reactions to products similar to

what the stylist intends to use; (4) if there was any color correction within twenty-four hours of a previous, multiple step coloring process; (5) if there will be a clash of products, synthetic, natural and any product not intended for use on hair; and (6) “when a stylist cannot determine with a reasonable amount of certainty the impact the chemical will have on a clients [sic] hair/scalp.” Finally, Harasic presented the deposition testimony of Dr. Loiben, who treated her before the incidents and opined that, although he had not seen her after the incidents, he believed that a “total loss of hair could be extremely disconcerting, it could trigger further relapse of depression....” On cross-examination, Dr. Loiben stated that to a reasonable degree of medical probability, Harasic’s hair loss caused her to suffer from depression.

¶15 Despite this evidence, the trial court determined that there was no basis to require Buchmann, the first stylist, to perform a patch test on the first day, and as for the second day, no expert was “offering that link” to indicate a patch test should have been performed during the second visit to Boston Store. However, this conclusion ignores the letter and report of Foley, who opined that a patch test should have been administered. The trial court discussed Foley’s opinion, stating: “[S]o I’m not satisfied, that David Foley’s opinion is sufficient to provide that link.” We disagree. Foley showed that a genuine issue exists as to whether industry standards were followed. According to Harasic, when she went to Boston Store, she told Buchmann of her sensitivity to bleach, and that she was dissatisfied with an earlier coloring treatment. Additionally, she was a new customer. All of these conditions, according to Foley, required a patch test. Moreover, “[t]he weight and credibility to be given to the opinions of expert witnesses are uniquely within the province of the fact finder,” not the trial court on

summary judgment. *Ricco v. Riva*, 2003 WI App 182, ¶17, 266 Wis. 2d 696, 669 N.W.2d 193.

¶16 As to cause, the trial court determined that: “So I think that as to cause, it’s too speculative.” The trial court pointed to the lack of medical evidence supporting the cause element and noted that Foley did not see Harasic until after Harasic applied Palmolive to her scalp, which could have caused the harm that Harasic alleged. Again, we disagree. Under the facts as presented by Harasic, no medical testimony was needed. Harasic claimed her scalp was undamaged immediately prior to her first appointment, and the reaction began during the procedure. This type of evidence is sufficient to show a genuine issue as to cause. So, too, is Harasic’s claim that her scalp was not discolored until after the second procedure. Jurors can evaluate this evidence and determine cause without a medical expert. “Expert testimony is not necessary unless the subject matter involved is outside the realm of the ordinary experience of mankind, and requires special learning, study or experience.” *Kujawski v. Arbor View Health Care Ctr.*, 132 Wis. 2d 178, 181, 389 N.W.2d 831 (Ct. App. 1986), *rev’d on other grounds by* 139 Wis. 2d 455, 407 N.W.2d 249 (1987). The trial court was simply wrong in determining that Harasic could not show cause because “[t]here’s no medical testimony as the cause of the redness, the numbness and the headaches.” While a jury is free to decide otherwise, Harasic’s testimony, buttressed by Foley’s observations, is sufficient to show a genuine issue as to cause and withstand summary judgment.

¶17 Finally, as to damages, Harasic offered the testimony of Dr. Loiben, who testified he had not seen her since March of 2004, but believed her depression was caused by her hair loss. Dr. Loiben’s testimony created a genuine issue for trial regarding whether Harasic suffered from depression as a result of the alleged

negligence of the hair stylists. The doctor's opinion, coupled with Harasic's statements as to her numerous ailments caused by the procedures and her contention that her hair loss affected her income because no one wanted to hire a bald computer consultant, were sufficient to create an issue as to damages.

¶18 In sum, the trial court failed to follow the summary judgment methodology. Instead, the trial court decided factual issues and evaluated the strength of Harasic's case. Under our summary judgment methodology, "[t]he court does not decide an issue of fact. The court decides only whether a genuine issue of fact exists. The court does not decide issues of credibility, weigh the evidence, or choose between differing but reasonable inferences from the undisputed facts." *Fortier v. Flambeau Plastics Co.*, 164 Wis. 2d 639, 665, 476 N.W.2d 593 (Ct. App. 1991) (footnote and citation omitted).

¶19 Here, the record supports the conclusion that not only do many material fact disputes exist, but also that Harasic presented sufficient evidence to defeat Boston Store's requested summary judgment. Accordingly, we reverse the trial court's order and remand for a trial.

By the Court.—Order reversed and cause remanded.

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