IN THE COURT OF APPEALS OF IOWA

No. 3-840 / 13-0285
Filed November 6, 2013

NATASHA L. ELICK, Individually, and TODD C. ELICK, Individually, and as Next Friend of TRISTAN ELICK and CALEB ELICK, Minors,
Plaintiffs-Appellees,

vs.

JERRY A. GARRETT and ENVIRONMENTAL SERVICES, INC.,
Defendants-Appellants.

Appeal from the Iowa District Court for Scott County, Mary E. Howes, Judge.

The defendants appeal from the district court's denial of their motion for a new trial or remittitur, contending (1) the court erred in admitting certain evidence, and (2) the jury's damage award for future loss of function was not supported by the evidence. **AFFIRMED.**

Michael C. Walker and Amanda R. Newman of Hopkins & Huebner, P.C., Davenport, for appellants.

Earl A. Payson, Davenport, for appellees.

Heard by Doyle, P.J., and Tabor and Bower, JJ.

DOYLE, P.J.

This appeal arises from a rear-end motor vehicle collision that resulted in personal injury to Natasha (Tasha) Elick. The defendants, Jerry Garrett and Environmental Services, Inc., claim on appeal the trial court erred in admitting evidence concerning the types of vehicles involved, their weights, their post-impact points of rest, and their speeds, as well as photographs of damage to the Elicks' SUV. The defendants also assert the details of the collision were irrelevant and prejudicial because fault and causation were admitted. Additionally, the defendants argue there was insufficient evidence to support the jury's verdict for future loss of function of body sustained by Tasha. Upon our review, we conclude the trial court did not abuse its discretion in admitting the evidence, and we find the jury's verdict for loss of function is supported by sufficient evidence. We therefore affirm the jury's verdict and the trial court's judgment entry.

***I. Background Facts and Proceedings*.**

Tasha Elick was driving a Saturn SUV the afternoon of July 7, 2010. She was stopped at the intersection of West River Drive and South Concord Street in Davenport. The traffic signals for the intersection were not operating, and traffic was alternating through the intersection. As she waited for her turn to proceed, she was struck from behind by a garbage truck owned by Environmental Services, Inc. (ESI) driven by ESI employee Jerry Garrett.[1] As a result of the

[1] We refer to defendants ESI and Garrett collectively as Garrett.

collision, Tasha sustained a neck injury, which ultimately required a discectomy and the fusion of her cervical vertebrae 5-7.

Tasha and her family filed suit seeking damages to compensate Tasha for her personal injuries and for her family's loss of consortium. Prior to trial, Garrett admitted fault for the collision and the causation of Tasha's injuries. Left in dispute were the nature and extent of Tasha's personal injuries, as well as the amount of damages to compensate for her and her family's injuries.

Following a jury trial, the jury rendered a verdict in favor of the Elicks. Thereafter, Garrett filed a motion for new trial, or alternatively for remittitur, which was subsequently denied by the district court. Garrett now appeals.

II. Discussion.

On appeal, Garrett asserts the trial court "erred by allowing evidence concerning: (1) the types of vehicles involved, (2) the empty and loaded weight of [the] truck, (3) the speeds of the vehicles, (4) the vehicles' post-impact points of rest, and (5) the damage sustained by [the Elicks'] SUV." Garrett also contends there was insufficient evidence to support the jury's verdict for future loss of function of body sustained by Tasha. Before we turn our attention to the heart of Garrett's arguments, we must first address an error preservation issue.

A. Error Preservation.

Garrett's motions in limine requested the Elicks be precluded or prohibited from introducing certain evidence at trial, including the weight of the truck; photographs of the garbage truck and the Elicks' SUV; photographs, diagrams, or videos of location of accident; and the speed of the truck. At the

commencement of trial, outside the presence of the jury, the trial court first considered objections to exhibits. The court disallowed pictures of the garbage truck because it did not believe the photographs fairly represented what the truck looked like on the date of the collision or shortly thereafter. The court next considered Garrett's motions in limine. The following transpired:

> [GARRETT'S COUNSEL]: If it's permissible with the court and [the Elicks' counsel], we would submit on our written materials.
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> THE COURT: You've filed arguments on both sides?
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> [GARRETT'S COUNSEL]: You have already indicated what the ruling is going to be, so for purposes of going forward, I've spoken with [the Elicks' counsel], and he's agreed that my question that goes to the weight or speed of the vehicle from anybody, other than Mr. Garrett, is objectionable and that we have a standing objection without raising it at trial with the independent witnesses.
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> THE COURT: Absolutely, and I do agree it would be prejudicial for you in front of the jury if you were objecting constantly, so we can put that standing objection into the record as to the weight of the truck, that the truck was filled, and the speed of the truck.
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> [THE ELICKS' COUNSEL]: [Directing comment to Garrett's counsel], just so we are on the same page, we are going to call Mr. Axel [the owner of ESI] by deposition—redacted deposition, in which we will be discussing the weight of the truck, but that's by somebody who knows the weight of the truck.
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> [GARRETT'S COUNSEL]: True.
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> THE COURT: I'm going to allow it in. [Garrett's counsel is] objecting to it, but I think it can come in . . . so I'll overrule his objection on that.

There was no further discussion of Garrett's motions in limine regarding the evidence he challenges here, nor was there any further ruling by the court, by request or on the court's own motion, concerning these items.

At trial, Tasha's first witness was John Axel, the owner of ESI, and he testified by deposition as discussed above. Axel testified to the weight of the truck via a scale ticket and a landfill load receipt. Toward the end of the trial,

when counsel and the court were attending to housekeeping details outside the presence of the jury, the Elicks offered a series of exhibits, including the landfill receipt and the scale ticket. Garrett responded, "No objection." The exhibits were received into evidence.

Jerry Garrett also testified by deposition. He testified he was driving a rear-loader Freightliner loaded with approximately five tons of trash. He described how the collision occurred. He described the damage to the truck and to the Elicks' SUV. He testified he was not going any faster than the forty-five mile-per-hour speed limit when he crested the hill before encountering the stopped traffic at the intersection, and he testified he was likely going slower because of wet-pavement conditions.

Todd Elick testified he immediately went to the scene of the collision after receiving a call from Tasha. He described his observations of the scene, including the resting points of the vehicles and the property damage done to the rear of the Elicks' SUV. He illustrated his testimony with a diagram of the scene.[2] He testified to the weight of the SUV. He also testified the vehicle was "totaled" because the roof was buckled and the frame was bent. There were no objections to this testimony or to the use of the diagram. The Elicks offered three photographs depicting the damage to the SUV. Garrett responded, "No objection." The exhibits were received into evidence.

[2] It appears this diagram was not offered into evidence.

Tasha testified and described how the collision occurred, and she illustrated her testimony with a diagram.[3] There were no objections to this testimony or to the use of the diagram. She also described how the impact felt and what it did to her body.

"It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). "When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal." *Id.* These rules exist to ensure that district courts have the opportunity to correct or avoid errors and to provide appellate courts with a record to review. *See State v. Pickett*, 671 N.W.2d 866, 869 (Iowa 2003).

Other than the colloquy set forth above, there was no on-the-record ruling by the court on Garrett's motions in limine concerning the evidentiary issues raised in this appeal. There was no ruling concerning the types of vehicles involved. There was no ruling concerning the vehicles' post-impact points of rest. There was no ruling concerning the damage sustained by Elicks' SUV. At best, the court's approval of a standing objection concerning the weight and speed of the truck was limited to witnesses other than Jerry Garrett. The court did overrule Garrett's objection to Axel testifying to the weight of the truck.

When the landfill receipt and scale ticket showing the weight of the truck and its load were offered, Garrett responded, "No objection." When photographs

[3] It appears this diagram was not offered into evidence. It is not clear from the record whether or not this was the same diagram utilized during Todd's testimony.

depicting the damage to Elicks' SUV were offered, Garrett responded, "No objection." No objections were raised when testimony came in at trial describing the types of vehicles involved in the collision. No objections were raised when testimony came in at trial describing the vehicles' post-impact points of rest. Under the record before us, we conclude error was not preserved regarding the admission of evidence of the types of vehicles involved, the vehicles' post-impact points of rest, and the damage sustained by the Elicks' SUV.

B. Admission of Evidence.

Error preservation is not as clear concerning the admission of evidence of the weight and speed of the truck. We choose to bypass that issue and address the merits of this claim. *See State v. Taylor*, 596 N.W.2d 55, 56 (Iowa 1999). We review evidentiary rulings for an abuse of discretion. *Hall v. Jennie Edmundson Mem'l Hosp.*, 812 N.W.2d 681, 684 (Iowa 2012). "An abuse of discretion exists when the court exercises its discretion on ground or for reasons clearly untenable or to an extent clearly unreasonable." *Heinz v. Heinz*, 653 N.W.2d 334, 338 (Iowa 2002) (citation and internal quotation marks omitted).

Garrett argues any evidence of the force of the collision is irrelevant and unfairly prejudicial, asserting "Whether [Tasha] was struck by a marble, a bowling ball, or a garbage truck was not a 'fact in issue' because responsibility and causation were conceded." This is at odds with our jurisprudence. Responding to the same arguments Garrett makes here, the supreme court stated the way in which an accident happened "is relevant to two factual issues: (1) whether the accident caused any injuries [to the plaintiff]; and (2) the nature and extent of any

such injuries." *Waits v. United Fire & Cas. Co.*, 572 N.W.2d 565, 575 (Iowa 1997). Garrett having admitted causing an injury to Tasha, the first factual issue under *Waits* is not applicable in this appeal. But Garrett vigorously disputed the severity of Tasha's neck injury. Clearly then, the second factual issue under *Waits* comes into play.

> Evidence of the force of the impact, [the plaintiff's] position in the vehicle, and the location and extent of the damage to [the plaintiff's] vehicle is probative of these issues. These issues, in turn, are probative of the amount of damages sustained by [the plaintiff] as a result of [the defendant's] fault. If evidence of the accident itself were excluded, the jury would have to determine if [the plaintiff] was seriously injured in "the accident" without knowing whether "the accident" was a light tap to the bumper of [the plaintiff's] car or a more violent and forceful collision.

Id. Indeed, Tasha's orthopedic surgeon testified the type of force exerted on a patient's neck "can have a direct bearing on understanding the injury and the symptoms." Furthermore, the *Waits* court concluded "the probative value of the evidence weigh[ed] heavily in favor of its admission," explaining "[t]he need for this evidence is great because it is the only way for [the plaintiff] to establish the nature and severity of the force causing her injury." *Id.* Applying the reasoning in *Waits* here, we conclude the trial court did not abuse its discretion in admitting evidence of the collision.

C. Future Loss of Function.

Garrett next asserts that since surgery corrected Tasha's neck instability and she no longer has restrictions on her functional activities, she therefore has no future loss of function of her body. Garrett argues the trial court erred in failing to grant a motion for new trial because the evidence presented at trial was

inadequate to support the jury's award of $150,000 for Tasha's future loss of function of body.[4] "We review the denial of a motion for new trial based on the grounds asserted in the motion." *Fry v. Blauvelt*, 818 N.W.2d 123, 128 (Iowa 2012). The sufficiency of the evidence presents a legal question, and we review this ground for the correction of errors at law. *See id.*

The jury was instructed that "[l]oss of body is the inability of a particular part of the body to function in a normal manner." *See Brant v. Brockholt*, 532 N.W.2d 801, 804-05 (Iowa 1995); *see also* Iowa Civ. Jury Instruction 200.10. Dr. Millea, Tasha's orthopedic surgeon, testified the collision caused the injury to Tasha's neck, including a bulging disk at cervical vertebrae C5-C6 and instability or excessive motion at C5-C6. He performed a diskectomy and cervical fusion to stabilize the neck. A titanium plate and screws going into C5, C6, and C7, and bone grafts between C5 and C6 and between C6 and C7 were utilized in the fusion. Now solidly and permanently fused, there is an absence of motion in this portion of Tasha's cervical spine. "Function" is defined as "the special, normal, or proper action of any part or organ." Dorland's Pocket Medical Dictionary 284 (22d ed. 1977). A normal cervical spine flexes, extends, and rotates. It naturally follows that if a portion of the cervical spine no longer moves, it is unable to function in a normal manner. Even Garrett acknowledges "the area of fusion no longer moves, which is a loss of function at that joint." We find sufficient evidence for the jury to have made an award for future loss of function.

[4] The jury also awarded Tasha $44,835.30 for past medical expenses, $15,082.35 for past loss of full mind and body, $15,082.30 for past physical and mental pain and suffering, and $150,000 for future physical and mental pain and suffering. Each of Tasha's two sons was awarded $5000 for loss of consortium.

Next we address Garrett's argument that the jury's award for loss of function "was radically inconsistent with the undisputed evidence." Garrett's motion for new trial claimed the verdict was excessive and the result of passion and prejudice. *See* Iowa R. Civ. P. 1.1004(4). "We review the district court's denial of a motion for new trial based on the claim a jury awarded excessive damages for an abuse of discretion." *WSH Props., L.L.C. v. Daniels*, 761 N.W.2d 45, 49 (Iowa 2008). We also review remittitur rulings for an abuse of discretion. *Triplett v. McCourt Mfg. Corp*., 742 N.W.2d 600, 602 (Iowa Ct. App. 2007). This level of deference is proper "because the trial court has had the advantage of seeing and hearing the evidence." *See* i*d.*

"In considering a contention that the jury verdict is excessive, the evidence must be viewed in the light most favorable to the plaintiff." *Id.*; *see also Hammes v. JCLB Props., LLC*, 764 N.W.2d 552, 558 (Iowa Ct. App. 2007) (noting "if the uncertainty lies only in the amount of damages, recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated."). The assessment of damages is traditionally a jury function with which "we are loath to interfere." *See Triplett*, 742 N.W.2d at 602 (citation and internal quotation marks omitted); *see also Olsen v. Drahos*, 229 N.W.2d 741, 742 (Iowa 1975). The real question in most cases is whether the amount and sufficiency of the evidence supports the award made. *Olsen*, 229 N.W.2d at 742. We take a broad view of the evidence in answering this question. *Hammes*, 764 N.W.2d at 558.

Tasha was a thirty-nine-year-old 911 dispatcher at the time of trial, with a life expectancy of over forty-two years. She has a permanent fusion of cervical vertebrae 5-6-7, held in place by a titanium plate and three screws. Solidly fused, this area of Tasha's neck no longer moves in the normal manner. While Dr. Millea did not impose specific restrictions on Tasha's activities, he stated he did not encourage jumping or impact activities and that it was okay for Tasha to run if she could do it without significant symptoms. At work, Tasha sits in front of six monitors, five in front of her and one above. This requires her to move her head constantly from right to left, left to right, and up and down. She uses a C-shaped pillow around her neck at work to give her neck some support. A co-worker of Tasha testified she observed that when Tasha "sits down a lot at work, she's kind of stiff and everything." Tasha wears a neck brace when she sleeps. Tasha indicated she had difficulty swallowing at times: "It feels like there's a big lump of food there, which [the doctor] says is normal and can last a couple of years." The surgical fusion was done to stabilize Tasha's neck in hopes of alleviating her pain. She still has pain, and most of the damage testimony at trial focused on the pain and how it affects Tasha's day-to-day life and relationships with her family and others. In viewing the evidence in a light most favorable to Tasha, we find sufficient evidence to support the jury's award for future loss of function of body. We find nothing in the record to suggest the verdict was the product of passion or prejudice, nor do we find it so excessive as to shock the conscience.

Where, as here, "the verdict is within a reasonable range as indicated by the evidence we will not interfere with what is primarily a jury question." *Olsen*, 229 N.W.2d at 742; *see also Hawkeye Motors*, *Inc*. *v*. *McDowell*, 541 N.W.2d 914, 918 (Iowa Ct. App. 1995) (noting "precision is not required" in fixing damages). We accordingly conclude the jury's award of damages was supported by substantial evidence and affirm the judgment of the district court.

Garrett suggests the verdict "was inappropriately duplicative of the jury's award for future pain and suffering." The jury here was instructed that it could consider awarding damages for loss of function of the body in addition to damages for pain and suffering. The jury was admonished not to award duplicate damages.[5] We are mindful of the risk that the award for loss of function duplicated the pain and suffering award. However, because the jury was required to itemize its damages, this risk was minimized. Additionally, the jury was explicitly told not to duplicate damages, an instruction we presume it followed. *See Kiner v. Reliance Ins. Co.*, 463 N.W.2d 9, 15 (Iowa 1990). For all the above reasons, we affirm the district court's post-trial ruling upholding the award for future loss of function.

III. Conclusion.

Under the record before us, we conclude Garrett failed to preserve error regarding the admission of evidence of the types of vehicles involved, the vehicles' post-impact points of rest, and the damage sustained by the Elicks'

[5] The jury was instructed: "A party cannot recover duplicate damages. Do not allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage." *See* Iowa Civil Jury Instruction 200.1.

SUV; consequently, we do not consider these claims. As to Garrett's other evidentiary challenges, we conclude the trial court did not abuse its discretion in admitting that evidence. Finally, we find the jury's verdict for loss of function is supported by sufficient evidence. We therefore affirm the jury's verdict and the trial court's judgment entry.

AFFIRMED.