IN THE COURT OF APPEALS OF IOWA

No. 9-644 / 08-1994
Filed November 25, 2009

MATTHEW GAVIN,
Plaintiff-Appellant/Cross-Appellee,

vs.

TYLER ALAN JOHNSON, DAVID TASCHNER, MATTHEW MCLAUGHLIN and FARM BUREAU,
Defendants-Appellees/Cross-Appellant.

Appeal from the Iowa District Court for Johnson County, Mitchell E. Turner, Judge.

Plaintiff appeals the district court's refusal to grant his motion for a new trial. **AFFIRMED.**

James Weston II for Tom Riley Law Firm, P.C., Iowa City, for appellant.

Les V. Reddick of Kane, Norby & Reddick, P.C., Dubuque, for appellees Johnson and Taschner.

Kimberly K. Hardeman, Brenda K. Wallrichs, and Benjamin M. Weston, of Lederer, Weston & Craig, P.L.C., Cedar Rapids, for appellee McLaughlin.

William Roemerman of Crawford, Sullivan, Read & Roemerman, P.C., Cedar Rapids, for appellee Farm Bureau.

Heard by Sackett, C.J., and Vaitheswaran and Danilson, JJ.

SACKETT, C.J.

Plaintiff Matthew Gavin appeals the district court's refusal to grant a new trial on his claims for damages arising out of two separate motor vehicle accidents tried at the same time to the same jury. Plaintiff claims a new trial is justified because (1) the district court erred in refusing to give a requested jury instruction on a previous infirm condition, and (2) the jury, while awarding him past medical expenses in both cases, only awarded one dollar in each case for his alleged pain and suffering. We affirm.

I. BACKGROUND. Plaintiff was in an accident with a car driven by defendant Johnson and owned by defendant Taschner[1] on the afternoon of September 22, 2004. Apparently Johnson failed to yield when making a turn and hit plaintiff's car. Plaintiff drove home from the accident and went to work the next day. When his shift was over at 3:00 p.m. he went to the emergency room at Mercy Hospital to be checked out. He testified he believed his problem was mostly stiffness. However, he had had a previous surgery in 2003 where cadaver bones and screws were put in his neck. He testified because of the accident he wanted that checked out. He did not recall whether or not he left the emergency room with instructions concerning follow-up care.

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[1] Johnson's and Taschner's answer admitted that Johnson was operating the vehicle with Taschner's consent. Taschner filed a notice of cross appeal contending Gavin failed to prove Johnson drove with Taschner's consent. However, due to Johnson's and Taschner's admission in their answer, Gavin was not required to prove Taschner gave Johnson consent to drive the vehicle. *See Smith v. Bitter*, 319 N.W.2d 196, 199 (Iowa 1982) ("[A]dmissions in the pleadings, if not amended or withdrawn, stand as conclusive proof of the admitted facts. The party making them is bound thereby. No evidence is needed to establish them.").

Over two years later, on December 7, 2006, plaintiff was involved in a second accident with defendant McLaughlin. Plaintiff testified it was dusk and he was driving on the highway when he came up behind a car apparently stopped and he started braking. He testified he had just stopped his car when McLaughlin came up behind him and rear-ended his car and shoved him into the car ahead. Plaintiff got out of his car and into McLaughlin's car waiting for law enforcement. He said he was checked to be sure he was alright and then he drove his own car home. He testified that he felt stiff and had neck and shoulder pain. He believed he had his neck checked to be sure the bones and screws from the 2003 surgery were in place. He continued in the care of a chiropractor he was seeing before this accident.

Plaintiff ultimately sued claiming to have suffered personal injuries in both accidents. The case was tried from October 6 through 9 of 2008. Plaintiff complained of soft tissue injury to his neck, arm, and back. The jury deliberated for more than seven hours over the course of two days and found defendants[2] Johnson and McLaughlin negligent and initially returned with a verdict finding plaintiff was entitled to damages for past medical expenses of $3,619.76 in the Johnson case and for $1424 in the McLaughlin case. The district court sent the jury back to deliberate, instructing them without objection that:

> You are instructed that in the event you award past medical expenses, you must award some amount for Past Physical and Mental Pain and Suffering. Please return to your deliberations and return the re-signed original Verdict Forms once you have reached your decisions.

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[2] The jury found Johnson's negligence to have solely caused the accident, but allocated fault in the McLaughlin case sixty percent to McLaughlin and forty percent to plaintiff.

The jury returned a second verdict, maintaining the original award for past medical expenses, and awarding the plaintiff one dollar against each defendant for past pain and suffering. The district court advised counsel of the verdict and asked if they wished to poll the jury. There was no request to do so nor did any party request the jury be sent back with further instruction. The plaintiff subsequently filed a motion for a new trial contending the court erred in refusing to issue a jury instruction on previous infirm condition and that the jury verdict was inadequate and inconsistent. The district court denied the motion and plaintiff appeals.

II. SCOPE AND STANDARD OF REVIEW. A court may grant a motion for a new trial when the jury awards "excessive or inadequate damages appearing to have been influenced by passion or prejudice" or if the verdict "is not sustained by sufficient evidence, or is contrary to law." Iowa R. Civ. P. 1.1004(4), (6). We are slower to interfere with the grant of a new trial than with its denial. Iowa R. App. P. 6.14(6)(*d*).

Trial court rulings concerning jury instructions are reviewed for correction of errors at law. *Beyer v. Todd*, 601 N.W.2d 35, 38 (Iowa 1999). The trial court must instruct the jury on all issues material to the case. Iowa R. Civ. P. 1.924. A party is entitled to have proposed instructions submitted to the jury when the instructions correctly state the law, apply to the case, and are not otherwise explained in the court's instructions. *Vasconez v. Mills*, 651 N.W.2d 48, 52 (Iowa 2002). Legal theories encompassed by the proposed instructions must be supported by the pleadings and substantial evidence in the record. *Beyer*, 601

N.W.2d at 38. Evidence is substantial to support giving a proposed instruction if a reasonable mind would accept it as adequate to reach a conclusion. *Coker v. Abell-Howe, Co.*, 491 N.W.2d 143, 150 (Iowa 1992). When considering whether evidentiary support for an instruction exists, we give the evidence the most favorable construction it will bear. *Hughes v. Massey-Ferguson, Inc.*, 522 N.W.2d 294, 295 (Iowa 1994). It is error for the court to submit instructions on issues that have no support in the evidence, even if they correctly state the law. *Vachon v. Broadlawns Med. Found.*, 490 N.W.2d 820, 822 (Iowa 1992).

In *Foggia v. Des Moines Bowl-O-Mat, Inc.*, 543 N.W.2d 889, 891 (Iowa 1996), where, as here, the plaintiff moved for a new trial on the grounds the jury verdict was not supported by substantial evidence and the damages awarded were inadequate, the court found the standard of review to be for abuse of discretion. We therefore adopt that standard of review here. *Foggia*, 543 N.W.2d at 891; *see Matthess v. State Farm Mut. Auto Ins. Co.*, 521 N.W.2d 699, 702 (Iowa 1994); *Witte v. Vogt*, 443 N.W.2d 715, 716 (Iowa 1989). Under this review, we are cognizant that calculation of damages is traditionally a jury's function and it should be disturbed for only the most compelling reasons. *Olsen v. Drahos*, 229 N.W.2d 741, 742 (Iowa 1975).

III. PREVIOUS INFIRM CONDITION JURY INSTRUCTION. A defendant is liable only for injuries caused by the defendant's fault, and not for pain or disability resulting from other causes. *Mead v. Adrian*, 670 N.W.2d 174, 179 (Iowa 2003). Where a plaintiff had a prior injury that caused pain and/or disability before the injury inflicted by the defendant, the defendant is not responsible for

the disability and pain that predated the accident with defendant. *See Waits v. United Fire & Cas. Co.*, 572 N.W.2d 565, 577 (Iowa 1997). Rather, the defendant is only liable for any additional pain and disability caused by defendant's negligence, and in such a case an aggravation instruction should be given. *See id.* The infirm condition instruction is an exception to this general rule. *Id.* It applies only when the pain or disability arguably caused by another condition arises *after* the injury caused by the defendant's negligence, has exacerbated the prior condition. *Id.* In that case, it is the injury caused by defendant, not the prior condition that is deemed to be the proximate cause of the injury. *See id*.

The district court said in overruling the motion on failure to instruct:

> [T]here was a wealth of evidence showing that the Plaintiff had similar complaints for well in excess of 20 years prior to the first accident. The only possible issue would be whether or not Plaintiff's testimony that he was asymptomatic for the one year period of time prior to the first accident (between his neck fusion and the first accident) was enough time of a break in time so as to allow a reasonable person to conclude the Plaintiff's prior symptomatic condition had been transformed into an asymptomatic condition. In this case, however, although Dr. Schaeffer may have said that his "dormant condition" was the "proximate cause" of the pain and disability, the Court does not recall any testimony establishing that the injury from this motor vehicle accident impacted the dormant condition, or that it in fact made it symptomatic. Consequently, even taking the facts in the light most favorable to the Plaintiff, the Court finds that the giving of a[] [previous infirm condition] instruction was not warranted by the evidence. It is also to be noted that in this Court's opinion, under no circumstances would a[] [previous infirm condition] instruction have been appropriate referable to McLaughlin, because under no stretch of the imagination could it be said that the Plaintiff was asymptomatic in the period of time prior to this second accident. Additionally . . . any [previous infirm condition] would have applied only to the Plaintiff's claimed neck condition, and not to the back and shoulder pain or the depression which he claimed.

Johnson claims that the district court was correct in not instructing on a previous infirm condition and that the aggravation of a pre-existing condition instruction was properly given. He argues the aggravation of a pre-existing condition instruction is supported by the record showing that plaintiff had a history of back pain beginning in the 1980's and of neck pain beginning in 2000 and that he has seen any number of professionals seeking relief. Johnson argues that while Dr. Schaeffer testified that the 2003 surgery made plaintiff more susceptible to injury, there is no evidence that his neck fusion condition was exacerbated by their accident. We agree. Dr. Chad Abernathey, M.D., evaluated plaintiff in February 2005 and testified that his MRI study did not demonstrate any new, acute changes. Furthermore, plaintiff was unable to show that he was asymptomatic prior to the first accident in that his own testimony was that he was unable to recall whether, in the months before the September 2004 accident, he had been having trouble with his neck and back. The district court did not err in not giving the requested previous infirm condition instruction in the Johnson case. There was not substantial evidence in the record to support giving this instruction. Moreover, we agree with the district court that it cannot be said that plaintiff was asymptomatic in the period of time prior to the second accident. The evidence clearly supports this finding. Plaintiff testified that there was no time between the two accidents when there was no pain, rather it was just pretty mild.

IV. INADEQUATE DAMAGE AWARD. The plaintiff also contends that his motion for a new trial should have been granted because the damages awarded were not adequate. The district court denied this request.

In denying plaintiff's motion, the district court said:

> [W]ith the exception of some physical therapy expenses, the vast majority of these expenses are for diagnostic procedures, or referable to examinations shortly after the accident. Given the hardware[3] in Plaintiff's neck as a result of the prior fusion, the jury could readily conclude that such medical expenses should be awarded to the Plaintiff, irrespective of whether or not there was any pain associated with it. . . . Unlike the first accident [(Johnson,)] however, there was significant evidence that the Plaintiff was claiming severe pain as little as three days prior to the December 2006 accident [(McLaughlin)]. In such a circumstance, this Court believes that a jury could find by a preponderance of the evidence that the medical expenses were warranted, and proximately caused by the December 2006 collision, but fail to find that the Plaintiff had established by a preponderance of the evidence that the Plaintiff had any significant new pain and suffering caused by this accident. . . . The jury . . . was confronted with starkly conflicting evidence regarding whether either of the accidents exacerbated [Plaintiff's] pre-existing conditions, and "was required to choose which was correct."

The district court has considerable discretion in ruling upon a motion for a new trial based upon the ground that the verdict was inadequate. *Householder v. Town of Clayton*, 221 N.W.2d 488, 493 (Iowa 1974). Whether damages are so inadequate to warrant a new trial is for the district court to decide. *Fisher v. Davis*, 601 N.W.2d 54, 57 (Iowa 1999). We also consider that the trial court, with the benefits of seeing and hearing witnesses, observing the jury, and having before it all incidents of the trial, did not see it fit to interfere with the jury's verdict. *Olsen*, 229 N.W.2d at 743. Additionally, it is not for us to invade the province of

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[3] The reference to hardware apparently is to the screws and bone piece placed in plaintiff's neck.

the jury and the verdict will not be set aside or altered unless it is, (1) flagrantly excessive or inadequate; or (2) so out of reason as to shock the conscience or sense of justice; or (3) raises a presumption it is the result of passion, prejudice or other ulterior motives; or (4) is lacking in evidential support. *Cowan v. Flannery*, 461 N.W.2d 155, 158 (Iowa 1990). The most important of these tests is support in the evidence. *Olsen*, 229 N.W.2d at 742.

The district court, on this issue and the instruction issue, has done an excellent job of setting forth the reasons for its decisions. Its findings are supported by the record and we give these findings weight. We also recognize that the jury spoke, not once but twice, that basically it did not accept the plaintiff's testimony that he suffered pain and disability as a result of these two automobile accidents.

The only real question is whether a finding that plaintiff was entitled to recover for medical expenses but not entitled to recover more than one dollar for pain and suffering, justifies a new trial. This case has some parallel to *Cowan*. There, the jury awarded plaintiff $21,220 for past and future medical expense but made no award for pain and suffering. *Cowan*, 461 N.W.2d at 160. The supreme court determined that the award of medical expenses was supported by substantial evidence. *Id.* But as to the absence of an award for pain and suffering said,

> It is illogical to award past and future medical expense incurred to relieve headache, neck and back pain and then allow nothing for such physical and mental pain and suffering. Having determined that these medical expenses were recoverable, there seems no way for the jury to disallow recovery for the appellant's pain and suffering for the same injuries. Although the award may be

> adequate, a special verdict award of nothing for pain and suffering is inconsistent and unsupported by evidence.

Id.

This precedent on the issue of inadequate verdict awards is of little value to our analysis because each case must be decided by applying its own unique circumstances to the general principles outlined above. *Moore v. Bailey*, 163 N.W.2d 435, 436 (Iowa 1968). Also, certain facts distinguish this case from *Cowan*, most importantly the evidence of the accident. The two accidents here did little vehicle damage and happened at low speeds. Plaintiff drove home from both. Defendants legitimately challenged his alleged accident-related injuries.

In *Cowan*, the court explained that Cowan was in a 1977 Chevrolet Chevelle when he collided with a 10,800 pound grain truck at a rural intersection and the force of the impact was so great that the front of Cowan's vehicle virtually collapsed and the defendant's grain truck was knocked off its course. *Id.* at 159. Additionally, Cowan testified his head struck the windshield and his body struck the steering wheel, and he was examined by his family physician who prescribed muscle relaxants and pain medication and physical therapy. *Id.* There was testimony from Cowan's family members that he had pain and discomfort. *Id.* at 160. While there was conflicting medical evidence, an orthopedic surgeon, who examined Cowan for the defendant, diagnosed Cowan as suffering a cervical and lumbar strain or sprain as a result of the collision. *Id.*

According the required weight we give to the facts found by the trial court, aided by seeing and hearing the witnesses, observing the jury and having before it all incidents of the trial, we deem it inappropriate to interfere. *See Kautman v.*

Mar-Mac Comty. Sch. Dist., 255 N.W.2d 146, 147-48 (Iowa 1977). The jury was confronted with conflicting evidence as to whether each accident aggravated the plaintiff's pre-existing neck and back pain and it was the jury's duty to determine which evidence was correct. *See Moore*, 163 N.W.2d at 437 (finding a jury award not inadequate when the testimony showed a serious dispute regarding the nature, extent, and severity of plaintiff's injuries and presented "a situation in which the jury was confronted by conflicting medical testimony and was required to choose which was correct."). The jury could well have concluded from the evidence that the only damages caused by the defendants' negligence were the medical expenses incurred to determine whether injuries resulted from the accident. A conclusion which, on the evidence presented at trial, can well be justified. The district court did not abuse its discretion in refusing to order a new trial.

Furthermore, while the defendants have not contended error on this issue was not preserved, upon notification of the second jury verdict and before the jury was discharged, Gavin made no request that the jury receive additional instruction and return to deliberate.

AFFIRMED.