IN THE COURT OF APPEALS OF IOWA

No. 7-690 / 06-1786
Filed December 12, 2007

ROGER L. SUTTON, SR. and
TAMARA SUTTON,
Plaintiffs-Appellants,

vs.

ROGER M. HANSEN and
CHARLES MIHM, as Owner,
Defendants-Appellees.

Appeal from the Iowa District Court for Chickasaw County, Bruce B. Zager, Judge.

Plaintiffs appeal from the district court's ruling denying their motion for a new trial following a jury verdict and judgment entry in favor of defendants. **AFFIRMED.**

Russell Schroeder, Jr. of Schroeder Law Office, Charles City, for appellants.

Samuel C. Anderson of Swisher & Cohrt, P.L.C., Waterloo, for appellees.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MILLER, J.

Roger and Tamara Sutton appeal from the district court's ruling denying their motion for a new trial following a jury verdict and judgment entry in favor of Roger Hansen and Charles Mihm. We affirm the judgment of the district court.

I. BACKGROUND FACTS AND PROCEEDINGS.

On the afternoon of July 13, 2003, Roger Sutton and Hansen were operating jet skis owned by Mihm on the Cedar River near Nashua, Iowa, when they collided. Earlier in the day, Sutton and Hansen decided to take Hansen's seven-year-old son, Michael, and his friend, Adam, for a ride on the jet skis. Adam rode with Sutton on one jet ski, while Hansen and Michael were on a different jet ski.

Sutton followed Hansen from his dock down a "back channel" of the river to its wider main channel. Upon entering the main portion of the river, Hansen noticed three girls stopped on a jet ski. Gabrielle Throndson was in the driver's seat of the jet ski, Brianna Rausch was on the back passenger seat, and Laura Rausch was on a "knee board" in the water behind the jet ski. Hansen pulled over to the girls to see if they needed help. Throndson informed him she was "waiting for the jet skis to pass so the water would calm down" before she pulled Laura on the knee board.

After learning they were fine, Hansen gradually accelerated in order to avoid causing a wake. He was proceeding "straight down the river" when he saw Sutton "coming across my bow." Throndson saw Sutton pass Hansen "on the right side and turn[ ] left in front of him." The jet skis collided. Sutton suffered an "open tibial fracture" on his left leg, which required multiple surgeries to repair.

The Suttons filed a personal injury action against Hansen and Mihm on June 27, 2005, alleging Hansen negligently operated Mihm's jet ski, causing the collision and Sutton's resulting injury. The Suttons sought damages for bodily injury, medical expenses, and loss of consortium. The defendants answered, generally denying fault and asserting any damages sustained by the Suttons were a result of Roger Sutton's own fault.

The Suttons filed a motion in limine on July 5, 2006, seeking to prevent the defendants from introducing evidence regarding Sutton's "actions in driving a jetski earlier the day of the accident." The Suttons then filed a motion for sanctions on July 11, 2006, requesting the district court prohibit the defendants from calling witnesses at trial that were not designated as potential witnesses in the defendants' initial discovery responses. The district court overruled both motions and ruled the witnesses could "testify to what they observed without getting into their own opinions as to whether it was dangerous, or reckless, or too fast for conditions."

The case proceeded to trial on July 12, 2006. The jury returned a verdict finding seventy percent of the causal fault was attributable to Sutton's negligence while thirty percent of the causal fault was attributable to Hansen's negligence. In response to a special verdict form, the jury indicated Hansen's negligence was a proximate cause of damages to Tamara Sutton, but it did not award any damages to her on the loss of consortium claim. The Suttons filed a motion for new trial, claiming in relevant part that the jury verdict finding "for Tamara Sutton on her claim for loss of consortium without an award of damages is an inconsistent verdict, contrary to law and a new trial should be granted." In the

alternative, the Suttons requested an additur. The district court denied the motion for new trial.

The Suttons appeal and raise the following issues:

I. The court allowed the defendants to present witnesses concerning plaintiff Roger Sutton's operation of a jet ski prior to the accident. The witnesses had not been disclosed despite discovery requests prior to the date of trial. The ruling created an unfair and prejudicial circumstance which left plaintiff without an opportunity to respond to this evidence.

II. The court erred by failing to grant the motion for new trial or additur on the claim of Tamara Sutton's loss of consortium as the jury instruction required that Tamara Sutton was entitled to damages in accordance with the evidence.

II. SCOPE AND STANDARDS OF REVIEW.

We review the admission of evidence at trial for abuse of discretion. *Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 609-10 (Iowa 2006). We likewise review "sanction issues" regarding compliance with our discovery rules for abuse of discretion. *M-Z Enters., Inc. v. Hawkeye-Sec. Ins. Co.*, 318 N.W.2d 408, 414 (Iowa 1982).

Our review of a district court's ruling on a motion for new trial depends on the grounds raised in the motion. *Clinton Physical Therapy Servs.*, 714 N.W.2d at 609. When the motion and ruling are based on discretionary grounds, our review is for abuse of discretion. *Id.* However, when the motion and ruling are based on a claim the trial court erred on issues of law, our review is for correction of errors at law. *Id.*

In this case, the Suttons' motion for new trial argued the jury's award of zero damages to Tamara Sutton on her loss of consortium claim was inadequate, "failed to effectuate substantial justice between the parties," and constituted "an

inconsistent verdict." The district court has considerable discretion in ruling on a motion for new trial based upon the grounds that the verdict was inadequate or failed to effectuate substantial justice between the parties. *Fisher v. Davis*, 601 N.W.2d 54, 57 (Iowa 1999); *see also* Iowa R. App. P. 6.14(6)(*c*). We accordingly review the court's denial of the Suttons' motion for new trial on these grounds for an abuse of discretion. *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 162 (Iowa 2004). The trial court also generally has some discretion when faced with inconsistent answers in a jury verdict. *Clinton Physical Therapy Servs.*, 714 N.W.2d at 609. However, the question of whether the verdict is inconsistent so as to give rise to the exercise of that discretion is a question of law. *Id.* We therefore review the district court's conclusion as to whether answers are inconsistent for correction of errors at law. *Id.*

III. MERITS.

A. Evidentiary Rulings.

The Suttons argue the district court's denial of their motion in limine and motion for sanctions "created an unfair surprise . . . and did not allow [them] to present evidence or even have time to consider evidence to resist the allegations made for the first time on the day of trial." [1] We do not agree.

The Iowa Rules of Civil Procedure require that discovery be conducted in good faith. *See* Iowa R. Civ. P. 1.501(2). A party is accordingly charged with a

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[1] Although their motion in limine argued that evidence as to Sutton's operation of the jet ski earlier on the day of the accident was "irrelevant, prejudicial and inadmissible," the Suttons do not challenge the relevancy of the evidence on appeal. The Suttons' reply brief explicitly states the "issue of Relevance or Prejudice was not raised by the Plaintiffs" on appeal. Instead, they assert the "issue is did the Court in permitting this undisclosed evidence give an unfair advantage to Defendants by allowing Hansen, Wilhouski, and Strike" to testify. We will therefore confine our analysis to that issue.

duty to "seasonably" supplement or amend a prior response to discovery as to "[t]he identity of each person expected to be called as a witness at trial." Iowa R. Civ. P. 1.503(4)(*a*)(2). "Implicit in this rule are sanctions for noncompliance such as exclusion of evidence, continuance or other actions that a trial court deems appropriate." *Miller v. Bonar*, 337 N.W.2d 523, 527 (Iowa 1983). We are hesitant to interfere with the district court's discretion in sanctioning parties for noncompliance with the discovery rules. *M-Z Enters.*, 318 N.W.2d at 414.

The Suttons' motion for sanctions requested the district court bar the defendants from calling Mark Wilhouski, Brianna and Laura Rausch, Tina Hansen, and Shirley Mihm as witnesses at trial as a sanction for the defendants' failure to timely designate these individuals as potential witnesses in their responses to interrogatories propounded by the Suttons. The defendants supplemented their responses to the Suttons' interrogatories less than a week before trial, at which time they indicated their intent to call the aforementioned individuals as witnesses at trial. They did not list any of these individuals in their initial response to Interrogatory No. 10, which asked them to designate "any individual(s) who witnessed the accident." Nor did the defendants list any of these individuals in their answer to Interrogatory No. 16, which requested them to name each witness they planned to call to testify at trial.

We first note the defendants' initial responses to the interrogatories notified the Suttons well before trial that they intended to introduce evidence regarding Sutton's use of the jet ski earlier on the day of the accident. In response to Interrogatory No. 10, the defendants listed Douglas Strike as a witness and indicated that although he "did not witness the accident," he did

observe "that Mr. Sutton had been driving carelessly on the river that day." Hansen's response to Interrogatory No. 9, which asked for a description as to "what happened at the time of the accident," stated that before the accident "[Sutton] was riding around my dock splashing water on people there and up and down the river." Thus, the Suttons' argument that they "were not able to present evidence to resist these allegations because they were not raised until the day of trial" is without merit.

Furthermore, although Wilhouski, the Rausches, Tina Hansen, and Shirley Mihm, were not designated as witnesses in the defendants' first response to Interrogatory No. 16, these individuals' names and phone numbers were listed in response to a different interrogatory. Wilhouski was the only witness among those the Suttons sought to exclude in their motion for sanctions that actually testified before the jury,[2] and his testimony was cumulative to that of Strike and Roger Hansen.[3] *See, e.g., Miller*, 337 N.W.2d at 528 (finding the admission of hearsay at trial was "harmless since the facts sought to be shown were proven by other testimony"); *In re Estate of Hettinga*, 514 N.W.2d 727, 733 (Iowa Ct.

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[2] The Rausches and Shirley Mihm were not called as witnesses by the defendants during the trial. Tina Hansen testified outside the presence of the jury in an offer of proof after the district court sustained the Suttons' oral motion in limine and precluded her from testifying "as to any admissions that Mr. Sutton may have made to her."

[3] Wilhouski testified he observed Sutton driving the jet ski earlier on the day of the accident "back and forth on that channel . . . he was also making donuts or eights in the water. And at some point . . . he also ran into" a boat that was docked. He further testified Sutton was driving the jet ski "at a high rate of speed," and he "came . . . in close proximity, within 12 feet of people." Strike similarly testified that while he was out boating on the day of the accident, Sutton "came up alongside of us on a jet ski, spun the back end, covered us all with water, went on past us, turned around, and came back by us again." Roger Hansen also testified that earlier on the day of the accident he saw Sutton driving the jet ski "really close to the dock" at "about 10, 15, maybe 20 miles an hour," and he "turned and sprayed the kids that were on the dock."

App. 1994) (noting cumulative evidence, "which only corroborates other evidence properly in the record, does not constitute reversible error").

Under the circumstances of this case, we cannot conclude the district court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable" in declining to exclude the challenged evidence. *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000); *see also Miller*, 337 N.W.2d at 527 (finding that although plaintiff's failure to update his answers to defendant's interrogatories "would have been sufficient grounds for imposition of sanctions," the district court did not abuse "its discretion in failing to exclude the evidence").

B. Loss of Consortium Claim.

The Suttons next claim the district court erred in denying their motion for new trial or an additur because the jury's "finding for Tamara Sutton on her claim for loss of consortium without an award of damages is inconsistent" with the jury instructions. We do not agree.

"[A] verdict is not inconsistent if it can be harmonized in a reasonable manner consistent with the jury instructions and the evidence in the case, including fair inferences drawn from the evidence." *Clinton Physical Therapy Servs.*, 714 N.W.2d at 613. In this case, the jury was instructed, "*If* you find Tamara Sutton is entitled to recover damages, it is your duty to determine the amount." (Emphasis added.) Special Verdict No. 2 asked the jury, "Was the Defendant Roger Hansen at fault?" The jury answered, "Yes." Question No. 2 on the special verdict form asked the jury, "Was the fault of the Defendant Roger

Hansen a proximate cause of any item of damage to the Plaintiff?"[4] The jury again answered, "Yes." The verdict form then directed the jury to enter "the total amount of damages, *if any*, sustained by the Plaintiff Tamara Sutton." (Emphasis added.) The jury answered "0" for both past and future loss of consortium.

These instructions recognized that Tamara was required to prove damages in order to recover on her loss of consortium claim. *See Brunson v. Winter*, 443 N.W.2d 717, 720 (Iowa 1989) (stating that spouse seeking damages for loss of consortium must prove "he suffered damages in an ascertainable amount"). We reject the Suttons' argument that a finding of fault and causation necessitates an award of damages for a loss of consortium claim. *See, e.g., Stockburger v. Robinson*, 270 N.W.2d 453, 454 (Iowa 1978) (noting if the injured spouse "proves negligence and proximate cause in obtaining a favorable judgment," the spouse seeking recovery for loss of consortium must then prove "his injury and damages"). We do not believe the jury's decision to award no damages on the loss of consortium claim is inconsistent with its findings of fault and causation in light of the evidence, jury instructions, and applicable law in this case.

Damages for spousal consortium claims compensate for the loss of intangible benefits, such as "company, cooperation, affection, and aid," in addition to "tangible benefits of general usefulness, industry, and attention within

[4] The jury was not instructed as to the effect of Iowa Code section 668.3(1)(b) (2005) on Tamara Sutton's loss of consortium claim. This section provides,

> Contributory fault shall not bar recovery in an action by a claimant to recover damages for loss of . . . consortium, unless the fault attributable to the person whose injury . . . provided the basis for the damages is greater in percentage than the combined percentage of fault attributable to the defendants. . . .

the home and family." *Gail v. Clark*, 410 N.W.2d 662, 667 (Iowa 1987). Our supreme court has recognized that "[t]he value of a spouse's companionship, affection, and aid is difficult to measure." *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 870 (Iowa 1994). Thus, the amounts of damages "are primarily for the trier of fact to determine." *Beeck v. Aquaslide 'N' Dive Corp.*, 350 N.W.2d 149, 164 (Iowa 1984). We will consequently refrain from "disturb[ing] a jury verdict for damages unless it is 'flagrantly excessive or inadequate, so out of reason so as to shock the conscience, the result of passion or prejudice, or lacking in evidentiary support.'" *Kuta v. Newberg*, 600 N.W.2d 280, 284 (Iowa 1999) (citations omitted). "Whether damages in a given case are adequate depends on the particular facts of the case." *Fisher*, 601 N.W.2d at 57.

Under the facts of this case, we do not believe the district court abused its discretion in denying the Suttons' motion for new trial or an additur on the basis that the jury's verdict was inadequate and failed to effectuate substantial justice between the parties. Upon receiving the jury's answers to Special Verdict No. 2, the district court provided the jury with a supplemental question asking, "For clarification, is the jury saying that Tamara Sutton suffered no past loss of consortium or future loss of consortium?" The jury answered in the affirmative and explained, "We agree that Mrs. Sutton suffered some past loss of consortium but not a substantial enough loss to award monetary damages. . . . We also maintain that the present value of future loss of consortium is 0."

The only evidence submitted in support of the loss of consortium claim was the Suttons' testimony regarding the effect Roger Sutton's injury had on their lives. Tamara testified she cared for Roger while he was in the hospital and

recovering at home. She further testified they had to sleep in separate bedrooms for a "couple months." Both of the Suttons testified that before Roger's injury, they enjoyed gardening and going for walks. Since his injury, Roger is still able to garden and walk with Tamara, although their walks are more "limited in the distance." Based on the relatively scant evidence offered by Tamara in support of her consortium claim, we cannot say the jury's determination that her loss was not "sufficient enough" to justify an award of damages was lacking in evidentiary support or the result of passion or prejudice. *Brunson*, 443 N.W.2d at 720 (holding a "reasonable jury could have determined that [the spouse's] loss was insufficient to support a money award"). We therefore affirm the district court's denial of the Suttons' motion for a new trial or an additur.

IV. CONCLUSION.

We conclude the district court did not abuse its discretion in denying the Suttons' motion in limine and motion for sanctions. We further conclude the district court did not err in rejecting the Suttons' motion for a new trial on the basis that the jury's verdict was inconsistent. Nor did the district court abuse its discretion in denying the Suttons' motion for new trial or an additur on the basis that the jury's verdict was inadequate and failed to effectuate substantial justice between the parties. The judgment of the district court is accordingly affirmed.

AFFIRMED.