**IN THE COURT OF APPEALS OF IOWA**

No. 9-099 / 08-0727
Filed May 6, 2009

**SALLY A. COX and GREGORY F. COX,**
Plaintiffs-Appellants,

**vs.**

**JARED M. ALLEN,**
Defendant-Appellee.

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Appeal from the Iowa District Court for Black Hawk County, Jon Fister, Judge.

Sally and Gregory Cox appeal from the district court's denial of their new trial motion. **AFFIRMED.**

Thomas L. Staack and Carolyn A. Rafferty of Dutton, Braun, Staack & Hellman, P.L.C., Waterloo, for appellant.

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

Heard by Vaitheswaran, P.J., and Eisenhauer and Mansfield, JJ.

**VAITHESWARAN, P.J.**

Sally and Gregory Cox sued Jared Allen for injuries resulting from a car accident. This appeal raises a challenge to the district court's denial of their new trial motion.

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

Jared Allen consumed alcohol, got into his car, and drove. He came to a "rolling stop" at a Waterloo intersection. When he proceeded through the intersection, his vehicle struck a car driven by Sally Cox.

Cox received follow-up treatment with a chiropractor, Dr. Widen. Meanwhile, Allen pled guilty to operating while intoxicated first offense.

The Coxes sued Allen for negligence and loss of consortium. A jury awarded Sally Cox $14,527.39 for past medical expenses, $4000 for future medical expenses, $5000 for past pain and suffering, $5000 for future pain and suffering, and $1400 for past earnings, for a total of $29,927.39. The jury did not assess damages for past or future loss of the use of her body or for future loss of earning capacity.

The Coxes moved for a new trial. They (A) raised issues relating to Dr. Widen's medical records, (B) challenged the district court's failure to give a requested jury instruction on loss of earning capacity, and (C) contended the damage award was inadequate. The district court denied the motion and this appeal followed.

***II. Analysis***

The Coxes contend the district court should have granted their motion for new trial on the grounds set forth above. "The manner in which we review a

denial of a motion for new trial depends on the grounds for new trial alleged in the motion and ruled upon by the district court." *Hoskinson v. City of Iowa City*, 621 N.W.2d 425, 426 (Iowa 2001). Therefore, we will address the standards of review in connection with our analysis of each ground.

***A. Medical Records***

Before, during, and after trial, the Coxes raised issues concerning Dr. Widen's medical records. The records were produced to defense counsel in discovery. After they were produced, Allen's attorney asked Dr. Widen to have them typed up, as large portions were difficult to read. Dr. Widen complied with the request but only had the illegible portions transcribed. The Coxes objected to the admission of the transcription on various grounds. The district court ultimately issued a conditional ruling which gave the Coxes' attorney a choice, as follows:

> You could choose not to put the records in or you can put them in and see if [defense counsel] objects and then you can decide if he's willing to make a deal with you on withdrawing his objection to get his translation in. You can decide what to do about that.
>
> So I'm going to let the attorneys figure this out. But my point is, I'm inclined to keep the records out for the reasons I've said unless that defect in their illegibility can be cured by the translation. And, quite frankly, with the doctor being here and the way they testify and go through their notes it's almost getting it in the record twice, and people routinely do that and I don't object to it, I don't care, but the point is it's impossible to redact them to take out the illegible parts without making them incomplete and not helpful to the jury. So with that that's my—that's what my rulings are going to be.

At trial, the Coxes' attorney questioned Dr. Widen extensively about his medical records but elected not to offer them into evidence. Likewise, the transcription was not made part of the record. Defense counsel did, however,

develop a summary of Dr. Widen's medical records, which was admitted into evidence.

After trial, the Coxes sought a new trial based on the court's treatment of the medical records. The court explained its earlier conditional ruling on the admissibility of the medical records as follows: "It was Plaintiffs' trial strategy not to offer the handwritten medical records so as to deny Defendant a reason to offer the typed transcription and Plaintiffs cannot be prejudiced by a defense exhibit which was neither offered nor admitted." The court also suggested that the Coxes were not prejudiced by the earlier ruling:

> [P]laintiff's chiropractor testified extensively from his handwritten records and was thoroughly cross-examined on his diagnosis and treatment and, although admissible as an exception to the exclusion of hearsay, it would not have been an absence of discretion to exclude those records on the grounds that they were cumulative of his testimony and would give undue emphasis to it.

With respect to defense counsel's chart, the court affirmed its earlier ruling admitting the document:

> [T]he chart the chiropractor prepared from his records showing the dates he treated Sally Cox, her complaints on those dates and the scope of his treatment on those dates, was merely a summary extracted from the doctor's records, which would have otherwise been difficult to present, and were admissible pursuant to Rule 5.1006, Iowa Rules of Evidence.

The Coxes contend the district court abused its discretion in "conditioning the admissibility of [Sally]'s medical records on admission of an incomplete transcription." We begin by noting that even if an abuse of discretion is found, reversal is warranted only if the exclusion affected the Coxes' substantial rights. *See* Iowa R. Evid. 5.103(*a*); *Tucker v. Caterpiller, Inc.*, 564 N.W.2d 410, 414 (Iowa 1997).

As the district court stated, the Coxes' attorney used Dr. Widen's medical records during trial. He showed Dr. Widen the records, referred to them by date, and questioned him extensively about them both before and after the court ruled on their admissibility. For that reason, we are not persuaded that the exclusion of those records affected the Coxes' substantial rights. *See Shepherd v. McGinnis*, 257 Iowa 35, 49, 131 N.W.2d 475, 483 (1964) ("[T]he matters shown by the excluded portions of the exhibits, especially those relating to plaintiff, appear quite clearly from her own testimony and that of her doctors. Defendants therefore suffered no substantial prejudice from the rulings.").

As for the district court's admission of the chart summarizing the medical records, it is established that charts may be admitted even if the underlying records are not, as long as those underlying records have been made available for examination and copying. Iowa R. Evid. 5.1006; *State v. Fingert*, 298 N.W.2d 249, 255-56 (Iowa 1980). It is undisputed that the medical records were made available in advance of trial. Therefore, the district court did not abuse its discretion in admitting the chart.

We conclude the Coxes were not entitled to a new trial on this ground.

***B. Jury Instructions***

At trial, the Coxes requested the following jury instruction on loss of earning capacity:

> An impairment of physical capacity creates an inference of lessened earning ability in the future. The basic element to be determined in the matter of claimed impairment of future earning capacity is the reduction in value of the power to earn, not the difference in earnings received before and after the injuries. In determining the amount of loss, consideration should be given to evidence of wages and earnings of the plaintiff prior to the injury.

The court refused to give the instruction, stating an inference of lessened earning ability was not warranted in every case and such an inference would shift the burden of proof. The court instead gave the following uniform jury instruction on earning capacity: "The present value of loss of future earning capacity. Loss of future earning capacity is the reduction in the ability to work and earn money generally, rather than in a particular job." *See* Iowa Civil Uniform Jury Instruction 200.9. The Coxes maintain this instruction did not go far enough because "[i]t did not address the inference that arises from physical impairment or explain that the value in the power to earn is more than just the difference in earnings before and after the injury."

The district court must give a requested jury instruction if the instruction (1) correctly states the law, (2) has application to the case, and (3) is not stated elsewhere in the instructions. *Weyerhaeuser Co. v. Thermogas Co*., 620 N.W.2d 819, 823 (Iowa 2000). Our review of a court's refusal to give an instruction is for errors of law. *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 160 (Iowa 2004). Error in refusing to give a requested instruction does not warrant reversal unless it is prejudicial. *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994).

Allen's arguments in support of the court's ruling are as follows: (1) the instruction on earning capacity given by the district court "adequately [told] the jury" what it needed to know on this issue, and (2) he would have been prejudiced had the court given the requested jury instruction.

We agree with Allen on the first point. The district court instructed the jury that "[l]oss of future earning capacity is the reduction in the ability to work and

earn money generally." Viewed in the context of the proffered evidence, the instruction's reference to a "reduction in the ability to work" was a reference to Sally Cox's reduced physical capacity. Therefore, the actual jury instruction did what the Coxes claim the proposed instruction would have done; it "alerted the jury to the connection between an injury and loss of earning capacity."

The instruction adequately covered the issue despite its failure to mention an "inference" of lessened earning ability. As the Coxes note, an inference is simply "a deduction that can be made from the facts proved." *See generally Henderson v. Scurr*, 313 N.W.2d 522, 525-26 (Iowa 1981); *Leaders v. Dreher*, 169 N.W.2d 570, 574-75 (Iowa 1969) (discussing definitions of inference). One of the district court's general instructions stated that the jury was to "make deductions and reach conclusions according to reason and common sense." This instruction covered the language that the Coxes claimed was missing from the earning capacity instruction. *See State v. Rinehart*, 283 N.W.2d 319, 322-23 (Iowa 1979) (examining reference to "infer" in context of remaining jury instructions).

In the end,

> [i]t is probably true that no instruction or charge to a jury has ever been drawn with such perfect clearness and precision that an ingenious lawyer in the seclusion and quiet of his office with a dictionary at his elbow cannot extract therefrom some legal heresy of more or less startling character.

*Law v. Bryant Asphaltic Paving Co.*, 175 Iowa 747, 753, 157 N.W. 175, 177-78 (1916). But, "[t]he charge in this case, taken as a whole, recognizes the right of the defendant as well as of the plaintiff." *Id.* at 753, 175 N.W. at 178. In light of our conclusion that the actual instruction on earning capacity adequately

covered the issue of lost earning capacity, we find it unnecessary to address Allen's second argument that the proposed instruction would have prejudiced him.

We conclude the district court did not err in denying the Coxes' motion for new trial on this ground.

***C. Damages.***

Finally, the Coxes contend the verdict did not adequately compensate Sally Cox for her injuries. We review the district court's denial of the Coxes' new trial motion on this ground for an abuse of discretion. *Fisher v. Davis*, 601 N.W.2d 54, 57 (Iowa 1999).

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." As noted, the jury did not award damages for Sally Cox's past and future loss of the use of her body. The Coxes essentially concede that the record supports the absence of an award for future loss of the use of her body but maintain that they proved damages for past loss of the use of her body.

This damages component "does not include conditions of incapacity embraced within the definition of pain and suffering." *Blume v. Auer*, 576 N.W.2d 122, 126 n.2 (Iowa Ct. App. 1997). As Sally Cox based her loss of function on pain in her neck and back, the jury could have found that its pain and suffering award adequately compensated her and past loss of body damages would have been duplicative.

We turn to the jury's award of past lost earnings. The jury granted Sally Cox $1400, which the Coxes concede was "the amount associated with Sally's

daycare being closed for 4 weeks." The Coxes argue they should also have been awarded the amount they lost when two families stopped using her daycare services. However, one of the mothers who pulled her daughter out of the daycare center stated she did not do so until well into 2006, approximately eighteen months after the accident. Additionally, the jury could have found that Sally Cox had already reduced the number of families she serviced as a result of an accident that preceded this one. As the evidence supported the $1400 award, the district court did not abuse its discretion in declining to find this damage component inadequate.

The Coxes also assert the jury's award of damages for future medical expenses and past and future pain and suffering was inadequate. On these damage items, "the jury was in the best position to judge the credibility of the witnesses and to make the judgment call about what the noneconomic elements of damages were worth." *Matthess v. State Farm Mut. Auto. Ins. Co.*, 521 N.W.2d 699, 704 (Iowa 1994).

The Coxes next take issue with the jury's award of no damages for the loss of future earning capacity. The Coxes attribute the absence of an award to "instructional error." As we have upheld the jury instruction on future earning capacity, we also uphold the jury's decision on this component of the damages award.

The Coxes finally argue that the jury award was affected by passion and prejudice. "Passion and prejudice arise only when the award is not sustained by the evidence." *Guinn v. Millard Truck Lines, Inc.*, 257 Iowa 671, 685, 134 N.W.2d 549, 558 (1965). The jury's award in this case was sustained by the

evidence. Accordingly, the district court did not abuse its discretion in declining to provide redress on this basis.

**AFFIRMED.**