IN THE SUPREME COURT OF IOWA

No. 19-1983

ROBYN MENGWASSER,

Plaintiff-Appellant,

v.

JOSEPH COMITO and CAPITAL CITY FRUIT COMPANY,

Defendants-Appellees.

APPEAL FROM THE
IOWA DISTRICT COURT FOR POLK COUNTY
The Honorable Robert B. Hanson, District Judge

APPELLEES' FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

This case may be transferred to the Iowa Court of Appeals for consideration and decision, as it presents the application of existing legal principles. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case. Plaintiff-Appellant Robyn Mengwasser (hereinafter referred to as "Plaintiff") appeals from an Order denying her Motion for Partial New Trial, following a jury trial on her personal injury claim stemming from a minor automobile accident. The district court entered judgment on the jury's verdict in favor of Plaintiff, but she nevertheless sought a new trial on the sole issue of damages because she was unsatisfied with the amount of the verdict. (App. vol. I pp. 439-40, 452-61). Additionally, Plaintiff appeals from the district court's Order granting in part Defendants' Application to Tax Costs against Plaintiff pursuant to Iowa Code section 677.10.

Course of Proceedings. On September 27, 2017, ostensibly one day before the applicable statute of limitations period was to expire, Plaintiff commenced this action by filing a Petition at Law and Jury Demand. (App. vol. I pp. 27-31). On December 8, 2018, Plaintiff filed an Amended Petition. (App. vol. I pp. 32-37). Defendants Joseph Comito and Capital

City Fruit Company (hereinafter "Defendants") filed their Answer and Affirmative Defenses on January 9, 2018.[1] (App. vol. I pp. 38-42). On March 8, 2018, a Trial Scheduling and Discovery Plan was filed, providing deadlines for completion of discovery and for disclosure of expert witnesses. (App. vol. I pp. 43-48). The Plan stated that: (1) Plaintiff's deadline for certifying or designating expert witnesses was 210 days before trial, or November 26, 2018; (2) Plaintiff's deadline for serving expert disclosures pursuant to Iowa Rule of Civil Procedure 1.500(2)(b) was 30 days later, on December 26, 2018; (3) written discovery was required to be served no later than 90 days before trial, or by March 26, 2019; and (4) pretrial submissions, including all proposed trial exhibits, were due seven days before trial, or by June 17, 2019. (App. vol. I pp. 44-45).

On November 26, 2018, Plaintiff filed a Designation of Expert Witnesses which designated all of Plaintiff's "treating medical personnel," as well as a "non-treating" physician, Dr. Jacqueline Stoken, as experts. (App. vol. I pp. 49-51). Dr. Stoken's report of her independent medical exam ("IME") of Plaintiff, completed July 16, 2018, was produced on or

[1] Plaintiff also brought a claim for underinsured motorist benefits against Defendant Employers Mutual Casualty Company, but dismissed that claim shortly before trial. (App. vol. I p. 138).

before Plaintiff's expert disclosure deadline of December 26, 2018. (App. vol. II pp. 17-23).

On March 12, 2019, Defendants filed an Offer to Confess Judgment in the amount of $25,000 pursuant to Iowa Code Chapter 677. (App. vol. I pp. 52-53). Plaintiff did not accept the offer. (App. vol. I p. 462).

On March 4, 2019, Plaintiff produced a report dated February 22, 2019 from one of her treating health care providers, chiropractor Randy Dierenfield. (App. vol. III pp. 4-6). On March 26, 2019, Plaintiff filed her First Designation of Rebuttal Expert Witnesses, identifying Carma Mitchell, Sunil Bansal, M.D., and Richard Sherman as "Medical Experts – Non-Treating." (App. vol. I pp. 54-56). Later, on May 24, 2019, Plaintiff served disclosures from the so-called rebuttal experts. (App. vol. I pp. 62-83). Also on May 24, 2019, Plaintiff produced a report dated April 3, 2019 from another of her health care providers, physician's assistant Scott Meyer. (App. vol. I pp. 88-89).

On May 29, 2019, Defendants filed two motions directed to Plaintiff's experts and expert reports disclosed subsequent to Plaintiff's expert disclosure deadline of December 26, 2018. (App. vol. I pp. 57-89). The first was Defendants' Motion to Strike Reports and Opinion Testimony of Plaintiff's Experts Randy Dierenfield, D.C., and Scott Meyer, P.A.-C. (App.

vol. I pp. 84-89). The second was Defendants' Motion to Exclude Plaintiff's Experts Carma Mitchell, Sunil Bansal, M.D., and Richard Sherman. (App. vol. I pp. 57-83).

On May 30, 2019, Plaintiff served her Second Supplemental Answers to Interrogatories, providing notice that she had a follow-up appointment on May 29, 2019 with a Dr. Jackson at a clinic called Regenexx, and that a MRI was scheduled for June 7, 2019. (App. vol. I pp. 132-36). On June 16, 2019, the district court entered an Order on Defendants' Motion to Strike Reports and Motion to Exclude Plaintiff's Experts. (App. vol. I pp. 122-24). The court granted the Motion to Strike in its entirety, ruling that Dierenfield's opinions (as to causation and loss of function and its impact on Plaintiff's ability to work) and Meyer's opinion (as to causation) were not formed or stated during the course of their treatment of Plaintiff, and were not timely disclosed. (App. vol. I p. 123). The district court granted in part and denied in part Defendants' Motion to Exclude, ruling that Mitchell and Bansal did not qualify as rebuttal experts but that Sherman would be allowed to testify. (App. vol. I p. 122-23).

On June 17, 2019, Defendants filed their Second Motion in Limine, which among other things, requested exclusion of evidence of Plaintiff's most recent medical treatment at Regenexx (reports of which had not yet

been produced in to Defendants). (App. vol. I pp. 129-30). On Sunday, June 23, 2019, one day prior to the start of trial, Plaintiff filed a 92-page document which appeared to consist of her medical records from Regenexx and which Plaintiff had apparently marked as her proposed trial exhibit 21. (App. vol. III pp. 7-98).

The case was tried to a jury from June 24 to 28, 2019. (App. vol. I p. 439-40). The court's Order Entering Judgment on Jury Verdict was filed on July 1, 2019, stating the jury returned a verdict in favor of Plaintiff and against Defendants in the total amount of $12,705. (App. vol. I p. 439).

On July 3, 2019, Defendants filed their Application for Taxation of Costs based upon the fact the jury's verdict was less than the amount of Defendants' Offer to Confess Judgment. (App. vol. I pp. 441-44). On July 16, 2019, Plaintiff filed a Motion for Partial New Trial. (App. vol. I pp. 452-61). The district court entered its Order on all post-trial motions on November 10, 2019. (App. vol. I pp. 462-64). The court granted in part Defendants' Application for Taxation of Costs and denied Plaintiff's Motion for New Trial. (App. vol. I pp. 462-63). On November 25, 2019, Plaintiff filed her initial Notice of Appeal with this Court and with the district court.[2] (App. vol. I pp. 468-69). On November 26, 2019, the district court entered

[2] This was followed by several amended notices of appeal and amended combined certificates.

an Order Nunc Pro Tunc, providing the correct total amount of costs to be taxed against Plaintiff, $5,358.30. (App. vol. I pp. 470-71).

STATEMENT OF FACTS

This case arose from a minor automobile accident that occurred on September 28, 2015, at the end of a freeway exit ramp located at Interstate 35 and Mills Civic Parkway in West Des Moines, Iowa. (App. vol. I pp. 27-31; 353-54 (Tr. 1:163-64); 391-92 (Tr. 3:130-31)). Plaintiff was the driver of a 2000 Buick Park Avenue stopped at a stoplight on the exit ramp. (App. vol. I pp. 355 (Tr. 2:165); 376-77 (Tr. 3:17-18); 391 (Tr. 3:130)). Defendant Joseph Comito, driving a 2012 Jeep Grand Cherokee owned by his employer, Capital City Fruit Company, approached from behind, was slowing down, and had almost come to a stop. (App. vol. I pp. 355-56 (Tr. 2:165, 2:180); 370 (Tr. 3:11)).

Unfortunately, Comito's foot slipped off the brake pedal and the front bumper of the Jeep made slight contact with the rear bumper of the Buick. (App. vol. I p. 356 (Tr. 2:180)). Comito estimated he was traveling at no more than five miles per hour. (App. vol. I p. 376 (Tr. 3:17)). The impact was very minor, as shown by photographs taken at the scene and taken by an investigator a short time later. (App. vol. I pp. 357-60 (Tr. 2:185-88); 363-76 (Tr. 3:4-17); 153-87). Neither police nor paramedics were called, and no

one required medical attention at the scene. (App. vol. I pp. 378 (Tr. 3:20); 404 (Tr. 3:168)). Comito exchanged information with Plaintiff and heard nothing more about the accident until more than two years later when served with suit papers. (App. vol. I pp. 356 (Tr. 2:180); 378 (Tr. 3:20)). Plaintiff never had the minor damage to the rear bumper of the Buick repaired before trading it for another vehicle. (App. vol. I p. 403 (Tr. 3:164)).

Plaintiff complained only of a soft-tissue injury to her neck as a result of the accident. (App. vol. I pp. 395-99 (Tr. 3:139-43)). Plaintiff had significant pre-existing medical history related to her neck, ostensibly caused by her work as a "closed captioner" for television programs. (App. vol. I pp. 380 (Tr. 3:117); 383-87 (Tr. 3:120-24)). This work is similar to that of a court reporter. (App. vol. I pp. 379-82 (Tr. 3:116-19)). Plaintiff said she had neck compression symptoms in 2006-08; as well as carpal tunnel symptoms and Raynaud's syndrome, which causes her hands to be cold, prior to the automobile accident. (App. vol. I pp. 384-87 (Tr. 3:121-24); 410-11 (Tr. 4:32-33)).

ARGUMENT

Having failed to obtain the substantial personal injury award she sought at trial, and after failing to persuade the district court to order a new trial, Plaintiff brings this appeal. In so doing, Plaintiff glosses over or

ignores critical procedural facts of the case and neglects to mention her numerous failures to meet agreed-upon litigation deadlines. Plaintiff attempts to twist the trial court's decisions, which correctly required adherence to the trial scheduling order, into assignments of error on appeal. Her efforts ultimately fall short. The appeal is completely lacking in merit. The district court's entry of judgment on the jury verdict, its ruling on Defendants' Application for Taxation of Costs, and its decision denying the request for a new trial should be affirmed.

I. THE DISTRICT COURT CORRECTLY LIMITED THE TRIAL TESTIMONY OF DR. DIERENFIELD BY EXCLUDING HIS UNTIMELY OPINIONS ON CAUSATION AND LOSS OF FUNCTION.

a. Preservation of Error.

Defendants agree that error on this issue has been preserved, albeit for reasons different than those stated in Plaintiff's brief. Error was preserved because the issue was addressed in Plaintiff's Motion for Partial New Trial. (App. vol. I pp. 452-61).

b. Standard of Review.

Defendants agree with Plaintiff's statement that rulings concerning trial testimony of expert witnesses are discretionary, such that an appellate court reviews a district court's decision on the matter for an abuse of discretion. *See Eisenhauer v. Henry Cty. Health Ctr.*, 935 N.W.2d 1, 9

(Iowa 2019) (citing *Hansen v. Cent. Iowa Hosp. Corp.*, 686 N.W.2d 476, 479 (Iowa 2004)). Defendants disagree, however, with Plaintiff's apparent (and confusing) contention that the standard of review might also be for "errors at law" in light of Plaintiff's request for new trial on the issue.[3]

An appellate court's review of a trial court's ruling on a motion for new trial depends on the grounds raised in the motion. *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 859 (Iowa 2001). If the motion for new trial was based upon a discretionary ground, the appellate court reviews the ruling for an abuse of discretion. *Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 609 (Iowa 2006). On the other hand, if the motion was based on a legal question, the lower court's ruling is reviewed for errors of law. *Id.* As stated above, the appropriate standard of review here is abuse of discretion. *Eisenhauer*, 935 N.W.2d at 9.

[3] Subsection A of Plaintiff's first brief point appears misplaced, as it suggests the district court made an error in law when it declined to grant a new trial due to an allegedly inconsistent verdict. Plaintiff revisits this argument in greater detail in Argument section III of her brief. Accordingly, Defendants will respond to this argument in section III of this brief, below, rather than address it under section I.

c. The District Court Properly Exercised its Discretion in Precluding the Chiropractor's Untimely Opinion Testimony.

In subsection B of Plaintiff's argument section I, Plaintiff completely ignores the point of Defendants' pretrial Motion to Strike, as well as the basis for the district court's ruling granting the Motion. Contrary to what Plaintiff implies, the court did not totally preclude Plaintiff's chiropractor, Dr. Dierenfield, from testifying regarding the care and treatment he rendered to Plaintiff. Indeed, Dr. Dierenfield was the first witness Plaintiff called to testify. (App. vol. I pp. 281-322). Rather, the court merely restricted Dr. Dierenfield from testifying to his opinions on the legal questions of causation, loss of function, and its impact on Plaintiff's ability to perform her work, because those opinions were not timely disclosed under the Trial Scheduling and Discovery Plan. (App. vol. I pp. 122-24; 323-30). That decision was thoroughly correct.

It is well established that district courts may exercise their inherent power to enforce terms of a scheduling order to effectively manage pretrial conduct and control the conduct of a trial. *Fry v. Blauvelt*, 818 N.W.2d 123, 130 (Iowa 2012); *see also* Iowa R. Civ. P. 1.602(5) (stating if a party fails to obey a scheduling or pretrial order, the court "may make such orders which regard thereto as are just"). "By fixing time deadlines, a scheduling order

stimulates litigants to focus on the most germane issues in the case. *Fry*, 818 N.W.2d at 129 (citing Fed. R. Civ. P. 16 advisory committee's notes to 1983 amendments; 3 James W. Moore, *Moore's Federal Practice* § 16.02, at 16-19 to 16-20 (3d ed. 2012)). Time limits thus promote efficiency and reduce the amount of resources required to be invested in the litigation. *Id.*

Plaintiff designated Dr. Dierenfield as an expert on November 26, 2018, and relied on medical records he authored regarding Plaintiff as the basis for his testimony. (App. vol. I pp. 49-51; 281-96 (Tr. 2:6-21); 326-27 (Tr. 2:52-53)). Under the Trial Scheduling and Discovery Plan, Plaintiff's expert disclosures were due on December 26, 2018. (App. vol. I pp. 43-48). A review of Dr. Dierenfield's records showed that he never stated opinions as to causation of Plaintiff's injuries, permanency, or loss of function in his records. (App. vol. II pp. 42-340). It was not until March 4, 2019 when Plaintiff produced a letter from Dr. Dierenfield dated February 22, 2019 – more than two months after the deadline for production of Plaintiff's expert disclosures – that Plaintiff first indicated she planned to elicit testimony from Dr. Dierenfield on those legal questions. (App. vol. III pp. 4-6).

It is therefore a misnomer for Plaintiff to contend on appeal that Dr. Dierenfield "developed these opinions through treating [Plaintiff]." *See* Plaintiff's Brief p. 26. Contrary to Plaintiff's argument, and as proven by

Dr. Dierenfield's own records, Plaintiff failed to show Dr. Dierenfield formed his opinions regarding causation, loss of function, etc. during the course of his treatment. (App. vol. I pp. 122-24). The district court was absolutely correct in ruling these opinions "were not formed or stated during the course of [Dierenfield's] treatment of plaintiff and certainly were not disclosed or even revealed in [Dierenfield's] … medical records as of plaintiff's December 26, 2018 deadline for making expert disclosures." (App. vol. I pp. 122-24).

Nevertheless, Plaintiff contends the district court erred in limiting Dierenfield's opinion testimony because, in Plaintiff's conclusory view, Dierenfield was solely a treating physician and therefore a witness who did not need to provide a written report under Iowa Rule of Civil Procedure 1.500(2)(b). In so arguing, Plaintiff relies upon *Morris-Rosdail v. Schechinger*, 576 N.W.2d 609 (Iowa Ct. App. 1998). A thorough analysis of that case reveals Plaintiff's reliance is misplaced. The reasoning and holding of *Morris-Rosdail* instead support the district court's decision limiting Dierenfield's testimony in the instant action. The Court in *Morris-Rosdail* observed:

> Before determining the appropriateness of sanctions in a personal injury action for nondisclosure under rule 125, it is necessary to examine the threshold question whether the facts and opinions were formulated by a physician in treating a

> patient or whether they were formulated by a physician for purposes of the issues in pending or anticipated litigation. *See Carson v. Webb*, 486 N.W.2d 278, 281 (Iowa 1992). … Although the disclosure requirements of rule 125 are generally limited to physicians retained for purposes of litigation and exclude treating physicians, the application of the rule does not necessarily depend on the label or role of the physician. Instead, it hinges on the ***reason*** and ***time frame*** in which the underlying facts and opinions were acquired by the physician. ***Thus, even treating physicians may come within the parameters of rule 125 when they begin to assume a role in the litigation analogous to that of a retained expert***. [citing *Day v. McIlrath*, 469 N.W.2d 676, 677 (Iowa 1991)]. This generally occurs when a treating physician begins to focus less on the medical questions associated in treating the patient and more on the legal questions which surface in the context of a lawsuit.

Morris-Rosdail, 576 N.W.2d at 612 (emphasis added).

In the present case, it is abundantly clear the time frame when Dr. Dierenfield formed his opinions as to causation and loss of function were, according to his own testimony, toward the conclusion of Plaintiff's treatment. (App. vol. I pp. 324, 327 (Tr. 2:50, 53)). Such opinions were not set forth in his treatment notes, but only in his letter dated February 22, 2019. (App vol. I p. 327 (Tr. 2:53)). This was confirmed by Dierenfield himself during Plaintiff's Offer of Proof on the matter. (App. vol. I pp. 323-29 (Tr. 2:49-55)). By the time he had written his letter, Plaintiff's lawsuit had been on file for many months and trial preparation was well underway.

The uncontroverted facts are that Plaintiff designated Dierenfield as an expert in November 2018, but gave no indication she would be eliciting opinions from him on causation, loss of function, etc. until after Plaintiff's expert disclosure deadline in December 2018 expired. Given these circumstances, the district court was correct when it impliedly found Dierenfield was akin to a retained expert, subject to the disclosure requirements of Rule of Civil Procedure 1.500(2)(b) and the disclosure deadline established by the Trial Scheduling and Discovery Plan. There was no abuse of discretion in limiting Dierenfield's testimony to a discussion of the care and treatment he provided Plaintiff. He was properly precluded from testifying to his opinions which clearly related to the legal questions of causation, loss of function, and permanency which had by that point had surfaced in the lawsuit. The district court's ruling as to Dr. Dierenfield's trial testimony should be affirmed.

II. THE DISTRICT COURT CORRECTLY DECLINED TO INSTRUCT THE JURY AS TO PLAINTIFF'S ALLEGED PREVIOUS INFIRM CONDITION BECAUSE THE EVIDENCE DID NOT SUPPORT SUBMISSION OF SUCH AN INSTRUCTION.

a. Preservation of Error.

Defendants agree that Plaintiff preserved this issue for appeal by discussing it in her Motion for Partial New Trial. (App. vol. I pp. 452-61).

b. Standard of Review.

Defendants disagree with Plaintiff's assertion regarding the applicable standard of review. When a party alleges a district court gave an instruction not supported by the evidence, that decision is reviewed for correction of errors at law. *Pavone v. Kirk*, 801 N.W.2d 477, 494 (Iowa 2011). However, "[w]e review the related claim that the trial court should have given a party's requested instructions for abuse of discretion." *Id.* (citing *Summy v. City of Des Moines*, 708 N.W.2d 333, 340 (Iowa 2006)). In this case, Plaintiff alleges the district court erred in disallowing a jury instruction she requested, so abuse of discretion is the correct standard of review. Additionally, an appellate court will not reverse a verdict due to erroneous instructions unless the error was prejudicial. *Waits v. United Fire & Cas. Co.*, 572 N.W.2d 565, 569 (Iowa 1997). Instructions must be considered as a whole, and if the jury has not been misled there is no reversible error. *Thavenet v. Davis*, 589 N.W.2d 233, 236 (Iowa 1999).

c. Substantial Evidence did not Support Submission of an "Eggshell Plaintiff" Jury Instruction.

In section II of her Brief, Plaintiff makes a rather strained and improperly supported argument that she was entitled to a jury instruction patterned after Iowa Civil Jury Instruction 200.34, titled "Previous Infirm Condition" and commonly known as the "eggshell plaintiff" instruction.

The record, however, demonstrates that evidentiary support for such an instruction was lacking. The district court correctly found the instruction inapplicable.

As Plaintiff acknowledges, a trial court "***must refuse*** to instruct on 'an issue having ***no substantial evidential support or which rests on speculation***.'" *Thompson v. City of Des Moines*, 564 N.W.2d 839, 846 (Iowa 1997) (quoting *Clinton Land Co. v. M/S Assocs.*, 340 N.W.2d 232, 234 (Iowa 1983) (emphasis added); *Sleeth v. Louvar*, 659 N.W.2d 210, 215 (Iowa 2003); *Walker v. Sedrel*, 260 Iowa 625, 632, 149 N.W.2d 874, 878 (1967) ("There is, of course, no duty to instruct on an issue without substantial support in evidence or which rests only on speculation or conjecture."). In other words, substantial evidence must be presented at trial to support the submission of an instruction. *Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 150 (Iowa 1992). Evidence is substantial when reasonable minds would accept it as adequate to reach the conclusion. *Id.*

More specifically, for the eggshell plaintiff instruction to be submitted, there must be substantial medical evidence that a plaintiff is more susceptible to injury than a person of normal health. *See, e.g., Waits*, 572 N.W.2d at 576-77; *Benn v. Thomas*, 512 N.W.2d 537, 540 (Iowa 1994); *Bowers v. Grimley*, No. 08-0484, 2009 WL 139570 (Iowa Ct. App. Jan. 22,

2009). Under this standard, the evidence in the present case did not support the eggshell plaintiff jury instruction. In explaining its reasoning for declining to give the instruction, the district court astutely stated:

> [T]here is no evidence that the court can recall, nor has any evidence been identified by either of the parties, that would indicate where there was any opinion given by an expert witness and I think that's what would be required here that there was any kind of previous condition that [Plaintiff] had that made her more susceptible to the injuries that she allegedly suffered in the accident in question. I don't think that's anywhere in the record and so that's why I am not including that instruction.

(App. vol. I p. 425 (Tr. 5:11)). However, the district court instructed the jury regarding aggravation of a pre-existing condition, as Plaintiff requested. (App. vol. I p. 151, 436).[4]

On appeal, Plaintiff appears to suggest a different standard should apply to the eggshell plaintiff instruction, arguing that witnesses on both sides of the case "provided evidence that could lead a jury to reasonably conclude and/or infer susceptibility of Plaintiff based on a prior asymptomatic condition for Plaintiff's injuries." *See* Plaintiff's Brief p. 29.

[4] Jury Instruction No. 15, patterned after Iowa Civil Jury Instruction 200.32, stated: "If you find Robyn Mengwasser had a physical ailment or disability before the subject collision was aggravated by the subject collision causing further suffering then she is entitled to recover damages caused by the aggravation. She is not entitled to recover for any physical ailment or disability which existed before the subject collision or for any injuries or damages which she now has which were not caused by the subject collision." (App. vol. I p. 436).

In support of this contention, Plaintiff provides a string citation to various parts of the record without offering any explanation of what those parts actually state. Plaintiff's Brief p. 29.

A careful review of the evidentiary items, however, fails to reveal anything remotely resembling substantial evidence that Plaintiff was more susceptible to injury. This is borne out by the following description of the parts of the record referenced in Plaintiff's string citation:

- Trial testimony by Plaintiff's expert, Dr. Stoken, indicating Plaintiff's neck pain more likely than not resulted from the accident, that she was impaired to a certain degree, and that she might need pain management in the future. (App. vol. I pp. 338-41 (Tr. 2:124-27));
- Two pages of Dr. Stoken's IME report, reciting opinions similar to her trial testimony. (App. vol. II pp. 21-22);
- Excerpts from the evidentiary deposition of defense expert, Dr. Todd Harbach, where he generally stated his opinions that he did not believe the injury sustained in the accident would have accelerated Plaintiff to an end she would not have reached naturally on her own, that Plaintiff's diagnosis was cervicalgia, that Plaintiff had tenderness in her trapezius muscle when he

examined her, and that this tenderness was due in part to degeneration and partly to the automobile accident. (App. vol. I pp. 117, 119, 120-21);

- A page of Dr. Harbach's IME report, stating the opinions to which he testified at deposition. (App. vol. II p. 447);
- A portion of the trial transcript reflecting counsel's argument on jury instructions, outside the presence of the jury. (App. vol. I p. 423 (Tr. 5:4));
- An incomplete citation to Dr. Dierenfield's trial testimony referring to an article in a medical journal he apparently relied upon in treating Plaintiff. (App. vol. I p. 321 (Tr. 2:46)); and
- Additional trial testimony from Dr. Stoken stating her opinion that Plaintiff will need future medical care. (App. vol. I p. 342 (Tr. 2:149)).

As is abundantly clear, these parts of the record simply do not equate to substantial evidence that Plaintiff was more susceptible to injury than an average person. No witness testified directly or indirectly to that effect, as the facts obviously did not support such a conclusion or even inquiry. Indeed, under direct examination by Plaintiff's own counsel, her medical expert, Dr. Stoken, provided testimony completely inconsistent with the

notion that Plaintiff was someone more fragile than a regular individual. (App. vol. I p. 340 (Tr. 2:126)). After opining that Plaintiff had mild degenerative disc disease in the cervical spine, the following exchange took place between the doctor and Plaintiff's lawyer at trial:

> Q. What is degenerative disc disease, Dr. Stoken?
> A. That's some arthritis that's occurring, and the disc – what happens is that the disc, when you're young, is full of water, and it's nice and puffy. But as we age, it gets harder and loses the water, so it becomes – so you start developing some arthritis.
> Q. Is that something that **typically everyone** has?
> A. **Yes**.

(App. vol. I p. 340 (Tr. 2:126)) (emphasis added). To further emphasize the point that Plaintiff had no "previous infirm condition," and thus did not meet the definition of an "eggshell plaintiff," Dr. Stoken's IME report stated: "[p]revious to the collision she had no disability related to her cervical condition." (App. vol. II p. 22). Plaintiff is obviously mistaken when she argues in her Brief that Dr. Stoken's testimony concerning Plaintiff's "Degenerative Disease" amounted to substantial evidence that she was more susceptible to injury.

Nor did Dr. Harbach's opinion testimony provide evidentiary support for an eggshell plaintiff instruction. He found that any aggravation of Plaintiff's pre-existing condition could not be identified on any diagnostic imaging, *i.e.* the CT scan, completed after the accident. (App. vol. I p. 117).

He testified: "There was no obvious fracture. There's no obvious herniated disk. All it shows is normal progression of degeneration that had already started nearly a decade earlier." (App. vol. I p. 117). Further, he found the automobile accident did not accelerate Plaintiff to an end she would not have reached naturally on her own. (App. vol. I pp. 117-18). Dr. Harbach's opinions are directly contrary to the notion that Plaintiff was an individual more susceptible to injury.

This case does not present the same situation as *Benn v. Thomas*, 512 N.W.2d 537 (Iowa 1994), one of the cases Plaintiff seems to believe is supportive of her argument. In *Benn*, plaintiff's medical expert testified the decedent had a history of coronary disease and insulin-dependent diabetes, and that the stresses of the automobile accident in which he was involved and subsequent treatment were responsible for his heart attack and death. *Benn*, 512 N.W.2d at 540. In that circumstance, failure to instruct on the eggshell plaintiff rule "would fail to convey to the jury a central principle of tort liability." *Id.* By contrast, Plaintiff in the present case did not introduce evidence of this nature.

Plaintiff also frequently cites *Waits v. United Fire & Cas. Co.*, but its holding instead favors the district court's decision rejecting the eggshell plaintiff instruction. *See Waits*, 572 N.W.2d at 576. In *Waits*, the plaintiff's

treating physician did, in fact, testify that her prior injury would make her more susceptible to a later injury. *Id.* Again, however, in the present case, Plaintiff failed to develop any such evidence.

The facts of this case are more analogous to those of *Bowers v. Grimley*. The plaintiff in *Bowers* had rods attached to her spine to correct curvature due to scoliosis. *Bowers*, 2009 WL 139570, at *1. She was injured in an automobile accident in which her vehicle's airbag deployed, and because she later felt a "protrusion" of the corrective hardware, she underwent surgery to remove a portion of it. *Id.* at *1-3.

The district court in *Bowers* gave a jury instruction regarding aggravation of a pre-existing condition, as did the district court in the instant case, but declined to instruct the jury on the eggshell plaintiff doctrine. *See Bowers*, 2009 WL 139570, at *8. The Iowa Court of Appeals found no error in refusing to instruct on the eggshell plaintiff rule and affirmed the ruling denying plaintiff's motion for new trial. *Id.* at *9. Although plaintiff had introduced considerable expert medical testimony indicating the force of the auto accident was the mechanism that loosened the rod in her back, the Iowa Court of Appeals concluded no evidence was presented that plaintiff was "more susceptible to injury due to her scoliosis or due to her corrective hardware." *Id.* at *4-5, 9.

Likewise, the record in the present case is devoid of any evidence that Plaintiff was more susceptible to injury, as discussed above. Contrary to Plaintiff's suggestion on page 29 of her Brief, mere speculation and conjecture regarding alleged susceptibility to injury does not meet the required standard. *See, e.g., Thompson*, 564 N.W.2d at 846. The district court therefore properly exercised its discretion by excluding the eggshell plaintiff instruction and a new a trial is not warranted.

III. THE JURY'S VERDICT WAS SUPPORTED BY SUFFICIENT EVIDENCE AND WAS NOT "INCONSISTENT."

a. Preservation of Error.

Defendants acknowledge that Plaintiff's Motion for Partial New Trial included a short section broadly arguing the jury's verdict was "logically inconsistent." (App. vol. I pp. 455-56). In this appeal, however, her argument regarding the allegedly inconsistent verdict is far more specific than her earlier contentions, to the point it is a completely different iteration of the issue. Accordingly, Defendants disagree that Plaintiff properly preserved the issue for appeal.

It is a fundamental doctrine of appellate review that an issue must ordinarily be both raised in district court and decided before the appellate court will address that issue on appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002); *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998)

("issues must be presented to and passed upon by the district court"). Because Plaintiff failed to present to the court below the specific contentions she is now making regarding the allegedly inconsistent verdict, she did not properly preserve the issue for appellate review.

b. Standard of Review.

Defendants do not dispute that Plaintiff has, for the most part, accurately recited certain authorities discussing the standard of review applicable to allegedly inconsistent jury verdicts. When faced with inconsistent answers in a verdict, a trial court has three alternatives: (1) order judgment appropriate to the answers notwithstanding the verdict; (2) order a new trial; or (3) send the jury back for further deliberations. *Clinton Physical Therapy*, 714 N.W.2d at 609. Ordinarily, it is discretionary with the court as to which of these alternatives to choose. *Id.* The question whether a verdict is inconsistent so as to give rise to the exercise of that discretion is a question of law, meaning the district court's conclusion as to whether answers are inconsistent is reviewed for errors at law. *Id.*

However, if the answers are not inconsistent, the court is permitted to enter judgment consistent with the jury's answers. *Id.* at 613. Accordingly, on review, the appellate court must determine whether an internal inconsistency in the verdict exists. *See Pavone*, 801 N.W.2d at 498.

c. The District Court Correctly Entered Judgment Consistent with the Jury Verdict, as There was no Inconsistency in Awarding Damages for Past Pain and Suffering and Past Loss of Function but Declining to Award 'Future Damages.'

Plaintiff's third point in this appeal sets forth another labored contention: that the jury's verdict was not supported by sufficient evidence and was inconsistent, apparently because the jury declined to award her any amounts for "future damages."[5] These arguments are without merit.

1. Sufficiency of Evidence

With regard to sufficiency of the evidence, Defendants' medical expert, Dr. Harbach, testified regarding his review of Plaintiff's medical records and his opinion of Plaintiff's claimed injuries. (App. vol. I pp. 108-16). More specifically, his review of records showed that Plaintiff did, in fact, "get better" following whatever minor injury she might have sustained, and that further treatment was not necessary because she complained of pain on a "one-point scale," *i.e.* she rated her pain as merely a "one," with ten being the worst. (App. vol. I p. 118). Following a detailed analysis of Plaintiff's medical records under direct examination by Defendants' counsel, Dr. Harbach testified:

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[5] Although the term "future damages" is not expressly defined by Plaintiff, it is apparently a shorthand reference to Plaintiff's claims (properly rejected by the jury) for future pain and suffering and future loss of function of mind and body. *See* Plaintiff's Brief pp. 39-42.

> [I]n this patient's case, she was complaining that exacerbation never changed, but your review of the records show that that really isn't true. She stated that [on the day of his independent medical examination of Plaintiff] that was really the case but she did get better. She – I didn't feel she had consistent treatment following the injury, consistent with the physical therapy that was maintained, medicines that were maintained, but it sounds like, you know, looking closer at the stuff we just went through, that it wasn't necessary because she was feeling good.

(App. vol. I p. 118). Dr. Harbach opined he expected Plaintiff's injury would be a "temporary aggravation" of any prior neck pain, and that it was "unusual" and "statistically very unlikely" Plaintiff would have the symptoms she reported three and a half years after the accident. (App. vol. I p. 118). He added that the review of Plaintiff's medical records "pretty much proved it because she did get better." (App. vol. I p. 118). A reasonable interpretation of this testimony is that Plaintiff fully recovered from any injury she sustained in the automobile accident and would therefore not experience future pain and suffering or future loss of function.

As previously discussed above in Argument section II, Dr. Harbach also opined the accident did not accelerate Plaintiff to an end she would not have reached naturally on her own. (App. vol. I p. 117-18). Taken as a whole, Dr. Harbach's testimony provided clear evidence the automobile accident did not cause any "future damages." Instead, Plaintiff's physical condition at the time of his examination had progressed to a point she would

have reached through the natural aging process whether the accident had occurred or not. (App. vol. I p. 117-18).

It is thus a gross misstatement of fact when Plaintiff contends "there was an agreement by all doctors that there was some form of permanent injury" and "[a]ll the doctor's [sic] agreed" Plaintiff had a permanent injury. *See* Plaintiff's Brief pp. 40-42. Plaintiff completely ignores the testimony by Dr. Harbach highlighted above. As in her preceding brief point, she fails to provide any description or explanation whatsoever of the parts of the record she repeatedly string-cites as support for her flagrant overstatements of fact. *See* Plaintiff's Brief pp. 39-42. A proper review of the expert medical testimony, in its entirety, obviously belies Plaintiff's brazen attempts to mislead this Court.

Plaintiff also fails to recognize that it was certainly within the province of the jury to believe all, part, or none of any witnesses' testimony, consistent with Jury Instruction no. 5. (App. vol. I p. 434). Instruction no. 5 was patterned after Iowa Civil Jury Instruction 100.9 – Credibility of Witnesses, and is a standard instruction given in civil cases.[6] The jury was thus free to ignore the testimony of Plaintiff's independent medical expert, Dr. Stoken, who suggested that Plaintiff might incur future medical expense

[6] Indeed, Plaintiff requested this instruction. (App. vol. I p. 150).

as a result of the accident. (App. vol. I p. 339 (Tr. 2:125)). The verdict reflects that the jury properly discharged its duties as instructed.[7]

Accordingly, contrary to Plaintiff's contentions, substantial evidence supported the decision declining to award any amounts for so-called future damages. The district court correctly denied Plaintiff's Motion for Partial New Trial.

2. Consistency of verdict.

It is particularly baseless for Plaintiff to contend the verdict was "logically inconsistent." In several prior cases involving personal injury claims, including one Plaintiff cites in her Brief, the Iowa Supreme Court described the types of jury verdicts that are truly logically inconsistent. *See, e.g., Bryant v. Parr*, 872 N.W.2d 366, 376-80 (Iowa 2015) and cases cited therein. A verdict which awards money for past pain and suffering and past loss of function, but which rejects a plaintiff's claims for pain and suffering and future loss of function, is not considered an inconsistent verdict. *See id.*

Instead, an example of an inconsistent verdict is one in which the jury awards a plaintiff damages for past and future medical expense, but allows nothing for pain and suffering. *Id.* (citing *Cowan v. Flannery*, 461 N.W.2d

[7] Plaintiff's own counsel acknowledged in closing argument the jury had the option of rejecting claims for "future damages," stating it was "not required" to use the standard mortality table showing Plaintiff's life expectancy in calculating such damages. (App. vol. I p. 427 (Tr. 5:19)).

155, 157 (Iowa 1990)); *see also Shewry v. Heuer*, 255 Iowa 147, 152, 121 N.W.2d 529, 532 (1963). There is nothing inconsistent or illogical in a jury's decision to award damages for past pain and suffering and past loss of function, while disallowing any award for categories of future damages, as occurred in the present case. Again, such a verdict reflects a determination that Plaintiff fully recovered from whatever injury she sustained and therefore would not incur damages in the future. Plaintiff does not cite authority from Iowa or any other jurisdiction holding that it is a logical inconsistency simply because a jury awards damages for past medical expense, or other categories of "past" damages, but rejects plaintiff's claim for "future" damages.

Plaintiff attempts to analogize this case to *Foster v. Schares*, No. 08-0771, 2009 WL606232 (Iowa Ct. App. March 11, 2009). The comparison is unavailing because *Foster* is quite obviously factually distinguishable. Quite unlike the present case, the *Foster* decision was premised on these facts: (1) defendant presented no medical testimony which conflicted with that of plaintiff's treating physicians; (2) the parties stipulated to the amount of plaintiff's medical bills; and (3) testimony concerning future medical expense and future pain and suffering was uncontroverted. *Foster*, 2009 WL606232, at *2. The jury, however, awarded plaintiff less than the

amount stipulated by the parties for past medical expense. *Id.* On appeal, the Iowa Court of Appeals did not disturb the district court's decision granting a new trial on the issue of damages. *Id.* at *4.

In affirming, the Court of Appeals observed that plaintiff's medical testimony was neither "inconsistent with other circumstances established in the evidence," nor was it "contradictory within itself." *Id.* The same certainly cannot be said of the medical testimony in the present case. As discussed above, Dr. Harbach's testimony did not reflect an agreement with the opinions of Plaintiff's independent medical expert, Dr. Stoken. The medical evidence in this case was anything but "uncontroverted," and Defendants definitely did not stipulate to the amount of Plaintiff's medical bills. In fact, Plaintiff ultimately decided against presenting any evidence whatsoever of her past medical expense. (App. vol. I pp. 437-38).

For these reasons, a new trial was not warranted on the grounds of lack of sufficient evidence or logical inconsistency in the jury's verdict. The district court's decision denying Plaintiff's Motion for Partial New Trial should be affirmed.

IV. THE DISTRICT COURT DID NOT ERR IN EXCLUDING EVIDENCE OF PLAINTIFF'S RECENT MEDICAL TREATMENT.

a. Preservation of Error.

Defendants disagree that Plaintiff preserved error on this point, which concerns the district court's ruling granting Defendants' Motion in Limine as to certain late-disclosed medical records. It is well established in Iowa that a district court's ruling on a motion in limine is not subject to appellate review because the error, if any, occurs when the evidence is offered at trial and is either admitted or refused. *Wailes v. Hy-Vee, Inc.*, 861 N.W.2d 262, 264 (Iowa Ct. App. 2014) (citing *Quad City Bank & Trust v. Jim Kircher & Assoc., P.C.*, 804 N.W.2d 83, 89-91 (Iowa 2011)). This is because a ruling sustaining a motion in limine is generally not an evidentiary ruling. *Id.*

In the present case, Plaintiff neglected to offer the records regarding her "recent medical treatment" at trial and therefore never obtained an evidentiary ruling on the admissibility of the challenged evidence. Remarkably, in her Brief, Plaintiff never identifies with specificity what she means by evidence of "recent medical treatment." Plaintiff's Brief pp. 42-47. It would appear she is referring to records describing her visits to the Regenexx medical clinic shortly before trial in late May 2019 and early June 2019. Plaintiff cites specific pages of the trial transcript – where counsel

presented argument on Defendants' twelfth Motion in Limine requesting exclusion of those particular records – and also cites the Motion in Limine itself. Plaintiff's Brief p. 43 (citing App. vol. I pp. 275-78 (Tr. 1:37-40) & App. vol. I pp. 129-30). Accordingly, the evidence at issue apparently consists of Regenexx records dated May 29, 2019 and June 6, 2019, which were part of Plaintiff's proposed Exhibit 21, filed with the court June 23, 2019, the day before trial began. (App. vol. I pp. 275-78 (Tr. 1:37-40), 129-30; App. vol. III pp. 7-12). Notably, the trial transcript contains no record that Plaintiff ever offered Exhibit 21 into evidence.[8] Thus, Plaintiff waived the issue and error was not preserved. *See Wailes*, 861 N.W.2d at 264.

b. Standard of Review.

Defendants also disagree with Plaintiff's statement regarding the standard of review applicable to this issue. Assuming for the sake of argument only that Plaintiff preserved error, such that there was an "evidentiary ruling" on the medical records in question, then the ruling should be reviewed for an abuse of discretion. *See Hall v. Jennie*

[8] Plaintiff attempted to discuss the contents of her proposed Exhibit 21 with Dr. Stoken during direct examination, to which Defendants objected. (App. vol. I pp. 343-52 (Tr. 2:150-59)). However, at no point did Plaintiff actually offer Exhibit 21. (App. vol. I pp. 343-52 (Tr. 150-59)). Plaintiff *was* able to introduce Exhibit 22, a collection of her earlier Regenexx records which did not include the records from late May and early June 2019. (App. vol. I pp. 336-37 (Tr. 2:121-22); App. vol. II pp. 342-440).

Edmundson Mem'l Hosp., 812 N.W.2d 681, 685 (Iowa 2012) (holding that generally, review of a trial court's evidentiary rulings is for abuse of discretion).

c. The District Court Properly Exercised its Discretion in Omitting Evidence of Plaintiff's "Recent Medical Treatment."

As discussed above, the evidence in question consists of Plaintiff's medical records from the Regenexx clinic dated May 29, 2019 and June 6, 2019. (App. vol. I pp. 275-78 (Tr. 1:37-40), 129-30; App. vol. III pp. 7-12). Even if Plaintiff had preserved error on the issue, which she did not, there was no error or prejudice in the district court's decision to exclude the records.

In her Brief, Plaintiff ignores the reason the Court granted Division XII of Defendants' Second Motion in Limine. The Regenexx records simply were not produced in a timely fashion in accordance with the trial scheduling order. (App. vol. I pp. 129-30, 332). Defendants' Motion, filed June 17, 2019, showed that evidence of Plaintiff's recent medical care by Dr. Jackson at Regenexx had not been timely disclosed and constituted unfair surprise to Defendants.[9] Subsequently, Plaintiff waited to produce the

[9] By this point in the litigation, Plaintiff had merely given notice of medical appointments she attended on May 29, 2019 and June 7, 2019, which led Defendants to move preemptively to exclude any evidence of those visits.

records until the weekend immediately before trial,[10] by which point discovery was closed and the deadline for the parties' pretrial submissions had expired. (App. vol. I p. 43-47).

The district court properly exercised its discretion to omit this evidence from the trial. Iowa law is well established that trial courts have broad discretion in evidentiary matters. *See, e.g., Hall*, 812 N.W.2d at 685. Additionally, as previously discussed above, district courts may exercise their inherent power to enforce terms of a scheduling order to effectively manage pretrial conduct and control the conduct of a trial. *Fry*, 818 N.W.2d at 130; *see also* Iowa R. Civ. P. 1.602(5). "By fixing time deadlines, a scheduling order stimulates litigants to focus on the most germane issues in the case." *Fry*, 818 N.W.2d at 129. Time limits thus promote efficiency and reduce the amount of resources required to be invested in the litigation. *Id.* There was no error in the district court's decision to enforce the scheduling order and exclude records which were produced subsequent to the close of discovery, on March 26, 2019, and past the pretrial-submission deadline, June 17, 2019.

Later it was revealed the June 7 appointment actually took place on June 6, 2019.

[10] Plaintiff's proposed trial Exhibit 21, filed June 23, 2019, consisted of 92 pages of records from Regenexx. (App. vol. III pp. 7-98). This was the first instance in which Plaintiff had produced, and Defendants had received, records relating to Plaintiff's May 29 and June 6, 2019 medical visits.

Plaintiff argues on appeal that introduction of the May and June 2019 medical records would not have caused prejudice to Defendants because "the ongoing treatment did not affect the expert opinions, but was merely being brought forth to show that treatment was ongoing." Plaintiff's Brief p. 46. This is a strange argument to make, especially when it is directly inconsistent with the contentions Plaintiff advanced in the court below—specifically in division IV of her Motion for Partial New Trial. (App. vol. I pp. 460-61). In the post-trial motion, Plaintiff argued that her retained medical expert, Dr. Stoken, was "unable to discuss [the issue of future medical costs] with the jury as the court's ruling held her from the current treatment Plaintiff had." (App. vol. I p. 460). In other words, Plaintiff *was*, in fact, planning to use the Regenexx records to bolster her expert's opinion in some manner. Plaintiff maintained the sole purpose of introducing the records of "current treatment" was to support Dr. Stoken's opinion that Plaintiff would incur medical expenses in the future. (App. vol. I pp. 460-61).

However, that line of reasoning is completely incongruous with the new theory Plaintiff has developed on appeal: that the records had nothing to do with any expert opinions, and therefore, are exempt from the duty to supplement discovery regarding experts under Iowa Rule of Civil Procedure

1.508(3). Plaintiff should not be allowed to significantly alter the substance of her arguments in this fashion, when they are so diametrically inconsistent with one another, in her attempts to obtain a new trial. The fact is that Plaintiff clearly intended to elicit testimony from Dr. Stoken regarding the medical records in dispute. Plaintiff even served a "supplemental report" from Dr. Stoken the day before trial which indicated she had reviewed the exact records in question. (App. vol. I pp. 276-78 (Tr. 1:38-40); App. vol. II p. 41). Plaintiff's counsel admitted as much on the record when arguing against Defendants' Motion in Limine. (App. vol. I pp. 276-78 (Tr. 1:38-40)).

Two cases upon which Plaintiff relies as support for her newly formulated contentions are quite clearly inapposite. She cites *Duncan v. City of Cedar Rapids*, 560 N.W.2d 320 (Iowa 1997), a case where the defendant in a personal injury action was allowed to call two late-disclosed medical technologists to testify. *See Duncan*, 560 N.W.2d at 323. The Iowa Supreme Court affirmed the trial court's decision allowing the testimony because their knowledge of testing plaintiff's blood for alcohol was not acquired or developed in anticipation of litigation or for trial. *Id.*

By contrast, in the present case, it was clear that Plaintiff planned to introduce the May and June 2019 Regenexx records expressly for a

litigation- or trial-related purpose. That purpose was to prop up Dr. Stoken's opinion on Plaintiff's supposed need for future medical care. (App. vol. I pp. 276-78 (Tr. 1:38-40); 460-61).

Plaintiff also incorrectly views *Eisenhauer v. Henry County Health Ctr.*, 935 N.W.2d 1 (Iowa 2019) as supporting her position. In that case, the defendant treating physician, sued for medical malpractice in the delivery of a baby, testified he prepared a single page of handwritten notes while reviewing the birth video either during or shortly before trial. *Eisenhauer*, 935 N.W.2d at 22. He used the notes to assist him in recalling the times he heard fetal heart rates during birth. *Id.* Only after plaintiff's counsel published the notes to the jury did defendants later move to admit them as demonstrative evidence. *Id.* The Supreme Court rejected the plaintiff's contention on appeal that the doctor had been allowed to testify to an undisclosed opinion on fetal heart rate. *Id.* The Court held the notes were simply a summary of the doctor's observations used to refresh his recollection, not an opinion in anticipation of litigation. *Id.*

Quite obviously, the circumstances surrounding admission of the doctor's notes in *Eisenhauer* are vastly different than those regarding the exclusion of the May and June 2019 Regenexx records in the present case. Plaintiff's interest in introducing the Regenexx records was not merely to

refresh a testifying witness's recollection, but rather, to corroborate an opinion of her retained medical expert. (App. vol. I pp. 276-78; 460-61).

Finally, even if the district court's exclusion of the medical records could in some technical sense be considered incorrect, the error was harmless. Error in excluding evidence may be claimed "only if exclusion of evidence affected a party's substantial rights." *Eisenhauer*, 935 N.W.2d at 19 (citing *Scott v. Dutton-Lainson Co.*, 774 N.W.2d 501, 503 (Iowa 2009)); *see also Mercer v. Pittway Corp.*, 616 N.W.2d 602, 612 (Iowa 2000) (not every erroneous evidentiary ruling requires reversal). In the case of a nonconstitutional error, an appellate court employs the harmless error analysis. *Eisenhauer*, 935 N.W.2d at 19 (citing *State v. Russell*, 893 N.W.2d 307, 314 (Iowa 2017)).

Exclusion of the Regenexx records of May 29 and June 6, 2019 certainly did not affect Plaintiff's substantial rights, contrary to her bombastic claims that it kept the jury "in the dark" about Plaintiff's recent medical treatment and was a "miscarriage of justice." *See* Plaintiff's Brief p. 47. At trial, Plaintiff was able to elicit testimony from her husband regarding the recent appointments Plaintiff attended with Dr. Jackson at Regenexx. (App. vol. I pp. 333-34 (Tr. 2:104-05)). Plaintiff's husband accompanied her to those appointments and, although he could not recall the

exact dates they took place, he acknowledged they had been within the last few months before trial. (App. vol. I pp. 333-34 (Tr. 2:104-05)). Plaintiff's husband further testified he was aware an ultrasound was conducted, and that future treatment might consist of "injections." (App. vol. I pp. 334-35 (Tr. 2:105-06)).

Additionally, it is specious for Plaintiff to now contend exclusion of the May 29 and June 6, 2019 Regenexx records deprived her of a fair trial when one of those records reflects medical treatment completely unrelated to her claim of personal injury in this case. (App. vol. III pp. 7-8). The June 6 "progress note" refers only to a platelet injection for her right ankle and a joint in one of her toes. (App. vol. III pp. 7-12). Nothing in that medical record states or even suggests the injection she received had anything to do with her alleged neck pain stemming from the automobile accident. (App. vol. III pp. 7-12). In fact, there is no mention whatsoever of neck pain or the accident in the June 6 note. (App. vol. III pp. 7-12).

Accordingly, the evidentiary record of this case affirmatively establishes the exclusion of Plaintiff's May 29 and June 6, 2019 medical records did not affect Plaintiff's substantial rights. There was no error warranting a new trial. Even if Plaintiff properly preserved error as to this

issue, the district court's decision granting Defendant's Motion in Limine should be affirmed.

V. THE DISTRICT COURT PROPERLY TAXED COSTS AGAINST PLAINTIFF PURSUANT TO IOWA CODE CHAPTER 677.

a. Preservation of Error.

Defendants disagree with Plaintiff's statement that she preserved error with regard to the district court's ruling taxing certain defense costs against her. Whether error was properly preserved for appeal is determined by the content of Plaintiff's Resistance to Defendants' Application for Taxation of Costs. *See Prouty v. Martin*, No. 03-0677, 2004 WL 239998, at *2-3 (Iowa Ct. App. Feb. 11, 2004) (citing *Dutcher v. Lewis*, 221 N.W.2d 755, 759 (Iowa 1974)). While Plaintiff's Resistance objected to taxation of *videographer* fees, among other things, she did not specifically argue against taxation of *videoconferencing* fees or the costs associated with Defendants' biomechanical experts, as she does in this appeal. (App. vol. I pp. 445-51).

Plaintiff's act of appending a list of costs to her Resistance, marked with blue X's to denote the various line items she found objectionable,[11] was inadequate to alert the trial court to the specific errors which are urged on appeal. *See Dutcher*, 221 N.W.2d at 759. While Plaintiff may have

[11] *See* App. vol. I p. 451.

preserved error as to taxation of videographer fees, she failed to preserve error with respect to her other two contentions in Division V of her Brief regarding taxation of videoconferencing fees and taxation of costs related to Defendants' biomechanical experts.

b. Standard of Review.

Defendants also dispute Plaintiff's statement concerning the standard of review applicable to this issue. Because a trial court's decision-making process regarding taxation of costs is twofold, this triggers a two-tiered standard of review. *EnviroGas, L.P. v. Cedar Rapids/Linn County Solid Waste Agency*, 641 N.W.2d 776, 786 (Iowa 2002) (citing *Security State Bank v. Ziegeldorf*, 554 N.W.2d 884, 893 (Iowa 1996)). First, the trial court must make a factual finding that the prerequisite for allowance of the expense is met, *i.e.*, that a deposition was "introduced into evidence in whole or in part at trial." *Id.* (citing Iowa R. Civ. P. 1.716 & *Woody v. Machin*, 380 N.W.2d 727, 730 (Iowa 1986)). The court must then exercise its discretion in deciding whether all or some portion of the cost was "necessarily incurred." *Id.*

Accordingly, an appellate court must review the record to determine whether there is substantial evidence to support the trial court's finding that the threshold requirement of admission at trial was met. *Id.* The trial court's

subsequent determination of necessity is reviewed for an abuse of discretion. *Id.*

c. The District Court Correctly Exercised its Discretion in Taxing Costs in the Amount of $5,358.30 Against Plaintiff.

As a threshold matter, Plaintiff states the incorrect total amount of costs which the district court taxed against her pursuant to Iowa Code Chapter 677. The court's Order Nunc Pro Tunc dated November 26, 2019 corrected the Order of November 10, 2019 to state the amount of costs taxed was $5,358.30. (App. vol. I pp. 470-71).[12] Even if Plaintiff preserved error on this issue, it is clear that substantial evidence supported the district court's reasoning in allowing for the videographer and videoconferencing fees associated with the depositions of Defendants' witnesses, Dr. Todd Harbach, Sebastian Bawab, and Michael Woodhouse. Additionally, the court correctly taxed the statutorily allowed witness fees for Mr. Bawab and Mr. Woodhouse, as well as the court reporting fees related to their depositions, against Plaintiff.

[12] The correction was necessary to account for the district court clerk's amended court costs and the official court reporter's jury trial reporting fee, which were submitted subsequent to the filing of Defendants' Application for Taxation of Costs. (App. vol. I pp. 465-67, 470-71).

1. Videographer and Videoconference Fees

Plaintiff complains that Iowa Code section 625.14, a statutory provision on which the district court properly relied in taxing costs, does not contain the words "videographer" and "videoconference," and therefore does not authorize allowance of such expenses. *See* Plaintiff's Brief pp. 48-49. This contention is obviously erroneous based on the unambiguous language of the statute itself. Section 625.14 provides:

> The clerk shall tax in favor of the party recovering costs the allowance of the party's witnesses, ***the fees of officers***, the compensation of referees, ***the necessary expenses of taking depositions*** by commission or otherwise, ***and any further sum for any other matter which the court may have awarded as costs in the progress of the action, or may allow***.

Iowa Code § 625.14 (2019) (emphasis added).

The particular phrases "necessary expenses of taking depositions" and "any further sum for any other matter" reflect legislative intent to vest a district court with broad discretion to award costs for any expense reasonably related to the taking of depositions. An appellate court should "not search for legislative intent beyond the express language of a statute when that language is plain and the meaning is clear." *Voss v. Iowa Dep't of Transp.*, 621 N.W.2d 208, 211 (Iowa 2001). Words used in a statute are presumed to have their "ordinary and commonly understood meaning." *City of Sioux City v. Iowa Dep't of Revenue & Fin.*, 666 N.W.2d 587, 590 (Iowa

2003). Under the ordinary meaning of section 625.14, taken as a whole, a district court is not restricted when awarding costs to a certain type of expense specifically enumerated in the statute.

Moreover, it is now commonplace for parties to take pretrial evidentiary depositions of expert witnesses in civil cases, to video-record them, and to present them at trial. Further, through advances in technology, it is becoming routine to conduct such depositions via videoconference when witnesses are located out-of-state. It is therefore inconsequential that Iowa Code section 625.14 does not expressly refer to technological devices now in everyday use, but which were likely inconceivable in 1860 when the first derivation of the statute was enacted. *See* Iowa Code Ann. § 625.14, Historical and Statutory Notes (2018). Plaintiff is therefore mistaken when she maintains that the district court lacked authority to tax the videographer and videoconference fees as costs. Such fees were necessarily incurred in taking the depositions of Defendants' expert witnesses. The trial court was within its discretion to allow them as costs.

2. Witness Fees for Messrs. Bawab and Woodhouse

As her final point in this appeal, Plaintiff objects to the district court's decision taxing costs "associated with" Mr. Bawab and Mr. Woodhouse. Plaintiff's Brief p. 50. Plaintiff does not specify what costs she is referring to, but presumably she means the compensation of $300.00 ($150.00 per day for each witness) allowed by the trial court for these experts' depositions. (App. vol. I pp. 463). She might also be referring to fees in the amount of $1,442.80 for the court reporter and transcripts, as allowed by the district court. (App. vol. I pp. 463).

Whatever Plaintiff's objections may be, they are without merit based on relevant case authority. One of the cases Plaintiff cites, *Meyer v. City of Des Moines*, 475 N.W.2d 181 (Iowa 1991), expressly held that witnesses called to give expert opinions are entitled to "additional compensation" of $150.00 per day. *Meyer*, 475 N.W.2d at 192 (citing Iowa Code § 622.72). Thus, under authority Plaintiff acknowledges is controlling, the district court was clearly correct in taxing $300.00 in witness fees as costs for the expert deposition testimony of Mr. Bawab and Mr. Woodhouse.

Applicable authority also supports the court's allowance of the court reporting and transcript expense. In order for a party to recover the cost of a deposition at the conclusion of a trial, the deposition must only be

introduced into evidence in whole or in part, and be used for a useful purpose. *Long v. Jensen*, 522 N.W.2d 621, 624 (Iowa 1994). It cannot be disputed the depositions in question were introduced into evidence in their entirety. (App. vol. I pp. 413-21 (Tr. 4:59-67)).[13] It is also uncontroverted that the depositions served a "useful purpose," because at no point has Plaintiff argued they were lacking such a purpose. *See* Plaintiff's Brief pp. 48-50.

Instead, Plaintiff seems to suggest a different standard should apply, which she confusingly describes as one based upon "the decision on the merits." *See* Plaintiff's Brief. p. 49. She cites a nonexistent "Defendant's Exhibit 27"[14] for the proposition that Defendants called Mr. Bawab and Mr. Woodhouse for the purpose of arguing Plaintiff was not injured in the collision. Plaintiff's Brief p. 49. Because the jury reached the opposite conclusion, or so she maintains, the deposition expenses should not have been taxed as costs. Plaintiff's Brief pp. 49-50.

However, no such rule can be found in the authority upon which she relies. The verbiage of the 1904 federal case she cites does not explain why

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[13] The deposition transcripts of Mr. Bawab and Mr. Woodhouse were admitted into evidence as court's exhibits 2 and 3, respectively. (App. vol. I pp. 418, 421 (Tr. 4:64, 67)).

[14] Per the trial scheduling order, Defendants' trial exhibits were identified with letters, not numbers, and there was no Exhibit 27 offered or admitted at trial. (App. vol. I pp. 46, 140-47).

that court allowed certain expenses to be taxed as costs while disallowing others. *See Kane v. Luckman*, 131 F. 609, 622 (C.C.N.D. Iowa 1904).

In any regard, Defendants in the present case considered the expert opinions of Mr. Bawab and Mr. Woodhouse necessary to their defense of Plaintiff's rather dubious claim of serious and permanent injury resulting from an automobile collision involving forces no greater than five miles per hour. (App. vol. I p. 224). Plaintiff was allowed the opportunity to cross-examine both defense experts, and in doing so, elicited testimony from Mr. Woodhouse that "there's always a possibility for injury" in a collision. (App. vol. I p. 255).

Accordingly, it cannot be credibly argued the depositions served no useful purpose in the case, in the event Plaintiff were to make such an argument. If Plaintiff wanted to avoid the risk of being obligated to pay costs associated with Defendants' defense of her claim, then she should not have (1) rejected Defendants' Offer to Confess Judgment, or (2) brought suit in the first place.

The district court correctly found that prerequisites were met in allowing each of the Defendants' deposition-related costs at issue. Further, the court properly exercised its discretion in deciding which costs were

necessarily incurred in the defense of the case. The court's decision taxing costs in the amount of $5,358.30 should be affirmed.

VI. IN THE EVENT THIS COURT FINDS ANY OF PLAINTIFF'S ARGUMENTS PERSUASIVE, THE PROPER REMEDY IS TO ORDER A NEW TRIAL ON ALL ISSUES.

As discussed above, Plaintiff has failed to demonstrate the district court erred in its rulings on any of the issues presented in this appeal. However, to the extent this Court finds any of Plaintiff's arguments persuasive, the appropriate remedy is to order a new trial on all issues, as opposed to a partial new trial on "future damages" alone.

Under Iowa law, the general rule is that when a new trial is granted, all issues must be retried. *Bryant v. Parr*, 872 N.W.2d 366, 380 (Iowa 2015) (quoting *McElroy v. State*, 703 N.W.2d 385, 389 (Iowa 2005) (holding that practice of granting partial retrials is "not to be commended")).

In situations when the scope of a retrial may be narrowed, "it should appear that the issue to be tried is distinct and separable from the other issues, and that the new trial can be had without danger of complications with other matters." *Id.* (quoting *Larimer v. Platte*, 243 Iowa 1167, 1176, 53 N.W.2d 262, 267-68 (1952)). In personal injury cases, the party seeking a retrial only on the issue of damages must show that the verdict establishing liability "was not the result of a compromise trading off liability for reduced

damages." *Thompson v. Allen*, 503 N.W.2d 400, 402 (Iowa 1993) (quoting *Vorthman v. Keith E. Myers Enters.*, 296 N.W.2d 772, 778 (Iowa 1980)).

Plaintiff has failed to adequately demonstrate that these exceptions to the general rule apply in this case. Because Defendants admitted fault but denied the nature, extent, and causation of Plaintiff's alleged injuries, it cannot be said that the issues to be retried would be "distinct and separable" from the other issues. Indeed, the issues of fault, causation, and damages are so closely related and intertwined that it would be impossible to have a retrial on the issue of "future damages" alone without the danger of unfairly complicating matters for Defendants.

The jury's relatively modest monetary awards for past pain and suffering and past loss of function suggest their decision was the result of a compromise. The jury awarded just $12,705.00 in a case where Plaintiff was seeking, according to Defendants' analysis of Plaintiff's closing argument, nearly $700,000.00 in total damages. (App. vol. I p. 437; 426-31; 435). In all likelihood, the jury's finding on causation – its answer of "yes" to Question 1 on the Verdict Form – reflects an interest in giving Plaintiff a small sum despite considerable evidence the minor auto accident caused no serious injury. (App. vol. I pp. 437-38). The probability that the verdict was borne of compromise would not be consistent with a new trial on the issue of

"future damages" alone. *See Bryant*, 872 N.W.2d at 380; *Thompson*, 503 N.W.2d at 402; *Vorthman*, 296 N.W.2d at 778. Plaintiff has not attempted to show the applicability of any exception to the general rule that *all* issues must be retried when a new trial is granted.

Accordingly, in the event this Court finds any basis for granting a new trial, the retrial should be as to all issues submitted in the first trial, and Defendants should have the opportunity to once again argue the fault of Defendant Joseph Comito was not a cause of any element of damage to Plaintiff.

CONCLUSION

It is clear, as a threshold matter, that Plaintiff failed to properly preserve error on all issues raised in her appeal. Assuming *arguendo* that error was preserved, the district court reached the correct decisions in limiting the trial testimony of Plaintiff's expert and treating chiropractor, and in excluding certain late-disclosed medical records of the Plaintiff. Additionally, the court did not err in declining to instruct the jury as to the eggshell plaintiff rule, nor was there any error in declining to order a new trial because of an alleged inconsistency the jury's verdict. Finally, the district court correctly allowed taxation of certain defense costs against Plaintiff based on Iowa Code Chapter 677. The decisions of the district

court, entering judgment on the jury's verdict, denying Plaintiff's Motion for Partial New Trial, and granting in part Defendants' Application for Taxation of Costs, should be affirmed. Plaintiff's request for a new trial should be denied.

REQUEST FOR ORAL ARGUMENT

Defendants-Appellees Joseph Comito and Capital City Fruit Company respectfully request to be heard in oral argument on all issues raised in this appeal, pursuant to Iowa Rule of Appellate Procedure 6.908.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa Rules of Appellate Procedure 6.903(1)(*e*) and 6.903(1)(*g*)(1) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font and contains 11,376 words excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(*g*)(1).

/s/ Jeffrey D. Ewoldt August ___, 2020
Jeffrey D. Ewoldt Date

CERTIFICATE OF FILING AND SERVICE

I certify the preceding Appellees' Final Brief and Request for Oral Argument was filed with the Iowa Supreme Court by electronically filing the same with the Iowa Supreme Court Clerk on the 19th day of August, 2020.

I further certify I served the preceding Appellees' Final Brief and Request for Oral Argument on attorneys of record for all other parties by electronically filing this document on the 19th day of August, 2020, in accordance with Chapter 16, Iowa Rules of Electronic Procedure.

/s/ Jeffrey D. Ewoldt
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