IN THE COURT OF APPEALS OF IOWA

No. 0-181 / 09-1258
Filed June 16, 2010

MARY STERNER,
Plaintiff-Appellant,

vs.

TERESA SMITH and WILLIAM H. SMITH,
Defendants-Appellees.

Appeal from the Iowa District Court for Dallas County, Paul R. Huscher, Judge.

A plaintiff in a personal injury action appeals the denial of her new trial motion, asserting the jury verdict was inadequate. She also raises certain discovery issues. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Mark D. Sherinian and Melissa C. Hasso of Sherinian & Walker Law Firm, West Des Moines, for appellant.

Harry Perkins III and Jason W. Miller of Patterson Law Firm, L.L.P., Des Moines, for appellees.

Heard by Vaitheswaran, P.J., Doyle, J. and Schechtman, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VAITHESWARAN, P.J.

A plaintiff in a personal injury action appeals the denial of her new trial motion. She asserts the jury verdict was inadequate. She also raises certain discovery issues.

I. Background Facts and Proceedings

Mary Sterner, a Dallas County farmer, was driving down a rural gravel road when she was forced to come to a complete stop, because deer were crossing the road. Teresa Smith, who was cresting a hill behind Sterner, crashed into Sterner's truck.

Sterner sued Smith and her husband for negligence. Before trial, Sterner served the Smiths with requests to admit or deny certain specifications of negligence alleged in her petition. Sterner also requested the production of the claims investigation file maintained by the Smiths' insurer. The Smiths denied the requests for admissions and refused to produce the insurer's file. Sterner filed a motion to compel production, which the district court denied.

Following trial, a jury awarded Sterner a total of $13,420 in damages, broken down as follows:

Past medical expenses (not to exceed $15,813)	$420
Future medical expenses	$2500
Past physical and mental pain and suffering	$9000
Future physical and mental pain and suffering	$1500
Past loss of function of the mind or body	$0
Future loss of function of the mind or body	$0
Past loss of time from business	$0
Future loss of earning capacity	$0

Sterner filed a motion for new trial challenging the adequacy of the award. She also sought attorney fees based on what she contended was the Smiths'

unreasonable denial of her requests for admission. The district court summarily denied the new trial motion and the request for attorney fees. Sterner appealed.

II. New Trial Motion

Sterner seeks reversal of the district court's new trial ruling on several grounds. We find dispositive her argument that the award for past medical expenses was not supported by sufficient evidence. *See* Iowa R. Civ. P. 1.1004(6).

Damages itemized on a special verdict form constitute special findings by the jury. *Cowan v. Flannery*, 461 N.W.2d 155, 158 (Iowa 1990). These special findings must be supported by the evidence. *Id.* "When a special finding of the jury is not supported by the evidence, a new trial must be granted." *Id.*

Sterner asserts that her total past medical expenses alone amounted to $13,883 rather than $420, as the jury found. She sets forth those medical expenses as follows:

West Des Moines Family Physicians	$982
Millennium Rehabilitation physical therapy	$3838
Apex Physical Therapy	$7144
Des Moines Orthopaedic Surgeons	$511
Mercy Ruan Neurology Clinic	$432
Iowa Radiology West	$920
Medication expenses	$56

As a preliminary matter, we note that the exhibits cited in support of these figures do not entirely support them. However, the Smiths do not raise these discrepancies, and even if we consider the figures in the exhibits rather than the summary above, the jury's award amounts to only a fraction of Sterner's actual medical expenses. Therefore, the inaccuracy of the summary is not a factor in our analysis.

We turn to the substance of the parties' arguments. Sterner asserts the evidence of past medical expenses was undisputed. The Smiths, in contrast, urge that the necessity of these expenses and the causal connection between the expenses and the accident were "vigorously contested." They assert that Sterner delayed seeking medical treatment or cancelled scheduled appointments, obtained certain treatment only to advance the litigation, and continued to perform farm work after the injury.

Even if we accept all of the Smiths' assertions as true, they have nonetheless established no cause for Sterner's injuries or medical expenses other than the accident. Sterner's treating physician, Dr. Jeffrey Schoon, testified, "I think Mary's neck pain and headaches are directly related to the incident with the motor vehicle accident." Another physician, Dr. Jeffrey Rodgers, diagnosed tenderness and pain on the outside of Sterner's right elbow and testified that this injury was consistent with an acute force on that portion of the elbow. Dr. Steven Adelman, who also examined Sterner, noted that she had "a decreased range of motion about her . . . neck." His diagnosis was "cervical strain" and "associated tension-type headache." He testified as follows:

> The fact that she did not experience these symptoms prior to her accident, they were present after the accident and for three years after the accident, we felt that there was a causal relationship between her motor vehicle accident and her current symptoms.

Even Dr. Thomas Carlstrom, a neurosurgeon who examined Sterner and whose opinions the Smiths invoked, did not contradict the causation opinions of the other physicians. He acknowledged that Sterner experienced "tenderness in the shoulder and the neck" and pain in those areas if engaged in "the full range of

motion." He also conceded Sterner did not seek any treatment for neck or shoulder pain prior to the accident, she was not prescribed pain medication before the accident, and he had no reason to believe that her symptoms resulted from a farm injury. While Dr. Carlstrom characterized Sterner's limitation as "minimal," he acknowledged she required "conservative treatment," which could mean "anything nonsurgical" from physical therapy to "[v]arious kinds of medication." This medical evidence leads us to conclude that the award of $420 for past medical expenses was not supported by the record.

We reach this conclusion notwithstanding the general rule that "the determination of damages is peculiarly within the domain of the jury." *Witte v. Vogt*, 443 N.W.2d 715, 716 (Iowa 1989). As the Iowa Supreme Court stated in *Witte*, "'a verdict often is so large or so small, when viewed in the light of the specific facts, as to indicate a failure upon the part of the jury to properly evaluate the same and to do substantial justice.'" *Id.* (quoting *Feldhahn v. Van DeVenter*, 253 Iowa 1194, 1197, 115 N.W.2d 862, 864 (1962)). That is the case here. Accordingly, a new trial is required.

We turn to the scope of a new trial. Where there is evidence of a compromise on the question of liability, a new trial should encompass both liability and damages. *See Householder v. Town of Clayton*, 221 N.W.2d 488, 493 (Iowa 1974). Here, the jury was asked to answer separate questions on negligence and causation before it addressed damages. On the question of whether Teresa Smith's negligence was a cause of Sterner's damages, the jury answered yes. Based on this answer, we conclude the damage award did not reflect a compromise on liability. Therefore, a new trial is warranted on damages

alone. *See Thompson v. Allen*, 503 N.W.2d 400, 402 (Iowa 1993) ("If there is no evidence in the record that the jury's determination of fault was compromised or affected by the evidence of damages, the issue of liability should not be resubmitted on remand.").

We must next determine whether the new trial should encompass all the damages itemized on the verdict form. *See Fisher v. Davis*, 601 N.W.2d 54, 60 (Iowa 1999). "Jury determinations of various elements of damages are apt to be influenced by the recovery allowed for other elements of damage." *Brant v. Bockholt*, 532 N.W.2d 801, 805 (Iowa 1995). Where, as here, there is no indication that the jury rejected any of Sterner's separate injuries, we conclude the new trial should encompass all the damage specifications. *See Fisher*, 601 N.W.2d at 60.

III. Denial of Application for Attorney Fees and Costs

Sterner argues that she should have been awarded attorney fees based on what she contends was the Smiths' unreasonable denial of her requests for admission. Our review of the district court's refusal to award attorney fees and costs is for an abuse of discretion. *Koegel v. R Motors, Inc.*, 448 N.W.2d 452, 456 (Iowa 1989).

"A party responding to a request for admission has three choices: admit, object, or deny. An admission conclusively establishes what is requested; a denial places that matter in issue." *Id.* A denial also exposes the denying party to liability for attorney fees and costs unless "[t]he party failing to admit had reasonable grounds to believe that the party might prevail on the matter." Iowa R. Civ. P. 1.517(3)(*c*). "Although a trial may ultimately result in a finding that

matters denied were true, this does not necessarily mean the matters were 'unreasonably denied.'" *Koegel*, 448 N.W.2d at 456.

Sterner served the following requests for admissions on the Smiths:

> 1. Defendant Teresa Smith failed to maintain a proper lookout immediately prior to the motor vehicle accident that occurred on January 24, 2006, which is the subject of this lawsuit (hereinafter "accident").
> 2. Defendant Teresa Smith was driving at a rate of speed which did not allow her to stop within the assured clear distance ahead in violation of Iowa Code Sec. 321.285 (2005) immediately prior to the accident.
> 3. Defendant Teresa Smith failed to maintain control of her vehicle in violation of Iowa Code Sec. 321.288 (2005) immediately prior to the accident.
> 4. Defendant Teresa Smith failed to drive at a proper speed under the circumstances immediately prior to the [accident].

The Smiths denied them. We find there was a reasonable basis for denying them.

First, the requests did not simply request the admission of facts, but the admission of mixed questions of fact and law. As one commentator stated, "Facts are often verified easier than the application of law to facts. Thus, requested admissions based on mixed questions of law and fact, like causation or intoxication, often support denials." Mark S. Cady, *Curbing Litigation Abuse and Misuse: A Judicial Approach*, 36 Drake L. Rev. 483, 508 (1986–1987). In short, the substance of the requested admissions alone suggests a reasonable basis for denying them.

Additionally, at the time Teresa Smith denied the request for admissions, she provided an alternate explanation for the accident. In her answers to interrogatories, she stated:

> I was taking my children to basketball. I had been traveling behind the plaintiff for about a mile. I came over a hill, and there was a dust cloud from the gravel road. The dust cleared, and I saw that plaintiff had come to a stop on the road. I did not see brake lights. I applied my brakes but was unable to stop in time, and my vehicle collided with the back of the plaintiff's vehicle. The accident occurred around 4:00 p.m., and it was sunny and dry.

This explanation suggests that she had reasonable grounds to believe she would prevail at trial.

On this record, we conclude the district court did not abuse its discretion in denying Sterner's request for attorney fees and costs.

IV. Denial of Motion to Compel Production of Insurance Claim File

Sterner finally argues that the district court abused its discretion in denying her motion to compel the production of the Smiths' insurer's investigative file. As the retrial only will encompass damages, we find it unnecessary to address this issue.

V. Disposition

We affirm the district court's denial of Sterner's request for attorney fees and costs in connection with her discovery requests. We reverse the district court's denial of Sterner's new trial motion and remand for a new trial on damages.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Doyle, J., concurs. Schechtman, S.J., partially concurs and partially dissents.

SCHECHTMAN, S.J. (concurring in part and dissenting in part)

I would affirm on the issue of denial of a new trial, but concur in all other respects.

It is recognized the "court is slower to interfere with the grant of a new trial than with its denial." Iowa R. App. P. 6.904(3)(*d*). Yet, since assessing damages is a function of a jury, we are "'loath to interfere with a jury verdict.'" *Triplett v. McCourt Mfg. Corp.*, 742 N.W.2d 600, 602 (Iowa Ct. App. 2007) (quoting *Sallis v. Lamansky*, 420 N.W.2d 795, 799 (Iowa 1988)). Traditionally, determination of damages is for the jury. *Estate of Pearson ex rel. Latta v. Interstate Power & Light Co.*, 700 N.W.2d 333, 345 (Iowa 2005). Those findings should be disturbed "'only for the most compelling reasons.'" *Id.* (quoting *Rees v. O'Malley*, 461 N.W.2d 833, 839 (Iowa 1990)). The evidence is viewed in the light most favorable to the verdict, whether contradicted or not. *Id.* The verdict should not be set aside merely because the reviewing court would have obtained a different result. *Triplett*, 742 N.W.2d at 602. The question whether the damages awarded are inadequate is determined upon the peculiar facts of this case and comparison with awards in other cases lends little resolve. *Householder v. Town of Clayton*, 221 N.W. 2d 488, 493 (Iowa 1974). We accord weight to the fact that the trial court saw and heard the witnesses, observed the jury, and had all the incidents of trial before it prior to its ruling. *Kaufman v. Mar-Mac Cmty. Sch. Dist.*, 255 N.W.2d 146, 147–48 (Iowa 1977).

We should set aside only on the grounds urged by the movant, *Clinton Physical Therapy Services, P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 609 (Iowa 2006), and only if it (1) is flagrantly excessive or inadequate; (2)

is so out of reason as to shock the conscience or sense of justice; (3) raises a presumption it is a result of passion, prejudice, or other ulterior motives; or (4) is lacking in evidentiary support. *Rees*, 461 N.W.2d at 839. In our analysis, we emphasize whether there is evidentiary support for the verdict. *Id.* "If the verdict has support in the evidence the others will hardly arise, if it lacks support they all may arise." *Id.*

The credibility of Sterner on the medical necessity and causation issues were acutely contested. Sterner was a forty-six-year-old farmer who cared for a stock cow and calf herd, poultry, horses, and dairy goats with little assistance. Looking at the medical evidence in the light most favorable to the verdict, Sterner did not complain about her neck or right elbow at the scene; her vehicle was functional after the rear end collision to it. She did not see a doctor for twenty-three days after the accident and continued with her farming operations.

On that first visit with her family physician, it was noted that Sterner "had a whiplash injury and also injury to the right elbow"; "elbow has good motion and has good strength"; "the neck is improved"; and "[w]e are going to get her into physical therapy today." A month after starting physical therapy, the therapist's notes reflect she "continues to perform daily heavy labor farm chores" and "her neck pain has improved 50% since start of care." She quit therapy of her own volition about a month later and did not return to the therapist for six weeks. On that June 6, 2006 visit, the therapist's comments included reference to "heavy manual work around the farm" and "[s]he apologizes for her inconsistency in attending physical therapy . . . has been very busy with home life." Sterner quit

physical therapy shortly thereafter by cancelling appointments "due to schedule conflict."

On Sterner's second visit to her doctor, about six months after the accident, she was told "if it is not back to normal in the next three weeks . . . she needs to come back." Sterner did not return to that doctor for five months. Her family physician reported that she said her attorneys "are insisting on an MRI and a neurosurgery referral and so we are going to help facilitate that for her."

The referral neurosurgeon stated "she had a good range of motion" in her neck, she had no "permanent impairment," the MRI was normal for her age, and she was not restricted from any of her farming activities. Sterner was diagnosed with myofascial neck pain, mild in nature. The neurosurgeon concluded that

> people who have myofascial neck pain frequently seek treatment even though treatment is not likely to help . . . if I were to advise her on whether she should go get more physical therapy, cortisone shots, any of that sort of stuff, I would probably have advised her that it wouldn't be likely to be helpful and not to bother.

A hand-surgeon testified that Sterner suffered from tendinopathy in the elbow, which cause is unknown.

Though the defendants did provide the standard practice stipulation that the medical providers, if called, would testify their charges were reasonable, they did not stipulate to their necessity or causation. Admittedly, the evidence set forth above was contradicted to a large degree, but it is for the jury, as the fact-finder, to assess the credibility of the evidence when conflicting. The selected evidence did bring to the jury's consideration the necessity of the various treatments and causation, i.e., whether the injuries were the cause of the accident, degenerative, or the result of her farming activities; whether some of

the medical care was prompted by the litigation; and whether the injuries had healed but been exacerbated by interim activities, exemplified by the gaps in medical attention and her failure to follow up on therapy appointments. The testimony of the neurosurgeon alone, if believed, would negate the need for physical therapy or medical attention for the neck. The hand-surgeon contradicted the cause of the other injury to the elbow, though the jury did allow a sum for future surgery on it.

The jury also awarded Sterner a sum for past pain and suffering. They did not allow any damages for permanency (loss of function of the body), but there is evidence that she had no permanent impairment; nor did the jury award any sum for loss of time for business or earning capacity, but there is countering evidence that there were no restrictions on any activity. That the medical special damages were over $13,000, with the award pared to $420, does not in itself impel the court to grant a new trial on that finding alone. Again, there was sufficient testimony that the bulk of the medical expense may have been caused by the twelve- to fifteen-hour days tending to a time-consuming livestock operation and a school-age child or the litigation itself.

Sterner's injuries were subjective in nature, which accentuates the need for a critical assessment of her credibility. A specialist, referred by her treating physician, perceived no need for any treatment. Sterner's argument that the disparity in the amount spent for medical and the amount awarded by the jury infers a compromise verdict is not persuasive, as the medical evidence was rebutted from a causation and necessity standpoint. Mere speculation as to whether a verdict is the result of a compromise on liability is not sufficient to set

that verdict aside. *Kuper v. Chicago & Nw. Transp. Co.*, 290 N.W.2d 903, 909 (Iowa 1980).

This verdict, though modest, does not lack evidentiary support nor was it flagrantly inadequate. I am hesitant to intervene with a jury's verdict or a denial of a new trial when it satisfies the applicable standards. The trial court saw and heard the witnesses, instructed and observed the jury. I would affirm the trial court in denying the motion for new trial.