

**IN THE COURT OF APPEALS OF IOWA**

No. 2-1006 / 12-0467  
Filed January 9, 2013

**RICHARD D. RATH JR.,**  
Plaintiff-Appellant,

**vs.**

**BRIANNA J. MATHIAS, WILLIAM  
BALLENSKY and ANN BALLENSKY,**  
Defendants-Appellees.

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Appeal from the Iowa District Court for Muscatine County, Thomas G. Reidel, Judge.

Richard Rath appeals following retrial of his damages for future medical expenses. **AFFIRMED.**

R. Craig Oppel of Allbee, Barclay, Allison, Denning & Oppel, P.C., Muscatine, and Christopher D. Stombaugh and Scott D. Winston of Laufenberg, Stombaugh & Jassak, S.C., Platteville, Wisconsin, for appellant.

Daniel P. Kresowick of Stanley, Lande & Hunger, Muscatine, for appellees.

Heard by Potterfield, P.J., Tabor, J., and Huitink, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

**TABOR, J.**

Following a personal injury trial on damages arising from a motor vehicle accident, the district court granted remittitur or a conditional new trial on the question of Richard Rath's future medical expenses. Rath rejected the remittitur, opting instead for a new trial on the damage issue. Following retrial, Rath appeals the court's grant of remittitur. He also challenges the district court's evidentiary rulings and the denial of his request for a continuance.

We find Rath's challenge to the court's remittitur ruling is untimely. Rath did not file a notice of appeal until after the conclusion of the retrial on the future-medical-expense damages. We also find the district court properly exercised its discretion in admitting evidence regarding the permanency of his injuries and their causation during the retrial, and in allowing the defendants to show a surveillance video to support their expert's opinion. Finally, the court acted within its discretion in denying Rath's motion for a continuance. Accordingly, we affirm.

**I. Background Facts and Proceedings**

On July 10, 2007, vehicles driven by Rath and Brianna Mathias collided in Muscatine County. Mathias, who was driving a Dodge Dakota truck owned by her mother and stepfather, Ann and William Ballensky, pulled into an intersection in front of the GMC semi-tractor trailer operated by Rath. Mathias does not dispute she failed to yield the right of way and was at fault for the collision.

Rath filed a petition against Mathias and the Ballenskys, seeking monetary damages for past and future medical expenses, past and future pain and suffering, past and future loss of earnings, and past and future loss of mind and

body. The defendants admitted liability, so the only issue to settle at trial was the amount of Rath's damages.

In his interrogatory answers, Rath asserted he had incurred the following damages:

a.	Past Medical Expenses	\$3845.30
b.	Future Medical Expenses	\$24,000.00
c.	Loss of Earnings/Earning Capacity	\$0
d.	Loss of Future Earning/Earning Capacity	\$0
e.	Loss of Full Mind and Body, Past	\$200,000.00
f.	Loss of Full Mind and Body, Future	\$200,000.00
g.	Physical and Mental Pain and Suffering, Past	\$200,000.00
h.	Physical and Mental Pain and Suffering, Future	\$200,000.00
i.	Property Damage Repair/Market Value of Semi-Tractor and Trailer	\$15,000 to \$20,000.00
j.	Storage and Towing Fees Est.	\$50,000.00

Rath waived his claim for past medical expenses before trial.

At trial, Rath introduced the deposition of Dr. Jerome Lerner into evidence. Dr. Lerner is board certified in physical medicine and rehabilitation. The doctor testified that after reviewing Rath's medical records and examining him, he determined to a reasonable degree of medical certainty that Rath's injuries were caused by the accident. Dr. Lerner addressed the fact Rath had participated in skydiving for fifteen years, but opined that activity would not in and of itself cause damage to the spine. He also testified about radiofrequency ablation, a procedure used to numb painful nerves and provide longer relief than the short-term medical branch block. Dr. Lerner testified that in radiofrequency ablation, "the nerve is ablated or basically completely knocked out and that can last for up to a year or a year and a half." He testified the estimated cost of the procedure

for Rath is “going to range between \$4,000 and \$20,000, depending on how he responds.”<sup>1</sup>

The defendants introduced into evidence portions of a surveillance video taken of Rath by a private investigator. The video shows Rath climbing up and down scaffolding, squatting for long periods of time, lifting items, and moving about freely without any evident pain or discomfort.

Following trial, the jury found Rath suffered the following damages:

1.	Future medical expenses.	\$70,000
2.	Loss of function of the body in the past.	\$5,000
3.	Loss of function of the body in the future.	\$0
4.	Past pain and suffering.	\$12,000
5.	Future pain and suffering.	\$2,500
	TOTAL	\$89,500

On March 31, 2011, the district court entered judgment in favor of Rath in the amount of \$89,500.

The defendants filed a motion for new trial or remittitur, arguing the jury’s award for future medical expenses was excessive because it was not supported by the evidence. The defendants asked the court to reduce the award of future medical expenses to \$20,000 based on Dr. Lerner’s testimony.

Rath filed a motion for new trial or additur, arguing the jury’s award of damages for future loss of body function and future pain and suffering were inadequate, not sustained by the evidence, and contrary to law. Rath also argued the jury’s award of future medical expenses was supported by the evidence.

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<sup>1</sup> Although Dr. Lerner testified this amount was *per treatment* and that the treatment would have to be repeated, this portion of his testimony was excluded from the appendix.

In its May 26, 2011 ruling, the district court denied Rath's motion in its entirety. The court found the jury's award of damages for future pain and suffering and future loss of function to the body were not inconsistent with the jury's award of past loss of function, especially in light of the surveillance video. The court cited Rath's decision not to make a claim for past medical expenses or lost wages or lost earning capacity as a possible factor in the jury's award. The court also noted the jury heard evidence Rath had not been skydiving for two years before the accident—with no explanation of why he had given up the hobby.

The court granted the defendants' motion for remittitur on future medical expenses. Although the court noted counsel had agreed Rath's damages for future medical expenses could not exceed \$20,000 based on the evidence presented, the court ultimately found counsel's statements were irrelevant to the determination of whether the award was supported by the evidence. The court determined the maximum amount of future medical expenses supported by the evidence presented at trial was \$20,000. The court ordered a reduction in the jury's award to \$20,000, and if Rath did not accept remittitur, the case was to be retried on the issue of future medical expenses. Because Rath did not accept the remittitur, the court scheduled a new trial to begin on February 6, 2012.

On January 30, 2012, Rath filed motions in limine, seeking to limit the defendants from introducing certain evidence in the new trial, including Rath's pre-existing injuries and evidence as to whether he was permanently injured.

At the February 2, 2012 hearing on his motions in limine, Rath argued the issues of the permanency of his injury and whether his medical condition was caused by the accident had been foreclosed by the jury's award of future pain and suffering in the first trial. The district court disagreed, stating "implicit" in the grant of the new trial was the question whether Rath's future medical expenses were caused by the accident. The court noted the lack of an interrogatory from the prior jury confirming whether Rath's future medical expenses were related to injuries sustained in the accident or whether his injuries were permanent. The court pointed to the relatively small amount of damages awarded for future pain and suffering: "The jury could have made that determination for many different reasons and not have any determination that there was permanency." Nor did the jury award damages for loss of function of the body, which the court believed would have been "indicative" of permanency. The court also ruled the surveillance video could be introduced at the second trial.

Three days before the new trial, Rath filed a motion asking the court to reconsider its limine rulings. At the same time, Rath asked the court to continue trial, arguing that in ruling on the motions in limine, the court "essentially re-wrote its previous written Order and essentially is allowing the defense to re-try most of the issues in this case calling for a trial significantly broader and beyond the reasonable expectations of plaintiff's counsel." Rath argued he was not adequately prepared to present his case given the "unforeseen and unanticipated rulings" and that he would be prejudiced if trial was not continued.

On the morning of trial, the court held a hearing on Rath's motions to reconsider and to continue. The court denied both motions, stating that causation and the extent of Rath's injuries were "essential" to establishing the proper amount of future medical expenses. "To not require there to be a link between the causation and the damages would be to allow for all damages from any source, including infirmity, illness, or other preexisting injuries, rather than just aggravation of the same, and to allow that would be contrary to the law." The court again noted the lack of interrogatory requested or submitted to the jury on the issue of the permanency of Rath's injuries. The court also stated its belief that Rath would not suffer any prejudice from proceeding to trial that day.

The new trial ran from February 6 to February 8, 2012. The defendants designated orthopedic surgeon Jerry Jochims as an expert witness. Dr. Jochims testified to a reasonable degree of medical certainty that although Rath would need future medical care, "he should need no more than what is required prior to this accident." Dr. Jochims believed any problems Rath was having with his low back related to prior incidents.

Dr. Lerner was deposed a second time ahead of the new trial and Rath introduced his deposition. He opined: "Mr. Rath has a permanent back injury as a result of the motor vehicle accident of July 10, 2007 and that consists of a persistent cervical sprain and aggravation of an underlying degenerative disease of the lumbar spine." Dr. Lerner testified Rath would need radiofrequency ablation at the cost of \$20,000 per treatment, with three projected treatments over the course of five years for a total cost of \$60,000. He also projected Rath

would incur between \$50 and \$150 per month in medication expenses and approximately \$400 to \$600 per year in doctor's appointments.

During the jurors' deliberations, they asked to see the surveillance video a second time. The judge allowed the video to be shown again over Rath's objection. Rath moved for a mistrial, which the district court denied.

The jury returned a verdict awarding Rath \$0 for future medical expenses. The district court entered an amended judgment entry to reflect the verdict.

## **II. Standard of Review**

We review remittitur rulings for an abuse of discretion. *Triplett v. McCourt Mfg. Corp.*, 742 N.W.2d 600, 602 (Iowa Ct. App. 2007). This level of deference is proper because the district court has the advantage of seeing and hearing the evidence. *Id.* Other cases are of limited value when applying this standard. *Id.*

We also review the court's evidentiary rulings for an abuse of discretion. See *Scott v. Dutton-Lainson Co.*, 774 N.W.2d 501, 503 (Iowa 2009). We will not reverse the court's decision to admit evidence unless the record shows prejudice to the objecting party. *Whitley v. C.R. Pharmacy Serv., Inc.*, 816 N.W.2d 378, 385 (Iowa 2012).

Finally, trial courts have broad discretion in ruling on motions for continuance, and we will not interfere absent an abuse of that discretion. *Netteland v. Farm Bureau Life Ins. Co.*, 510 N.W.2d 162, 167 (Iowa Ct. App. 1993). Such rulings are presumptively correct and a party challenging a ruling on a motion for continuance has a heavy burden in overcoming that presumption.



*Id.* Rath must show substantial justice will be more nearly obtained by granting the continuance. *See id.*

Appellate courts do not find an abuse of discretion unless the district court ruled on grounds clearly untenable or to an extent clearly unreasonable. *Triplett*, 742 N.W.2d at 602. A ground or reason is untenable when it is not supported by substantial evidence or is based on an erroneous application of the law. *State v. Rodriquez*, 636 N.W.2d 234, 239 (Iowa 2001).

### **III. Analysis**

#### **A. Grant of remittitur**

Rath first contends the district court erred in granting remittitur following the jury's verdict in the original trial. He argues sufficient evidence supported the jury's \$70,000 award for future medical expenses.

The defendants assert this issue has not been preserved for our review. They argue Rath had thirty days to appeal from the May 26, 2011 order granting remittitur or new trial on the issue of future medical expenses. In the defendants' view, Rath cannot timely appeal the May 26, 2011 order after the second trial. The defendants also argue Rath failed to comply with Iowa Rule of Appellate Procedure 6.102(1)(a)(1), which requires the notice of appeal to specify the order being challenged; Rath's notice of appeal only cites to the district court's February 12, 2012 order, not its May 26, 2011 order.

Iowa Rule of Appellate Procedure 6.101(1) requires a notice of appeal to be filed within thirty days of the final order or judgment. Our supreme court has defined what constitutes a final ruling as follows:

A final judgment or decision is one that finally adjudicates the rights of the parties. It must put it beyond the power of the court which made it to place the parties in their original condition or, as frequently said, put the case out of court. It is a determination which may be enforced by execution or in some other appropriate manner.

*Employers Group of Ins. Cos. v. Villhauer*, 118 N.W.2d 38, 39 (Iowa 1962).

Filing a timely motion to enlarge or amend will toll the deadline until thirty days after ruling on such motion. Iowa R. App. P. 6.101(1)(b). Failure to file a timely notice of appeal leaves the appellate courts without subject matter jurisdiction to hear the appeal. *Hills Bank & Trust Co. v. Converse*, 772 N.W.2d 764, 771 (Iowa 2009).

The May 26, 2011 order was a conditional grant of new trial. Under Iowa Rule of Civil Procedure 1.1010(1), a district court may permit a party to avoid a new trial by agreeing to such terms or conditions as the court may impose. The court may give a party the “choice between consenting to a reduced, modified or increased judgment amount or proceeding to a new trial.” Iowa R. Civ. P. 1.1010(2). Our rules contemplate the appeal of such an order, providing that in the event of an appeal, “any such term or condition or judgment entered pursuant to district court order shall be deemed of no force and effect” and the original judgment is “deemed reinstated.” Iowa R. Civ. P. 1.1010(3). In other words, had Rath appealed from the May 26, 2011 order, the conditional feature of that order would have had no force and effect. See *Mead v. Adrian*, 670 N.W.2d 174, 180 (Iowa 2003). The question before this court would have been whether the jury’s reinstated damage award was correct or, in the alternative, whether this was a case calling for the grant of a conditional new trial, as the district court concluded.

*See id.* We also would have been free to impose our own conditions for sustaining the district court's grant of new trial. *See id.*

Rath argues the court's order granting remittitur or new trial falls within the rule 6.101(1)(c) exception for final orders on partial dispositions. That rule states:

A final order dismissing some, but not all, of the parties or disposing of some, but not all, of the issues in an action may be appealed *within the time for appealing from the judgment that finally disposes of all remaining parties and issues to an action*, even if the parties' interests or the issues are severable.

Iowa R. App. P. 6.101(1)(c) (emphasis added).

Rath acknowledges the May 26, 2011 order would have been a final, appealable ruling had he consented to remittitur. But he contends that because he did not accept remittitur, there was no final disposition on the issue of future medical expenses until entry of the February 2012 verdict.

We disagree with Rath's logic. By rejecting remittitur, Rath transformed the conditional order into an order granting a new trial. An order granting a new trial is a final order, which may be appealed. Iowa R. App. P. 6.103. The order granting a new trial on Rath's damages for future medical expenses disposed of all remaining issues in the action, and required Rath to decide between trying the damage issue again or filing an appeal. The May 26, 2011 order was final and appealable when Rath did not consent to remittitur and a new trial was imposed. *See Mead*, 670 N.W.2d at 177-78 (addressing an appeal by a plaintiff who did not agree to remittitur of damages where a conditional new trial was offered). Had Rath appealed the May 26, 2011 order, the original judgment would have been reinstated and we could have addressed whether the jury's verdict was

supported by substantial evidence. Because Rath accepted a new trial on the issue of future-medical-expense damages instead of filing a timely appeal, he failed to preserve his challenge to the court's conditional grant of new trial. Thus, our review is limited to the district court's rulings related to the second trial.

**B. Retrial on causation and permanency.**

Rath next contends the district court abused its discretion in permitting the questions of causation and permanency of his injuries to be considered during the retrial. Rath argues on appeal: "By ruling that there would be no new trial on the issue of future pain and suffering, the trial court in the case at bar determined that the issues of permanency and causation would be not be subject to retrial and the only question for retrial was the amount of the charges for future medical expenses." Rath goes on to assert that the jury's \$2500 award for future pain and suffering "reflects that he sustained a permanent injury, or an injury that will cause pain and suffering into the future." In addition, Rath complains for the first time in this appeal that the district court erred by not granting a new trial on all of the issues.

As discussed above, Rath did not appeal from the May 26, 2011 order, which denied his motion for new trial or additur. Thus, Rath did not preserve error on his claim that the court should have granted a new trial on all the damage issues. Instead, we address Rath's argument that by denying his motion for new trial or additur, the district court implicitly held the issues of causation and permanency would not be retried.

While damages for future pain and suffering may be awarded for permanent injuries, it is not necessary for an injury to be permanent in nature to justify an award of such damages. See *Mabrier v. A.M. Servicing Corp.*, 161 N.W.2d 180, 183 (Iowa 1968) (“In Iowa, when pain is suffered right up to the time of trial and there is evidence plaintiff has not fully recovered, future pain and suffering may be submitted to the jury without medical testimony.”). The award of damages for Rath’s future pain and suffering does not mean the jury found he suffered permanent injuries; the jury’s award recognized only that Rath would suffer some pain beyond the time of trial and would require additional recovery. The district court did not abuse its discretion in allowing evidence regarding the permanent nature of Rath’s injuries when it was relevant to issues of his future medical treatment and the expenses he would incur in receiving that treatment. See generally *Mossman v. Amana Soc’y*, 494 N.W.2d 676, 679 (Iowa 1993) (“To recover the cost of future medical treatment, a plaintiff must furnish substantial proof of the necessity for future treatment and the cost thereof.”).

The issue of causation is also relevant to the jury’s determination of Rath’s future medical expenses. The record indicated Rath suffered prior injuries; the jury was responsible for deciding which injuries were related to the collision with Mathias to determine which treatments were compensable. The district court did not abuse its discretion in allowing evidence regarding causation at the retrial of his future medical expenses.

Finally, we are not persuaded by Rath’s claim that the defendants took inconsistent positions on the scope of the retrial issues. Rath invokes the

doctrine of judicial estoppel to support his position that the court should have barred the defendants from offering evidence of causation and permanency in the retrial of his future medical expenses. “The doctrine of judicial estoppel prohibits a party who successfully and unequivocally asserts a position in one proceeding from asserting an inconsistent position in a subsequent proceeding.” *Duder v. Shanks*, 689 N.W.2d 214, 220 (Iowa 2004). It also applies when inconsistent positions otherwise meeting the doctrine’s requirements are taken in the same proceeding. *Id.* at 221.

Rath claims that by not disputing the jury’s award of \$2500 in future pain and suffering, the defendants “made clear that a second trial could effectively be had solely on the amount of the future medical charges, not whether Rath was permanently injured in the collision and would have future pain and suffering.” As stated above, future pain and suffering is a concept distinct from permanent injury. The jury’s finding that Rath should be compensated for future pain and suffering does not equate to a conclusion he incurred permanent injuries. Because the defendants’ acceptance of the future pain and suffering award was not inconsistent with their desire to present evidence regarding permanency, the doctrine of judicial estoppel does not apply.

### **C. Surveillance video.**

At the retrial, the district court allowed into evidence twenty-six minutes of footage taken from twelve hours of surveillance video documenting Rath’s physical activities. Rath contends the court abused its discretion in denying his motion in limine to exclude the surveillance footage. The defendants offered the

videotape in the first trial to assist the jury in its determination of future loss of function and future pain and suffering. Those issues were not before the jury in the retrial, which was limited to the question of Rath's future medical expenses. As a result, Rath argues the video was irrelevant.

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 5.401. The test is whether a reasonable person might believe the probability of the truth of the consequential fact to be different if the person knew of the proffered evidence. *McClure v. Walgreen Co.*, 613 N.W.2d 225, 235 (Iowa 2000).

At the retrial, two experts offered disparate views regarding the amount of Rath's future medical expenses. Dr. Lerner testified that based on the nature and extent of Rath's injuries, his pain would increase after prolonged sitting or with repetitive bending and lifting activities. Dr. Lerner stated:

When the low back is painful, there are problems both with remaining still too long or doing too much activity, both of which tend to make the pain worse. So an individual struggles with increased pain if he tries to sit too long or lay down too long but also has pain with bending and lifting activities. So the person will struggle with increasing pain and a need to change positions and to limit the amount of time doing an activity.

Dr. Lerner recommended Rath undergo radiofrequency ablation to assist with his pain at a cost of approximately \$20,000 per treatment, to be repeated three times over five years. His recommendations were based in large part on Rath's self-reporting of his injuries.

Dr. Jochims also testified at the retrial. He viewed the surveillance video and testified that from his observations, Rath has “very excellent physical skills in climbing, kneeling, turning, twisting, reaching, carrying, bending. All of those are manifested in that video.” Based on his observations of the video and a review of Rath’s medical records, Dr. Jochims concluded Rath would have future medical expenses, though no more than he would have had before the accident.

We find the surveillance video was relevant to several retrial issues: the extent of Rath’s injuries, whether he would incur future medical expenses, and the amount of those expenses. The jury also could have found the video probative of the credibility of Rath and both doctors when those witnesses addressed Rath’s physical limitations. The court was within its discretion to allow the surveillance footage into evidence.

As a final point in support of this appeal issue, Rath acknowledges Dr. Jochims may be allowed to testify regarding the video he viewed, but argues “the profound prejudicial effect of showing the video to the jury substantially outweighed any remaining probative value.” Rath makes no further argument on this point and cites no authority to support his position. Rath’s passing mention of the balancing test is insufficient to preserve error. See Iowa R. App. P. 6.903(2)(g)(3) (requiring the argument section of an appellant’s brief to contain the appellant’s contentions and the reasons for them with citations to the authorities relied on and references to the pertinent parts of the record); see also *Parsons v. Brewer*, 202 N.W.2d 49, 53 (Iowa 1972) (holding a claim, absent



supportive argument or authority, is deemed waived). We do not find this argument sufficiently developed for our review.

**D. Motion for a continuance.**

Finally, Rath contends the district court abused its discretion in not granting his motion for a continuance. He argues the motion should have been granted in light of the “surprise” engendered by the court’s ruling on his motions in limine, which allowed the issues of causation and permanency to be litigated in the retrial of his future medical expenses.

Iowa Rule of Civil Procedure 1.911 governs continuances. The rule states in relevant part: “A continuance may be allowed for any cause not growing out of the fault or negligence of the movant, which satisfies the court that substantial justice will be more nearly obtained.” Iowa R. Civ. P. 1.911(1). The rule provides a guideline to measure the district court’s reasonableness in granting or denying a continuance. *Ragan v. Petersen*, 569 N.W.2d 390, 393 (Iowa Ct. App. 1997). When a party seeks a continuance not stemming from his own fault or negligence, the court must determine whether substantial justice will be more nearly obtained by postponing the trial. *Id.*

Rath explains he prepared for trial “solely on the issue of the cost of future medical care and treatment” and was prepared “with the understanding that the evidence would be limited to future medical costs, not including the issues of cause or permanency, or past pain and suffering and medications, as necessitated by the admission of the video.” But nothing in the court’s prior rulings prevented the defendants from challenging the permanency of Rath’s

injuries or arguing his future medical expenses related to injuries predating the accident. Although Rath might have been subjectively surprised by the court's rulings on his motions in limine, his failure to anticipate the scope of the retrial issues was not objectively reasonable.

Because the record does not reveal an abuse of discretion, we affirm the district court's denial of Rath's motion for continuance.

**AFFIRMED.**