

IN THE COURT OF APPEALS OF IOWA

No. 2-565 / 11-1298
Filed October 3, 2012

BETTE ANN JOSLIN,
Plaintiff-Appellant,

vs.

**HALEY ELIZABETH HOWELL
and JULIE ANN HOWELL and
AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,**
Defendants-Appellees.

Appeal from the Iowa District Court for Webster County, Gary L.
McMinimee, Judge.

Plaintiff Bette Joslin appeals the denial of her motion for a new trial. She
asserts the jury verdict was inadequate. **AFFIRMED.**

Jerry L. Schnurr, Fort Dodge, for appellant.

Courtney J. Vernon, West Des Moines, for appellees.

Heard by Eisenhauer, C.J., and Doyle and Danilson, JJ.

DANILSON, J.

Plaintiff Bette Joslin appeals the denial of her motion for a new trial. She asserts the jury verdict (1) was so inadequate as to have been influenced by passion, prejudice, or confusion; (2) was not supported by sufficient evidence; and (3) failed to effectuate substantial justice between the parties. Because there was evidence in the record which the jury could have accepted as an alternate cause for some of her damages, we conclude the district court did not abuse its discretion in denying the motion for new trial and affirm.

I. Background Facts and Proceedings.

Fifty-four-year-old cosmetologist Bette Joslin was struck by a negligent, uninsured driver on August 25, 2007. Joslin brought this action seeking to recover damages under the uninsured motorist coverage of her insurance policy with American Family Mutual Insurance Company (American Family). Joslin appeals from the district court's denial of her motion for new trial. The only issue raised on appeal is whether the jury verdict is inadequate.

Joslin was traveling thirty miles per hour and wearing her seatbelt at the time of the collision. The collision caused Joslin's head to jerk violently in one direction, and then back the other way, hitting the driver's side molding inside her car. She was taken to the emergency room and treated for pain in her neck, traveling down to her right shoulder blade.¹ She was given a soft collar for her

¹ Some of the bills for treatment Joslin received the day of the accident had been paid by the time of trial. The parties agree that the record is unclear as to what entity made those payments.

neck and pain medications. Joslin was told it would take time for her injuries to heal.

Joslin reduced her work hours and did not do household chores or clean her beauty shop, as she had before the accident.² She stopped doing manicures and pedicures in her salon because she could not reach down without pain.

Joslin did not seek additional care until October 2007, when she reported continued back and neck pain, which she testified included the trapezius muscle. Medical records demonstrate that pain interfered with her activities of daily living. She was again told that she would heal with time.

Though her pain persisted, Joslin waited to seek additional care until February 2008. Dr. McGuire, an orthopedic surgeon, observed a restricted range of motion and discomfort in both shoulders. Joslin reported that since the accident she suffered pain in her neck which traveled down to the shoulder blades, restricted activities and motion. Dr. McGuire repeated the notion that her type of injury would take time to heal. He prescribed pain medication and told Joslin to reduce her work load.³

Joslin returned to Dr. McGuire's office in February 2009 because her pain "kept on getting worse and worse" and progressed to include tingling in her fingers and numbness in her hands. He observed persistent symptoms,

² Joslin graduated from cosmetology school in 1996. After five years of work at Regis, she opened her own beauty salon in 2002. She had worked as a cosmetologist for nine years without physical complaints prior to the accident.

³ Joslin called Dr. McGuire periodically over the next year to report continued pain. She was told she needed to give it more time, and was given additional refills for her pain prescription over the phone. American Family notes that Dr. McGuire's records do not document these phone calls.

including limited rotation of the neck, scapular pain, pain radiating down into the supraclavicular region and developing symptoms into her arms along the ulnar nerves. By this time, Joslin was only able to handle three or four salon appointments per day, over an eight hour period.

In April, she returned to the doctor, as her pain had increased again. With extension and flexion, she had pain going down her right arm, and her C-7 reflex appeared diminished. Dr. McGuire noted she had “pretty significant radiculopathy.” On a return visit later that month, she continued to report neck and shoulder pain. Numbness and tingling in her hands awakened her at night.⁴

Dr. McGuire referred Joslin to Kristina Johnson, PA-C, in October 2009, who performed a physical examination and concluded that Joslin suffered from radiculitis from the neck, which caused carpal tunnel syndrome. An EMG confirmed moderate carpal tunnel syndrome in Joslin’s right hand.

By November 2009, Joslin was having migraines, could not turn her head, and could not raise her hands or arms well.⁵ Johnson referred Joslin to physical therapy with Michelle Applegate. Applegate’s examination demonstrated decreased range of motion of the cervical region and decreased range of motion of both shoulders, the right worse than the left.

⁴ Dr. McGuire attributed the numbness and tingling to Joslin’s ulnar nerve. His October 2009 record noted that Joslin’s work would aggravate the ulnar nerve. However, he did not speculate as to the origination of the problem. A diagnostic EMG conducted that month revealed no evidence of ulnar neuropathy.

⁵ Joslin reports that she had never experienced any of these symptoms prior to the August 2007 accident. Though she was insured, Joslin never sought treatment for any neck or shoulder pain prior to the accident.

In April 2010, Joslin returned to Johnson and reported continued neck and shoulder issues, despite significant progress after five months of physical therapy. An MRI of Joslin's right shoulder demonstrated anterior and posterior labral signals showing some truncation at the anterior labrum, indicating a probable labral tear, and mild supraspinatus tendinopathy. Joslin was evaluated by orthopedic surgeon, Dr. Li, in August of 2010. He recommended arthroscopic surgery to relieve her right shoulder pain.

After a two-day trial the jury itemized damages on a special verdict form, as follows:

Past medical expenses	\$2503.43
Future medical expenses	\$0
Past pain and suffering	\$1500.00
Present value of future pain and suffering	\$0
Past loss of function in the body	\$500
Present value of future loss of function	\$0
Past loss of earnings	\$0
Present value of future earning capacity	\$0.

Joslin asserts her past medical expenses alone were \$28,841.16. The jury awarded past medical expenses of \$2503.43, a sum which would exactly cover the balance for Trinity emergency room physicians and the physical therapy provided from November 12, 2009, through April 7, 2011.⁶ Wellmark claimed subrogation of \$13,009.48 for its payments on Joslin's past medical expenses. The jury made no award for Wellmark's subrogation.⁷

⁶ Plaintiff's exhibit 19 reflected remaining balances owing to these entities of \$111.00 and \$2392.43, respectively. It is undisputed that Wellmark paid \$7942.87 for physical therapy treatment.

⁷ The verdict form required the jury to answer, "What amount of damage proximately caused by Haley Howell has been paid by Wellmark Blue Cross Blue Shield and must

Though exhibits were admitted at trial in support of the expenses incurred, the jury verdict did not award any other medical expenses, even for those incurred on the day of the accident for emergency room services, imaging, and radiology. Nor did the jury cover services provided by Dr. Li, though they awarded compensation for the physical therapy treatment and radiology imaging he ordered.

Joslin asserts that the evidence of her past medical expenses was undisputed. Every treating practitioner testified that Joslin's symptoms were a result of the accident. Even Dr. Boulden, the expert hired by American Family, testified that Joslin's complaints were consistent with the expected results of a collision at thirty miles per hour when the individual's head is "rag dolled forward and back to the left." All treating practitioners also agreed that a delay in diagnosis and treatment was common for the type of injuries Joslin sustained.

American Family does not dispute that Joslin's neck injury was caused by the accident, but it challenges the causal connection between the remaining symptoms and the collision. Dr. Boulden testified that he did not believe Joslin's shoulder injuries were caused by the accident. He found the cause of her shoulder pain was undetermined, but that Joslin's occupation could have caused or contributed to her symptoms. Dr. Boulden based his opinion on the "[l]ength of time from the motor vehicle accident to treatment of the shoulder" and the "activities of being a hairstylist." However, Boulden conceded that he did not know how much she had been working and that would be an important part of

be refunded by Plaintiff Joslin to Wellmark?" To this interrogatory, the jury responded "\$0."

determining whether or not Joslin's occupation caused her shoulder symptoms. American Family asserts that Joslin's condition was at least exacerbated by her profession.

Joslin also argued that she suffered both loss of past earnings and loss of future earning capacity. She provided evidence which demonstrated an average loss of \$7000 in income per year from the accident to the time of trial. Joslin testified that she had to cut back her work hours significantly after the accident. Dr. Li, Michelle Applegate, and Dr. Boulden all testified that Joslin's symptoms would interfere with her ability to work as a hairdresser. However, American Family suggested other potential causes for Joslin's diminished earnings, including her post-accident thigh lift and her husband's passing in February 2009. The jury awarded no compensation for past or future loss of earning capacity.

Dr. Li testified that Joslin needed a future shoulder surgery.⁸ Physical therapy after the surgery would typically last eight to ten weeks and maximum medical improvement would be expected in three to four months after the surgery. An estimate of the surgical cost was between \$18,000 and \$25,000.⁹ The jury awarded no compensation for future medical expenses, future pain and suffering, or future loss of function of the body.

⁸ Dr. Boulden agreed that on examination Joslin demonstrated a loss in range of motion in her shoulder. Normal forward flexion is 180 degrees. Joslin demonstrated 110 degrees during his exam. Normal extension is fifty degrees. Joslin demonstrated forty degrees of extension. Normal abduction is anything over 160 degrees. Joslin had ninety degrees of abduction. Normal adduction is anything over thirty degrees. Joslin had twenty degrees of adduction.

⁹ Dr. Li was uncertain whether or not the surgeon's fee was included in that sum.

After the verdict was entered, Joslin filed a motion for new trial raising the issue she now presents on appeal. American Family resisted the motion. The district court denied Joslin's motion stating:

The only issues in this case were what medical conditions of the Plaintiff, what medical expenses, and what other damages, if any, were proximately caused by the motor vehicle collision and the amount of those damages. There was substantial evidence to support the verdict. Viewing the evidence in the light most favorable to the verdict, the jury award is not inadequate.

II. Standard of Review.

We do not ordinarily disturb the district court's decision to grant or deny a motion for new trial unless there is an abuse of discretion. *Fisher v. Davis*, 601 N.W.2d 54, 57 (Iowa 1999). The district court has broad, but not unlimited discretion in determining whether a verdict effectuates substantial justice between the parties. Iowa R. App. P. 6.904(3)(c).

III. Discussion.

"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). However, assessment of damages is the function of the jury. *Estate of Pearson ex rel. Latta v. Interstate Power & Light Co.*, 700 N.W.2d 333, 345 (Iowa 2005). We review evidence in the light most favorable to the verdict, whether contradicted or not. *Id.*

A jury verdict should not be set aside merely because the reviewing court would have obtained a different result. *Triplett v. McCourt Mfg. Corp.*, 742 N.W.2d 600, 602 (Iowa Ct. App. 2007). Rather, a jury verdict should be set aside "only if it (1) is flagrantly excessive or inadequate; or (2) is so out of reason as to shock the conscience or sense of justice; or (3) raises a presumption it is a result

of passion, prejudice or other ulterior motive; or (4) is lacking in evidentiary support.” *Rees v. O’Malley*, 461 N.W.2d 833, 839 (Iowa 1990).

Where evidence of the cause of injury is disputed, a motion for new trial based on inadequate damages may be denied. *Cowan v. Flannery*, 461 N.W.2d 155, 159 (Iowa 1990). “Although the evidence may have justified a higher award, such is not controlling. The determinative question posed is whether under the record, giving the jury its right to accept or reject whatever portions of the conflicting evidence it chose, the verdict effects substantial justice between the parties.” *Id.* at 158 (quoting *Kautman v. Mar-Mac Cmty. Sch. Dist.*, 255 N.W.2d 146, 148 (Iowa 1977)). 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. *Kautman*, 255 N.W.2d at 147–48.

Joslin reported that all of her symptoms originated with the August 2007 accident. However, the jury was not required to believe her.

Dr. Li testified that symptoms like Joslin’s could originate from trauma, degenerative, or occupational causes. He conceded that hairstylists could have shoulder problems or carpal tunnel without a trauma and that Joslin’s profession has the potential to aggravate her symptoms. However, he also believed that Joslin’s condition originated with the trauma from the accident.¹⁰ The jury was entitled to disagree.

¹⁰ Michelle Applegate also testified that hairstylists could have neck, shoulder, and carpal tunnel symptoms from overuse. However, she opined only that Joslin’s job could *exacerbate* her symptoms, not that it caused the symptoms to originate.

The expert witness hired by American Family, Dr. Boulden, testified that he did not believe Joslin's shoulder symptoms were related to the accident because of the length of time between the accident and treatment focused on the shoulder. Though Dr. Li and Michelle Applegate both testified that a delay in treatment and diagnosis for injuries like those sustained by Joslin was very common, the jury was entitled to accept Dr. Boulden's testimony over that of the treating practitioners.

Medical records naturally contained Joslin's reports of diminished ability to perform her job due to persistent symptoms. Though Joslin had not experienced any physical problems after nine years of professional cosmetology before the accident, the jury was entitled to attribute the cause of those symptoms to Joslin's profession. While Joslin presented evidence of her diminished earnings, American Family offered potential alternative causes for those damages.

Joslin also argues that the jurors misapprehended their duty in respect to Wellmark's right to subrogation. The jury's verdict may be unjust if the jury was attempting to only award out-of-pocket expenses, that is, the "remaining balance" owed to Trinity Emergency Room Physicians and the Trinity Regional Hospital. *See Bangs v. Pioneer Janitorial of Ames, Inc.*, 570 N.W.2d 630, 631 (Iowa 1997) (concluding in part that where damages were awarded for pain and suffering, loss of function, and loss of earning capacity, but no medical damages, a just result may not be achieved if the payor of medical expenses sought subrogation).

Here, Joslin's argument is premised upon the fact that the medical damages awarded are equal to the unpaid balances owed to Trinity Emergency

Room Physicians and Trinity Regional Hospital. Although this mathematical fact is true, we have no evidence of how the jury reached its verdict.¹¹

In *Bangs*, which we acknowledge is factually distinguishable, the district court ordered an additur for medical expenses where no past medical expenses were awarded and the payor of the medical expenses sought subrogation. *Id.* Our supreme court concluded that “it was improper to order the additur on the assumption that the jury erroneously considered third-party payments,” as there was no admissible evidence tending to support the district court’s finding. *Id.* at 632. Instead, the supreme court ordered a new trial because the verdict was internally inconsistent. *Id.*

Here, Joslin has contended that the verdict was inadequate. Similar to *Bangs*, there is no evidence tending to support Joslin’s premise for how the jury reached its decision on the award of past medical expenses, or that the jury erroneously considered third party payments by excluding them. Moreover, because the jury was asked to determine the amount to be refunded to Wellmark on its subrogation claim and concluded no money was owed, Joslin is not

¹¹ We also note that after the verdict was entered, but before the jury was discharged, the district court conferred with the attorneys to ask if they had any objections to the verdict or if the jury could be discharged. American Family’s counsel requested that the court submit an interrogatory to the jury inquiring what medical bills were incorporated in their verdict. Counsel’s concern was whether the past medical expense verdict may have included some medical bills that American Family had already paid. Joslin’s counsel objected to the request. Conveniently, Joslin now seeks to bolster her claim and impeach the verdict by surmising which medical bills were relied upon by the jury.

required to reimburse Wellmark for medical expenses paid, but not awarded under the verdict.¹²

Under these facts, we cannot afford Joslin a remedy. Because the verdict was supported by some of the evidence of record, it does not fail to accomplish substantial justice between the parties. We conclude the district court did not abuse its discretion by denying Joslin's motion for a new trial. The cause of her injuries and loss of earning capacity were disputed by American Family. The district court was able to observe the evidence as it was presented during trial. The court concluded that the jury could have determined the accident was not the cause of all of Joslin's damages.

IV. Conclusion.

The jury verdict does not rise to the level of flagrant inadequacy and effects substantial justice. While significant sums were left uncompensated by the jury, the record contained a plausible though vigorously contested explanation that Joslin's symptoms were caused or exacerbated by her profession, which the jury was free to adopt. The district court did not abuse its discretion in denying the motion for new trial.

AFFIRMED.

Eisenhauer, C.J., concurs; Doyle, J., dissents.

¹² If the jury had reduced the past medical expenses verdict because of Wellmark's payments, but granted Wellmark's subrogation claim, Joslin would have unjustly faced a double reduction. *Schonberger v. Roberts*, 456 N.W.2d 201, 203 (Iowa 1990) (finding reduction of a damage award because of payments by insurer and requiring plaintiff to pay back benefits is a double reduction not intended by the legislature notwithstanding literal application of Iowa Code section 668.14).

DOYLE, J. (dissenting)

I respectfully dissent. Something went awry in the jury room. I believe the jury's award of itemized damages for past medical expenses is illogical, inconsistent, and therefore not supported by the evidence. I would reverse and remand to grant a new trial.

The jury awarded Joslin \$2,503.43 for past medical expenses. Joslin argues "the only reasonable conclusion is that the jury awarded the balance due to Trinity Emergency Room Physicians of \$111.00 for services on August 25, 2007 and the balance due to Trinity Regional Hospital for Physical therapy from November 12, 2009 through April 7, 2011 of \$2,392.43 for past medical expenses." American Family counters Joslin's conclusion "is based on nothing more than mere speculation Neither [Joslin] nor her attorney have any way of knowing how the jury came to the numbers they did in the verdict."

Because I was not in the jury room during deliberations, I cannot, with certainty, determine how the jury arrived at its award for past medical expenses, but I also cannot ignore the patently obvious. It is more than just coincidence that the jury's award of \$2,503.43 mirrors, to the penny, the unpaid balances for the emergency room physician services and the physical therapy treatment, as clearly set forth on Joslin's bill summary exhibit. This alone would probably not warrant interference with the jury's verdict, but there is more to consider.

It is readily apparent from the verdict that the jury found Joslin was entitled to the unpaid balance of the physical therapy charges. In doing so, the jury necessarily found the physical therapy item of damage was proximately caused

by the other driver's fault. Curiously, the jury failed to award the unpaid balance of the charges of Dr. Li, the doctor who authorized the physical therapy. Further, the TENS unit was ordered as a part of the physical therapy treatment, but the jury failed to award the unpaid balance of the TENS unit charges. Both of these items were clearly delineated on the bill summary exhibit and supported by other billing statement exhibits. To be sure, it was within the jury's domain to determine what medicals were proximately caused by the other driver's fault and what medicals were not. See *Kautman v. Mar-Mac Cmty. Sch. Dist.*, 255 N.W.2d 146, 148 (Iowa 1977). But it was illogical for the jury to award Joslin the unpaid balance of the physical therapy and then allow nothing for the unpaid balances for services directly related to the physical therapy.

In *Hoffman v. National Medical Enterprises*, the Iowa Supreme Court provided the following guidance on jury verdicts:

It is fundamental that a jury's verdicts are to be liberally construed to give effect to the intention of the jury and to harmonize the verdicts if it is possible to do so. The test is whether the verdicts can be reconciled in any reasonable manner consistent with the evidence and its fair inferences, and in light of the instructions of the court. Only where the verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside.

442 N.W.2d 123, 126-27 (internal citations omitted). Thus, a jury's award of itemized damages should be logically and legally consistent. See *id.* 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.*

The jury's award for Joslin's past medical expenses is illogical and legally inconsistent. In other words, the award is not supported by the evidence. I would therefore reverse the district court's judgment and remand for new trial.