IN THE COURT OF APPEALS OF IOWA

No. 2-789 / 12-0698
Filed November 29, 2012

CAROL JANE HENSON and
ELISE NICOLE HENSON,
Plaintiff-Appellants,

vs.

THE CITY OF DAVENPORT,
Defendant-Appellee.

Appeal from the Iowa District Court for Scott County, Charles H. Pelton, Judge.

Plaintiff appeals from a district court ruling denying her motion for new trial following a jury verdict and judgment entry in her personal injury action. **REVERSED AND REMANDED.**

Brendan M. Bush of Bush, Motto, Creen, Koury & Halligan, P.L.C., Davenport, for appellants.

Craig A. Levien and Amanda M. Richards of Betty, Neuman & McMahan, P.L.C., Davenport, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

BOWER, J.

Carol Henson appeals from a district court ruling denying her motion for new trial following a jury verdict and judgment entry in her personal injury action against the City of Davenport. Henson argues the jury returned an inconsistent and inadequate verdict in finding the City was negligent and the proximate cause of damages, but simultaneously failing to award her any damages. Under the facts and circumstances of this case, we find the jury verdicts were inconsistent and a new trial is warranted. We conclude the judgment of the district court should be reversed. The case is remanded to district court for retrial of the issue of damages.

I. Background Facts and Proceedings.

Carol Henson first began having back pain in the mid-1990's. Dr. Timothy Miller began treating Carol Henson for chronic back pain in 2006.[1] An MRI taken of Henson's low back "showed degenerative changes" and "a tear present in her bottom disk." Dr. Miller treated Henson with lumbar epidural steroid injections. Henson did physical therapy and was prescribed a muscle relaxant and pain medication. Henson also took medication for depression and anxiety. In May 2008, as a result of her back pain, trouble sleeping, and other personal issues, Henson requested and was granted a leave of absence from her job as a paraeducator for the Davenport Community School District.

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[1] At that time it was noted Henson also experienced "major depressive disorder," "generalized anxiety disorder," "fatigue," "muscle aches," "stomach issues," and "a lot of sinus infections."

In June 2008, Henson's vehicle was "sideswiped" by a City of Davenport bus driven by Daniel Lucier while Henson was stopped at an intersection. The driver "misjudged" the turn and collided with Henson's vehicle. The bus was traveling at about "five to ten" miles per hour when it struck Henson's vehicle. The collision was "glancing," and "light impact" went "down the side" of Henson's vehicle causing "light to moderate" damage. The City accepted responsibility for the repairs to Henson's vehicle.[2]

Henson was in the driver's seat and her adult daughter, Elise, was in the passenger seat when the accident occurred. Henson and Elise got out of the vehicle and walked across a lane of traffic to sit in the grass alongside the road. Henson called the police "to report an accident and no injury." They next called Elise's father, Joel, who arrived at the scene shortly thereafter. After speaking with Joel, they called an ambulance.

Henson was taken to the emergency room complaining of pain in her neck and upper back. A medical evaluation failed to reveal any damage to Henson's neck or back. Henson was treated and released that day, diagnosed with "a neck sprain" and instructed to take Advil and follow up with her family physician.

In August 2008, Dr. Michael Miniter, a rheumatologist, formally diagnosed Henson with fibromyalgia. Dr. John Buckner, a rheumatologist, opined Henson's fibromyalgia could be traced back to 1992 according to "the variety of symptoms she was having, even though it wasn't diagnosed." Dr. Buckner also noted fibromyalgia can be inherited and observed Henson's "mother also had

[2] The repairs were approximately $5000.

fibromyalgia." Henson agreed she likely had fibromyalgia in 2006, and possibly before that time.

Dr. Miller continued to treat Henson for her back pain. Henson did not tell Dr. Miller about the collision until November 2008. At that time, Dr. Miller diagnosed Henson with chronic myofascial pain. Dr. Miller believed the collision "had exacerbated her symptoms," and caused a "whiplash" injury. Dr. Miller directed Henson to continue her previously prescribed medications and also prescribed stimulant and sleep aid medications.

As a result of the accident, Henson alleged she "developed a chronic pain condition that is permanent." Henson filed a personal injury lawsuit[3] against the City of Davenport and its bus driver, Daniel Lucier,[4] in May 2010, alleging Lucier's negligence caused the accident and her resulting "permanent physical injuries."

Henson sought over 3.8 million dollars in damages for pain and suffering, "economic losses" and loss of "quality of life." The case proceeded to trial. During closing argument, Henson's counsel revised Henson's claimed damages, and instructed the jury that Henson was not asking for any past medical damages from the time of the accident until trial, but was requesting damages for past and future pain and suffering:

> You're going to get a verdict form, which is going to ask you, first, "Was there fault?" and I would hope you'd say there is. I don't know how anyone could say there isn't. Two, "Did they cause injury to Carol?" And so we've tried to be as conservative as we

[3] Henson's daughter, Elise, was also named a plaintiff in the lawsuit, but is not a party on appeal.

[4] Henson later dismissed Lucier from the lawsuit.

> can in terms of only identifying those medications and those treatments that are specifically related to this collision, and not even specifically related to fibromyalgia, even though before this accident she never was on any medication for fibromyalgia. You're going to get this exhibit, Exhibit 8, and because we want to be extremely fair and extremely conservative we're not even asking for any damages from the time of the accident 'til now. Taken care of, don't worry about it. But future, for the next 34 years, Carol needs to be taken care of. . . . We are suggesting $100,000 for past pain and suffering, and $400,000 for future pain and suffering, which averages out to about $13,000 a year if she lives a normal life expectancy.

Henson also requested $720,000 for "economic losses," including future medical expenses, past loss of income, future loss of earning capacity, and past and future loss of function of the body and mind.

In its closing argument, the City rebutted Henson's request for economic damages. The City acknowledged Henson waived any claim to past medical bills, but conceded Henson could be compensated for past pain and suffering:

> Plaintiffs have withdrawn completely every penny of medical bills incurred from the time of this accident up to the present time. You heard her attorney say, "We're not seeking any damages for that," so that has to do with the ambulance ride, the emergency room visit, the visits to her family physician afterwards. They're not making any claim for those bills. That is by their statement, not by our argument. . . . But in terms of pain and suffering, to the extent she had pain and suffering at the scene, when she went to the emergency room, when she went home after going out to dinner, and for whatever period of time that neck strain existed, there should be some award made for past pain and suffering. I don't think there was any reflection that this caused her a loss of function, but I think there could be pain and you could make an award for that as to Carol Henson.

The jury returned a verdict finding the City, through its bus driver, Lucier, at fault for being negligent to Henson. The jury also found the City, through Lucier, to be the proximate cause of damages to Henson. The jury, however,

awarded Henson "0" damages. The court received the verdict and asked the jury, ex parte, whether the foreperson would explain the jury's verdict on the record. The jury agreed. The following colloquy took place:

> COURT: . . . And the verdict form is this: Number 1, on Carol Henson's claim, the answer to number Question 1 was whether there's negligence on the part of the defendant. Their answer is yes. On Question Number 2, causation, the answer is yes. The question in Number 3, on damages, is zero on every element of the damages, and one could conclude that that seems inconsistent, to have a liability and no damages. . . .
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> And now I ask the jury foreperson if that's consistent. And maybe I should put it more succinctly and say how can you find liability and causation and still no damages? And my job is to make sure that this is consistent.
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> FOREPERSON: With Carol Henson—Carol Henson, we said no damages because, where we felt that she maybe could have had some reimbursement for medical, we were instructed not to take that into account as far as the—Mr. Bush [Henson's attorney] said that we weren't going to awarding for—he wasn't asking for the medical reimbursement on her. . . . Did I say that right everybody?
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> (Several jurors answered in the affirmative.)
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> COURT: I think that's consistent, because, like you say, at closing argument [plaintiff's attorney] withdrew the claims for past medical expenses.
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> FOREPERSON: And [past medical expenses is] the only place that we thought [Henson] would have been reimbursed.
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> COURT: I think that's fully consistent.

Henson filed a motion for new trial, arguing in part that the jury abused its discretion "by restricting the damages of the plaintiff to out-of-pocket expenses and excluding pain and suffering damages contrary to the evidence." The district court denied the motion,[5] finding evidence of Henson's "past medical expenses

[5] The court, however, ordered an additur in the amount of $5,716 for Elise's past medical expenses, finding a "fair reading of the record of closing arguments where Plaintiff's counsel waives claim for past damages is that the waiver was intended to apply to Carol Henson, not Elise Henson." The plaintiffs accepted the additur for Elise, and Elise does not appeal.

caused by the collision were limited," and in any event, Henson "waived all past damages." The court also described the collision as "relatively minor," and found the jury could have concluded Henson "had no future damages based upon the fiercely contested evidence." Henson now appeals, claiming the district court abused its discretion in denying her motion for new trial.

II. Scope and Standard of Review.

Our scope of review of a district court's ruling on a motion for new trial depends on the grounds raised in the motion. *Roling v. Daily*, 596 N.W.2d 72, 76 (Iowa 1999). To the extent the motion is based on a discretionary ground, we review it for an abuse of discretion. *Channon v. United Parcel Serv.*, 629 N.W.2d 835, 859 (Iowa 2001). But if the motion is based on legal grounds, our review is on error. *Id*.

III. Discussion.

Henson claims the district court erred in failing to recognize the inconsistency of the verdict. Henson alleges the jury's verdict awarding no damages did not fairly and reasonably compensate Henson and is therefore grounds for a new trial. Henson argues when the jury found the City negligent and the proximate cause of damages while simultaneously failing to award Henson any damages, the jury returned an inconsistent and inadequate verdict.

A. Inconsistency in the Verdict. "A new trial may be granted, and the jury verdict set aside, when the verdict is so logically and legally inconsistent it is irreconcilable in the context of the case." *Kalvik ex rel. Kalvik v. Seidl*, 595 N.W.2d 136, 139 (Iowa Ct. App. 1999). We consider whether the verdict can be

reconciled in any reasonable manner consistent with the evidence, its fair inferences, and in light of the instructions of the court. *Holdsworth v*. *Nissly*, 520 N.W.2d 332, 337 (Iowa Ct. App. 1994). Where verdicts are clearly inconsistent and there is no way to determine which verdict is consistent with the jury's intent, the proper remedy is a new trial. *Hoffman v*. *Nat'l Med*. *Enters*., *Inc*., 442 N.W.2d 123, 127 (Iowa 1989).

As a general rule, new trials will be granted as to the whole case and on all of the issues, and seldom on the issue of damages only, except where liability of a defendant is definitely established. *Householder v*. *Town of Clayton*, 221 N.W.2d 488, 493 (Iowa 1974). When it appears that an award of inadequate damages is the result of a jury compromise on the issue of liability, then a new trial should be granted on all issues. *Id*. We may infer a compromise on the issue of liability if there was a conflict of evidence as to the issue of liability and the jury's verdict bears no relationship to the injuries sustained by the plaintiff. *Id*. at 494; *Yoch v*. *City of Cedar Rapids*, 353 N.W.2d 95, 100 (Iowa Ct. App. 1984).

If there is no evidence the jury's determination of fault was compromised by the evidence of damages, the issue of liability should not be retried. *Thompson v*. *Allen*, 503 N.W.2d 400, 401 (Iowa 1993). Specific issues may be retried, instead of a new trial on all issues, if "it appears that the other issues have been rightly settled and that an injustice will not be occasioned." *Brant v*. *Bockholt*, 532 N.W.2d 801, 805 (Iowa 1995); *see also Fisher v*. *Davis*, 601 N.W.2d 54, 60 (Iowa 1999) (holding new trial on damages only was justified because liability was not an issue); *but see Moore v. Bailey*, 163 N.W.2d 435,

436-37 (Iowa 1968) (finding jury's minimal award for medical expenses and pain and suffering was not inadequate where the evidence regarding the cause and extent of plaintiff's injuries, some of which were pre-existing, was disputed).

Under the facts and circumstances of this case, we find the jury verdicts were inconsistent and a new trial is needed. However, we do not find the inconsistent verdicts were the result of jury compromise on the issue of liability. The record does not contain evidence that legitimately conflicts the issue of fault. Here, we can say the jury found the liability of the City was definitely established. *See Fisher*, 601 N.W.2d at 60; *see also Householder*, 221 N.W.2d at 493. There was no dispute Henson was injured—even if her injury was limited to a neck strain—as a result of the accident and that she received medical treatment. Indeed, at the recitation of the verdict, the jury foreperson stated "we felt that [Henson] maybe could have had some reimbursement for medical [expenses]." Further, the City conceded "there should be some award made for past pain and suffering." The jury's award of no damages was not supported by the evidence. *See, e.g.*, *Fisher*, 601 N.W.2d at 58 (finding jury's verdict awarding plaintiff all claimed medical expenses but nothing for pain and suffering was inadequate).

B. Scope of Retrial. Because our finding requires a retrial, we must next determine the extent of that retrial. "[S]pecific issues may be retried in lieu of total retrial if it appears that the other issues have been rightly settled and that an injustice will not be occasioned." *Brant*, 532 N.W.2d at 805. In these circumstances, we find it unnecessary for a retrial of the issues affecting liability. We also find, however, it would be inappropriate to order retrial of only a single

element of damage (*i.e*., past pain and suffering). "Jury determinations of various elements of damages are apt to be influenced by the recovery allowed for other elements of damage." *Id*. We conclude the retrial should be limited to damages.

IV. Conclusion.

Upon our review, we conclude that the judgment of the district court should be reversed. The case is remanded to district court for retrial of the issue of damages.

REVERSED AND REMANDED.