

IN THE COURT OF APPEALS OF IOWA

No. 6-520 / 04-1724
Filed November 16, 2006

DENNIS L. CAWTHORN,
Plaintiff-Appellant/Cross-Appellee,

vs.

CATHOLIC HEALTH INITIATIVES IOWA CORP.,
d/b/a MERCY HOSPITAL MEDICAL CENTER, a corporation,
Defendant-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Polk County, Artis I. Reis, Judge.

Plaintiff appeals from the district court's order granting a new trial and denying his claim for punitive damages. Defendant cross-appeals from various evidentiary rulings. **AFFIRMED.**

Gary R. Fischer of Dreher, Simpson & Jensen, P.C., and Verle W. Norris, Corydon, for appellant.

Roberta M. Anderson of Schroeder & Anderson, Mason City, and Thomas A. Finley, Jack Hilmes, and Kami M. Lang of Finley, Alt, Smith, Scharnberg, Craig, Hilmes & Gaffney, P.C., Des Moines, for appellee.

Heard by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

SACKETT, C.J.

This appeal arises from plaintiff Dennis Cawthorn's action seeking actual and punitive damages from defendant Mercy Hospital Medical Center (Mercy Hospital) as a result of the defendant hospital's alleged (1) willful and wanton conduct and (2) negligence. The district court found insufficient evidence of willful and wanton conduct and dismissed that claim. The negligence claim was submitted to the jury and a verdict was returned in plaintiff's favor. The district court found the verdict flagrantly excessive and not sustained by the evidence. The court ordered a remittitur and conditionally provided for a new trial if plaintiff did not agree to the remittitur. Plaintiff has appealed, contending the court erred in reducing the jury verdict and granting a new trial. He also appeals from the court's grant of a directed verdict on his claim of negligent credentialing and refusal to submit punitive damages to the jury. Defendant cross-appeals, contending the court abused its discretion in allowing testimony regarding privileged and confidential information.

I. BACKGROUND

On May 1, 2000, Dr. Daniel Miulli performed a discectomy on plaintiff at defendant, Mercy Hospital, to repair a work-related spinal injury. Dr. Miulli performed a second surgery on May 22 to remove a disc fragment. Plaintiff was readmitted to the hospital on June 20 complaining of pain. Dr. Miulli consulted Dr. Hlavin for a second opinion; she recommended testing plaintiff for infection. Relying on week-old tests, Dr. Miulli treated plaintiff with steroids and pain medication.

In early July plaintiff went to the emergency room at the Mayo Clinic. A biopsy revealed a bacterial infection. The infection was treated with antibiotics. As a result of the deterioration of his spine, plaintiff underwent spinal fusion surgery in

March of 2002. Plaintiff developed an incisional hernia, requiring surgery in April of 2004.

On May 22, 2002, plaintiff filed suit against Dr. Miulli, Dr. Koontz,¹ Dr. Hlavin, and Mercy Hospital. Before trial, plaintiff dismissed his claims against Dr. Miulli, Dr. Koontz, and Dr. Hlavin.

A jury trial was held in June and July of 2004. Prior to submitting the case to the jury, the court granted Mercy Hospital's motion for directed verdict on plaintiff's punitive damages claim. The jury returned a verdict including the following damages:

Past medical expenses	\$190,000
Future medical expenses	\$400,000
Past pain and suffering	\$3,000,000
Future pain and suffering	\$4,000,000
Past loss of full body	\$1,000,000
Future loss of full body	<u>\$2,000,000</u>
Total damages	\$10,590,000

The jury allocated fault seventy percent to Dr. Miulli and thirty percent to Mercy Hospital.

Defendant filed several posttrial motions including a motion for judgment notwithstanding the verdict or, alternatively, for new trial and remittitur of damage award. Plaintiff filed a motion for partial new trial on punitive damages. The district court, after a hearing on the motions, found "that a portion of the jury's verdict was flagrantly excessive and not sustained by sufficient evidence and should be reduced." The court entered an order on October 19, 2004, providing for a conditional new trial, which plaintiff could avoid by agreeing to remittitur of damages as follows:

¹ Dr. Koontz was Dr. Miulli's employer and, for a time, chairman of Mercy Hospital's department of neurosurgery.

Past pain and suffering	\$200,000
Future pain and suffering	\$100,000
Past loss of full body	\$200,000
Future loss of full body	\$100,000

The court did not disturb the award for past or future medical expenses. The total damages following the remittitur were \$1,190,000. The court's October 21, 2004 order denied plaintiff's motion for partial new trial on punitive damages, concluding "the evidence submitted did not rise to the level necessary for the submission of punitive damages to the jury."

II. Scope of review

A. *Conditional new trial - remittitur.* "The scope of our review of a district court's ruling on a motion for new trial depends on the grounds raised in the motion." *Richards v. Anderson Erickson Dairy Co.*, 699 N.W.2d 676, 678 (Iowa 2005) (quoting *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 859 (Iowa 2001)). If the motion for a new trial was "based on a discretionary ground, we review it for an abuse of discretion." *Id.* (quoting *Roling v. Daily*, 596 N.W.2d 72, 76 (Iowa 1999)). In contrast, if the motion was "based on a legal question, our review is on error." *Id.* (quoting *Roling*, 596 N.W.2d at 76). A court has "broad but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties." Iowa R. App. P. 6.14(6)(c). Our review of the court's ruling conditionally granting a new trial or remittitur, therefore, is for an abuse of discretion. *See id.* We are "slower to interfere with the grant of a new trial than with its denial." Iowa R. App. P. 6.14(6)(d).

In passing on the alleged excessiveness of damages, we need to determine only whether there was substantial evidence to support the verdict. We have noted that the trial court is generally in a better position to determine whether the evidence was sufficient to justify an award based on the observations of the trial court.

Clarey v. K-Products, Inc., 514 N.W.2d 900, 903 (Iowa 1994) (citations omitted).

B. Partial new trial.

Our review of the court's ruling denying a partial new trial on punitive damages and the earlier directed verdict on the issue is for correction of errors at law. See *Summy v. City of Des Moines*, 708 N.W.2d 333, 343 (Iowa 2006). In determining there was not substantial evidence to support an element of plaintiff's claim for punitive damages, the district court was required to view the evidence in the light most favorable to the plaintiff. *Bellville v. Farm Bureau Mut. Ins. Co.*, 702 N.W.2d 468, 473 (Iowa 2005). Substantial evidence means evidence that a "reasonable mind would accept as adequate to reach a conclusion." *Thompson v. U.S. Fid. & Guar. Co.*, 559 N.W.2d 288, 290-91 (Iowa 1997).

III. Discussion

A. Conditional new trial – remittitur. Plaintiff claims the trial court erred by remitting approximately ninety-five percent of the non-economic damages award. He argues the amount of damages awarded is "peculiarly a jury, not court, function." *Riniker v. Wilson*, 623 N.W.2d 220, 230 (Iowa Ct. App. 2000). He correctly asserts that a court may interfere with a jury's award of damages "when the damage award is 'flagrantly excessive or inadequate, so out of reason so as to shock the conscience, the result of passion or prejudice, or lacking in evidentiary support.'" *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 869 (Iowa 1994) (quoting *Harsha v. State Sav. Bank*, 346 N.W.2d 791, 799 (Iowa 1984)). He argues the district court's order only makes conclusory statements that the awards were flagrantly excessive and lacking in evidentiary support, but does not give any facts in support of its conclusions.

Defendant contends plaintiff “failed to file a bill of exceptions or otherwise ask for a more specific trial court ruling on the motion for new trial” and has not preserved for our review the claim the district court’s decision is not supported by the evidence. Defendant argues the verdict (1) was flagrantly excessive and not supported by the evidence and (2) was influenced by passion or prejudice because of evidence improperly admitted.

The district court concluded the verdict was excessive and not supported by the evidence. It did not conclude it was influenced by passion or prejudice. If the jury’s findings are not supported by the evidence, a new trial must be granted. *Cowan v. Flannery*, 461 N.W.2d 155, 158 (Iowa 1990). “The determinative question for the district court was whether the verdict effected substantial justice between the parties.” *Blume v. Auer*, 576 N.W.2d 122, 126 (Iowa Ct. App. 1997).

From our review of the record, we cannot say the district court abused its discretion.

B. Partial new trial on punitive damages. The district court, both in its ruling on Mercy Hospital’s motion for directed verdict and its ruling on plaintiff’s motion for partial new trial on punitive damages, determined there was not substantial evidence the hospital acted with willful and wanton disregard for the rights or safety of the plaintiff or others. See Iowa Code § 668A.1(1)(a) (2003) (requiring “a preponderance of clear, convincing, and satisfactory evidence the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another”). Willful and wanton is defined as an intentional “act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow.” *Fell v. Kewanee Farm*

Equip. Co., 457 N.W.2d 911, 919 (Iowa 1990) (quoting *Prosser and Keeton on Torts* § 34, at 213 (1984)).

Plaintiff contends Mercy Hospital's conduct in credentialing and retaining Dr. Miulli was willful and wanton, justifying submitting a claim for punitive damages to the jury. Plaintiff argues "complaints and concerns from within the Neurosurgery Department and later other departments should have led to the termination of Dr. Miulli's privileges . . . long before" he performed the surgery on plaintiff. Mercy Hospital responds that the only concerns raised by other doctors came in early February 1999 and related to one surgery in January 1999. Limitations were placed on Dr. Miulli for surgery involving lumbar surgery on more than two disc levels. The surgery on plaintiff involved only one disc level. The damages claimed by plaintiff did not occur from the surgery, but from an infection.

Punitive damages "are allowable upon a showing of legal malice." *Meyer v. Nottger*, 241 N.W.2d 911, 922 (Iowa 1976). "Legal malice is shown by wrongful conduct committed or continued with a willful or reckless disregard for another's rights." *McClure v. Walgreen Co.*, 613 N.W.2d 225, 231 (Iowa 2000). "To receive punitive damages, plaintiff must offer evidence of defendant's persistent course of conduct to show that the defendant acted with no care and with disregard to the consequences of those acts." *Wolf v. Wolf*, 690 N.W.2d 887, 893 (Iowa 2005) (quoting *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co.*, 510 N.W.2d 153, 156 (Iowa 1993)). In granting the directed verdict and in denying plaintiff's motion for a partial new trial, the district court concluded there was insufficient evidence on this element to submit the claim to the jury.

We agree the evidence does not support the submission of punitive damages.

C. Cross-appeal. Because we have affirmed the district court on plaintiff's appeal, we need not address defendant's evidentiary claims raised on cross-appeal.

AFFIRMED.