IN THE COURT OF APPEALS OF IOWA

No. 8-455 / 07-1600
Filed July 16, 2008

MARY LITTERER and RUSSELL LITTERER,
Plaintiffs-Appellants,

vs.

HY-VEE, INC., and REGENCY SQUARE LTD.,
An Iowa Limited Partnership,
Defendants-Appellees.

Appeal from the Iowa District Court for Cerro Gordo County, Paul W. Riffel, Judge.

Plaintiffs appeal from a district court ruling denying their motion for new trial following a jury verdict and judgment entry in their personal injury action. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Judith O'Donohoe of Elwood, O'Donohoe, Braun, White, Charles City, for appellants.

Jay Shriver and Joel J. Yunek of Yunek Law Firm, Mason City, for appellees.

Considered by Miller, P.J., and Vaitheswaran and Eisenhauer, JJ.

MILLER, J.

Mary and Russell Litterer appeal from a district court ruling denying their motion for new trial following a jury verdict and judgment entry in their personal injury action against Hy-Vee, Inc. and Regency Square, Ltd. We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND FACTS AND PROCEEDINGS.

On September 24, 2003, as Mary was exiting a tent in the parking lot of a Hy-Vee in Mason City, Iowa, she tripped on a piece of shrinkwrap that had blown off of a pallet and fell on her hands and knees. A Hy-Vee employee helped Mary up and brought her ice for her scraped hands. She waited for her husband, Russell, in her car in the parking lot. By the time he arrived, her right knee was "seizing up" and "getting tight," but she was able to drive home.

The next morning Mary was unable to extend or bear weight on her right knee. She sought medical treatment that day from Dr. Paul Gordon. He ordered an x-ray of her right knee, which was negative, and prescribed a pain reliever. Approximately one week later, Mary sought further medical treatment from Kim Larson, a nurse practitioner, due to continuing pain and swelling in her right knee. Larson ordered an MRI, which was negative aside from a "[m]inimal degenerative signal within the medial meniscus." She recommended that Mary begin physical therapy and referred her to Dr. Michael Crane, an orthopedic surgeon.

Mary saw Dr. Crane on October 30, 2003. After examining her right knee, x-ray, and MRI, he concluded she was suffering from a posterior capsular strain. He recommended that she continue with rehabilitation and routine activities. By

December 2003, Dr. Crane noted that Mary was "actually getting around reasonably well," although she was "limp[ing] some." He ordered a second MRI in January 2004 due to her continuing right knee pain. That MRI also did "not show any significant internal derangement or acute injury." He discharged her from his care as "slightly improved" on January 29, 2004.

Mary, however, continued to experience pain in her right knee. She consequently began seeing Dr. Mark Kirkland in March 2004. He diagnosed her with a resolving right knee contusion. He felt "one of the reasons she is having posterior knee pain is secondary to the fact that she is limping" and suggested several exercises for her to perform at home. By April 2004, her right knee pain was improving, and she was able to walk without a limp. In July 2004, Dr. Kirkland opined that Mary had reached maximum medical improvement with no permanent restrictions or limitations.

Shortly thereafter, Mary and Russell went on a vacation in Sweden. Her knee swelled during the flight, and they had to limit some of their sightseeing due to her knee problems. Mary continued with physical therapy when she returned from her trip, but "it seemed like the more [she] did, the worse it got." As a result, she sought additional medical treatment in October 2004 from Dr. Arnold Delbridge. He performed arthroscopic surgery on her right knee on October 26 and discovered "considerable degenerative changes on the medial femoral condyle." He also found a "medial plica impinging on the medial femoral condyle," which he resected. Following the surgery, Mary continued to experience some "soreness in her knee and a little swelling." She receives

periodic protein and steroid injections from Dr. Delbridge, which help to temporarily relieve some of her knee pain.

The Litterers filed suit against Hy-Vee and Regency Square[1] in April 2005, claiming the defendants' negligence in maintaining their premises caused Mary's injuries. Mary sought damages for past and future medical expenses, lost wages, past and future pain and suffering, and past and future loss of body function, and Russell sought damages for past and future loss of consortium. Following a trial, the jury determined the defendants were negligent and awarded Mary $11,839.75 in past medical expenses, $500 for past loss of function, and $500 for past pain and suffering. The jury denied Russell's claim for loss of consortium.

The Litterers filed a motion for new trial. The district court denied the motion, and the Litterers appeal. They claim the court erred in denying the motion for new trial because the jury verdict was inadequate, not sustained by sufficient evidence, and inconsistent. They also claim the court erred in refusing to submit "future lost time from work due to medical care as an element of damages" to the jury. In response, the defendants argue that the jury verdict was not inadequate or inconsistent and that it was supported by sufficient evidence. They further argue Iowa does not recognize a claim for loss of future earnings.

II. SCOPE AND STANDARDS OF REVIEW.

Our review of a district court's ruling on a motion for new trial depends on the grounds raised in the motion. *Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 609 (Iowa 2006). When the motion

[1] Regency Square owns the real estate upon which Hy-Vee's grocery store is located.

and ruling are based on discretionary grounds, our review is for abuse of discretion. *Id.* However, when the motion and ruling are based on a claim the trial court erred on issues of law, our review is for correction of errors at law. *Id.*

In this case, the Litterers' motion for new trial argued the jury's verdict was inadequate and not supported by sufficient evidence. The district court has considerable discretion in ruling on a motion for new trial based upon the ground that the verdict was inadequate. *Fisher v. Davis*, 601 N.W.2d 54, 57 (Iowa 1999). Whether damages are so inadequate as to warrant a new trial is for the district court to decide, and we will ordinarily not disturb its discretion to grant or deny the motion unless an abuse of discretion is shown. *Id.*

On the other hand, we review the court's ruling as to whether the verdict was sustained by sufficient evidence for correction of errors at law. *Estate of Hagedorn ex rel. Hagedorn v. Peterson*, 690 N.W.2d 84, 87 (Iowa 2004). We likewise review a challenge to the district court's refusal to submit a jury instruction for correction of errors at law. *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 160 (Iowa 2004). *But see Summy v. City of Des Moines*, 708 N.W.2d 333, 340 (Iowa 2006) ("We review the . . . claim that the trial court should have given the defendant's requested instructions for an abuse of discretion.").

III. MERITS.

A. Past Medical Expenses.

The Litterers first claim the district court erred in denying their motion for new trial because the jury's award of $11,839.75 in past medical expenses, which they assert is limited to the medical care Mary received until she began seeing Dr. Delbridge, is inadequate and not supported by sufficient evidence.

They argue that the jury should have also awarded her the medical expenses she incurred from her treatment with Dr. Delbridge. We do not agree.

"Whether damages in a given case are adequate depends on the particular facts of the case." *Fisher*, 601 N.W.2d at 57. "The test is whether the verdict fairly and reasonably compensates the party for the injury sustained." *Id.* We view the evidence in the light most favorable to the jury's verdict when reviewing a motion for new trial. *Estate of Pearson ex rel. Latta v. Interstate Power & Light Co.*, 700 N.W.2d 333, 345 (Iowa 2005). "Where the verdict is within a reasonable range as indicated by the evidence we will not interfere with what is primarily a jury question." *Olsen v. Drahos*, 229 N.W.2d 741, 742 (Iowa 1975).

We do not believe the district court erred in concluding the jury's award of past medical expenses fairly and reasonably compensates Mary for the injury she sustained as a result of her fall on September 24, 2003. The medical records demonstrate that Mary's injury was relatively minor. Dr. Gordon initially diagnosed her with a patellar contusion, or bruise, while Dr. Crane believed she suffered from a posterior capsular strain. In March 2004, Dr. Kirkland stated Mary was recovering from a right knee contusion. None of these physicians recommended surgical intervention for her injury. Instead, they encouraged her to continue to engage in her routine daily activities and believed the injury would resolve itself over time.

In addition, neither the x-rays nor the MRIs revealed any injury "directly related to the fall." Instead, the MRIs showed that Mary had normal degeneration of her right knee prior to her fall. Dr. Delbridge's arthroscopic surgery confirmed

that she had a "considerable amount of degeneration on . . . the inside of her knee," which predated her fall. He testified, however, that the degenerative changes in Mary's knee caused her to be more prone to injury from a traumatic fall; thus, he believed her fall on September 24, 2003, aggravated her pre-existing asymptomatic condition.

The Litterers rely on Dr. Delbridge's testimony in arguing the jury should have awarded Mary the medical expenses she incurred from her treatment with Dr. Delbridge as instructed by jury instruction No. 16, which stated:

> If Mary Litterer had an arthritic condition making her more susceptible to injury than a person in normal health, then the defendants are responsible for all injuries and damages which are experienced by Mary Litterer legally caused by defendants' actions, even though the injuries claimed produce a greater injury than those which might have been experienced by a normal person under the same circumstances.

See Benn v. Thomas, 512 N.W.2d 537, 539 (Iowa 1994) ("A tortfeasor whose act, superimposed upon a prior latent condition, results in an injury *may* be liable in damages for the full disability." (emphasis added)). However, the jury was confronted with conflicting medical testimony regarding Mary's injury and was "required to choose as to which was deemed correct." *Kautman v. Mar-Mac Comm. Sch. Dist.*, 255 N.W.2d 146, 148 (Iowa 1977). "[T]he jury was at liberty to accept or reject any such opinion evidence in whole or part." *Id.*; *see also Cowan v. Flannery*, 461 N.W.2d 155, 157 (Iowa 1990) (stating ordinarily the jury should be allowed to settle disputed fact questions).

Although Dr. Delbridge testified that the knee problems Mary was experiencing when he began treating her in October 2004 were related to her September 24, 2003 fall, Dr. Kirkland noted significant improvement in Mary's

condition in the preceding months that he saw her. In July 2004, he observed that she was able to walk without a limp, perform a half knee bend without difficulty, and fully extend her knee. He accordingly believed that she was "doing well enough [at that time] that [he] did not need to see her back." He further stated that she did not have any permanent restrictions, limitations, or impairment from her fall.

Based on this evidence, the jury may have reasonably concluded that any aggravation of Mary's pre-existing degenerative condition due to her fall was resolved before she began seeing Dr. Delbridge. *See Seastrom v. Farm Bureau Life Ins. Co.*, 601 N.W.2d 339, 346 (Iowa 1999) ("When evidence is in conflict, 'we entrust the weighing of testimony and decisions about the credibility of witnesses to the jury.'" (citation omitted)). Thus, in limiting her recovery for past medical expenses, the jury may have attempted to award Mary only that portion it believed was related to the injury caused by the fall.

Viewing the evidence in the light most favorable to the jury's verdict, we conclude the district court did not err in finding sufficient evidence supported the jury's award for past medical expenses. Nor did the court abuse its discretion in concluding that award was adequate. To the extent the district court denied a new trial on the ground of a claimed inadequacy of the award for past medical expenses, we find no error in the court's ruling on the motion for new trial.

B. Loss of Consortium.

The Litterers next claim the jury's failure to award Russell damages for loss of consortium is inconsistent with its award of past medical expenses, pain and suffering, and loss of function. They argue that because "the jury found

Mary had some past pain and suffering and past physical limitation and the uncontradicted testimony indicates that the pain and suffering as well as the limitation of function impacted Russ, some consortium should have been awarded." We reject this assignment of error.

In order to recover on his loss of consortium claim, Russell was required to prove he suffered damages as a result of Mary's injury. *See Brunson v. Winter*, 443 N.W.2d 717, 720 (Iowa 1989) (stating that spouse seeking damages for loss of consortium must prove "he suffered damages in an ascertainable amount"). We do not believe the jury's decision to award no damages on the loss of consortium claim is inconsistent with its award of past medical expenses, pain and suffering, and loss of function in light of the evidence in this case. *See Clinton Physical Therapy Servs.*, 714 N.W.2d at 613 ("[A] verdict is not inconsistent if it can be harmonized in a reasonable manner consistent with the jury instructions and the evidence in the case, including fair inferences drawn from the evidence.").

The Litterers testified that before Mary's injury, they enjoyed traveling, dancing, gardening, and walking. After Mary's injury, they were still able to travel to Sweden, although they limited their sightseeing due to her knee problems. Mary is also able to "dance a little" and do some gardening. Although Russell testified that Mary was not able to help with the housework to the extent that she did before her injury, the Litterers have made some accommodations to their home that have allowed her to continue to be involved with the housework. We also note that Mary's physicians encouraged her to continue to engage in her routine daily activities.

Our supreme court has recognized that "[t]he value of a spouse's companionship, affection, and aid is difficult to measure." *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 870 (Iowa 1994). Thus, the amounts of damages "are primarily for the trier of fact to determine." *Beeck v. Aquaslide 'N' Dive Corp.*, 350 N.W.2d 149, 164 (Iowa 1984). We believe a reasonable jury could have determined based on the evidence in this case that Russell's "loss was insufficient to support a money award." *Brunson*, 443 N.W.2d at 720. We therefore affirm the district court's denial of the Litterers' motion for new trial as to Russell's loss of consortium claim.

C. Lost Wages.

We turn next to the Litterers' claim that the jury's failure to award Mary damages for lost wages is inconsistent with its award of past medical expenses, pain and suffering, and loss of function. We agree.

A claim for time lost from work is compensable. *Hopping v. College Block Partners*, 599 N.W.2d 703, 706 (Iowa 1999). Our supreme court has "characterized this element of damage as recovery for loss of time and ha[s] held that it is competent for the trier of fact to include in the damages assessed the reasonable value of a plaintiff's loss of time in that person's occupation." *Id.* The jury was accordingly instructed it should consider the "reasonable value of lost wages from the date of injury to the present time" if it determined Mary was entitled to recover damages.

The undisputed evidence presented at trial established that Mary had to take time off work in order to receive medical care for the injury she suffered on September 24, 2003. Although Mary received paid medical leave during the

periods she missed work, "time taken as sick leave is compensable." *Cockerton v. Mercy Hosp. Med. Ctr.*, 490 N.W.2d 856, 860 (Iowa Ct. App. 1992); *see also Hopping*, 599 N.W.2d at 706 (stating damages for time lost from work should not be reduced as a result of sick leave). The jury, however, did not award Mary anything for the time she lost from working as a result of her knee injury despite allowing her a portion of the medical expenses made necessary by that injury.

We conclude that it was illogical for the jury to award Mary medical expenses to treat her knee injury but then allow her nothing for the time she missed from work due to those medical appointments. *See Hopping*, 599 N.W.2d at 707 (reversing the district court's judgment denying plaintiff's claim for time lost from work as a result of her injury). We therefore reverse the district court's ruling denying the Litterers' motion for new trial as to Mary's claim for damages and remand for new trial on Mary's claim.

We will briefly address the Litterers' claim regarding the district court's refusal to submit "future lost time from work due to medical care as an element of damages" only to aid in its resolution should it arise again on retrial. *See Mills County State Bank v. Fisher*, 282 N.W.2d 712, 716 (Iowa 1979).

"In tort cases for personal injuries, impairment of future earning capacity is a distinct item of damage." *Holmquist v. Volkswagen of America, Inc.*, 261 N.W.2d 516, 525 (Iowa Ct. App. 1977). Here, the Litterers acknowledge Mary had "no basis for showing the lack of earning capacity" because she was able to continue working after her injury. Instead, they claim that the jury should have been instructed it could consider Mary's "future loss of time off of work due to medical care and recovery from medical care" in assessing her damages.

In support of their argument, the Litterers rely upon a rule summarized in *Corpus Juris Secundum*, which states that a "[p]laintiff seeking damages for lost future earnings has the burden of demonstrating, with reasonable certainty, that he or she has sustained loss of future earnings or earning capacity." 25 C.J.S. *Damages* § 38, at 372 n.9 (2002). *But see Sallis v. Lamansky*, 420 N.W.2d 795, 798 (Iowa 1988) ("It is the loss of earning capacity that is compensable, not the loss of earnings."). Based on the speculative evidence presented at the first trial,[2] we do not believe the district court erred in refusing to submit a jury instruction on this issue. On remand, such an instruction should only be given if the evidence and applicable law supports it.[3] *See Pexa*, 686 N.W.2d at 160 (stating a court is generally required to give a requested instruction when it states a correct rule of law having application to the facts of the case).

IV. CONCLUSION.

We affirm that portion of the district court's ruling denying the Litterers' motion for new trial as to Russell's lost of consortium claim. We reverse that portion of the court's ruling denying the Litterers' motion for new trial as to Mary's claim for damages and remand for new trial on Mary's claim.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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[2] Mary testified that she generally has to take "at least two hours," "[s]ometimes . . . more than that," off of work "every three or four months, depending on how [her] knee's doin'," to receive injections from Dr. Delbridge. She also testified that she planned to have knee replacement surgery "at some point" in the future, which would require her to be off of work for "two to three months." There was no testimony as to how long she would need to receive injections in her knee. Nor was there any testimony as to the "annual average wage increases of a person in [her] trade." *Bergquist v. Mackay Engines, Inc.*, 538 N.W.2d 655, 659 (Iowa Ct. App. 1995) (finding plaintiff presented insufficient evidence to submit the issue of lost earning capacity to the jury).

[3] We note that the Litterers do not cite any Iowa cases or cases from other states where a claim for "future lost wages" has been submitted in the absence of a claim for lost earning capacity.