IN THE COURT OF APPEALS OF IOWA

No. 8-929 / 08-0484
Filed January 22, 2009

AUTUM BOWERS,
Plaintiff-Appellant,

vs.

ANNA GRIMLEY and
JEFFREY GRIMLEY,
Defendants-Appellees.

Appeal from the Iowa District Court for Linn County, Robert E. Sosalla, Judge.

Plaintiff appeals the jury verdict in a tort suit based on an automobile accident. **AFFIRMED.**

Sara Riley of Tom Riley Law Firm, P.L.C., Cedar Rapids, for appellant.

Corinne R. Butkowski and Ryan M. Sawyer of Lynch Dallas, P.C., Cedar Rapids, for appellees.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

MAHAN, J.

Plaintiff Autum Bowers appeals the jury verdict in a tort suit based on an automobile accident. She contends the jury verdict was inadequate and that the jury instructions were flawed. We affirm.

I. Background Facts and Proceedings.

On December 19, 2005, a vehicle driven by Autum Bowers was hit by a vehicle driven by Anna Grimley.[1] Bowers was on her way to work at the time. Bowers' airbag deployed as a result of the collision. Bowers declined medical treatment at the accident site, but went to the emergency room with family members within hours of the collision.

At the emergency room she presented with a headache and back pain. Emergency room personnel noted injuries to her head, face and right shoulder. "[M]oderate tenderness of the mid cervical spine" was noted, as was "[v]ertebral point tenderness over the mid lumbar spine." Crystal Shannon, R.N., noted limited range of motion in Bowers' back and right shoulder. The left side of Bowers' face was reddened, the bridge of her nose was tender to palpation, and the nurse wrote that Bowers "[s]tates she feels like her jaw is pushed to the right."

The emergency room doctor, Karl E. Anderson, was made aware that Bowers had hardware attached to her spine to correct curvature due to scoliosis.[2] Several x-rays of her back and a CT scan of her head were taken.

[1] The vehicle driven by Anna Grimley was owned by her father, Jeffrey Grimley.
[2] Bowers has Miami Moss rods inserted into her back to correct her scoliosis, however, the record also includes medical personnel referring to the hardware as Harrington rods, a former version of hardware.

Anderson's notes of his examination of Bowers indicate: "mild tenderness of the upper and middle forehead"; "[n]o dental injury"; mild tenderness of the nose, but no laceration, swelling, or deformity; "[p]osterior neck, left paraspinous area, mild tenderness and muscle spasm. Limited ROM secondary to pain. No erythema. No swelling, laceration, abrasion, ecchymoses or deformity." He further noted mild tenderness to the right scapula and no back tenderness. Under "clinical impression," Anderson diagnosed: "Minor closed head injury. Cervical strain. Contusion to the head and right shoulder. Vehicle –Vehicle accident – driver." Dr. R.L. Kundel reviewed the various x-rays and CT scan and noted no fractures and "[n]o acute abnormalities."

Bowers was given Benadryl, Dilaudid, Valium, and Zofran while at the emergency room. She was released a few hours after arriving and given prescriptions for Lortab and Valium and encouraged to take Ibuprofen. Bowers was told not to work for two days and to follow up with her own doctor in two days.

On December 29, 2005, Bowers saw her physician, Dr. Mary Ann Nelson. Nelson noted:

> She says her usual weight is 140 and today she weighs in here at 126. She is not sleeping very well. As time has gone on, her concern is that her jaw does not close properly. Her teeth don't seem to line up straight and she can't chew normally. She has become aware of pain in the midportion of the left humerus. She is also aware of increasing prominence of the proximal end of the Harrington rod which now is protruding to the right of the midline in her upper thoracic spine. (The skin is closed.) She feels a lot of aching in the lateral portion of her left neck.

Dr. Nelson observed bruising in the midportion of Bowers' left humerus and noted "prominence of the Harrington rod is present on the upper back and the

point located above." She also notes, "I can observe the jaw asymmetry." Dr. Nelson ordered a CT scan of Bowers' facial bones and x-rays of her thoracic spine and left humerus. She advised Bowers to take Aleve.

On December 30, 2005, Bowers had the x-rays and CT scan performed at St. Luke's Hospital. The following impressions were included in the reports:

CT scan: "Minimal inflammatory changes of maxillary and ethmoid sinuses, probably chronic. No demonstrated mandibular or other fracture. No subluxation seen."

X-rays of spine: "Significant thoracolumbar scoliosis. Long Herrington rods are in place."

X-rays of humerus: "No acute changes left humerus. Minimal to mild bowing of distal left clavicle. Is patient painful over distal left clavicle?"

On January 5, 2006, Bowers returned to Dr. Nelson for follow up of the accident. Dr. Nelson noted sinusitis aggravated by airbag deployment, bite problems with spasm of the left jaw, and improved spasm in the upper back. She reviewed the spine and humerus x-rays with Bowers and gave Bowers a copy of the CT scan to take to the oral surgeon. Dr. Nelson noted that Bowers had been going to work at Proctor & Gamble and continued to be stiff and sore. Dr. Nelson restricted Bowers to light duty, but noted that Bowers "says P&G has no light duty. (From my standpoint, that is up to the company to determine.)"[3] Dr. Nelson also noted that Bowers was a bit sore in the left distal clavicle, "that would have been point of pressure from the seatbelt." Bowers did not return to work for Proctor & Gamble after January 5, 2006.

[3] Parenthetical and underlining in original.

On January 17, 2006, Bowers interviewed at Midland Forge, a company specializing in manufacturing industrial-grade steel hooks. As part of the hiring process, Bowers was required to undergo a pre-employment physical and obtain releases from her treating physicians.

On January 26, 2006, Bowers was seen by an oral maxillofacial surgeon for jaw pain and the development of a cross-bite, which she claimed were caused by the accident. Dr. Steven Vincent wrote:

> Based on the clinical, historical and radiographic features I felt Ms. Bowers showed evidence of mild masticatory myfascial pain but no other evidence of jaw abnormality. The left posterior cross bite based on evidence of wearfacets is developmental in nature and must have been present for at least several years. The chronicity of her jaw pain clearly implicates clenching and bruxing as a major contributing factor.

On January 27, 2006, Bowers again saw Dr. Nelson. Notes from that visit are as follows:

> S: Autum is thrilled that she is going to be doing painting at Midland Forge - her dad works there. She has been seen by the company physician and needs my clearance for her jaw, distal left clavicle and her back. Autum is right handed. She has seen the jaw and joint doctors at the University and they are happy that the malocclusion will settle down (and it is getting better) as the swelling recedes. She does not need braces. She is going to be using Naproxen 500 mg p.o. b.i.d. for a month (rather than the ibuprofen – per the directive of the doctors in Iowa City). She no longer has any soreness at the tip of her clavicle, left. The prominence of her Harrington rod in her upper back is not bothersome to her.
> O: BP: 122/70. She is happy. There is very negligible malocclusion seen on the left face – the swelling is gone. Chest and heart – negative. She is not tender over the distal left clavicle. There is some prominence of the Harrington rod to the right of the midline in her upper back but the swelling she had before has resolved.
> A: She is dismissed from my care – she may go to work and wear the respirator device over the face that she needs for the painting that she will be doing.

P: No restrictions. (She will be doing some painting of hooks.)

Bowers began seeing a chiropractor, Phillip Marchiori, on February 6, 2006, which was also the day she began working at Midland Forge on the paint line.[4] Marchiori treated Bowers for issues in her jaw and lower back for several months. On March 9, 2006, Marchiori noted:

> Correlation of current radiographs with previous studies shows minimal if any displacement of Harrington Rod instrumentation. Hypertonus edema and tenderness findings right upper thoracic region over superior Harrington Rod probably continued chronic inflammation stemming from traumatic insult during auto accident and continued aggravation from activities associated with work.

In April 2006 Bowers returned to the surgeon who implanted the spinal hardware. At that time, Dr. Stuart Weinstein noted that the upper end of the right side of Bowers' hardware and near the edge of her scar was tender to touch and seemed to be more prominent than it had at her last visit in August 2004. Dr. Weinstein recommended anti-inflammatories, ice, and exercises.

Bowers returned to Dr. Weinstein on May 10, continuing to complain of pain in her upper right thoracic region. At that point, Dr. Weinstein inquired as to the type of Bowers' employment: he talked to her about doing something that involved less upper extremity lifting. A CT scan was ordered and showed "there may be some slight disruption of the contact area between the bone and the upper hook [of the apparatus] on the right side. On May 24, 2006, Bowers returned to Dr. Weinstein's office. His notes indicate that "the hardware on the

---

[4] Her duties at Midland Forge involved regular lifting, bending, twisting, reaching, pushing, and pulling; in addition, about one-third of the time she donned protective wear and spray-painted hooks.

right upper thoracic area is prominent and very painful" and that "any light touch causes her significant discomfort."

Bowers underwent surgery to remove a portion of the hardware on June 6, 2006. She returned to work on July 3, 2006, working forty hours per week, plus overtime. She saw Dr. Weinstein for post-operative follow up appointments on June 19, July 19, September 13, and October 12, 2006. She initially reported relief from the pain, but despite the surgery Bowers continued to report pain.

On October 20, 2006, Bowers filed suit against Anna and Jeffrey Grimley for injuries she sustained in the December 19, 2005 automobile accident.

At trial, Bowers testified that she did not feel the rod protrusion before the accident, but did after the accident. She explained that on January 27, 2006, she told Dr. Nelson that the pain in her rod area had decreased "[b]ecause I wanted the job at Midland." She testified that she did not return to see Dr. Nelson after starting work at Midland Forge because "she would have put me back on light duty." She went to Dr. Marchiori because "I was still in a lot of pain. And my jaw was still bothering me some, so I went and seen him for a second opinion." She described her work at Midland Forge and testified that "I've always been able to do my job even when I'm in pain, yes."

Dr. Weinstein testified that there was no protrusion of Bowers's hardware in August 2004, but it was evident in May 2006. He testified that there was no baseline CT scan (the preferred diagnostic test to view displacement of the hardware) prior to the accident, so he was unable to determine with certainty that the accident caused the protrusion. We note the following exchanges between Bowers's counsel and Dr. Weinstein relative to causation:

Q. Okay. From your medical records, your memory of your history, physical and treatment of Autum, as well as your knowledge of Autum before the automobile accident, is it your belief to a reasonable degree of medical probability that Autum's treatment visits at the University of Iowa Hospitals and Clinics from April of 2006 through January 11th of 2007 were related to the automobile accident? A. I would say related to the pain she had in her back, which was related to her – seemed to have a start date which she related to the accident, yes.

Q. Okay. It is unusual, I understand for any of the rod to need to be removed, is that correct? A. Yes, it is not common.

Q. And as you understand it, Autum started to have symptoms or complained of symptoms to the area that you later removed part of the rod from after the accident, correct? A. Specifically to that area, yes.

Q. Okay. And you had seen her prior to the accident, the last time being in August of 2006 – I'm sorry, 2004, correct? A. Yes.

Q. And if she had been having the kind of pain that she reported to you when you saw her in April of 2006, would you have expected her to come and see you? A. I would have hoped she would come to see me.

Q. That was at least what you would have told her and her mother or whoever accompanied her, because she was still a minor in August 2004, correct? A. Yes. My standard message after leaving the clinic, is let's say you have a two-year appointment, is that you're always welcome to come if you're having any problems at any time.

. . . .

Q. So as I understand it, the rod was not separated but was loosened and allowed the rod to move upward or protrude outward? A. The rod is hooked to – is connected to hooks in Autum's case. It seemed on the CT scan that one of the hooks, the purchase or the grasping to the bone underneath of it changed a little bit, and it is our guess that that little bit of change allowed the rod to become more prominent and cause her symptoms.

Q. And given that she was in an automobile accident on December 19, 2005, and started complaining to health care professionals, both emergency room physicians and then a doctor and then a chiropractor as to pain in the same area that you later treated her for, is that consistent with the automobile accident being the force or the mechanism that loosened the rod? . . . . A. Well, I don't have any of her emergency room records that I'm aware of. It is possible I do. But Autum, after I first saw her after the accident, gave me that history, so I assume that's the case.

Q. And is the history she gave you as well as your knowledge beforehand consistent with the auto accident being the

> force or the mechanism that most likely caused the loosening of the rod? . . . . A. An accident is compatible with something like that happening.
>
> . . . .
>
> Q. Based upon the history that Autum provided you, which was that she was in an automobile accident, that at that point she started to have the pain and protrusion in the area that you subsequently removed part of the rod and the hook from, do you believe to a reasonable degree of medical probability that the auto accident was the most likely or was the probable cause of the loosening of the rod? . . . A. That corresponds to the history the patient gave me and is consistent with her history. It is certainly possible.
>
> . . . .
>
> A. Yes, I have no other history of trauma that would be related to it, so based on her history and the new physical findings and her relating no – not having previous discomfort in that area, there is an association between those two that is reasonable.
>
> Q. And, in fact, don't several of your medical records refer to the auto accident being the cause of the injury to or – injury might not be the right word, but the loosening of the rod or the pain that she was experiencing? . . . . A. Yes, I think the records document the fact she was well until she had this accident in December, so that's the relationship that the records indicate.
>
> Q. Just so it is clean and you can have your record – or your objection be a standing objection, reading the records it appears that you are relating the injury or the symptoms, the problems she was having in her back where the rod was protruding to the automobile accident. Would you agree with that? . . . . A. As a physician, when the patient gives me a history that relates an event to the new onset of discomfort and you have a physical finding, albeit it is five months later that relate to it, as the physician I must assume that there is a likely cause and effect from the history the patient relates to the physical findings I now find and to the history that they gave me. So she related no other incident which would relate to that, so –

Dr. Weinstein testified that he had performed hundreds of surgeries on children with scoliosis and only in a handful of cases was revision of the surgery required. He testified that he had two or three patients where the hardware had come loose and "some cases there really is no history that we can pin our hats on. They just come in with – they start having pain and something is loose." On

cross-examination, Dr. Weinstein testified that there can be many different causes of hardware problems, including repetitive lifting and even "without a history of an event."

Bowers asked for an "eggshell plaintiff" jury instruction, but the district court refused, finding:

> the evidence from the experts, and particularly Dr. Weinstein is who I would refer to, does not indicate that even with the rod that that made Ms. Bowers more susceptible to an injury. Nor does it indicate that her injuries would be greater than those which might be experienced by a normal person. . . . He does not indicate at any time that the rods make them more susceptible to injury nor is there any indication they're supposed to do anything special once they have the rods in their back to avoid injury or anything of that nature.

Because Grimley admitted fault, the matter went to the jury on damages only. The jury returned a verdict form on which it found the fault of defendant was the proximate cause of damage to plaintiff. The jury awarded $5602.79 for past medical expenses, but nothing for lost wages, loss of body function, or past pain and suffering. The district court sent the verdict form back to the jury with this direction:

> Members of the Jury,
>
> I have reviewed the Form of Verdict. I am unable to accept the verdict in the form it's presented. Upon your finding that the Plaintiff is entitled to recover medical expenses, the law requires that you also award damages for pain and suffering.

After receiving the instruction, the jury amended the verdict form and awarded $100 for pain and suffering.

Bowers moved for a new trial, contending the award was inadequate and that the court erred in not including an eggshell plaintiff instruction. The district court denied the motion:

> In the case at hand, I conclude that a reasonable jury could have concluded from the evidence that the accident was not the cause of the displacement of the Miami Moss rod that required later surgery. The jury could have concluded that the plaintiff's work at Midland Forge resulted in the rod's displacement. The jury is free to accept Dr. Weinstein's opinion that the plaintiff's problems were related to difficulties with her rod while rejecting his opinion that the accident caused the rod to loosen.
>
> The jury in its verdict in essence awarded the plaintiff medical expenses it attributed to the accident up to the time she began working at Midland Forge. It was . . . reasonable for the jury to conclude the plaintiff deserved compensation for her medical expenses at the emergency room and some follow up care.
>
> Given the state of the record in this case, I find that a reasonable jury could also conclude the pain and suffering the plaintiff endured as a result of the accident was minimal. It was not until she began her job at Midland Forge that she began to experience real discomfort. It was reasonable for the jury to conclude that it was the plaintiff's employment rather tha[n] the accident that resulted in her pain and discomfort. The $100.00 award for pain and suffering is within the range of the jury's sound discretion.
>
> Finally, I reaffirm my ruling regarding the giving of the "eggshell" plaintiff instruction for the reasons given at the time of the trial. Admittedly, the evidence showed without contradiction that the plaintiff had a Miami Moss rod implanted in her back to correct a scoliosis condition. The plaintiff offered no evidence, though, to indicate that this condition made her more susceptible to injury than a person without the implanted rod. The jury would need to base such a conclusion only upon speculation.

Bowers also filed a supplemental motion for new trial alleging the defendants' counsel's use of Exhibit Q (indicating a hospital release of lien) during cross-examination of the plaintiff implied improperly that insurance had paid for her medical bills. The exhibit was not admitted into evidence. Bowers noted that the release of lien was a release of a duplicate lien only and that defendants' counsel had intentionally misled the jury.

The district court denied this motion for new trial. The court noted, first, that plaintiff did not object to the use of the exhibit; second, that the "context of

the defendant's cross examination does not support the plaintiff's allegation that the defendant misrepresented the meaning and import of the exhibit" and plaintiff had the opportunity on redirect to clarify any misunderstanding; and third, the jury was properly instructed that it was to consider the reasonable value of necessary hospital charges, not unpaid hospital charges.

Bowers now appeals.

II. Discussion.

A. Adequacy of Verdict.

Bowers complains that the jury verdict lacks evidentiary support and raises the presumption that it was a result of passion or prejudice. Our review of a district court's ruling on a motion for new trial depends upon the grounds raised in the motion. *Channon v. United Parcel Serv., Inc.,* 629 N.W.2d 835, 859 (Iowa 2001). If the motion for new trial was based upon a discretionary ground, we review the court's ruling for an abuse of discretion. *Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc.,* 714 N.W.2d 603, 609 (Iowa 2006). On the other hand, if the motion was based on a legal question, we review the court's ruling for errors of law. *Id.*

"The district court has considerable discretion in ruling upon 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). A district court has broad, but not unlimited, discretion to determine whether a jury's verdict effectuates substantial justice between the parties. Iowa R. App. P. 6.14(6)(*c*). Because the motion for new trial was based upon a discretionary ground, we will not reverse the district

court's decision unless there has been an abuse of discretion. *See Fisher,* 601 N.W.2d at 57.

Where evidence of the cause or extent of injury is disputed a motion for new trial based on inadequate damages may be denied. *See 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 (internal quotation omitted).

We conclude the district court did not abuse its discretion by denying Bowers's motion for a new trial based on a claim of inadequate damages. The cause of Bowers's injuries and the extent of her injuries were clearly disputed. The district court was able to observe the evidence as presented during the trial. The court concluded the jury could determine that the accident did not cause the displacement of plaintiff's hardware.

Bowers, relying upon *Cowan*, contends that the failure of the jury to initially award damages for pain and suffering required a new trial. In *Cowan*, 461 N.W.2d at 160, our supreme court noted that it was "illogical to award past and future medical expenses incurred to relieve headache, neck and back pain and then allow nothing for such physical pain and suffering." The case is inapposite to the case before us.

The district court did find the jury's initial failure to award pain and suffering inconsistent with its award of past medical expenses, but it corrected that inconsistency by having the jury reconsider its award. This falls within the

Cowan court's cautionary instruction: "The trial court should not discharge the jury until it determines the special verdict is consistent and supported by the evidence." *Id.*

B. Eggshell Plaintiff Instruction.

Bowers also contends the trial court erred in refusing to give an eggshell plaintiff jury instruction. We review challenges to jury instructions for the correction of errors at law. *Sleeth v. Louvar,* 659 N.W.2d 210, 213 (Iowa 2003). We will not reverse a verdict due to an erroneous instruction unless the error was prejudicial. *Waits v. United Fire & Cas. Co.,* 572 N.W.2d 565, 569 (Iowa 1997). Instructions may be considered erroneous if they contain a material misstatement of the law, are not supported by the evidentiary record, or are conflicting and confusing. *Id.* at 575.

Here, the district court's instructions to the jury included:

> Instruction No. 10
>
> The conduct of a party is a proximate cause of damage when it is a substantial factor in producing damage and when the damage would not have happened except for the conduct.
>
> "Substantial" means the party's conduct has such an effect tin producing damage as to lead a reasonable person to regard it as a cause. There can be more than one proximate cause of an injury or damage.

> Instruction No. 11
>
> If you find Autum Bowers had a back condition before this incident and this condition was aggravated or made active by this incident causing further suffering or disability, then she is entitled to recover damages caused by the aggravation. She is not entitled to recover for any physical ailment or disability which existed before this incident, or for any injuries or damages which she now has which were not caused by the defendants' actions.

Bowers contends she was also entitled to the eggshell plaintiff instruction. The eggshell plaintiff instruction is stated in Iowa Uniform Instruction No. 200.34. The uniform instruction reads:

> If (plaintiff) had (describe condition) making [him] [her] more susceptible to injury than a person of normal health, then the defendant is responsible for all injuries and damages which are experienced by (plaintiff) proximately caused by defendant's 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.

The comment to the instruction provides that one might consider the appropriateness of giving this instruction, in addition to the instruction on proximate cause, where the eggshell plaintiff rule applies. The district court found the instruction inapplicable and we agree.

Substantial evidence must be presented at trial to support the submission of an instruction. *Coker v. Abell-Howe Co.,* 491 N.W.2d 143, 150 (Iowa 1992). Evidence is substantial when reasonable minds would accept it as adequate to reach the conclusion. *Id.* Under this standard, the evidence in this case did not support the eggshell plaintiff instruction.

This case does not present the same situation as *Benn v. Thomas*, 512 N.W.2d 537, 540 (Iowa 1994), where the plaintiff's medical expert testified that decedent had a history of coronary disease and insulin-dependent diabetes and that the accident that decedent was in and the attendant problems that it caused in the body were "the straw that broke the camel's back" and caused decedent's death. The court ruled that under the circumstances, the failure to instruct the jury on the eggshell plaintiff rule "would fail to convey to the jury a central principle of tort liability." There, "the plaintiff introduced substantial medical

testimony that the stresses of the accident and subsequent treatment were responsible for his heart attack and death." *Id.* at 540. Bowers did not introduce such evidence.

No evidence was presented that Bowers was more susceptible to injury due to her scoliosis or due to her corrective hardware. It is reversible error to submit an instruction that does not have evidentiary support in the record. *Waits*, 572 N.W.2d at 575. Consequently, the district court did not err in refusing to instruct the jury on the eggshell plaintiff rule.

III. Conclusion.

The district court did not err in denying the motion for new trial. The damages awarded were within the range of the evidence. There was not evidentiary support for an "eggshell plaintiff" instruction. We affirm.

AFFIRMED.