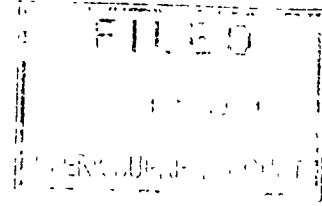


**IN THE COURT OF APPEALS OF IOWA**

No. 9-114 / 98-699  
Filed September 15, 1999



**MADELYN COOPER,**

Appellee,

vs.

**AMERICAN FAMILY MUTUAL INSURANCE CO.,**

Appellant.

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Appeal from the Iowa District Court for Jackson County, David H. Sivright,  
Jr., Judge.

Defendant appeals the district court judgment entered upon a jury verdict in  
plaintiff's favor on her claim for underinsured motorist benefits. **AFFIRMED.**

Ted J. Wallace, Bettendorf, for appellant.

Mark R. Lawson, P.C., Maquoketa, for appellee.

Considered by Huitink, P.J., and Streit and Mahan, JJ.

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**HUTTINK, P.J.*****I. Background Facts and Proceedings.***

Madelyn Cooper was injured in an automobile accident involving Jammie Dodds. Because Dodds was arguably at fault, his insurance carrier paid Cooper the full amount of liability limits of Dodd's policy. Cooper's subsequent claim for uninsured motorists benefits was denied by her insurance carrier, American Family, resulting in these proceedings.

The district court, over American Family's objection, gave the jury the following instruction:

The parties stipulate the following facts are undisputed: (1) at the time of the motor vehicle collision involved here, plaintiff Madelyn Cooper was insured by defendant American Family Mutual Insurance Company for bodily injuries caused by the fault of an operator of an underinsured motor vehicle; (2) Jammie F. Dodds was the operator of an allegedly underinsured motor vehicle; (3) the collision was the fault of Jammie F. Dodds; and (4) Madelyn Cooper has received the full amount available to her under Dodds' insurance policy.

The court's jury instructions and special verdict form also provided for an award of damages for past and future loss of function of the body if the jury found Cooper met her burden of proof on these issues. American Family, citing Cooper's failure to call "seven or eight physicians" to testify to any relationship between Cooper's accident and their treatment, requested the following instruction:

If relevant evidence that is within the control of a party whose interest is affected is not produced, the jury may infer that the evidence, if not produced, would have been unfavorable to that party.

The district court declined to give this instruction, noting:

**THE COURT:** The requested instruction will not be given. There is evidence in the record that will allow--or lack of evidence in the record that will allow the defendant to challenge the reasonableness and necessity of some of the medical treatment and also to raise a question about the causation of some of the damages.

The jury returned a special verdict awarding Cooper \$134,532.74. The verdict included a \$15,000 award for past loss of function of the body and \$20,000 for future loss of function of the body. Cooper was also awarded \$15,000 for past pain and suffering and \$50,000 for future pain and suffering. Because the total award exceeded American Family's \$100,000 policy limits for underinsured motorists coverage, Cooper's judgment against American Family was reduced accordingly.

In this appeal American Family demands a new trial citing the district court's failure to properly instruct the jury on the law applicable to Cooper's claim. American Family argues the jury should not have been informed that Cooper was paid the full amount of Dodd's liability insurance. American Family also contends the record does not support submission of Cooper's claims for past and future loss of function of the body and the district court should have submitted its instruction on Cooper's failure to call favorable witnesses.

## ***II. Standard of Review.***

We review the district court's jury instructions for correction of legal error. *Waits v. United Fire & Cas. Co.*, 572 N.W.2d 565, 569 (Iowa 1997). Jury instructions must correctly state the law and be supported by substantial evidence. *Grefe & Sidney*

v. *Watters*, 525 N.W.2d 821, 824 (Iowa 1994). An erroneous instruction does not entitle the party claiming error to reversal unless the error was prejudicial. *Id.*

### ***III. Stipulation Instruction.***

American Family's challenge to this instruction is premised on its reference to Cooper's receipt of "the full amount [of] available insurance." They cite the supreme court's decision in *Waits v. United Fire & Cas. Co.*, 572 N.W.2d 565, 569 (Iowa 1997) holding evidence of the amount paid by the underinsured tortfeasor irrelevant and prejudicial. They also cite *Waits'* express rejection of an instruction concerning stipulated facts which disclosed the amount paid by the underinsured tortfeasor. *Id.* at 57 fn. 2.

We think American Family's interpretation of *Waits* is too broad. Although the court disapproved of the instruction's reference to the amount paid, the remainder of the instruction informing the jury *Waits* received the full amount of the tortfeasor's liability coverage was expressly approved. Unlike in *Waits*, the challenged instruction here makes no reference to the amount Cooper received from Dodd's carrier. We, like the court in *Waits*, conclude the instruction's reference to the full amount of insurance available "was necessary to the jurors' understanding of the nature of the dispute before them." *Id.* We affirm on this issue.

### ***IV. Loss of Function of the Body.***

Loss of function of the body is a discrete element of damages. *Brandt v. Burkholt*, 532 N.W.2d 801, 804-05 (Iowa 1995) (citation omitted). Loss of function

of the body “relates to functional impairment as opposed to structural impairment of the body.” *Id.* It is the “inability of a particular body part to function in a normal manner.” *Id.* Loss of function of the body does not include conditions of incapacity embraced within the definition of pain and suffering. *Blume v. Auer*, 576 N.W.2d 122, 126 n.2 (Iowa App. 1997). An award of damages for pain and suffering and loss of function of the body is not inconsistent if the record includes substantial evidence of both. *Id.*

The gist of American Family’s argument is that Cooper failed to prove her back injuries resulted in functional rather than structural impairment. They cite medical evidence indicating Cooper’s muscle and nerve functions were normal and she experienced pain as opposed to loss of function. American Family also cites Cooper’s testimony concerning the absence of medical restrictions on her physical activities and that “everything still works.” The evidence cited, however, is not all inclusive. Cooper’s treating chiropractor testified Cooper suffered injuries to tendon and ligaments in her lower back resulting in instability of her pelvis. There is also testimony from another chiropractor who concurred in this diagnosis. Both described not only Cooper’s resulting pain, but the failure of the body parts involved to function in a normal manner. We find this evidence sufficiently supports the district court’s submission of past and future loss of function of the body for the jury’s consideration. We affirm on this issue.

***V. Missing Witness Instruction.***

American Family correctly notes the negative inference a fact finder may make when relevant evidence within the control of the party whose interest is affected is not produced. *See Hamer v. Iowa Civil Rights Comm'n*, 472 N.W.2d 259, 262 (Iowa 1991). The inference, however, is not implicated “when it is shown that the witness is equally available to either party or when the testimony that could be elicited from such witness would be merely cumulative.” *Prestype, Inc. v. Carr*, 248 N.W.2d 111, 120 (Iowa 1976). Here, Cooper offered testimony and reports from several medical professionals detailing the cause, nature, and extent of her injuries, and her resulting pain and disability. In view of this evidence, we hold American Family’s ambiguous reference to seven or eight other doctors with relevant evidence is insufficient to implicate the inference or require an instruction explaining it.

The judgment of the district court is affirmed in its entirety.

**AFFIRMED.**

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