

IN THE COURT OF APPEALS OF IOWA

No. 7-543 / 96-1355

000249

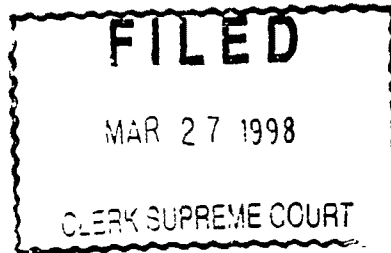
KENNETH W. MILLER, JR.,

Plaintiff-Appellee,

vs.

**JERRY LEE WEHDE, JR.,
JERRY L. WEHDE, and
LAVIDA WEHDE,**

Defendants-Appellants.



Appeal from the Iowa District Court for Linn County, Patrick R. Grady, Judge.

Defendants appeal the amount of damages awarded by the district court for injuries plaintiff sustained in a car accident. **AFFIRMED.**

Sara Riley Brown of the Tom Riley Law Firm, Cedar Rapids, for appellants.

Russell A. Neuwoehner of Lange & Neuwoehner, Dubuque, for appellee.

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

MAHAN, J.

Jerry Lee Wehde, Jr. (Jerry, Jr.), Lavidia Wehde, and Jerry L. Wehde (Jerry) appeal the district court's awards of damages. The Wehdes allege the district court awarded excessive damages when it awarded Kenneth Miller \$18,296 for damages suffered in a 1992 car accident the trial court determined was caused by Jerry. The Wehdes do not challenge \$724 of the award representing past medical expenses. We affirm.

This claim arises from a rear-end collision. Miller contends he has suffered damages from the accident, including past and future pain and suffering, lost wages, and past and future medical expenses. The Wehdes do not deny Miller has suffered injuries, but they claim Miller's injuries are not solely the result of this accident. The Wehdes claim Miller had previous injuries and the trial court failed to correctly account for these injuries when it assessed damages.

Dr. Stephen Dalsing, a chiropractor, began treating Miller for lower back and right shoulder pain associated with Miller's work as a barber. In 1990, Miller was involved in a rear-end collision. As a result, he suffered headaches and stiffness. Miller also saw Dalsing for these injuries. Miller testified he believed he had fully recovered from the 1990 accident when the collision with Jerry occurred. At trial, the parties admitted the deposition transcript of Dalsing. In the deposition, Dalsing testified he was still treating Miller at the time of the 1992 accident, but the treatment

was for the symptoms that had existed prior to the 1990 accident. Miller also went to see a medical doctor and a physical therapist. Miller testified these doctors would not make the assumption the pain they were treating him for were related to the 1992 accident.

Dalsing testified Miller will continue to need chiropractic treatment for the rest of his life. He further claimed Miller should be having at least one treatment per month, if not two, at a present cost of \$25 per treatment.

I. STANDARD OF REVIEW. We review a claim of excessive damages for an abuse of discretion. *Matthess v. State Farm Mut. Auto. Ins. Co.*, 521 N.W.2d 699, 702 (Iowa 1994). We will not find an abuse of discretion unless such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Selestian*, 515 N.W.2d 356, 358 (Iowa App. 1994). Whether damages in a given case are adequate depends on the particular facts of the case. *Matthess*, 521 N.W.2d at 702. The test is whether the verdict fairly and reasonably compensates the injury the party sustained. *Id.*

The Wehdes also question the sufficiency of the evidence. Findings of fact in a law action are binding on appeal if supported by substantial evidence. *Fox v. Interstate Power Co.*, 521 N.W.2d 762, 764 (Iowa App. 1994). Evidence is substantial if reasonable minds would find it adequate to reach the same conclusion. *Id.* Even if we might draw a contrary inference from the evidence, we may not

substitute our view of the evidence for the trial court's view. *Id.* We are obligated to view the evidence in the light most favorable to the trial court's verdict. *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 144 (Iowa 1996).

II. FUTURE MEDICAL EXPENSES. The trial court found Miller had a pattern of three visits per year for chiropractic treatment for his injuries from the 1992 collision and he would need to continue these visits for the rest of his life. The trial court determined Miller had a life expectancy of twenty-seven years. The trial court awarded Miller \$2025 for future medical expenses based on three visits per year for twenty-seven years at a cost of \$25 per visit as currently charged by Dalsing. The Wehdes claim the trial court incorrectly took judicial notice of the CSO mortality tables, and Dalsing did not testify to a "reasonable degree of chiropractic certainty" that Miller would need any future treatment or that the treatment would be related to the accident. They claim it was incorrect for the trial court to take judicial notice without a request by Miller. The Wehdes also claim the trial court did not reduce the future medical expenses to present value.

We start by noting the objections to the judicial notice of the mortality tables and Dalsing's testimony are objections to the admissibility of the evidence. If the Wehdes intended to object to the admissibility of the evidence, they have cited no authority in favor of their position. "Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue." Iowa R. App.

P. 14(a)(3); *Genetzky v. Iowa State Univ.*, 480 N.W.2d 858, 861 (Iowa 1992). We find the Wehdes have waived this issue.

Even if the Wehdes had properly raised the arguments, we would affirm the trial court. Given our courts' liberal rule on the admission of expert testimony, we do not think it is necessary for a question or answer to be prefaced with the ritualistic statement the opinion is based on a "reasonable degree of chiropractic certainty." *See Johnson v. Knoxville Community Sch. Dist.*, 570 N.W.2d 633 (Iowa 1997); *see also Williams v. Hedican*, 561 N.W.2d 817 (Iowa 1997).

Further, rule 201(b) of the Iowa Rules of Evidence allows the trial court to take judicial notice of facts not subject to reasonable dispute if it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Iowa R. Evid. 201(b). The trial court has discretion to take judicial notice of these facts whether a request is made or not. *Id.* at 201(c). The rules also allow a party to request an opportunity to be heard about the propriety of taking judicial notice; and this request may be made after judicial notice has been taken if there was no prior notification. *Id.* at 201(e). We think it is clear the CSO mortality tables are not subject to reasonable dispute, and we find nothing in the record, nor do the Wehdes cite anything, to show a hearing was requested. Further, it does not appear the Wehdes raised the issue in a motion under rule 179(b) of the Iowa Rules of Civil Procedure.

We find there is substantial evidence to support the trial court's determination Miller had a life expectancy of twenty-seven years and would incur \$2025 in future medical expenses.

III. LOST WAGES. The Wehdes contend Miller's testimony about lost wages is not credible. We are obliged to give great deference to the trial court on issues of witness credibility. *McKinley v. Iowa Dist. Court*, 542 N.W.2d 822, 825 (Iowa 1996). We find there is substantial evidence to support the finding Miller suffered lost wages. We also find the damages were not excessive; therefore, the trial court did not abuse its discretion when it awarded Miller \$3047 for past lost wages.

IV. PAIN AND SUFFERING. The Wehdes again raise the argument Dalsing did not testify to a "reasonable degree of chiropractic certainty" Miller would endure pain and suffering in the future and we deny this argument for the same reasons stated above. The Wehdes also argue Miller was unable to prove all of his pain was caused by the 1992 accident, and they should only be required to pay damages for the injuries they caused. The Wehdes argue the trial court improperly applied the "eggshell plaintiff" rule.

In some cases, future pain and suffering may be inferred from the nature of the injury alone. *Daniels v. Bloomquist*, 138 N.W.2d 868, 873 (Iowa 1965). However, when the symptoms from which personal injury may be inferred are subjective only, medical testimony is required. *Id.* At Dalsing's deposition, a letter from Dalsing was

admitted without objection. In the letter, he stated it was his opinion Miller has permanent damage that is responsible for his chronic pain. Dalsing stated it was his opinion the pain and injuries were the result of the 1992 motor vehicle accident. At the deposition, Dalsing testified the treatments Miller received from November 1990 to September 1992 were for the pre-1990 accident symptoms. As stated above, Dalsing's deposition was admitted at trial and made a part of the record.

In its ruling, the trial court found Miller established his injuries and pain were caused by the 1992 accident and not by any pre-existing injuries. The trial court found the injuries suffered in the 1990 accident had been resolved prior to the 1992 accident. We find there was substantial evidence to support this finding. Because Miller's previous injuries were resolved prior to the 1992 accident, we find the trial court properly applied the "eggshell plaintiff" rule. *See Benn v. Thomas*, 512 N.W.2d 537, 538-39 (Iowa 1994).

For these reasons we find the trial court's ruling is supported by substantial evidence and was not influenced by sympathy for Miller's economic plight. Therefore, we affirm the decision of the trial court.

AFFIRMED.