IN THE COURT OF APPEALS OF IOWA

No. 0-215 / 99-0119
Filed July 26, 2000

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CLERK SUPREME COURT

KATHLEEN MARCEY-FLEMING,
Plaintiff-Appellant,

vs.

JOHN DUYSEN,
Defendant-Appellee.

Appeal from the Iowa District Court for Mills County, James S. Heckerman, Judge.

The plaintiff appeals from a judgment entered on a jury verdict in her favor in her action for damages for personal injuries suffered in an automobile accident. **REVERSED AND REMANDED FOR NEW TRIAL ON THE ISSUE OF DAMAGES.**

Ronald J. Palagi and Tiffany N. Floth, Omaha, Nebraska, and Matthew D. Wilber, Council Bluffs, for appellant.

R. Laubenthal and Paul M. Shotkoski of Smith Peterson Law Firm, Council Bluffs, for appellee.

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

MAHAN, J.

The plaintiff appeals from a judgment entered on a jury verdict in her favor in her action for damages for personal injuries suffered in an automobile accident. She contends (1) the district court erred in overruling her motion for directed verdict on liability and comparative fault, (2) the district court erred in overruling her motion for new trial and/or judgment notwithstanding the verdict, and (3) the damages awarded by the jury were inadequate, unsupported by the evidence, and influenced by passion or prejudice. We reverse and remand to the district court.

On May 26, 1992, Kathy Marcey-Fleming was driving westbound on U.S. Highway 34. Jon Duysen was driving northbound on County Road 34. The intersection of U.S. Highway 34 and County Road 34 is controlled by a stop sign on County Road 34. Jon stopped at the stop sign. However, as Kathy was approaching this intersection, Jon crossed U.S. Highway 34 in front of Kathy's minivan. This caused a collision.

As a result of the collision, Kathy suffered a fracture to her left patella, a fracture to her right heel, bruises, and pain. These were undisputed injuries. However, Jon questioned whether Kathy actually sustained a herniated disc and a closed-head injury as she claims and if she did, whether they were related to the accident in question.

Kathy brought an action alleging the negligence of Jon caused the collision and resulting damages. Jon answered claiming comparative fault. At the close of Jon's case, Kathy moved for a directed verdict which the district court denied.

The jury found negligence on the part of both Jon and Kathy. Seventy percent fault was attributed to Jon and thirty percent to Kathy. The jury also found Kathy failed to wear a seat belt and as a result, her damages should be reduced by three percent.

The jury awarded total damages of $54,257.58.[1] However, the jury awarded nothing for past or future loss of body or mind. Kathy made a motion for a new trial and/or judgment notwithstanding the verdict which the district court also denied. Kathy appeals.

I. Motion For Directed Verdict. Our review of motions for directed verdict is for correction of errors at law. Iowa R. App. P. 4; *James ex rel. James v. Burlington Northern*, 587 N.W.2d 462, 464 (Iowa 1998). We review the evidence in the light most favorable to the nonmoving party and determine whether sufficient evidence existed to warrant submission of the issues to the jury. *Id.* We must consider whether reasonable minds could differ on the issues in controversy. *Id.*

Kathy contends the court erred in overruling her motion for directed verdict on liability and comparative fault. She argues the evidence presented at trial was not sufficient to support the submission of the issues of liability and comparative

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[1] The jury answered Question No. 6 in INSTRUCTION NO. 34 as follows:
Question No. 6: State the amount of damages sustained by the plaintiff for each of the following items of damage. Do not take into consideration any reduction of damages due to plaintiff's fault. If the plaintiff has failed to prove any item of damage, enter 0 for that item.

1. Past medical expenses $19,257.58
2. Future medical expenses $ 0
3. Past pain and suffering $25,000.00
4. Future pain and suffering $10,000.00
5. Past loss of body or mind $ 0
6. Future loss of body or mind $ 0

TOTAL (add the separate items of damage) $54,257.58

fault to the jury. Negligence questions are typically for the jury and only in exceptional situations may negligence cases be decided by the court as a matter of law. *Wiesler v. Sisters of Mercy Health Corp.*, 540 N.W.2d 445, 449 (Iowa 1995). We determine this case to fall within the category of one of the exceptional cases.

Kathy claims Jon was negligent in several particulars.[2] Jon claims Kathy was also negligent.[3] It is clear from the evidence presented at trial Jon stopped prior to entering the intersection. However, he admits he did not see Kathy's

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[2] The district court instructed the jury as follows:

INSTRUCTION NO. 15

The plaintiff claims the defendant was at fault in one or more of the following particulars:

1. Negligence.

The plaintiff must prove all of the following propositions:

1. The defendant was negligent in one or more of the following ways:
   a. Improperly starting a parked or stopped vehicle.
   b. Failure to maintain proper lookout.
   c. Improperly entering a through highway.
   d. Improperly entering a stop or yield intersection.
2. The defendant's negligence was a proximate cause of the plaintiff's damage.
3. The amount of damage.

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If the plaintiff has proved all of these propositions, you will consider the defense of comparative fault as explained in Instruction No. 12.

[3] The district court instructed the jury on comparative fault as follows:

INSTRUCTION NO. 20

The defendant claims the plaintiff was at fault in one or more of the following particulars:

1. Negligence.

The defendant must prove both of the following propositions:

   a. Failing to maintain a proper lookout.
   b. Failing to maintain control.

2. The plaintiff's negligence was a proximate cause of the plaintiff's damage. If the defendant has failed to prove either of these propositions, then you will assign a percentage of fault against the plaintiff and include the plaintiff's fault in the total percentage of fault found by you answering the special verdicts.

minivan coming from the east at any time prior to the impact. In addition, the following colloquy took place between Jon and his attorney:

> Q. Jon, you believe that there was fault on your part for crossing the roadway without seeing Mrs. Marcey-Fleming's car? A. Yes.
>
> Q. And so, you admit there was fault on your part? A. Yes.

It is also clear from the evidence Kathy does not recall the accident. The only other person in the direct vicinity at the time of the accident was George Holly, Sr.[4] Mr. Holly was westbound on U.S. Highway 34 directly behind Kathy's vehicle. Mr. Holly testified as follows:

> A. Okay. When I came over the crest of the hill. And, of course, Nishna Valley School is over on the right. There was a van on the – dark color. The van was west on Highway 34. Was almost to the intersection. There was a pickup stopped at the intersection. He was stopped when I first seen him start up. And crossed the intersection heading north.
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> Q. From the time you first saw the pickup leave the southbound going north, how fast did the collision occur? A. Pretty fast. It happened pretty fast. Like matter of two seconds. I suppose probably that. Yeah.
>
> Q. Did you see the red van attempt to do anything to prevent the collision? A. No, I didn't.
>
> Q. Did you notice the red van slow down? A. I could tell basically it slowing down. But how much, I don't know.

Deputy Michael Mercer investigated the accident. Deputy Mercer testified there was nothing obstructing Jon's view looking to the east. Jon admitted to Deputy Mercer "he just didn't see her." Deputy Mercer issued a ticket to Jon for failure to yield. Deputy Mercer further testified Kathy made some attempt to veer to her right and it is a normal tendency to turn away from the direction of the danger.

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[4] From the facts of this case, it is clear Mr. Holly was the only eyewitness to the entire accident as it unfolded.

Jon claims Kathy could have avoided the accident by instead veering to her left. It is clear such action on her part would have been contrary to the normal tendency to turn away from the danger. In addition, it would have required Kathy to veer into possible oncoming traffic coming from the west. Jon's position is unreasonable under the circumstances of this case. It is clear from the evidence this accident took place in a matter of seconds. There is no evidence Kathy was speeding. In addition, there is no credible evidence she either failed to maintain a proper lookout or failed to maintain control of her vehicle. We have carefully reviewed the evidence and conclude said evidence was insufficient to submit the issue of comparative fault to the jury. We find the evidence supports only a three percent allocation of fault to Kathy for failing to wear a seat belt.

II. Damages. Kathy contends the district court erred in its denial of her request for a new trial and/or judgment notwithstanding the verdict on the issue of damages. She asserts the damages awarded by the jury were inadequate, unsupported by the evidence, and influenced by passion or prejudice.

Our standard of review is for abuse of discretion. *Matthess v. State Farm Mut. Auto Ins. Co.*, 521 N.W.2d 699, 702 (Iowa 1994). We recognize an inadequate damage award can merit a new trial as much as an excessive damage award. *Id.* Our supreme court has stated:

> "We will not set aside or alter a judgment regarding damages unless it is (1) flagrantly excessive or inadequate, or (2) shocks the conscience or sense of justice, or (3) raises a presumption it is the result of passion, prejudice or other ulterior motive, or (4) *lacks evidential support.*" *Class v. Whyle*, 526 N.W.2d 519, 525 (Iowa 1994). "In reviewing damage awards, we consider the evidence in the light most favorable to the plaintiff." *Id.* We thus will uphold an award of damages "so long as the record discloses a reasonable

> basis from which the award can be inferred or approximated." *Westway Trading Corp. v. River Terminal Corp.*, 314 N.W.2d 398, 403 (Iowa 1982), and will not disturb an award of damages on appeal that is within the range of evidence presented. *Hawkeye Motors, Inc. v. McDowell*, 541 N.W.2d 914, 918 (Iowa App. 1995).

Revere Transducers, Inc. v. Deere & Co., 595 N.W.2d 751, 769 (Iowa 1999).

A new trial is not a matter of right. *Cowan v. Flannery*, 461 N.W.2d 155, 157 (Iowa 1990). In ruling upon motions for new trial, the court has broad but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties. *Id.* Our supreme court has also stated:

> It is well settled the trial court has wide, but not unlimited, discretion in ruling on a motion for a new trial. Ordinarily the jury should be allowed to settle disputed fact questions, but that, too, is a limited power and one which must be exercised within the framework of the evidence in any particular case. A verdict should not be set aside as either too large or too small simply because the reviewing court would have reached a different conclusion. The court always has inherent power to set aside a verdict which fails to do substantial justice between the parties.

Id. at 157-58 (citing *Kautman v. Mar-Mac Community Sch. Dist.*, 255 N.W.2d 146, 147-48 (Iowa 1977)).

Specifically, Kathy claims the damage award cannot stand because the jury failed to award any damages for past or future loss of body or mind. It is undisputed Kathy's injuries included a fracture to her left patella and a fracture to her right heel. There was a period of time when she was unable to walk. A cast and splint were placed on Kathy's legs. She was eventually placed in a brace for her knee and was able to walk with the aid of crutches. We conclude the evidence clearly establishes a past loss of body. However, the future ramifications of these injuries as well as her other alleged injuries were contested, including the closed-head injury. We conclude the jury was not

obligated to return a verdict for future loss of body or past and future loss of mind. Therefore, we will focus our discussion on the jury's failure to return a verdict for past loss of body.

Clearly, the district court may grant a new trial when the jury awards inadequate damages or when the verdict is not sustained by sufficient evidence or is contrary to law. Iowa R. Civ. P. 244(d), (f); *Fisher v. Davis*, 601 N.W.2d 54, 57 (Iowa 1999). Whether damages in a given case are adequate depends upon the particular facts of that case. *Id.*

Had there been a general verdict in this case, it could be upheld under our standards of review because we would not be privy as to how the jury resolved each element of damage. However, damages itemization now requires the jury to address each separate item or allegation of damage. *Matthess*, 521 N.W.2d at 703. Each itemization is a special finding of fact that must be supported by the evidence. Id. If the finding is not supported by the evidence, a plaintiff is entitled to a new trial. *Id.* (citing *Cowan*, 461 N.W.2d at 158); see also *Bangs v. Pioneer Janitorial of Ames, Inc.*, 570 N.W.2d 630, 632 (Iowa 1997).

We note, first of all, that a jury's failure to award damages for loss of body in a case where they have awarded medical expenses and pain and suffering does not, per se, require a grant of a new trial. *Brant v. Bockholt*, 532 N.W.2d 801, 804-05 (Iowa 1995); *Blume v. Auer*, 576 N.W.2d 122, 126 (Iowa App. 1997); *Jackson v. Roger*, 507 N.W.2d 585, 589 (Iowa App. 1993). However, in those cases the record was not sufficient to establish past loss of body. In the instant case, the evidence clearly establishes the plaintiff is entitled to damages for past

loss of body. We conclude the verdict is not sustained by sufficient evidence. We therefore remand for a new trial on the issue of damages only.[5]

III. Summary. We reverse the district court's denial of Kathy's motion for directed verdict on the issue of liability. We also reverse the district court's denial of Kathy's motion for new trial on the issue of damages. We remand to the district court to enter a directed verdict in favor of the plaintiff on the issue of liability with the exception of the allocation of fault against Kathy for failure to use a seat belt. We further remand for a new trial on the issue of damages.

REVERSED AND REMANDED FOR NEW TRIAL ON THE ISSUE OF DAMAGES.

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[5] We do not conclude a new trial is mandated on the liability issue. *Householder v. Town of Clayton*, 221 N.W.2d 488, 493 (Iowa 1974).