**IN THE COURT OF APPEALS OF IOWA**

No.1999-399 (9-652) / 99-0061
Filed April 28, 2000

FILED
APR 2 8 2000
CLERK SUPREME COURT

**SANDRA BERKLAND,**
**Plaintiff-Appellant,**

**vs.**

**ANTHEM CASUALTY INSURANCE COMPANY,**
**Defendant-Appellee.**

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Appeal from the Iowa District Court for Polk County, George Bergeson, Judge.

Sandra Berkland appeals from the judgment entered upon a jury verdict in a personal injury action, contending that the trial court erred in denying her motion for new trial when the damage award was inconsistent and inadequate as a matter of law. **AFFIRMED.**

Marc S. Harding, Des Moines, for appellant.

Jeff M. Margolin and Hugh J. Cain of Hopkins & Huebner, P.C., Des Moines, for appellee.

Heard by Huitink, P.J., and Streit and Miller, JJ.

MILLER, J.

Plaintiff Sandra Berkland appeals the district court's denial of her motion for a new trial, following jury trial and a verdict in her favor for $6,827.00, on her claim against defendant Anthem Casualty Insurance Company ("Anthem") for underinsured motorist benefits. We affirm.

The following facts are undisputed. On or about August 1, 1994, Berkland was involved in an accident with Andrew Sullivan. Berkland filed an action against Sullivan, who settled with Berkland for $20,000, the policy limit of his insurance policy. Berkland then filed this petition at law against Anthem, her insurance carrier, alleging she sustained damages in excess of her settlement and was entitled to compensation from Anthem under the underinsured motorist coverage of her policy. Trial was held, and the jury returned a special verdict in favor of Berkland for past medical expenses in the amount of $6,227.00, and for past pain and suffering in the amount of $600.00. Judgment was entered in favor of Berkland for court costs only, as the jury award was less than the previous settlement with the at-fault driver. Berkland moved the court for a new trial. She contended the verdict was an inconsistent verdict and inadequate as a matter of law. Although the nature of her complaint was far from clear, three possible claims or complaints can be deduced from her written motion: (1) the verdict was inconsistent or inadequate because the award for past medical expenses matched none of the actual bills for medical services; (2) the verdict was inadequate because her medical expenses substantially exceeded the jury's award for medical expenses; and (3) the verdict was inadequate because of the

small award of past pain and suffering damages in relation to the award for past medical expenses. The trial court summarily overruled the motion. Berkland appeals.

We review district court rulings on motions for new trials for abuse of discretion. Iowa R. App. P. 14(f)(3); *Kalvik ex rel. Kalvik v. Seidl*, 595 N.W.2d 136, 138 (Iowa App. 1999). Iowa has long recognized the trial court's inherent power to grant a new trial where the verdict fails to administer substantial justice. *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 144 (Iowa 1996). It is well settled that

> 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.
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> It is not for us to invade the province of the jury. In fact a verdict will not be set aside or altered unless it is, (1) flagrantly excessive or inadequate; or (2) so out of reason as to shock the conscience or sense of justice; or (3) raises a presumption it is the result of passion, prejudice or other ulterior motives; or (4) is lacking in evidential support.
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> If the verdict has support in the evidence the others will hardly arise, if it lacks support they may all arise. The real question in most cases, and here, is the amount and sufficiency of evidence to support the award made. Certainly where the verdict is within a reasonable range as indicated by the evidence the courts should not interfere with what is primarily a jury question.
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> 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.

*Cowen v. Flannery*, 461 N.W.2d 155, 157-58 (Iowa 1990) (quoting *Kautman v. Mar-Mac Community School District*, 255 N.W.2d 146, 147-48 (Iowa 1977)).

The Iowa Supreme Court has (1) affirmed the court's granting of a new trial where the evidence material to the damage award is undisputed and the damage award was approximately equal or less than the special damages; (2) reversed the court's denial of a new trial where evidence material to the damage award is undisputed and the award was nearly equal or less than the special damages; (3) affirmed the trial court's denial of a new trial where the evidence of the cause or the extent of injury was disputed; and (4) reversed the granting of a new trial based on inadequate damages where the evidence as to the nature, extent and severity of the injuries were disputed. *See Cowan*, 461 N.W.2d at 159 and cases cited therein. In *Cowan*, the supreme court reversed the trial court's denial of a motion for a new trial where the jury awarded damages for past and future medical expenses, but awarded no damages for past and future pain and suffering. *Cowan*, 461 N.W.2d at 160.

On appeal Berkland raises the same claims of verdict inconsistency and inadequacy she raised in her motion for new trial. She also adds a claim the verdict was inconsistent or inadequate because it included nothing for future medical expenses, future pain and suffering and "temporary and permanent disability."

Our review of the record reveals the evidence of the cause and of the extent of the injuries was disputed. In her brief Berkland correctly acknowledges the cause of her injuries was disputed. She presented evidence from her various physicians as to the cause and extent of her injuries. Dr. Hansen testified for Berkland, and opined the August 1994 automobile accident caused the injuries,

and that there are no cures for Berkland's fibromyalgia, vestibular dysfunction, and neck problems. He further opined that as a result of the accident, her disabilities will impact her jobs in the future and will require future physical therapy. A licensed massage therapist estimated that Berkland would require five more years of weekly treatment. Berkland submitted past medical bills of $17,552.82, all of which were attributed by her experts to the August 1994 accident.

Anthem presented the testimony of Dr. Wirtz, who reviewed Berkland's past medical history and x-rays, and also personally examined Berkland. He found that many of Berkland's medical problems pre-dated the August 1994 accident. He also opined that Berkland would not need any future medical care as a result of the accident, nor did she suffer any permanent function limitations as a result of the accident. Anthem also presented evidence that pointed to causation other than the August 1994 accident, including three prior accidents Berkland had been involved in, her work schedule of seventy hours per week, and the stressful nature of her work.

Berkland attacks Dr. Wirtz's testimony as lacking in foundation and credibility. However, it is well settled that the credibility of witnesses and the weight to be given their testimony is a matter peculiarly for the trier of fact, in this case the jury. *See, e.g., Nichols v. Schweitzer*, 472 N.W.2d 266, 275 (Iowa 1991). The jury, as the trier of fact, can accept or reject all or part of the testimony of any witness. *See, e.g., Ward v. Loomis Bros., Inc.*, 532 N.W.2d

807, 812 (Iowa App. 1995). In fact, the jury was instructed on these points of law.

Berkland argues substantial evidence would support larger awards for past medical expenses and past pain and suffering and awards for future medical expenses, future pain and suffering and "temporary and permanent disability." However, under the issues as framed, our concerns are whether the verdict is supported by substantial evidence and whether it is flagrantly inadequate. We find the verdict is so supported and is not flagrantly inadequate. We conclude the jury was well within its right to find the damages it did. The trial court did not abuse its discretion in denying Berkland's motion for a new trial.

**AFFIRMED.**