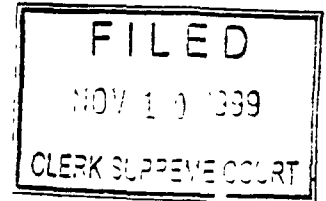


IN THE COURT OF APPEALS OF IOWA

No. 1999-197 (9-421) / 98-1756
Filed November 10, 1999



ROGER F. HAVIG,
Plaintiff-Appellee,

vs.

**SHAYNE A. MEINDERS, R. MICHAEL
HESTON and MARSHA HESTON,**
Defendants-Appellants.

Appeal from the Iowa District Court for Cerro Gordo County, John S. Mackey,
Judge.

Defendant appeals a district court order granting plaintiff a new trial following
a jury verdict in plaintiff's favor on his personal injury claim. **AFFIRMED.**

Richard R. Winga and Joel J. Yunek of Laird, Heiny, McManigal, Winga,
Duffy & Stambaugh, P.L.C., Mason City, for appellants.

H. P. Folkers of Folkers & Keen, Mason City, for appellee.

Considered by Streit, P.J., Vaitheswaran, J., and Peterson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

PETERSON, S.J.

Defendants-appellants, Shayne A. Meinders, R. Michael Heston, and Marsha Heston appeal the trial court's granting of plaintiff-appellee, Roger F. Havig's motion for a new trial. We affirm.

I. Background and Proceedings. A jury could have found the following facts. Roger Havig is self-employed in the appliance repair business. He repairs ranges, washers, dryers, refrigerators, air conditioning units, furnaces, and does duct work, which is overhead work, in connection with the air conditioning and furnace operations.

On June 19, 1995, he was involved in a motor vehicle accident. He was driving his pickup truck in a southerly direction on North Federal Avenue in Mason City, Iowa, when Shayne A. Meinders, operating a Ford automobile owned by R. Michael Heston and Marsha Heston, in a northerly direction made a left-hand turn in front of Roger Havig which resulted in the collision.

Roger Havig told the police officer at the scene his shoulder was sore from the seatbelt. An ambulance was called, however, when it arrived, he rejected it. The officer then took him to his wife's place of employment where he picked up her motor vehicle. He returned to the scene of the accident to remove his tools from his truck to go on another service call. While doing this, he felt a shooting pain in his neck for the first time. He said it was sharp and came all at once. He then returned to his

wife's place of employment and told her he was going to the hospital emergency room.

X-rays were taken at the emergency room, and they were negative except there was an indication of early degenerative narrowing of the C3-4 and C5-6 disks which is consistent with arthritis. It was also noted there was tenderness, especially on rotation of the neck to the right. He was also given Ibuprofen and Flexeril, a muscle relaxant. He went to work on the following Monday, but was only able to work approximately three hours because of pain.

On June 27, 1995, Roger Havig consulted with Dr. Douglas Sande. Dr. Sande is a doctor of chiropractic and Roger Havig had consulted with him as a result of a fall he sustained in December of 1994. That treatment was for a lower back problem, however, he complained to Dr. Sande about a stiff neck because of the overhead duct work he did.

Dr. Sande's diagnosis was a thoracic sprain with thoracic pain, neck pain, and segmental dysfunction, or what is commonly referred to as whiplash. His treatment was chiropractic manipulation, therapy, and diathermy which was done approximately two to three times a week.

On September 15, 1995, Roger Havig consulted Dr. Faches, an M.D. at the Mason City Clinic. At that time, he complained of a neck pain which extended down into his shoulders, which was a result of an accident on June 16, 1995. He said since the accident he has been on Relafen and Flexeril. He did not feel his symptoms had

improved which he described as occasionally sharp neck pain, but usually dull. It was intermittent in nature and sometimes made him remain awake at night. Dr. Faches diagnosis was a cervical neck strain, secondary to a motor vehicle accident. Dr. Faches asked he discontinue Relafen, but gave him sample tablets of Rudail. He also could continue taking Flexeril, and physical therapy was prescribed for evaluation and treatment. He was to follow-up in ten days.

On September 25, 1995, Roger Havig saw Dr. Broman, an M.D. at the Mason City Clinic. On examination, he was moderately tender in the upper shoulder, and there was some mild tenderness in the C3-4 area. The doctor also noted the x-rays showed degenerative changes in C-3, C-4, and C-5. Her diagnosis was a cervical muscle strain and whiplash injury. It was noted he was just starting with physical therapy and would follow-up if he is not having good improvement.

Roger Havig saw Dr. Broman again on November 2, 1995. At that time, he stated he had been doing quite well with the physical therapy and had been seeing the therapist three times a day for a four-week period and was no longer having the neck pain and headaches. He had stopped the physical therapy two weeks ago and began having more pain in his neck and headaches. Dr. Broman prescribed physical therapy two times a week for six weeks and would obtain a consultation with Dr. Beck, a neurosurgeon.

On November 8, 1995, Roger Havig consulted Dr. Beck. He found on examination Roger Havig was in good shape with no weakness in the upper

extremities, but tenderness to palpation in the paracervical area. His reflexes were normal and his strength normal. He felt he was neurologically intact. C-spines were unremarkable but there was a very early narrowing at C-5/C-6. He did not feel Roger Havig had a surgical problem, and he would recommend therapeutic massages a couple of times a week.

Dr. Broman was again consulted by Roger Havig on March 1, 1996. He said he continued to have some regular pain in his neck as well as spasms, but feels he has been able to bring it under fairly good control with the physical therapy exercises and the massage therapy twice a week. Dr. Broman found there was less spasm of the upper shoulders, but he was still moderately tender to palpations over the L-4/L-5 region of the cervical spine. Deep tendon reflexes were intact in the upper arms and good strength in the upper extremities with no obvious tenderness in the paraspinous muscles. She felt he would probably need to continue with the regular exercise program as well as massage therapy. Dr. Broman felt this would be a chronic problem secondary to exacerbation following a whiplash injury.

On October 4, 1996, Roger Havig again saw Dr. Broman. At that time, he stated he continued to have some neck pain, but it was fairly well controlled with the current medication and muscle massages once a week and intermittent visits to the chiropractor every two to three weeks. Dr. Broman noted the chronic neck pain resulting from the injury was well controlled on medication, and she recommended exercises.

On May 1, 1997, Roger Havig saw Dr. Broman for his yearly physical. He stated he was in general good health except for the neck pain that he has on a daily basis since the automobile accident. He also stated he had occasional headaches depending upon the activities he had been doing that day as well as generalized neck pain. He felt he was able to keep it under moderate control with weekly massage therapy and visiting the chiropractor two to three times a month for realignment.

Dr. Broman felt Roger Havig's injury has caused him some chronic neck pain which was likely to continue and require regular massage, intermittent physical therapy, and medication to keep it controlled. She felt he does have some underlying degenerative changes in his neck and the work he is doing could possibly aggravate the pain and headaches, but it seems he is able to manage this with the current treatment regiment. This will likely continue in the future. It is possible as degenerative changes increase, he could have more pain.

Roger Havig's medical expenses include charges from the North Iowa Mercy Health Center, Alternative Therapies, Dr. Douglas Sande, the Mason City Clinic, Dr. David Beck, the radiologist of Mason City, Miller Medical Service, Easter Pharmacy, and Cash Wise Pharmacy. These total \$11,438.10. His tax returns for the years 1993 to 1997 showed his income from his business increased each year. His net profit decreased in 1997 due to increasing vehicle expense.

Trial of this matter began on July 21, 1998. Following the selection of the jury in the early afternoon, the opening statements were began at 3:25 p.m. Testimony

followed until the court adjourned at 4:32 p.m. Testimony began at 9:05 a.m. on July 22, and concluded at approximately 1:54 p.m. The defendants did not put on any evidence. They admitted liability, but denied the extent of the injuries claimed by Roger Havig. Following the closing arguments of the parties and the giving of the instructions by the court, the case was submitted to the jury at 3:40 p.m. on July 22, 1998.

The jury returned a verdict at 5:15 p.m. They awarded Roger Havig a total of \$12,938.10 for past medical expenses and loss of time from work. They did not award any damages for past pain and suffering, although they did award damages for past medical expenses. In accordance with *Cown v. Flannery*, 461 N.W.2d 155, 160 (Iowa 1990), the court instructed the jury the law required an award for past pain and suffering because they awarded damages for past medical expenses. The jury then deliberated for approximately fifteen additional minutes and returned a verdict adding an award for past pain and suffering in the sum of \$1500 for a total verdict of \$14,438.10. The original verdict included an award of \$1500 for past loss of time from work.

Roger Havig filed a motion for new trial contending the award for pain and suffering in the amount of \$1500 was a result of passion or prejudice on the part of the jury, and it did not effectuate substantial justice between the parties. The trial court granted that motion.

II. Discussion. We review district court rulings on motions for new trial for abuse of discretion. Iowa R. App. P. 14(f)(3). We are more reluctant to interfere with grant of a new trial than its refusal. Iowa R. App. P. 14(f)(4); *Delaney v. Gansemer*, 567 N.W.2d 664, 665 (Iowa App. 1997). The determining question for the district court was whether the verdict effected substantial justice between the parties. 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. I.B.P., Inc.*, 558 N.W.2d 142, 144 (Iowa 1996). The trial court is not limited to the grounds for granting a new trial specified in Iowa Rule of Civil Procedure 244. *Id.* Nevertheless, there must be a reason apparent from the record to justify the court's exercise of its power, and we will reverse only if the court's decision was based on "grounds clearly untenable or to an extent clearly unreasonable." *Lehigh Clay Prods., Ltd. v. Iowa Dep't of Transp.*, 512 N.W.2d 541, 544 (Iowa 1994).

When determining whether the court abused its discretion based on substantial justice not being achieved by the verdict, precedent is of little value. Each case must be decided by relating its own unique characteristic to the general principles announced. *Kautman v. Mar-Mac Community Sch. Dist.*, 255 N.W.2d 146, 148 (Iowa 1977). We must also accord weight to the fact the trial court, aided by seeing and hearing the witnesses, observing the jury, and having before it all incidents of the trial, deemed a new trial appropriate. *See id.*

The trial court, in ruling on the motion for a new trial, gave the following reasons:

[i]t appears that the jury's initial refusal to award any damages for pain and suffering in light of the award of \$11,438.10 award for past medical expenses, together with a subsequent award of \$1,500 fifteen minutes later (which is identical to the award for past loss of time from work) indicates that such damage was influenced by passion or prejudice against Plaintiff or at least a presumption could be reasonably inferred that the jury had an ulterior motive for awarding such amount, i.e., the desire to hurriedly return a verdict and go home.

We cannot say the trial court abused its discretion. Its decision was not based on grounds clearly untenable or to an extent clearly unreasonable.

We affirm the trial court.

AFFIRMED.

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