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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MALINDA RAE SCHIPPERS, DAVID SCHIPPERS, and **SHIRLEY SCHIPPERS,**	)	
Plaintiffs-Appellants,	)	Filed December 18, 1985
vs.	)	
MARVIN STEENHOEK and **BRADLEY WAYNE MILLER,**	)	5-445 84-1015
Defendants-Appellees.	)	

Appeal from the Iowa District Court for Jasper County - Michael J. Streit, Judge.

Plaintiffs appeal from the judgment in a negligence action asserting that the jury verdict was inconsistent when the jury found that plaintiff minor accident victim had sustained no compensable injury but awarded plaintiff parents damages of $2,000 on their claim under Iowa R. Civ. P. 8. **AFFIRMED BY OPERATION OF LAW.**

Mark A. Humphrey of Humphrey & Haas, Des Moines, for plaintiffs-appellants.

Ken J. Smith of Selby, Updegraff & Smith, Newton, for defendants-appellees.

Heard by Snell, P.J., and Schlegel and Hayden, JJ., but considered en banc.

The judges of this court being evenly divided on the decision in this case, it is affirmed by operation of law. Judges Snell, Donielson, and Schlegel vote to affirm; Chief Judge Oxberger, and Judges Hayden and Sackett vote to reverse. Snell, J., would affirm for the following reasons:

Plaintiff Malinda Rae Schippers and defendant Bradley Miller were involved in an automobile accident on October 26, 1979. Both parties were minors at the time of the accident. Malinda filed suit in October of 1981 to recover for personal injuries she sustained in the 1979 accident. Her parents sought recovery for medical expenses and loss of services, companionship, and society. Miller counterclaimed for property damage.

The issues presented here arise out of the jury's answers to special interrogatories submitted by the court. In them the jury found that the defendant was negligent and that plaintiff Malinda Rae Schippers was also negligent. Fault was apportioned 65% to defendant and 35% to Malinda. The question: "Was the negligence of defendant a proximate cause of injury or damage to plaintiffs?" was answered "yes." The jury then found that the total amount of actual damages sustained by plaintiff Malinda without taking into consideration any reduction due to her negligence was none. The total amount of damages sustained by plaintiff's parents without taking into consideration any reduction of damages due to plaintiff, Malinda's negligence, was found by the jury to be $2,000.00.

Plaintiffs' appeal claims error by the trial judge in overruling their motion for new trial on the ground the jury's verdicts are inconsistent as a matter of law. The legal problem posed is whether the parents' recovery of damages is dependent on damages in some amount being awarded to plaintiff Malinda.

A damage award to Malinda's parents is based on Iowa Rule of Civil Procedure 8 (1984), which provides:

> [a] parent or the parents, may sue for the expense and actual loss of services, companionship and society resulting from injury to or death of a minor child.

We note initially that the parents' suit under rule 8 is keyed to the occurrence of an "injury" of the minor child. No express requirement is stated that damages must be recovered by the minor child.

The evidence at trial was primarily concerned with Malinda's physical condition. Malinda did not complain of physical injury until several days after the accident. On November 12, 1979, she went to her family physician, Dr. Charles Peterson, complaining of severe headaches and chest pains. Dr. Peterson diagnosed Malinda's condition as thoracic outlet syndrome. Dr. Peterson explained that this syndrome arises from the shifting of or damage to the thoracic spine. A person afflicted with this syndrome cannot elevate her arms without discomfort. Dr. Peterson prescribed muscle relaxant medication. Malinda also sought chiropractic care in an attempt to alleviate her pain.

Over one year later, on December 17, 1980, Malinda returned to Dr. Peterson because her neck, shoulders, and back ached, she was losing the grip in her left hand, and could not carry buckets of water during farm chores. After reviewing cervical x-rays, Dr. Peterson determined that Malinda's posture needed attention and he prescribed traction, diathermy, ultrasound, and manipulations.

Malinda next visited Dr. Peterson on February 17, 1981, still complaining of headaches and neck pain. At this time Dr. Peterson found evidence of not only thoracic outlet syndrome, but also of a spinal myofascial strain (sprain). In February and March of 1982 Malinda again saw Dr. Peterson because she was experiencing muscle twitching of her right arm and pain in her left arm. Dr. Peterson discovered that the pulse in her left arm was obliterated. Because he suspected a cervical disk problem and the development of thoracic outlet syndrome, he referred Malinda to specialists in each field.

Malinda saw two specialists regarding the thoracic outlet syndrome. Both agreed to the characterization of her condition as bilateral thoracic outlet syndrome. However, one suggested biofeedback therapy and the other recommended surgery. Malinda elected to undergo surgery. In April of 1982 one rib on her left side was removed and in May of 1982 one rib on her right side was removed.

Dr. Peterson and the surgeon, Dr. Albert Clemens, testified that an individual can be predisposed to thoracic outlet syndrome without suffering serious discomfort until it is aggravated by trauma. Both doctors concluded that because Malinda never had neck and arm pains before the 1979 automobile accident, the accident constituted the aggravating factor in her case. After the surgery, Malinda had full range of arm motion on both sides, unobliterated pulses, and her grip returned to a more normal level.

A neurological specialist further discovered that Malinda suffered a moderate cervical sprain syndrome with headache as the predominant symptom, and a moderate to severe cervicothoracic strain and myofascial fibrosities (muscle injury with an ongoing inflammatory response). This doctor also felt that Malinda's condition was causally connected to the 1979 automobile accident.

Defendant Miller retained a physician, Dr. Thomas Summers, who performed an independent medical examination of Malinda in March of 1984. Dr. Summers found that her neck movement was normal and that she had no neurologic deficit. He explained that thoracic outlet syndrome is most commonly caused by the presence of an extra rib or pair ribs, referred to as cervical ribs. These present a predisposition to the syndrome which can be set off by trauma. Dr. Summers, a medical doctor specializing in neurology, diagnosed Malinda's present condition as extracranial myogenic tension headaches.

Evidence was also presented that Malinda was treated during these visits to the doctor for pharyngitis and other ailments. The total cost for Malinda's medical care following the 1979 accident to her date of majority was $1,869.30. After her eighteenth birthday her medical expense was $8,058.62. At a hearing on post-trial motions Miller offered juror affidavits stating the considerations that prompted them to arrive at their verdict. The post-trial motions were denied by the trial court. All of the affidavits were identical and stated that any injuries to Malinda from the accident were insignificant but that her parents were entitled to have her checked out medically.

Scope of Review. Motions for new trials can be granted pursuant to Iowa Rule of Civil Procedure 244(f) if a jury verdict is not sustained by sufficient evidence. Likewise, a trial court can grant a new trial when the verdict fails to effectuate substantial justice. Thompson v. Rozeboom, 272 N.W.2d 244, 246 (Iowa 1978). Generally, a trial court has broad discretion in passing on motions for new trials and only when there has been a clear abuse of that discretion will we interfere with a ruling upon the motion. Houvenagle v. Wright, 340 N.W.2d 783 (Iowa Ct. App. 1983). Our review convinces us, as it did the jury in answering the interrogatory, that sufficient evidence was presented of an "injury" to Malinda in the automobile accident. Whether an award of damages to Malinda is required before her parents' claim is viable depends on how our Rule of Civil Procedure 8 is interpreted.

In Wardlow v. City of Keokuk, 190 N.W.2d 439, 443 (Iowa 1971), the supreme court stated: "Actions brought under Rule 8 are not for the injury to the child but for the injury to the father as a consequence of the injury to the child. See 67 C.J.S. Parent and Child §§ 40 and 41c."

The court also has determined that a rule 8 claim brought on behalf of the parents is not a derivative action—"the parent has a cause of action for

a legal wrong to himself, independent of that of the child. It is derivative only in the sense that it is based on injury to or death of the child." Irlbeck v. Pomeroy, 210 N.W.2d 831, 833 (Iowa 1973). "The gist of the parental action under rule 8 is a wrong done to the parent in consequence of injury to his child by the actionable negligence of another." Handeland v. Brown, 216 N.W.2d 574, 578 (Iowa 1974).

> In other words, when a minor child is injured, two causes of action immediately spring into existence: first, the child's right of action for his own injuries; and second, the parent's right of action for consequential damages, based on loss of services and on the expenses caused by the injury. But the parent's right of action, although distinct from the child's right of action, is based upon and arises out of the negligence which causes the injury to the child.

59 Am. Jur. 2d Parent and Child § 112 at 212 (1971).

Fleming describes the logic of this interpretation as follows:

> There is a school of thought which maintains that the action is genuinely independent and distinct from the right of recovery by the . . . child, and, provided the defendant's conduct was prima facie wrongful, a complete cause of action is made out. From this follows that defenses like voluntary assumption of risk or contributory negligence available against the primary casualty will not bar or otherwise prejudice a claim for loss of that person's services.

Fleming, The Law of Torts 626 (2d ed. 1960).

In Handeland, the court held that a child's contributory negligence that was not the sole proximate cause of the injury is not a defense to a parental claim under rule 8 for the expense and actual loss of services, companionship and society resulting from injury to or death of the child. Handeland, 216 N.W.2d at 579; accord Fuller v. Bushrow, 292 N.W.2d 672 (Iowa 1980) (contributory negligence of an injured spouse which is not the sole proximate cause of that spouse's injury does not bar a claim by the other spouse for loss of consortium).

Plaintiffs cite Shewry v. Heuer, 255 Iowa 147, 121 N.W.2d 529 (1963), wherein the supreme court remanded for new trial on the ground it was illogical to award an injured plaintiff the cost of medical services made necessary by his pain and suffering and yet allow him nothing for pain and suffering. Shewry did not involve a rule 8 claim and is therefore inapposite.

Consistent with the legal history of rule 8 claim interpretations we further the remedial intent of the rule by applying only those words used by the legislature. So doing, the parents' cause of action is legally established upon a finding of injury to the child. To require an assessment of damages against the defendant for the child's injury as a prerequisite to a rule 8 claim imposes a requirement not found in the rule. Nor is it logically necessary since the rule 8 claim is separate, depending only for a nexus that the child be injured.

The facts of this case are such that the jury could have concluded that although plaintiff Malinda was injured, it was of minimal consequence and the causal connection to the accident was tenuous. No doctor was consulted about an injury until some time after the accident. Thereafter, visits were made once a year for three years. The jury's decision to not award Malinda damages against defendant under these circumstances is within its discretion. Because an injury was found to have been caused in the accident, the damage award to Malinda's parents is legally supported.

The trial court's overruling of plaintiffs' motion for new trial should be affirmed.

SACKETT, J. would reverse:

I believe in a 3-3 decision that any explanation filed should be brief.

The issue is not whether the parents' recovery of damages is dependent on damages in some amount being awarded to Malinda. The issue is whether the jury verdicts are inconsistent. Are there logical grounds to award Malinda's parents $2,000 for medical expenses and loss of services, companionship, and society during Malinda's minority and not award Malinda damages for pain, suffering, and disability after a finding that defendant's negligence was a proximate cause of the injury or damages to plaintiffs?

The judges affirming the trial court have rejected the holdings of Shewry v. Heuer, 255 Iowa 147, 121 N.W.2d 529 (1963), contending Shewry is not applicable because it does address Iowa Rule of Civil Procedure 8. I determine Shewry clearly dictates that plaintiff is entitled to a new trial. In Shewry an award was made for medical expense but not pain and suffering. The same thing happened here except the medical expense went to the parents. The logic of Shewry is that you cannot have medical expense without pain and suffering. The same logic applies here.

I find no basis from which the jury could conclude Malinda was injured and award her parents medical expense and loss of services, companionship and society but make no award to Malinda. See Shewry at 152, 121 N.W.2d at 532. And that is the issue. In fact, it is totally illogical to determine a child who was injured sufficiently to generate a $2,000 claim on her parents' behalf would have no pain or suffering.[1]

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[1] Malinda was 16-years-old when the accident happened on October 26, 1979. On the date of the accident, Malinda was seen at the emergency room of Grinnell General Hospital and received an arm sling for total hospital and doctor charges of $62.50. On October 27, 1979, she was seen at Mercy Hospital and charged $57.00. Malinda saw Dr. Peterson from November 12, 1979 until February 27, 1981, incurring doctor charges and test fees of $218.00. Malinda was seen numerous times by the Phipps Chiropractic Clinic from December 7, 1979 until August 31, 1981, incurring charges of $1,269.00. On February 8, 1981, Malinda was seen at Mercy Hospital for $40.00. She was seen at the Lieberman Chiropractic Office from September 8, 1981 until October 16, 1981, incurring expenses of $127.00. Malinda's medical expenses incurred before her eighteenth birthday (October 20, 1981) totaled $1,772.50.

The interesting fact is, despite his holding, Judge Snell has determined: "The facts of this case are such that the jury could have concluded that although plaintiff Malinda was injured, it was of minimal consequence and the casual connection to the accident was tenuous." Such a statement is totally inconsistent with an award to the parents of $2,000. The jury verdicts are inconsistent. I would remand for a new trial.