IN THE COURT OF APPEALS OF IOWA

No. 8-568 / 97-2268

GAILA M. EHLERS,

Plaintiff-Appellee,

vs.

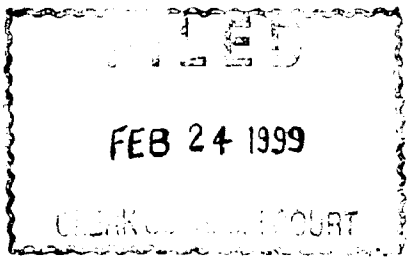
GERALD K. SCHIMMELPFENNIG,

Defendant/Third-Party Plaintiff-Appellant,

vs.

EAGLE NATIONAL ASSURANCE CORP.,

Third-Party Defendant-Appellee.



Appeal from the Iowa District Court for Jefferson County, James P. Rielly, Judge.

Defendant claims the district court abused its discretion in granting plaintiff and third-party defendant's motions for a new trial. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Gregg Pieper, Fairfield, for appellant.

Kenneth L. Keith of the Keith Law Firm, P.C., Ottumwa, for appellee Ehlers.

Michael J. Moreland of Lynch, McKay, Moreland & Webber, Ottumwa, for appellee Eagle National Assurance Corporation.

Considered by Sackett, C.J., and Streit and Mahan, JJ.

MAHAN, J.

Defendant Gerald Schimmelpfennig appeals the decision of the district court granting a new trial in this tort suit based on a dog bite. We affirm in part, reverse in part, and remand.

Gaila Ehlers was employed by Schimmelpfennig as a general assistant to help him with housekeeping and also in his work as a bulldozer operator. On July 9, 1996, Ehlers came to Schimmelpfennig's home at 7:00 a.m. The parties disagree whether this was Ehlers' regular hour to begin work. They also disagree about whether Schimmelpfennig requested Ehlers to drive to Fairfield to purchase dog food as a part of her employment or whether she agreed to go as a personal favor.

Ehlers went into the garage to examine a bag of dog food to determine what brand to buy. She was bitten by Schimmelpfennig's dog, Lucky. Ehlers was injured as a result of the dog bite. She filed a tort suit seeking medical damages, past and future pain and suffering, loss of earning capacity, and loss of body function. She claimed continuing pain from the dog bite and the inability to perform some types of work.

Schimmelpfennig filed a third-party petition against his homeowner's insurance carrier, Eagle National Assurance Corporation. Eagle claimed the homeowner's policy was not applicable because Ehlers was acting within the scope of her employment at the time of the injury.

The case was tried to a jury. The jury awarded Ehlers her medical expenses, $425.65, and $1500 for lost wages. No awards were made for loss of future earning

capacity, loss of body function, or physical and mental pain and suffering. The jury rejected Ehlers' request for punitive damages. The jury found Ehlers was not acting within the course of her employment at the time of the dog bite.

Ehlers filed a motion for a new trial claiming the award of damages was inadequate. She also asserted Schimmelpfennig's counsel acted improperly by making several objections during closing argument and seeking a mistrial. Eagle also filed a motion for new trial claiming the jury's verdict was not supported by substantial evidence.

The district court granted the motions for new trial. The court determined it was improper for the jury to award damages for past medical expenses but no damages for past pain and suffering. The court also found defense counsel's several frivolous objections and motions for mistrial in the presence of the jury had an effect upon the fairness of the trial. The court granted a new trial to Ehlers and Eagle. Schimmelpfennig appealed.

I. Our review of a district court's action on a motion for new trial is for abuse of discretion. *Ten Hagen v. DeNooy*, 563 N.W.2d 4, 6 (Iowa App. 1997). In rulings upon motions for new trial, we give the district court broad but not unlimited discretion in determining whether the verdict effectuated substantial justice between the parties. *Id.* at 6-7. We will not find an abuse of discretion unless it is shown that the trial court's discretion was exercised on grounds clearly untenable or to an extent clearly unreasonable. *Id.* at 7. We are more reluctant to interfere with the grant of a new trial than its refusal. Iowa R. App. P. 14(f)(4).

II. Schimmelpfennig contends the district court abused its discretion by granting a new trial to Ehlers on the issue of damages. He admits there was sufficient evidence to show Ehlers had medical expenses associated with the dog bite, and under Iowa Code section 351.28 he was strictly liable for these medical expenses. He believes, however, the jury could reasonably find Ehlers had not experienced pain and suffering.

A party may be granted a new trial when a jury awards excessive or inadequate damages. *Foster v. Pyner*, 545 N.W.2d 584, 586 (Iowa App. 1996). When the itemization of damages made by the jury is not supported by the evidence, a new trial must be granted. *Cowan v. Flannery*, 461 N.W.2d 155, 158 (Iowa 1990). The supreme court stated:

> It is illogical to award past and future medical expenses incurred to relieve headache, neck and back pain, and then allow nothing for such physical and mental pain and suffering. Having determined that these medical expenses were recoverable, there seems no way for the jury to disallow recovery for the appellant's pain and suffering with the same injuries.

Id. at 160. Thus, when a jury awards damages for past and future medical expense incurred to relieve pain and then awards nothing for pain and suffering, the itemization of damages is inconsistent and plaintiff is entitled to a new trial. *Id.*

In the present case, the award of damages for past medical expenses was inconsistent with the decision to award no damages for past pain and suffering. The past medical expenses included treatment for the pain of the dog bite. For this reason, we affirm the district court decision granting a new trial on the issue of damages.

III. Schimmelpfennig claims the district court abused its discretion granting Ehlers a new trial on the issue of damages based on attorney misconduct. The district court concluded the numerous frivolous objections and motions for mistrial made by defense counsel in the presence of the jury during closing arguments were without merit and had an effect upon the fairness of the trial. Defense counsel objected several times and moved for a mistrial in the presence of the jury on at least five occasions during plaintiff's closing argument. He also objected two times during plaintiff's rebuttal; one of the objections was accompanied by a motion for mistrial.

The general rule is that in order for the granting of a new trial based upon attorney misconduct to be warranted, the objectionable conduct ordinarily must have been prejudicial to the interest of the complaining party. *Mays v. C. MacChambers Co., Inc.*, 490 N.W.2d 800, 803 (Iowa 1992). A new trial is required for improper conduct by counsel if it appears a different result would have been probable but for any misconduct. *Rosenberger Enter., Inc. v. Insurance Serv. Corp.*, 541 N.W.2d 904, 907 (Iowa App. 1995). A trial court has considerable discretion in determining whether alleged misconduct was in fact prejudicial. *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 543 (Iowa 1996).

Here, the district court had the advantage of observing the reaction of the jury and found defense counsel's conduct had an effect upon the fairness of the trial. We are unable to find the district court's exercise of discretion was clearly untenable or unreasonable. We determine the district court did not abuse its discretion in granting a new trial on the issue of damages to Ehlers based on attorney misconduct.

IV. Schimmelpfennig asserts the district court abused its discretion by granting Eagle's motion for new trial. The district court found the conduct of defendant's attorney had an impact on the jury's decision regarding Eagle.

We find the district court abused its discretion by granting a new trial to Eagle based on attorney misconduct because this was not the ground for a new trial requested by Eagle. When reviewing the grant or denial of a motion for new trial, we look to the grounds for the new trial asserted in the motion and ruled on by the court. *Rosenberger*, 541 N.W.2d at 906; *Ladeburg v. Ray*, 508 N.W.2d 694, 696 (Iowa 1993). Eagle requested a new trial based only on a claim there was insufficient evidence to support the jury's finding Ehlers was not acting in the course of her employment at the time of the injury. The district court had already found this evidence to be sufficient when it overruled Eagle's motion for judgment notwithstanding the verdict prior to ruling on Eagle's motion for new trial.

The grant of a new trial on the issue of damages to Ehlers does not necessitate the grant of a new trial to Eagle. While the award of damages to Ehlers may have been affected by passion and prejudice due to the conduct of defense counsel, no corresponding assumption can be made regarding the jury's conclusion Ehlers was not acting in the course of her employment at the time of the injury. This is especially true considering the district court's ruling on the motion for judgment notwithstanding the verdict. We reverse the district court decision granting Eagle a new trial.

V. Ehlers and Eagle have asked to have costs of the appendix assessed to Schimmelpfennig. Defendant included the entire trial court file, transcript, and exhibits in the appendix. Iowa Rule of Appellate Procedure 15(c) provides:

> The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be unnecessarily included in the appendix the appropriate appellate court may impose the cost of producing such parts on that party.

After consideration, we determine Schimmelpfennig should be responsible for the costs of this appeal, including the appendix.

We have affirmed the decision of the district court as to Ehlers. We have reversed the grant of a new trial to Eagle. We remand the case for further proceedings. We do not retain jurisdiction.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.