FILED
MAY 31 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

KERRY JACOBSEN and
CHARLES JACOBSEN,

Plaintiff-Appellants/Cross-Appellants,

vs.

SKYLINE HARVESTORE SYSTEMS, INC.,

Defendant-Appellee/Cross-Appellant,

and

ROSKAMP MANUFACTURING, INC.,

Defendant-Appellee.

Filed May 31, 1983

2-521
2-68363

Appeal from Fayette District Court, Joseph C. Keefe, Judge.

Plaintiffs appeal from a judgment entered on a verdict for plaintiffs in a product liability lawsuit, contending the court erred in advising the jury that one defendant had settled with plaintiffs by agreeing to pay $110,000, which sum should be deducted from any recovery granted plaintiffs. REVERSED IN PART AND REMANDED FOR NEW TRIAL ON THE ISSUE OF DAMAGES ONLY.

R. L. Donohue and Jay D. Villont of Donohue Law Office, P.C., West Union, for plaintiffs-appellants.

John Pieters of Pieters and Pieters, and James F. Smith of Noah, Smith & Ott, Waterloo, for defendant-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, and Schlegel, JJ.

Hayden, J., takes no part.

SNELL, J.

Plaintiffs appeal, and defendant Skyline Harvestore Systems, Inc. (Skyline) cross-appeals, from a judgment entered on a verdict for plaintiffs in a product liability lawsuit arising from injuries one of the plaintiffs suffered while using a piece of farm equipment (roller mill) manufactured by defendant Roskamp Manufacturing, Inc. (Roskamp) and sold by defendant Skyline. We reverse the judgment of the trial court in part, and remand for a new trial on the issue of damages only.

Kerry Jacobsen, a minor, received an injury to his hand resulting in the amputation of two fingers while using the roller mill.

Kerry's father Charles filed the present lawsuit, both on his own behalf and as next friend of Kerry. Charles sought damages on Kerry's behalf for the injuries suffered by Kerry, and on his own behalf for medical expenses he paid and for loss of Kerry's services.

During trial the Jacobsens settled with Roskamp, the manufacturer. Under the terms of the settlement, Roskamp agreed to pay the Jacobsens $110,000. However, Roskamp remained a party to the case because Skyline had filed a third-party petition against Roskamp. Skyline's third-party petition sought indemnification from Roskamp for any judgment which might be entered against Skyline.

Over the Jacobsens' objections, the trial court told the jury in its instructions about the Jacobsens' settlement with Roskamp. The trial court instructed the jury that if it found the Jacobsens entitled to damages, it should determine the total amount of those damages and then subtract $110,000 (the amount of the settlement) in computing its verdict.

The jury concluded that Kerry had suffered damages but that Charles, in his individual capacity, was not entitled to any recovery either for medical expenses or for loss of services. The jury set Kerry's actual damages at $125,000 and then deducted the amount of the settlement, $110,000, for a net award of $15,000.

After the verdict the trial court rejected Skyline's claim for indemnity from Roskamp. The trial court relied on evidence that Skyline, the distributor and merchant, had substantially altered the piece of equipment in question. The court concluded that Skyline therefore bore partial responsibility for the alleged design defects, that Skyline and Roskamp were similarly situated parties, and that Skyline was not entitled to indemnity from Roskamp.

The trial court entered judgment for $15,000 against Skyline and in favor of Kerry Jacobsen. It provided that Kerry was entitled to interest on $125,000 (the full amount of his damages, from the date petition was filed) until March 4, 1982, which was the date the settlement from Roskamp was received, and to interest on $15,000 after March 4, 1982.

The Jacobsens have appealed from judgment on the jury's verdict. They contend that jury acted inconsistently by returning an award for Kerry (and thereby establishing the defendants' negligence and liability) but denying an award to Charles in his individual capacity for medical expenses and loss of services. They contend the case should at the least be remanded for a partial new trial limited to the issue of Charles's damages. They also contend the trial court erred by instructing the jury to deduct the amount of their settlement with Roskamp from the amount of damages; they contend that when a partial settlement occurs during trial, the necessary adjustment in the damages award should be made by the court rather than the jury in order to avoid prejudicing the jurors.

The defendant Skyline has cross-appealed. It challenges the trial court's refusal to grant it indemnity from Roskamp. It also contends the trial court should have awarded interest only on $15,000.

I. Inconsistent Jury Verdicts

Plaintiffs' first assignment of error is that the jury's denial of recovery for Charles's medical expenses is inconsistent with its award of damages to Kerry and

is therefore invalid. We agree. Once a defendant's liability has been conclusively established, the jury is required to award recovery for all proximately resulting damages which have been proven by plaintiffs.

In Shewry v. Heuer, 121 N.W.2d 529 (Iowa 1963), the jury awarded medical expenses to a plaintiff who had been injured in an automobile accident, but denied any recovery for pain and suffering. The case at bar presents a situation involving the same legal principles.

> We can find no logical ground on which the jury could award plaintiff the cost of medical services made necessary by his pain and suffering and yet allow him nothing for the pain and suffering. There is no basis for finding that anything other than the pain and suffering resulting from the accident necessitated the medical services for which allowance was made. Of a similar situation Wall v. Van Meter, 311 Ky. 198, 223 S.W.2d 734, 20 A.L.R.2d 272, 274-275, says: "It is evident from the verdict that the jury found appellee was negligent and that appellant was not guilty of contributory negligence, and was entitled to recover the damages he sustained in the accident. Such being the case, it was incumbent upon the jury to compensate him for all damages he suffered, that is, for pain and suffering as well as for his medical expenses. With reason the jury could not have awarded him a recovery for his medical expenses and then denied him recovery for the very injuries which necessitated such medical expenses." (emphasis added).
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> An annotation in 20 A.L.R.2d 276, following Wall v. Van Meter, states: "The question discussed * * * is whether a verdict may validly award plaintiff, in a personal injury action, the exact amount of his medical expenses without simultaneously awarding him damages for pain and suffering where claim therefor was properly made and proven.
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> "The number of cases in which this question has been specifically answered is relatively small. But despite the dearth of authority, it seems permissible to state, on general principles, that such a verdict is invalid and all the cases in which this particular point was involved are in accord with this rule."

Id. at 532.

When the jury returns a verdict awarding a recovery for some elements of damages, but specifically denying recovery for other elements of damages which have been clearly proven, and the issue of liability is the same with reference to all elements of damage, the verdict is inconsistent with itself and invalid. See

Robertson v. Stanley, 206 N.E.2d 190 (N.C. 1974).

In the case at bar, the jury found for plaintiffs on the issue of defendants' liability. The issue of liability was the same with reference to Kerry's claim for damages and Charles's claim for medical expenses. The medical expenses Charles seeks to recover were necessitated by the injuries sustained by Kerry as a direct result of defendants' negligence. The amount of those expenses was documented and uncontested.

In response to plaintiffs' motion for a new trial and judgment notwithstanding the verdict, the trial court ruled that it was conceivable that, because the jury was aware of the settlement with Roskamp, it might have determined that the medical expenses had already been received. This is mere speculation. Where it is unclear what the jury intended to do, or it is apparent that it misconstrued the law, its verdict is erroneous. "The rule that a trial court has the power to mold a verdict to agree with the obvious intention of the jury has no application here when the intention of the jury was never expressed." Bowie v. Shelton, 251 A2d 667, 670 (Penn. 1969).

The claim for Kerry's damages did not include a claim for medical expenditures. Charles' claim for damages on his own behalf, however, did include a claim for those expenditures, and his claim was specifically denied by the jury. Moreover, the jury specifically found that Kerry suffered damages in the amount of $125,000 as a result of his injuries. The jury's net award to Kerry was $15,000 which, when added to the $110,000 settlement, equaled the amount of his damages. Any amount deducted from the $110,000 to recompense Charles for the cost of Kerry's medical care would reduce Kerry's actual recovery to less than the $125,000 to which the jury determined he was entitled. Clearly, the jury did not intend to permit any recovery for medical expenditures made by Charles on behalf of Kerry. The verdict is clearly invalid.

II. Pro Tanto Reduction by the Jury

Plaintiffs allege the trial court erred when it informed the jury that Roskamp had settled with plaintiffs for $110,000, and instructed the jury to deduct that amount from their verdict. Plaintiffs argue it was prejudicial for the jury to know the amount of the settlement prior to its deliberations, and that the court should have made the pro-tanto reduction from the jury's award. We agree.

This issue is one of first impression in Iowa.

In Greiner v. Hicks, 231 Iowa 146 300 N.W. 727 (1941), a jury was told by the court to deduct the amount of money paid in settlement by one of the defendants. The issue on appeal, however, was whether the deduction was proper as a matter of law. The court held it was. See also Fridieres v. Lowsen, 235 Iowa 640, 17 N.W.2d 396 (1945); Harris v. Deere & Co., 263 N.W.2d 727 (Iowa 1978). The federal court in Bolton v. Zeigler, 111 F Supp 516 (D Iowa 1953), ruled that the jury should be instructed that the plaintiffs have received specified sums which should be credited upon plaintiff's recoveries. The court reasoned that where the court does not so instruct the jury and effects the credit itself, the jury could conclude, notwithstanding instructions to the contrary, that another party is responsible for part of the damages and should bear that responsibility.

Neighboring jurisdictions have considered it. The Minnesota Supreme Court faced the issue in Frye v. Snellgrove, 269 N.W.2d 918 (Minn 1978). That court stated:

> The jury should be given those facts necessary to arrive at a fair verdict to all parties, but as a general rule, the amount paid in settlement should never be submitted. That figure itself may have little relation to the actual damages of a plaintiff, since it may reflect a compromise, the evaluation of a defendant's potential liability, and many other factors not relevant to a jury's consideration of actual monetary damages. (emphasis added).

Id. at 923.

More recently, the Michigan Supreme Court addressed this same issue. In Brewer v. Payless Stations, Inc., 316 N.W.2d 702 (Mich. 1982), that court ruled that a jury should not be informed of the existence of a settlement or the amount paid unless the parties agree otherwise. In rejecting a rule which would permit disclosure, the court reasoned that

> Such a rule is a two-edged sword. It cuts both ways. Some of the plaintiff's arguments above could be used by a defendant. For example, the mere fact of settlement by a codefendant could suggest liability on the part of a blameless non-settling defendant. The amount of the settlement, if large, might tend to suggest a higher value of a claim. If small, the jury might tend to "make it up" by a higher verdict as to the non-settling tortfeasor. See Orr v. Coleman, 455 S.W.2d 59 (Ky. 1970), in which the court found jury consideration of the fact and amount of settlement prejudicial to defendant non-settling tortfeasor.
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> On the other hand, a small settlement could disadvantage a plaintiff if the jury perceived that amount as bearing on the total value of the claim. The jury also might consider its duty to be diminished by settlement or consider the amount involved to be adequate regardless of the non-settling defendant's liability.
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> It is true that juries are expected to consider complicated facts and instructions and that our adversary system relies upon their ability to do so before reaching their conclusions. It is also true that jurors are human and so are subject to suggestion and sometimes to confusion concerning the relative importance of a mass of factual material and its relationship to instructions from the bench.
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> If facts such as here before us have or should have no bearing upon either liability or ultimate damages, there appears to be little cause to burden the jury with the added duty of calculating a liquidated settlement into its deliberations.

Id. at 705.

We find the reasoning of the Minnesota and Michigan courts persuasive. The jury should not be informed that a settlement has been agreed to, and it should not be informed of the amount paid. Any reduction in the verdict necessitated by a settlement should be made by the court rather than the jury. We hold that submission of these facts regarding settlement to the jury without the consent of all parties to the suit constitutes reversible error.

III. Partial New Trial

As a general rule, when a new trial is ordered, it is ordered for the entire case. However, where it can be done without prejudice, a new trial may be limited to one or more severable issues. In Guinn v. Millard Truck Lines, Inc., 134 N.W.2d 549, 558 (Iowa 1965), the Iowa Supreme Court dealt with the issue of partial retrials.

> It is the correction of error and not a new trial to which the aggrieved party is primarily entitled. Of course a partial new trial may be granted as a means by which that end may be accomplished. Robinson v. Payne, supra. In Feldhahn v. Van DeVenter, 253 Iowa 1194, 115 N.W.2d 862, this court recently ordered a new trial as to damages only. While we have recognized the modern device of granting partial retrials, we have also said this device must be exercised "with caution". Larimer v. Platte, 243 Iowa 1167, 1176, 53 N.W.2d 262. Nevertheless, it appears when there are separate verdicts or judgments, and there is no danger of complications, this procedure is becoming widely sanctioned by statute, court rule, and decision. See 66 C.J.S. New Trial § 11 a, page 89; 39 AM. Jur., New Trial, § 22, It is especially adaptable where liability of defendant is definitely established.

In the case at bar, defendants' liability has been established. It is not at issue here, and need not be relitigated. There is no contention that the refusal of the jury to award damages for Charles's medical expenses represented a compromise verdict in which some jurors conceded liability against their judgment in return for a reduction in the award of damages. See Albee v. Berry, 119 N.W.2d 230 (Iowa 1963)(new trial must be awarded on all issues where it appears that inadequate damage award represented a compromise on the issue of liability). We therefore remand for a partial new trial, limited to the issue of plaintiffs' damages.

IV. Defendant's Cross-Appeal

The trial court correctly applied the principles set out in Sweeny v. Pease, 294 N.W.2d 819 (Iowa 1980), when it denied Skyline's claim of indemnity against defendant Roskamp. Indemnity rests upon a distinction between primary and secondary liability. "While it is true Roskamp manufactured the initial roller mill

at the time the agreement for manufacture with Skyline Harvestore was entered into, the Roskamp mill was altered materially [by Skyline] to satisfy [its] requirements... [I]n no way can [Skyline] now claim to have been a passive participant in this incident."

We find no error in the trial court's calculation of interest on the damage award.

REVERSED IN PART AND REMANDED FOR PARTIAL NEW TRIAL ON THE ISSUE OF DAMAGES ONLY.