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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-499 / 91-1888

MICHAEL C. DUNBAR, As Trustee of the Property of Richard E. Speicher,

Appellant/Cross-Appellee,

vs.

CATHERINE A. SIMON, Administrator of the Estate of Earl Franklin Stewart,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Chickasaw County, John Bauer, Judge.

Plaintiff appeals a district court ruling denying his motion for new trial. **AFFIRMED IN PART; REVERSED IN PART AND REMANDED.**

Roger L. Sutton and Ann M. Troge of Sutton Law Office, Charles City, for appellant.

Gene Yagla and Karla J. Shea of Lindeman & Yagla, Waterloo, for appellee.

Considered by Oxberger, C.J., and Donielson and Hayden, JJ.

HAYDEN, J.

This case arises out of an accident involving a pickup truck driven by Earl Stewart and a motorcycle driven by Richard Speicher. Stewart was making a left-hand turn out of the eastern southbound lane of a four-lane road into a parking lot. Speicher was traveling in the eastern lane of northbound portion of the road. Stewart made a left turn into the path of Speicher. Speicher and his motorcycle hit the back quarter of the right side of Stewart's truck. As a result of the accident, Speicher suffered a fractured left arm and other injuries.

Three months after the accident, in September of 1990, Speicher filed a voluntary petition for bankruptcy. On the bankruptcy schedules Speicher claimed wearing apparel, household goods, 1989 Kawasaki motorcycle, and "insurance proceeds to indemnify for personal injury" as exempt property. In October 1990 Speicher, as plaintiff, filed this lawsuit. In February of 1991 Stewart passed away. In May of 1991 Stewart's administrator [hereinafter Stewart] filed a motion for summary judgment. Stewart contended Speicher lacked standing to pursue this action because he had filed for bankruptcy thereby causing any such claim to fall under the control of the trustee. Speicher then filed a motion to substitute the bankruptcy trustee as party plaintiff. The district court denied the summary judgment motion, and granted the motion to substitute a party. Speicher amended his bankruptcy schedules and the case proceeded to trial.

At trial, Speicher presented evidence concerning the extent of his injuries and the liability of Stewart in making the left turn. Stewart argued Speicher was negligent in speeding, failing to keep a proper lookout, and failing to control his motorcycle. The case was then submitted to the jury. The jury found Stewart and Speicher each fifty percent negligent. The jury then assessed total damages at $18,000, consisting of $16,000 for medical expenses, $1500 for past loss of body function, and $500 for past physical and mental pain and suffering. The district court entered judgment accordingly. Speicher filed a motion for new trial on both liability and damages. The district court denied the motion and Speicher appealed. Stewart cross-appealed from the denial of his summary judgment motion.

The trial court has a broad but not unlimited discretion in determining whether the jury verdict effectuates substantial justice between the parties. Wirtanen v. Provin, 293 N.W.2d 252, 253 (Iowa 1980); Iowa R. App. P. 14(f)(3). The trial court's discretion will be reversed upon a finding such discretion was abused. Waddell v. Peet's Feeds, Inc., 266 N.W.2d 29, 30 (Iowa 1978). We are slower to interfere with the grant of a new trial than with its denial. Iowa R. App. P. 14(f)(4). A verdict will not be set aside or altered unless it (1) is flagrantly excessive or inadequate, (2) is so out of reason as to shock the conscience or sense of justice, (3) raises

a presumption that it is the result of passion, prejudice or ulterior motive, or (4) is lacking in evidential support. Cowan v. Flannery, 461 N.W.2d 155, 157 (Iowa 1990) (citing Kautman v. Mar-Mac Community School Dist., 255 N.W.2d 146, 147 (Iowa 1977)); Holmquist v. Volkswagon, Inc., 261 N.W.2d 516, 517 (Iowa App. 1977); Iowa R. Civ. P. 244 (d), (f).

I. New trial on liability issue.

Speicher contends the record does not support the jury finding of fifty percent liability on his part. Speicher argues the jury could not have found him liable based on the speed of his motorcycle, his failure to have control of his motorcycle, or his failure to maintain a proper lookout. Speicher contends the trial court erred in denying his motion for a new trial on the issues of liability and damages.

We find evidence supported the allocation of liability upon Speicher. Evidence of Speicher's speed prior to the accident was presented at trial through testimony of witnesses and an investigating officer. One witness testified he was traveling northbound in his vehicle between thirty-five to forty miles per hour when Speicher passed him and then collided with the Stewart vehicle. The officer conducted speed tests and determined three minimum speeds of Speicher's motorcycle were 36.5, 37.4, and 37.8 miles per hour. The speed limit in the area of the accident is thirty-five miles per hour. Speicher even

testified he may have admitted to an officer he had been traveling between thirty-five to forty miles per hour. This evidence could support a finding Speicher's speed was above the speed limit and was a cause of the accident.

In addition to Speicher's speed, evidence of his failure to control the motorcycle prior to the accident could have provided further support for the jury's finding of liability. Speicher testified he applied only the back brake in an attempt to avoid the accident. His action, however, caused the bike to tip. As a result, Speicher had to let up on the brake in order to regain control of the motorcycle, get it in an upright position, and then reapply the brakes. There was also conflicting testimony regarding whether the other northbound lane of traffic, which was to the left of Speicher, was clear so he could have changed lanes in an attempt to avoid an accident.

"Only when the evidence clearly shows an abuse of discretion by the trial court will we interfere with a ruling upon a motion for new trial; such rationale being based upon the trial court's better position to evaluate the motion [for new trial]." Thompson v. Rozeboom, 272 N.W.2d 444, 446 (Iowa 1978) (citations omitted). The jury verdict effectuated substantial justice in view of the evidence presented at trial. The trial court did not abuse its discretion in so finding. The liability of the parties was definitely established. There was substantial evidence by which the jury could have found Speicher was fifty

percent liable for the accident. There was no evidence the jury award was the result of a compromise. The issue of liability should not be resubmitted on remand. Cowan, 461 N.W.2d at 160 (citing Witte v. Vogt, 443 N.W.2d 715, 717 (Iowa 1989)). We affirm the trial court's denial of Speicher's motion for a new trial on the issue of liability.

II. New trial on damages issue.

Speicher claims the damages as determined by the jury were inadequate and inconsistent with the evidence presented at trial. He contends the trial court should have ordered a new trial. We review this issue for an abuse of discretion. The amount of damages to be awarded is peculiarly a jury, not a court function. Yoch v. City of Cedar Rapids, 353 N.W.2d 95, 99 (Iowa App. 1984) (citation omitted). However, a court should see a verdict fairly and adequately compensates a plaintiff for the damages suffered. Id. The itemizations of damages required by a special finding verdict form constitute a special finding by the jury. The findings must be supported by evidence. When a special finding of the jury is not supported by the evidence, a new trial must be granted. Id.

Speicher attacks several aspects of the jury's award of damages. Speicher contends the jury's award of $1500 for past loss of body function and zero for future loss of body function was inconsistent with the evidence. He argues the

jury cannot award damages for past loss of body function without awarding damages for future loss of body function. We reject this argument. However, we agree the verdict was inconsistent with the evidence because proof was presented at trial Speicher suffered a permanent loss of body function. Doctor Beckenbaugh testified Speicher had an impairment rating of ten percent to his upper left extremity. Doctor Beckenbaugh based this permanency rating on Speicher's loss of some grip strength, limitations of rotation in his arm, and twenty percent loss in his ability to bend his wrist up and down. Although Doctor Beckenbaugh testified there was no lasting injury to the tendons and nerves in Speicher's arm, he could not predict whether Speicher would experience arthritis in his left arm. A jury award of nothing for future loss of body function is inconsistent with and unsupported by the evidence.

Speicher also contends the jury award of $500 for past physical and mental pain and suffering was inadequate. Evidence shows Speicher suffered a comminuted fracture which is a fracture that is broken in many fragments involving the wrist joint and the main bones of the forearm. Doctor Beckenbaugh testified this fracture is one of maximum severity. Speicher suffered several abrasions from the accident which needed to heal before surgical procedures could be undertaken to repair the fractured arm. He also had to endure a period of traction before surgery was performed. The surgical procedure performed on

Speicher required the use of plates and screws or pins to hold the broken bone fragments of his arm and hand in place. A second surgery was required because Speicher was unable to extend two fingers of his injured hand. Speicher experienced pain from both surgeries and during the healing process. He suffered numbness, soreness, bleeding, swelling, a lot of irritation, and permanent scars. Speicher was on pain medication and had his arm in casts and splints, which usually covered his arm from shoulder to knuckles, for four months. The jury's award of $500 is inadequate to compensate Speicher for past physical and mental pain and suffering.

We conclude the jury failed to render a verdict which was consistent with the evidence. The verdict failed to effect substantial justice between the parties. The trial court abused its discretion in refusing to grant a new trial on the issue of damages. We reverse and remand for a new trial on the issue of damages only.

III. Cross-appeal on summary judgment motion.

Stewart cross-appeals, contending the trial court erred in denying its motion for summary judgment. Stewart alleges in its motion Speicher lacked standing to pursue this lawsuit because he had already filed for bankruptcy which caused any claim against Stewart to become the property of the trustee in bankruptcy. The trial court allowed Speicher to substitute the trustee as party plaintiff, and then denied Stewart's motion for summary judgment.

In reviewing a denial of a summary judgment motion, this court is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. Adam v. Mount Pleasant Bank & Trust Co., 355 N.W.2d 868, 872 (Iowa 1984) (citing Drainage Dist. No. 119, Clay County v. Incorporated City of Spencer, 268 N.W.2d 493, 499-500 (Iowa 1978)). The burden of showing the nonexistence of a material fact is upon the moving party. Martinko v. H-N-W Assocs., 393 N.W.2d 320, 321 (Iowa 1986) (citation omitted). We afford the nonmoving party every legitimate inference that reasonably can be deduced from the evidence. Id.

Stewart argues the controlling case regarding Speicher's standing is Bronner v. Exchange State Bank, 455 N.W.2d 289 (Iowa App. 1990). We disagree. Bronner is distinguishable from the case at bar. In Bronner, the plaintiff failed to list a potential lawsuit against defendant on his petition for bankruptcy. Id. After filing for bankruptcy, plaintiff filed a cause of action against defendant. Id. Later the bankruptcy trustee abandoned plaintiff's claim against defendant. Id. at 289-90. Defendant filed a motion for summary judgment on the basis plaintiff lacked standing to bring suit because the cause of action was under the control of the bankruptcy trustee. Id. at 290. The issue in Bronner was whether the abandonment of plaintiff's cause of action against defendant related back to when plaintiff filed the action

against defendant. Id. at 291. This court held there was no relation back and defendant's summary judgment motion was properly sustained. Id.

The case at bar does not involve abandonment; Speicher's trustee did not abandon the claim against Stewart. Rather Speicher, his attorney, and his trustee filed a motion to substitute the bankruptcy trustee as party plaintiff. If a bankrupt files a cause of action in his own name, a trustee who has not abandoned the asset may move to be substituted as party plaintiff. Wood v. Lowe, 39 Cal. App. 3d 296, 301, 114 Cal. Rptr. 69, 73, (Cal. App. 1974). If the motion is to substitute a plaintiff and the correct defendant is already in the case, the test is whether (1) the original and new plaintiff have an "identity of interest," (2) defendant received sufficient notice of the action before the statute of limitations ran, and (3) defendant would not be prejudiced by the substitution. M-Z Enters. v. Hawkeye-Security Ins. Co., 318 N.W.2d 408, 411 (Iowa 1982) (citations omitted). The facts of this case satisfy the test because the interests of Speicher and his trustee were identical and arise from the same set of facts, Stewart received sufficient and timely notice through the bankruptcy schedules and amended versions, and Stewart would not be prejudiced by this substitution.

The trial court properly denied the summary judgment motion. We affirm the trial court on this issue.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.