IN THE COURT OF APPEALS OF IOWA

No. 4-015 / 93-217

FILED
FEB 25 1994
CLERK SUPREME COURT

LLOYD G. MATTHESS,

Appellant,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, COLONIAL INSURANCE COMPANY OF CALIFORNIA, AND HERITAGE MUTUAL INSURANCE COMPANY,

Appellees.

Appeal from the Iowa District Court for Linn County, August F. Honsell, Judge.

Plaintiff appeals the judgment of the district court concerning damages from an automobile accident and the district court's denial of his motion for a new trial. **REVERSED AND REMANDED.**

Hugh G. Albrecht of the Tom Riley Law Firm, Cedar Rapids, for appellant.

Stephen J. Powell of Swisher & Cohrt, Waterloo, for appellee Heritage Mutual Insurance.

Richard S. Fry of Shuttleworth & Ingersoll, P.C., Cedar Rapids, for appellee Colonial Insurance Company.

Robert R. Rush of Lynch, Dallas, Smith & Harman, Cedar Rapids, for appellee State Farm Mutual Insurance Company.

Heard by Oxberger, C.J., Donielson, Schlegel, Sackett, and Habhab, JJ.

DONIELSON, J.

The plaintiff, Lloyd Matthess, was injured in a two-car accident in Cedar Rapids on June 9, 1990. At the time of the collision, Matthess was a back seat passenger in an automobile owned by his employer, Bruce McGrath Pontiac, Inc. and test driven by Ann Leonard. The defendant, Heritage Mutual Insurance, provided coverage for the car owned by McGrath. Leonard was insured by defendant Colonial Insurance Company. State Farm Mutual Insurance provided coverage for Matthess. On June 6, 1991, Matthess filed suit against Heritage, Colonial, and State Farm, seeking compensation for injuries and damages sustained as a result of the accident.

Matthess suffered serious injuries in the accident. He was thrown partially through the rear driver's side window, almost tearing off his scalp. Matthess was treated by a cardiothoracic surgeon and a plastic surgeon and remained in intensive care for three days. When Matthess began to accumulate blood in his lungs, a chest tube was inserted to drain the fluid. Matthess remained in the hospital another six days. Upon his release, he needed assistance for nearly all of his daily living activities. During the following two-week period, Matthess complained of severe headaches, ear, shoulder, and back pain.

On August 5, 1990, Matthess' physician, Dr. Levit, determined his injuries had progressed to the extent he

could return to work. However, as time progressed, Matthess continued to complain of severe headaches, neck, and back pain. Because of the continuing pain, Matthess conferred with a neurologist, Dr. Hines. The doctor's diagnosis included a possible orbital frontal cortex injury, post-traumatic trigger point dysfunction, myofacial pain secondary to neck, shoulder and low back injury, and depression. Dr. Hines prescribed physical therapy, anti-inflammatory medication, pain medication, anti-depressants, and additional testing.

Because of the injuries, Matthess could not work full time, but was restricted to two hours per day three times per week. However, Matthess had difficulty working even under this minimal schedule. Dr. Hines ultimately concluded Matthess' neck and back problems were related to soft tissue injury, but with proper rehabilitation, he hoped these injuries would eventually heal. Dr. Hines assigned a whole body impairment rating of twenty-four percent.

Another neurologist, Dr. Neiman, also concluded the injuries were to soft tissue. Dr. Neiman also recommended therapy. Although Dr. Neiman determined Matthess had a physical impairment of sixteen percent, with therapy he would be able to obtain significant improvement in his range of motion and discomfort and might be able to decrease his impairment to as little as four percent. In June 1991, McGrath terminated Matthess as a car salesman.

Since then, Matthess has not looked for another job. Matthess obtained work at his stepfather's mechanic shop cleaning and working on automobiles. Matthess is not compensated for this work.

During the course of pre-trial proceedings, State Farm and Colonial filed identical motions seeking severance and separate trial. On December 7, 1992, the district court granted the motion to sever. Pursuant to a written stipulation, State Farm and Colonial agreed to be bound by the jury's verdict in the case with Heritage. Prior to commencement of trial, Matthess settled with the driver of the other car involved in the accident for $20,000, the limit of her policy coverage.

Following trial, the jury awarded Matthess $50,085 against Heritage. Broken down, the damages awarded included $20,085 for past medical expenses, $4500 for future medical expenses, $14,000 for lost wages, $4500 for loss of future earning capacity, $2500 for loss of body function, $1000 for future loss of body function, $2500 for past pain and suffering, and $1000 for future pain and suffering. On December 22, 1992, Matthess filed a motion for new trial. On January 11, 1993, the district court denied the motion. Matthess has appealed.

Matthess claims the damage award was inadequate. Matthess contends his injuries are severe and permanent, and the jury award does not conform to the evidence introduced at trial.

We review the trial court's ruling on a motion for a new trial for an abuse of discretion. Kiner v. Reliance Ins. Co., 463 N.W.2d 9, 13 (Iowa 1990). "In ruling on motions for new trial the trial court has a broad but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties." Iowa R. App. P. 14(f)(3). We are slower to interfere with the grant of a new trial than with its denial. Iowa R. App. P. 14(f)(4). A new trial is not a matter of right. Cowan v. Flannery, 461 N.W.2d 155, 157 (Iowa 1990). The trial court may grant a new trial where the jury apparently was influenced by passion or prejudice, resulting in either excessive or inadequate damages, where the verdict is not sustained by sufficient evidence, or is contrary to law. Iowa R. Civ. P. 244(d), (f); Ort v. Klinger, 496 N.W.2d 265, 269 (Iowa App. 1992). Whether damages are inadequate is determined on the particular facts of a case. Householder v. Town of Clayton, 221 N.W.2d 488, 493 (Iowa 1974). "A review court does not set aside a verdict simply because it might have reached a different conclusion." Klinger, 496 N.W.2d at 269.

The trial court should "see that a verdict fairly and adequately compensates a plaintiff for the damages suffered." Yoch v. City of Cedar Rapids, 353 N.W.2d 95, 99 (Iowa App. 1984). Damages should be commensurate with the injury and be sufficient to right the wrong done to the plaintiff. Householder, 221 N.W.2d at 493. "An inadequate

award merits a new trial as much as an excessive one." Witte v. Vogt, 443 N.W.2d 715, 716 (Iowa 1898); Iowa R. Civ. P. 244(d). "If uncontroverted facts show that the amount of the verdict bears no reasonable relationship to the loss suffered, the verdict is inadequate." Id.; Householder, 221 N.W.2d at 493. Itemization of damages by the jury constitutes a special finding by the jury. "When a special finding of the jury is not supported by the evidence, a new trial must be granted." Cowan, 461 N.W.2d at 158.

Appellant first asserts the award for pain and suffering is inadequate and inconsistent with uncontroverted evidence. We agree. The record is replete with descriptions of the great pain experienced by appellant during the treatment for his injuries. The testimony concerning his headaches, pain, and other suffering over the period between the accident and trial is substantial and uncontroverted. We conclude the amounts awarded for past and future pain and suffering are inconsistent with the evidence and do not effectuate substantial justice between the parties.

Appellant next asserts the award for past and future body function is inadequate and inconsistent with the uncontroverted evidence. We agree. Dr. Hines opined appellant sustained a twenty-four percent permanent partial disability. Dr. Neiman computed the whole body disability at sixteen percent. We recognize Dr. Neiman believes

appellant may, as a result of therapy, reduce the degree of disability. This has not yet occurred. Based on the evidence of appellant's present disability, we conclude the award for loss of body function is inadequate. Even if we assume appellant receives the appropriate therapy and decreases his disability rating to the four percent minimum suggested by Dr. Neiman, the cumulative effect of even this small disability exceeds the award for future loss of body function. We determine, therefore, the awards for past and future loss of body function are inconsistent with the evidence and do not effectuate substantial justice between the parties.

For the reasons stated, we determine the trial court abused its discretion in denying appellant's motion for a new trial. We therefore reverse the decision of the district court and remand this case for a new trial on the damage awards.

REVERSED AND REMANDED.

All judges concur, except Sackett and Habhab, JJ., who dissent.

SACKETT, J. (dissenting)

The issue in this appeal is whether the trial court abused its discretion in not setting aside a $50,085 jury verdict for plaintiff as being inadequate.

After the accident plaintiff spent six days in the hospital where he was treated by a cardiothoracic surgeon, a plastic surgeon and an orthopedic surgeon. The orthopedic surgeon treated plaintiff for a broken clavicle. Plaintiff had only one follow-up visit with this physician and received no further treatment from the orthopedic surgeon.

Plaintiff's plastic surgeon testified plaintiff had a nice result from the surgery and had no problems in terms of his recovery from the scalp laceration. Plaintiff's cardiothoracic surgeon testified plaintiff's injuries healed on their own and did not lead to any permanent impairment.

Plaintiff was treated by a battery of specialists after he contacted legal counsel. Plaintiff was referred to a neurologist. The cariothoracic surgeon and the plastic surgeon testified there was no evidence of neurological injury at the time of their treatment and thus a neurologist was not consulted.

There was evidence plaintiff did not regularly follow his daily medication routine. Physical therapy was prescribed. Plaintiff never went. There was evidence plaintiff's soft tissue injuries could be aided by proper

rehabilitation. No evidence of a more serious closed-head injury was reported.

Plaintiff was under the care of a chiropractor but the doctor doing an independent medical on plaintiff testified in his opinion continued manipulation of the neck by a chiropractor would be counterproductive depending upon the manipulation involved.

There was evidence plaintiff did not give accurate answers to discovery when asked about his employment after the incident.

A videotape taken over a five-day period shows plaintiff lifting heavy objects and using a forklift at his stepfather's shop.

There was conflicting evidence of the severity of plaintiff's injuries and the effect they had on his life. The evidence of a good deal of plaintiff's pain came from plaintiff's subject complaints. There was evidence that impeached plaintiff's testimony. The jury and the trial court saw the witness and were in a better position to assess their credibility. While a jury is not warranted in arbitrarily rejecting the testimony of a witness, it is not required to accept it if it finds it is not reliable even if it is not contradicted. See Kaiser v. Stathas, 263 N.W.2d 522, 526 (Iowa 1978).

The jury verdict should stand. The trial court should be affirmed.

Habhab, J., joins this dissent.