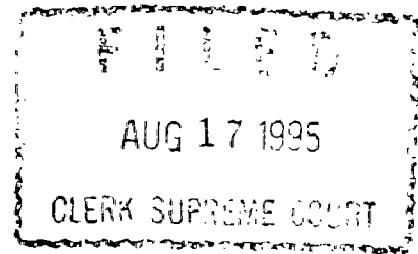


IN THE COURT OF APPEALS OF IOWA

No 5-328 / 94-0771



PAULINE ARGO,

Appellant.

vs.

**AMERICAN FAMILY INSURANCE
and AETNA,**

Appellees.

Appeal from the Iowa District Court for Scott County, James Kelley, Judge.

Pauline Argo appeals an order granting defendants' motion for a directed verdict on an award for future medical expenses. **AFFIRMED.**

Patricia Zamora of Dwyer, Wing, Zamora, Taylor & Walters, Davenport, for appellant.

Ted J. Wallace and Anne M. Henry, Bettendorf, for appellee American Family Insurance.

No appearance by Aetna.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

HAYDEN, P.J.

Pauline Argo was a passenger in a car driven by William Stinocher which was struck by another motorist, Richard Soliz. Without going to trial, Argo received the policy limits of the insurance coverage held by Soliz. She then filed an action against American Family Insurance, Stinocher's insurer, and Aetna, her insurer, for underinsured motorist benefits.

The defendants stipulated Soliz was responsible for Argo's injuries, and Argo was entitled to benefits if a verdict exceeded the limits paid by Soliz's insurance carrier. A pretrial order determined American Family would have primary coverage and Aetna secondary coverage.

At the close of evidence and prior to submission of the case to the jury, Defendants moved for directed verdict on the issue of future medical expenses. Judge Kelley reserved ruling on the issue, and the case was submitted to the jury. The jury returned a verdict in favor of Argo in the amount of \$92,969. The jury specifically awarded \$24,000 for future medical expenses. Defendant American Family then motioned for a ruling on its earlier directed verdict motion. The trial court stated the jury had no evidence before it from which an inference or determination concerning the probable cost of future medical expenses could be made. Therefore, the award for future medical expenses was stricken from the judgment.

Argo appeals. She claims there was ample evidence of the need for and cost of future medical care. She argues the jury, which had a strong medical background, was

able to arrive at a reasonable approximation of future medical expenses. Argo claims the court, in granting the directed verdict, improperly substituted its own judgment for the jury's.

I. Standard of Review.

Initially, we consider the proper scope of review. The essential character of a cause of action and the relief it seeks, as shown by the complaint, determine whether an action is at law or equity. *Moseback v. Blythe*, 282 N.W.2d 755, 758 (Iowa App. 1979). Where the primary right of the plaintiff arises from nonperformance of a contract, where the remedy is money, and where the damages are full and certain, remedies are usually provided at law. *Id.* The present action was the result of a written insurance contract; the action below was tried at law. Our scope of review is on assigned error only. Iowa R. App. P. 4.

II. Substantive Law on Future Medical Expenses.

There is a distinction between proof damages have been sustained and proof of the amount of damages. *Kanzmeier v. McCoppin*, 398 N.W.2d 826, 833 (Iowa 1987).

If it is speculative and uncertain whether damages have been sustained, recovery is denied. If the uncertainty lies only in the amount of damages, recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated.

Id. (quoting *DeWaay v. Muhr*, 160 N.W.2d 454, 460 (Iowa 1968)). "If the evidence shows damages have been sustained, we uphold recovery *so long as* the record discloses a reasonable basis from which the amount can be inferred or approximated " *Westway Trading Corp. v. River Terminal Corp.*, 314 N.W.2d 398, 403 (Iowa 1982)

(emphasis added). In order to recover future medical expenses, a plaintiff must present substantial proof of the necessity for future treatment *and* the cost thereof. *Mossman v. Amana Society*, 494 N.W.2d 676, 679 (Iowa 1993); *Stanley v. State*, 197 N.W.2d 599, 607 (Iowa 1972); *Zach v. Morningstar*, 258 Iowa 1365, 1371, 142 N.W. 440, 444 (1966); *Shover v. Iowa Lutheran Hosp.*, 252 Iowa 706, 723, 107 N.W.2d 85, 95 (1961) (emphasis added). In the case at bar, there was no evidence presented at trial concerning the cost of future medical expenses. Therefore, we must affirm the trial court.

III. Analysis on Future Medical Expenses.

Argo was examined by Dr. Robert J. Chesser, M.D., a psychiatrist. He testified Argo needed an ongoing treatment program to promote increased functioning. Apparently, Dr. Chesser made a report estimating the cost of additional tests, a psychiatrist, and a pain clinic. The report, however, was never identified or marked as a deposition exhibit, and it was not identified by Dr. Chesser as a true copy of his report. When Argo offered the report at the time of trial, defendants objected on the basis it lacked foundation. The objection was sustained. Consequently, the content of the report **was never** revealed to the jury. Since facts not properly presented during the course of trial cannot be considered upon review, *Kliege v. Iowa Employment Security Comm'n*, 206 N.W.2d 123, 126 (Iowa 1973), the content of the report cannot affect our decision.

Here, neither Dr. Chesser's report nor any other evidence was presented at trial regarding the cost of future medical expenses. The record contains no evidence of such costs. As stated above, in the absence of evidence creating a reasonable basis from which the cost of medical expenses can be inferred or approximated, the jury cannot grant an award for future medical expenses.

We have examined the arguments and case law presented by Argo, and find them unpersuasive. Argo argues the jury was able to arrive at a reasonable approximation of future medical expenses because some of its members worked in the medical field. Argo's brief states, "This jury did not speculate as to the damages, rather they inferred or approximated, based upon their own personal background and experiences, an extremely accurate amount which they determined to be appropriate for the Plaintiff and awarded that amount to her."

Iowa courts, however, have never held the cost of future medical expenses need not be proven if certain members of the jury are particularly skilled. In *Westway Trading Corp.*, 314 N.W.2d at 403-04, the case Argo cites for her above proposition, the court stated, "[W]e find evidence that plaintiff suffered damages which were not pled. Assuming the issue was nevertheless in the case, we do not find a reasonable basis in the record from which their amount could be determined. We therefore reverse the award of compensatory damages." Despite evidence damages were suffered, no award was allowed because the cost of such damages was not proven.

Many of Argo's witnesses testified Argo would need future medical treatment for her injuries. Although we agree Argo may have presented sufficient evidence concerning the *need* for future medical expenses, such evidence alone is insufficient to support an award of future medical expenses. See *Shover*, 107 N.W.2d at 95 (defendant's motion to withdraw from jury consideration of future medical expenses granted where evidence of the necessity of hospital expenses was presented, but there was no estimate of the extent or probable cost thereof). The *Shover* and *Mossman* line of cases has separated the need to prove damages from the need to prove the cost of such damages. Argo cannot claim she has proven the cost of damages merely by showing there is a need for future medical treatment. They are two distinct elements of proof.

In this case, the trial court did not err in concluding there was no evidence submitted to the jury from which it could reasonably infer future medical expenses of \$24,000. The record contains no evidence concerning those costs. Therefore, we must affirm.

AFFIRMED.