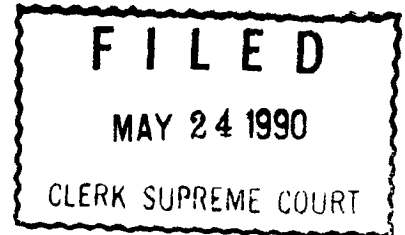


IN THE COURT OF APPEALS OF IOWA

No. 0-124 / 89-273



RICHARD J. KENNY, ANTHONY G. ROSENBERG, and KAREN KENNY as
Guardian and Next Friend of **ANTHONY ROSENBERG,**

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Appellants,

vs.

ROBERT E. WHITTLE,

Appellee.

Appeal from the Iowa District Court for Linn County,
Van D. Zimmer, Judge.

The appellants challenge a jury verdict that awarded
Kenny \$4,145.79 and Rosenberg \$431. **REVERSED AND REMANDED.**

Benjamin W. Blackstock of Affeldt & Blackstock, Cedar
Rapids, for appellants.

Gale E. Juhl of Morian, Burlingame, Pugh, Juhl &
Peyton, West Des Moines, for appellee.

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

SCHLEGEL, J.

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The plaintiffs in this personal injury action appeal a verdict in their favor. Plaintiffs requested a new trial based on the inadequacy of the damage award. Their motion was denied by the trial court. Plaintiffs appeal this denial and we reverse and remand for a new trial.

On August 5, 1986, Richard Kenny was driving his car and his stepson, Anthony Rosenberg, was a passenger. They were injured when their car was hit from behind by a motor home owned by Robert Whittle and driven by his son, Scott.

Thirteen days later Anthony Rosenberg was involved in a different motor vehicle accident. Rosenberg was taken to the hospital and was treated by Dr. Kundal.

The district court entered an order precluding Whittle from naming and calling any expert witnesses because of Whittle's failure to name any experts within the discovery deadlines.

Prior to trial, Whittle stipulated that he was negligent and that his fault caused the collision. The case proceeded to jury trial on the issue of whether Whittle's negligence was the proximate cause of the appellants' injuries, and if so, the amount of damages.

During trial the court, over the appellants' objections, permitted Dr. Richard Kundal to testify on behalf of Whittle. Dr. Kundal testified at trial about the x-rays he took of Rosenberg and his examination of Rosenberg. The court, based on the jury's verdict, entered

judgment for Kenny in the amount of \$4,145.79, and for Rosenberg in the amount of \$431. Kenny and Rosenberg now appeal.

First, the appellants contend that the verdict is contrary to law and is inadequate as a matter of law. According to the appellants, the jury awarded Kenny the exact amount of his special damages consisting of health care expenses, loss of wages, and property damage, and did not award him any recovery for past and future pain and suffering, loss of function of the body, loss of future earning capacity, and future medical expenses. Therefore, the appellants claim that an award equal to special damages is inadequate.

Second, the appellants contend that the damages were inadequate because they appear to have been influenced by passion or prejudice.

Third, the appellants claim that the district court's allowance of Dr. Kundal's testimony was: (1) an abuse of discretion; (2) contrary to a prior court order; (3) an error of law; (4) unfair; and (5) a denial of due process. Whittle counters by stating that Dr. Kundal was not called as a medical expert, but rather he was called as a treating physician. Whittle also states that Dr. Kundal was a rebuttal witness and the prior court order did not control rebuttal witnesses.

Our scope of review is for the correction of errors at law. Iowa R. App. P. 4.

Plaintiffs contend that an award equal to special damages is inadequate as a matter of law and a new trial on the issue of damages is required. See Iowa R. Civ. P. 244(f). There are certain facts that concern us on this appeal which must be specifically set out. Liability was admitted by the defendant. The only issues litigated at trial were whether the negligence of the defendant was the proximate cause of the injuries and, if so, the amount of damages for such injuries. The jury found the existence of probable cause and awarded the exact amount requested of the special damages. It failed to award any general damages. The question now becomes whether, based on these facts, an award equal to special damages is inadequate as matter of law.

In ruling upon 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. Yoch .v City of Cedar Rapids, 353 N.W.2d 95, 98 (Iowa App. 1984). Ordinarily the jury should be allowed to settle factual disputes and the verdict should not be set aside simply because the reviewing court would have reached a different conclusion. Id. Precedents in this field are of little value and each case must be decided by relating its own unique circumstances to certain well-established principles. Id.

The jury returned a verdict for the exact amount of the special damages consisting of health care expenses, loss of

wages, and property damages. No recovery was given to either plaintiff for physical and mental pain and suffering; loss of function of the body, both past and future; loss of future earning capacity; future health care expenses; or future physical and mental pain and suffering. Although the amount of damages to be awarded is peculiarly a jury, not a court, function, courts should see that a verdict fairly and adequately compensates a plaintiff for the damages suffered. Id. at 99. Where the jury found the defendant's liability had been established, the award in an amount equal to the special damages is grossly inadequate. Id. The jury apparently believed the negligence of the defendant was the proximate cause of the injury and awarded damages based on this conclusion. However, the complete failure of the jury to award any general damages is inadequate as a matter of law and therefore a new trial must be granted.

The cases cited by the defendants dealt with situations where the liability was evident, but the proximate cause was not. The court in Young v. Gibson, 423 N.W.2d 208 (Iowa App. 1988), specifically determined that the jury could have found the cause of the injuries to be from other injuries. However, the one injury which could not have been from another accident was the property damage which the jury properly awarded. In this case, the jury gave damages for health care and loss of wages in addition to property damages. This necessarily must include some type

of general damages. There is a possibility that Rosenberg's injuries could have arisen from the subsequent accident, but if that is the case the jury should not have given him health care or lost wages. In any event, there is no evidence to suggest that Kenny's injuries arose from anything except the accident caused by the defendant and he should be entitled to some amount of general damages, be it only a nominal amount. We reverse and remand for a new trial.

As a general rule, new trials will be granted as to the whole case and on all the issues. Id., at 100. Where it appears from the jury award there was a compromise on liability, a new trial should be granted on all of the issues. Id. The nature of this case suggests that a compromise may have been reached by the jury. The second accident suffered by one of the plaintiffs raises a number of questions concerning proximate cause, and it is conceivable that the jury compromised on the issue of damages. Therefore, we remand for a new trial on all the issues.

We will address only one of the remaining issues because only that issue is likely to reoccur on remand. The issue is whether the trial court abused its discretion in permitting the defendant's witness, Dr. Kundal, to testify in spite of a court order denying the defendants the right to call a medical expert as a discovery sanction. There is no question the sanction was properly

imposed on the defendant by the trial court. The sanction denied the defendant the right to call a medical expert. Dr. Kundal was clearly a medical expert. The attempt by the defendant to characterize Dr. Kundal as a person merely testifying from personal observations is misplaced. An examination of Dr. Kundal's testimony shows that he was giving his medical opinion based on his examination of the x-rays of plaintiff Anthony Rosenberg. In other words, the defendant was using this witness for the specific purpose excluded by the court order. Admissibility of expert testimony is discretionary. Poyzer v. McGraw, 360 N.W.2d 748, 752 (Iowa 1985). It was clearly an abuse of the court's discretion to exclude any expert testimony, cause the plaintiff to rely on such an exclusion, and then allow the defendant to call an expert less than three hours before trial. The result of such an action is to prejudice the only party who complied with discovery requirements and to benefit the party who did not.

REVERSED AND REMANDED.

Oxberger, C.J., concurs; Habhab, J., dissents.

HABHAB, J. (dissenting)

I respectfully dissent. Our charge here is "to determine whether the trial court abused its discretion in not granting a new trial in light of the award made, not whether a higher verdict would have been justified." Young v. Gibson, 423 N.W.2d 208, 210 (Iowa App. 1988). As the Iowa Supreme Court noted in Waddell v. Peet's Feeds, Inc., 266 N.W.2d 29, 32 (1978):

"In jury trials controverted issues of fact are for the jury to decide. This is what juries are for. To hold that a judge should set aside a verdict just because he would have reached a different conclusion would substitute judges for juries. It would relegate juries to unimportant window dressing. That we cannot do."

Id. (quoting Lantz v. Cook, 256 Iowa 409, 413, 127 N.W.2d 675, 677 (1964)). I would find the trial court did not abuse its discretion in not granting appellants a new trial.