FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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JOHN ROBERT HORNER,	)	
Plaintiff-Appellee/ Cross-Appellant,	)	
vs.	)	
KYLE RICHARD KLUENDER and **VERLA M. KLUENDER,**	)	8-481 87-1514
Defendants-Appellants/ Cross-Appellees.	)	

Appeal from the Iowa District Court for Woodbury County (No. 94026-C), Phillips S. Dandos, Judge.

Defendants appeal from a jury award of $138,400 to the plaintiff for injuries sustained in a car accident. **AFFIRMED.**

William G. Deck of Deck & Deck, Sioux City, for defendants-appellants/cross-appellees.

Charles T. Patterson and Gregg E. Williams of Eidsmoe, Heidman, Redmond, Fredregill, Patterson & Schatz, Sioux City, for plaintiff-appellee/cross-appellant.

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

PER CURIAM

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Verla and Kyle Kluender, defendants, appeal a jury verdict which awarded the plaintiff, John Horner, $138,400 for injuries sustained in an automobile accident. Plaintiff cross-appeals. Appellants argue the district court erred 1) in not ordering a new trial, and 2) in making several evidentiary determinations. We affirm.

On September 29, 1985, the plaintiff and defendant Kyle Kluender were involved in an automobile collision which occurred at the intersection of Morningside Avenue and Davis Street in Sioux City, Iowa. Mr. Horner sustained neck and back injuries. Because of his injuries, he is unable to return to his former occupation, construction work.

Appellants argue the jury award of $138,400 is excessive, not supported by substantial evidence, and contrary to law. The district court has broad discretion in determining whether to grant a new trial. Thompson v. Rozeboom, 272 N.W.2d 444, 446 (Iowa 1978). The trial court will not alter or set aside a jury verdict unless it is flagrantly excessive or inadequate or so out of reason as to shock the conscience or sense of justice or raises a presumption it is the result of passion, prejudice, or ulterior motive or lacks evidentiary support. Schmidt v. Jenkins Truck Lines, Inc., 170 N.W.2d 632, 659 (Iowa 1969).

The ruling will only be disturbed on appeal if there is a clear abuse of discretion. Id. at 661; Thompson, 272 N.W.2d at 446. In this respect, we view the evidence in a light most favorable to the verdict in assessing damages. Beek v. Aquaslide 'N' Dive Corp., 350 N.W.2d 149, 164 (Iowa 1984).

After a careful review of the record, we decline to overturn the award. The plaintiff's expert, Jerome Sherman, testified that Mr. Horner's loss of earnings and loss of future earning capacity was $169,628. Mr. Horner submitted approximately $4,474 in hospital and medical bills. The jury's award was well within the limits set by the evidence. We therefore find the jury award as not excessive and is supported by substantial evidence.

The defendants further object that the award of damages was contrary to the law as stated in the instructions. We parenthetically note that the defendants did not object to any of the testimony of plaintiff's economic expert, Dr. Sherman. In addition, the jury was instructed on loss of earning capacity and impairment of earning capacity without objection by defendants.

The defendants argue there was no evidence to support an impairment of an ability to work.

> Impairment of physical capacity creates an inference of lessened earning ability in the future. Medical testimony is, of course, admissible in support of this element of damage but not always essential. The basic element to be determined in the matter of claimed impairment of future earning capacity is the reduction in value of the power to earn . . . .

Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516, 525 (Iowa App. 1977). Seven doctors examined and treated the plaintiff in conjunction with this injury. Six testified at trial. All testified concerning the injuries Mr. Horner sustained to his neck and back.

When we review the testimony of the witnesses, we conclude there is substantial evidence to support a finding that the plaintiff sustained impairments of physical capacity. The testimony in this respect was more than sufficient to generate a jury question on the issue of physical impairment. We affirm the trial court in this respect.

Appellants also raise evidentiary considerations. They assert the district court erred 1) in admitting exhibit #28 into evidence; 2) in excluding exhibit #103 (court's exhibit #2; 3) in excluding parts of Dr. Nitz's testimony; 4) in permitting Dr. Stevens to testify concerning the plaintiff's inability to return to work; and 5) in permitting Mr. Parrott to testify regarding wage and salary.

We turn first to defendants' contention that the trial court committed reversible error when it allowed into evidence the report (Exhibit 28) of plaintiff's economist, Jerome Sherman. Dr. Sherman testified live at the trial. At the conclusion of his direct testimony, the plaintiff offered Exhibit 28, which represented a summary of Dr.

Sherman's testimony. The defendants' counsel objected under Evidentiary Rule 403 and on the grounds of hearsay. The objections were overruled.

We hold the trial court did not commit reversible error when it overruled defendants' objection. But see Carter v. Wiese Corp., 360 N.W.2d 122 (Iowa App. 1984).

The document was prepared by the witness and summarized his testimony. He was available at trial and cross-examination took place. The jury was properly instructed that the opinions expressed by the economist were not binding or conclusive on the jury. Although we do not find error, we do not encourage the practice of allowing such reports to go to the jury for it may tend to place undue emphasis on certain portions of the witnesses' testimony. We do not find such to be the case here, but nonetheless advance this cautionary statement for the benefit of the trial bench and bar.

Concerning the excluded testimony and documents, we find no error. Exhibit #103, medical records from the Mayo Clinic in Rochester, Minnesota, were properly excluded. They concern an exam which took place eight years earlier and were not introduced by a person who had knowledge of its compilation. Iowa Rules of Evidence 401 & 803(6). The trial court also properly excluded the testimony of Dr. Nitz regarding the permanency of cervical strain as affected by resolution of litigation. This testimony was

not relevant because, as Dr. Nitz himself testified, he believed Mr. Horner was not exaggerating or lying regarding his physical symptoms. Iowa Rule of Evidence 401.

Finally, we find no error in permitting the testimony of Dr. Stevens and Mr. Parrott. The defendants objected to a hypothetical question presented to Dr. Stevens concerning Mr. Horner's inability to return to work. Admittedly, the question is not well framed and is unclear. The defendants objected to this question because it assumed a fact not in evidence; specifically, that Mr. Horner was unable to return to construction work. We disagree. Mr. Horner testified both on direct and upon cross-examination concerning this issue. Defendants object to the admission of Mr. Parrott's testimony concerning future wages or salary. Mr. Parrott was the vice president of the plaintiff's employer at the time of the accident. His testimony is relevant to the plaintiff's future earning power in lieu of his injury. Iowa Rule of Evidence 401.

The plaintiff cross-appeals. He states the district court erred in not granting his motion for a directed verdict. In reviewing a motion for directed verdict, we view the evidence in a light most favorable to the non-moving party to determine if reasonable minds could differ on the issue. Harvey v. Palmer College of Chiropractic, 363 N.W.2d 443, 444 (Iowa App. 1984). We find the issue of the plaintiff's negligence properly at

issue at the time of his motion. Therefore, we affirm the trial court in this regard.

For the above reason, we affirm the judgment of the district court on the jury verdict awarding the plaintiff $138,400.

AFFIRMED.