STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1364

Drake Lallas,
Respondent,

vs.

Lolita Elaine Paquette,
Appellant,

American Family Mutual Insurance Company,
Intervenor.

Filed July 14, 2009
Affirmed
Collins, Judge[*]

Ramsey County District Court
File No. 62-C7-06-007380

Pamela F. Rochlin, Rochlin Law Firm, 5200 Willson Road, Suite 412, Edina, MN 55424 (for respondent)

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Considered and decided by Minge, Presiding Judge; Worke, Judge; and Collins, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

COLLINS, Judge

Appealing from the judgment following a jury verdict and the district court's denial of her post-trial motions, appellant contends that (1) the award for future medical expenses is perverse and represents a compromise between the right to recover and proved damages sustained; (2) the evidence is insufficient to allow consideration of respondent's claim for future medical expenses; (3) the award is excessive because it is contrary to the evidence and because the district court failed to instruct the jury on the adjustment of future damages awards to present value; and (4) the district court abused its discretion by excluding evidence of the settlement of respondent's lawsuit stemming from a previous accident. We affirm.

FACTS

In 2003, respondent Drake Lallas was involved in two automobile accidents. The first accident occurred in August, and the second in November, when a vehicle driven by appellant Lolita Paquette struck Lallas's vehicle from behind. Approximately two weeks after the August accident, Lallas started a job that required physical labor. Although Lallas experienced lower-back aches and soreness, his daily activities were not limited. Following the November accident, however, Lallas experienced severe back pain and was prescribed pain medication. Lallas attended physical therapy, as recommended by his physician, but reported no improvement. He was referred to Midwest Spine Institute, where ultimately he was seen by Louis Saeger, M.D., the clinic's pain specialist.

Dr. Saeger performed a series of tests and determined that Lallas's pain was caused by injury to the facet joints in his back. Dr. Saeger prescribed a radiofrequency neurolysis treatment, from which Lallas experienced considerable relief. Lallas was able to return to normal activities, including athletics. Lallas had a second treatment that also was effective.

Lallas sued the driver and the owner of the vehicle in the August accident and Paquette in a single action. The district court granted a motion to sever, and the claims arising from the August accident ultimately were settled. The suit against Paquette was tried to a jury. The jury found both drivers negligent, and attributed 75% of the fault to Paquette and 25% to Lallas. The jury also found that Lallas had sustained a permanent injury, was entitled to past medical expenses and lost wages, and was entitled to $286,110 for future medical expenses. The jury awarded nothing on Lallas's claims for past or future pain, disability, or emotional distress. The district court ordered judgment in accordance with the jury verdict, less collateral-source payments, and denied Paquette's motions for judgment as a matter of law, remittitur, and a new trial. This appeal followed.

D E C I S I O N

I.

As a threshold matter, Lallas argues that Paquette, as the defendant, does not have standing to request a new trial based on an inadequate jury verdict. Paquette counters that the verdict is evidence of a compromise, not that the verdict is inadequate.

A defendant does not have standing to challenge the adequacy of a jury verdict but does have standing to argue that the jury's verdict represents a compromise. *Thiesen v. Hellermann*, 242 Minn. 218, 222, 64 N.W.2d 762, 765 (1954). A reviewing court should not set aside a jury verdict for damages "unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict." *Raze v. Mueller*, 587 N.W.2d 645, 648 (Minn. 1999) (quotation omitted). "[A] new trial should be ordered if it appears that the damages awarded were a compromise between the right to recover and the proved damages sustained." *Schore v. Mueller*, 290 Minn. 186, 190, 186 N.W.2d 699, 702 (1971).

Because the jury awarded nothing for past or future pain, disability, or emotional distress, but awarded $286,110 for future medical expenses for pain-relief treatments, Paquette argues that this verdict is impossible to reconcile unless it represents a compromise verdict.

The Minnesota Supreme Court has held that a jury's verdict is invalid when the verdict does not include proven damages for lost wages, pain and suffering, or permanent injuries sustained but rather seemingly accounted only for medical expenses. *Walser v. Vinge*, 275 Minn. 230, 2333-35, 146 N.W.2d 537, 539-40 (1966). But when a jury's verdict awarded medical expenses and an amount that was inadequate to cover the lost earnings and other general damages, as was apparently intended, the supreme court concluded that there was "no evidence of passion and prejudice entering into the jury's determination on the issue of plaintiff's right to recover and that the verdict rendered was

not the result of a compromise." *Fortier v. Newman*, 248 Minn. 69, 74, 78 N.W.2d 382, 386 (1956).

Here, the jury awarded damages for past and future medical expenses and lost wages, found that Lallas had suffered permanent injury, and found that he was 25% negligent. This differs from *Walser*, in which the jury awarded only medical expenses. 275 Minn. at 283, 146 N.W.2d at 539. Here, the record supports the conclusion that the jury properly considered each question on the verdict form and determined that some elements of damages had been proved while others had not.

Paquette asserts that, because the jury did not award damages for pain and suffering, it necessarily found that no such pain and suffering had occurred. But the jury could simply have determined that the past treatments had been effective at alleviating the pain and that future treatments will do likewise. Thus, rather than compensating Lallas for future pain, the jury apparently elected to award him the wherewithal to alleviate it. Moreover, the jury attributed 25% of the fault for the accident to Lallas, which belies the notion of a compromise between the right to recover and the proved damages sustained.

As in *Fortier*, there is no evidence of passion or prejudice entering into the jury's verdict. Viewing the evidence "as a whole and in the light most favorable to the verdict," *Raze*, 587 N.W.2d at 648, we are satisfied that this verdict was not the result of a compromise between Lallas's right to recover and proved damages sustained, and the district court's denial of Paquette's motion for a new trial was not erroneous.

II.

Paquette contends that the evidence was insufficient to support consideration of future medical expenses and, therefore, that she is entitled to judgment as a matter of law (JMOL). A district court may grant JMOL on an issue when, following a jury trial, there is no legally sufficient evidentiary basis for a reasonable jury to have found for a party on that issue. Minn. R. Civ. P. 50.01(a), 50.02. On appeal from the denial of a JMOL motion, this court will affirm if there is "any competent evidence reasonably tending to sustain the verdict." *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998) (quotation omitted).

In asserting a claim for damages for future medical expenses, the plaintiff must (1) demonstrate that future medical treatments will be required and (2) establish the amount of the damages. *Myers v. Hearth Techs., Inc.*, 621 N.W.2d 787, 793 (Minn. App. 2001), *review denied* (Minn. Mar. 13, 2001). Both requirements must be substantiated through competent evidence, which ordinarily is established through expert testimony. *See Pietrzak v. Eggen*, 295 N.W.2d 504, 507 (Minn. 1980) (holding that expert testimony established that the necessity of future knee surgery was more likely than not); *see also Lamont v. Indep. Sch. Dist. No. 395*, 278 Minn. 291, 295, 154 N.W.2d 188, 192 (1967) (holding that jury cannot compute future medical expenses "blindly without expert testimony").

Paquette argues that Lallas failed to prove beyond a preponderance of the evidence the necessity of future medical treatment and that Dr. Saeger's testimony amounted to "mere plausible anticipation." The evidence need not establish future damages to an

absolute certainty; rather, the jury must determine that the necessity of such treatment is more likely than not. *See Dornberg v. St. Paul City Ry.*, 253 Minn. 52, 60, 91 N.W.2d 178, 185 (1958) (holding that standard was satisfied when expert testified future treatment "*might* be necessary"); *Mueller v. Sigmond*, 486 N.W.2d 841, 844 (Minn. App. 1992) (holding that standard was satisfied when expert stated that future surgery was "very likely," "reasonably certain," and "very possible"), *review denied* (Minn. Aug. 27, 1992).

Here, the record supports the jury's determination that Lallas will need future medical care. Dr. Saeger testified that, based on Lallas's historical pattern, the type of care required likely would be continued treatments to alleviate pain and that those treatments would be required "[p]robably once a year or so." Dr. Saeger also testified about treatment costs, thereby providing a basis for the jury to determine the necessity of future treatments, as well as the costs that Lallas will reasonably incur related to those treatments. Thus, the district court did not abuse its discretion in denying Paquette's motion for JMOL on this ground.

III.

Paquette next contends that the jury's future damages award is excessive, arguing that the award is contrary to the evidence and that the district court failed to instruct the jury on the adjustment of future damages to the present value. Thus, asserts Paquette, the district court abused its discretion by declining to grant a new trial or remittitur.

A district court may grant a new trial because of excessive damages that appear to have been given under the influence of passion or prejudice or are not justified by the evidence. Minn. R. Civ. P. 59.01(e), (g). A district court possesses "the broadest possible discretion in determining whether a new trial should be granted for excessive damages." *Bisbee v. Ruppert*, 306 Minn. 39, 48-49, 235 N.W.2d 364, 371 (1975). Likewise, a district court has the discretion to grant or deny remittitur, and appellate courts will not reverse unless there was "a clear abuse of discretion." *Kwapien v. Starr*, 400 N.W.2d 179, 184 (Minn. App. 1987).

Award contrary to the evidence

We conclude that the award is justified by the evidence and the asserted calculations drawn from the evidence, including that (1) Lallas would need annual treatments at a cost similar to that incurred in prior procedures, with adjustments for inflation; (2) treatments that include diagnostic blocks for the next 51 years, Lallas's life expectancy, would total $543,150; (3) the cost over 51 years without the diagnostic blocks, which may not be necessary throughout Lallas's life, would be $336,600; and (5) an expert believed 15% of Lallas's injuries were attributable to the first accident. The jury awarded $286,110, which coincides with a 15% deduction from $336,600. This record supports the jury's verdict, and the district court did not abuse its discretion by denying Paquette's motions for a new trial or remittitur on this ground.

Jury instruction on adjustment to present value

"District courts are allowed considerable latitude in selecting language used in the jury charge and determining the propriety of a specific instruction." *Morlock v. St. Paul*

Guardian Ins. Co., 650 N.W.2d 154, 159 (Minn. 2002). An objection to a jury instruction is timely if the party objects prior to delivery of the instruction, upon being given the opportunity by the district court, or promptly after learning that the instruction has been given or the request for the instruction has been refused. Minn. R. Civ. P. 51.03(b).

"A court may consider a plain error in the instructions affecting substantial rights that has not been preserved as required . . . ." Minn. R. Civ. P. 51.04(b). Absent a request, the district court's failure to give a particular instruction is reversible error only if the omission is an error with respect to fundamental law. *Anderson v. Ohm*, 258 N.W.2d 114, 118 (Minn. 1977). An error in a jury instruction is likely to be considered fundamental if the error destroys the substantial correctness of the entire jury charge, results in a miscarriage of justice, or causes substantial prejudice to a party. *Lindstrom v. Yellow Taxi Co. of Minneapolis*, 298 Minn. 224, 229, 214 N.W.2d 672, 676 (1974).

Paquette concedes that she had full opportunity and did not object to the jury instructions before or after they were given to the jury, but argues that the district court's failure to instruct the jury as to the adjustment of an award for future damages was an error of fundamental law that requires a new trial. Paquette primarily relies on *Olsen v. Special Sch. Dist. No. 1*, 427 N.W.2d 707 (Minn. App. 1988). *Olsen* arose from the legislature's repeal of a statute directing the district court to discount certain future damages awards. We concluded that the repeal was retroactive and applied to Olsen's pending case. 427 N.W.2d at 713. Because the jury did not "benefit from the type of

discounting instruction that existed prior to the enactment of [the discount statute]," we held that a new trial was necessary. *Id.* at 714.

However, *Olsen* is distinguishable from this case in that there the parties were precluded from requesting such an instruction or objecting to its absence because of the statutory scheme that existed at the time of trial. A new trial was required to afford the parties the opportunity to present to the jury evidence of discounting factors and "*request an instruction* on discounting future medical expenses to present value." *Id.* at 714 (emphasis added). Here, Paquette had the opportunity to request such an instruction and to object to its absence but did not do so.

Moreover, the absence of an instruction on the adjustment to present value did not substantially prejudice Paquette. The pattern instruction invites an adjustment not only for interest, but also for inflation. 4A *Minnesota Practice*, CIVJIG 90.25. It is reasonable that a jury would find that the cost of future medical treatments will increase due to inflation. This increase in cost may very well offset any decrease in the award attributable to the fact that invested money earns a return, at least such that we cannot conclude that there was substantial prejudice caused by the omission of such instruction.

Because we cannot determine that Paquette has suffered substantial prejudice or a miscarriage of justice, the district court did not commit an error of fundamental law by declining to sua sponte instruct the jury on the adjustment of future damages to present value.

IV.

Finally, Paquette contends that the district court erred by excluding evidence regarding Lallas's suit against both the driver and the owner of the vehicle involved in the August accident. Absent an erroneous interpretation of the law or an abuse of discretion, the district court's ruling on whether to admit evidence will not be disturbed. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997).

Settlements or offers to compromise are not admissible to prove liability, but may be offered for another purpose, such as to prove bias or prejudice of a witness. Minn. R. Evid. 408. Paquette maintains that she intended to use the evidence of settlement of the other case to demonstrate bias, as Lallas "had every reason to minimize his injuries from the [August] accident, for he had already settled his claim with regard to that accident." Paquette also complains that she was unable to question Lallas's expert as to whether the settlement on the prior accident was a factor in his change of apportionment of the respective injury caused by each accident from a 30/70 split to a 15/85 split.

The district court acted within its discretion by excluding the evidence regarding the settlement of the other lawsuit. The jury was not kept from hearing about the August accident or about Lallas's physical condition thereafter. Indeed, the jury accounted for the August accident when it reduced the award for future medical expenses by 15%, which is consistent with the expert's apportionment. Further, evidence of the prior settlement would not serve to demonstrate bias in any way in which that evidence about Lallas's injuries from the August accident did not. There is no evidence supporting a theory that either Dr. Saeger or Lallas altered their testimony after the settlement

occurred. Nor is there evidence to support that Dr. Saeger had any motive to help Lallas obtain a greater amount than he deserved.

Because evidence of the settlement would not serve to demonstrate bias or prejudice, the district court did not abuse its discretion by excluding this evidence.

Affirmed.