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IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 19-1983
Polk County No. LACL139112

ROBYN MENGWASSER,

Plaintiff-Appellant,

vs.

JOSEPH COMITO and CAPITAL CITY FRUIT COMPANY,

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
THE HONORABLE ROBERT HANSON, JUDGE

APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

This case should be transferred to the Iowa Court of Appeals because it is a case that presents the "application of existing legal principles." Iowa R. App. P. 6.903 (2)(d) and Iowa R. App. P. 6.1101 (3)(a).

STATEMENT OF THE CASE

Nature of the Case:

Appellant Robyn Mengwasser appeals an Order denying her Partial Motion for a New Trial after the Court entered judgment against the Appellees following a jury trial. Also, following the jury trial the trial court ordered Appellant Robyn Mengwasser to pay costs pursuant to Iowa Code §677.10, and from the same Order denying her Partial Motion for a New Trial the Appellant also pursues this appeal.

Course of Proceeding and Disposition Below:

On September 27, 2017, a Petition at Law and Jury Trial Demand was filed on behalf of the Plaintiff Robyn Mengwasser. (Second Amd. App. Vol. I, pgs. 27-31). Plaintiff later amended her petition, and on January 9, 2018 the Defendants answered Ms. Mengwasser's petition. (Second Amd. App. Vol. I, pgs. 38-42).

On November 26, 2018, Plaintiff Robyn Mengwasser filed her designation of expert witnesses where she designated all "treating medical personnel identified in discovery and medical records…" as witnesses who would testify to matters pertaining to "treatment, diagnosis, prognosis, mechanism of injury, and causation

for injuries sustained due to the actions of Defendant." (Second Amd. App. Vol. I, pg. 49).

On March 4, 2019, more than three months before trial, attorneys for Plaintiff Robyn Mengwasser produced a written report from the Robyn Mengwasser's chiropractor, Dr. Randy Dierenfield. (Second Amd. App. Vol. III, pg.4). Dr. Dierenfield concluded in his report that Robyn Mengwasser's injuries were the result of the September 28, 2015 motor vehicle collision at issue in this case. (Second Amd. App. Vol. III, pg. 5).

Discovery continued without interruption until on May 29, 2019, the Defendants filed a Motion to Strike testimony of Randy Dierenfield, D.C. and in so doing contending that Dr. Dierenfield's opinion testimony was untimely. (Second Amd. App. Vol. II, pg. 84-86). Plaintiff resisted the Motion to Strike noting that Dr. Dierenfield is a treating physician, and that his opinions formed during the course of his treatment of Robyn Mengwasser are not required to be issued as a written report. (Second Amd. App. Vol. I, pgs. 90-92). The trial court heard arguments from the parties regarding the motion to strike on June 14th, and on June 16th entered an order granting the Defendants' motion to strike the testimony of Dr. Dierenfield citing the absence of his opinions in the chiropractic records. (Second Amd. App. Vol. I, pgs. 122-123).

STATEMENT OF THE FACTS

On September 28, 2015, the Plaintiff Robyn Mengwasser was involved in a motor vehicle collision. (Second Amd. App. Vol. I, 28). Robyn exited the off-ramp of I-35 and stopped at the intersection with Mills Civic Parkway in West Des Moines, Iowa. (Second Amd. App. Vol. I, 28; 392 Tr. 131:21-24). While Robyn stopped at this intersection, the front of Defendant Comito's vehicle collided with the rear-end of Robyn's vehicle. (Second Amd. App. Vol. I, 393 Tr. 132:15-25, 394 Tr. 133:1-6). Immediately following the collision, Plaintiff Robyn Mengwasser and Defendant Joseph Comito proceeded into the local Target parking lot to assess the damage to their vehicle. (Second Amd. App. Vol. I, 394 Tr. 133:16-25). Fault or Liability of the Defendants was not contested at trial. (Second Amd. App. Vol. I, 437).

Although Robyn did not experience immediate pain at the scene of the collision, she did on the same day begin to experience significant neck pain and sought treatment at a local emergency room. (Second Amd. App. Vol. I, 394 Tr. 133:9-16). Unfortunately, Robyn continued to experience significant neck pain and sought continued treatment on October 5, 2015 with her chiropractor, Dr. Randy Dierenfield. (Second Amd. App. Vol. II, 18) (Second Amd. App. Vol. I, 295 Tr. 20:6-8).

On June 24, 2019, a five-day jury trial commenced resulting in the jury finding that the Defendants caused damage to the Plaintiff Robyn Mengwasser. (Second Amd. App. Vol. 1, 437).

At trial, Robyn Mengwasser presented evidence that her neck pain and functional limitations were the result of the September 28, 2015 motor vehicle collision. (Second Amd. App. Vol. II, 21). Robyn Mengwasser also presented evidence that the collision impacted her ability to work in her profession. (Second Amd. App. Vol. II, 21). And she also presented evidence that her physical condition would require future treatment. (Second Amd. App. Vol. II, 21).

Defendants presented to the jury reports of their experts contending that the September 28, 2015 collision could not have permanently injured Robyn. (Second Amd. App. Vol. I, 194). Defendants also presented evidence from Dr. Harbach, who concluded that Robyn had permanent injury due to the collision as evidenced by his impairment rating for Robyn. (Second Amd. App. Vol. II, 447).

The jury determined that the Plaintiff's past pain and suffering amount totaled $10,950.00, and that her past loss of function of full mind and body damage amount totaled $1,755.00. (Second Amd. App. Vol. I, 437). The jury did not find any damage total for future pain and suffering or future loss of function of full mind and body, nor did the jury find any damage total for loss of future earning capacity. (Second Amd. App. Vol. I, 437). The trial court entered judgment against the Defendants on July 1, 2019. (Second Amd. App. Vol. I, 439).

On July 3, 2019, the Defendants filed an application for taxation of costs under Iowa Code §677 that was resisted by the Plaintiff Robyn Mengwasser on July 11th. (Second Amd. App. Vol. I, 441-443; 445-447). On July 16, 2019, Plaintiff Robyn Mengwasser filed a partial motion for a new trial pursuant to Iowa Rule of Civil Procedure 1.1004 which in turn was resisted by the Defendants on July 24, 2019. (Second Amd. App. Vol. I, 452-461). A hearing on both matters was held, and district court on November 10. 2019 granted the Defendants application for taxation of costs in an amount totaling $5,138.30 while in the same order denying the Robyn Mengwasser's partial motion for a new trial. (Second Amd. App. Vol. I, 462-463). From that order the Plaintiff Robyn Mengwasser brings this appeal.

ARGUMENT

I: In limiting the testimony of Robyn Mengwasser's treating chiropractor, Dr. Randy Dierenfield, the trial court abused its discretion because Dr. Dierenfield is a treating physician forming his opinions during the course of treating Robyn Mengwasser rather than an expert retained in anticipation of litigation.

Preservation of Error

Plaintiff Robyn Mengwasser preserved error by resisting the Defendants' May 29, 2019 motion to strike the testimony of Dr. Randy Dierenfield. (Second Amd. App. Vol. I, 90-92). Plaintiff Robyn Mengwasser also preserved error through submitting Dr. Dierenfield's testimony as an offer of proof at trial. (Second Amd. App. Vol. I, 323 Tr. 49:2-25, 330 Tr. 56:1-23).

Standard of Review

Generally, rulings concerning trial testimony of expert witnesses are discretionary, so this Court will review the matter to determine if the trial court abused its discretion. *Milks v. Iowa Oto-Head & Neck Specialists, P.C.*, 519 N.W.2d 801, 805 (Iowa 1994). However, if a motion is based on a legal question, then the review is for errors at law. *Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc.,* 714 N.W.2d 603, 609 (Iowa 2006). Plaintiff/Appellant sought a new trial on this issue under Iowa Rule of Civil Procedure 1.1004(8) concerning "Errors of law occurring in the proceedings…" Iowa R. Civ. P. 1.1004(8).

Argument

A. *The New Trial should be a Partial New Trial*

A verdict form was filed in the above-captioned case on July 1, 2019. The jury answered "Yes" to the question posed on the verdict form regarding the Defendant's fault causing harm to the Plaintiff. (Second Amd. App. Vol. I, 437).

However, the jury only awarded damages to the Appellant/Plaintiff Robyn Mengwasser for past pain and suffering and past loss of function of full mind and body. The Court has held that where issues of a new trial are concerned, issues that are distinctly separate can be tried separately without having a full new trial:

> "The general rule is that when a new trial is granted, all issues must be retried." *McElroy v. State,* 703 N.W.2d 385, 389 (Iowa 2005). We may narrow the scope of the retrial under some circumstances:
>
> ["]As a condition to the granting of a partial new trial, it should appear that the issue to be tried is distinct and separable from the

> other issues, and that the new trial can be had without danger of complications with other matters.[”]
>
> *Id.* (quoting *Larimer v. Platte*, 243 Iowa 1167, 1176, 53 N.W.2d 262, 267–68 (1952)). In applying these principles to personal injury cases, we have said, “If there is no evidence in the record that the jury's determination of fault was compromised or affected by the evidence of damages, the issue of liability should not be resubmitted on remand.” *Thompson v. Allen*, 503 N.W.2d 400, 401 (Iowa 1993) (citing cases).

Bryant v. Parr, 872 N.W.2d 366, 380 (Iowa 2015). The only issues with the new trial are to those of future damages as the jury has determined that the Plaintiff was, in fact, damaged by Defendant’s conduct, and as such, whether there was in fact past pain and suffering or medical expenses, or as in *Bryant*, any issues regarding liability, that of whether Defendant was responsible for any of Plaintiff’s injuries, has no need of being retried. “Generally, ‘it [is] unfair to require a new trial on all issues “when the verdict establishing liability was not the result of a compromise trading off liability for reduced damages.”’ *Thompson*, 503 N.W.2d at 402 (quoting *Vorthman v. Keith E. Myers Enters*., 296 N.W.2d 772, 778 (Iowa 1980)).’ ” *Id.*

Crash Reconstruction expert testimony was submitted by both Plaintiff and Defendants, and the jury has made a determination that injury occurred, and Defendant was at fault for said injury with the full knowledge and testimony of both parties of the details of the crash.

"A new trial need not be granted on the whole case if the court's error, if any, is limited to certain issues. *Powell v. Khodari–Intergreen Co*., 334 N.W.2d 127, 132 (Iowa 1983)." *In re Marriage of Wagner*, 604 N.W.2d 605, 609 (Iowa 2000).

A new trial is not required to determine if there was any liability for Plaintiff's injuries by Defendant or that there was injury, as the Jury has already determined that there was, and Plaintiff contends the court's error was solely on issues that do not concern liability of the injuries or even that there was an injury, as Past Loss of Mind and Body and Past Pain and Suffering have been awarded, but on damages for the future. Therefore, Appellant requests a Partial New Trial.

B. *Dr. Dierenfield's Treating testimony should have been allowed, and the Plaintiff was prejudiced in not being able to have her current treater testify about her current and future treatment.*

Defendants in their May 29, 2019 motion to strike the testimony of the chiropractor Dr. Randy Dierenfield claimed that Dr. Dierenfield is an expert required to provide a report pursuant to Iowa Rule of Civil Procedure 1.500(2)(b). However, Dr. Dierenfield was not an expert retained in anticipation of litigation. Instead, Dr. Dierenfield is Robyn Mengwasser's treating physician. Thus, the Iowa Rule of Civil Procedure 1.500(2)(b) deadlines referenced in the trial scheduling order is inapplicable to Dr. Dierenfield, and the trial court abused its discretion in excluding his testimony.

Iowa Rule of Civil Procedure 1.500(2)(b) concerns disclosure of expert testimony pertaining to a witness who is "retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert witness testimony. Iowa R. Civ. P. 1.500(2)(b). On the other hand, Iowa Rule of Civil Procedure 1.500(2)(c) covers disclosures of witnesses who do not need to provide a report, but instead provide a disclosure stating a "summary of facts and opinions to which the witness is expected to testify." Iowa R. Civ. P. 1.500(2)(c). Plaintiff/Appellant Robyn Mengwasser submits that Dr. Dierenfield falls under 1.500(2)(c) as a treating provider.

Under Iowa law, only those opinions and facts acquired by an expert in anticipation of litigation or for trial are subject to discovery under our discovery rules, and our discovery rules do not preclude an expert from testifying to facts and opinions derived prior to being retained as an expert. *Morris-Rosdail v. Schechinger*, 576 N.W.2d 609, 612 (Iowa App. 1998). It would be an abuse of discretion to exclude or limit the testimony of a treating physician as a nondisclosure sanction under our discovery rules. *Id*.

In this case, Dr. Dierenfield provided chiropractic treatment to Robyn Mengwasser soon after Robyn was involved in the September 2015 motor vehicle collision. There is no doubt that Dr. Dierenfield was not retained in anticipation of litigation given that Robyn Mengwasser did not file her petition until nearly two years after she began treating with Dr. Dierenfield.

As he testified in trial during Plaintiff's offer of proof, "Robyn's pain and functional limitations with respect to her cervical injury are more likely than not to be the result of this accident we're talking about." (Second Amd. App. Vol. I, 324 Tr. 50:1-4). Dr. Dierenfield also testified that he "concluded that her diminished functionality has impacted her ability to perform her work since she is unable to sit for long periods of time." (Second Amd. App. Vol. I, 324 Tr. 50:5-8). These opinions form the crux of the dispute regarding the limited trial testimony.

Dr. Dierenfield, as a treating physician, need only comply with Iowa Rule of Civil Procedure 1.500(2)(c) disclosure requirement which was not applicable to the deadline in the trial scheduling order. Dr. Dierenfield's report provided to the Defendants/Appellees on March 4, 2019 represents his compliance with 1.500(2)(c).

Otherwise, Iowa Rule of Civil Procedure 1.508(4) only limits trial testimony in that the testimony "may not be inconsistent with or go beyond the scope of the expert's disclosures, report, deposition testimony, or supplement thereto." Iowa R. Civ. P. 1.508(4). Dr. Dierenfield's trial testimony, submitted as an offer of proof, did not exceed this scope.

Defendants argued in their motion that Dr. Dierenfield should only be allowed to testify to matters appearing in his records. However, Iowa Courts recognize that treating physicians focus on treating patients rather than answering legal questions in the form of a medical record. *Hansen v. Cent. Iowa Hosp. Corp.*, 686 N.W.2d 476, 481 (Iowa 2004). It is unusual for a treating physician to express opinions

concerning legal questions to a patient before offering treatment. *Morris-Rosdail v. Schechinger*, 576 N.W.2d 609, 612 (Iowa App. 1998).

The Court of Appeals in *Morris-Rosdail* dealt with a set of circumstances where two treaters were excluded from testifying at trial. *Id*. One expert had treated with the Plaintiff once, nine months prior, while the other had been an active treating physician up to the point of trial. *Id.* Both were not allowed to testify as to permanent impairment or the need for future surgery. *Id.* at 610.

The Court of Appeals ruled that the District Court had abused its discretion in excluding their testimony, respectively, as "[t]here was no evidence developed in the record to support a finding his opinions were subsequently acquired or developed in anticipation of trial" and "absent evidence to the contrary, it is reasonable to presume the focus of his inquiry and opinions about his patient were medical". *Id* at 612. Like that case, Dr. Dierenfield had continue to treat with her up to the point of trial and there was no evidence to show his testimony was developed in anticipation of litigation. He should have been allowed to testify as to permanency and need for future treatment.

Dr. Dierenfield's testimony would have been on the ongoing issues that he was treating Mengwasser for as well as his impressions on how to best treat the issues that arose from the collision. "A treating physician ordinarily learns facts in a case, and forms mental impressions or opinions, substantially before he or she is retained as an expert witness, and often before the parties themselves anticipate

litigation." *Day by Ostby v. McIlrath*, 469 N.W.2d 676, 677 (Iowa 1991). Similar to *McIlrath*, Mengwasser started seeing Dierenfield before any litigation was begun. He developed these opinions through treating her and was still currently treating her.

To summarize, the trial court's pre-trial order limiting the testimony of Dr. Randy Dierenfield materially affected Plaintiff Robyn Mengwasser's substantial rights to fully provide evidence. Because the jury, as fact finder, was not allowed to hear Dr. Dierenfield's opinions with respect to Robyn's pain and loss of functionality concerning her employment, the only remedy is for a new trial.

II. The District Court erred by failing to instruct the jury on a Prior Asymptomatic Condition, otherwise known as the "Eggshell Plaintiff" jury instruction.

Preservation of Error and Standard of Review

This issue was preserved by Plaintiff during the Trial on the record prior to instructing the jury, and again in the Motion for Partial New Trial, and finally in the Notice of Appeal. (Second Amd. App. Vol. I, 423 Tr. 4:19-22, 456-460, 468). As to standard of review, the Iowa Supreme Court has stated: "'A party is entitled to have an adverse decision vacated and a new trial granted if errors of law occurred in the proceedings.' *Iowa Mut. Ins. Co. v. McCarthy*, 572 N.W.2d 537, 544 (Iowa 1997) (citing Iowa R. Civ. P. 244(h))." *Greenwood v. Mitchell*, 621 N.W.2d 200, 204 (Iowa 2001).

The Motion for Partial New Trial is based on the District Court's error by failing to instruct the Jury on the "Eggshell Plaintiff" jury instruction. "The standard

of review for jury instructions is for prejudicial error by the district court. *Thavenet v. Davis*, 589 N.W.2d 233, 236 (Iowa 1999) (en banc)." *Eisenhauer ex rel. T.D. v. Henry Cty. Health Ctr.*, 935 N.W.2d 1, 9 (Iowa 2019) Further:

> "Iowa law requires a court to give a requested jury instruction if it correctly states the applicable law and is not embodied in other instructions." *Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 707 (Iowa 2016) (quoting *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994)). "The verb 'require' is mandatory and leaves no room for trial court discretion." *Id.* Therefore, "we review refusals to give a requested jury instruction for correction of errors at law" when there is no discretionary component. *Id.*

Andersen v. Khanna, 913 N.W.2d 526, 536 (Iowa 2018).

Argument

***A.** The New Trial should be a Partial New Trial*

As above in Issue I(A), the new trial should be a Partial New Trial, as requested by the Plaintiff in District Court, and Appellant restates her arguments in Issue I(A) here.

***B.** Mengwasser provided evidence to support the Jury Instruction for "Eggshell Plaintiff" based on a totality of the circumstances of evidence*

The District Court erred in failing to instruct the jury on the Plaintiff potentially being more susceptible to an injury. The Supreme Court has long held that if there is not substantial evidence in the record, the trial court must refuse an instruction:

> A trial court "must refuse to instruct on 'an issue having no substantial evidential support or which rests on speculation.'" *Thompson v. City of Des Moines*, 564 N.W.2d 839, 846 (Iowa

> 1997) (quoting *Clinton Land Co. v. M/S Assocs., Inc*., 340 N.W.2d 232, 234 (Iowa 1983)). "Substantial evidence is that which a reasonable person would find adequate to reach a conclusion." *Bredberg v. Pepsico, Inc.*, 551 N.W.2d 321, 326 (Iowa 1996). In *205 determining the sufficiency of the evidence, we give the evidence "the most favorable construction possible in favor of the party urging submission." *Hoekstra v. Farm Bureau Mut. Ins. Co.*, 382 N.W.2d 100, 108 (Iowa 1986).

Greenwood v. Mitchell, 621 N.W.2d 200, 204-205 (Iowa 2001). However, Substantial evidence exists in which a reasonable person could make the decision based on that evidence. *Id.* The sufficiency viewed from totality of the circumstances of the evidence, viewed in the light most favorable to the party requesting the instruction, justifies it being submitted, and requires its submission. *Sleeth v. Louvar*, 659 N.W.2d 210, 215 (Iowa 2003).

> "Evidence is substantial enough to support a requested instruction when a reasonable mind would accept it as adequate to reach a conclusion." *Id*. at 920 (quoting *Beyer v. Todd*, 601 N.W.2d 35, 38 (Iowa 1999)). "[W]e give the evidence the most favorable construction it will bear in favor of supporting the instruction." *Asher*, 846 N.W.2d at 496–97.

Eisenhauer ex rel. T.D. v. Henry Cty. Health Ctr., 935 N.W.2d 1, 14 (Iowa 2019). See also *Thornton v. Am. Interstate Ins. Co*., 897 N.W.2d 445, 473 (Iowa 2017) *Ludman v. Davenport Assumption High Sch*., 895 N.W.2d 902, 919–20 (Iowa 2017).

In the current case, the trial court indicated that substantial evidence did not exist that a jury could find susceptibility on the part of Plaintiff and instead ruled that

a doctor must state in no uncertain terms specifically that Plaintiff is more susceptible based on their condition (Second Amd. App. Vol. I, 425:7-19).

However, the District Court did not use any case law to justify this thought process. And in fact, it is contrary to Iowa law:

> We first address CDI's challenge to the "eggshell plaintiff" instruction. As a general rule, the instruction is applicable "when the pain or disability arguably caused by another condition arises after the injury caused by the defendant's fault has lighted up or exacerbated the prior condition." *Waits*, 572 N.W.2d at 577.

Tibodeau v. CDI, LLC, 902 N.W.2d 592, *5 (Iowa Ct. App. 2017) (citing to *Waits v. United Fire & Cas. Co.*, 572 N.W.2d 565, 577 (Iowa 1997). See also *Grebasch v. State*, 674 N.W.2d 682, *4 (Iowa Ct. App. 2003) (holding that there was evidence from prior surgeries that a Plaintiff could be more susceptible justifying the "eggshell" instruction.)

Plaintiff's witnesses and Defendants witnesses provided evidence that could lead a jury to reasonably conclude and/or infer susceptibility of Plaintiff based on a prior asymptomatic condition for Plaintiff's injuries. (Second Amd. App. Vol. I, 117 Deposition of Dr. Harbach p. 50:12-19, 52:2-8, 22, 119 p. 57:1-5,23, 120 p. 62:20-25, p.63:1-25, p. 64:1-25, 121 p. 65:1-18; 321 Tr. 46:7-10, 342: Tr. 149:17-20, 338 Tr. 124:18-21, 339 Tr. 125:10-12, 340 Tr. 126:10-16, 341 Tr. 127:4-11, 408 Tr. 4:19-22)(Second Amd. App. Vol. II, pgs. 21-22, 423, 447).

Plaintiff contends that the position the trial court took on the evidentiary requirement for the submission of the jury instruction on susceptibility on Plaintiff was an increased burden on Plaintiff of evidentiary support.

Plaintiff preserved the record on the error by reading in testimony of Defense Expert, of whom the parties had the transcript of at the time of trial, and citing to testimony that could lead a jury to reasonably conclude that Plaintiff was more susceptible than a normal person to this kind of injury due to a prior asymptomatic condition. The at issue instruction, as proposed by Plaintiff, states:

INSTRUCTION NO. ___

If Robyn Mengwasser had a neck injury making her more susceptible to injury than a person in normal health, then the defendant is responsible for all injuries and damages which are experienced by Robyn Mengwasser that are caused by defendant's actions, even though the injuries claimed produce a greater injury than those which might have been experienced by a normal person under the same circumstances.

Authority:

I.C.J.I. 200.34

(Second Amd. App. I, 152). This instruction is otherwise known as the "Eggshell Plaintiff" instruction, which provides that a Defendant is liable for any injury, even if it is asymptomatic, that becomes worse after the injury due to being more susceptible or more likely to have the issue arise than a person in normal health.

The District Court's ruling stating that some Doctor must state specifically the word susceptible increases that burden past what is necessary for a Plaintiff to prove to include it in the jury instructions.

Plaintiff expert witness Dr. Stoken, did provide testimony about the Plaintiff's Degenerative Disease which is substantial evidence that a jury could use in determining that Plaintiff was more susceptible due to a prior asymptomatic condition.

Plaintiff also contends that her treater Dr. Dierenfield, if allowed to testify as to such, would have testified to the same the jury, however, that issue will be discussed in Issue I.

"A tort-feasor whose act, superimposed upon such condition, results in an injury may be liable in damages for the full disability. In these cases the injury, and not the dormant condition, is deemed to be the proximate cause of the pain and disability." *Becker v. D & E Distrib. Co*., 247 N.W.2d 727, 731 (Iowa 1976). (additional citations omitted)

The jury came back determining that Plaintiff was injured, and Defendant was liable for past injuries of Plaintiff. The Jury did not determine that Defendant was liable for future injuries of Plaintiff. (Second Amd. App. Vol. I, 437)

The susceptibility of Plaintiff due to her prior asymptomatic condition would have provided the jury the necessary law to show that Plaintiff was entitled to payment for future damages due to her injuries. The jury could have reasonably

inferred from the evidence provided by Dr. Stoken, Dr. Harbach, and Plaintiff that she was more susceptible, thereby bringing the jury instruction into play.

"[O]ur courts use the phrase substantial proof interchangeably with the term substantial evidence. *Offermann v. Dickinson*, 175 N.W.2d 423, 425–26 (Iowa 1970). "Evidence is substantial if a jury could reasonably infer a fact from the evidence." *Johnson v. Interstate Power Co*., 481 N.W.2d 310, 317–18 (Iowa 1992). *Ludman v. Davenport Assumption High Sch*., 895 N.W.2d 902, 912 (Iowa 2017). The evidence provided could have led a jury to infer the susceptibility, and in fact Appellant's counsel argued as much in the record. (Second Amd. App. Vol. I, 424 Tr. 7:9-15).

The trial court's error materially prejudiced Plaintiff by affecting the deliberations of the jury and it failed to instruct them on the law such that the Plaintiff was not awarded future damages.

Further, after this finding by the jury, the only evidence submitted concerning the Plaintiff's physical condition consisted of the testimony of her chiropractor (who was still planning to treat Plaintiff in the future at the time of trial) and two examining physicians, Dr. Harbach and Dr. Stoken. Both Dr. Harbach and Dr. Stoken concluded that the Plaintiff suffered some degree of permanent injury as a result of the September 2015 motor vehicle collision. (Second Amd. App. Vol. I, 338 Tr. 124:18-21; 339 Tr. 125:10-12; 341 Tr. 127:4-11; 342 Tr. 128:17-20; 119, Deposition of Dr. Harbach, p. 57: 1-5; 120, p. 62: 20-25, p. 63: 1-25, p. 64: 1-25; 121 p. 65:1-18) (Second Amd. App. Vol. II, 21-22; 447)

The Iowa Supreme Court has a very in-depth discussion as to pre-existing conditions, the "eggshell plaintiff" rule and whether someone can recover for them in the two following cases.

> The eggshell plaintiff rule is an exception to the general rule. See *id*. This exception applies only when the pain or disability arguably caused by another condition arises after the injury caused by the defendant's fault has lighted up or exacerbated the prior condition. The law on this point was clearly stated in Becker:
>
> ["]It is also apparent mere existence of a prior nondisabling, asymptomatic, latent condition is not a defense. A tort-feasor whose act, superimposed upon such condition, results in an injury may be liable in damages for the full disability. In these cases the injury, and not the dormant condition, is deemed to be the proximate cause of the pain and disability.["]
>
> *Id*. at 731; accord *Benn*, 512 N.W.2d at 539. In the situation described in Becker, the tortfeasor would be liable for the entire damage, see 247 N.W.2d at 731, so an eggshell plaintiff instruction is properly given.

Waits. Further:

> In the case Sub judice there is proof Becker had no disability before the collision. He did have a latent foot problem which Dr. Marr found 'contributed' to his postcollision disability. It is not clear whether this latent condition eventually would have caused some partial disability even without the collision. Assuming for the purposes of our consideration such result might have ensued, we nonetheless apply the Vogel rule, supra, in holding impossibility of allocation should not forcelose plaintiff's right of action against an injury-causing tort-feasor.

Becker v. D & E Distrib. Co., 247 N.W.2d 727, 731 (Iowa 1976) The Defendants were entitled to argue that Plaintiff would have had this happen to her eventually, and in fact Dr. Harbach testified to such and Defendants' counsel closed with it. (Second Amd. App. Vol. I, 432, Tr. 36:3-11; 118, Deposition of Dr. Harbach, p. 53, lines 17-22).

However, The District Court erred, as the Plaintiff was not entitled to state her position that regardless of whether the future conditions would have happened in the future, or not, those same future conditions happened due to the injury and the Defendant was liable for such injury as part of the law for eggshell plaintiff. The trial court's decision materially prejudiced the Plaintiff due to the inability for Plaintiff to state the law.

> The court in *Newbury v. Vogel*, 151 Colo. 520, 379 P.2d 811 (1963), reversed the trial court for failure to give an eggshell instruction. It discussed the difficulty in apportioning disability between the recent trauma and a preexisting arthritic condition. The court held the jury should have been instructed on the eggshell rule in view of the difficulty in assessing the amount of preexisting disability:
>
> Under the instructions given the jury was advised that the plaintiff could recover only that portion of his damage which was due to aggravation. If the jury could not make such apportionment (and it might well be that they could not, since two of the medical experts could not) they were left without an instruction *216 as to the law which would apply in such circumstances.
>
> *Newbury*, 379 P.2d at 813.

Sleeth v. Louvar, 659 N.W.2d 210, 215–16 (Iowa 2003). Similar to the situation in *Newbury*, as discussed by the Iowa Supreme Court, the Jury in the current case was not provided the instruction that said new future damages caused by the condition, even if they would have happened eventually at a later date (Appellees' very argument in closing), would be recoverable by the Plaintiff. See *Benn v. Thomas*, 512 N.W.2d 537, 539–40 (Iowa 1994). This prejudiced Plaintiff from future damages that the jury did not award. (Second Amd. App. Vol. I, 437).

Indeed, Courts tend to err on including the "eggshell" jury instructions if there is at least some substantial evidence that would support it in the record, and the District Court instructs the jury on the difference. *Waits* at 578, *Tibodeau* at *6, *Grebasch* at *6, *Becker*. See also *Benn*:

> Moreover, the other jurisdictions that have addressed the issue have concluded that a court's refusal to instruct on the eggshell plaintiff rule constitutes a failure to convey the applicable law. See *Priel v. R.E.D., Inc.*, 392 N.W.2d 65, 69 (N.D.1986) (stating that instructions must advise the jury that defendant "cannot escape the consequences of its negligence merely because its negligence would not have caused that extent of injury to a normal person"); *Pozzie v. Mike Smith, Inc.*, 33 Ill.App.3d 343, 337 N.E.2d 450, 453 (1975) (stating that the failure of the court to instruct on the eggshell plaintiff rule "left the jury without proper judicial guidance").

Benn at 540. There are no magic words that need to be said to justify the instruction, only substantial evidence to justify the instruction, such evidence to be viewed in the most favorable light of the party requesting the instruction when weighing if it is substantial.

Further, Defendants experts did not surmise or consider future damages. Plaintiff submits that the jury's finding with respect to her future damages is logically inconsistent with the evidence as no evidence other than Plaintiff's witnesses concerning her future damages was offered, and that the pre-existing condition made her more susceptible to be injured and cause the pain.

The trial court's error in failing to allow the susceptibility "eggshell" instruction affected the ability of the jury to understand the future damages and materially misstated the law. The trial court's rulings prejudiced the Plaintiff and requires a partial new trial. The Appellant/Plaintiff prays that the Court do so now by reversing and remanding the District Court's rulings on a Motion for Partial New Trial and remand this to the District Court for further processing.

III. The District Court erred by failing to Order a Partial New Trial from an inconsistent jury verdict.

<u>Preservation of Error and Standard of Review</u>

This issue was preserved in the Motion for Partial New Trial, and again in the Notice of Appeal. (Second Amd. App. Vol. I, 455-456; 468-469). The District Court denied the Motion for Partial New Trial without analysis as to the arguments by Plaintiff. As to standard of review, the Iowa Supreme Court has stated:

> Generally, the trial court has some discretion when faced with inconsistent answers in a verdict. However, the question whether a verdict is inconsistent so as to give rise to the exercise of that discretion is a question of law. Therefore, we review the district court's conclusion as to whether answers are inconsistent for correction of errors at law.

> *Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 609 (Iowa 2006) (citations omitted). Therefore, we will review this issue for corrections of error at law.

Pavone v. Kirke, 801 N.W.2d 477, 496 (Iowa 2011). The Court of Appeals review of the discretionary component of the judge in failing to rule that the verdict is inconsistent is for correction of error at law. "'[J]ury[ ] verdicts are to be liberally construed to give effect to the intention of the jury and to harmonize the verdicts if it is possible to do so.' *Hoffman v. Nat'l Med. Enters., Inc.*, 442 N.W.2d 123, 126 (Iowa 1989)." *Bryant v. Parr*, 872 N.W.2d 366, 375 (Iowa 2015)

Argument

A. *The New Trial should be a Partial New Trial*

As above in Issue I(A), the new trial should be a Partial New Trial, as requested by the Plaintiff in District Court, and Appellant restates her arguments in Issue I(A) here.

B. *The Jury's failure to award Future Damages shows a logical inconsistency in the verdict.*

The Appellant requested a partial new trial pursuant to Iowa Rule Civil Procedure 1.1004 as she contended that the verdict was not supported by substantial evidence and it was inconsistent given the evidence. Iowa R. Civ. P. 1.1004(6).

A new trial may be granted, and the jury verdict set aside, when the verdict is so logically and legally inconsistent it is irreconcilable in the context of the case.

Kalvik ex rel. Kalvik v. Seidl, 595 N.W.2d 136, 138–39 (Iowa App. 1999). "If a verdict is internally inconsistent, as this one was, and there is no way to determine the jury's intent, the proper remedy is a new trial. *Cowan v. Flannery*, 461 N.W.2d 155, 160 (Iowa 1990); *Hoffman v. National Med. Enters., Inc.*, 442 N.W.2d 123, 127 (Iowa 1989)." *Bangs v. Pioneer Janitorial of Ames, Inc.*, 570 N.W.2d 630, 632 (Iowa 1997)

The jury answered the first question on the verdict form, that of liability, affirmatively. The jury then awarded $10,950 in Past pain and suffering and $1,755 in Past loss of function of mind and body, and no other damages. (Second Amd. App. Vol. I, 437) "We also noted "the award for one element of damages may affect another," and "our general reluctance to engage in speculation to uphold findings in an inconsistent verdict." *Id*. at 382." *Thornton v. Am. Interstate Ins. Co.*, 897 N.W.2d 445, 471 (Iowa 2017). (citing to *Bryant*). The Iowa Supreme Court has held relating to verdicts:

> The evidence presented at trial must support each of the jury's findings of fact. Id. Furthermore, the jury's findings of fact cannot be internally inconsistent. Id.; accord Bangs v. Pioneer Janitorial *498 of Ames, Inc., 570 N.W.2d 630, 632 (Iowa 1997) ("If a verdict is internally inconsistent ... and there is no way to determine the jury's intent, the proper remedy is a new trial."); 89 C.J.S. Trial § 992, at 603 (2001) (stating, when findings in special verdicts "are utterly and irreconcilably inconsistent with, or repugnant to, each other, they neutralize, nullify, or destroy each other"). If the jury's special findings of fact are internally inconsistent with each other, the district court may either send the jury back for additional deliberations or grant a new trial.

Iowa R. Civ. P. 1.934 (providing if answers to interrogatories are inconsistent court can either send the jury back or order new trial)

Pavone v. Kirke, 801 N.W.2d 477, 497–98 (Iowa 2011)

Concerning the finding by the jury, the evidence, other than Plaintiff's testimony, submitted concerning the Plaintiff's physical condition for past and future outcomes consisted of the testimony of her chiropractor (who was still planning to treat Plaintiff in the future at the time of trial) and two examining physicians, Dr. Harbach and Dr. Stoken. (Second Amd. App. Vol. I, 295:17-19).

Both Dr. Harbach and Dr. Stoken concluded that the Plaintiff suffered some degree of permanent injury and pain as a result of the September 2015 motor vehicle collision. (Second Amd. App. Vol. I, 321 Tr. 46:7-10; 331 Tr. 79:6-9; 338 Tr. 124: 18-21; 339 Tr. 125:10-12; 341 Tr. 127:4-11; 342 Tr. 128:17-20; 119, Deposition of Dr. Harbach, p. 57: 1-5; 120 p. 62: 20-25, p. 63:1-25, p. 64:1-25; 121 p. 65:1-18) (Second Amd. App. Vol. II, 21-22; 447). This means that there had to be some future damages. "The jury's finding of no damages for plaintiff's future pain and suffering and no damages for future medical expense is unsupported by the evidence and contrary to the uncontroverted expert testimony." *Foster v. Schares*, 766 N.W.2d 649, *4 (Iowa Ct. App. 2009).

This Court of Appeals discusses a case quite like the current case in *Foster*. In *Foster*, a woman was injured in a car collision and eventually went to trial. *Id.* at *1-*2. During the trial, her primary care provider and her physiatrist testified that she

would require future care. *Id.* She also testified as to how it was still affecting her. *Id.* No other medical testimony was provided, and the jury eventually awarded her past damages but did not award her future damages despite the medical testimony. *Id.* The Court of Appeals found:

> Upon our review, we cannot say Foster's medical testimony was "so contrary to natural laws, inherently improbable or unreasonable, opposed to common knowledge, inconsistent with other circumstances established in the evidence, or contradictory within itself' " so as to be the subject of rejection by the jury. *Kaiser v. Stathas*, 263 N.W.2d 522, 526 (Iowa 1978). While it is true a jury is not absolutely bound by the testimony of experts, the experts' opinions are intended as an aid to the jury, and the jury may not arbitrarily, without cause, disregard them. See *Larew v. Iowa State Highway Comm'n*, 254 Iowa 1089, 1093, 120 N.W.2d 464, 464 (1963).

Foster at *4. The Motion for New Trial was eventually granted on those damages for the above reasons. Like *Foster*, although there was an agreement by all doctors that there was some form of permanent injury, the expert testimony was disregarded as if Mengwasser did not have any future damages. (Second Amd. App. Vol. I, 321 Tr. 46:7-10; 331 Tr. 79:6-9; 338 Tr. 124:18-21; 339 Tr. 125:10-12; 341 Tr. 127:4-11; 342 Tr. 149:17-20; 119 Deposition of Dr. Harbach p. 57: 1-5, p. 62: 20-25, p. 63: 1-25, p. 64:1-25, p. 65:1-18; 437) (Second Amd. App. Vol. II, 21-22; 447).

The jury's finding with respect to Appellant's future damages is logically and irreconcilably inconsistent with the evidence as there is absolutely no other evidence

concerning her future damages that was offered. The medical evidence provided is not so contrary to natural laws to be the subject of rejection by the jury, and the jury cannot arbitrarily disregard them

"The traditional elements of pain and suffering include the physical and emotional consequences of facial scars. *Brant*, 532" *Foster By & Through Foster v. Pyner*, 545 N.W.2d 584, 587 (Iowa Ct. App. 1996). Similarly, the permanent injuries to Mengwasser, testified to by all the doctors, satisfy the elements to necessitate future damages.

> The photographic exhibits indicate Sable's scar is conspicuous because of its size, color, and location. Both plastic surgeons testified the scar is **permanent**. They also testified females with facial scars experience emotional distress as they mature. We accordingly conclude the jury's verdict failing to award damages for future pain and suffering **is in conflict with rather than supported by the evidence** in this case. The district court correctly concluded … that the verdict was inadequate.

Foster By & Through Foster v. Pyner, 545 N.W.2d 584, 587 (Iowa Ct. App. 1996) (**emphasis added**). In the current case, Mengwasser's injuries were described as permanent by all the doctors. (Second Amd. App. Vol. I, 119 Deposition of Dr. Harbach p. 57: 1-5; 321 Tr. 46:7-10; 339 Tr. 124:10-12; 342 Tr. 149:17-20) (Second Amd. App. Vol. II, 21-22; 447). She testified, her husband testified, and the doctor's testified to the pain she would suffer and does suffer. (Second Amd. App. Vol. I, 331 Tr. 79:6-9; 338 Tr. 124:18-21; 341 Tr. 127:4-11; 395 Tr. 139:13-15; 400 Tr. 145:6-16; 401 Tr. 162:6-25; 402 Tr. 163:1-25; 405 Tr. 178:21-22) (Second Amd. App. Vol.

III, 101:12-25, 102:1-25, 103:1-17) (Plaintiff's Ex. 4, p. 5 & 6) (Second Amd. App. Vol. I, 120 Deposition of Dr. Harbach, p. 62:20-25, p. 63: 1-25, p. 64:1-25, 121 p. 65:1-18). There was even a demonstration to the jury of the permanent injury to Mengwasser by having her come to the middle of the courtroom and show how she is still in pain and how it affected her. (Second Amd. App. Vol. I, 388 Tr. 126:3-25; 389 Tr. 127:1-25; 390 Tr. 128:1-20).

The lack of a finding of future pain and suffering and future loss of function of mind and body is in conflict with the evidence and is inconsistent with the verdict. All the doctor's agreed, Mengwasser had a permanent injury, which means there must be either some future pain and suffering, or future loss of function of mind and body. Perhaps indeed, the confusion by the jury and this logical inconsistency and failure to apply the future damages by the rules is due to the error in a failure to instruct on an "eggshell plaintiff" instruction as well.

The trial court's error in failing to grant a partial new trial on the issue of logical inconsistency prejudices Appellant. The Appellant/Plaintiff prays the Court reverse and remand this matter for a Partial New Trial to remedy this error.

IV. The trial court erred in granting the Defendants' Second Motion in Limine by excluding evidence of Plaintiff Robyn Mengwasser's recent medical treatment prior to the trial.

Preservation of Error

Plaintiff Robyn Mengwasser preserved error by resisting the Defendants' June 17, 2019 second motion in limine, and by requesting a partial new trial on the issue pursuant to Iowa Rule of Civil Procedure 1.1004.

Standard of Review

Generally, a denial of a motion for a new trial is reviewed for corrections of errors at law. *Ladeburg v. Ray,* 508 N.W.2d 694, 697 (Iowa 1993); Iowa R. App. P. 6.907.

Argument

***A.** The New Trial should be a Partial New Trial*

As above in Issue I(A), the new trial should be a Partial New Trial, as requested by the Plaintiff in District Court, and Appellant restates her arguments in Issue I(A) here.

***B.** The Granting of the Second Motion in Limine was in Error.*

The trial court granted the Defendants' second motion in limine excluding evidence of Robyn Mengwasser's recent medical treatment. (Second Amd. App. Vol. I, 275 Tr. 37:4-25; 276 Tr. 38; 277 Tr. 39; 278 Tr. 40:1-22). Defendants claimed unfair surprise and prejudice in their second motion in limine. (Second Amd. App. Vol. I, 129-130). Defendants pointed only to Iowa Rule of Civil Procedure 1.508 in their Second Motion in Limine. (Second Amd. App. Vol. I, 129-130).

Presumably, Defendants were contending in their second Motion in Limine that Robyn Mengwasser failed to supplement her own expert's opinions by producing evidence of recent medical appointments within 30 days of trial. The rule states that "additions or changes to this information must be disclosed no later than 30 days before trial." Iowa R. Civ. P. 1.508(3).

In this case, however, Plaintiff submits that evidence of recent medical treatment did nothing to change an opinion of any expert so Rule 1.508 should not have been applied to Robyn's recent treatment. Dr. Jacqueline Stoken, a physician that examined Robyn Mengwasser before trial, concluded in her report that Robyn suffered permanent impairment as a result of the September 28, 2015 motor vehicle collision. (Second Amd. App. Vol. II, 21-22). Defendants were well aware of her opinion at the time of trial, and even their own expert Dr. Harbach concluded Robyn suffered some degree of permanent impairment as a result of the collision. (Second Amd. App. Vol. II, 447) (Second Amd. App. Vol. I, 119 Deposition of Dr. Harbach 57:1-5).

The Court of Appeals only must look at *Morris-Rosdail*, again, it would find another situation where a treater would have been allowed to testify to recent treatment. *Morris-Rosdail* at 612. "Additionally, Dr. Lindaman was an active treating physician at the time of trial. He performed surgery on Amy less than six weeks before trial." *Id.* The recent and current medical treatment off the Plaintiff would have explained to the jury that the damages were still happening and ongoing.

Even if Rule 1.508 is applicable under these circumstances, exclusion of the evidence is the most severe available sanction under the rule and is not to be imposed lightly and is justified only when prejudice would result. *Stephenson v. Furnas Elec. Co.*, 522 N.W.2d 828, 831 (Iowa 1994). Defendants are unable to point to any prejudice resulting from Robyn's recent medical appointments.

Defendants arguments stem towards Expert Witness evidence, not towards the damages and whether prejudice occurs. "When making the determination of whether to admit evidence, the district court must engage in a two-step inquiry, asking (1) whether the proposed evidence is relevant, and (2) if so, whether its probative value substantially outweighs the dangers of prejudice or confusion. *State v. Webster*, 865 N.W.2d 223, 242 (Iowa 2015)." *Stender v. Blessum*, 897 N.W.2d 491, 511 (Iowa 2017). The fact remains, the current medical treatment was both relevant, and showed no prejudice as all current records were supplemented and did not change expert testimony.

The trial court should have been using Iowa Rule of Evidence 5.402 and Iowa Rule of Evidence 5.403 to make its determination, but instead erred in its discretion by considering current treatment as expert testimony required to be provided within thirty days, thereby creating an artificial "hole" in treatment, destroying a full meritorious trial.

An example of this fact can be found in *Duncan v. City of Cedar Rapids*, 560 N.W.2d 320, 323 (Iowa 1997), as amended on denial of reh'g (Mar. 26, 1997)." Rule

125 applies to the discovery of facts known and mental impressions and opinions held by an expert and "acquired or developed in anticipation of litigation or for trial." Iowa R. Civ. P. 125(a)." *Duncan v. City of Cedar Rapids*, at 323.

> "The witnesses here were medical technologists employed by the hospital at which Duncan was treated. They were being called to testify to the procedures employed by the hospital generally in the testing of blood, and to the specific testing for alcohol done in this case. This knowledge was not "acquired or developed in anticipation of litigation or for trial." Therefore, rule 125 does not apply."

Id. See also *Eisenhauer ex rel. T.D. v. Henry Cty. Health Ctr.*, 935 N.W.2d 1, 22 (Iowa 2019) (Handwritten notes of treating physician testified to on the sixth day of trial developed "last Friday" and were simply a summary of treating physicians observations used to refresh his recollection and were subsequently properly admitted).

Like *Duncan*, the treatment that Mengwasser had been continuing to get was not developed in anticipation of litigation, but for her actual treatment. In addition, it did not prejudice the Defendants as the ongoing treatment did not affect the expert opinions, but was merely being brought forth to show that treatment was ongoing. Like *Eisenhauer*, these medical records and treatment were merely a summary of the current treatment Mengwasser was still getting and therefore properly admissible.

"Moreover, because the estate planned to challenge the foundation for the blood tests, the court believed the estate could not close its eyes to relevant information accessible to it and then claim surprise when the City attempted to lay the foundation upon which the estate insisted." *Duncan* at 324. The Defendants had equal access to these medical records as they had waivers to retrieve them as required under Iowa Rule of Civil Procedure 1.500(1).

This sole fact is unassailable, the point of a trial is to argue the merits along with all damages, past and future. That is a fundamental concept of the American trial system. To remove current medical treatment from the record obfuscates the record from the jury and keeps them in the dark that medical treatment is still ongoing.

There was no prejudice to Defendants as they knew all this and knew treatment was ongoing. It is a miscarriage of justice to have restricted the Jury's access to current medical treatment in its deliberations, thereby limiting past damages to the amount they set in the jury verdict. (Second Amd. App. Vol. I, 437). The jury awarded past damages, but there is no way to know if the damages would have included the past damages of the treatment of the thirty days leading up to trial. Therefore, damages that could have been awarded were not allowed to be testified to. Thus, the trial court's exclusion was in error and a new trial is warranted.

V. The Trial Court Erred When It Granted the Defendants/Appellees Application for Taxation of Costs Under Iowa Code §677.10 Because Videographer and Videoconferencing Fees Are Not Mentioned in Iowa

Code §625.14, Nor Were Costs Related To Two Of The Experts Necessary To The Jury's Decision.

Preservation of Error

Plaintiff Robyn Mengwasser preserved error by resisting the Defendants' application for taxation of costs pursuant to Iowa Code §677.10. (Plaintiff's Resistance to Defendants' Application for Taxation of Costs).

Standard of Review

Review of this matter is for errors at law. Iowa R. App. P. 6.907.

Argument

The trial court ordered Plaintiff Robyn Mengwasser to pay Defendants' costs totaling $5,138.30 under Iowa Code §677.10. (Second Amd. App. Vol. I, 463). More specifically, the trial court ordered that Robyn Mengwasser pay videographer and videoconferencing fees for Defendants' experts Dr. Harbach and Messrs. Bawab and Woodhouse. (Second Amd. App. Vol. I, 463).

The trial court relied upon Iowa Code §625.14, which states:

> The clerk shall tax in favor of the party recovering costs the allowance of the party's witnesses, the fees of officers, the compensation of referees, the necessary expenses of taking depositions by commission or otherwise, and any further sum for any other matter which the court may have awarded as costs in the progress of the action, or may allow.
>
> Iowa Code §625.14.

Iowa Code §625.14 contains no reference to videographer or videoconferencing fees. In interpreting statues, courts are to determine if

the language has a plain and clear meaning within the context of the circumstances presented by the dispute. *McGill v. Fish*, 790 N.W.2d 113, 118 (Iowa 2010). See also *Meyer v. City of Des Moines*, 475 N.W.2d 181,191 (Iowa 1991) (Court costs are taxable only to the extent provided by statute); *Hughes v. Burlington N. R. Co.*, 545 N.W.2d 318, 321-322 (Iowa 1996).

In this case, the lack of reference in the statute to videographer and videoconferencing fees means the trial court had no authority to order those costs paid by the Plaintiff. Therefore, the Plaintiff requests that this Court subtract the $823.00 videographer fee for Dr. Harbach and the $500.00 videographer fee for Bawab and Woodhouse, and the $1,015.00 videoconferencing fee for Bawab and Woodhouse.

Additionally, the jury determined that Robyn Mengwasser was injured in the September 28, 2015 collision. (Second Amd. App. Vol. I, 437). Messrs. Bawab and Woodhouse were utilized by the Defendants for the purpose of arguing that Robyn Mengwasser was not injured in the September 28, 2015 collision. (Second Amd. App. Vol. I, 194).

Plaintiff Robyn Mengwasser submits that only fees and the other costs of the case upon the merits can be taxed as costs, and other costs unnecessary to the decision on the merits are not taxable as costs. *Kane v. Luckman*, 131 F. 609, 622 (N.D. Iowa 1904). Since the jury determined that Robyn Mengwasser was injured

in the September 28, 2015 collision, none of the costs associated with Bawab and Woodhouse should be taxable as a cost to the Plaintiff.

Thus, the Plaintiff Robyn Mengwasser requests that this Court subtract all costs associated with Messrs. Bawab and Woodhouse in the trial court's November 10, 2019 order regarding pending post-trial motions.

CONCLUSION

The District Court Erred when it failed to provide a Partial New Trial on the above issues. The District court erred by failing to allow the jury to hear Dr. Dierenfield's testimony as to his opinions based on his treatment of the Plaintiff, as it was not required under Iowa R. Civ. P. 1.500(2)(c) nor under Iowa R. Civ. P. 1.508. Further, the Court erred by failing to instruct the jury on the "Eggshell" Plaintiff jury instruction as there was substantial evidence in the record to support it and for the jury to infer it.

The District Court further erred in allowing an inconsistent verdict to stand and in denying the request for the Partial New Trial, as the future damages were required because no testimony could contradict the expert testimony provided by Plaintiff, Plaintiff's experts, and Defendants' expert. The District Court further erred by failing to include present and current treatment in the trial by artificially creating a barrier to the damages of the case to thirty (30) days prior to trial instead of allowing all damages and treatment in. Due to these rulings, the Appellant/Plaintiff

prays the Court of Appeals reverses the District Court rulings on all counts and remand the Case for further processing and a Partial New Trial.

Further, The District Court erred in awarding excessive costs outside of Statutory guidelines to the Defendants after the Offer to Confess. If the Court of Appeals does not reverse and remand on the Partial New Trial, Plaintiff/Appellant prays and requests the Court of Appeals to remove the excessive costs outside of Statutory Guidelines as it as error to grant them to the Defendants.

REQUEST FOR ORAL ARGUMENT

Counsel for the Plaintiff requests to be heard in oral argument.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 9,246 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(9).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14 point font.

/S/ Zachary Priebe

CERTIFICATE OF SERVICE

We, Jeff Carter, Zachary Priebe, John Q. Stoltze, members of the Bar of Iowa, hereby certify that on the 21st day of August, 2020, we electronically filed the foregoing with the Clerk of Court using the Iowa Electronic Document Management System which will send a notice of electronic filing to the following Counsel of Record. Per Rule 16.317(1)(a), this constitutes service of the document(s) for purposes of the Iowa Court Rules.

/S/ Zachary Priebe

CERTIFICATE OF FILING

We hereby certify that on the 21st day of August, 2020, we electronically filed the foregoing with the Clerk of Court using the Iowa Electronic

Document Management System which will send a notice of electronic filing to the following Counsel of Record. Per Rule 16.317(1)(a) this constitutes service of the document(s) for purposes of the Iowa Court Rules.

/S/ Zachary Priebe