IN THE SUPREME COURT OF IOWA

No. 19-1983

ROBYN MENGWASSER,

Plaintiff-Appellant,

v.

JOSEPH COMITO and CAPITAL CITY FRUIT COMPANY,

Defendants-Appellees.

APPEAL FROM THE
IOWA DISTRICT COURT FOR POLK COUNTY
The Honorable Robert B. Hanson, District Judge
AND IOWA COURT OF APPEALS DECISION OF APRIL 14, 2021

APPELLEES' RESISTANCE TO APPLICATION FOR FURTHER REVIEW

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STATEMENT OF RESISTANCE TO FURTHER REVIEW

Further review by the Supreme Court is not a matter of right, but of judicial discretion. Iowa R. App. P. 6.1103(1)(b). Indeed, the rule states such applications "will not be granted in normal circumstances." *Id.* In her Application, Plaintiff-Appellant Robyn Mengwasser (hereinafter "Plaintiff") has failed to demonstrate the Iowa Court of Appeals incorrectly decided an important question of law that has not been, but should be, decided by the Supreme Court. Additionally, Plaintiff has not shown that the Court of Appeals entered a decision in conflict with prior precedent. Her Application for Further Review should therefore be denied in its entirety.

Moreover, Plaintiff's "Statement Supporting Further Review" sets forth an argument which has never before been raised in this litigation. That is, the contention that plaintiffs in personal injury actions will be "severely limited in developing and prosecuting their claims" if she is prohibited from presenting the late-disclosed opinion testimony of her treating chiropractor to a jury. She appears to maintain the district court's ruling which limited the chiropractor's testimony, as well as the Court of Appeals' decision affirming it, should be overturned because they were somehow inconsistent with a finding by the non-adjudicative Iowa Civil Justice Reform Task Force. This argument should be rejected outright under basic rules of error

preservation. *See Katko v. Briney*, 183 N.W.2d 657, 662 (Iowa 1971) (a contention not raised in trial court will not be considered on appeal). It may also be rejected because Plaintiff fails to explain with any clarity how the district court's decision in this case ran afoul of the Task Force's recommendations.

With regard to the other points raised in Plaintiff's Application, they are merely a rehashing of arguments properly rejected by the district court and by the Court of Appeals. The Application fails to adequately explain how the decision disallowing the so-called "eggshell plaintiff" jury instruction, and the lower courts' rejection of Plaintiff's "inconsistent verdict" argument, were in conflict with any case authority. To the contrary, the Court of Appeals' thorough and well-reasoned opinion showed that the rulings in question were entirely consistent with established precedent.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S DECISION LIMITING THE TESTIMONY OF PLAINTIFF'S TREATING CHIROPRACTOR BY EXCLUDING HIS UNTIMELY OPINIONS ON CAUSATION AND LOSS OF FUNCTION.

Plaintiff's argument concerning her treating chiropractor, Dr. Dierenfield, must fail because it is predicated on one or more false premises. Plaintiff contends the decision of the Court of Appeals means that

defendants will be able to "label" treating physicians as experts retained for litigation as a way to prevent them from introducing into evidence the physicians' opinions formed during the course of treatment.

First, the Defendants in the instant case did not "label" Plaintiff's treating chiropractor as an expert retained for litigation. Instead, it was the *Plaintiff* who opted to designate all of her treating physicians as experts. Defendants did not characterize Dr. Dierenfield in any particular fashion. Defendants merely requested through their Motion in Limine the enforcement of certain expert disclosure deadlines, and that the doctor's testimony be limited to a discussion of the care and treatment he provided to Plaintiff.

Second, as correctly determined by the district court and Court of Appeals, the chiropractor's treatment records did not include any opinions on causation of Plaintiff's injuries, permanency, or loss of function. However, toward the end of the litigation – well after expiration of Plaintiff's deadline for expert disclosures – Plaintiff produced a written report by the chiropractor in which he opined on those legal questions.

It is therefore a misnomer for Plaintiff to contend on appeal that she was wrongly prohibited from offering a treating physician's opinions which were "formed during the course of treatment" into evidence. *See* Plaintiff's

Application p. 7. Contrary to Plaintiff's argument, and as proven by Dr. Dierenfield's own records, Plaintiff failed to show Dr. Dierenfield formed his opinions regarding causation, loss of function, etc. during the course of his treatment. (App. vol. I pp. 122-24). This was also confirmed by the Court of Appeals' "full review of the treatment records." *See* Court of Appeals decision of 4/14/21 p. 11. Other than Dr. Dierenfield's initial reference to Plaintiff's 2015 automobile accident, he never directly tied his treatment to any particular cause or tied Plaintiff's loss of function to the accident. *See* Court of Appeals decision of 4/14/21 p. 11.

The record is clear that, if anyone is attempting to artificially attach a "label" to the chiropractor, it is the Plaintiff. She repeatedly refers to him as a treating physician, and not an expert retained in anticipation of litigation, and then attempts to show he was not required to provide a report pursuant to Iowa Rule of Civil Procedure 1.500(2)(b). As noted by the Court of Appeals, Plaintiff's argument ignores well-established precedent holding that the label assigned to a physician does not necessarily dictate their role for litigation purposes. *See Morris-Rosdail v. Schechinger*, 576 N.W.2d 609, 612 (Iowa Ct. App. 1998) (Cady, C.J.) (noting a treating physician may begin to assume the expert role "when a treating physician begins to focus less on the medical questions associated in treating the patient and more on

the legal questions which surface in the context of a lawsuit"). Likewise, a treating physician "ordinarily is not required to formulate [an opinion on causation] in order to treat the patient." *Hansen v. Cent. Iowa Hosp. Corp.*, 686 N.W.2d 476, 482 (Iowa 2004).

The uncontroverted facts are that Plaintiff designated Dierenfield as an expert in November 2018, but gave no indication she would be eliciting opinions from him on causation, loss of function, etc. until after Plaintiff's expert disclosure deadline in December 2018 expired. It was therefore entirely correct for the Court of Appeals to find the opinions stated in Dr. Dierenfield's February 2019 report were not arrived at as a necessary part of Plaintiff's ongoing treatment. *See* Court of Appeals decision of 4/14/21 p. 11. The untimely report clearly addressed subjects which were within the scope of expert testimony. *See Day v. McIlrath*, 469 N.W.2d 676, 677 (Iowa 1991) ("We believe a treating physician ordinarily focuses, while treating a patient, on purely medical questions rather than on the sorts of partially legal questions (such as causation or percentage of disability) which may become paramount in the context of a lawsuit.").

Finally, it must be observed that Plaintiff's Application for Further Review reveals a serious logical flaw in putting forth the argument concerning Dr. Dierenfield. On the one hand, Plaintiff contends that this

treating physician was not retained in anticipation of litigation, and therefore was not required to provide a written report under the expert disclosure rules. At the same time, however, Plaintiff's chief complaint in this appeal is that *the written summary of his opinions* on causation and permanency of injury was not allowed into evidence at trial. Plaintiff seems to suggest Dr. Dierenfield does not fall within the ambit of Iowa Rule of Civil Procedure 1.500(2)(b) ("Witnesses who must provide a written report"), while simultaneously arguing that a report he supposedly drafted should have been admitted into evidence.

Plaintiff simply cannot have it both ways. This Court should decline her invitation to enact this particular sort of cognitive dissonance into law. The first brief point of Plaintiff's Application for Further Review fails to state any adequate basis for disturbing the Court of Appeals decision.

II. THE COURT OF APPEALS WAS CORRECT IN AFFIRMING THE LOWER COURT'S DECISION DECLINING TO INSTRUCT THE JURY AS TO PLAINTIFF'S ALLEGED PREVIOUS INFIRM CONDITION, AS THE EVIDENCE DID NOT SUPPORT SUBMISSION OF SUCH AN INSTRUCTION.

As in her initial appellate brief considered by the Court of Appeals, Plaintiff's Application for Further Review makes a rather strained, even nonsensical, argument that she was entitled to a jury instruction patterned after Iowa Civil Jury Instruction 200.34, titled "Previous Infirm Condition"

and commonly known as the eggshell plaintiff instruction. The record, however, clearly demonstrates that evidentiary support for such an instruction was lacking. The Court of Appeals correctly affirmed the district court's ruling which found the instruction inapplicable.

For an eggshell plaintiff instruction to be submitted, there must be substantial medical evidence that a plaintiff is more susceptible to injury than a person of normal health. *See, e.g., Waits v. United Fire & Cas. Co.*, 572 N.W.2d 565, 576-77; *Benn v. Thomas*, 512 N.W.2d 537, 540 (Iowa 1994); *Bowers v. Grimley*, No. 08-0484, 2009 WL 139570 (Iowa Ct. App. Jan. 22, 2009). Evidence is substantial when reasonable minds would accept it as adequate to reach the conclusion. *Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 150 (Iowa 1992); *Walker v. Sedrel*, 260 Iowa 625, 632, 149 N.W.2d 874, 878 (1967) ("There is, of course, no duty to instruct on an issue without substantial support in evidence or which rests only on speculation or conjecture.").

Plaintiff's argument on this point seems to equate the testimony regarding Plaintiff's alleged pre-existing condition (mild degenerative disc disease) with substantial evidence that she was more susceptible to injury than a person of normal health. In other words, Plaintiff maintains that simply because she had a pre-existing condition, it should be regarded as

substantial evidence warranting the eggshell plaintiff jury instruction. But that is simply not consistent with Iowa law on the subject, as the Court of Appeals' decision accurately discussed. The Court found as follows:

> The eggshell plaintiff rule is an exception to the general rule, applying "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." … But evidence is required to establish that the pain or disability is greater than the injured person would have suffered in the absence of the prior condition. … Here, no substantial evidence tied [Plaintiff's] prior condition to a greater susceptibility to injury.

Court of Appeals decision of 4/14/21 p. 15 (citations omitted).

In support of her Application for Further Review, Plaintiff appears to misinterpret an important statement by one of Defendants' experts, Todd Harbach, M.D. Dr. Harbach opined, in relevant part, "I do not believe that the injury accelerated her to an end that she would not have reached naturally on her own." (App. vol. I pp. 117-18; App vol. II p. 447). Plaintiff egregiously misreads or misquotes Dr. Harbach in her Application when she states: "The fact that Mengwasser had an injury, *and it accelerated her to an end that she would have reached in years* shows that this pre-existing condition made her more susceptible to the injuries she received." *See* Plaintiff's Application p. 16 (emphasis added).

Quite obviously, Dr. Harbach did not state what Plaintiff paraphrases him as saying. Again, his statement was that he did **not** believe the injury accelerated Plaintiff to an end she would not have reached naturally on her own. (App. vol. I pp. 117-18). Rather than supporting Plaintiff's argument that the record was "laden" with evidence that she was more susceptible to injury, this quotation when properly read instead confirms that the rulings of the district court and Court of Appeals were correct.

Plaintiff's reliance on the Supreme Court's decision in the *Waits* case is unavailing. The Court of Appeals' decision is entirely consistent with, rather than in conflict with, *Waits*, as the earlier case's holding confirms there must be substantial evidence a plaintiff is more susceptible to injury than a normal person in order to justify an eggshell plaintiff instruction. *Waits*, 572 N.W.2d at 576. In that particular case, the plaintiff's treating physician did, in fact, testify that her prior injury would make her more susceptible to a later injury. *Id*. By contrast, Plaintiff in the present case simply failed to develop such evidence.

As such, the second point of Plaintiff's Application for Further Review fails to demonstrate that the Court of Appeals entered a decision in conflict with the evidentiary record or with binding precedent. The Application should therefore be denied as to this issue.

III. THE COURT OF APPEALS CORRECTLY DETERMINED THE JURY'S VERDICT WAS SUPPORTED BY SUFFICIENT EVIDENCE AND WAS NOT "INCONSISTENT."

In section III of Plaintiff's Application for Further Review, she complains that the Court of Appeals did not follow binding case precedent when it rejected her argument that the jury verdict was inconsistent. In essence, Plaintiff believes it was logically inconsistent for the jury to award her nothing on her claims for future medical expense, future pain and suffering, future loss of function of mind and body, and future loss of earning capacity. As with Plaintiff's two preceding assignments of error, her arguments are completely without merit for the reasons discussed in the decision of the Court of Appeals.

It is particularly baseless for Plaintiff to contend there was a logical inconsistency in the jury's verdict. In several prior cases involving personal injury claims, including one Plaintiff cited in her initial appellate brief, the Iowa Supreme Court described the types of jury verdicts that are truly logically inconsistent. *See, e.g., Bryant v. Parr*, 872 N.W.2d 366, 376-80 (Iowa 2015) and cases cited therein. A verdict which awards money for past pain and suffering and past loss of function, but which rejects a plaintiff's claims for pain and suffering and future loss of function, is not considered an inconsistent verdict. *See id.*

Instead, an example of an inconsistent verdict is one in which the jury awards a plaintiff damages for past and future medical expense, but allows nothing for pain and suffering. *Id.* (citing *Cowan v. Flannery*, 461 N.W.2d 155, 157 (Iowa 1990)); *see also Shewry v. Heuer*, 255 Iowa 147, 152, 121 N.W.2d 529, 532 (1963). There is nothing inconsistent or illogical in a jury's decision to award damages for past pain and suffering and past loss of function, while disallowing any award for categories of future damages, as occurred in the present case. Such a verdict reflects a determination that Plaintiff fully recovered from whatever injury she sustained and therefore would not incur damages in the future. Notably, Plaintiff does not cite authority from Iowa or any other jurisdiction holding that it is a logical inconsistency simply because a jury awards damages for past medical expense, or other categories of "past" damages, but rejects plaintiff's claim for "future" damages.

As in section II of Plaintiff's Application, she once again ignores or misinterprets Dr. Harbach's testimony when, in section III, she repeatedly asserts that all of the doctors agreed her injuries were permanent. Plaintiff places undue emphasis on a portion of Dr. Harbach's written report – which noted that Plaintiff "seems to have some permanency to her symptoms" – and attempts to pass that off as a definitive medical opinion that Plaintiff

was permanently injured by the auto accident. Then, proceeding with her argument to an almost absurd extreme, she maintains that this testimony absolutely required the jury to render a verdict in some amount for the various categories of future damages.

Again, however, this is simply too much of a stretch to support a request for a new trial. The Court of Appeals was absolutely correct when it astutely observed that Dr. Harbach's opinion regarding Plaintiff's degree of permanent injury "was far more nuanced than she suggests." *See* Court of Appeals decision of 4/14/21 p. 17. When asked directly whether he believed Plaintiff's injuries, conditions, or symptoms were permanent, Dr. Harbach replied, "All right. So I went based on basically what she was telling me. … she thought that she had some permanency to her symptoms, although the records don't support that well or very well at all." (App. vol. I pp. 118-19). Instead, as the Court of Appeals observed, Dr. Harbach described Plaintiff's condition as "the normal progression of degeneration" or in other words, the natural aging of the body. (App. vol. I p. 119).

Plaintiff also ignores other testimony from Dr. Harbach opining that Plaintiff did, in fact, "get better" following whatever minor injury she might have sustained, and that further medical treatment was not necessary because she complained of pain on a "one-point scale," *i.e.* she rated her pain as

merely a "one," with ten being the worst. (App. vol. I p. 118). Dr. Harbach said he expected Plaintiff's injury would be a "temporary aggravation" of any prior neck pain, and that it was "unusual" and "statistically very unlikely" Plaintiff would have the symptoms she reported three and a half years after the accident. (App. vol. I p. 118). He added that the review of Plaintiff's medical records "pretty much proved it because she did get better." (App. vol. I p. 118). A reasonable interpretation of this testimony is that Plaintiff fully recovered from any injury she sustained in the automobile accident and would therefore not experience future pain and suffering or future loss of function.

In her Application, Plaintiff erroneously contends the Court of Appeals' decision conflicted with two Supreme Court opinions, *Kaiser v. Stathas*, 263 N.W.2d 522, 526 (Iowa 1978) and *Larew v. Iowa State Highway Commission*, 254 Iowa 1089, 120 N.W.2d 462 (1963). To borrow a phrase from the Court of Appeals in the present case, the holdings of *Kaiser* and *Larew* are much more nuanced than Plaintiff would lead this Court to believe. The following discussion from *Kaiser* is instructive:

> While the jury as the trier of fact is not warranted in arbitrarily or capriciously rejecting the testimony of a witness, neither is it required to accept and give effect to testimony which it finds to be unreliable, although it may be uncontradicted. Testimony may be unimpeached by any direct evidence to the contrary and yet be so contrary to natural laws, inherently improbable or

> unreasonable, opposed to common knowledge, inconsistent with other circumstances established in evidence, or so contradictory within itself, as to be subject to rejection by the court or by the jury as the trier of the facts.

Kaiser, 263 N.W.2d at 526 (finding "no sound legal basis" for the trial court's granting of plaintiff's motion for new trial); *see also Larew* ("It is well settled the trier of facts is not absolutely bound by the testimony of experts upon values, even when undisputed, but may use his own knowledge and judgment in connection with the testimony.").

In the instant matter, the jury was properly instructed to give the testimony of each witness the weight and credibility to which they believed it was entitled. (App. vol. I p. 434). The trial court also instructed the jury that Plaintiff was entitled to recover damages if she had a physical ailment before the auto accident which was aggravated by the accident. (App. vol. I p. 436). She was not entitled to recover for any ailments or disabilities that existed before the collision and which were not caused by the collision. (App. vol. I p. 436).

Plaintiff has not pointed to any evidence the jury did not consider and respond to each of these instructions and to the others given. The verdict

reflects that the jury responded in such a way as to find against Plaintiff on her claims for so-called future damages.[1]

Accordingly, contrary to Plaintiff's contentions, substantial evidence supported the jury's decision declining to award any amounts for future medical expenses, future pain and suffering, future loss of function, and future loss of earning capacity. The Court of Appeals correctly affirmed the district court's decision which found no logical inconsistency in the verdict and which denied Plaintiff's Motion for Partial New Trial.

IV. IN THE EVENT THIS COURT FINDS ANY OF PLAINTIFF'S ARGUMENTS PERSUASIVE, THE PROPER REMEDY IS TO ORDER A NEW TRIAL ON ALL ISSUES.

As discussed above, Plaintiff has failed to demonstrate the district court or the Court of Appeals erred in their decisions on any of the issues raised in the Application for Further Review. To the extent this Court finds there are any grounds warranting a new trial, the appropriate remedy is to order a new trial on all issues, as opposed to a partial new trial on "future damages" alone.

Under Iowa law, the general rule is that when a new trial is granted, all issues must be retried. *Bryant v. Parr*, 872 N.W.2d 366, 380 (Iowa 2015)

[1] Plaintiff's own counsel indicated in closing argument the jury had the option of rejecting claims for "future damages," stating it was "not required" to use the standard mortality table showing Plaintiff's life expectancy in calculating such damages. (App. vol. I p. 427).

(quoting *McElroy v. State*, 703 N.W.2d 385, 389 (Iowa 2005) (holding that practice of granting partial retrials is "not to be commended")).

In situations when the scope of a retrial may be narrowed, "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 personal injury cases, the party seeking a retrial only on the issue of damages must show that the verdict establishing liability "was not the result of a compromise trading off liability for reduced damages." *Thompson v. Allen*, 503 N.W.2d 400, 402 (Iowa 1993) (quoting *Vorthman v. Keith E. Myers Enters.*, 296 N.W.2d 772, 778 (Iowa 1980)).

Plaintiff has failed to adequately demonstrate that these exceptions to the general rule apply in this case. Because Defendants admitted fault but denied the nature, extent, and causation of Plaintiff's alleged injuries, it cannot be said that the issues to be retried would be "distinct and separable" from the other issues. Indeed, the issues of fault, causation, and damages are so closely related and intertwined that it would be impossible to have a retrial on the issue of "future damages" alone without the danger of unfairly complicating matters for Defendants.

Accordingly, in the event this Court finds any basis for granting a new trial, the retrial should be as to all issues submitted in the first trial, and Defendants should have the opportunity to once again argue the fault of Defendant Joseph Comito was not a cause of any element of damage to Plaintiff.

CONCLUSION

This Court should decline Plaintiff's invitation to further review the decisions of the Iowa District Court and the Iowa Court of Appeals. It is clear the lower courts reached the correct decisions regarding limitation of the trial testimony of Plaintiff's expert and treating chiropractor. Additionally, the courts did not err in finding the eggshell plaintiff jury instruction inapplicable to this case, nor was there any error in declining to order a new trial because of a supposed inconsistency the jury's verdict. Plaintiff's Application for Further Review fails to demonstrate the Iowa Court of Appeals incorrectly decided an important question of law that has not been, but should be, decided by the Supreme Court. Similarly, Plaintiff has not shown that the Court of Appeals entered a decision in conflict with binding precedent. For these reasons, Defendants respectfully request that this Court deny Plaintiff's Application for Further Review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa Rules of Appellate Procedure 6.903(1)(*e*), 6.903(1)(*g*)(1) and 6.1103(4)(*a*) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font and contains 3,857 words excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(*g*)(1).

/s/ Jeffrey D. Ewoldt May 14, 2021
Jeffrey D. Ewoldt Date

CERTIFICATE OF FILING AND SERVICE

I certify the preceding Appellees' Resistance to Application for Further Review was filed with the Iowa Supreme Court by electronically filing the same with the Iowa Supreme Court Clerk on the 14th day of May, 2021.

I further certify I served the preceding Appellees' Resistance to Application for Further Review on attorneys of record for all other parties by electronically filing this document on the 14th day of May, 2021, in accordance with Chapter 16, Iowa Rules of Electronic Procedure.

/s/ Jeffrey D. Ewoldt
Jeffrey D. Ewoldt