IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHELLE LEA GILLUM,
Appellant,
vs.
CAMDEN USA, INC., A DELAWARE CORPORATION,
Respondent.

No. 46820

FILED

DEC 0 4 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court judgment on a jury verdict in a personal injury action. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Michelle Gillum contends that the district court improperly denied her alternative motions for an additur or a new trial. This court reviews the denial of such motions for an abuse of discretion.[1] The parties are familiar with the facts and we do not recount them except as necessary to our disposition. For the following reasons, we reverse the judgment of the district court and remand with instructions to grant an additur or a new trial limited to damages.

District courts may grant an additur where (1) damages are clearly inadequate and (2) the case would be a proper one for granting a motion for a new trial limited to damages.[2] This test is conjunctive—both prongs must be met before an additur is appropriate.[3]

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[1]Lee v. Ball, 121 Nev. 391, 394, 116 P.3d 64, 66 (2005).

[2]Id.

[3]Id.

Damages were clearly inadequate

With respect to the first prong of this test, Gillum raises two arguments. First, Gillum argues that the jury's award of zero damages was clearly inadequate because Camden did not completely contest her damages. Thus, Gillum contends that she was entitled to the portions of her damages that were uncontroverted at trial. Second, Gillum argues that her permanent impairment resulting from her ankle fusion surgery automatically entitled her to damages for pain and suffering.

This court has recently recognized that damages awards may be clearly inadequate when they ignore uncontested evidence.[4] In this case, Camden appeared to challenge Gillum's ankle fusion surgery and medical expenses, but not Gillum's expenses relating to her preceding two surgeries. Specifically, Camden argues that evidence of Gillum's pre-existing hip condition, history of being heavily prescribed, and second ankle injury was sufficient to cast doubt on all of Gillum's damages as well as her theory of causation. We conclude, however, that this argument lacks merit as this evidence only partially challenged Gillum's damages. While the evidence generally casts doubt on the cause of Gillum's fusion surgery, past prescription costs, lost wages, and future damages, it did not allow the jury to necessarily doubt the cause of Gillum's first two surgeries. Gillum proved her early surgical expenses with medical bills

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[4]Id. (recognizing that a damages award for less than the amount of damages conceded at trial appeared to be clearly inadequate); Donaldson v. Anderson, 109 Nev. 1039, 1042-43, 862 P.2d 1204, 1206-07 (1993) (concluding that the district court abused its discretion in denying an additur for loss of consortium where there was ample uncontroverted evidence of a healthy parent-child relationship and parents' grief).

and the extensive testimony of her doctors. Camden did not offer conflicting evidence. Moreover, Gillum's second ankle injury occurred after—not before—her first two surgeries. As such, we conclude that substantial evidence did not support the jury's decision to totally deny Gillum damages. Because the jury returned a verdict equally apportioning fault, Gillum was entitled to recover at least half the cost of her uncontested surgical expenses.[5] Thus, we conclude that the jury's award of zero damages was clearly inadequate.

Separately, we reject Gillum's second argument to the extent she contends that she was automatically entitled to an award for her pain and suffering. Although this court has ruled that an award of zero damages for pain and suffering is clearly inadequate in cases of permanent disability, pain and suffering awards in such cases are not mandatory where conflicting evidence of causation exists.[6] Here, Gillum's ankle injury did not ripen into a permanent impairment until after the fusion surgery. Camden disputed the reasonableness and necessity of this surgery with, inter alia, evidence that Gillum re-injured the same ankle

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[5]In Nevada, when a jury apportions fault equally, the prevailing plaintiff may still recover damages discounted by the plaintiff's percentage fault. NRS 41.141(1) (comparative negligence of plaintiff does not bar recovery if that negligence was not greater than negligence of defendant) (emphasis added); Comparative Negligence Manual, 3d § 1:4 (2007) (in modified comparative fault system, plaintiff may be guilty of 50% of the causal negligence and still recover, with damages diminished by 50%).

[6]See Donaldson, 109 Nev. at 1042-43, 862 P.2d at 1206-07; Arnold v. Mt. Wheeler Power, 101 Nev. 612, 614, 707 P.2d 1137, 1139 (1985); Drummond v. Mid-West Growers, 91 Nev. 698, 712-13, 542 P.2d 198, 208 (1975).

before she elected to pursue ankle immobilization. Because the jury could have attributed the cause of Gillum's fusion surgery to her intervening ankle injury, the jury was also able to doubt the causal significance of Gillum's original slip and fall with respect to her ultimate impairment. Thus, we conclude that Gillum's permanent impairment did not automatically entitle her to an award of pain and suffering.

New trial limited to damages

With respect to the second prong of the additur test, Gillum argues that (1) the jury disregarded comparative negligence and damages instructions, and (2) the issues of damages and liability are not sufficiently interrelated to preclude a new trial limited to damages.

A new trial is warranted under NRCP 59(a)(5) upon a showing that the jury manifestly disregarded instructions.[7] A jury manifestly disregards an instruction where it would have been impossible for the jury to reach its verdict had the instruction been properly applied.[8] Here, the jury attributed 50% fault to Camden, which entitled Gillum to recover half of her uncontested damages.[9] Thus, had the jury correctly applied

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[7]Quintero v. McDonald, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000).

[8]M & R Investment v. Anzalotti, 105 Nev. 224, 226, 773 P.2d 729, 730 (1989). The sole inquiry under NRCP 59(a)(5) is whether the evidence and instructions together could have permitted the jury to find as it did. Id.

[9]In Nevada, a jury is generally not free to conclude that an accident occurred without a compensable injury unless there is conflicting evidence supporting that conclusion. See, e.g., Quintero, 116 Nev. at 1184, 14 P.3d at 523-24; Shere v. Davis, 95 Nev. 491, 492-93, 596 P.2d 499, 500-01 (1979); Fox v. Cusik, 91 Nev. 218, 221, 533 P.2d 466, 468 (1975).

Nevada's law of comparative negligence, the jury would have had no conceivable reason to deny Gillum her uncontroverted surgical expenses. Accordingly, we conclude that the jury must have disregarded the damages and comparative negligence instructions.

Furthermore, the issue of damages and liability in this case do not appear to be sufficiently related to preclude a new trial limited to damages. Generally, retrying damages is not proper unless the issue of damages is clearly severable from liability, and liability has already been fairly determined.[10] Here, the amount of Gillum's uncontested damages is an issue that stands in isolation from the issue of liability for two reasons. First, Camden did not contest Gillum's ankle injury or the raw costs associated with Gillum's first two surgeries. Thus, Gillum's uncontested damages are fixed and discrete. Second, the jury clearly rendered Camden liable for half of Gillum's damages in determining that Camden was 50% at fault. Thus, assigning a monetary value to Gillum's uncontested damages and calculating her net recovery in light of her relative fault does not require re-opening the issue of liability. Accordingly, we conclude that the damages and liability issues in this case are severable.

Because the zero damages award was clearly inadequate, and grounds for a partial retrial on damages exist, we conclude that Gillum has satisfied both prongs of our additur test.

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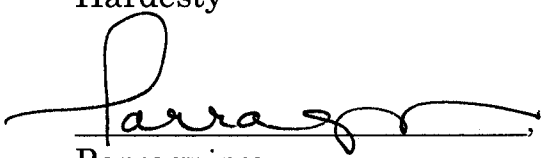
[10]Hogle v. Hall, 112 Nev. 599, 609, 916 P.2d 814, 821 (1996); see also 58 Am. Jur. 2d New Trial § 51 (electronically updated as of 2007); Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages—modern cases, 5 A.L.R. 5th 875 (electronically updated as of 2007).

Conclusion

We conclude that the district court abused its discretion in denying Gillum's alternative motions for an additur or a new trial limited to damages. We therefore reverse the district court's judgment and remand with instructions to grant Gillum a new trial limited to her uncontested damages unless Camden agrees to an additur to be determined by the district court.[11] Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Hardesty



_____, J.
Parraguirre

_____, J.
Douglas

cc: Hon. Michelle Leavitt, District Judge
Carolyn Worrell, Settlement Judge
Paul W. Van Derwerken
Parnell & Associates
Eighth District Court Clerk

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[11]The district court's calculation should discount Gillum's ultimate recovery by her 50% fault. Furthermore, if Camden agrees to an additur, the district court must re-tax the award of costs. If, however, a new trial is granted, the award of costs is reversed.