

IN THE COURT OF APPEALS OF IOWA

No. 4-411 / 93-904

DAVID A. BERG,

Plaintiff-Appellee/Cross-Appellant,

vs.

DES MOINES GENERAL HOSPITAL,

Defendant-Appellant/Cross-Appellee.

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Appeal from the Iowa District Court for Polk County,  
Glen E. Pille, Judge.

Appeal and cross-appeal from order granting a new trial  
on damages. **AFFIRMED.**

Kevin Reynolds and Megan M. Antenucci of Whitfield and  
Eddy, P.C., Des Moines, for appellant.

Davis L. Foster of Barker, Cruise, Kennedy, Houghton &  
Foster, Iowa City, for appellee.

Heard by Donielson, C.J., and Hayden and Cady, JJ.

**FILED**

JAN 23 1995

CLERK SUPREME COURT

**DONIELSON, C.J.**

This case involves an appeal and cross-appeal from a trial court order granting the plaintiff a new trial on the issue of damages. We have reviewed the parties' arguments, the record and applicable law and affirm the trial court's order in its entirety.

The plaintiff had sued Des Moines General Hospital and one of its doctors for medical malpractice relating to the diagnosis and treatment of a heart attack. A jury returned a verdict finding the doctor was not at fault, the hospital was 51% percent at fault, and the plaintiff was 49% percent at fault. It awarded the plaintiff \$12,398.42 for past medical expenses, \$1000 for past pain and suffering, \$32,000 for past lost wages, and \$1000 for past loss of function of mind and body.

The plaintiff filed a motion for new trial. The district court granted the motion only on the issue of damages. It found the jury's award to be inconsistent as it had awarded damages for past loss of function for the plaintiff's permanently-damaged heart muscle, but failed to award any damages for future loss of function. The district court denied the plaintiff's request for a new trial with respect to the submission of the issue of mitigation of damages and the assessment of fault. The hospital appealed and the plaintiff cross-appealed.

## I. DAMAGES

The hospital briefed three arguments which all pertain to the adequacy of the damages awarded by the jury. It contends the trial court erred in granting a new trial on this issue. In ruling upon motions for a new trial, a district court has broad but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties. Iowa R. App. P. 14(f)(3). A trial court's discretion in granting or refusing a new trial on the ground of inadequacy of a verdict will not ordinarily be disturbed on appeal unless an abuse of discretion is shown. Householder v. Town of Clayton, 221 N.W.2d 488, 493 (Iowa 1974). We more reluctantly interfere with the grant of a new trial than with the denial. Northrup v. Miles Homes, Inc., 204 N.W.2d 850, 861 (Iowa 1973).

The jury awarded the plaintiff all of his past medical expenses not covered by collateral sources and damages for his past loss of function. The plaintiff sustained an irreparable injury to his heart muscle and was disabled by it. The evidence in the record establishes it could not seriously be disputed an injury of this nature would result, to some extent, in a future loss of function.

The defendant is correct in that an award of "past" damages does not automatically entitle a plaintiff to "future" damages. However, in determining if a verdict is excessive or inadequate, each case must be determined on

its own special facts. Waddell v. Peet's Feeds, Inc., 266 N.W.2d 29, 32 (Iowa 1978). There was considerable evidence of the severity of the plaintiff's irreparable injury and its debilitating effects. The record supports the trial judge's conclusion that the verdict was inconsistent. The hospital's argument that abrogation of the collateral source rule explains the verdict is not persuasive, nor is its contention it did not proximately cause all of the plaintiff's damages resulting from the permanently-damaged heart muscle. We cannot find an abuse of discretion in the trial court's grant of a new trial on the issue of damages.

## II. MITIGATION OF DAMAGES

In his cross-appeal the plaintiff argues the trial court erred in submitting the issue of mitigation of damages to the jury. The unreasonable failure to mitigate damages constitutes fault under the Iowa Comparative Fault Act. Miller v. Eichhorn, 426 N.W.2d 641, 643 (Iowa App. 1988). Our review is limited to the correction of legal errors in determining if the trial court erred in submitting a requested jury instruction. Sanders v. Christ, 421 N.W.2d 520, 521 (Iowa 1988).

The hospital had argued the plaintiff had failed to follow medical advice to quit smoking, lose weight, and exercise. There was evidence continued smoking would decrease the plaintiff's life expectancy.

The plaintiff adopts a limited view of the issue of mitigation by arguing none of the medical advice he declined to follow would repair his damaged heart muscle. As the hospital correctly points out, the plaintiff is required to mitigate his damages, not the injury which gave rise to the damages. The plaintiff did not take steps which could have reduced his degree of disability and prevented decreased longevity. The hospital's evidence met its burden to show mitigation would have reduced the plaintiff's damages and was reasonable under the circumstances. See Tanberg v. Ackerman Investment Co., 473 N.W.2d 193, 196 (Iowa 1991). The trial court did not err in submitting the issue of mitigation to the jury.

### III. APPORTIONMENT OF FAULT

The plaintiff sought a new trial on the basis the verdict assessing 49% of the fault to him was not supported by the evidence. In ruling on the request for a new trial, the district court concluded the apportionment of 49% of the fault to the plaintiff was within the province of the jury even if the 49% figure "seems high." In granting a new trial a judge is not to set aside a verdict merely because he or she would have reached a different conclusion. See Lappe v. Blocker, 220 N.W.2d 570, 573 (Iowa 1974).

There was considerable evidence regarding the plaintiff's failure to adhere to all of his physician's

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advice. He had a significant smoking habit which had a negative effect on his life expectancy. We cannot conclude the record lacks substantial evidence to sustain the jury's apportionment of fault. The trial court did not abuse its discretion in denying the request for a new trial on this issue.

**AFFIRMED.**