IN THE COURT OF APPEALS OF IOWA

No. 0-142 / 98-1963
Filed September 27, 2000

DOROTHY HOLMES,
Plaintiff-Appellant,

vs.

K-MART CORPORATION,
Defendant-Appellee.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, James C. Bausch, Judge.

Plaintiff appeals from the district court ruling entered upon a jury verdict in her negligence action against defendant. **AFFIRMED.**

Thomas P. Fredrics and Brandon Adams of Fredrics Law Office P.C., Waterloo, for appellant.

James F. Kalkhoff of Dutton, Braun, Staack & Hellman, P.L.C., Waterloo, for appellee.

Considered by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

VAITHESWARAN, J.

Dorothy Holmes appeals certain rulings entered in her negligence action against K-Mart. She contends the district court incorrectly: (1) instructed the jury on comparative fault and failure to mitigate damages but not on res ipsa loquitur, and (2) excluded a doctor's deposition testimony regarding psychological components of her injury. We disagree and affirm.

I. Background Facts and Proceedings

Holmes and a friend went to K-Mart in July 1996 to purchase a fishing pole. The pole was displayed on a shelf about eight feet above the ground. Holmes asked a clerk to help reach the fishing pole. The clerk climbed a ladder to retrieve the pole. In the process, the pole slipped and hit Holmes's face, near her left eye. Holmes mentioned the incident to a customer service employee as she left the store.

Later that day, Holmes went to the emergency room with complaints her face hurt, was swollen, and "was running water." The emergency room doctor reported "no visible sign of injury." She returned to the emergency room the next day complaining of pain in the area beneath her left eye. After examining her again, the doctor reported "I still see no evidence whatsoever of trauma." Tests revealed no injury to the eye. Holmes then had an examination and x-ray at an eye clinic. The doctor noted a swelling in her left cheek but found no fractures of the facial bones or problems with her eyes.

Ten weeks after the incident, Holmes saw a third doctor. He found "no abnormalities related to her recent trauma" and diagnosed her with "chronic rhinitis, likely related to smoking." The doctor found sinus congestion and

recommended Holmes stop smoking and obtain a precautionary CT scan of her sinuses.

Holmes also consulted a plastic surgeon, two oral surgeons, and her family physician. Finally, Holmes went to Dr. Alexander, who treats pain. He treated her and also referred her to Dr. Bose for nerve block treatments. Holmes incurred medical bills from these two doctors approaching $10,000. Her total claim for medical bills was $12,247.

Holmes sued K-Mart for negligence. Before trial, K-Mart filed a motion in limine seeking to exclude Dr. Alexander's testimony on Holmes's psychological condition, treatment, and future care and costs. The court granted the motion, finding Dr. Alexander was not qualified to give expert opinion on those subjects. At the close of evidence, Holmes objected to proposed instructions on comparative fault, failure to maintain a proper lookout, and failure to mitigate damages, and also sought an instruction on the doctrine of res ipsa loquitur. The district court overruled her objections and denied her requested instruction. After trial, the jury found both parties fifty percent at fault and awarded Holmes $2500 for past medical expenses and $500 for past pain and suffering. Holmes unsuccessfully moved for a new trial and for enlarged findings and conclusions. This appeal followed.

II. Jury Instructions

Holmes claims the court erred in: (1) instructing the jury on comparative fault and mitigation of damages and (2) refusing to instruct the jury on res ipsa loquitur. We will address each contention in turn.

A. Comparative fault and failure to mitigate damages. We review challenged jury instructions for errors of law. Iowa R. App. P. 4; *Sheets v. Ritt, Ritt & Ritt, Inc.*, 581 N.W.2d 602, 604 (Iowa 1998). Specifically, we determine whether the instructions are a correct statement of the law and are supported by substantial evidence. *Bride v. Heckart*, 556 N.W.2d 449, 452 (Iowa 1996). Evidence is substantial if a reasonable person could find it adequate to reach a conclusion, even if the evidence might support a different conclusion. *Miller v. Eichhorn*, 426 N.W.2d 641, 643-44 (Iowa App. 1988). When weighing the sufficiency of the evidence to support an instruction, we view the evidence in the light most favorable to the party seeking the instruction. *Franklin v. Andrews*, 595 N.W.2d 488, 489 (Iowa 1999).

The district court instructed the jury that Holmes could be found at fault for: (1) failing to maintain a proper lookout; (2) failing to exercise ordinary care to avoid injury; and (3) failing to mitigate damages. Holmes challenges the sufficiency of the evidence to support the comparative fault instruction and the mitigation of damages specification. At trial, she additionally urged the district court to delete the first two specifications as contrary to Iowa law, but she does not pursue that challenge on appeal. Therefore, we deem the matter waived and address only the sufficiency of the evidence to support a general comparative fault instruction and a mitigation of damages specification. Iowa R. App. P. 14(a)(3); *Hollingsworth v. Schminkey*, 553 N.W.2d 591, 596 (Iowa 1996).

Holmes maintains the comparative fault instruction is premised solely on testimony of the K-Mart employee who retrieved the fishing pole, evidence which she maintains is insufficient to support the instruction. We disagree with her

premise that the employee's testimony was the sole evidence supporting the instruction.

First, Holmes testified she had glasses but was not wearing them at the time of the incident and could not see the pole without them. Second, K-Mart's store manager testified he thought a reasonable person would watch and pay attention if someone were moving something overhead. In combination with the employee's testimony that Holmes stood about two feet from him while he was retrieving the fishing pole from above, we conclude the record contained substantial evidence to support the comparative fault instruction.

We also note there is substantial evidence establishing Holmes failed to mitigate damages, an omission which is defined as fault. *See* Iowa Code section 668.1 (1997). Specifically, Holmes ignored doctors' recommendations to stop smoking, undergo a CT scan, and complete a "pain log." With respect to her decision to ignore her doctor's advice concerning smoking, Holmes testified, "I didn't do it because I felt I--I felt he didn't know what he was doing." She further testified she did not go in for a recommended CT scan because she believed she did not have a sinus problem as the doctor had suggested. While an injured person is under no absolute duty to follow a doctor's advice in order to minimize damages, the person is under an obligation to use ordinary care in following the advice. *Fuches v. S.E.S. Co.*, 459 N.W.2d 642, 643 (Iowa App. 1990). Whether the person has acted reasonably in mitigating damages and whether or not the suggested treatment was reasonable are questions for the trier of fact. *Id.* at 644. We recognize there must be a showing that the suggested treatments would in fact have mitigated damages. *Id.* K-Mart did not present such

evidence. However, it did present evidence that Holmes ignored medical recommendations without justification. We conclude Holmes's refusal to: (1) stop smoking; (2) obtain non-invasive follow-up treatment; and (3) document her claims of pain, created a submissible issue on failure to mitigate damages, particularly when coupled with evidence Holmes incurred substantial medical expenses after being told she had no medical problem. This evidence together with the testimony of the employee, manager, and Holmes herself, amounted to substantial evidence to support a comparative fault instruction and a mitigation of damages specification.

B. Res ipsa loquitur. Holmes next contends the district court should have instructed the jury on the doctrine of res ipsa loquitur. The Iowa Supreme Court has stated errors against a party are cured by a verdict in that party's favor unless the error goes to the amount of damages. *Mills v. Guthrie County Rural Elec.* 454 N.W.2d 846, 848 (Iowa 1990). The jury here found K-Mart liable for failing to exercise ordinary care in removing the fishing pole from the shelf. The jury awarded damages totaling $3000. The elements of damages would not have differed if the court had also submitted a res ipsa loquitur instruction. *Id.* Therefore, we need not address the issue of whether the district court erred in refusing to instruct the jury on this theory. *See Schultz v. Security Nat. Bank,* 583 N.W.2d 886, 888 (Iowa 1998).

III. Exclusion of Expert Testimony.

Holmes claims the court should not have excluded portions of Dr. Alexander's testimony. We generally review admission or exclusion of expert

testimony for abuse of discretion. *Williams v. Hedican*, 561 N.W.2d 817, 822 (Iowa 1997).

Dr. Alexander provided pain treatment and physical therapy. Holmes sought to introduce deposition testimony from him concerning the psychological effects of the physical injury, the necessity of treating those effects, and the costs of that treatment. The court ruled Dr. Alexander was not qualified to opine about these subjects and admitted only that portion of his deposition testimony addressing his treatment of Holmes. In support of her request for reversal, Holmes cites Iowa's "liberal standard on the admission of expert testimony." *Id.* at 822. However, we have stated, "[a] witness may testify only as far as his or her area of expertise extends. Expert witnesses may not give opinions on matters outside of their scope of knowledge simply because they are designated to be experts." *Oldham by Oldham v. Shenandoah Community School Dist.*, 461 N.W.2d 207, 208 (Iowa App. 1990). The court did not abuse its discretion in limiting the deposition evidence from Dr. Alexander. His practice was confined to pain medicine, physical medicine, rehabilitation and occupational medicine. Although he worked with psychologists during his training and in his practice, there was no evidence he had special training in psychology or psychiatry or practiced in these fields. *Id.*

For these reasons, we conclude the district court did not abuse its discretion in limiting Dr. Alexander's testimony.

IV. Summary

The district court did not err in instructing the jury on comparative fault and a mitigation of damages specification because those instructions were supported

by substantial evidence. We do not address Holmes's contention the court erred in refusing to instruct the jury on res ipsa loquitur. The proposed psychological evidence contained in Dr. Alexander's deposition was properly excluded as being beyond his area of expertise.

AFFIRMED.