

IN THE COURT OF APPEALS OF IOWA

FILED

MAY 31 1983

CLERK SUPREME COURT

DEBORAH S. LEBEDA,)

Plaintiff-Appellee,)

Filed May 31, 1983

vs.)

CHRIS ANNE CHARTERS AND JOAN)
CHARTERS,)

Defendants-Appellants.)

3-83
2-68516

Appeal from Linn District Court - Larry J. Conmey, Judge.

Defendants appeal from the judgment entered on a jury verdict for plaintiff in this personal injury tort suit arising out of an automobile accident.

AFFIRMED.

James F. Pickens and Mathew G. Novak of Pickens, Barnes & Abernathy, Cedar Rapids, Iowa, for defendants-appellants.

Lew Eells and James W. Affeldt of Eells, Blackstock, Affeldt & Harms, Cedar Rapids, Iowa, for plaintiff-appellee.

Heard by Oxberger, C.J., Donielson, Snell and Schlegel, JJ. Hayden, J., takes no part.

PER CURIAM

Defendants appeal from the judgment entered on a jury verdict for plaintiff in this personal injury tort suit arising out of an automobile accident. On appeal, defendants assert that: (1) the court should have granted a mistrial when the plaintiff, while testifying, allegedly violated an order in limine not to refer to beer, directly or indirectly, by volunteering that an "ASAP officer . . . an alcohol prevention officer" was called to the scene of the accident; (2) defendants should have been allowed to ask plaintiff about her lawsuit which arose out of a similar accident which occurred shortly before the one which gave rise to this suit; and (3) the jury verdict was excessive. We affirm.

Plaintiff, a Cedar Rapids police officer, while in an unmarked police car was involved in an accident with a car driven by defendant Chris Charters and owned by her mother, defendant Joan Charters. The impact occurred at a low speed; damage to the police car was slight and to the Charters' car, negligible. Plaintiff asserted that she injured her neck. She lost time from work, visited many doctors, and suffered recurring pain.

There was beer in the Charters car, which was driven by sixteen-year-old Chris and occupied by other teenagers. Although an ASAP (Alcohol Safety Action Program) officer was called, it is undisputed that Chris was not charged with OMVUI, and plaintiff makes no claim she was intoxicated.

Before trial, defendants admitted negligence, leaving damages as the only issue for jury determination. They then filed a motion in limine asking that plaintiff be prohibited from mentioning beer "directly or indirectly." The motion was granted. At trial, plaintiff in response to a question "[w]hat happened next," stated "I got . . . photos of the scene. And we also called for an ASAP officer, which is an alcohol prevention officer which —" Defendant objected and moved to strike. A motion for a mistrial was denied, and defendants rejected the court's offer to give a cautionary instruction to the jury to disregard the

challenged statements on the grounds it would only bring the matter to the jury's attention anew.

Also before trial, the court sustained plaintiff's motion in limine to exclude any reference to another lawsuit by defendant; it involved a similar accident two months before in which she claimed to have suffered similar injuries. The court allowed examination about the earlier accident itself, and about the injuries, but forbade mention of the fact of the lawsuit. At trial, defendants made a further request to be allowed to present the information, which was denied.

The jury returned a verdict of \$55,000 for plaintiff. Her medical costs had been \$861.35, but there was evidence of permanent partial disability and future medical needs. Defendant's motion for new trial was overruled and they brought this appeal.

I. Defendants' first claim that the trial court erred in failing to grant their motion for a mistrial after plaintiff referred in her testimony to the ASAP officer in alleged violation of the motion in limine. In overruling the motion for new trial on this issue, the trial court found that this testimony "was technically a violation of the Court's order; however, . . . the Plaintiff did not intentionally violate the Court's order, nor was the statement prejudicial to the Defendants."

In Twyford v. Weber, 220 N.W.2d 919, 922-24 (Iowa 1974), the supreme court discussed at length the principles involved in using the motion in limine. Here, the question is not whether the court erred in sustaining the motion; indeed, plaintiff does not argue that she should have been allowed to testify that there was beer in defendant's car. Rather, defendants claim that plaintiff's ASAP reference violated the court's ruling on the motion and that a mistrial should have been declared.

We agree with the trial court that the challenged testimony constituted at least a technical violation of the motion. Plaintiff was previously admonished not to refer to the beer "directly or indirectly." It may be conceded that the

reference to ASAP (and "an alcohol prevention officer") may reasonably be construed to be an indirect reference to the beer in defendants' car. Of course, we do not condone violations such as this, whether or not they are inadvertant. We also agree with the trial court, however, that this violation does not automatically require a mistrial. In this case, the challenged testimony was struck by the trial court whose offer to admonish the jury to disregard the testimony was declined by defendants.

Prompt withdrawal of testimony that is improper with such an admonition to the jury as was given [in this case, offered] here leaves no ground for complaint except in extreme instances where it is manifest its prejudicial effect remained and influenced the verdict despite its exclusion.

State v. Johnson, 183 N.W.2d 194, 198 (Iowa 1971). The trial court concluded that this case did not present one of those "extreme instances" of "manifest prejudicial effect." We cannot say that the court abused its discretion in so concluding. See Kester v. Bruns, 326 N.W.2d 279, 281 (Iowa 1982). The court did not err in overruling the motion for mistrial.

II. Defendants next claim that the court erred in forbidding them to cross-examine plaintiff about another lawsuit she filed arising from a car accident which occurred approximately two months before the accident giving rise to this action. Plaintiff apparently claimed injuries in the prior accident similar to those now claimed.

This issue has no merit. Defendants were allowed to bring into evidence the facts involving the prior accident, the existence and extent of the injuries received by plaintiff in the prior accident and the portion of her current injuries specifically attributable to the subsequent accident involved in this case. The jury was instructed to assess damages only for injuries sustained in the second accident. The additional fact that plaintiff initiated a lawsuit arising out of the prior accident has no relevance in determining the damages she sustained as a

result of the accident involved here. The trial court did not err in excluding this evidence as irrelevant and immaterial.

III. Finally, defendants assert that the jury's verdict of \$55,000 in plaintiff's favor was excessive and not supported by sufficient competent evidence.

Allowance of damages is primarily for the trier of fact. This court will not interfere therewith unless it clearly appears the verdict is flagrantly excessive or inadequate, or so out of reason as to shock the conscience or sense of justice or raise a presumption it is the result of passion, prejudice or other ulterior motive or is lacking in evidential support.

Frantz v. Knights of Columbus, 205 N.W.2d 705, 712 (Iowa 1973). We see no reason to disturb the jury's award. The evidence indicates that plaintiff has sustained a permanent partial disability as a result of this accident, has endured considerable pain and suffering and will continue to do so, and will have to undergo continual chiropractic treatment for the rest of her life with its attendant expenses. The trial court did not err in overruling defendants' motion for new trial on this ground.

Finding no reversible error, we affirm the trial court's judgment in all respects.

AFFIRMED.