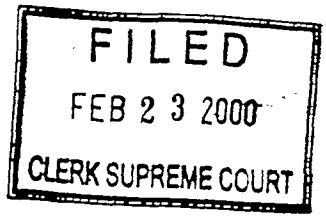
IN THE COURT OF APPEALS OF IOWA



No. 1999-589 (9-850) / 99-0677
Filed February 23, 2000

TRACY L. BROCKMAN, Individually, KEVIN H. BROCKMAN, Individually, and TRACY L. BROCKMAN and KEVIN L. BROCKMAN as Parents and Next Friends of LUCAS BROCKMAN and NICHOLAS BROCKMAN, Minors,
Appellants,

vs.

JOHN WILBERT WEBBER AND FRANCES WEBBER,
Appellees.

Appeal from the Iowa District Court for Black Hawk County, Jon C. Fister, Judge.

Plaintiffs appeal a district court order entering judgment, following a jury trial, on their action against the defendants for damages sustained resulting from an automobile accident. **AFFIRMED IN PART, REVERSED IN PART AND REMANDED.**

David W. Stamp of Ball, Kirk & Holm, P.C., Waterloo, for appellants.

Ted J. Wallace, Bettendorf, for appellees.

Heard by Sackett, C.J., Hecht, J., and Schlegel, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (1999).

SCHLEGEL, S.J.

Tracy Brockman is appealing the jury verdict in her personal injury award, alleging the jury lacked substantial evidence to find a fifty-percent comparative fault apportionment based on her failure to mitigate damages by not losing weight. Because the jury lacked substantial evidence to reasonably find such a liability percentage against Tracy, we reverse.

Procedural facts. Tracy Brockman was injured in an automobile accident on February 8, 1996. She subsequently filed a suit to recover her damages. John Webber conceded liability for the accident, offering only the affirmative defense that Tracy failed to mitigate her damages by not losing weight. The jury returned a verdict finding Tracy fifty percent at fault for failing to lose weight. Tracy moved for a new trial. The motion was denied.

Background facts. Tracy Brockman was treated by several doctors. Two of the physicians' opinions were introduced into evidence during the trial. Dr. Kontos testified at trial by way of deposition. This evidence consisted of no notes recording a physician's order to lose weight, only a recollection that she *probably* would have given Tracy such advice during the course of her treatment. Dr. Kothari did not testify, but her records were submitted into evidence. These records contained two references to weight loss. The first reference stated, "She was also advised on weight reduction as best as she can with recheck in the office in one month." The second note simply stated, "She was also advised on weight reduction." Tracy Brockman testified as to what the doctors had told her regarding the effect of weight loss on her injury. She testified that she was told it

"might help" if she lost weight. This is the only evidence in the record regarding her physicians' orders to lose weight and the effect it would have on her injuries.

Scope of review. The standard of review in this case is for errors at law. *Pearson v. Ossian*, 420 N.W.2d 493, 495 (Iowa App. 1988). Findings of facts in a law action are binding on us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). In evaluating the sufficiency of the evidence, we view it in the light most favorable to sustaining the court's judgment. *Meade v. Roller*, 212 N.W.2d 426, 429 (Iowa 1973). We need only consider evidence favorable to the judgment, whether or not it was contradicted. *Id.* "Evidence is substantial or sufficient when a reasonable mind could accept it as adequate to reach the same findings." *Waukon Auto Supply v. Farmers & Merchants Sav. Bank*, 440 N.W.2d 844, 846 (Iowa 1989) (citation omitted).

Substantial evidence to submit to the jury. The court must determine that sufficient evidence existed to warrant submission of an issue to the jury for a verdict. *Leonard ex rel. Meyer v. Behrens*, 601 N.W.2d 76, 78 (Iowa 1999); *see also Podraza v. City of Carter Lake*, 524 N.W.2d 198, 202 (Iowa 1994). If reasonable minds could differ as to the outcome, then a question exists for the jury to decide. *Coppola v. Jameson*, 200 N.W.2d 877, 879 (Iowa 1972). "If there is substantial evidence in the record such that a reasonable trier of fact could find for the party, then the jury's verdict is binding on the reviewing court." *Beeman v. Manville Corp. Asbestos Disease Compensation Fund*, 496 N.W.2d 247, 254 (Iowa 1993).

The question on appeal is whether there was substantial evidence regarding the failure to mitigate damages issue to allow submission to the jury. We find there was not.

When asserting the defense of mitigation, the pleading party, in this case Mr. Webber, has the burden of proof. *Iowa Power & Light Co. v. Board of Water Works Trustees,* 281 N.W.2d 827, 833 (Iowa App.1979). The plaintiff, in refuting such a defense, only has to show that they used "reasonable diligence." *See Whewell v. Dobson,* 227 N.W.2d 115, 120 (Iowa 1975) (citation omitted).

In order to meet this burden of proof and allow a jury finding that the plaintiff failed to mitigate her damages by not losing weight, Mr. Webber must have submitted substantial evidence that Tracy's failure to lose weight was subsequent to a physician's order and that losing weight would have reduced her damages. Mr. Webber failed to meet this burden of proof. The record before us indicates one treating physician *might have mentioned* weight reduction to Tracy with no evidence that such an effort would help alleviate her back injury. Another treating physician made reference to weight loss on two occasions, stating only that Tracy was advised about weight reduction "as best as she can." Again, there was no mention that weight loss would, to any medical probability, help reduce the damage suffered by Tracy in the accident. Mr. Webber has failed to show Tracy Brockman failed to use reasonable diligence in following her treating physicians' medical orders. Therefore, this issue was incorrectly submitted to the jury, and the fifty-percent liability apportionment against Tracy Brockman should

be stricken, and judgment should be entered for the amount of $18,889.17. We hereby remand for an order consistent with this finding. Costs are assessed to the defendant, John Webber.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.