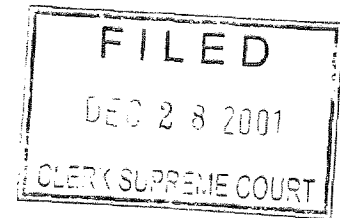


IN THE COURT OF APPEALS OF IOWA

No. 1-581 / 01-0244
Filed December 28, 2001



CHARLES I. JOHNSON,
Appellee,

vs.

**JENNIFER L. HADENFELDT, JERRY L. HADENFELDT, and SHIRLEY A.
HADENFELDT,**
Appellants.

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

Defendants appeal following a trial on the plaintiff's personal injury action
in which the jury awarded the plaintiff \$126,760.15. **AFFIRMED.**

Gary D. Ordway and Michael S. Jones of Patterson, Lorentzen, Duffield,
Timmons, Irish, Becker & Ordway, L.L.P., Des Moines, for appellants.

Channing L. Dutton of Lawyer, Lawyer, Dutton & Drake, L.L.P., West Des
Moines, for appellee.

Considered by Vogel, P.J., and Zimmer and Hecht, JJ.

VOGEL, P.J.

Defendants appeal following a trial on the plaintiff's personal injury action in which the jury awarded the plaintiff \$126,760.15. They contend (1) the court erred in instructing the jury on several matters, and (2) the damages awarded by the jury are excessive. We affirm.

I. FACTS.

Around 5:45 on the morning of August 26, 1997, Charles Johnson, age fifty-five, was jogging in the gutter of the left lane of a city street, facing the oncoming lane of traffic. Johnson preferred to run in the street to avoid pedestrians and dogs on the sidewalk. As he was rounding a curve, a car being driven by seventeen-year-old Jennifer Hadenfeldt, approached at a speed of ten to fifteen miles per hour in the right hand lane from behind Johnson. Jennifer had been attempting to change her defroster and had drifted into the left lane when she struck Johnson from behind. He suffered extensive cuts, scrapes and bruises. Jennifer testified the morning was foggy and the visibility low, while Johnson claimed the morning was merely hazy, with visibility of five miles.

Johnson incurred hospital expenses and missed work because of the accident. He returned to jogging normally within six months of the accident. He continues to experience some problems with his left knee and has some scarring. Additionally, he is now more "skittish" about vehicles when jogging. He testified that he essentially does everything now that he did before the accident, except when he squats or does things involving his left knee.

Based on the injuries sustained in the accident, Johnson filed an action against Jennifer and her parents, Jerry and Shirley Hadenfeldt, who owned the vehicle. Jennifer admitted crossing over into the oncoming lane and striking Johnson. Following trial, the court instructed the jury that Johnson had a right to jog in the street and that Iowa law does not require a jogger to wear reflective clothing. The jury found in favor of Johnson and awarded damages totaling \$126,760.15. The defendants filed a motion for new trial, arguing in part that several jury instructions were erroneous and the damage award was excessive. The district court denied the motion, and the defendants appeal.

II. JURY INSTRUCTIONS.

We review a trial court's formulation of jury instructions for errors of law. *Shinn v. Iowa Mut. Ins. Co.*, 610 N.W.2d 538, 541 (Iowa Ct. App. 2000). The standard of review for jury instructions is whether prejudicial error by the trial court has occurred. *Thavenet v. Davis*, 589 N.W.2d 233, 236 (Iowa 1999). Jury instructions must be considered as a whole, and if the jury has not been misled, then there is not reversible error. *Id.*

The defendants claim (1) jury instructions numbers twenty-one and twenty-two failed to properly state Iowa law as they advised the jury that Johnson had a right to jog in the street and instructed that he could not be negligent for failing to jog on the sidewalk and wear reflective clothing, (2) the instructions were misleading, confusing, and erroneously diminished Johnson's duty to avoid the accident, and (3) the instructions erroneously emphasized Johnson's theory of the case and prejudiced them.

Instruction number twenty-one stated:

As a pedestrian, Mr. Johnson had the right to jog on the left side of the street. However, you are instructed that the primary use for which a street is designed, other than a crosswalk, is for vehicular traffic, and use by pedestrians is secondary thereto. Therefore, a pedestrian, meaning the Plaintiff in this case, must consider such fact in the exercise of the care of a careful and prudent person when traveling upon the street. In considering whether the Plaintiff exercised reasonable care as defined in these instructions, you may consider that the use of the streets is primarily intended for vehicular traffic.

Instruction number twenty-two stated:

The Plaintiff, as a jogger or pedestrian on the roadway, had a duty to exercise ordinary care for his own safety. There are no special rules for joggers. They have the same rights, duties and obligations under the law as any other pedestrian. Iowa law does not require a jogger to jog on the sidewalk or to necessarily wear any special reflective clothing. In determining whether or not the Plaintiff was guilty of negligence, you should consider, as may appear from the evidence, these, as well as any and all facts and circumstances which tend to show that he did or did not use care commensurate with the dangers to be reasonably apprehended, and did or did not use that degree of care which a reasonably careful and prudent person would have used in the same or similar situation.

These instructions must also be read in conjunction with the other instructions, particularly instructions nineteen and twenty. Instruction number nineteen stated:

Plaintiff, as a pedestrian, had a duty to keep and maintain a proper lookout for his own safety. "Proper lookout" is the lookout a reasonable person would keep in the same or similar situation. It means more than looking and seeing. It includes being aware of one's movements in relation to things seen or that could have been seen in the exercise of ordinary care. A violation of this duty is negligence.

Instruction number twenty stated:

Both parties had a right to use the road, but each had to respect the rights of the other. Each party could assume the other would obey the law until they knew, or in the exercise of ordinary care should have known, the other party was not going to obey the law.

All of these instructions are accurate statements of the law. See *Ackerman v. James*, 200 N.W.2d 818, 826 (Iowa 1972) (stating that a pedestrian has a duty to keep a proper lookout and make use of all his natural senses to discover the approach of an automobile and to avoid being struck); Iowa Code § 321.326 (1997) (pedestrians shall at all times when walking on or along a highway, walk on the left side of such highway); *Engman v. City of Des Moines*, 255 Iowa 1039, 1044, 125 N.W.2d 235, 238 (1963) (stating that streets are intended primarily for vehicular traffic and sidewalks for pedestrians). Iowa law does not require a jogger to wear reflective clothing or use the sidewalk. We disagree with the defendants' contention that instructions twenty-one and twenty-two instructed the jury that Johnson could not be negligent for failing to jog on the sidewalk or wear reflective clothing. The jury was instructed that these were circumstances they should consider in determining whether Johnson used the degree of care that a reasonably careful and prudent person would have used in the same or similar situation.

Likewise, we do not find these jury instructions misleading, confusing, or diminishing Johnson's duties to keep and maintain a proper lookout, to respect the rights of Jennifer, and to exercise ordinary care for his own safety. Furthermore, the jury instructions do not erroneously emphasize Johnson's theory of the case, nor do they prejudice the defendants. They fairly and

accurately stated the law, and they did not give undue emphasis to either side of the case. See *Hoyt v. Chicago, R.I. & P.R. Co.*, 206 N.W.2d 115, 120 (Iowa 1973) (stating that instructions should not give undue emphasis to any phase of the case).

In their reply brief, the defendants contend Iowa's common law requires a pedestrian to leave or avoid the roadway if necessary under the conditions such as those here where darkness and fog affected visibility, but the jury instructions failed to properly communicate that duty to the jury. We question whether the defendants have preserved error on this issue, as it appears they did not raise it before the district court. See *Boham v. City of Sioux City, Iowa*, 567 N.W.2d 431, 437 (Iowa 1997) (noting that issues regarding jury instructions must be preserved by a specific objection); see also *Sievers v. Iowa Mut. Ins. Co.*, 581 N.W.2d 633, 638 (Iowa 1998) (stating that on appeal a party may not amplify or change the grounds for objecting to a jury instruction). Nonetheless, even if error has been preserved, this issue has been improperly raised for the first time in a reply brief. *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 642 (Iowa 1996). Therefore, we will not address this allegation.

We find no error in the jury instructions, and thus we affirm the district court on this issue.

III. DAMAGES.

The jury awarded damages in the amount of \$25,000 for past loss of function of the body, \$5000 for future loss of function of the body, \$75,000 for past pain and suffering, \$20,000 for future pain and suffering and \$1760.15 for

past medical expenses. The defendants moved the district court for a new trial asserting the damages awarded by the jury were excessive. The district court denied defendants' motion, finding the verdict was "fair, reasonable and sustainable by the evidence." We review the trial court's ruling on an abuse of discretion standard. *Foggia v. Des Moines Bowl-O-Mat, Inc.*, 543 N.W.2d 889, 891 (Iowa 1996).

The amount of damages awarded is a jury, not a court, function. *Gorden v. Carey*, 603 N.W.2d 588, 590 (Iowa 1999). We do not set aside a verdict simply because we might have reached a different conclusion. *Ort v. Klinger*, 496 N.W.2d 265, 269 (Iowa Ct. App. 1992). The jury's verdict should not be set aside or altered unless it: (1) is flagrantly excessive or inadequate; or (2) is so out of reason as to shock the conscience or sense of justice; or (3) raises a presumption it is the result of passion, prejudice or other ulterior motive; or (4) is lacking in evidential support. *Gorden*, 603 N.W.2d at 590.

On appeal, the defendants assert that the damages awarded by the jury are excessive but do not indicate where the evidence fails the award. *See id.* at 588, 590.

Johnson, age fifty-five at the time of his injuries, incurred medical expenses of \$1760.15. He continues to have pain when he squats and uses his left knee. He missed at least one week of work as a territory manager for Swaney Equipment. His pay is partially, if not fully, dependent on the commissions he earns. His duties include promoting and selling John Deere construction equipment, which requires considerable driving and getting into and

out of his car several times a day. Johnson testified as to the pain he suffered both at the time of the accident and during the healing process. Given the evidence presented we do not find the jury's damage award excessive, and accordingly, the district court did not abuse its discretion in denying defendants' motion for new trial.

IV. CONCLUSION.

We find no error in the district court's jury instructions. We do not believe the damages award is excessive. Therefore, we conclude the district court did not abuse its discretion in denying the defendants' motion for new trial. Accordingly, we affirm the district court's judgment.

AFFIRMED.