IN THE COURT OF APPEALS OF IOWA

No. 6-159 / 95-455

FILED
AUG 30
CLERK SUPREME COURT

JAMES PETERSON,

Appellant,

vs.

KAREN GAYLE KOCKS and KAM CARS OF AMERICA d/b/a THRIFTY CAR RENTAL OF AUSTIN, TEXAS,

Appellees.

Appeal from the Iowa District Court for Polk County, Jack D. Levin, Judge.

James Peterson appeals from judgment entered in his favor in his personal injury action against Karen Kocks and Thrifty Car Rental. **AFFIRMED.**

John P. Roehrick of Roehrick, Hulting, Blumberg & Kirlin, P.C., Des Moines, for appellant.

Lee P. Hook and Joseph M. Barron of Peddicord, Wharton, Thune & Spencer, P.C., Des Moines, for appellees.

Considered by Cady, P.J., and Streit, and Vogel, JJ.

PER CURIAM

This is an appeal by a plaintiff claiming he should be granted a new trial because the district court failed to properly instruct the jury in this personal injury suit. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

On February 21, 1992, the vehicle driven by James Peterson was struck by a vehicle driven by Karen Kocks. Kocks' car was owned by Thrifty Car Rental. Peterson filed suit against Kocks and Thrifty, alleging he suffered permanent injury to his back due to the accident. Defendants presented evidence to show Peterson had been treated since 1980 for back pain and headaches. In fact, Peterson had visited his chiropractor, Dr. Roger Brown, three times in February 1992 before the accident occurred. A jury awarded Peterson damages for past medical expenses, but no damages for future loss of function or future physical and mental pain and suffering.

Peterson requested a jury instruction, which provided in part:

> If the plaintiff James Peterson had a pre-existing back and headache condition making him more susceptible to injury than a person in normal health; and, the injuries, if any, which were sustained in this occurrence aggravated or accelerated the condition resulting in pain and disability, then the Defendant is responsible for all injuries and damages proximately caused if no apportionment of the disability and pain can be made between that caused by the pre-existing condition and to that caused by this occurrence.

The district court refused to give this instruction, and submitted Iowa Uniform Jury Instruction 300.32 to the jury. This instruction provides a plaintiff is not entitled to

recover for any disability which existed before the incident in question. After the jury's verdict, Peterson filed a motion for new trial, which was denied by the court. Peterson now appeals.

Under the case of *Becker v. D & E Distributing Co.*, 247 N.W.2d 727 (Iowa 1976), the jury instruction requested by Peterson would only be proper if his prior condition were non-disabling, asymptomatic, and latent. *See Id.* at 731. The evidence in the present case shows Peterson was treated continuously and frequently for back pain prior to the accident. The district court properly found Peterson failed to show his prior condition was non-disabling, asymptomatic, and latent. We conclude the court correctly decided to give Iowa Uniform Jury Instruction 300.32 instead of the instruction requested by Peterson.

Peterson also claims he was entitled to an "eggshell plaintiff" instruction. We find Peterson failed to preserve error on this issue because he failed to request such an instruction. Therefore, we do not address this issue on appeal.

We affirm the decision of the district court. Costs of this appeal are assessed to Peterson.

AFFIRMED.