

## IN THE COURT OF APPEALS OF IOWA

No. 1-228 / 90-1593

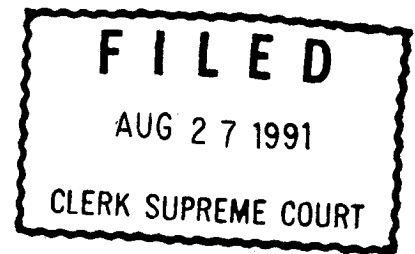
JOSEPH W. WEST and BEVERLY J. WEST,

Appellants,

vs.

JAMES F. NICHOLS,

Appellee.



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Appeal from the Iowa District Court for Woodbury County, Michael S. Walsh, Judge.

Plaintiffs appeal from a judgment in their favor, contending the jury's damage award was inadequate as a matter of law. **AFFIRMED.**

David A. O'Brien of O'Brien, Galvin, Moeller & Neary, Sioux City, for appellants.

John C. Gray of Eidsmoe, Heidman, Redmond, Fredregill, Patterson & Schatz, Sioux City, for appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

**OXBERGER, C.J.**

Joseph West was injured in a two-car collision. West sued the driver of the other car, James Nichols. West's wife was also named as a plaintiff; she sought damages for loss of consortium.

The defendant Nichols conceded fault in causing the accident. However, he raised in his defense a contention that West could have mitigated his damages by having knee replacement surgery to improve his future employability. Because this issue was raised, the case was tried under the comparative fault principles of Iowa Code chapter 668 in spite of Nichols' concession of fault.

The jury returned a verdict finding Nichols 100% at fault and rejecting his claim that West had failed to mitigate his damages. The jury awarded West \$5000 for past damages and \$10,000 for future damages. The jury declined to award West's wife any damages for loss of consortium. The district court then entered a judgment in favor of West for these amounts.

West and his wife, dissatisfied with the amount of their recovery, have appealed from the generally favorable judgment.

The Wests contend their case was prejudiced by the issue of failure to mitigate damages being submitted to the jury, and by the submission of this case under the Iowa Comparative Fault Statute, and also by the introduction of

evidence that the Wests already received payment from a collateral source. The three issues are interrelated.

The defendant Nichols alleged Mr. West failed to mitigate damages. Generally, questions of contributory negligence are questions of fact for the jury. Iowa R. App. P. 14(f)(10). Only in exceptional cases will these questions be decided as a matter of law. Id. We find sufficient evidence to support the trial court's determination that this issue contains a factual dispute and therefore cannot be decided as a matter of law.

Where the issue of failure to mitigate damages is submitted to the jury, the case automatically becomes one of comparative fault. Miller v. Eichorn, 426 N.W.2d 641, 643 (Iowa Ct. App. 1988). Before the mitigation instruction is given, defendant has the burden of showing substantial evidence that plaintiff's knee surgery would have mitigated his damages and that requiring plaintiff to undergo such treatment was reasonable under the circumstances. Tanberg v. Ackerman Investment Co., No 89-1893 (Iowa filed July 17, 1991).

In light of the jury's finding that Mr. West's failure to mitigate was not unreasonable and that he was zero percent at fault, we are unpersuaded by his contention that he was prejudiced by the submission of that issue under comparative fault.

The Iowa Comparative Fault Act allows the introduction of collateral source evidence except where the collateral source is the recipient's immediate family or a federal program. Iowa Code Section 668.14(1) (1991). The Wests' collateral source is neither of these, and we find the collateral source evidence was properly submitted.

The Wests claim the trial court erred in refusing to take judicial notice of the fact that Nichols elected not to exercise his right, pursuant to Iowa Rule of Civil Procedure 132, to have Mr. West undergo an independent medical examination. The trial court refused on the grounds that the fact is irrelevant. Relevancy of evidence is a matter of trial court discretion and appellate court will not interfere unless trial court has clearly abused its discretion to the prejudice of the complaining party. Hulme v. Barrett, 449 N.W.2d 629, 634 (Iowa 1989). Lack of contrary witness testimony would favor the Wests' case, notwithstanding Rule 132. Furthermore, we are persuaded by Nichols' argument that the testimony of plaintiffs' witness was sufficient for each side to plead its case. We therefore agree with the trial court that Nichols' decision to forego Rule 132 is irrelevant.

The Wests claim the trial court erred in refusing to grant their motion for new trial. This motion was based on inadequacy of award for past damages and future damages, failure of the court to instruct the jury that loss of

future pension benefits should be included in the calculation of lost future earning capacity, and failure of the jury to award damages to Mrs. West for loss of consortium. The trial court has broad but not unlimited discretion in ruling on a motion for a new trial. Iowa R. App. P. 14(f)(3). An abuse of discretion will not be found unless it is shown that the trial court's discretion was exercised in a clearly untenable or unreasonable manner. Kiner v. Reliance Ins. Co., 463 N.W.2d 9, 13 (Iowa 1990).

Regarding the matter of past and future damages, we find sufficient evidence existed within the testimony of the Wests' medical witness to raise a question as to the degree Mr. West's complete medical condition was proximately caused by the accident involving Nichols. Furthermore, we find the issue of combining lost future pension benefits with lost future earning capacity was adequately argued at trial. Finally, we find that sufficient evidence existed for the jury to doubt Nichols' responsibility for Mrs. West's loss of consortium.

For the foregoing reasons, we find the trial court did not abuse its discretion in denying the Wests' motion for a new trial.

**AFFIRMED.**

Donielson, J., concurs; Schlegel, J., dissents.

**SCHLEGEL, J.** (dissenting)

I respectfully dissent. The majority finds there was sufficient evidence to support Nichols' allegation of mitigation. I disagree. I believe there was insufficient evidence to submit the issue of mitigation and, hence, comparative fault, to the jury.

Expert testimony of Dr. Earl Mumford, West's orthopedic surgeon, does not support submission of the failure to mitigate issue. Dr. Mumford testified that were West to have knee surgery "he might well be employable on a very light sedentary basis such as a desk job." This testimony alone might support submission, but Dr. Mumford further stated he advised West to put off surgery for a while because the longer he waited before knee replacement, the better chance he had of it lasting his lifetime. In light of this testimony, there was no unreasonable failure to mitigate damages. Iowa Code § 668.1(1) (1991); Miller v. Eichhorn, 426 N.W.2d 641, 643 (Iowa App. 1988).

Nichols needed to show with substantial evidence that it was reasonable under the circumstances for West to undergo knee surgery at present. Tanberg v. Ackerman Inv. Co., No. 89-1893 (Iowa filed July 17, 1991). There was insufficient evidence to support the submission of the mitigation of damage issue. I would reverse the trial court.