IN THE COURT OF APPEALS OF IOWA

No. 7-525 / 96-972

STEPHEN B. BROCKWAY and PRISCILLA BROCKWAY,

Appellants,

vs.

BEHROUZ RASSEKH,

Appellee.

FILED
MAY 29 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Pottawattamie County, Glen M. McGee, Judge.

Stephen and Priscilla Brockway appeal from a denial of their motion for new trial. **AFFIRMED.**

Troyce A. Wheeler, Council Bluffs, and James R. Welsh of Bradford, Coenen & Welsh, Omaha, Nebraska, for appellants.

John M. French of Willson & Pechacek, P.L.C., Council Bluffs, for appellee.

Considered by Cady, C.J., Huitink, J., and Peterson, S.J.*

***Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).**

PETERSON, S.J.

Stephen and Priscilla Brockway appeal from a denial of their motion for a new trial. They contend the trial court erred in refusing to grant them a new trial when the jury verdict finding liability was inconsistent with the verdict assessing no damages.

I. BACKGROUND. A jury could have found the following facts. At the time of the trial, Stephen was fifty-three years of age. He has a bachelor's degree in speech and theater, a minor in music, and a master's degree in theater. He is employed as a teacher at Abraham Lincoln High School in Council Bluffs, Iowa. He taught theater and music and some English classes. His efforts in the theater arts area included some relatively heavy physical labor. This consisted of building sets and props, and included climbing ladders and ropes. He and his wife, Priscilla, have four children: Rachel and Naomi, who are twins, Elizabeth, and Benjamin. At the time of trial, the twins were fourteen, Elizabeth was thirteen, and Benjamin was eleven.

When Stephen was a freshman in high school, during the Spring of 1957, he suffered an injury during a wrestling match. Although he finished that particular match, he was taken to a hospital due to pain and headaches. At that time, Stephen said he was advised the disc between C3 and C4 had been "squeezed out." As a result of this information, he did not continue with any other sporting activity in high school.

Stephen served in the military between 1963 and 1968. While in the military, he was advised the disc problem between C3 and C4 was congenital in nature.

Stephen, while working in his capacity as a drama instructor on October 18, 1985, was pulling on a counterweight and holding a rope with both hands. Suddenly, he was pulled approximately six feet off the ground. He could recall that his neck was extended violently and he had immediate numbness in his neck and a feeling of generalized weakness. Stephen sent the students home on that day and fell asleep on the floor. He woke approximately four hours later and rode his motorcycle home.

Approximately five days later, Stephen began experiencing pain and he consulted a chiropractor. He was told by the chiropractor this was not a chiropractic situation, but a medical situation. He then consulted with Dr. Margules, who performed a myelogram on October 27, 1985. As a result of that myelogram, Dr. Margules determined there was a degenerated herniated cervical disc at the C4-C5 interspace. There also was minimal disc degeneration at the C5-C6 interspace and evidence of a congenital fusion with block vertebrae at the C3-C4 interspace.

The history Dr. Margules took at the time of the myelogram indicates since the school sports injury Steven has never been free of pain in the cervical region and in the right upper extremity. In 1966, he was advised he had severe degenerative disk disease at the C6-C7 interspace and showed fusion. In 1976, he was again told he had degenerative disk disease. All this time, Steven has episodic manifestations of radicular pain involving the right upper extremity. It is only recently he has experienced pain in the left upper extremity. Steven also indicated he has severe suboccipital headaches. Dr. Margules recommended surgery.

Stephen's insurance company, however, required additional opinions. One of the physicians he consulted was Dr. Rassekh. Primarily, as the result of this consultation, Stephen elected not to have surgery at that time.

On the Wednesday before Easter in the Spring of 1986, a student came around a corner at the high school quickly and ran into Stephen. Stephen requested he be taken to Dr. Margules. Stephen advised Dr. Margules he was ready for the surgery he had previously recommended. On March 28, 1986, Dr. Margules performed a discectomy at C4-C5. Stephen contended it took him approximately one year to recover from that surgery.

In the early part of 1987, Stephen began to have pain in his left armpit and elbow. He thought this was because of the problems in his neck; however, it was diagnosed as carpal tunnel syndrome. Surgery was performed as a result of that diagnosis, which took care of this complaint.

Subsequent to the carpal tunnel surgery, Stephen began to notice more pain radiating down into his hands and more pain and numbness in his hands, especially at night. He began having problems sleeping because of the pain.

On November 30, 1988, Stephen saw Dr. Rassekh. Dr. Rassekh's notes indicate Stephen was seen because of constant pain in his neck and left arm to left elbow and numbness of the hand. There was also marked restriction of neck motion. Feldine was prescribed and Stephen was requested to return in two weeks.

Between November 30, 1988, and April 6, 1993, Stephen saw Dr. Rassekh six times. His complaints were generally the same. That is, constant neck pain, pain in the left upper extremity, and numbness as well as shoulder pain. Medication was prescribed at times during those visits, as well as physical therapy. On the doctor's notes of March 31, 1993, it is noted that the MRI of the cervical spine shows the fusion and degenerative changes at C5 and C6.

On April 6, 1993, Stephen returned to see Dr. Rassekh. His notes indicate that Stephen had pain in the left cervical neck and on the left side. He had a slight weakness of the left deltoid and left biceps. Stephen told Dr. Rassekh the medication did not help and he could not tolerate the pain. At that time, they discussed the fusion and laminectomy procedures, and it was ultimately agreed to do an anterior fusion at C5 and C6 on April 14, 1993. They also discussed the possibility of further surgical needs at C2 and C3.

On the day prior to the surgery, Stephen delivered a letter to Dr. Rassekh's office. The thrust of the letter was to raise the possibility of some further surgery at C2 and C3. Stephen felt because he was undergoing surgery at C5 and C6, it may be possible to remedy the problem at C2 and C3.

Prior to the surgery on April 14, 1993, Stephen and Dr. Rassekh discussed the situation. It was ultimately agreed that a laminectomy would be done at C5 and C6 rather than a fusion. It was also determined nothing could be done at this time at the

C2-C3 level. Stephen signed consents for a decompression laminectomy at the C5-C6 level. Dr. Rassekh, however, performed a laminectomy from C2 through C7.

Stephen returned to see Dr. Rassekh seven times between the operation and November 22, 1993. After the surgery, Stephen felt there was improvement. However, things began to deteriorate. He still suffers pain and has been unable to continue teaching theater because of the physical requirements, and has been unable to do things at home that he had previously been able to do.

Dr. Rassekh wanted to achieve three goals by the surgical procedure. He initially wanted to insure that Stephen would not lose any more motion, he would get rid of the pain in the arm and the weakness of the arm, and he would achieve complete relief of his pain in his neck. Dr. Rassekh felt he was able to eliminate the pain in Stephen's arm and the weakness of his arm, and that there was no further loss of motion of his neck. However, Dr. Rassekh was unable to eliminate the pain in the back of Stephen's head. Dr. Rassekh believes that to some extent Stephen has difficulty because he has not followed through on what the doctor believes to be necessary exercises.

In April 1995, Stephen and Priscilla filed a medical malpractice case against Dr. Rassekh. They allege that Dr. Rassekh was negligent in three particulars: (1) in failing to obtain Stephen's informed consent before operating on Stephen; (2) in performing a decompression laminectomy on C2 through C7; and (3) in failing to

treat Stephen's symptoms conservatively with epidural steroids and/or anti-inflammatory medication and/or physical therapy.

The jury returned a verdict finding Dr. Rassekh at fault for failing to obtain Stephen's informed consent before operating on him. However, they found that this fault was not a proximate cause of Steven's damage.

Stephen filed a motion for new trial or a judgment notwithstanding the verdict. That motion was overruled by a calendar sheet entry. Stephen appeals, contending the trial court erred in refusing to grant a new trial when the jury verdict, finding liability, was inconsistent with the verdict assessing no damages.

II. STANDARD OF REVIEW. Our review of a district court's action on a motion for new trial is for abuse of discretion. *Foggia v. Des Moines Bowl-O-Mat, Inc.*, 543 N.W.2d 889, 892 (Iowa 1996). In rulings on motions for new trial, we give the district court broad but not unlimited discretion in determining whether the verdict effectuated substantial justice between the parties. *See* Iowa R. App. P. 14(f)(3). We will not find an abuse of discretion unless it is shown that the trial court's discretion was exercised on grounds clearly untenable or to an extent clearly unreasonable. *Kiner v. Reliance Ins. Co.*, 463 N.W.2d 9, 13 (Iowa 1990). We are more reluctant to interfere with the grant of a new trial than its refusal. Iowa R. App. P. 14(f)(4).[1]

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[1] The trial court, in denying plaintiffs' motion, did not set forth any reasons for its denial.

III. MOTION FOR NEW TRIAL. The elements of a tort claim are (1) a duty to conform to a standard, and (2) a failure to conform to the standard, and (3) the failure to conform to the standard proximately caused the plaintiff's damages, and (4) the amount of damages. *Haafke v. Mitchell*, 347 N.W.2d 381, 385 (Iowa 1984). Questions of fault and proximate cause are questions of fact, and only in exceptional cases may these questions be taken from the jury and decided as a matter of law by the court. *Johnson v. Junkmann*, 395 N.W.2d 862, 864 (Iowa 1986). Even though fault is established, it does not necessarily follow that proximate cause exists. *See Oak Leaf Country Club, Inc. v. Wilson*, 257 N.W.2d 739, 746 (Iowa 1977). Proximate cause must be separately determined. The trial court did this when it submitted in its instructions the questions of fault and proximate cause to the jury.

Stephen contends that because Dr. Rassekh was found at fault, it necessarily follows that damages should be awarded. In order to be a proximate cause of a plaintiff's injury, it is not enough to assert that the harm to the plaintiff would not have occurred had the defendant not been negligent. *Pedersen v. Kuhr*, 201 N.W.2d 711, 713 (Iowa 1972). A finding of negligence is necessary; however, it is not standing alone sufficient. *Id.* The fault or negligence of a defendant must be a substantial factor in bringing about plaintiff's harm. *Id.*

Proximate cause is defined as:

> In order to be a [proximate] cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent . . . . (T)his is necessary, but it is not of itself sufficient. The

> negligence must also be a substantial factor in bringing about the plaintiff's harm. The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in a popular sense, in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense," which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called "philosophic sense," yet, the effect of many of them is so insignificant that no ordinary mind would think of them as causes.

Id. (quoting Restatement (Second) of Torts §431, comment (a)).

The cases establish a two-part test for proximate cause: (1) but for defendant's fault, plaintiff's injuries would not have occurred; and (2) defendant's fault must be a substantial factor in bringing about plaintiff's harm. *Johnson*, 395 N.W.2d at 865; *Pedersen*, 201 N.W.2d at 713. In this situation, although the jury found Dr. Rassekh at fault, by finding such fault was not a proximate cause of Stephen's damages, it follows the jury determined such fault was not a substantial factor in bringing about Stephen's harm.

Stephen contends the verdict finding Dr. Rassekh at fault was inconsistent with the verdict assessing no damages. There are situations where proximate cause may be determined as a matter of law, but those apply only in exceptional cases. *See Burton v. Des Moines Metropolitan Transit Authority*, 530 N.W.2d 696, 703 (Iowa 1995). An exceptional case is one which, after construing the evidence in the most favorable light and resolving all doubts in favor of the party seeking to establish proximate cause, the relationship between cause and effect is so apparent and so

related to the defendant's conduct that no reasonable jury could conclude the defendant's fault was not a proximate cause of the plaintiff's damages. *Johnson*, 395 N.W.2d at 865; *see also Kamerick v. Wal-Mart Stores, Inc.*, 503 N.W.2d 24, 26 (Iowa App. 1993).

We find there is substantial evidence within the record to support the jury's finding that Dr. Rassekh's fault was not a substantial factor in producing Stephen's damages and, therefore, it was not a proximate cause of the damages sustained by Stephen.

Stephen cites several cases in support of his contention that when a jury returns a verdict for a plaintiff in a negligence action but awards no damages, the verdict is inconsistent on its face. A close reading of those cases indicates that a question of proximate cause was not an issue and that in each case not only had negligence or fault been established, but also that fault or negligence was a proximate cause of the damages. Liability had been established. It is a different issue in this situation.

In conclusion, we find the question of proximate cause was not established by the evidence as a matter of law and the trial court was correct in overruling the motion for new trial.

AFFIRMED.