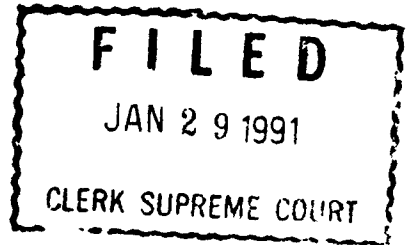


IN THE COURT OF APPEALS OF IOWA

No. 0-644 / 90-366



PATRICK KELLY and RUTH KELLY,
Appellees/Cross-Appellants,

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vs.

MARY JO MEADOR and JOE MEADOR,
Appellants/Cross-Appellees.

Appeal from the Iowa District Court for Pottawattamie
County, Keith E. Burgett, Judge.

Meadors appeal submission of future pain and suffering
issue to jury and various evidentiary rulings. **AFFIRMED.**

Matthew V. Stierman and Philip Willson of Smith,
Peterson, Beckman & Willson, Council Bluffs, for
appellants.

Lyle A. Rodenburg, Council Bluffs, for appellees.

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

SCHLEGEL, J.

Defendants Mary Jo Meador and Joe Meador appeal denial of various motions for post-judgment relief and a judgment upon a jury verdict granting an award for personal injury to plaintiff Patrick Kelly. Defendants contest the submission to the jury of a claim for future pain and suffering. Defendants also contend that the trial court erred in two evidentiary rulings. Plaintiff cross-appeals, asking for a limited remand on the issue of lost capacity. We affirm on both appeals.

I. In February 1988 Mary Jo Meador lost control of her car on an icy bridge. The car, which she owned jointly with her husband, spun and hit a concrete median. Patrick Kelly was unable to avoid a collision. Kelly was injured.

Kelly sued the Meadors for negligence. (Denial of Mrs. Kelly's loss of consortium claim has not been appealed.) The jury found Meador one hundred percent at fault and awarded Kelly \$6,467, which sum includes \$5,000 for future pain and suffering.

Our review is for errors of law. Iowa R. App. P. 4.

II. Defendants argue that the claim for future pain and suffering should not have been submitted. They argue that there was no testimony on showing a causal connection between the accident and future pain and suffering.

A causal connection is necessary in personal injury cases, see Becker v. D & E Distrib. Co., 247 N.W.2d 727, 730 (Iowa 1976); Bradshaw v. Iowa Methodist Hosp., 101

N.W.2d 167, 170 (Iowa 1960), but defendants confuse the issue of causation with evidence of injuries. In Mabrier v. A.M. Servicing Corp., 161 N.W.2d 180, 183 (Iowa 1968), the supreme court stated,

In Iowa, when pain is suffered right up to the time of trial and there is evidence plaintiff has not fully recovered, future pain and suffering may be submitted to the jury without medical testimony. [Citations.]

The jury can find from such evidence that it is reasonably certain plaintiff will suffer pain in the future.

There was ample evidence from both the plaintiff and his physician showing plaintiff still suffered pain from the crash. Given this evidence, see Kaltenheuser v. Sesker, 121 N.W.2d 672, 676-77 (Iowa 1963), we will not second guess the jury.

III. Defendants contend the trial court erred by allowing Kelly to relate medical opinions given by his physician. They complain about the following testimony:

[PLAINTIFF'S COUNSEL]: Did [the doctor] ever prescribe anything for you that would rid you of the problem that he had diagnosed? Yes or no.
A. Yes.

Q. What was that, that could rid you of that problem? A. Take three or four months off of work.

Q. And did he guarantee that would help or suggest that it would help? A. Suggest--

[DEFENDANT'S COUNSEL]: I move to strike the answer . . . on the ground that it now appears this was hearsay. We have the doctor's deposition, and this is improper, and I ask the Court to instruct the jury not to consider it.

THE COURT: The objection is sustained, and the response to the last question and answer are stricken.

[PLAINTIFF'S COUNSEL]: Did the doctor at anytime from then up until now ever suggest to you that there was anything more that could be done for you other than what's already been done? Yes or no.

[DEFENDANT'S COUNSEL]: Same objection; calling for hearsay.

THE COURT: Overruled.

[PLAINTIFF'S COUNSEL]: Just answer yes or--- A. Yes.

Q. Other than-- what is it, four months off? or three months? A. Yes, sir.

[DEFENDANT'S COUNSEL]: Just a minute; I object to the question about three or four months off. There's absolutely no testimony from the doctor to support that statement. This is an improper effort to get the evidence in that the Court has previously stricken, and I ask the Court to tell the jury to disregard it.

THE COURT: That question relating to three or four months off is stricken.

[PLAINTIFF'S COUNSEL]: . . . I didn't understand that was stricken, Judge. I apologize to the Court if you struck that out. . . .

Defense counsel's apparent objection to the second question in this exchange was made after the third question had been asked and partially answered. The objection to "the answer" and the ruling on "the last question and answer" were extremely unclear, and any confusion as to which question and answer were stricken is attributable to defense counsel.

The question and answer relating to the prescribed rest period were, nevertheless, stricken from the record. Curative instructions were given advising the jury to disregard objections and rulings as well as statements, arguments, questions, and comments by counsel. State v. Plaster, 424 N.W.2d 226, 232-33 (Iowa 1988); State v. Conner, 314 N.W.2d 427, 429 (Iowa 1982); see also Shawhan

v. Polk County, 420 N.W.2d 808, 811 (Iowa 1988). Although the court did not, at the time, instruct the jury to disregard the testimony, defense counsel did not renew its request. See Shover v. Iowa Lutheran Hosp., 107 N.W.2d 85, 93 (Iowa 1961); see also Shawhan, 420 N.W.2d at 811 (failure to follow jury instructions not presumed). Because of defense counsel's tardy and unclear objection, we are unpersuaded that any later reference by counsel to the testimony is reversible error.

IV. During presentation of plaintiff's case, the deposition of an officer who investigated the accident was read into the record. At the deposition, defense counsel conducted the direct examination, which covered the officer's investigatory credentials, weather conditions, and a description of the accident. Plaintiff's counsel conducted cross-examination and asked the following:

[PLAINTIFF'S COUNSEL]: As a matter of fact, you discovered that in your conversation with the drivers as a supplement to [your report] that [Mrs. Meador] was traveling too fast for the existing circumstances here?

[Defense counsel objects at the deposition on the grounds that the question calls "for an opinion on a mixed question, fact and law, and not a proper subject for expert opinion and inadequate foundation." Defense counsel apparently makes the same objection at trial, but the objection never appears in the transcript of the record. Defense counsel notes during trial that "the court overruled the objection."]

* * *

[PLAINTIFF'S COUNSEL]: You ascertained that after your conversation with these other drivers and investigation of the scene, did you not?
A. Yes.

[DEFENDANT'S COUNSEL]: The same objection.

. . .

* * *

THE COURT: Sustained. . . .

There is substantial confusion about what the record actually shows. Contrary to plaintiff's contention, the transcript shows that the officer's answer was read to the jury. At pages 69, 74, and 75 of the trial transcript, it is clear that the court at first overruled the defense objection. Defense counsel then asked for a ruling on the second objection, which was on the same grounds and to the same question. The court responded three times on pages 75 and 76 of the transcript that the objection was sustained.

We can draw no other conclusion from the record than that defendants' objection was sustained. Although the answer came into the record, there was no motion to strike and no request to admonish the jury not to consider the testimony. Because defendants' objection was sustained and no further action was taken, they cannot now complain that the court erred in overruling the objection. Shover, 107 N.W.2d at 93-94.

V. On cross-appeal Kelly argues that the trial court erred in refusing to submit his proposed instruction for loss of earning capacity. The court overruled Kelly's objections to the instructions, citing a lack of evidence to support the theory. Kelly argues that there was sufficient evidence to support his theory.

The court must give a proposed instruction if the theory has been pleaded or properly litigated. Gunnison v. Torrey, 216 N.W.2d 361, 364 (Iowa 1974). The evidence must be sufficient to warrant submission to the jury. Id.; see also Seaway Candy, Inc. v. Cedar Rapids YMCA, 283 N.W.2d 315, 316 (Iowa 1979) (citing Mora v. Savereid, 222 N.W.2d 417, 419 (Iowa 1974)).

Although "[i]mpairment of physical capacity creates an inference of lessened earning ability in the future," DeWall v. Prentice, 224 N.W.2d 428, 435 (Iowa 1974); Carradus v. Lange, 203 N.W.2d 565, 569 (Iowa 1973); Holmquist v. Volkswagen of Am., Inc., 261 N.W.2d 516, 525 (Iowa App. 1977), there must be supporting evidence to show a reduction in the power to earn. DeWall, 224 N.W.2d at 435 (reduction in value of power to earn a basic element); Carradus, 203 N.W.2d at 569 (same); Holmquist, 261 N.W.2d at 525 (same). No such evidence appears in the record. Kelly performs the same job, and the record shows no medical or employer restrictions. The trial court was, therefore, within its discretion to deny submission of the loss of earning capacity claim.

VI. We hold that the trial court did not err in submitting the issue of future pain and suffering to the jury. We hold that the court did not err in ruling on testimony by the plaintiff and by an accident investigator. We hold that the court did not err in refusing to submit the issue of future earning capacity. We, therefore, affirm both appeals.

Costs of appeal shall be taxed seventy-five percent to appellants/cross-appellees Meadors and twenty-five percent to appellees/cross-appellants Kellys.

AFFIRMED.