

IN THE COURT OF APPEALS OF IOWA

No. 8-425 / 97-2018

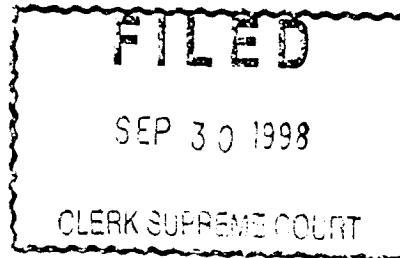
TAMI WAILES,

Plaintiff-Appellant,

vs.

**JOSHUA P. GOODE and
JANET GOODE,**

Defendants-Appellees.



Appeal from the Iowa District Court for Polk County, Robert A. Hutchinson,
Judge.

Plaintiff appeals the jury verdict for damages. **REVERSED AND
REMANDED.**

Donald G. Beattie and R. Bradley Skinner of Skinner & Beattie, Altoona, for
appellant.

Richard N. Winders of Herrick, Langdon & Langdon, Des Moines, for
appellees.

Considered by Sackett, P.J., and Huitink and Mahan, JJ.

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SACKETT, P.J.

The sole question in this appeal from a jury verdict for plaintiff-appellant Tami Wailes awarding her money for damages suffered in an automobile accident is whether the trial court correctly limited the period for which she could collect damages. We find the period should not have been limited and reverse and remand for the limited purpose of allowing plaintiff to try her claim for future damages, if any, after November 14, 1994.

Plaintiff was injured in a collision with defendants' car¹ on May 23, 1994. She sued claiming, among other things, compensation for future medical expenses and pain and suffering. Defendants-appellees Joshua Goode and Janet Goode admitted they were liable for the accident. The only question litigated was the extent of plaintiff's injury.

On November 14, 1994, plaintiff was injured in a second accident for which she has sought compensation from other tort-feasors. Plaintiff's claim, if any, against that tort-feasor is not a part of this action.

The trial of this case was held in August of 1997. Prior to trial, defendants filed a motion in limine seeking to limit plaintiff's claim to damages incurred prior to November 14, 1994, the date of her second accident. The motion was sustained and the jury was so instructed as to the limitation. The jury returned a verdict of \$5442.29. Plaintiff sought a new trial contending defendants' motion in limine should

¹ The car belonging to defendant Janet Goode was being driven by defendant Joshua Goode with Janet's permission.

not have been sustained. The motion for new trial was overruled and this appeal follows.

Our standard of review of a trial 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, 891 (Iowa 1996); *Matthess v. State Farm Mut. Auto. Ins. Co.*, 521 N.W.2d 699, 702 (Iowa 1994); *Witte v. Vogt*, 443 N.W.2d 715, 716 (Iowa 1989).

Plaintiff suffered headaches and back problems prior to the accident with defendants, though she had not been treated for these problems since August of 1992. The day after this accident, plaintiff saw Donald A. MacKenzie, D.C. She continued to see him through and after the November 14, 1994 accident.

Defendants' motion in limine focuses on deposition testimony of MacKenzie they interpreted as saying: (1) In his treatment of plaintiff, MacKenzie was unable to separate injuries plaintiff received May 23, 1994 with injuries she received in the November 1994 accident; and (2) since plaintiff appeared better in October of 1994, the November 1994 accident exacerbated her condition.

MacKenzie gave the opinion plaintiff had fibromyalgia prior to the May 1994 accident with defendant. His deposition testimony, in part, was:

Q. Is it your opinion that the injuries she suffered in November of 1994 exacerbated her symptoms that you had been treating her for?

A. At that time there was an exacerbation.

Q. Would I be correct in assuming that your treatment subsequent to November of 1994 would be for her condition that had been exacerbated by injuries she received in the November 1994 accident? A. It's so hard to separate the two.

....

Q. And would it be fair to say that it's certainly possible that [the November 1994 accident] caused the setback in her ongoing, hopeful improvement? A. Yes.

Q. And that probably is still the case today, isn't it? A. Again, it's hard to say once an episode creates a crisis, but science is not developed enough to tell us whether or not --

Q. [T]he injuries that she suffered in the May accident of 1994 at least brought forth the symptoms of fibromyalgia, and it is now a chronic condition. Am I understanding your statement correct? A. I believe that what I'm saying is . . . , based on the accumulation of information that I had, she had fibromyalgia. That would be a reasonable medical conclusion.

Q. And then is it my understanding that the injuries, in your opinion, that she suffered in May of 1994 in the car accident caused the fibromyalgia to be more than mild; the symptoms greater? A. That's my -- I think the term "chronic" fits it best, hangs on longer.

Q. Now, I think we'd established by a review of your records that in October of 1994 when you examined her you noted that at that examination you felt that her reflex extension injuries were resolving and that the fibromyalgia was not present on that date on that examination. Do you remember when we talked about that? A. Yes, Counselor.

Q. And then we had the second accident that she was involved in in November of 1994, which, I think, we've established exacerbated the conditions that you were treating her for up until that time; correct? A. Correct.

Q. Would it be correct that since she appeared to be perhaps better in October of 1994 concerning fibromyalgia that the injuries she received in the November 1994 accident exacerbated the fibromyalgia also? A. Yes, Counselor.

Q. In your care and treatment since November of 1994, we've established you really can't separate out the two accidents and the injuries that she received because you were treating an ongoing condition; right? A. Yes, Counselor.

Plaintiff contends, based on this evidence, the jury should not have been foreclosed from considering plaintiff's claim for damages after November 14, 1994.

In determining whether a jury issue is engendered on an issue, a trial court views the evidence in the light most favorable to the party against whom the motion was made regardless of whether such evidence is contradicted. *Schiltz v. Cullen-Schiltz & Assoc., Inc.*, 228 N.W.2d 10, 17 (Iowa 1975). Every legitimate inference which may reasonably be deduced therefrom must be carried to the aid of the evidence. *Id.* If reasonable minds can differ on the issue, it is for the jury. *American Family Mut. Ins. Co. v. DeGroot*, 543 N.W.2d 870, 871 (Iowa 1996).

The weight and credibility of testimony are matters for the jury. *Oak Leaf County Club, Inc. v. Wilson*, 257 N.W.2d 739, 747 (Iowa 1977). This rule applies even though there are contradictions or inconsistencies in the testimony of a particular witness. *Rehmann v. Balduchi*, 169 N.W.2d 894, 896 (Iowa 1969).

An expert may express his opinion either as to the possibility, probability, or actuality of causation. *Winter v. Honeggers' & Co.*, 215 N.W.2d 316, 321 (Iowa 1974); *State v. Stribley*, 532 N.W.2d 170, 172 (Iowa App. 1995). Evidence indicating a probability or likelihood of the causal connection is necessary to generate a jury issue. *Gerst v. Marshall*, 549 N.W.2d 810, 818 (Iowa 1996); *Bradshaw v. Iowa Methodist Hosp.*, 251 Iowa 375, 379-80, 101 N.W.2d 167, 170 (1960). This probability may be inferred by combining an expert's possibility testimony with nonexpert testimony that the described condition of which a complaint is made did not exist before the occurrence of those facts alleged to be the cause thereof. *Chenoweth v. Flynn*, 251 Iowa 11, 17-18, 99 N.W.2d 310, 314 (1959); *Koeller v. Reynolds*, 344 N.W.2d 556, 559 (Iowa App. 1983).

A reasonable inference from MacKenzie's evidence is, in his opinion, plaintiff continued to suffer as a result of the May 1994 accident following the November 1994 accident. Defendants do not appear to dispute this fact.

The trial court reasoned and defendants, in arguing for affirmance, advance the failure of MacKenzie to separate the future difficulties caused by the May 1994 injuries from the future difficulties caused by the November 1994 injuries rendered her evidence insufficient to submit the issue of damages after November 14, 1994.

It is well established a tort-feasor takes the person he injures as he finds him. *McBroom v. State*, 226 N.W.2d 41, 45 (Iowa 1975). The mere existence of a prior non-disabling, asymptomatic, latent condition is not a defense. *Becker v. D & E Distrib. Co.*, 247 N.W.2d 727, 731 (Iowa 1976). A tort-feasor whose acts, when superimposed upon such condition, result in an injury may be liable in damages for the full disability. *Id.* In these cases the injury, and not the dormant condition, is deemed to be the proximate cause of the pain and disability. *Koeller*, 344 N.W.2d at 559.

We agree with defendants the general rule holds a defendant cannot be held liable for injuries sustained after his negligence. *Becker*, 247 N.W.2d at 730. We also recognize generally a defendant's liability to compensation for injuries caused by his own acts of negligence, and not for injury, suffering, or impaired health due to other causes. *Waits v. United Fire & Cas. Co.*, 572 N.W.2d 565, 577 (Iowa 1997); *Foggia*, 543 N.W.2d at 893-94. This principle, however, does have exceptions. For example, a tort-feasor whose independent acts contribute to a total injury may be

jointly and severally liable for the full amount of indivisible damages. *Treanor v. B.P.E. Leasing, Inc.*, 158 N.W.2d 4, 5-6 (Iowa 1968). That situation does not, however, apply here.

In addressing the case where it was not possible to distinguish between the injury caused by the preexisting condition and the trauma of the accident, the Iowa Supreme Court said the impossibility of allocation should not foreclose plaintiff's right of action against an injury-causing tort-feasor. *Becker*, 247 N.W.2d at 731. It seems reasonable to apply that reasoning here. The evidence shows plaintiff continues to suffer from the accident with defendants. While it is recognized defendants have no responsibility for the exacerbation caused by the November 1994 accident, MacKenzie's testimony is sufficient for the jury to allocate the damages to the two accidents.

Defendants have admitted liability. Plaintiff has been compensated for injuries to November 14, 1994. Neither party challenges this award.

We remand for the limited purpose of allowing plaintiff to try her claim for future damages, if any, after November 14, 1994. We do not retain jurisdiction.

REVERSED AND REMANDED.