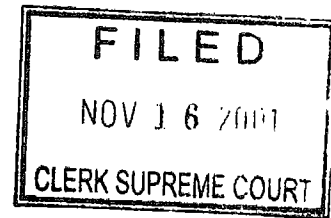


IN THE COURT OF APPEALS OF IOWA

No. 1-331 / 00-361
Filed November 16, 2001



**RICHARD ELLIOTT MATHIESON
And DARLA MATHIESON,
Plaintiffs-Appellees,**

vs.

**KENNY LEE VANDERLINDEN
And MOTOR CLUB OF IOWA,
Defendants-Appellants.**

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

On appeal from an adverse jury verdict in a personal injury action, the defendants argue the district court erred in failing to instruct the jury that the plaintiff failed to mitigate his damages by not following doctor's orders to stop smoking and discontinue the use of narcotics. **AFFIRMED.**

Jeffrey A. Sar of Baron, Sar. Goodwin, Gill & Lohr, Sioux City, for appellants.

Al Sturgeon, Sioux City, for appellees.

Heard by Huitink P.J., and Zimmer and Vaitheswaran, JJ.

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VAITHESWARAN, J.

Richard Mathieson sued and obtained a jury verdict for head and neck injuries sustained in a car accident. On appeal, the defendants contend the court should have instructed the jury that Mathieson failed to mitigate his damages when he did not give up smoking or the non-prescription use of codeine. Finding no prejudicial error in the district court's failure to give this instruction, we affirm.

I. Background Facts and Proceedings

Kenny Vanderlinden was driving a vehicle owned by his employer, Motor Club of Iowa, when he collided with Mathieson. Mathieson injured his neck and shoulder and underwent physical therapy for several weeks. He suffered headaches and chronic neck and shoulder pain for which he received trigger point injections of cortisone and, ultimately, surgery.

When Mathieson could no longer afford medical intervention for the pain, he began massage therapy and took Tylenol with codeine, which he obtained in Canada without a prescription.¹ At the time of trial, Mathieson was also taking a prescription medication for depression and was smoking about one pack of cigarettes per day.

At trial, the defendants asked the district court to instruct the jury it could find Mathieson at fault for failing to mitigate damages. The court gave a fault instruction but declined to specify the two requested mitigation grounds: (1) failure to quit smoking and (2) continued use of nonprescription narcotics.² The district

¹ In the United States, this medication must be prescribed by a doctor.

² The court deleted items (c) and (d) from the following instruction requested by the defendants:

court found a lack of substantial evidence to support these grounds. The court reasoned:

[i]t seems to me that there has to be proof not only that there is something that the plaintiff is doing that it was recommended that he not do, but there also has to be proof that if he had quit, it would have, in fact, mitigated his damages, at least some medical proof.

The jury returned a verdict for Mathieson in the amount of \$260,534. The court entered judgment on the verdict and subsequently denied the defendants' request for new trial. This appeal followed.

II. Failure to Mitigate Instruction

A. Scope and Standard of Review. The sole issue on appeal is the district court's refusal to specify in its jury instructions the mitigation of damages grounds requested by the defendants. Our review of this issue is for prejudicial error. *Stover v. Lakeland Square Owners Ass'n*, 434 N.W.2d 866, 868 (Iowa 1989).

Defendants claim that Plaintiff, Richard Elliot Mathieson, was at fault in one or more of the following ways:

- (a) In entering the intersection before the light turned green;
- (b) In failing to keep a proper lookout;
- (c) In failing to mitigate his injuries by stopping smoking after being so advised;
- (d) In failing to mitigate his injuries by the continued use of the narcotics without a prescription.

Defendants further claim that the fault of the Plaintiff was a proximate cause of the Plaintiff's damages, if any.

If the Defendants fail to prove that the Plaintiff has fault and that the fault was a proximate cause of the Plaintiff's damages, if any, they have not proved this defense.

If the Defendants have proved that the Plaintiff had fault and that the fault was a proximate cause of his damages, if any, then you will next determine what percentage of the combined fault is attributable to the Plaintiff and what percentage is attributable to the Defendants.

The court has a duty to include in its instructions all the litigants' legal theories that are supported by the pleadings and substantial evidence. *Tullis v. Merrill*, 584 N.W.2d 236, 240 (Iowa 1998). Conversely, the court must refuse to instruct on an issue "having no substantial evidential support or which rests on speculation." *Id.* (quoting *Thompson v. City of Des Moines*, 564 N.W.2d 839, 846 (Iowa 1997)).

B. Mitigation of Damages. The concept of fault includes an unreasonable failure to mitigate damages. See Iowa Code § 668.1. The party asserting a failure to mitigate on the part of the plaintiff has the burden of presenting substantial evidence in support of that theory. *Greenwood v. Mitchell*, 621 N.W.2d 200, 205-6 (Iowa 2001).

The Iowa Supreme Court recently articulated a three-prong test for determining whether a defendant's proof is sufficient to support submission of a mitigation of damages instruction to the jury. *Greenwood*, 621 N.W.2d at 205. First, there must be substantial evidence that there was a specific course of action the plaintiff could take to mitigate the damages and that requiring the plaintiff to take the action was reasonable under the circumstances. *Id.* at 205. Second, there must be evidence that the plaintiff acted unreasonably in failing to mitigate damages. *Id.* Third, "there must be proof of a causal connection between the plaintiff's failure to mitigate and his damages." *Id.*; see also *Fuches v. S.E.S. Co.*, 459 N.W.2d 642, 643 (Iowa Ct. App. 1990) (where defendant alleges a failure to undergo medical treatment, there must be showing that such treatment would in fact have mitigated damages). We proceed to apply this test to the evidence of smoking and codeine use.

1. Smoking Evidence. Under the first prong of the *Greenwood* test, we must determine whether there was substantial evidence to show Mathieson could take some action to mitigate his damages and requiring him to take the action was reasonable under the circumstances. Mathieson smoked one to one and a half packs of cigarettes a day. Dr. Purves, a physician to whom Mathieson was referred following the accident, believed the smoking was compounding his pain and, two years before trial, suggested he "cut back" on his smoking. This evidence is sufficient to establish there was some action Mathieson could take to mitigate his damages. However, it is insufficient to establish Mathieson was "required" to reduce his smoking and that the requirement was reasonable.

Mathieson testified that Dr. Purves "suggested" he stop smoking and "may have" also advised him that smoking might be contributing to his headaches. Dr. Purves' medical progress notes are no less equivocal. Although she recommended Mathieson "cut back" on smoking, her management plan for addressing his chronic pain made no mention of reduced smoking, and a smoking reduction assessment discussed with Mathieson was never implemented. As there was no requirement to reduce smoking, there could be no determination as to whether such a requirement was reasonable. Therefore, the defendants failed to establish the first prong of the *Greenwood* test for obtaining a mitigation instruction.

Under the second prong of the *Greenwood* test, we must determine whether Mathieson acted unreasonably in failing to reduce his smoking. *Greenwood*, 621 N.W.2d at 205. Again, resolution of this issue turns on the fact that none of the physicians who treated him required him to stop smoking.

Without such a requirement, Mathieson's failure to reduce smoking could not be deemed unreasonable. Accordingly, the second prong of the *Greenwood* test is not satisfied.

The third prong of the *Greenwood* test provides that a defendant is entitled to a mitigation instruction only if the defendant introduces substantial evidence that the plaintiff's actions "were a proximate cause of an identifiable portion of his damages." *Id.* at 207. The defendants argue that the testimony of two physicians, Dr. Purves and Dr. Cook, establishes this causal connection. Dr. Purves' medical progress notes state:

It is my conclusion based on the review of these records and evaluation of the patient that he has clearly developed a myofascial syndrome with features of fibromyalgia. This is being compounded by his nicotine and codeine use which is going to make relief in this now very chronic condition extremely difficult to obtain.

Dr. Cook, a physician who treated Mathieson with nerve block injections, was asked by defense counsel whether he agreed with Dr. Purves' conclusion that Mathieson's myofascial syndrome was being compounded by his nicotine use, rendering relief extremely difficult. Dr. Cook stated, "I'm sure it could exacerbate it, yes." He further stated, "I don't know if it would be extremely difficult. It's obviously a contributing factor"

Although this evidence suggests a link between Mathieson's smoking and his pain, it does not establish that Mathieson's smoking was the proximate cause of his damages. See *Rieger v. Jacque*, 584 N.W.2d 247, 250 (Iowa 1998) (noting that, to constitute proximate cause, negligence must be substantial factor in bringing about harm); Cf. *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1138 (5th Cir. 1985) (noting evidence of smoking "related directly" to extent of

damage caused by inhalation of asbestos fibers); *Ostrowski v. Azzara*, 545 A.2d 148, 158-59 (1988) (noting district court would need to carefully scrutinize proof on before resubmitting mitigation of damage issue to jury). None of the physicians testified that a reduction or cessation of smoking would have prevented Mathieson's damages. See *Greenwood*, 621 N.W.2d at 206. To the contrary, the physicians almost uniformly agreed that all efforts to medically resolve Mathieson's pain had failed. One physician testified that Mathieson would need to take non-steroidal anti-inflammatory agents and muscle relaxants "for most of his life."

In light of this evidence, we conclude the defendants failed to establish the third prong of the *Greenwood* test.

Having failed to satisfy any of the elements of the *Greenwood* test, the defendants were not entitled to a mitigation instruction based on Mathieson's failure to cut back on his smoking.

2. Codeine Use. As noted, the record revealed Mathieson obtained Tylenol with codeine, without a prescription. Dr. Purves stated in her progress notes that Mathieson's chronic muscle tension headache syndrome "was being perpetuated by the steady use of codeine." She recommended Mathieson "carefully document the use of codeine and work towards reducing this on a steady basis."

The defendants contend this evidence entitled them to a mitigation instruction based on Mathieson's failure to cease the use of narcotics. We disagree because: (1) even if Dr. Purves' recommendation could be construed as a requirement, and a reasonable requirement, Mathieson in fact complied with it for a period of time; see *Greenwood*, 621 N.W.2d at 206 (noting plaintiff followed

exercise program until he felt it was not doing any good); (2) when Mathieson returned to using codeine, his use was reasonable; *Id.*, and (3) Mathieson's use of codeine was not the proximate cause of his shoulder and neck pain and his headaches. *Id.*

Dr. Purves' medical progress notes from her second visit with Mathieson state Mathieson in fact reduced his intake of the codeine-containing Tylenol from three to four tablets per day to just one every two to three days. However, during a subsequent visit, Mathieson informed Dr. Purves that his headaches had recurred despite his reduction of codeine and he had begun using Tylenol again because it was the "only thing that gave him any relief." At this juncture, Dr. Purves did not recommend Mathieson stop using the codeine compound and did not schedule a follow-up assessment of his codeine use with herself or any other physician. She noted, "I feel I have gone as far as I can with medical management of these headaches and they have remained very localized with an occipital nerve radiation pattern."

In light of this evidence, we are not convinced Dr. Purves' single statement that Mathieson's codeine use was perpetuating his headaches was sufficient to establish proximate cause. Indeed, when defense counsel asked Mathieson whether Dr. Purves informed him that his use of narcotics could have caused his headaches, Mathieson responded, "I don't believe she did." On this record, we conclude there was not substantial evidence to submit a failure to mitigate instruction based on continued codeine use.

III. Summary

The district court did not err in refusing to instruct the jury on the mitigation of damages grounds requested by the defendants.

AFFIRMED.