FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-456 / 89-1893

BRUCE A. TANBERG and MARSHA DeROSIER,

Plaintiffs-Appellants,

vs.

371

ACKERMAN INVESTMENT CO., d/b/a BEST WESTERN STARLITE VILLAGE,

Defendant-Appellee.

Appeal from the Iowa District Court for Story County, M.D. Seiser, Judge.

Plaintiff appeals a judgment of the trial court, following a jury trial, that plaintiff contributed to his injuries subsequent to slipping in a hotel bathtub because he failed to follow his doctor's advice to lose weight. **REVERSED AND REMANDED.**

Kathy A. Tatone of Karon, Jepsen & Daly, P.A., St. Paul, Minnesota, and David S. Wiggins of Marcucci, Wiggins & Anderson, P.C., West Des Moines, for appellants.

Thomas Henderson and Megan M. Antenucci of Whitfield, Musgrave & Eddy, Des Moines, for appellee.

Considered by Oxberger, C.J., and Schlegel and Sackett, JJ. Habhab, J., takes no part.

SACKETT, J.

We address the question of whether an injured plaintiff's failure to follow his doctor's instructions to lose weight to decrease the pain from his injury can be considered fault under Iowa's comparative fault statute. We hold it should not be considered fault.

Plaintiffs-appellants Bruce Tanberg and Marsha DeRosier sued defendant-appellee Ackerman Investment Co. d/b/a Best Western Starlight Village for injuries Bruce allegedly sustained when he fell in a whirlpool on defendant's premises. The only issue before us is whether the trial court erred in instructing the jury that Bruce's failure to lose weight could be considered in the percentage of fault allocated to Bruce. Following trial, the jury allocated negligence 30 percent to defendant and 70 percent to Bruce. A verdict was entered for defendant and plaintiff appeals.

Bruce claims to have suffered in the fall a compression fracture of a vertebrae, three herniated discs and an aggravation of a spondylolelthesis condition. Bruce, who is five foot eleven inches tall weighed over three hundred pounds when the accident happened. Two of Bruce's treating doctors recommended a weight loss. Over objection, the jury was instructed:

> Defendant claims plaintiff was at fault by failing to exercise ordinary care to follow reasonable medical treatment.

> Evidence has been introduced that damage could have been reduced to some extent if Mr. Tanberg followed his doctor's advice and lost weight. An injured person has no duty to undergo serious or speculative medical treatment but, if by slight expense and by slight inconvenience, a person exercising ordinary care could have reduced the damages, he has a duty to do so.

Plaintiff's attorney objected to the instruction contending, among other things, Bruce was overweight before the accident and his failure to lose weight should not be considered fault. Bruce presents this argument again on appeal.

Iowa's comparative fault statute defines the items of "fault," in addition to negligence, as:

> breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable and unreasonable failure to avoid an injury or to mitigate damages.

Iowa Code § 668.1 (1989) (emphasis added).

In Miller v. Eichhorn, 426 N.W.2d 641, 643 (Iowa App. 1988), we held section 668.1 clearly provides the unreasonable failure to mitigate damages means fault as used in the statute, id., and an unreasonable failure to mitigate damages is a part of the fault to be apportioned in Iowa under statutory comparative fault. Id.

Bruce contends his weight problem was a preexisting condition and should be treated as nothing more. A tortfeasor takes the person he or she injures as he or she finds him or her. McBroom v. State, 226 N.W.2d 41, 45-6

(Iowa 1975); Restatement (Second) Torts § 461, p. 281. A defendant is responsible for the ill effects that naturally follow the injury and it is no defense that the injury was more difficult to cure because of Bruce's health or that by reason of latent disease the injuries were more serious than they would have been to a person in good health. See 25 C.J.S. Damage § 21 p. 660. An injured person has a duty to use ordinary care in following his or her doctor's advice. Miller, 426 N.W.2d at 643; Shewry v. Heuer, 255 Iowa 147, 154-55, 121 N.W.2d 529 (1963). However, an overweight person unable to follow his or her doctor's instructions to lose weight has not breached that care.

We find the trial court erred in instructing a failure to lose weight could be considered fault. We reverse and remand for new trial.

REVERSED AND REMANDED.