IN THE COURT OF APPEALS OF IOWA

No. 6-119 / 94-1195

FILED
MAY 31 1996
CLERK SUPREME COURT

JAMES R. PHIPPS,

Appellant,

vs.

WESTWOOD COMMUNITY SCHOOL DISTRICT,

Appellee.

Appeal from the Iowa District Court for Woodbury County, Robert C. Clem, Judge.

Plaintiff appeals entry of judgment on jury verdict and denial of posttrial motions in personal injury action **AFFIRMED IN PART, REVERSED IN PART, AND JUDGMENT MODIFIED.**

Paul W. Deck, Sioux City, for appellant.

James R. Villone and Douglas L. Phillips of Klass, Hanks, Stoos, Stoik, Mugan & Villone, Sioux City, for appellee.

Heard by Habhab, P.J., and Cady and Streit, JJ. Vogel, J., takes no part.

STREIT, J.

The plaintiff, James Phipps, filed a negligence action against the defendant, Westwood Community School District, after one of its school buses hit the plaintiff's car and the plaintiff was injured. In its answer the defendant denied liability and asserted the affirmative defense of comparative fault. The jury found the school district eighty percent at fault and Phipps twenty percent at fault, and it awarded total damages of $10,400. Phipps appeals, and we affirm in part, reverse in part and modify the judgment.

I. Denial of Motion for Directed Verdict.

Phipps claims the trial court erred in not granting his request for a directed verdict on the issue of the defendant's liability. He claims only the issue of damages should have been submitted to the jury. We review a trial court's denial of a motion for directed verdict for correction of errors of law. *Podraza v. City of Carter Lake*, 524 N.W.2d 198, 202 (Iowa 1994). We view the evidence in the light most favorable to the nonmovant and determine whether sufficient evidence existed to warrant submission of an issue to a jury. *Id.*

"The movant is considered to have admitted the truth of all evidence offered by nonmovant and every favorable inference that may be deduced from it." *Hill v. Winnebago Indus., Inc.*, 522 N.W.2d 326, 328 (Iowa App. 1994). This standard of review requires us to consider whether reasonable minds could differ on the issues in

controversy. *Podraza*, 524 N.W.2d at 202. If reasonable minds could differ, an issue is for the jury. *Hill*, 522 N.W.2d at 328.

The definition of "fault" is not limited to negligent or reckless acts. "Fault" includes a plaintiff's "unreasonable failure to avoid an injury or to mitigate damages." Iowa Code § 668.1 (1993). The defendant raised the affirmative defense of comparative fault. Evidence offered by the plaintiff gave rise to the issue of mitigation of damages and was tried by the parties. There was substantial, disputed evidence about the failure of the plaintiff to adhere to an exercise program which could have improved his condition.

It was the function of the jury to allocate fault between the parties. Iowa Code § 668.3 (1993). There was sufficient evidence to generate a jury question on the apportionment of fault, and the trial court did not err in denying plaintiff's motion for a directed verdict.

II. Mitigation of Damages.

The plaintiff argues the trial court erred in submitting an instruction on mitigation to the jury when the defendant had not pled it as a defense and there was insufficient proof to support its submission. Mitigation of damages is a special defense which must be pled and proved by a defendant or the defendant is limited to circumstances growing out of the plaintiff's testimony. *F.S. Credit Corp. v. Shear Elevator, Inc.*, 377 N.W.2d 227, 233 (Iowa 1985), Iowa Code § 619.8(1993).

A review of the record indicates that through direct examination of his physician and through his own testimony, the plaintiff presented considerable evidence on the issue of mitigation. The issue was clearly tried by the parties. A mitigation instruction was requested by the defendant, and, in resisting it, the plaintiff never objected on the specific ground that the mitigation defense had not been pled. The failure to raise this specific objection below results in its waiver, and it cannot be raised for the first time on appeal. *See Moser v. Stallings*, 387 N.W.2d 599, 604 (Iowa 1986).

Requested jury instructions are required to be given when they properly state the law and apply to the facts in the case. *Sumpter v. City of Moulton*, 519 N.W.2d 427, 433 (Iowa App. 1994). Substantial evidence must be presented at trial to support the submission of an instruction *Id.* at 432 Evidence is substantial when reasonable minds would accept it as adequate to reach the conclusion. *Id.*

A review of the record reveals there was substantial evidence to support an instruction on the issue of the plaintiff's failure to mitigate his damages Plaintiff had been instructed by his physician to engage in an exercise program The plaintiff initially did so and had positive results When he failed to continue the program his improvement stopped His physician testified continued exercise would have improved the plaintiff's flexibility and reduced his pain. Substantial evidence warranted submission of the mitigation instruction

III. Avoidable Consequences -- Comparative Fault.

The plaintiff's final arguments pertain to the submission of instructions on comparative fault and the unreasonable failure to avoid an injury. We address these arguments together. The jury was instructed it could find plaintiff at fault for unreasonably failing to avoid an injury by not backing up his vehicle when the bus began its backward motion.[1] It was undisputed the bus had been stopped on a highway after the bus driver realized he had missed one of his stops. The bus moved backward, hitting the plaintiff's car at least once and possibly twice.

The plaintiff contends the defendant did not plead the defense of avoidable consequences and the evidence did not support its submission to the jury. As with the mitigation defense, the plaintiff did not object to the jury instruction on the basis of failure to plead and cannot raise this specific objection for the first time on appeal.

However, we agree with the plaintiff the record did not support the submission of instruction number 22. The doctrine of avoidable consequences states a party cannot recover damages that result from consequences a party could reasonably have avoided

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[1] Instruction 22 stated

A party is required to exercise reasonable care for their own safety. This means that, if, in the exercise of ordinary care under the circumstances, a party could have taken some particular action to avoid an injury, then they are under a duty to take such action

In this case defendant claims that plaintiff unreasonably failed to take action to avoid an injury because

Plaintiff failed to back up his vehicle when the bus began its backward motion

Olson v. Prosoco, Inc., 522 N.W.2d 284, 291 (Iowa 1994). Contributory negligence involves a plaintiff's behavior which occurs before or simultaneous with that of the defendant. *Coker v. Abell-Howe, Co.*, 491 N.W.2d 143, 149 (Iowa 1992). Avoidable consequences, on the other hand, occur after the defendant's negligence, but before an injury results. *Id.* The allegation that plaintiff should have backed up his car when he saw the bus moving backward amounts to conduct simultaneous with the defendant's negligence, and it does not support application of the doctrine of avoidable consequences.

Instruction 22 should not have been given; however, it was still appropriate for the jury to consider the plaintiff's "fault" as there was sufficient evidence to warrant submission of the issue of mitigation. The jury's verdict does not specify what, if any, proportion of the twenty percent of fault it allocated to the plaintiff is attributable to the properly submitted issue of mitigation, or if it was attributable in whole, or in part, to the improperly submitted issue of avoidable consequences.

Phipps argues he is entitled to a new trial on the issue of damages. He contends the improper submission of any fault instruction would have influenced the jury's assessment of damages. We have carefully considered the plaintiff's argument and find it is not persuasive. The determination of fault and the assessment of damages are distinct jury functions subject to separate instructions. The defendant concedes any error in submitting the issue of avoidable consequences can be rectified by eliminating

the twenty-percent assessment of fault to the plaintiff and awarding him the entire jury award of $10,400 in damages. *See generally, Peters v. Howser*, 419 N.W.2d 392, 396 (Iowa 1988). We agree. We modify Phipps' judgment to increase it to $10,400.

AFFIRMED IN PART, REVERSED IN PART, AND JUDGMENT MODIFIED.