

FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

SCOTT LEE SHANK,	)	Filed September 6, 1984	252
Plaintiff-Appellant/Cross-Appellee,	)		
vs	)	<u>4-184</u>	
JOHNSON COUNTY, IOWA,	)	83-627	
Defendant-Appellee/Cross-Appellant.	)		

Appeal from the Iowa District Court for Johnson County—L. Vern Robinson,
Judge.

Plaintiff appeals and defendant cross-appeals from a judgment for plaintiff
in a lawsuit arising out of a motorcycle accident which occurred on a Johnson
County road. **AFFIRMED.**

Lloyd E. Humphreys of Humphreys & Associates, and Henry M. Keyes of
Keyes, Bennett & Kucera, Cedar Rapids, for plaintiff-appellant/cross-appellee.

Bruce L. Walker of Phelan, Tucker, Boyle & Mullen, Iowa City, for
defendant-appellee/cross-appellant.

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

This is an appeal from a judgment of the trial court in a lawsuit arising out of a motorcycle accident which occurred on a Johnson County road. The trial court awarded a judgment to plaintiff, but ruled adversely to him on several issues. Plaintiff has taken this appeal and contends that he is entitled to a larger award for damages.

Plaintiff was injured when the motorcycle he was riding hit a pothole on County Road F-12 in Johnson County. A passenger on the motorcycle, Toni Cooley, was also injured.

Plaintiff and Cooley sued Johnson County, alleging negligence in maintaining the road. Cooley's claim was settled for \$2500. She assigned her claim to Johnson County, and the county counterclaimed against plaintiff for indemnity and contribution. At trial, the court found that Johnson County had been negligent, and that plaintiff's damages totaled \$9626.02. However, the court also found that plaintiff was negligent for failure to keep a proper lookout. It held that plaintiff's negligence constituted two-fifths, and reduced his recovery accordingly. It also directed plaintiff to pay \$1000 to Johnson county. This amount represents two-fifths of the amount the county had paid to Toni Cooley in settlement of her claim. The court refused to award punitive damages on the ground that there was no evidence to support such an award.

Plaintiff filed a motion pursuant to Iowa Rule of Civil Procedure 179(b) requesting that the court amend and enlarge its findings and judgment. He argued that the trial court's decree provided only a summary rather than a delineation of all of the facts and findings of the court. The trial court overruled plaintiff's motion on the grounds that the facts set out in its findings of fact and conclusions of law adequately support the decree.

Plaintiff appeals from the judgment in his favor. He contends that the trial court erred: (1) by concluding that the evidence would not support an award of punitive damages, (2) by failing to award sufficient compensatory damages for the injuries sustained, (3) by finding plaintiff 40 percent responsible for his own injuries, and (4) by overruling plaintiff's motion pursuant to rule 179(b). In conjunction with his third citation of error, plaintiff asserts that the contribution award of \$1000 was improper because Toni Cooley was not a party to the suit at the time of trial, and the county's payment to her was voluntary.

The county has cross-appealed. It contends that the trial court should have excluded the expert opinion testimony of plaintiff's chiropractor because plaintiff failed to disclose during discovery that an expert witness would be called.

I. Punitive Damages

The trial court did not err by refusing to award punitive damages, for it did not have the authority to do so. Under the common law, government subdivisions were immune from all tort liability. That sovereign immunity was relaxed, by legislative fiat, when Chapter 613A was added to the Iowa Code. The code was silent regarding liability for punitive damages until March 2, 1982, when it specifically excluded such liability.

Section 613A.4(5) was enacted subsequent to the time that plaintiff's cause of action arose. We are nevertheless convinced that this section is applicable. Although it is the general rule that statutes are presumed to operate only prospectively absent clear legislative intent, to the contrary, "[t]he rule is subject to an exception where the statute relates solely to remedy or procedures." Schnebly v. St. Joseph Mercy Hospital of Dubuque, 166 N.W.2d 780, 782 (Iowa 1969). Indeed, statutes which are strictly remedial are entitled to a presumption of retrospective applicability. State ex rel. Turner v. Limbrecht, 246 N.W.2d 330, 333 (Iowa 1976).

We are of the opinion that section 613A.4(5) is a strictly remedial statute. Absent evidence of a contrary legislative intent, it must be considered to be retrospectively applicable.

For the purpose of determining the legislative intent as to retrospective... application of a statute, [we]... first look at the language of the Act, second, [we]... consider the manifest evil to be remedied, and third [we]... determine whether there was a previously existing statute governing... the mischief which the new Act is intended to remedy. (citations omitted).

State ex rel. Turner, 246 N.W.2d at 333. Only the second consideration enumerated above is relevant here. The language of section 613A.4(5) is silent on the issue of intent. Moreover, there was no previously existing statute dealing with the mischief this section remedies. It appears that the legislature's purpose in enacting section 613A.4(5) was to correct an oversight in the original version of chapter 613A. Since this purpose is not best served by limiting its effect to a prospective application, we cannot say that that is what the legislature intended.

Even if there was some indication that the legislature intended that section 613A.4(5) not be applied retrospectively, plaintiff cannot prevail. Exemplary damages are permitted only where plaintiff has proven fraud, malice, gross negligence or oppression. See Stockdale v. Agrico Chemical Co., Division of Continental Oil Co., 340 F. Supp. 244, 261 (D.C. Iowa 1972). The term "malice" means the doing of an actual wrong in itself without just excuse. Claude v. Weaver Construction Co., 158 N.W.2d 139, 144 (Iowa 1968). Gross negligence is the "realization of imminent danger, coupled with a reckless disregard or lack of concern for the probable consequences of the act." Thompson v. Bohlker, 312 N.W.2d 501, 505 (Iowa 1981). Under the present record there is not a sufficient factual basis to support a finding of malice or gross negligence. No evidence was introduced to show that the county had actual knowledge of the defect. Indeed, the record indicates the contrary. Absent proof that the county was aware of the

hole in County Road F-12, the trial court could not have awarded exemplary damages.

II. Compensatory Damages

Plaintiff argues that the trial court erred by failing to award a sufficient sum for compensatory damages. We do not agree. The quantum of damages which may be awarded in any particular case is peculiarly a question for the trier of fact. As long as there is any reasonable basis in the record supporting the verdict we will not disturb it. See generally Kaiser v. Stathas, 263 N.W.2d 522 (Iowa 1978).

The trial court awarded plaintiff \$2448.02 for damage to his motorcycle, \$678 for past chiropractic expenses, \$3500 for future medical expenses, and \$3000 for pain and suffering and partial disability. Plaintiff argues that he is entitled to damages for his damaged jacket, pants, and boots, and for diminution of earning capacity. He also claims that the damages awarded for his disability and pain and suffering were inadequate.

Turning to the record, we are of the opinion that there is sufficient support for the trial court's award of damages. The trial court was justified in its failure to award damages for plaintiff's damaged clothing, since plaintiff offered no evidence at trial to substantiate this claim. To recover an item of damage plaintiff must do more than plead it generally. He must prove each item and the amount of his loss attributable thereto. See Stockdale, 340 F. Supp. at 259.

Similarly, the trial court was justified in failing to award any damages for diminution of earning capacity. While the existence of a permanent disability raises an inference of diminished earning capacity, it does not mandate such a conclusion. See Stanley v. State, 197 N.W.2d 599, 605 (Iowa 1972). Plaintiff's chiropractor testified that plaintiff would "probably" have a five percent partial disability; however, the evidence does not demonstrate that plaintiff has suffered

any loss of earning capacity as a result of such disability. Plaintiff works as a machine operator for Chicago Northwestern and has not claimed to have any difficulty at work whatsoever.

Even assuming that plaintiff could demonstrate some diminution in his earning capacity, he has failed to show the requisite proximate cause between his disability and the accident on F-12. Indeed, after reviewing the evidence, the trial court could legitimately have concluded that plaintiff's disability was not a result of this particular accident. Plaintiff had made numerous parachute jumps prior to his accident on County Road F-12, and offered no evidence tending to show that his claimed disability did not occur as a result of this activity. The only X rays offered at trial were ones which had been taken just prior to trial; no X rays taken prior to the motorcycle accident were introduced. We also note that between the time of his accident on County Road F-12 and the date of trial, plaintiff was involved in three motor vehicle accidents. Any of these might have caused, or significantly contributed to, his present disability.

III. Contribution

Plaintiff argues that the evidence does not demonstrate that he was in any way negligent, and that the trial court erred by finding him 40 percent responsible for the accident. We do not agree. From the evidence introduced at trial, the trial court could have concluded that plaintiff had been drinking before the accident, that plaintiff was under the influence at the time of the accident, that plaintiff failed to maintain a proper lookout, and that plaintiff took no action to avoid the pothole (or even slow down) once he saw it. Certainly these findings would be sufficient to support the conclusion that plaintiff's negligence amounted to 40 percent.

Plaintiff further argues that the trial court erred when it held that he should partially indemnify the county for sums paid in settlement of Toni Cooley's claim.

Plaintiff's argument is without merit. The adoption of comparative negligence does not negate the doctrine of joint and several liability. Rozevink v. Faris, 342 N.W.2d 845, 850 (Iowa 1983). The fact that Cooley made no claim against plaintiff in her petition is irrelevant, since a joint tortfeasor may not escape liability by the failure of the injured party to name him as a party defendant. See Getter v. R. G. Dickinson & Co., 366 F. Supp. 559, 569 (S. D. Iowa 1973).

A party defendant has a common law right to contribution or indemnity against a joint tortfeasor whose acts constituted primary, as opposed to secondary, negligence. See generally Eply v. Patt Construction co., 228 F. Supp. 1 (N.D. Iowa 1964). Primary negligence is defined as "the negligent conduct of active operations." Sweeny v. Pease, 294 N.W.2d 819, 823 (Iowa 1980). By contrast, secondary negligence rests upon a fault which is merely imputed or constructive. Clearly plaintiff's negligence was primary. The county was therefore entitled to partial indemnity.

IV. Motion to Enlarge Findings

Plaintiff argues that the trial court erred in overruling his motion to enlarge the findings. He complains that the trial court's findings constituted a summary rather than a delineation of all of the findings the court could have made. Specifically, plaintiff had requested the court to enlarge its findings regarding life expectancy, damage to plaintiff's clothing, medical expenses, and punitive damages. Plaintiff also requested that the trial court delete any finding that plaintiff was negligent for failing to keep a proper lookout, or that his negligence amounted to 40 percent of the fault involved.

In a review of the trial court's denial of a motion to enlarge, we are bound by the trial court's findings of fact as long as they have substantial evidentiary support. See Hamilton v. Town of Palo, 244 N.W.2d 329, 331 (Iowa 1976). We do

not weigh the evidence. We merely determine whether sufficient evidence exists to permit the trial court to come to the conclusions it reached.

In the instant case we have already determined that the evidence is sufficient to support a finding that plaintiff was 40 percent at fault. The evidence also supports the conclusion that plaintiff failed to maintain a proper lookout. As we previously pointed out, there was no evidence to support an award for damage to plaintiff's clothing, and punitive damages could not have been awarded in this case.

We are of the opinion that the evidence supports the trial court's award of damages for both medical expenses and pain and suffering. While the amount awarded for each item is not specifically enumerated, we do not believe that such a breakdown is necessary. See Stanley v. State, 197 N.W.2d at 606. The facts as set out adequately support the decree, and plaintiff's motion was properly overruled.

V. Defendant's Cross-Appeal

Defendant argues that the trial court erred by permitting Dr. Valentine to testify since answers to interrogatories indicated that plaintiff would not call any expert witnesses. Absent prejudice to defendant, however, we will not disturb the trial court's award.

Plaintiff argues that he did not know of the availability of Dr. Valentine until just before trial. He argues that any damage to defendant's case would have been obviated had defendant requested a continuance to allow additional discovery. Defendant did not request a continuance, however.

More important, defendant had copies of all of plaintiff's chiropractic reports. All of the evidence elicited from Dr. Valentine had already been discovered by defendant. Under these circumstances, we cannot say that defendant was disadvantaged by the trial court's refusal to disallow Dr. Valentine's testimony.

AFFIRMED.