IN THE COURT OF APPEALS OF IOWA

No. 3-081 / 92-933

CAROL A. BENN, As Executor of the Estate of Loras J. Benn, Deceased,

Appellant,

vs.

LELAND R. THOMAS, K-G, LTD., and HEARTLAND EXPRESS, INC., OF IOWA,

Appellees.

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Appeal from the Iowa District Court for Johnson County, August F. Honsell, Judge.

This case arises out of an automobile accident which injured a physically ill Loras J. Benn. Benn died six days after the accident. **REVERSED AND REMANDED.**

Appellate Counsel:

Gary L. Robinson and Jeffrey P. Taylor of Klinger, Robinson, McCaskey & Ford, Cedar Rapids, for appellant.

John M. Bickel and Diane Kutzko of Shuttleworth & Ingersoll, P.C., Cedar Rapids, for appellee.

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

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OXBERGER, C.J.

On February 15, 1989, a semi-tractor and trailer rear ended a van in which Loras J. Benn was a passenger. Benn suffered a fractured ankle and a bruise to his chest. Six days later Benn died of a heart attack.

Subsequently, Carol A. Benn, as executor of the estate of Loras J. Benn, filed suit against Leland R. Thomas, the driver of the semi-tractor, K-G Ltd., the owner of the semi-tractor and trailer, and Heartland Express, the permanent lessee of the semi-tractor and trailer. The estate sought damages for the injuries and death of Benn.

The estate filed a proposed set of jury instructions which included an instruction regarding the "eggshell plaintiff rule." The district court refused to submit this particular instruction, stating it did not find the evidence supported submission of the instruction.

During trial, the estate's medical expert, Dr. James E. Davia testified Benn had a history of coronary disease and insulin-dependent diabetes. Benn had a heart attack in 1985 and was at a risk of having another heart attack.

Also, prior to trial, the parties deposed Dr. John Webb, a hospital physician who treated Benn. Dr. Webb stated a nurse told him she thought Benn was experiencing chest pain although Benn denied it. Prior to the admission of the deposition into trial the defendants objected to the statement on hearsay grounds. The district court sustained the objection and limited the deposition accordingly.

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The jury returned a verdict for the estate in the amount of $17,000 for Benn's injuries and nothing for his wrongful death. In a special interrogatory, the jury determined the accident was not the proximate cause of Benn's death.

The estate filed a motion for new trial claiming the court had not instructed the jury on the "eggshell plaintiff rule." The estate also complained the court erred in limiting Dr. Webb's testimony based on a hearsay objection. The court denied the motion. The estate appeals.

I. Jury Instructions

The estate claims the district court erred in failing to submit Iowa Civil Jury Instruction 200.34 to the jury.

We find reversible error when the instructions given to the jury , when viewed a a whole, are insufficient to convey the applicable law. Sanders v. Ghrist, 421 N.W.2d 520, (Iowa 1988). When erroneous instructions are given, we presume prejudice has occurred. See Curran Hydraulic Corp. v. Nat'l Ben Franklin Ins. Co. of Ill., 261 N.W.2d 822, (Iowa 1978).

The requested instruction stated:

> "If Loras Benn had a prior heart condition making him more susceptible to injury than a person in normal health, then the defendant is responsible for all injuries and damages which are experienced by Loras J. Benn, proximately caused by the defendants' actions, even though the injuries claimed produce a greater injury than those which might have been experienced by a normal person under the same circumstances."

See Becker v. D & E Distributing Co., 247 N.W.2d 727, 731 (Iowa 1976); Iowa Uniform Jury Instructions 200.34.

A tortfeasor whose act, superimposed upon a prior latent condition, results in an injury, may be liable in damages for the full disability. Becker, 247 N.W.2d at 731. In these cases the injury, and not the dormant condition, is deemed to be the proximate cause of the pain and disability. Id.

At trial, the estate's expert, James E. Davia. M.D., testified to the following:

> Q. Do you . . . have an opinion as to a reasonable degree of medical certainty as to whether or not the accident Mr. Benn was involved in caused or contributed to his fatal heart attack on February 21, 1989? A. Yes, I have an opinion. Q. What is your opinion with respect to that, sir? A. My opinion is, as I stated it before , is that the best way to look at this accident was the straw that broke the camel's back; that all the factors that I have listed before when you sum them all up and add them all up were responsible for his heart attack that occurred a few days after the accident.

Dr. Davia also testified:

> Q. What, if any, effect would the fact of the accident have had upon a person in Mr.Benn's condition based on your examination of the records? A. I think that the accident that he had would best be compared to the straw that broke the camel's back. In other words, here's a man who had coronary artery disease, quite severe, and he was waiting to have a heart attack. Now, when the heart attack would have come without the accident, we don't know. It may have been many years. Who knows. But something came along and happened to this man that precipitated the heart attack, and I view this accident that he was in and the attendant problems that it causes in the body as the straw that broke the camel's back.

Based on Dr. Davia's testimony, we conclude a jury

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question was generated regarding the relationship between the auto accident and Benn's death. The court's failure to submit the proposed "eggshell"jury instruction was reversible error. We remand this cause for a new trial.

II. Hearsay Objection

The estate also complains the district court erred in refusing to admit portions of Dr. Webb's deposition testimony on hearsay grounds. We address this question because it may once again become an issue during retrial.

The estate claims the defendant waived his objection to the deposition testimony by failing to object to alleged hearsay during deposition. On these facts, Iowa R. Civ. P. 158(d) and (e) do not require objection to hearsay at deposition in order to preserve the objection at trial. Iowa R. Civ. P. 158(d) states:

> (E)rrors or irregularities occurring during an oral deposition as to any conduct or manner of taking it, or the oath, or the form of any question or answer; and any other errors which might thereupon have been cured, obviated or removed, are waived unless seasonably objected to when it is taken.

Iowa R. Civ. P. 158(e) states:

> [T]estimony taken by deposition may be objected to at the trial on any ground which would require its exclusion if given by a witness in open court, and objections to testimony, or competency of a witness, need not be made prior to or during the deposition, unless the grounds thereof could then have been obviated or removed.

We do not read these rules to require an objection during deposition to those questions going to the substance

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of the issue, e.g., hearsay or relevance. We do read the rules to require an objection in those cases going to the form of the question, e.g., leading questions. Objections going to the form of the question, such as a leading question, allow for the question to be cured, obviated or removed. However, objections going to the substance of the question are not required by the rule.

In addition, our rules are similar to Fed. R. Civ. P. 32 which has been interpreted to mean: "[O]bjections to the form of questions (leading, argumentative, and the like) are held to be waived if objection is not made at the time of deposition; but objections of substance, such as the competency of a witness or the competency, relevancy or materiality of testimony, are not waived by failure to make them before or during the taking of the deposition." West's Federal Practice Manual, section 8240 (1979).

The type of testimony objected to in this case is not an objection to form which may be obviated or removed during deposition. Therefore, Thomas's objection at trial was timely.

We affirm the decision of the district court.

REVERSED AND REMANDED.