FILED
MAY 2 9 1991
CLERK SUPREME COURT

300

IN THE COURT OF APPEALS OF IOWA

No. 1-117 / 90-957

HARRY KENT ULRICH

Plaintiff-Appellant,

and

HARRY KENT ULRICH as Next Friend of **CHRISTOPHER ULRICH** and **NICHOLAS ULRICH**, Minors, and **MARY JEAN ULRICH**,

Plaintiffs,

vs.

CHARLES CROSBY, M.D., and **FORT DODGE MEDICAL CENTER, P.C.**,

Defendants-Appellees,

and

ROBERT WEATHERWAX, M.D.,

Defendant.

Appeal from the Iowa District Court for Polk County, Richard A. Strickler, Judge.

Plaintiff appeals in a medical malpractice action, contending the trial court gave an erroneous jury instruction relating to plaintiff's preexisting medical condition and challenging the adequacy of the damage award. **AFFIRMED.**

Mark E. Liabo of the Tom Riley Law Firm, P.C., Cedar Rapids, for appellants.

Robin L. Hermann and Ronald M. Rankin of Patterson, Lorentzen, Duffield, Timmons, Irish, Becker & Ordway, Des Moines, for appellees.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ. Habhab, J., takes no part.

SCHLEGEL, J.

Plaintiff H. Kent Ulrich appeals a district court judgment entered after a jury trial in which the jury found Dr. Charles Crosby and Fort Dodge Medical Center liable for medical malpractice and awarded plaintiff $100,000. Plaintiff contends the trial court gave an erroneous jury instruction relating to a preexisting or latent medical condition which defendant aggravated. Plaintiff also contends that the jury failed to compensate him adequately. We affirm.

I. In the course of his employment at an underground rock quarry in August 1986, Ulrich was using equipment which exploded. Ulrich suffered a compound, comminuted, spiral fracture of his right femur. Dr. Charles Crosby rendered emergency care and initial treatments. Dr. Robert Weatherwax later assisted. Both doctors were employed by the Fort Dodge Medical Center, P.C.

A week and a half after the injury, Crosby and Weatherwax sought to repair Ulrich's shattered femur by inserting a stainless steel rod, or nail, into his leg. During preparation for surgery, the doctors discovered that the exit wound was infected and that the bandage which Crosby had ordered to remain in place for twelve days contained bacteria. The doctors proceeded with the surgery under an altered procedure. They inserted a Grosse-Kempf nail through the femur. They fastened the nail's proximal end (near the hip joint) with screws. Ulrich's right femur

and right tibia had been fused after a car accident in the 1970s, and the doctors drove the distal end of the nail into the fused joint.

The surgery left Ulrich with a bowed femur and what is described as a bony spike, apparently a bone fragment trapped in the posterior thigh muscles. Weatherwax testified that the altered surgical procedure, which was designed to avoid the contaminated wound, prevented the doctors from achieving the correct alignment and removing the bony spike. The spike was painful, and Ulrich had difficulty sitting. In March 1987 Ulrich consulted another surgeon who operated to correct a malunion and malalignment. In April 1987 the surgeon operated again to correct an improper rotation of the bone.

In June 1988, as a routine practice, the nail was removed, but doctors discovered the presence of osteomyelitis, a recurrent, painful bone inflammation, 6 Lawyers' Medical Cyclopedia § 41.23, at 220-21 (1977), which may be reactivated by trauma. Id. § 41.22, at 218. Ulrich had had a bout with osteomyelitis in 1972. Upon rediscovering osteomyelitis, Ulrich underwent a series of treatments after which the inflammation subsided. Plaintiffs' evidence sought to show that the osteomyelitis was aggravated by the later surgeries necessitated by negligent treatment rendered by Crosby and Weatherwax.

Ulrich has been unable to return to his job in heavy construction. Plaintiffs sought to show a dramatic change

in their lives, including several severe emotional problems in Ulrich. The parties dispute the degree and even the occurrence or frequency of physical pain at the time of trial.

Ulrich filed suit seeking recovery for medical malpractice against Doctors Crosby and Weatherwax and the corporation which employed them. Ulrich's wife and children joined the suit seeking damages for loss of consortium. Plaintiffs' nine specifications of negligence relating to the August 1986 surgery to implant the Grosse-Kempf nail were submitted to a jury. The trial court also included instruction 17 which stated:

> If Harry Kent Ulrich had a condition to his leg which made him more susceptible to injury than a person in normal health, then the Defendants are only responsible for all injuries and damages which are experienced by Harry Kent Ulrich proximately caused by Defendants' negligence, even though the injuries claimed produce a greater injury than those which might have been experienced by a normal person under the same circumstances.

The jury returned a special verdict finding Crosby and the Fort Dodge Medical Center 100% at fault. There was some discrepancy in the jury's answers to the special interrogatories, but it appears undisputed that the jury assessed Ulrich's damages at $100,000. The jury classified the damages as $67,400 for past lost wages, $20,300 for loss of future earning capacity, and $12,300 for other past damages. The jury declined to award damages for future

pain and disability.[1] The jury found no damages for loss of consortium.

Ulrich has appealed; however, neither his spouse nor his children have appealed the denial of damages for loss of consortium. Ulrich contends instruction 17 was an erroneous statement of the law and did not instruct the jury on the defendants' duty to a plaintiff who has a preexisting condition that may make the plaintiff more susceptible to injury. Ulrich also contends the jury award was inadequate.

We review assigned errors of law only, Iowa R. App. P. 4, and we are bound by the jury's findings of fact supported by substantial evidence, Iowa R. App. P. 14(f)(1).

II. Jury instructions are designed to explain the applicable law to the jurors so they may apply the law to the facts proven at trial. State v. Ritchison, 223 N.W.2d 207, 211 (Iowa 1978). Submission of issues that have no support in the evidence to the jury is error. W. T. Rawleigh Medical Co. v. Bane, 181 Iowa 734, 739, 165 N.W. 42, 43-44 (1917). Conversely, failure to submit issues

---

1. Having been injured in the course of employment, all medical expenses had been paid through workers' compensation. Pursuant to a motion in limine, no evidence of those medical bills was introduced. See Iowa Code § 147.136 (1989) (limiting such claims in medical malpractice actions). Ulrich indicates that he has a permanent partial disability, for which, presumably, he has been compensated by workers' compensation.

that are supported by substantial evidence also is error. See Miller v. International Harvester Co., 246 N.W.2d 298, 301 (Iowa 1976). A corollary to these rules is that the trial court has a duty to ensure that the jury understands the issues it must decide. Clinton Land Co. v. M/S Assocs., Inc., 340 N.W.2d 232, 234 (Iowa 1983). In fulfilling these duties, the trial court must "instruct with reasonable fullness on pleaded issues supported by substantial evidence." Id. at 234. A second corollary is that the trial court has a duty to ensure that the jury understands the law it must apply. Sanders v. Ghrist, 421 N.W.2d 520, 522 (Iowa 1988). In evaluating this, we must read all of the instructions together, not piecemeal or in artificial isolation. Id.; Clinton Land Co., 340 N.W.2d at 234. The trial court is free to phrase instructions in its own words, Clinton Land Co., 340 N.W.2d at 234, but we must reverse and order a new trial if the instructions as a whole are insufficient to convey the applicable law. Sanders, 421 N.W.2d at 522 (citing Adam v. T.I.P. Rural Elec. Co-op, 271 N.W.2d 896, 900-01 (Iowa 1978)).

Plaintiff's proposed instructions 28 and 29 are based, respectively, upon the Iowa State Bar Association's Iowa Civil Jury Instructions 200.32 (aggravation of a preexisting condition) and 200.34 (previous infirmed condition). There is one material difference between proposed instruction 29, which stated, "defendant is responsible for all injuries . . . proximately caused," and

the trial court's instruction 17, which stated, "defendants are only responsible for all injuries . . . proximately caused." Plaintiff objected to the use of the word "only" and sought the additional instruction 28:

> If you find that Harry Kent Ulrich had an impairment to his leg and the disability was increased by this incident causing him further suffering or disability, then plaintiff is entitled to recover damages caused by the aggravation. Plaintiff is not entitled to recover for any physical ailment or disability which existed prior to this incident or for any injuries or damages which he now has which were not caused by the defendants' actions.

Ulrich's objection to the word "only" is meritless. That "defendants are only responsible for all injuries . . . proximately caused" is an accurate statement of the law, see Becker v. D & E Distrib. Co., 247 N.W.2d 727, 730 (Iowa 1976) (citing Waterloo Sav. Bank v. Waterloo, C.F. & N.R.R., 244 Iowa 1364, 1375, 60 N.W.2d 572, 578 (1953)), and is not misleading. As a matter of fact, it conveys substantially the same meaning as the last sentence in plaintiff's proposed instruction 28: "Plaintiff is not entitled to recover . . . for any injuries . . . not caused by the defendants' actions."

The issue is reduced to whether instruction 17 adequately conveyed the law pertaining to aggravating a preexisting condition. Defendants do not challenge the sufficiency of evidence to justify submitting the theory, but they do contend that any error was harmless. Because it is impossible to say that the failure to submit the

plaintiff's theory to the jury would not in some way prejudice him, we believe that defendants' "harmless error" analysis is severely misplaced. We conclude, however, that the instruction given adequately conveyed the law to allow the jury to decide the issue properly.

Both the court's and plaintiffs' proposed instructions suggest to the jury that they must decide whether Ulrich suffered a preexisting condition. Both instructions allow the jury to award damages for all injuries that Ulrich suffered through defendants' actions, even if the injuries were greater than those which might have been suffered by an ordinary person without the preexisting condition. And both limit the damages to those injuries proximately caused by defendants' negligence. Thus, while the trial court could have amplified Ulrich's entitlement to recover damages caused by aggravating a preexisting condition, we cannot say that it gave inadequate instructions.

III. The trial court denied Ulrich's motion for a new trial on damages only. Iowa Rule of Civil Procedure 244 provides that

> [t]he aggrieved party may, on motion, have an adverse verdict . . . or some portion thereof vacated and a new trial granted, for any of the following causes, but only if they materially affected his substantial rights:
>
> * * *
>
> (d) Excessive or inadequate damages appearing to have been influenced by passion or prejudice[.]
>
> * * *

The trial court, however, "has a broad but not unlimited discretion in determining whether the verdict effectuates

substantial justice between the parties" when ruling on motions for a new trial. Iowa R. App. P. 14(f)(3).

In Kautman v. Mar-Mac Community School District, the Iowa Supreme Court stated:

> Although the evidence may have justified a higher award, such is not controlling. The determinative question posed is whether under the record, giving the jury its right to accept or reject whatever portions of the conflicting evidence it chose, the verdict effects substantial justice between the parties.

255 N.W.2d 146, 148 (Iowa 1977). Ulrich, however, complains only that he could have had a larger award. He makes only the unsupported assertion that the jury ignored various elements of past and future damages.

With respect to Ulrich's past damages for surgery and disability and to his past and future damages for physical and emotional suffering, the parties introduced considerable evidence, much of which conflicting. While we have no doubt that Ulrich suffered a series of tragic and painful injuries, it was the fundamental province of the jury to determine the damages for which the defendants here were responsible. Ulrich has identified nothing, and we are unable to find anything in the record that demonstrates that the verdict does not effect substantial justice between the parties before us. Ulrich has not overcome the fact that the cause and extent of his injuries were disputed. See Cowan v. Flannery, 461 N.W.2d 155, 159 (Iowa 1990), and cases cited therein. Consequently, we hold that

the trial court did not abuse its discretion in denying the motion for a new trial.

IV. We hold that the trial court did not err in instructing the jury and in refusing to give the plaintiffs' proposed instructions. We further hold that the trial court did not err in overruling the plaintiffs' motion for a new trial on the issue of damages.

AFFIRMED.