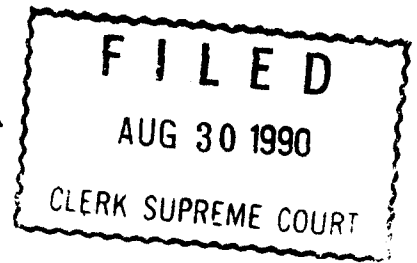


IN THE COURT OF APPEALS OF IOWA

No. 0-233 / 89-1082



BARBARA GORE,

Appellant,

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vs.

JOHN F. SMITH and WILLIAM R. PETRONE,

Appellees.

Appeal from the Iowa District Court for Story County,
Ronald H. Schechtman, Judge.

In this tort suit arising from an airplane accident, the jury returned a verdict in favor of the defendants. The plaintiff has appealed from the resulting judgment. She contends the decision of the trial proceeding is faulty because (1) the district court erred in failing to give proper jury instructions by improperly submitting the issue of negligence and refusing to instruct regarding the plaintiff's lost earning capacity; (2) the jury verdict is unsupported by the evidence; and (3) the district court erred in failing to grant plaintiff's motion for a new trial. **REVERSED AND REMANDED.**

Russell S. Wunschel and Dee Ann Wunschel, Carroll, for
appellant.

Barbara B. Davydov and James E. Cooling of Cooling & Herbers, P.C., Kansas City, Missouri, and Richard O. Parker, Nevada, for appellee Smith.

Michael J. Moon of Cartwright, Druker & Ryden, Marshalltown, for appellee Petrone.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ.

DONIELSON, P.J.

On July 14, 1985, Barbara Gore was a passenger in a vintage 1938 Tiger Moth airplane. John Smith was piloting the plane, which was owned by William Petrone. While Smith was attempting to take off, the plane collided with a runway marker.

Gore filed a lawsuit against Smith and Petrone alleging they were negligent and their negligence caused her to suffer permanent physical and mental injuries. Smith and Petrone admitted during discovery and at trial that Smith was negligent and was the proximate cause of the collision.

Following presentation of evidence to the jury, the district court instructed the jury that Gore had to prove two elements: 1) the defendants' negligence was a proximate cause of the plaintiff Barbara Gore's damage; and 2) the amount of damage which resulted from the defendants' negligence. However, in uniform instruction no. 100.1, the court informed the jury that Smith was negligent but this instruction contained a disclaimer, "Do not consider this summary as proof of any claim." The court then instructed the jury: "The plaintiff, Barbara Gore, claims the defendants, John F. Smith and William R. Petrone, were at fault . . ." (emphasis added). The jury returned a verdict in favor of Smith and Petrone. Gore's motion for a new trial was overruled. Gore appeals.

First, Gore contends the district court erred in instructing the jury. Since Smith and Petrone admitted

Smith's negligence, it was improper for the court to reintroduce that issue to the jury. Gore also claims the court erred in failing to instruct the jury on her loss of future earning capacity. Second, Gore claims the jury verdict was unsupported by the evidence. Finally, she contends the district court erred when it failed to grant her motion for a new trial.

Jury instructions will be considered on appeal only if objections have been presented to the trial court. Keller v. People's Natural Gas Co., a Division of Internorth, Inc., 352 N.W.2d 688, 692 (Iowa App. 1988). After reviewing the pertinent portion of the trial transcript, we believe Gore has sufficiently preserved this issue. Jury instructions are not to be evaluated individually, but are to be considered as a whole. Robeson v. Dilts, 170 N.W.2d 408, 414 (Iowa 1969).

Gore points specifically to the portion of jury instructions pertaining to the negligence issue. Since negligence was admitted during the course of the trial, it was erroneous for the district court to reintroduce that issue in the jury instructions. Coulthard v. Keenan, 256 Iowa 890, 895, 129 N.W.2d 597, 599 (1964). When considering the jury instructions as a whole, it is clear they are prejudicial to the plaintiff. The instructions were at best contradictory and injected confusion as to whether the plaintiff must show negligence. Any matter admitted during the trial proceeding is to be treated as

conclusively established. Iowa R. Civ. P. 128. The trial court erred in not so instructing the jury. Therefore, the decision of the district court must be reversed. See Stover v. Lakeland Square Owners Assn., 434 N.W.2d 866, 868 (Iowa 1989).

Iowa Rule of Civil Procedure 244 states that if a party's substantial rights have been affected, accompanied with an error of law, such a party is entitled to a new trial. The district court also erred in failing to grant Gore's motion for a new trial.

For the foregoing reasons, the decision of the district court is reversed and remanded.

REVERSED AND REMANDED.