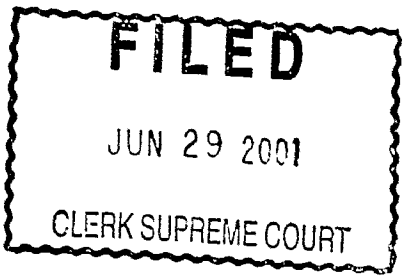
IN THE COURT OF APPEALS OF IOWA

No. 1-264 / 00-0811
Filed June 29, 2001



ANGELA A. BRUNDAGE, as Next Friend of CODY W. BRUNDAGE,
Plaintiff-Appellant,

vs.

LARRY MCELDERRY,
Defendant-Appellee.

Appeal from the Iowa District Court for Appanoose County, Richard J. Vogel, Judge.

The plaintiff appeals from the judgment entered on a jury verdict in an action for damages for personal injuries suffered by Cody Brundage as a result of an automobile accident. **AFFIRMED.**

Frederick W. James and Jennifer S. Gerrish-Lampe of the James Law Firm, P.C., Des Moines, and William L. Shelton and Richard L. Ambelang of the Shelton Law Firm, Chariton, for appellant.

Timothy L. McKay and Michael J. Moreland of Lynch, McKay, Moreland & Webber, P.C., Ottumwa, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

MAHAN, J.

The plaintiff appeals from the judgment entered on a jury verdict in an action for damages for personal injuries suffered by Cody Brundage as a result of an automobile accident. The plaintiff contends the district court erred in granting the defendant's motion for partial directed verdict as to future damages and refusing to instruct the jury on future damages. Plaintiff argues a new trial must be granted due to the inadequate verdict. We affirm.

Background Facts and Proceedings. On February 28, 1998, a pickup truck driven by Larry McElderry collided with a vehicle driven by Angela Brundage. Her children, Toni and Cody, were passengers in the vehicle. Cody was taken to the hospital, where Dr. Vincent Sullivan treated him. Cody's initial complaint of abdominal, visceral pain resolved in a couple of days with no complications. He remained hospitalized until March 6, 1998. A day or two after his admission to the hospital, Cody began complaining of lower back pain. An X-ray revealed a compression fracture at the L2-3 level. Cody participated in physical therapy and wore a Jewett back brace to help prevent him from inadvertent or too much flexion of his back. After his discharge from the hospital, neurosurgeon Dr. David Boarini took over Cody's care.

Dr. Boarini saw Cody four times between March 1998 and October 1998. He diagnosed Cody with a mild compression fracture in his low back. Cody reported no pain during his visits in March and May. In July, Dr. Boarini told Cody he could get rid of the Jewett brace he had been wearing since the accident. In his deposition testimony, the doctor indicated risk of further injury to

L2-3 level would be minimal: "[M]ost people that have these kinds of fractures do not have any long-term pain." Dr. Boarini released Cody from his care in October 1998.

Cody returned to Dr. Boarini in March 2000, with complaints of periodic back pain. An X-ray revealed a slight L2 compression fracture, unchanged from Cody's last visit in October 1998. Dr. Boarini reassured Cody the fracture was not changing. He did not give Cody any specific restrictions, but indicated he may want to avoid activities that cause an increase in back pain. In a May 1998 letter to Dr. Sullivan, Dr. Boarini indicated Cody had a three to four percent partial impairment. He explained at his deposition:

> Q. Regarding your letter to Dr. Sullivan where you stated that he [Cody] probably had a 3 or 4 percent permanent partial impairment, is that a number that you assigned to this type of compression fracture on patients? A. Yes. That's out of the AMA Guideline and it just relates to a compression fracture.
>
> Q. Does it have anything to do with disability? A. It does not.
>
> Q. So permanent partial impairment is not the same as disability; is that right? A. That is correct.
>
> Q. . . . You didn't diagnose any disability for this patient, did you? A. That's correct.

On May 14, 1999, Angela Brundage filed suit, individually and as next friend of Cody and Toni, against McElderry, seeking damages for bodily injuries sustained by Angela, Cody, and Toni as a result of the accident. Angela, individually and as next friend of Toni, accepted McElderry's offers to confess judgment and dismissed those claims, leaving only Cody's personal injury claim for trial.

McElderry admitted liability as to Cody and the case proceeded to trial on the damages issue. At the conclusion of plaintiff's case, the trial court sustained McElderry's motion for partial directed verdict on the issue of future damages. The trial court, over plaintiff's objection, refused to submit an instruction on future damages to the jury. The jury returned a verdict, awarding Cody $6,703.07 for past medical expenses, nothing for past loss of bodily function, and $1000 for past pain and suffering. The court entered judgment in plaintiff's favor for $7,703.07 plus interest. Plaintiffs filed no post-trial motions, but did file a timely notice of appeal.

Future Damages. We review rulings granting motions for directed verdict for correction of errors at law. *Gibson v. ITT Hartford Ins. Co.*, 621 N.W.2d 388, 391 (Iowa 2001). We view the evidence in the light most favorable to the party opposing the motion to determine whether a fact question was generated. *Dettmann v. Kruckenberg*, 613 N.W.2d 238, 250-51 (Iowa 2000). Where substantial evidence does not exist to support each element of a plaintiff's claim, the court may sustain the motion. *Id.* "Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion." *Determan v. Johnson*, 613 N.W.2d 259, 261 (Iowa 2000) (quoting *Hasselman v. Hasselman*, 596 N.W.2d 541, 545 (Iowa 1999)).

We review objections to jury instructions on assigned error. Iowa R. App. P. 4; *Grefe & Sidney v. Watters*, 525 N.W.2d 821, 824 (Iowa 1994). We read the court's instructions as a whole when determining whether there has been error. *Grefe & Sidney*, 525 N.W.2d at 824. We review to decide if the jury instructions

are correct statements of the law and are supported by substantial evidence. *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996); *Grefe & Sidney*, 525 N.W.2d at 824. Evidence is substantial when reasonable minds would accept it as adequate to reach the conclusion. *Lane v. Coe College*, 581 N.W.2d 214, 216 (Iowa Ct. App. 1998). As long as a requested instruction correctly states the law, has application to the case, and is not stated elsewhere in the instructions, the court must give the requested instruction. *Foggia v. Des Moines Bowl-O-Mat, Inc.*, 543 N.W.2d 889, 892 (Iowa 1996). If the trial court errs in submitting or refusing to submit an instruction, we will reverse only if the error has caused prejudice. *Kessler v. Wal-Mart Stores, Inc.*, 587 N.W.2d 804, 806 (Iowa Ct. App. 1998).

Brundage[1] contends the district court erred in granting McElderry's motion for partial directed verdict and refusing to instruct the jury on future damages.[2] Brundage cites no authority to support this position, but merely points to evidence in the record and argues substantial evidence supported the submission of future damages to the jury. McElderry argues Brundage's failure to cite authority in support of the damages issue should be considered waiver of the issue. *See* Iowa R. App. P. 14(a)(3). Even if Brundage did not waive assignment of error on the issue of future damages, the claim is without merit.

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[1] "Brundage" refers to Angela and Cody collectively, unless otherwise specified.

[2] Brundage seeks future damages for future loss of function of the mind and body, and future physical and mental pain and suffering. At trial, Brundage's counsel conceded directed verdict in favor of McElderry in regards to future medical care was appropriate.

There can be no recovery for future pain and suffering unless reasonably certain to result from the injury. *Mercer v. Ridnour*, 218 N.W.2d 625, 627 (Iowa 1974). Expert testimony is often necessary to establish future physical pain and suffering. *DeBurkarte v. Louvar*, 393 N.W.2d 131, 140 (Iowa 1986). However, "when pain is suffered right up to the time of trial and there is evidence plaintiff has not fully recovered, future pain and suffering may be submitted to the jury without medical testimony." *Id.* (quoting *Mabrier v. A.M. Servicing Corp.*, 161 N.W.2d 180, 183 (Iowa 1968)).

"The mere statement by the plaintiff that [he] still suffers pain is not sufficient per se to warrant a finding that there will be any future pain or physical suffering because of [his] injuries." *Daniels v. Bloomquist*, 258 Iowa 301, 309, 138 N.W.2d 868, 873 (Iowa 1965). Where "the symptoms from which personal injury may be inferred are subjective only," and plaintiff presents no medical testimony to establish future pain and suffering or permanent injury are "reasonably certain," the trial court need not instruct the jury on that element of damage. *See Daniels*, 258 Iowa at 309, 138 N.W.2d at 873.

Cody testified he experienced back pain after activities such as basketball, certain chores around the farm, and horseback riding. Angela, his mother, testified she observed Cody put his hand on his back or limit his activities due to pain. However, Cody did not return to Dr. Boarini with complaints of periodic back pain until approximately seventeen months after his release from Dr. Boarini's care. In October 1998, Dr. Boarini reported the compression fracture was "fully healed." He testified Cody's risk of further injury was minimal, and

most people with similar fractures do not experience long-term pain. His testimony does not support a conclusion future pain and suffering were "reasonably certain" in this case. The district court did not err in failing to instruct on future pain and suffering damages.

Similarly, the evidence does not support a loss of function of the body instruction. Loss of function of the body relates to functional impairment as opposed to structural impairment of the body. *Brant v. Bockholt*, 532 N.W.2d 801, 804 (Iowa 1995). "It is the inability of a particular body part to function in a normal manner." *Id.* at 804-05. It does not include conditions of incapacity embraced within the definition of pain and suffering. *Blume v. Auer*, 576 N.W.2d 122, 126 n.2 (Iowa App. 1997). Brundage presented no medical evidence Cody's back will not "function in a normal manner" in the future. To the contrary, Dr. Boarini testified he would not give Cody any specific restrictions, and Cody probably would not require further medical treatment from him. The district court did not err in refusing to instruct on future loss of function of the body damages.

Inadequate Verdict. A motion for new trial is the proper method for challenging the adequacy of damages. Iowa R. Civ. P. 244(d); *Gorden v. Carey*, 603 N.W.2d 588, 589-90 (Iowa 1999). The court can grant a new trial, or impose conditions pursuant to rule 250. *Ort v. Klinger*, 496 N.W.2d 265, 269 (Iowa App. 1992).

Brundage failed to preserve error on this issue by filing a motion for new trial in the district court. Therefore, we have nothing to review.

AFFIRMED.