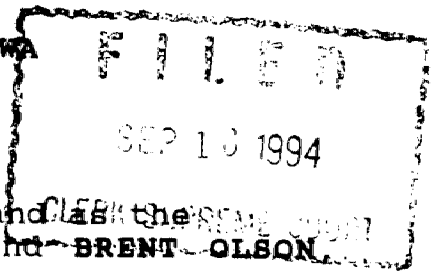
IN THE COURT OF APPEALS OF IOWA



No. 4-242 / 93-826

BRENDA MILLS and **PAUL MILLS**, Individually, and as the Parents and Next Friends of **JENA MILLS** and **BRENT OLSON**, Minors,

Appellants,

vs.

GRETCHEN OLSON,

Appellee.

Appeal from the Iowa District Court for Cerro Gordo County, Gilbert K. Bovard, Judge.

The plaintiffs appeal from the trial court's jury instructions and denial of motion for new trial. **AFFIRMED.**

Scott D. Brown of Brown Kinsey & Funkhouser, Mason City, for appellant.

Darrell J. Isaacson of Laird, Heiny, McManigal, Winga, Duffy & Stambaugh, P.L.C., Mason City, for appellee.

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

DONIELSON, C.J.

On April 16, 1990, a vehicle driven by defendant Gretchen Olson was stopped at a red light. Olson had mistakenly left her vehicle in reverse and when the light turned green she accelerated and backed into plaintiff Brenda Mills' vehicle. Each vehicle sustained only minor damage. Neither Olson nor Mills' three passengers were injured by the collision. Brenda Mills was treated for cervical strain following the accident and she remained under treatment for approximately a year.[1]

Mills brought suit against Olson seeking damages for her injuries.[2] By her amended answer Olson admitted fault in connection with the accident but denied being the proximate cause of Mills' alleged injuries and damages.

At trial Mills presented the testimony of three doctors who connected her present neck strain to the April 16, 1990, accident and concluded she had suffered a permanent impairment as a result. Olson presented evidence of Mills' prior medical records which indicated Mills had been treated for back, shoulder and neck pain in 1987 and 1988.

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1. Brenda Mills was involved in another automobile accident subsequent to the April 16, 1990, accident with Olson and prior to trial in this matter. The issues of damages and causation associated with the latter accident are not raised in the parties' briefs and are not addressed in this opinion.

2. Brenda Mills' husband and children also brought derivative consortium claims in the district court action. For ease of reference this opinion refers to Brenda Mills as the plaintiff/appellant.

Mills argued these prior physical problems were unrelated to the injuries she sustained in the accident, and she objected to the trial court's submission to the jury of an instruction on preexisting condition.

At the close of Mills' case and again at the close of all the evidence, Olson sought a directed verdict on the issue of loss of future earning capacity. The court denied the motions. However, it subsequently refused to submit the issue of loss of earning capacity to the jury.[3]

The jury returned a verdict finding Olson's negligence was not the proximate cause of Mills' damages. The court overruled Mills' motion for new trial. Mills appeals the trial court's submission of a jury instruction on preexisting condition, its refusal to instruct on loss of earning capacity and its ruling denying her request for a new trial. Our scope of review is for the correction of errors at law. Iowa R. App. P. 4.

I. Preexisting Condition

Mills contends the trial court erred in instructing the jury on the issue of preexisting condition. The instruction at issue generally conformed to Iowa Civil Jury Instruction 200.32, and instructed the jury Olson would be liable for the aggravation of a preexisting condition but

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3. Contrary to the implication in Mills' brief, a trial court is not precluded by a prior nonfinal ruling from taking a contrary position later in a case. See Avoca State Bank v. Merchants Mutual Bonding Co., 251 N.W.2d 533, 539 (Iowa 1977).

would not be liable for conditions existing prior to, and not caused by, Olson's negligent conduct.

"Parties are entitled to have their legal theories submitted to a jury if the theories are pleaded and are supported by substantial evidence." Ort v. Klinger, 496 N.W.2d 265, 267 (Iowa App. 1992). The trial court is vested with considerable discretion in determining whether evidence is sufficient to submit a claim to the jury. Kansas City Life Ins. Co. v. Hullinger, 459 N.W.2d 889, 894 (Iowa App. 1990). We review the evidence in a light most favorable to the trial court's decision. Id.

As a general rule a defendant's liability for injuries is limited to those caused by her own acts of negligence, and not for injury, suffering or impaired health due to other causes. Becker v. D & E Distrib. Co., 247 N.W.2d 727, 730 (Iowa 1976). However, the mere existence of a prior nondisabling, asymptomatic, latent condition is not a defense. Becker, 247 N.W.2d at 731. "A tort-feasor whose act, superimposed upon such condition, results in an injury, may be liable in damages for the full disability. In these cases the injury, and not the dormant condition, is deemed to be the proximate cause of the pain and disability." Id.

Olson relied upon Mills' medical records and Dr. Wolbrink's testimony in support of submission of the

preexisting condition instruction to the jury. Viewed in the light most favorable to Olson, this evidence establishes Mills had a neck condition in 1988 which caused her periodic or transient problems. From our review of the record we conclude Olson's evidence was sufficient to warrant submission of the preexisting condition instruction to the jury.

II. Loss of Earning Capacity

Mills also appeals from the trial court's refusal to instruct the jury on her loss of earning capacity. Loss of future earnings is a compensable item of damages. Sallis v. Lamansky, 420 N.W.2d 795, 798 (Iowa 1988). "The measure of damages for loss of earning capacity is the difference between the value of an individual's services, if working, as he would have been but for the injury, and the value of the services of an injured person, if working, in the future." Id. It is the loss of earning capacity that is compensable, not the loss of earnings. Id. Therefore damages are not measured by the difference in earnings received before and after the injury. Instead, the loss is to be measured by the impairment of general wage earning capacity, rather than loss of wages for a specific occupation. Id. "[T]here may be an allowance of damages for impairment of earning capacity even in the absence of evidence of earnings lost or expenditures made for substitute labor." DeWall v. Prentice, 224 N.W.2d 428, 435

(Iowa 1974) (quoting Jurgens v. Davenport, R.I. and N.W. Ry. Co., 249 Iowa 711, 718, 88 N.W.2d 797 (1958)).

Impairment of physical capacity creates an inference of lessened future earning ability. Anthes v. Anthes, 258 Iowa 260, 139 N.W.2d 201, 208 (1965). However, the extent of loss of earning capacity and its value must be shown. Stanley v. State, 197 N.W.2d 599, 605 (Iowa 1972). While Mills introduced evidence regarding the amount of permanent physical impairment she sustained as a result of the accident, she did not introduce sufficient evidence of the value of her alleged lost earning capacity. The evidence indicated Mills had planned to end her day-care business and obtain a manufacturing job once her daughter entered school. A vocational rehabilitation consultant testified Mills' medical restrictions would limit her ability to obtain such employment. However, there were no specific dollar estimates or calculations regarding the actual impairment of Mills' future earning capacity. In the context of this record the trial court did not err in refusing to submit the issue of loss of future earning capacity to the jury.

III. New Trial--Iowa R. Civ. P. 244

Mills contends the trial court abused its discretion in denying her request for a new trial. She claims the jury's verdict fails to administer substantial justice. A new trial is not a matter of right. Ort v. Klinger, 496 N.W.2d

265, 269 (Iowa App. 1992). The district court has considerable discretion as to whether to afford an aggrieved litigant a new trial, and only where there has been a clear abuse of discretion will we interfere with the district court's ruling on a motion for a new trial. Reener v. Hill & Williams Bros., Inc., 502 N.W.2d 26, 27 (Iowa App. 1993).

Even though Olson's fault in the accident was conceded, there was considerable evidence from which the jury could conlcude the accident was not a proximate cause of Mills' injuries. The accident was low-impact in nature and involved minimal damage to the parties' vehicles. Neither Olson nor any of Mills' passengers were injured. Mills had received prior medical treatment for a neck condition and the jury could reasonably find Olson's conduct was not the proximate cause of Mills' injuries under these circumstances. We find the jury's verdict administered substantial justice and there was no abuse of discretion in denying Mills' motion for a new trial.

AFFIRMED.