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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-040 / 99-0600
Filed April 28, 2000

BRUCE PETERS, father and next friend of CHAD PETERS and ERIC PETERS,
Plaintiffs-Appellants,

vs.

TOBY WRIGHT, RICHARD MURPHY, GLORIA MURPHY, MARTY PIPPETT, and MARK KUNKEL,
Defendants-Appellees.

Appeal from the Iowa District Court for Plymouth County, James D. Scott, Judge.

Plaintiff seeks a new trial following a jury verdict denying Bruce Peters' loss of parental consortium claim, denying Eric Peters any recovery on his personal injury claim and awarding Chad Peters but $100 on his claim. **AFFIRMED IN PART, REVERSED AND REMANDED FOR NEW TRIAL ON CHAD'S CLAIM.**

Jeffrey A. Neary of Law Office of Neary & Flannery, Le Mars, for appellants.

John C. Gray of Heidman, Redmond, Fredregill, Patterson, Plaza & Dykstra, L.L.P., Sioux City, for appellees.

Heard by Sackett, C.J., Vaitheswaran, J., and Habhab, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

HABHAB, J.

There are three separate claims by the plaintiff in this law action. Each will be considered separately. As it relates to the three claims, the trial court in its ruling on plaintiff's post-trial motion found the amount of the jury award of $100 as to Chad Peters' claim was inadequate and granted a new trial on the issue of damages. However, the trial court further ruled that a new trial could be avoided if an additur was consented to. Defendants consented, but plaintiff appealed.

We conclude the trial court was correct in its findings as to Chad. Because the appeal reinstated the judgment, we reverse the judgment and remand for a new trial on Chad's claim. The issue at the new trial is limited to damages only and any judgment is subject to the apportionment of liability and the reduction for failure to wear a seat belt as found by this jury.

The trial court also found that the jury verdict as to the separate claims of Bruce and Eric Peters was supported by substantial evidence and accordingly denied that part of the post-trial motion that requested a new trial for them. We agree and affirm as to those two claims.

I. Background. Plaintiffs Eric and Chad Peters were injured while passengers in a vehicle driven by defendant Toby Wright and owned by defendants Richard and Gloria Murphy. Their father, the plaintiff Bruce Peters, and their mother, Jill Peters, during the evening of December 31, 1995, went out to supper and to have a few drinks. They left their son, Eric, who was fifteen

years old at the time of the accident, in charge of their other son, Chad, who was then nine. Without the knowledge of his parents, Eric took Chad and accompanied friends to a New-Year's-Eve beer party in the country co-hosted by defendants Marty Pippett[1] and Mark Kunkel,[2] who are not involved in this appeal.

When he arrived at the party, Eric bought a glass for five dollars that entitled him to drink all the beer he wanted. Eric had drank beer before. While at the party, Eric consumed some six glasses of beer. Eric and Chad remained at the party for about three hours. Eric admits he was unable to drive home for he had too much to drink.

Eric searched for the driver who brought him to the party, but was unable to locate him. He asked Toby Wright, a minor who also had been drinking, to give him and Chad a ride home. Wright, although he did not know Eric, agreed to do so. As previously noted, the car Wright was driving was owned by the defendants Richard and Gloria Murphy.[3] The Murphys' son, Sean,[4] sat in the front seat with Wright. Eric and Chad and one other person sat in the rear seat. Neither Chad nor Eric were wearing seatbelts.

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[1] Prior to trial, the plaintiffs settled with Pippett.

[2] Kunkel filed for bankruptcy.

[3] These defendants stipulated they owned the vehicle and it was driven with their permission.

[4] There is testimony that Sean was too drunk to drive his parents' car.

Wright drove down the farm driveway to get to the county road. It was sleeting out. The farm driveway connected with a county road as a "T-intersection." Wright crossed the county road and, without stopping, drove into a deep ditch. All occupants hit their heads. Eric was mad and fearful of discipline from his parents. He got out of the car and took a swing at Wright. Both Eric and Chad caught a ride to Hinton and were later taken to and treated at St. Luke's Hospital in Sioux City, Iowa.

It was stipulated that Chad's medical expenses were $4,396.24 and Eric's medical expenses were $1,561.93. Bruce Peters testified that his health insurance carrier has also paid for some of the medical expenses. Plaintiffs did not allege that these payments were subrogated in any way. Peters admitted there were no outstanding medical bills to be paid. In addition, Toby Wright had been ordered by the court to pay Chad Peters the sum of $3,600.00 in restitution from his weekly wages, which he would fully satisfy by April 20, 1999. The restitution order followed Wright's plea of guilty to OWI. Wright's blood-alcohol test was .107.

Eric, Chad, and their father[5] sued Wright, Pippett, Kunkel, and the Murphys. Following trial, the jury returned separate verdicts as to Bruce, Eric, and Chad. The jury returned a verdict finding Eric sixty percent at fault, Pippett

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[5] Although suit was brought by Bruce Peters, as father and next friend of his two minor sons, for clarity purposes we will refer to their claim by the name of each child.

(settling defendant) thirty percent at fault, and Wright ten percent at fault for Eric's injuries. Thus, no damages were awarded to Eric, nor were damages awarded to his father. With respect to Chad's injuries, the jury found Pippett and Wright were each fifty percent at fault, but awarded no damages to Chad, nor were damages awarded to his father. After returning the verdict, the court instructed the jury in the presence of counsel and without objections that since Chad was injured the jury had to make an award in some amount for his past pain and suffering and, further, it was to answer the special interrogatory as to whether Chad failed to wear a seat belt and, if so, the percentage, if any, by which his recovery was to be reduced. The jury deliberated further, and it then awarded Chad $100, found that he failed to wear a seat belt, and reduced the amount of his recovery by five percent.

The Peters moved for a new trial or an additur. The district court granted the motion for new trial only as to Chad's damages. The district court further provided a new trial could be avoided if an additur of damages for him of $15,000 was agreed to. However, the additur was subject to apportionment of liability as determined by the jury and subject to reduction for failure to wear a seatbelt. The defendants acquiesced in the additur. The trial court denied the motion for new trial as to the other two claims. The plaintiff appealed.

On appeal, the Peters contend the court abused its discretion in denying the plaintiff a new trial on each of the three claims submitted to the jury. In the

alternatively as to Chad's claim, the request is made for an additur of not less than $40,000, and if a new trial as to Chad is ordered, that all issues should be submitted to the jury and any judgment recovered should not be subject to reduction.

II. Chad's Claim. The appellant claims that "Bruce Peters, individually and as father and next of friend of Chad Peters, is entitled to a new trial due to inadequate damages or in the alternative an additur by the appellate court should be ordered." As it relates to the plaintiff's motion for new trial, the trial court granted a new trial for Chad Peters' claim, but only on the issue of damages. The trial court, in its post-trial ruling, further provided:

> The new trial may be avoided by the parties' agreement to an additur of damages for past pain and suffering and present value of future loss of full use of body in the total sum of $15,000, subject to apportionment for liability in accordance with the jury's verdict and subject to reduction for failure to wear a seat belt.
>
> To accept the additur, Defendants shall file with the Court on or before March 31, 1999 their consent, in which event the Court will enter judgment accordingly.
>
> If Defendants do not consent to the additur and if neither party files notice of appeal within 30 days of the entry of this order, the court administrator is directed to conduct a trial-setting conference and reset this matter for trial.

The defendant consented to the additur. We can assume the plaintiffs did not for there is nothing in the record to indicate otherwise.

Our supreme court in *Fisher v. Davis*, 601 N.W.2d 54 (Iowa 1999) stated:

> The district court may grant an aggrieved party a new trial when the jury awards excessive or inadequate damages, or when

> [redacted] is not sustained by sufficient evidence, or is contrary to [redacted] R. Civ. P. 244(d), (f). The district court has considerable discretion in ruling upon a motion for new trial based upon the ground that the verdict was inadequate. *Householder v. Town of Clayton*, 221 N.W.2d 488, 493 (Iowa 1974). Whether damages are so inadequate to warrant a new trial is for the district court to decide. *Id.* And we will not ordinarily disturb its discretion to grant or deny the motion unless an abuse of discretion is shown. *Id.* We are slower to interfere with the grant of a new trial than with its denial. Iowa R. App. P. 14(f)(4). Whether damages in a given case are adequate depends on the particular facts of the case. *Witte v. Vogt*, 443 N.W.2d 715, 716 (Iowa 1989). The test is whether the verdict fairly and reasonably compensates the party for the injury sustained. *Id.*

In ruling on plaintiff's post-trial motions, the trial court found that the $100 award for Chad's injuries was "flagrantly inadequate and does not effect substantial justice." In reaching this decision, the trial court noted that Chad had suffered two cuts to his face, one above the eyebrows and the other just below the hairline. In addition, Chad was taken by ambulance to the hospital, kept overnight and treated by a plastic surgeon the next day. In asking for a new trial on appeal, the plaintiff urges these findings by the trial court along with the additional argument that the verdict was the result of passion and prejudice and lacking in evidentiary support. Plaintiff asks, in the alternative, that this court order an additur of at least $40,000 and if we grant an additur, that amount should not be subject to reduction and if we grant a new trial, the question of both liability and damages should be submitted to the jury.

The defendants contend that the jury award of $100 for Chad's injuries is not inadequate. They point out that Chad has made a full recovery and that the scars are not conspicuous. In addition, defendants argue that the jury had before

it evidenced that all of Chad's medical bills had been paid and that Toby Wright had also paid $3600.00 in the restitution order.

As noted, the district court has considerable discretion in ruling upon a motion for new trial based upon the ground that the verdict was inadequate. *Householder v. Town of Clayton*, 221 N.W.2d 488, 493 (Iowa 1974). In addition, we are slower to interfere with the grant of a new trial than with its denial. Iowa R. App. P. 14(f)(4).

We conclude the trial court was correct in finding that the damage award for Chad was inadequate. The court was well within its discretion to rule that in Chad's claim for damages a new trial was necessary.

Once the new trial was ordered, the trial court had to determine if it was necessary to retry all issues. In this respect, a new trial may be limited to those issues concerning which there was no error. *Barry v. State Surety Co.*, 154 N.W.2d 97, 102 (1967). The trial court found no error was committed in the determination of liability and that only damages to Chad should be considered. We agree.

The plaintiff further contends that the five percent reduction for failure to wear a seat belt should not apply for the jury did not take the five percent into consideration when it totaled 100% of fault between the two remaining defendants. But we are reminded that under Iowa law, the failure to wear a seat belt is not considered evidence of comparative fault under section 668.3(1) of the



Iowa Code Rather, and after July 1, 1986, and subject to certain statutory exceptions once the defendants introduced substantial evidence that Chad's failure to wear a seat belt contributed to his injury, then it was for the jury to determine the percentage, if any, (not to exceed five percent) that the amount of Chad's recovery is to be reduced after any reduction for comparative fault. Iowa Code § 321.445(4)(b)(1) and (2). Section 321.445(4) provides in relevant part that the failure of a party to wear a safety belt is not evidence of comparative fault, but may be considered to reduce the amount of plaintiff's recovery by no more than five percent. *Duntz v. Zeimet*, 478 N.W.2d 635, 637 (Iowa 1991).

We conclude that as to Chad's claim, a new trial as to damages is in order and that any judgment entered at the new trial is subject to apportionment for liability in accordance with this jury's verdict and is subject to reduction for failure to wear a seat belt as it so found. The transcript of the record is not sufficient for us to consider an additur.

III. Eric's Claim. We next consider whether a new trial should be granted as to Eric's claim. The trial court in its post-trial motion found that the jury verdict "is supported by substantial evidence and effects substantial justice between the parties." We agree.

The trial court has considerable, but not unlimited, discretion in ruling upon a motion for a new trial. Ordinarily, we will not disturb that discretion unless an abuse is shown. *Householder v. Town of Clayton*, 221 N.W.2d 488, 493 (Iowa

1974). In addition, we accord weight to the fact the trial court, aided by seeing and hearing the witnesses, observing the jury, and having before it all incidents of the trial, did not deem it appropriate to interfere. *Kautman v. Mar-Mac Community School Dist.*, 255 N.W.2d 146, 147-48 (Iowa 1977) (citing *Olsen v. Drahos*, 229 N.W.2d 741, 743 (Iowa 1975)).

It cannot go unnoticed that Eric admits he had too much to drink and drive home. He also admitted there was a lot he did not remember about the night or the accident. In addition, after the accident, he reacted with violence by taking a swing at Wright. With this in mind, the defendants contend that Eric was at fault for accepting a ride with Wright, who at that time was too intoxicated to drive. We do not believe that Eric should now claim he did not appreciate the danger he subjected himself to because he had too much to drink. See *Rippel v. J.H.M. of Waterloo, Inc.*, 328 N.W.2d 499, 501 (Iowa 1983).

We believe, under the circumstances here, that a reasonable jury could and as it did here, conclude an assignment of sixty percent of the fault to Eric. Such a finding is supported by substantial evidence. The trial court did not abuse its discretion in denying Eric's motion for a new trial. We affirm on this issue.

IV. Bruce's Claim. Special verdict forms were submitted to the jury as to Bruce Peters' claim for loss of parental consortium as to Chad and Eric Peters. In each instance, the jury was told that if they found either Toby Wright or Marty Pippett to be at fault, it was to determine whether Bruce Peters was entitled to an

award on [redacted] claims. The jury answered "no" on each form. The trial court denied Bruce's motion for a new trial.

We find the result reached by the jury is supported by substantial evidence. The trial court did not abuse its discretion in denying Bruce Peters' motion for a new trial. We affirm on this issue.

V. Additur. Neither party on appeal challenges the procedure employed by the trial court when it invoked additur under Iowa Rule of Civil Procedure 250. Nonetheless, in view of the case of *Fisher v. Davis*, 601 N.W.2d 54 (Iowa 1999), which came down after the trial court's additur ruling, a comment concerning Iowa Rule of Civil Procedure 250 may be in order.

Rule 250 is the rule that governs conditional new trials. In the *Fischer v. Davis* case, one of the issues was whether both parties to the law suit had to consent to an additur. *Fisher*, 601 N.W.2d at 60. The supreme court in *Fisher* held that only the party wishing to avoid a new trial has the right to accept or decline the condition, which in that case (as in the case at bar) was an additur. *Id.* The consent of both parties is not required. *Id.*

In the case before us, the plaintiff moved for a new trial. The defendants resisted. Thus, the party wishing to avoid a new trial is the defendant. When the trial court's ruling is considered in its entirety, we believe that is the only consent the trial court required.

The defendants gave their consent. The plaintiff took this appeal. The effect of the appeal, however, nullifies the court's additur order. See Iowa Rule of Civil Procedure 250(c)(providing that in the event of an appeal "any such term or condition or judgment entered pursuant to district court order shall be deemed of no force and effect and the original judgment entered pursuant to R.C.P. 223 shall be reinstated."). Thus, the judgment on the jury's award for Chad's damages was reinstated. Because we have concluded that the award is inadequate, it is reversed and remanded for a new trial as to damages only.

VI. Disposition. In sum, we conclude the verdict of $100 awarded to Chad was inadequate. The trial court was, therefore, correct in ruling a new trial should be granted as to Chad's claim. The issue at the new trial is limited to damages and any judgment is subject to the apportionment of liability and reduction for failure to wear a seat belt as found by this jury. Because the plaintiff's appeal reinstated the judgment, the judgment is reversed and as to Chad's claim is remanded for new trial.

We find that the trial court did not abuse its discretion in denying a new trial as to Bruce and Eric Peters' claim and accordingly affirm as to those two claims.

AFFIRMED IN PART, REVERSED AND REMANDED FOR NEW TRIAL ON CHAD'S CLAIM.