IN THE COURT OF APPEALS OF IOWA

No. 1-459 / 91-302

FILED
MAR 24 1992
CLERK SUPREME COURT

ROBERT J. DEMKIER,

Appellee,

vs.

55

PATRICIA ANN PARKER and **LARRY PARKER,**

Appellants.

Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson, Judge.

In this lawsuit arising from an auto accident, a jury awarded damages of over $87,000 to the plaintiff. The defendants have appealed from the resulting judgment. **AFFIRMED.**

Donald R. Breitbach of Reynolds & Kenline, Dubuque, for appellants.

Michael J. Coyle and Michael J. Shubatt of Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C., Dubuque, for appellee.

Considered by Donielson, P.J., and Hayden and Habhab, JJ.

DONIELSON, P.J.

This case arises from an automobile accident which occurred on October 4, 1987. Plaintiff Robert Demkier was driving west on Dodge Street in Dubuque, Iowa. Defendant Patricia Parker was driving east on the same street in a car owned by her father, Larry Parker. As she was making a left-hand turn, the two cars collided. Demkier suffered an injury to his right elbow which required surgery. He claims permanent partial injury to his elbow. He also received a gash on his forehead which required stitches.

After the accident Patricia was given a breath test by police officers. The test showed a blood alcohol level of .104. Patricia was arrested for driving while intoxicated. However, this charge was dropped. She later pled guilty to making an improper left turn.

Demkier filed this personal injury action against the Parkers. Prior to trial Demkier settled a claim with his insurer under an underinsured motorist provision. He received $33,884.45 and agreed to assign his rights in the lawsuit to the insurer up to that amount. The Parkers filed a motion for adjudication of law points alleging that by settling for $33,884.45, when his underinsured motorist coverage was $50,000, Demkier had in fact admitted that the lesser amount was the full amount of his damages. The district court denied the motion.

The case proceeded to trial before a jury. The jury found the Parkers 100% at fault and assigned no fault to

Demkier. Demkier was awarded damages of $87,583.08. The district court denied the Parkers' motion for a new trial. The Parkers then filed this appeal.

I.

In an action at law our review is confined to the correction of assigned errors. Stover v. Lakeland Square Owners Association, 434 N.W.2d 866, 867 (Iowa 1989). Findings of fact in a law action are binding upon the appellate court if supported by substantial evidence. Cook v. State, 431 N.W.2d 800, 805 (Iowa 1988). A finding of fact is supported by substantial evidence if the finding may be reasonably inferred from the evidence. Id. at 806. An appellate court is not bound by the trial court's application of legal principles or its conclusions of law. Midwest Recovery Services v. Wolfe, 463 N.W.2d 73, 74 (Iowa 1990).

II.

The Parkers contend the jury's verdict is not supported by the evidence. They believe the evidence shows Demkier failed to keep a proper lookout and did not have his car under control. The Parkers believe they should have been granted a new trial based on the jury's failure to assign a percentage of fault to Demkier.

A new trial may be granted where a jury verdict is not sustained by sufficient evidence or the verdict fails to effectuate substantial justice between the parties. Young v. Gibson, 423 N.W.2d 208, 210 (Iowa App. 1988). A trial

court has broad, but not unlimited, discretion in ruling on a motion for new trial. Kiner v. Reliance Insurance Co., 463 N.W.2d 9, 13 (Iowa 1990).

Whether we agree with the jury's findings of fact is not the issue. Cook v. State, 431 N.W.2d 800, 805 (Iowa 1988). The question is whether the verdict is supported by the evidence. Id. In evaluating whether a verdict is supported by the evidence, we must view the evidence in the light most favorable to the prevailing party. Gore v. Smith, 464 N.W.2d 865, 868 (Iowa 1991). Evidence is substantial when a reasonable mind could accept it as adequate to reach the same findings. Waukon Auto Supply v. Farmers & Merchants Savings Bank, 440 N.W.2d 844, 846 (Iowa 1989).

We affirm the district court's denial of a new trial; the jury's verdict was supported by substantial evidence. There was evidence to show Patricia's driving was impaired by alcohol and that she negligently turned into Demkier's driving path as she attempted to make a left turn. Furthermore, Demkier could not anticipate Patricia would make an improper left turn. Therefore, he had no duty to stop or slow down prior to the collision. See Iowa R. App. P. 14(f)(9).

III.

The Parkers also contend they should have been granted a new trial because the damages awarded by the jury were excessive and were the result of passion and prejudice.

A district court may grant a new trial where a jury awarded excessive or inadequate damages appearing to have been influenced by passion or prejudice. Cowan v. Flannery, 461 N.W.2d 155, 157 (Iowa 1990). Where the verdict is within a reasonable range as indicated by the evidence the courts should not interfere with what is primarily a jury question. Id. at 158. The amount of damages to be awarded is peculiarly a jury, not a court, function. Waddell v. Peet's Feeds, Inc., 266 N.W.2d 29, 32 (Iowa 1978).

We affirm the district court's denial of a new trial on this ground. The amount of damages awarded was within the reasonable range of the evidence.

IV.

The Parkers contend the district court should not have allowed a police officer to testify about Patricia's arrest for intoxication, the results of the breath test, and that she had been driving while intoxicated, because such evidence is overly prejudicial. The district court cautioned the jury not to consider any evidence indicating that Patricia was arrested for driving while intoxicated.

Initially, we are not convinced the Parkers have preserved error on this issue. When a party seeks to exclude evidence, the specific grounds of objection need to be indicated to the trial court. Carter v. Wiese Corp., 360 N.W.2d 122, 132 (Iowa App. 1984). A claim of "no

proper foundation" is insufficient to provide a basis for review on appeal. Id.

Even if the Parkers had preserved error on this issue, we conclude there was no error here. Generally, improper testimony is not unduly prejudicial if the jury is admonished to disregard it. Berg v. Des Moines General Hospital Co., 456 N.W.2d 173, 178 (Iowa 1990). We find the district court's admonishment cured any error resulting from the police officer's statement that Patricia had been arrested for driving while intoxicated.

Furthermore, the results of the breath test could properly be admitted under Iowa Code section 321J.15. We find that section 321J.2(9) does not apply to civil suits. That section prohibits the use of the results of a chemical test if the alcohol concentration indicated by the chemical test minus the established margin of error for that test does not equal an alcohol concentration of .10 or more. Section 321J.2(9) specifically states that it applies to criminal prosecutions.

V.

The Parkers contend the district court improperly instructed the jury on operation of a motor vehicle while intoxicated. This argument is based on their argument above that the district court should have excluded evidence of Patricia's intoxication. Because we found the evidence was proper, we are not persuaded by this argument concerning the jury instructions.

VI.

The Parkers contend the district court should have given their requested instruction on Demkier's injury from a later incident. Demkier injured his right shoulder in an unrelated incident after the accident in question. The Parkers sought an instruction stating that plaintiff could not recover for any later injury not caused by this accident.

Courts have a duty to instruct juries on the law applicable to the facts as disclosed by the evidence, and must so instruct if there is evidence admitted which supports some involved issue. State v. Freeman, 267 N.W.2d 69, 71 (Iowa 1978). Conversely, it is error to instruct upon an issue having no substantial evidentiary support or which rests only on speculation. Miller v. International Harvester Co., 246 N.W.2d 298, 300-301 (Iowa 1976).

Here, Demkier did not seek damages for his shoulder injury and no evidence was presented concerning damages for his injured shoulder. We affirm the district court's refusal to instruct the jury concerning Demkier's later shoulder injury.

VII.

Finally, the Parkers contend the district court should have granted their motion for adjudication of law points. They claim that by accepting less than the full amount of his underinsured motorist coverage, Demkier voluntarily waived his right to collect more from the defendants.

We note that this is an issue of first impression in Iowa. However, we are persuaded by the reasoning of the district court in denying the motion for adjudication of law points. We set forth here the district court findings on this issue:

> The Court finds that the concept of res judicata/ preclusion has no application because the plaintiff's carrier is not now and has never been a party to this proceeding or any related proceeding. Likewise, no duty exists nor cause of action lies between the defendants and plaintiff's underinsured motorist coverage carrier. As a result, plaintiff's agreement with his own carrier does not prejudice the defendants in any fashion nor serve to deprive the defendants of any right of recovery concerning the carrier.

We adopt this reasoning and affirm the district court's denial of the motion to adjudicate law points.

VIII.

In summary, we affirm the district court on all issues.

AFFIRMED.