

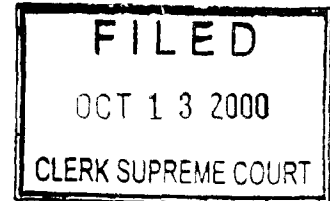
IN THE COURT OF APPEALS OF IOWA

No. 0-381 / 99-477
Filed October 13, 2000

STEVEN R. JOHNSON and CHERYL JOHNSON,
Plaintiff-Appellees,

vs.

ERIC MICHAEL JENNINGS,
Defendant-Appellant.



Appeal from the Iowa District Court for Clinton County, C.J. Pelton, Judge.

Defendant appeals the district court's judgment for plaintiff entered upon a jury verdict in a personal injury action. **AFFIRMED.**

Michael D. Huppert and Patrick V. Waldron of Patterson, Lorentzen, Duffield, Timmons, Irish, Becker & Ordway, L.L.P., Des Moines, for appellant.

Michael. K. Bush and James Carlin of Carlin, Hellstrom & Bittner, Davenport, for appellees.

Heard by Huitink, P.J., and Mahan and Zimmer, JJ.

ZIMMER, J.

Eric Michael Jennings appeals the district court's judgment for plaintiff Steven Johnson entered upon a jury verdict in a personal injury action. Jennings contends the trial court erred by not granting him judgment notwithstanding the verdict on Johnson's negligence claim. Jennings also argues he is entitled to a new trial based on opposing counsel's alleged misconduct during jury voir dire and closing arguments. We affirm.

On January 29, 1996, Jennings and Johnson were involved in an automobile accident. Some time after the accident, Johnson experienced diffuse muscle pain, headaches, depression, and difficulty sleeping. He became unable to continue full-time employment due to pain and movement restrictions. He was ultimately diagnosed with fibromyalgia, a connective tissue disorder. Johnson filed suit against Jennings on January 24, 1997. Jennings admitted fault but contested the causation and amount of damages.

Trial commenced on December 28, 1998. During jury voir dire, Johnson's counsel asked the panel whether any of them were employees, directors, or stockholders of American Family Insurance Company. Jennings's counsel moved for a mistrial. The court overruled the motion. The trial proceeded and on December 31, 1998, the jury returned a verdict in favor of Johnson for \$597,014. On January 11, 1999, Jennings filed a motion for new trial and judgment notwithstanding the verdict. He also filed a bill of exceptions in order to place into the record certain statements made by Johnson's counsel during unreported closing argument. The trial court declined to certify the bill of exceptions and denied the post-trial motions.

Jennings appeals. He contends the trial court erred in not granting his motion for directed verdict because Johnson failed to show the accident proximately caused his fibromyalgia. Jennings also argues he is entitled to a new trial based on misconduct by Johnson's counsel during jury voir dire and closing argument.

I. Scope of Review. We review the denial of a motion for directed verdict for correction of errors of law. *Top of Iowa Coop. v. Sime Farms, Inc.*, 608 N.W.2d 454, 466 (Iowa 2000). In reviewing a directed verdict, we determine whether a jury question was generated. *Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 593 (Iowa 1999). Similarly, in reviewing rulings on a motion for judgment notwithstanding the verdict, we determine whether there was sufficient evidence to generate a jury question. *Id.* In deciding this issue, we view the evidence in the light most favorable to the nonmoving party, regardless of whether the evidence was contradicted. *Federal Land Bank v. Woods*, 480 N.W.2d 61, 65 (Iowa 1992). We afford the nonmovant every legitimate inference that can reasonably be drawn from the evidence. *Top of Iowa Coop.*, 608 N.W.2d at 466. If reasonable minds could differ on the resolution of the issue, it was correctly submitted to the jury. *Id.*

II. Proximate Cause of Fibromyalgia. Johnson's claim against Jennings is based on negligence. In order to recover on a claim of negligence, the plaintiff must establish the defendant's conduct was a proximate cause of the plaintiff's injury or damage. *Hasselman v. Hasselman*, 596 N.W.2d 541, 545 (Iowa 1999). The general rule is that an actor's conduct is the proximate or legal cause of harm to another if that conduct is a "substantial factor" in bringing about the

harm. *Scoggins v. Wal-Mart Stores, Inc.*, 560 N.W.2d 564, 567 (Iowa 1997) (citation omitted). Jennings argues the trial court erred in denying his motions for directed verdict and JNOV because Johnson did not make out a jury question on the issue of proximate cause. Jennings points out the exact medical etiology of fibromyalgia is unknown and Johnson exhibited symptoms consistent with fibromyalgia prior to the accident.

In light of our standard of review, we must reject Jennings's arguments. The medical witnesses testified the trauma to the body from a car accident can lead to fibromyalgia and, in fact, the medical profession recognizes the term "post-traumatic fibromyalgia." They did concede that not all car accident victims will develop fibromyalgia or that all persons with fibromyalgia have had a car accident. However, three medical experts opined with a reasonable degree of medical certainty that the accident in this case led to *Johnson's* development of fibromyalgia. These same witnesses also testified that even though Johnson experienced some fatigue and depression prior to the accident (some of the symptoms of fibromyalgia), their conclusion remained the same regarding the triggering cause of his fibromyalgia—the car accident. In a thorough cross-examination of the experts, Jennings's attorney brought out weaknesses in their testimony, including the issues of the unknown etiology and Johnson's pre-accident symptoms. However, the jury could and did accept the physicians' evidence on causation of Johnson's fibromyalgia. Although we may disagree with the jury, we do not reweigh the evidence on appeal. Johnson generated a jury question on the issue of proximate cause. See *Bazel v. Mabee*, 576 N.W.2d 385, 389 (Iowa App. 1998) (concluding plaintiff's expert's statement regarding

cause of injury sufficed to generate fact issue).

This is not a case where the jury heard no evidence regarding causation and was left to speculate. See *Hasselman*, 596 N.W.2d at 546. Here, Johnson presented medical testimony attributing his fibromyalgia to the accident. The fact Jennings made inroads into the credibility of some of this testimony on cross-examination is not determinative. See *Oak Leaf Country Club, Inc. v. Wilson*, 257 N.W.2d 739, 747 (Iowa 1977). The weight and credibility of testimony are matters for the jury. *Id.* This rule applies even though there are contradictions or inconsistencies in the testimony of a particular witness. *Id.* Under our standard of review, the trial court properly denied the motions for directed verdict and JNOV.

III. Attorney Misconduct. Jennings claims Johnson's counsel committed misconduct during jury voir dire and closing argument which warranted a new trial. When reviewing the denial of a motion for a new trial, we look to the grounds for the new trial asserted in the motion and ruled on by the court. *Rosenberger Enters., Inc. v. Insurance Service Corp. of Iowa*, 541 N.W.2d 904, 906-07 (Iowa App. 1995). If the motion and ruling are based on a discretionary ground, such as attorney misconduct, we review for an abuse of discretion. *Id.* In order to show an abuse of discretion, one generally must show that the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.*

A. Jury Voir Dire. During unreported voir dire, Johnson's counsel asked the jury if anyone was an employee, shareholder, or director of American Family

Insurance Company. Jennings argues this question improperly injected the issue of his liability insurance into the case, in violation of Iowa Rule of Evidence 411.¹

The Iowa Supreme Court approved a similar voir dire question in *Anderson v. City of Council Bluffs*, 195 N.W.2d 373, 377 (Iowa 1972). In that case, the supreme court concluded even naming the insurance company is permitted during voir dire as long as a plaintiff's attorney "acts in good faith for the purpose of obtaining information upon which to exercise peremptory challenges of the jurors and not for the purpose of informing the jury that an insurance company" backs the defendant. *Id.* (citation omitted). In *Anderson*, the supreme court upheld the denial of the defendants' mistrial motion, finding the plaintiff's counsel had acted in good faith and was not guilty of a persistent effort throughout trial to impress on the jury that the defendants' liability was insured. *Id.*

We conclude *Anderson* controls our resolution of this issue. The trial court found Johnson's counsel acted in good faith by asking the question, even though he named American Family. Johnson's counsel expressed his concern that a member of the panel may have had some connection to American Family and thus personal knowledge of the case. Litigants have the right to examine prospective jurors in such a way as to enable them to select a jury composed of persons who can determine the facts in issue without bias, prejudice, or partiality. *Anderson*, 195 N.W.2d at 377. The trial court also pointed out the question was

¹Rule 411 provides:

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

one of many and counsel did not dwell upon the issue. The extent of jury voir dire examination is subject to the sound discretion of the trial court. *Id.* We conclude the trial court did not abuse its discretion by denying Jennings's motion for mistrial on this ground.

B. Closing Argument. On appeal, Jennings argues the district court erred by denying his motion for new trial based on improper argument by opposing counsel. He contends Johnson's counsel's comments interposed personal beliefs, attempted to create evidence, and improperly referred to a juror who was stricken during jury selection after she stated she suffered from fibromyalgia. Johnson contends Jennings failed to preserve error.

Closing arguments in this case were not reported. Jennings lodged no objections during closing argument and failed to bring any alleged misconduct to the court's attention before the verdict was returned. Approximately ten days after the verdict, Jennings filed a bill of exceptions containing the allegedly objectionable statements Johnson's counsel had made during his closing. In February of 1999, Jennings's counsel then obtained two affidavits, one from an attorney in his firm² who was present during closing argument and another from an attorney from the Clinton County Attorney's Office who happened to be in the courtroom that day. The two affidavits set forth remarks essentially verbatim

² There were only two ways in which the bill of exceptions in this case would have become part of the appellate record: if the trial court had signed it or defense counsel had presented the affidavits of at least two 'bystanders.' See Iowa R. Civ. P. 241(c). One of the 'bystander' affidavits came from an attorney in the firm representing Johnson. We note an attorney for a party does not qualify as a bystander under rule 241. See *Hornish v. Overton*, 221 N.W. 483, 485, 206 Iowa 780, 785 (1928) (deciding issue under predecessor statute to rule 241) (citations omitted); *Rudd v. Jackson*, 213 N.W. 428, 203 Iowa 661 (1927) (same); cf. *Millis v. Hute*, 587 N.W.2d 625, 630 (Iowa App. 1998) (declining to extend rule 241(c) to permit the parties to the litigation to serve as 'bystanders'). However, no objection was lodged to this affidavit below.

from the bill of exceptions. The trial court declined to certify Jennings's bill of exceptions because it could not recall the details of what was said with certainty or certify what Johnson's counsel implied during argument. The trial court overruled Jennings's new trial motion which was predicated on this alleged misconduct.

We conclude error was not preserved. We agree a bill of exceptions is the appropriate vehicle for making a *record* of unreported closing arguments. See Iowa R. Civ. P. 241(a); *Schwennen v. Abell*, 471 N.W.2d 880, 887-88 (Iowa 1991) (stating misconduct of counsel in unreported argument must be preserved by bill of exceptions) (citation omitted). However, the error itself must be preserved by objection prior to submission of the case to the jury. See *Rosenberger Enters.*, 541 N.W.2d at 907; see also *State v. Delay*, 320 N.W.2d 831, 835 (Iowa 1982) (concluding any objection to prosecutorial misconduct during closing argument waived on appeal by defense counsel's strategic choice not to object at trial and instead bank on a favorable verdict); *State v. Epps*, 313 N.W.2d 553, 555 (Iowa 1981) (stating grounds for mistrial properly preserved by lodging objection prior to submission of case to jury and filing bill of exceptions). This procedure affords the trial court an opportunity to correct the error or remember the difficulties, should a bill of exceptions be filed. Furthermore, it prevents a party from foregoing an objection, awaiting a favorable verdict, and then trying to recreate a record later, if an unfavorable verdict is received. See *Epps*, 313 N.W.2d at 555. Jennings failed to object or move for a mistrial until approximately ten days after a verdict was returned. We view the failure to object to the argument during trial as a strategic decision to bank on a

favorable verdict. We affirm the trial court's denial of Jennings's motion for new trial on this ground.

AFFIRMED.