IN THE COURT OF APPEALS OF IOWA

No. 9-026 / 98-420

Filed June 23, 1999

JANET HELMS and JEFFREY HELMS, Individually and as Parents and Next Friends of ANNE HELMS, a Minor, and THOMAS HELMS, a Minor,
Appellants,
vs.

SAM T. SUM-PING,
Appellee,
and

MARY A. ANDERSON,
Defendant.

Appeal from the Iowa District Court for Johnson County, L. Vern Robinson, Judge.

Plaintiffs appeal a jury verdict finding Janet Helms ninety percent at fault in a personal injury action arising from an automobile accident. **AFFIRMED.**

Michael K. Bush of Carlin, Hellstrom & Bittner, Davenport, for appellants.

Matthew J. Nagle of Lynch, Dallas, Smith & Harman, P.C., Cedar Rapids, for appellee.

Considered by Huitink, P.J., and Streit and Vogel, JJ.

STREIT, J.

Janet and Jeffrey Helms appeal a jury verdict finding Janet Helms ninety percent at fault for her damages based on her failure to mitigate damages. The finding resulted in an award of no damages under our comparative fault act. Because we find substantial evidence in the record that Helms failed to mitigate damages, we affirm.

I. Background Facts & Proceedings.

Janet Helms was a passenger in a car driven by Mary Anderson. Anderson's car was hit from behind by a car driven by Sam T. Sum-Ping when Anderson braked to avoid hitting a duck. Approximately $800 in damages was caused to each car. There were no reports of injuries at the accident scene.

Helms sued Sum-Ping and Anderson alleging each was negligent in causing her injuries. Helms alleged the accident caused her a significant closed-head injury and neck and back injuries resulting in lost-earning capacity, loss of function, and pain and suffering. Anderson settled with Helms.

The jury found Helms ninety percent at fault and Sum-Ping ten percent at fault for her damages. This finding resulted in no damages being awarded to Helms. The jury also awarded no damages for the loss of consortium claims. The court denied the Helms' motion for new trial. The Helms appeal.

II. Standard of Review.

On appeal, the Helms argue the district court erred in denying their motion for new trial. They assert the evidence did not support the jury's finding Helms caused ninety percent of her damages based on her failure to mitigate damages.

We review the denial of a motion for new trial for abuse of discretion. *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d 612, 618 (Iowa 1991). If a jury verdict is not supported by sufficient evidence and the verdict fails to effectuate substantial justice, a new trial may be ordered. *Thompson v. Rozeboom*, 272 N.W.2d 444, 446 (Iowa 1978). The reason for granting a new trial must fairly appear in the record. *Bredberg v. Pepsico, Inc.*, 551 N.W.2d 321, 326 (Iowa 1996). We must also 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); *Olsen v. Drahos*, 229 N.W.2d 741, 743 (Iowa 1975).

Sum-Ping argues the Helms have not preserved error for review because they did not object to the jury instruction on mitigation of damages. The Helms did, however, file a motion for new trial asserting the verdict was not supported by substantial evidence on the record. This motion preserved the issue for review. *See* Iowa R. App. 14(f)(1) (1998); *Konicek v. Loomis Bros., Inc.*, 457 N.W.2d 614, 617 (Iowa 1990).

III. Comparative Fault Principles Applied to Mitigation of Damages.

Sum-Ping asserted the defense of mitigation of damages at trial, arguing Helms' symptoms were caused by her addiction and withdrawal from the prescription drug Stadol rather than a cognitive injury sustained in the car accident.

Helms argues we should reverse or distinguish our supreme court's decision in *Tanberg* which held a plaintiff could be denied damages under operation of our comparative fault act for an unreasonable failure to mitigate damages. *Tanberg v. Ackerman Inv. Co.*, 473 N.W.2d 193 (Iowa 1991)(holding the jury's finding the plaintiff was seventy percent at fault for her damages for failure to lose weight was supported by substantial evidence and denied the plaintiff damages under the comparative fault act). We decline to do so. Our legislature has defined fault as including an unreasonable failure to mitigate damages[1] and our appellate courts have repeatedly held an unreasonable failure to mitigate damages constitutes fault. *See, i.e., Tanberg,* 473 N.W.2d 193; *McDonnell v. Chally,* 529 N.W.2d 611, 613 (Iowa App. 1994). In determining whether a party has failed to mitigate damages, the defendant has the burden of demonstrating the failure to mitigate was unreasonable

---

[1] Section 668.1. states:

> 1. As used in this chapter, "fault" means one or more acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages.

Iowa Code § 668.1 (1997).

under the circumstances. *Kirk v. Union Pacific R.R.*, 514 N.W.2d 734, 737 (Iowa App. 1994).

IV. Evidence Supporting the Jury Verdict.

The Helms contend Sum-Ping did not meet his burden of proving Helms failed to mitigate her damages and, for that reason, substantial evidence does not support the jury verdict. The Helms argue Sum-Ping failed to produce evidence from Helms' treating physicians she was addicted to Stadol and, without such testimony, a reasonable jury could not have found Helms failed to mitigate damages.

Our review of the record reveals substantial evidence supporting the jury verdict. Although Sum-Ping did not present expert testimony of Helms' treating physicians that she was addicted to Stadol, there is a plenitude of evidence in the record which could have led a reasonable jury to the conclusion Helms' symptoms were caused by her addiction to the drug Stadol.

Dr. Rizzo, a neurologist at the University of Iowa Hospitals, reviewed Helms' medical records and diagnostic testing. He found all her diagnostic testing normal and concluded she did not sustain a traumatic brain injury. Rizzo's medical report and testimony revealed the following: Helms' initial headaches in the fall of 1994 may have been headaches caused by her withdrawal from Stadol; the known side effects of Stadol are memory impairment, decreased cognitive functioning, and irritability or confusion;[2] Helms' other prescription drugs caused side effects such as

---

[2] Dr. Varner, Helms' expert witness, agreed these were side effects of Stadol use.

lethargy, fatigue, headaches, depression, slurred speech, and depression. Rizzo noted in his medical report the side effects of Stadol and the other prescription drugs caused symptoms which were the same symptoms associated with post-concussive disorders and post-traumatic disorders. Dr. Kimm, Helms' treating doctor, testified he felt many of Helms' memory problems were related to her overuse of pain medication.[3]

Further, the record reveals Helms' treating doctors recommended she decrease her prescription drug use. After Helms was no longer prescribed Stadol from Drs. Kimm and Biondi, she continued to obtain the drug from multiple doctors and from friends with access to the drug. Helms has undergone drug detoxification on three occasions.

Because we find the evidence in the record sufficient to support the jury verdict and that the verdict is just, we affirm.

AFFIRMED.

---

[3] Drs. Miller and Branca, who also treated Helms, stated in deposition testimony some of Helms' problems, such as depression and cognitive problems, were side effects of prescription drug use.

No. 98-420. [9-026] HELMS v. SUM-PING

Appeal from the Iowa District Court for Johnson County, L. Vern Robinson, Judge. **AFFIRMED.** Considered by Huitink, P.J., and Streit and Vogel, JJ. Opinion by Streit, J. (6 pages $2.40)

Janet and Jeffrey Helms appeal a jury verdict finding Janet Helms ninety percent at fault for her damages based on her failure to mitigate her damages from a car accident. The finding resulted in an award of no damages under our comparative fault act. Sum-Ping asserted the defense of mitigation of damages at trial, arguing Helms' symptoms were caused by her addiction and withdrawal from the prescription drug Stadol rather than a cognitive injury sustained in the car accident. **OPINION HOLDS:** Substantial evidence supports the jury verdict. There is a plenitude of evidence in the record which could have led a reasonable jury to the conclusion Helms' symptoms were caused by her addiction to the drug Stadol.