IN THE COURT OF APPEALS OF IOWA

No. 1999-582 (9-843) / 99-0414
Filed March 15, 2000

RONALD E. BALIK,
Plaintiff-Appellee,

vs.

CONTINENTAL WESTERN INSURANCE COMPANY,
Defendant-Appellant.

FILED
MAR 15 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Floyd County, Bryan McKinley, Judge.

Continental Western Insurance Company appeals a jury verdict and judgment in favor of Ronald Balik for underinsured motorist benefits. **AFFIRMED.**

Frederick G. White, Waterloo, for appellant.

Bruce Braley of Dutton, Braun, Staack & Hellman, P.L.C., Waterloo, for appellee.

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

MAHAN, J.

Continental Western Insurance Company appeals a jury verdict and judgment in favor of Ronald Balik for underinsured motorist benefits. They also appeal the district court's decision overruling its motion for judgment notwithstanding the verdict, motion for new trial, and alternative motion for conditional new trial with remittitur and reduction in damages. Specifically, Continental contends the district court erred in (1) overruling its motions for directed verdict; (2) instructing the jury on the fault of Jun Sun and future damages; and (3) overruling its post-trial motions. We affirm.

On October 31, 1995, James Rooff III was working on a construction project on Highway 150, approximately seven miles south of Rowley, Iowa. Rooff planned to use a backhoe to remove a traffic detour built off the main right of way, which allowed traffic to bypass the construction zone. A U.S. West representative arrived to locate a phone line before Rooff proceeded. Rooff showed the representative where he wanted to work to remove the detour. The representative crossed the highway to the east side, where his vehicle was parked in a farm driveway. Rooff stayed on the west side of the highway, standing in the detour area.

Jun Sun was traveling north on the highway. She slowed down to ask directions to Independence and veered toward Rooff, crossing the centerline, with her window up and mouth moving. Rooff told her not to cross the highway because a truck was coming. Sun looked in her mirror, and hit the brakes, stopping her vehicle. Approximately twenty-five percent of Sun's car was across the centerline when she completely stopped on the traveled portion of Highway 150. Rooff yelled, "pull ahead, pull ahead," and pointed to the shoulder. He told her there was

nowhere for her to go on his side of the highway. Rooff described the incident as follows:

> A station wagon – a car – a station wagon car came up and started to slow down, and the phone guy said, what's she doing? Well, my back was turned. I looked, you know, I seen it's a woman in the car. She's slowing down. It looks like this woman is trying to talk to me. The window was up but her mouth is moving, she's looking right at me. Well, she veered over like she was coming across the centerline. . . . And I'm telling her, hey, no, no, I mean, because this is a live highway. There's live traffic here. I didn't know what the deal was. First, I thought maybe there was an emergency, something was wrong with her or something. I'm trying to tell her to go. So she turned to come – go back, more or less, in her lane, and I'm telling her go, go, because there's a semi coming right behind her. She looks in her mirror. I point to her back there because she couldn't understand basically what I was saying. You know, he, there's a truck coming. She looks in her mirror, looks at me, hits the brakes and just stops right there.

Rooff further testified Sun could have pulled over to the new asphalt paved shoulder near the farm drive where the U.S. West representative had parked his van. He also stated when he first saw Balik's truck, he was following Sun at an appropriate distance.

Rooff feared for his own safety as he saw Balik's truck approach and slow down. Balik cranked the steering wheel in an attempt to avoid colliding with Sun's vehicle, and veered toward Rooff. Rooff saw Balik's truck hit the left rear bumper of Sun's car as he swerved to the left. Balik turned back to the right to avoid hitting Rooff. As a result, Balik's truck hit the soft dirt in the shoulder and went in the ditch, rolling onto the driver's side, pinning him in the cab.

Flames rose from the truck. Rooff ran to his backhoe, and attempted to rescue Balik. The U.S. West representative ripped the windshield out of the truck in an attempt to remove Balik. Several other people came running to the scene and

attempted to put out the fire. An ambulance and fire truck arrived. After one hour, they were able to successfully remove Balik from the truck with the jaws of life.

The ambulance transported Balik to a hospital in Independence. Balik's left leg and knee showed a comminuted fracture at the lateral tibial plateau, which ran from the tibial plateau into the spinous region of the tibia. The facture caused a gap at the fracture site up through the knee joint. The hospital staff placed Balik's leg in a splint and referred him to Dr. Lyons, an orthopedic surgeon in Charles City.

Lyons began treating Balik on November 2, 1995. He recommended surgery. Lyons performed the surgery in two stages. Following the first surgery Balik experienced severe pain, and he remained in a motion-restricting device for six weeks while he received physical therapy. On January 7, 1997, Lyons performed the second surgery to remove meal hardware from Balik's tibia. Following treatment, Lyons determined Balik sustained a four percent permanent disability rating to his left lower extremity.

Balik brought an action against Sun. Sun's automobile insurance policy had bodily injury liability limits of $25,000. Sun could not personally satisfy a judgment award in excess of her policy limits, so Balik settled his claim against her for $25,000. Balik commenced the current action against his underinsurance carrier, Continental Western.

The jury heard this matter December 1, 1998, through December 2, 1998. At the close of Balik's case, and at the close of all the evidence Continental moved for a directed verdict. On December 3, 1998, the jury returned its verdict, attributing no fault to Balik and 100 percent of the fault to Sun. The jury awarded Balik

$244,342.95 in damages. The court reduced the damage award by $25,000 to $219,342.95 to reflect Balik's prior settlement with Sun.

On December 10, 1998, Continental filed motions for judgment notwithstanding the verdict, new trial, or conditional new trial with remittitur and reduction in damages. The court denied all three motions in its ruling on February 8, 1998. Continental appeals.

I. Motions for Directed Verdict. Continental contends the district court erred in overruling its motions for directed verdict. Continental first argues Balik failed to establish a prima facie case of negligence against Sun. Next, Continental contends the evidence affirmatively showed:

> Ron Balik saw the defendant – or saw the driver, Jun Sun, in sufficient time to bring his vehicle to a stop, that he failed to keep the assured clear distance ahead as required by section 321.285, the Code of Iowa, that he failed to have his car under control as required – his vehicle under control as required by section 321.288 of the Code of Iowa, and that he did not drive his vehicle at a reasonable and proper speed under the circumstances then and there existing, by his own admissions.

Last, Continental argues Balik was barred from recovering under comparative fault principles.

Our review of a denial of a motion for directed verdict is for errors of law. *James ex rel. James v. Burlington N., Inc.*, 587 N.W.2d 462, 464 (Iowa 1998). We examine the record in the light most favorable to the nonmoving party to determine whether substantial evidence supports each of the plaintiff's claims. *Godar v. Edwards*, 588 N.W.2d 701, 705 (Iowa 1999). To successfully resist a motion for directed verdict a plaintiff need not prove each of their claims, rather they must demonstrate there is sufficient evidence to warrant submission of each issue to the

jury. *Timm v. Clement*, 574 N.W.2d 368, 371 (Iowa App. 1997). As such we consider whether reasonable minds could differ on the issues in the case. *James*, 587 N.W.2d at 464.

In general, questions of negligence, contributory negligence, and proximate cause are for the jury to determine. Iowa R. App. P. 14(10); *Crookham v. Riley*, 584 N.W.2d 258, 265 (Iowa 1998). Such issues are only decided as a matter of law in exceptional cases. *Rieger v. Jacque*, 584 N.W.2d 247, 250-51(Iowa 1998).

> An exceptional case is one which after construing the evidence in its most favorable light and resolving all doubts in favor of the party seeking to establish proximate cause, the relationship between cause and effect nonetheless is so apparent and so unrelated to defendant's conduct that no reasonable jury could conclude defendant's fault was a proximate cause of plaintiff's injuries.

Johnson v. Junkmann, 395 N.W.2d 862, 865 (Iowa 1986).

The district court did not find this to be an exceptional case, and denied the motions finding:

> [B]ased upon the evidence presented, that a prima facie case does exist for the jury's consideration as to whether or not the tortfeasor, Sun Jun, was in fact negligent under several specifications, that jury issues continue to exist as to the proximate cause of damage as well as those damages.

We agree substantial evidence supports each of Balik's claims to warrant submission of the issues to the jury.

II. Jury Instructions. In reviewing jury instructions, we determine whether the instructions correctly state the law and are supported by substantial evidence. *Franklin v. Andrews*, 595 N.W.2d 488, 489 (Iowa 1999). We examine the evidence in the light most favorable to the party seeking the instruction in determining whether the instructions are supported by substantial evidence. *Id.* We will not

reverse a court's refusal to give or grant a particular jury instruction unless the defendant is prejudiced. *Foggia v. Des Moines Bowl-O-Mat., Inc.*, 543 N.W.2d 889, 892 (Iowa 1996).

A. Fault Instructions. Continental contends the district court erred in giving instructions 14 and 17 to the jury, and by failing to give its requested instruction, based on Iowa Uniform Instruction Number 400.8.

At trial Continental did not object to the language of instructions 14 and 17, rather, Continental argued the court should not submit the instructions to the jury because evidence of Sun's negligence was insufficient to warrant submission to the jury. The court denied Continental's exceptions to the above instructions, finding substantial evidence existed to warrant submission of the instructions to the jury for assistance in determining whether Sun was negligent, and whether Sun's actions proximately caused Balik's damages. We find no error with the court's refusal to grant Continental's request.

The court also addressed Continental's requested instruction finding:

> The additional proposed instruction raised under 400.8, which deals with avoidable consequence doctrine would not be applicable since the Court finds that the negligence of both parties would be simultaneous as opposed to the requirements of the avoidable consequence doctrine to require the plaintiff's negligence must be subsequent to the negligent act of the defendant, or in this case, Sun Jun.

Iowa Uniform Instruction Number 400.8 addresses the avoidable consequences doctrine, which applies in situations where "the plaintiff could have acted to avoid injury after the defendant's alleged negligence occurred." *Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 149-50 (Iowa 1992). When a plaintiff fails to avoid an injury prior to or simultaneous with the defendant's negligent conduct, the avoidable

consequences doctrine is inapplicable and the court need only include a negligence instruction. *Id.* at 150.

The court determined instruction 400.8 was inapplicable in this case because any negligence attributable to Balik occurred simultaneously with Sun's negligence. In light of the court's findings, to give the requested instruction would constitute error, therefore we find no error with the court's refusal to grant Continental's requested instruction. *Id.* (holding trial court erred in presenting instruction regarding unreasonable failure to avoid injury in case where plaintiff's acts or omissions occurred prior to or simultaneous with the defendant's negligence).

B. Damage Instruction. Continental argues the court erred in submitting the portions of instruction 28 to the jury, which related to loss of future earning capacity, future loss of body, and future pain and suffering. We find no error in the court's instruction regarding future damages. Balik's surgeon determined he sustained a four percent permanent disability to his left leg, therefore, we find no error with the court's inclusion of instruction regarding future damages. *Carradus v. Lange*, 203 N.W.2d 565, 569 (Iowa 1973).

III. Post-Trial Motions.

A. Motion for Judgment Notwithstanding the Verdict. Our review of a district court's ruling on a motion for judgment notwithstanding the verdict is for errors of law. Iowa R. App. P. 4; *Roling v. Daily*, 596 N.W.2d 72, 74 (Iowa 1999). We examine the evidence in the light most favorable to the nonmoving party. *Magnusson Agency v. Public Entity Nat'l Co.-Midwest*, 560 N.W.2d 20, 25 (Iowa 1997). We limit our review to the grounds raised in the motion for directed verdict. *Schlegel v. Ottumwa Courier*, 585 N.W.2d 217, 221 (Iowa 1998). We inquire

whether substantial evidence supports submission of the case to the jury. *Magnusson Agency*, 560 N.W.2d at 25. Evidence is substantial if a reasonable mind could accept it as sufficient to reach the same conclusion. *Schlegel*, 585 N.W.2d at 221.

In its ruling on Continental's motion for judgment notwithstanding the verdict, the district court found "substantial evidence did exist on the record that a reasonable trier of fact could find for the plaintiff." The district court had the advantage of seeing and hearing the evidence. We find no error with the district court's denial of Continental's motion.

B. Motion for New Trial and Conditional Motion for New Trial with Remittitur of Damages. Continental contends the evidence supporting the jury's verdict is insufficient, and the verdict is contrary to law. Continental also argues the damages awarded were influenced by passion and prejudice, and therefore shock the conscience. Our review of a district court's ruling on a motion for new trial is for abuse of discretion. *Kuta v. Newberg*, 600 N.W.2d 280, 284 (Iowa 1999); *Johnson v. Knoxville Community Sch. Dist.*, 570 N.W.2d 633, 635 (Iowa 1997).

1. Sufficiency of Jury Verdict. We may reverse a denial of a motion for new trial if the jury verdict is not supported by sufficient evidence and fails to effectuate substantial justice. *Collier v. General Inns Corp.*, 431 N.W.2d 189, 190 (Iowa App. 1988). When the court denied Continental's combined motions for judgment notwithstanding the verdict and new trial, it found sufficient evidence existed on the record for a reasonable jury to find for Balik. The district court had the opportunity to see and hear the evidence, we do not find the court abused its discretion in denying Balik's motion for new trial for lack of sufficient evidence.

2. Damage Assessment. A damage assessment is typically a function for the jury. *Lamb v. Newton-Livingston Inc.*, 551 N.W.2d 333, 337 (Iowa App. 1996). We will only set aside a damage award when the judgment is "(1) flagrantly excessive or inadequate, or (2) shocks the conscience or sense of justice, or (3) raises a presumption it is the result of passion, prejudice or other ulterior motive," or (4) is unsupported by substantial evidence. *Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 769 (Iowa 1999) (quoting *Claus v. Whyle*, 526 N.W.2d 519, 525 (Iowa 1994)). We find these factors are not present in this case.

The jury awarded the following future damages:

Loss of Future Earning Capacity	$ 30,000
Future Loss Use of Body	$ 50,000
Future Pain and Suffering	$100,000

Balik presented evidence his work life expectancy is twenty years, and his life expectancy is thirty and one-half years. Based on Balik's life expectancy, of 11,132 days, this damage award is reasonable. While we agree the damage award is high, we do not believe the jury's award is flagrantly excessive, shocks the conscience or sense of justice, or raises a presumption it is the result of passion, prejudice, or other ulterior motive. We also conclude the jury's verdict is supported by substantial evidence, therefore we will not disturb it.

AFFIRMED.