

IN THE COURT OF APPEALS OF IOWA

FILED
AUG 26 1980
CLERK SUPREME COURT **326**

DONALD L. BRODERSON, JR.,)

Plaintiff-Appellee,)

Filed August 26, 1980

vs.)

CITY OF DAVENPORT,)

.. 0-141
2-64189

Defendant-Appellant.)

Appeal from Scott District Court - R. K. Stohr, Judge.

Defendant appeals from trial court's denial of its motion for new trial following a jury verdict for plaintiff alleging 1) that trial court erred in refusing to give a jury instruction on the assured-clear-distance rule and 2) that the jury verdict award was so flagrantly excessive a new trial should have been granted. **AFFIRMED.**

John R. Stonebraker of McDonald, Stonebraker & Cepican, Davenport, Iowa, for defendant-appellant.

Seymore M. Raben of Davenport, Iowa, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant, City of Davenport, appeals from trial court's denial of its motion for new trial following a jury verdict awarding \$17,500 to plaintiff, Donald L. Broderson, Jr., in his personal injury action arising from an automobile-garbage truck collision. Defendant alleges that trial court erred in refusing to give a jury instruction on the assured-clear-distance rule as there was substantial evidence that plaintiff failed to stop in the assured-clear-distance ahead. Defendant also alleges that the jury verdict award was so flagrantly excessive that a new trial should have been granted. We affirm.

The collision between plaintiff's 1966 Chevrolet and defendant's garbage truck occurred at approximately 10:15 a.m. on November 1, 1977, near the intersection of Harrison and Ninth Streets in Davenport, Iowa. Plaintiff was proceeding south on Harrison, between Ninth and Tenth Streets, in the first (western-most) lane of the four-lane, one-way street. Defendant's truck was going south on Harrison in the second lane. As the truck approached Ninth Street, the driver applied his brakes and commenced a right turn across the first lane. As a result, plaintiff's car collided with the right rear of defendant's garbage truck. The truck was using four way flashers and an amber dome light, but no turn signal was observable. The street surface was wet due to rain earlier that morning. Following the collision, plaintiff was hospitalized and treated for face lacerations. His medical expenses totaled \$660.06. His automobile, valued at \$1,000.00, was a total loss.

I. Scope of Review. Since this is an action at law, our review is on assigned error only. Iowa R. App. P. 4.

II. Assured-Clear-Distance Instruction. Defendant alleges trial court erred in denying its motion for a new trial on the basis of failure to give a jury instruction on assured clear distance ahead, pursuant to section 321.285, The Code 1977. In its answer, defendant alleged plaintiff was contributorily negligent in failing to stop within the assured clear distance ahead. At the close of the testimony, defendant requested submission of a jury instruction on that specification of negligence which trial court denied. An instruction on driving too fast for conditions was submitted to the jury.

Whether a specification of negligence should be submitted to the trier of fact depends on the supporting evidence. Nolte v. Case, 221 N.W.2d 741, 745 (Iowa 1974); Cavanaugh v. Jepson, 167 N.W.2d 616, 619 (Iowa 1969). The evidence in the record is viewed in the light most favorable to the party having the burden of proof on the issue, and, if reasonable minds can differ on the issue, it is for the jury. Coppola v. Jameson,

200 N.W.2d 877, 879 (Iowa 1972). However, the court is under no duty to instruct on an issue unless substantial support exists in the evidence. Support resting on speculation or conjecture is insufficient, as is a mere scintilla of evidence. Nolte, 221 N.W.2d at 745.

A jury question is generated on the issue of assured clear distance

[W]here there is substantial evidence:

"(1) That the object with which the operator collided was located ahead of him in his lane of travel;

"(2) That such object was reasonably discernible; and

"(3) That the object was (a) static or stationary, (b) moving ahead of him in the same direction as such operator, or (c) came into his lane of travel within the assured clear distance ahead at a point sufficiently distant ahead of him to have made it possible to bring his vehicle to a stop and avoid a collision."

Coppola, 200 N.W.2d at 880 (quoting Cerny v. Domer, 13 Ohio St. 2d 117, 123-24, 235 N.E.2d 132, 137 (1968)). Thus, defendant, as the party having the burden, had to produce "sufficient substantial evidence" to satisfy the trial judge that the jury, as reasonable persons, would be justified in concluding that the defendant came into plaintiff's "directional line of travel" sufficiently ahead of plaintiff to have made it possible for plaintiff in the exercise of due care to stop his vehicle and avoid the collision. Nolte, 221 N.W.2d at 745.

We agree with trial court's conclusion that the evidence is insufficient to meet the criteria of either part (1) or part (3)(c) of the Coppola test, which require defendant's vehicle to be "ahead" of plaintiff in plaintiff's "lane of travel." Coppola, 200 N.W.2d at 880. The court in Nolte defined "ahead" as used in (1) and (3)(c) of the Coppola test to mean "to the front and within the directional line of travel of a motorist whose conduct is sought to be brought within the statute's [section 321.285] application." 221 N.W.2d at 745 (emphasis added).

A review of the record shows the plaintiff testified that, between Ninth and Tenth Streets on Harrison, he was in the first (western-most) lane, that he was never behind the defendant's truck, and that the defendant's truck was in the second lane, to plaintiff's left. The only independent eye-witness testified to observing defendant's truck in lane two, next to the western-most lane, and plaintiff's car in the western-most lane. The truck driver at various times testified to driving between unidentified lines, to driving in the right or first lane, and to straddling the line between the first and second lanes. One of the truck driver's co-employees testified that the truck was in the second lane with plaintiff's vehicle in the right lane, while another co-employee

testified variously that the truck was in the right lane, partially in the second lane, and that if another witness said the truck was in the second lane, the employee would not say the witness was wrong. On this basis, we conclude trial court reasonably found there was no substantial evidence that defendant's vehicle was in the same lane so as to meet element (1) of the Coppola test.

Likewise, substantial evidence is lacking to show defendant's truck came into plaintiff's lane of travel at a point sufficiently ahead to have permitted plaintiff to avoid a collision, as required by (3)(c) of Coppola. The plaintiff testified that defendant's truck began coming into his lane when the vehicles were two to three car lengths apart and that no rear turn signals were observable. The independent witness testified to seeing the truck turn from lane two across lane one in front of plaintiff's vehicle with no observable turn signals and that plaintiff had no room to avoid the accident. The defendant's truck driver testified to seeing no one in the rear view mirrors at the time he turned onto Ninth Street. One of his co-employees testified to first seeing plaintiff's car within ten to twenty-five feet of the truck, while another co-employee testified to seeing plaintiff's vehicle three-fourths of a block behind the truck.

Defendant claims that under Vanderheiden v. Clearfield Truck Rentals, Inc., 210 N.W.2d 527, 531 (Iowa 1973), where two versions of the facts exist, one of which supports the assured clear distance ahead rule, the issue should be submitted to the jury to be applied only if that version of the facts is accepted. However, in Vanderheiden, unlike this case, the argument was not directed to applicability of the assured clear distance rule, since substantial evidence of the Coppola elements appeared to be present. The issue instead was whether the "sudden and unexpected entry" exception precluded use of the assured clear distance rule.¹ The court determined that the issue of assured clear distance should have been submitted to the jury, together with an instruction that they were to apply the rule only if they accepted plaintiff's version that no "sudden entry" was made. Vanderheiden, 210 N.W.2d at 531.

Further, we find that, while the evidence on the record of speed and skid marks does support trial court's decision to instruct on driving too fast for conditions, evidence of speed alone is not enough for submission of an instruction on the assured clear

¹ The "sudden and unexpected" exception applies "where an established assured clear distance is suddenly and unexpectedly shortened and obstructed by some not reasonably anticipated intrusion by another rapidly approaching or converging vehicle into the driver's path." Nolte, 221 N.W.2d at 745.

distance rule. Reich v. Miller, 260 Iowa 929, 936, 151 N.W.2d 605, 609 (1967). The speed requirement of section 321.285 is that of a "reasonable and proper rate." This was satisfied by the instruction on "driving too fast for conditions."

We therefore conclude defendant has established no reversible error on this issue.

III. Excessive Jury Verdict. Defendant also claims that the jury's award to plaintiff was excessive, requiring a new trial. We note initially that assessment of damages is a jury function. Haumersen v. Ford Motor Co., 257 N.W.2d 7, 16 (Iowa 1977). We will interfere only for the most compelling reasons. Pagitt v. City of Keokuk, 206 N.W.2d 700, 704 (Iowa 1973).

The purpose of allowing damages is to return the injured party to his or her position prior to infliction of the wrong. Dealer's Hobby, Inc. v. Marie Ann Linn Realty Co., 255 N.W.2d 131, 134 (Iowa 1977). Courts must therefore assure a verdict fairly and adequately compensates a plaintiff for the damages suffered, Waddell v. Peet's Feeds, Inc., 266 N.W.2d 29, 32 (Iowa 1978). The question is whether the verdict affects substantial justice between the parties. Kautman v. Mar-Mac Community School District, 255 N.W.2d 146, 148 (Iowa 1977). We will not alter the verdict unless it is 1) flagrantly excessive or inadequate, 2) so out of reason as to shock the conscience, 3) raises a presumption it is the result of passion, prejudice or other ulterior motive, or 4) is lacking in evidentiary support. Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516, 524 (Iowa 1977); Olsen v. Drahos, 229 N.W.2d 741, 742 (Iowa 1975).

The crucial focus in this case, as in most, is the amount and sufficiency of the evidence supporting the award. If the verdict is "within a reasonable range" according to the evidence, the courts should not interfere. Mazur v. Grantham, 255 Iowa 1292, 1303, 125 N.W.2d 807, 814 (1964). This determination is made upon reviewing the facts of each individual case. Waddell, 266 N.W.2d at 32; Householder v. Town of Clayton, 221 N.W.2d 488, 493 (Iowa 1974). Due to the changing value of money, a monetary comparison of jury verdicts is of little value. Olsen, 229 N.W.2d at 743; Frost v. Des Moines Still College of Osteopathy and Surgery, 248 Iowa 294, 309, 79 N.W.2d 306, 315 (1957).

Applying these standards, we conclude the jury did not abuse its discretion. As the evidence at trial discloses, plaintiff suffered lacerations on his face requiring forty stitches and resulting in some permanent scarring. One scar running down his nose was plainly visible. He also experienced the loss of a permanent tooth, blurred vision, on-going headaches, and on-going backaches. He missed a short period of school. Plaintiff's eyes were swollen closed for approximately three weeks; he experienced

throbbing pain in his face and eyes. His monetary losses included the car at approximately \$1,000 and medical expenses of \$660.06.

Beyond plaintiff's actual losses and medical expenses, the verdict represents the jury's evaluation of plaintiff's pain and suffering. These damage elements are incapable of pecuniary measurement by witnesses and must be left to the sound judgment of the fact finder based on the evidence. Holmquist, 261 N.W.2d at 525: Pain and suffering awards are not confined to just physical symptoms but can include mental anguish and the sense of loss and embarrassment incurred from physical disfigurement such as crippling or disablement. Id. at 526. A permanent, plainly visible scar from the eyebrow to the bridge of the nose could be considered such a disfigurement.

Since the verdict was supported by the evidence, no presumption of passion or prejudice arises, as urged by defendant. As noted by the court in Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850, 860-61 (Iowa 1973), "if the verdict [was] the result of passion and prejudice, and intended as punishment, it is likely the jury would have awarded the full amount allowable under the pleadings and instructions." Here \$50,000 was requested but \$17,500 was awarded.

While the trial court in the interest of justice could have granted a new trial if it had found the jury award excessive, it declined to do so. See Lantz v. Cook, 256 Iowa 409, 413, 127 N.W.2d 675, 677 (Iowa 1964). The trial court characterized the jury award as "surprising and generous but not shocking to the conscience or sense of justice" and termed it "a generous verdict, but not flagrantly excessive." We give weight to the fact that trial court, with the benefit of seeing and hearing the witnesses, observing the jury, and having before it all incidents of the trial, did not interfere by granting a new trial. Olsen, 229 N.W.2d at 743. We decline to do so also. We conclude trial court properly denied defendant's motion for a new trial on the basis of the jury verdict.

AFFIRMED.