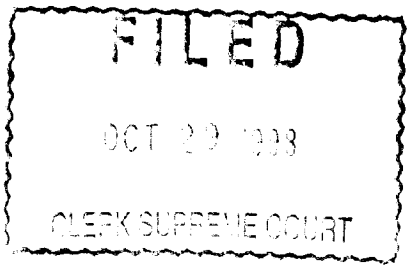
IN THE COURT OF APPEALS OF IOWA

No. 8-320 / 97-0044
Filed October 29, 1998



ROBERTA K. MICHEL,
Appellant,

vs.

SHAWN M. GERBER,
Appellee.

Appeal from the Iowa District Court for Linn County, Thomas M. Horan, Judge.

Roberta Michel appeals from the judgment entered on a jury verdict in her action against Shawn Gerber for damages for personal injuries Michel suffered in an automobile accident. **AFFIRMED AS MODIFIED.**

T. Todd Becker of Tom Riley Law Firm, P.L.C., Cedar Rapids, for appellant.

Chad M. Von Kampen and James R. Snyder of Simmons, Perrine, Albright & Ellwood, Cedar Rapids, for appellee.

Heard by Cady, C.J., and Streit and Vogel, JJ., but decided by Huitink, P.J., and Streit and Vogel, JJ.

STREIT, J.

Roberta Michel appeals the trial court's denial of her motion for a new trial. She alleges error in allowing certain cross-examination, submission of a comparative fault instruction, and inadequate damages. We agree there was insufficient evidence to submit the comparative fault instruction. However, any prejudice caused by the submission has been remedied by eliminating liability as an issue and awarding the plaintiff the jury's full assessment of damages. The plaintiff was not prejudiced by the cross-examination. We affirm as modified.

I. Background Facts & Proceedings.

Roberta Michel and Shawn Gerber were in an automobile collision in August 1993. Michel was driving Robert Ward's car on B Avenue in Cedar Rapids. As she approached the intersection of B Avenue and 13th Street, Gerber pulled into the intersection in front of her. Michel's vehicle struck Gerber's vehicle in the intersection.

Michel filed a petition in February 1995 for personal injuries allegedly sustained in the accident. Gerber answered and raised a comparative fault defense. Prior to trial, Michel filed a motion in limine to prevent Gerber from mentioning Michel's ex-husband was a convicted felon and in prison. The district court sustained the motion.

At trial, Michel testified she sustained $2665.15 in medical bills as a result of the accident. She also made claims for loss of past and future wages, past and future

pain and suffering, and loss of function of the body. On cross-examination, Gerber's counsel questioned Michel about the length of her relationship with her boyfriend, Robert Ward, and whether she was married to another man when the relationship began. Michel's counsel objected, but the trial court overruled the objection.

At the conclusion of the trial, the court formed its jury instructions, one of which was a comparative fault instruction. Michel objected to the court's submission of the comparative fault instruction to the jury.

The jury found Gerber and Michel at fault, fifty-one percent and forty-nine percent respectively. Michel was awarded $2665.15 for past medical expenses and $1500 for past pain and suffering. No damages were awarded for future pain and suffering, past or future lost earnings, or past or future loss of function of the body. The court entered judgment on the verdict, which, after application of comparative fault, was an award to Michel of $2124.23. Michel filed a motion for new trial which was denied.

II. Standard of Review.

Michel contends the trial court erred in not granting her a new trial. She bases her motion for new trial on several claims including the scope of Gerber's cross-examination of her, submission of a comparative fault jury instruction, and the adequacy of the jury's damage award.

We review the denial of a motion for new trial for correction of errors at law. Iowa R. App. P. 4. However, when the motion is based on a discretionary ground, we

review for an abuse of discretion. *Id.* The scope of cross-examination is within the trial court's discretion and will be reversed only if it appears prejudice resulted. *Netteland v. Farm Bureau Life Ins. Co.*, 510 N.W.2d 162, 168 (Iowa App. 1993). Likewise, a ruling on a motion for new trial based on the adequacy of the jury verdict is reviewed for an abuse of discretion. *Smith v. Air Feeds, Inc.* 556 N.W.2d 160, 165 (Iowa App. 1996). We review those issues for abuse of discretion. We review the denial of a new trial based on alleged error in the submission of a jury instruction for correction of errors at law.

III. Inquiry on Cross-Examination.

Michel contends the trial court erred in allowing defense counsel to inquire into when her divorce to her first husband was finalized.

The general rule is scope of cross-examination is limited to matters inquired into on direct examination or matters relating to the witness's credibility, bias, ill will, hostility, or interest in the case. *State v. Thongvanh*, 398 N.W.2d 182, 187 (Iowa App. 1986). It is an abuse of discretion to permit extended cross-examination on remote and collateral matters when no attempt is made to show its relevance to the issues. *Shepherd v. McGinnis*, 131 N.W.2d 475, 481 (Iowa 1964).

Michel objects to the following cross-examination:

Q: The car was owned by Alice Ward; is that correct?
A: Yes.
Q: And Alice Ward is the mother of Robert Ward; is that correct?
A: Yes.
Q: How long has he been your boyfriend?

A: About three years.
Q: Some of the medical bills and records refer to you by Roberta Kirklin; is that correct?
A: Yes.
Q: And when was your divorce finalized?
Mr. Becker: Objection. Irrelevant.
The Court: Overruled.
A: July 12, 1995, but I also had been through a long legal battle over that divorce before it was finalized.

Michel contends defense counsel's intention was to elicit testimony showing marital infidelity. The portion of this cross-examination which clarifies Michel's relationship to Robert Ward was relevant to this case. Ward was named as a witness and his relationship to Michel had a bearing on his credibility. The portion of the cross-examination which inquires into when Michel's divorce was finalized was irrelevant to this case. Defense counsel made no attempt at trial or in his appellate brief to explain the relevance of this information to the issues in the case. The trial court abused its discretion in allowing the cross-examination. However, such an abuse only warrants reversal if prejudice resulted. *Netteland v. Farm Bureau Life Ins. Co.*, 510 N.W.2d 162, 168 (Iowa App. 1993).

Michel argues she was obviously prejudiced by the cross-examination because the damage verdict was low. As discussed below, the damage verdict is supported by sufficient evidence on the record and did substantial justice between the parties. It is unlikely this small portion of cross-examination testimony had any prejudicial effect on the outcome of this case. For this reason, the trial court's allowance of irrelevant cross-examination does not warrant reversal.

IV. Submission of Comparative Fault Instruction.

Michel asserts the trial court erred in submitting instructions regarding comparative fault to the jury because there was not substantial evidence in the record Michel was at fault.

Requested jury instructions are required to be given when they properly state the law and apply to the facts in the case. *Duncan v. City of Cedar Rapids*, 560 N.W.2d 320, 327 (Iowa 1997) (quoting *Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 150 (Iowa 1992)). Even if a jury instruction should not have been given, reversal is not required unless the error is prejudicial. *Gore v. Smith*, 464 N.W.2d 865, 868 (Iowa 1991).

Instruction sixteen instructed the jury to determine whether the plaintiff was traveling at a reasonable and proper speed, whether she had control of her vehicle, and whether she failed to keep proper lookout. We agree with the plaintiff insufficient evidence exists in the record to show fault on the part of the plaintiff. There is no evidence showing she was speeding, lacked control of her vehicle, or failed to properly lookout. The court should not have given the jury the opportunity to speculate as to these matters by giving them a comparative fault instruction.

The defendant stipulated at oral argument that if this court found insufficient evidence to support the comparative fault instruction, liability could be imposed for all the damages found by the jury. Accordingly, the reduction of any plaintiff's damages for fault by the plaintiff is reversed.

000182

V. Adequacy of Damage Award.

Michel contends the jury's damage award was inadequate and failed to do substantial justice.

If a jury verdict is not supported by sufficient evidence and substantial justice was not accomplished by the verdict, a new trial may be granted. *Johnson v. Knoxville Comm. Schools,* 510 N.W.2d 633, 641 (Iowa 1997). It is not controlling that the evidence at trial may justify a higher damage award. *Foggia v. Des Moines Bowl-O-Mat, Inc.*, 543 N.W.2d 889, 891 (Iowa 1996). "The key question is whether after examining the record, giving the jury its right to accept or reject whatever portions of the conflicting evidence it chose, the verdict effects substantial justice between the parties." *Id.*

Michel sought damages for past medical expenses, past and future pain and suffering, past and future loss of function of the body, past lost earnings, and loss of future earning capacity. Michel was awarded $2665.15 for past medical expenses and $1500 for past pain and suffering. No other damages were awarded.

Review of the evidence shows sufficient evidence for the jury's verdict.

It is, as plaintiff has vehemently argued, uncontroverted that Michel's treating physician, Dr. Verdeck, assigned her a two-percent permanent impairment rating. This impairment rating was given nearly a year before trial and Dr. Verdeck also testified it was possible Michel's symptoms would resolve over the next couple months or years. After the accident, in an appointment for a separate medical

concern, Verdeck described Michel's health as excellent. At the time of trial, it had been over a year since Michel had received treatment for the August 1995 injury.

Michel leads an active life, including full-time employment with overtime, since the accident. Her level of activity and income have increased since the accident. The evidence indicated Michel experienced pain in her shoulder after the accident but it did not affect her function. There is no evidence indicating her shoulder will not function normally in the future. Dr. Verdeck testified she had full range of motion of her neck and shoulders and normal motor strength of her upper extremities, and her reflexes were normal. She was given no restriction from any type of physical activity or employment restrictions.

The year before the accident, Michel earned $4344. The year of the accident she earned $12,232. The year after the accident she earned $29,177. Michel worked more after the accident than she did before the accident.

The thrust of Michel's objection is the jury rejected Michel and Verdeck's testimony in coming to a damage award. The jury was in the best position to judge the credibility of the witnesses and to make the judgment call about what the elements of damages were worth. *See Matthess v. State Farm Mut. Auto. Ins. Co.*, 521 N.W.2d 699, 704 (Iowa 1994). "That is exactly what juries are for. [A verdict] should not [be] set aside simply because . . . a different conclusion [could be reached]. Were we to do so, we would be relegating juries to 'unimportant window dressing.'" *Id.* (quoting *Lantz v. Cook*, 256 Iowa 409, 413, 127 N.W.2d 675, 677 (1964)).

Michel argues she is entitled to a new trial on damages because the improper submission of the comparative fault instruction influenced the jury's assessment of damages. This argument is not persuasive. The determination of fault and the assessment of damages are distinct jury functions subject to separate instructions. The jury was told to not allow their fault determinations to affect their findings as to damages. As discussed above, the defendant concedes any error in submitting the comparative fault instruction could be rectified by eliminating liability as an issue in this case. Accordingly, we modify the verdict to eliminate the forty-nine percent assessment of fault to the plaintiff and award her the entire damage award assessed by the jury. *See generally Peters v. Howser*, 419 N.W.2d 392, 396 (Iowa 1988). Michel's judgment is increased to $4165.15.

AFFIRMED AS MODIFIED.