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AUG 25 1981

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

FRANK A. DEMAN and MARGARET
A. DEMAN,

Plaintiffs-Appellees,

vs.

JEFFREY L. MAAG and SEECO, INC.,

Defendants-Appellants.

Filed August 25, 1981

1-148
2-65027

Appeal from Buena Vista District Court - James P. Kelley, Judge.

Defendants appeal from judgment on jury verdict for plaintiffs in negligence action arising from automobile-truck collision. AFFIRMED.

David A. Scott of Cornwall, Avery, Bjornstad & Scott, Spencer, Iowa, for defendants-appellants.

Frank B. Nelson of Greer, Nelson, Bertell, Montgomery & Barry, Spencer, Iowa, for plaintiffs-appellees.

Ted Metier of Spencer, Iowa, for plaintiffs-appellees.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendants appeal from judgment upon jury verdict for plaintiffs in this negligence action arising from an automobile-truck collision. Defendants contend that certain questions were improperly asked and certain evidence was erroneously admitted in disregard of an earlier ruling of the trial court sustaining defendants' motion in limine. Defendants also contend that the amount of the verdict was excessive and that the evidence was insufficient to justify the trial court's instruction permitting the jury to compensate one of the plaintiffs for future pain and disability. We consider these issues separately. Facts of the case essential to proper resolution of these contentions can more appropriately be recited in our discussion of the legal issues presented.

I. We first consider defendants' contention that reversal is required as a result of certain questions asked and certain evidence admitted in disregard of an earlier ruling of the trial court sustaining defendants' motion in limine. The material portion of this motion (filed the morning on which trial commenced) asked the court to direct the plaintiffs' counsel not to interrogate or make other reference relating to the past driving record of defendant Jeffrey Maag, the driver of the truck involved in the collision upon which plaintiffs' claims are based. In addition to the general requests involving defendant Maag's past driving record, the motion specifically sought to exclude evidence of a traffic charge against him growing out of the collision which is the subject of the present action.

In response to this motion the trial court ruled, prior to the commencement of the trial, that the motion would generally be sustained. An exception was made, however, with respect to evidence, if any, of a plea of guilty by defendant Maag to a traffic offense related to the collision upon which plaintiffs' claims are based. It was in this posture that the case proceeded to trial.

During the presentation of defendants' evidence, defendant Jeffrey Maag testified concerning events leading up to a collision between the truck he was driving and the automobile in which plaintiffs were riding. In cross-examination, counsel for plaintiffs asked this witness whether he had testified in his discovery deposition that he had been stopped for speeding earlier on the day of the accident. After the witness answered in the affirmative, plaintiffs' counsel inquired further as to the circumstances under which defendant Maag had been stopped for speeding. This led to an answer that it was the result of aerial reconnaissance. It is clear from the testimony of the witness that the speeding charge to which reference was made was unrelated in time and place to the

collision giving rise to the present action. No objection was lodged at trial to the questions which produced this testimony.

Subsequently, plaintiffs' counsel interrogated defendant Maag as follows:

Q. When this accident happened, did you have a driver's license? A. Yes, sir.

Q. Regular license? A. Yes, sir.

Q. Issued by whom? A. State of Minnesota.

Q. Same one you have now? A. No, sir.

Q. Why is it different?

At this point, defendants' counsel objected based upon the prior ruling of the trial court on the motion in limine. This objection was sustained.

In considering the issue raised, we initially note our agreement with defendants' contention that evidence of the prior traffic offense on the day of the accident and the inquiry as to the status of defendant Maag's driver's license were matters relating to "past driving record" and thus subject to exclusion under the prior ruling of the trial court on the motion in limine. While plaintiffs suggest that this evidence was being used only to impeach defendant Maag, we find on the record presented, any such attempt at impeachment went to purely collateral matters and thus should not have been permitted. See State v. Webb, 244 N.W.2d 332, 333 (Iowa 1976); Wheatley v. Heideman, 251 Iowa 695, 709, 102 N.W.2d 343, 352 (1960).

Having concluded that the ruling on defendants' motion in limine was violated, we must next consider whether a reversal is warranted. On this issue we are not convinced that such relief is in order. Defendants' objection at trial to the question concerning the status of defendant Maag's driver's license was sustained by the trial court. Clearly there was no error in that ruling. No jury admonition was requested by defendants. No objection was lodged to the questions relating to the prior speeding charge on the same day and no motion for mistrial was made by defendants as to any of these matters. We believe this state of the record makes the present case very similar to that which confronted the court in State v. Davis, 240 N.W.2d 662, 663-64 (Iowa 1976). There it was held that if, following a ruling on a motion in limine excluding certain prejudicial evidence, such evidence is nonetheless injected into the record, some further action in the trial court is necessary to preserve a claim of reversible error. Under such circumstances, the party claiming prejudice must request a jury admonition or a mistrial or both in order to preserve an issue for appeal. Defendants' failure to do this in the present case precludes reversal on this claim of error.

II. We next consider defendants' claim that the trial court erred in permitting the jury to consider the elements of future pain and suffering and future disability on the claims of plaintiff Margaret Deman. In support of this contention, defendants assert that the only evidence bearing on this issue consists of: (1) the deposition testimony of plaintiffs' doctor, given in May of 1979, that "she [Margaret Deman] has definitely shown improvement in the last one or two months, and I think it will be a matter of time. I wouldn't be surprised if in five or six months she didn't have any problems;" and (2) the same doctor's trial testimony where, referring to the quoted deposition testimony, he stated: "That was my feeling at that time, but I wouldn't feel the same way today." Defendants claim this testimony taken as a whole does not establish the requisite probability of future pain and suffering or future disability. We disagree.

The medical witness whose testimony has been referred to also testified:

Q. And what have you observed and what has she told you with regard to the pelvic area? A. She still continues to complain of pain and complains primarily when she tries to sit on something flat. It hurts on the left side, right where she sits down. She complained primarily of that when I saw her the last time.

Q. Now, after your initial treatment and examination, Doctor, did you anticipate that this would be the lingering type of thing that it's turned out to be? A. I did not.

Q. But are you satisfied that Mrs. Deman at the present time does have a problem? A. I feel definitely she has a problem.

Q. And is it the kind of problem that you can predict as to when it will end or if it will end? A. I can't predict on it.

In addition, other witnesses testified concerning plaintiff Margaret Deman's discomfort at the time of trial and that she was still unable to perform certain physical tasks as she had done prior to the accident. Where pain and disability are shown to be suffered up to the time of trial and there is evidence plaintiff has not fully recovered, future pain and suffering and future disability may be submitted to the jury. See Mabrier v. A. M. Servicing Corp., 161 N.W.2d 180, 183 (Iowa 1968). The trial court did not commit error in doing so in the present case.

III. Finally, we consider defendants' assertion that the verdict of \$65,024 for plaintiff Margaret Deman was not supported by the evidence. In this regard, the record supports a finding that, as a result of defendants' negligence, she sustained a collapsed lung, fractures of the third, fourth and fifth ribs, and two fissure fractures of the pelvis. She was hospitalized for nine days, was forced to use a walker for three to four months,

was forced to use a cane for a year, and at the time of trial, continued to have pelvic pain and was unable to perform certain physical activities.

In assessing the claim that the damages are excessive, we apply the following standards taken from Olsen v. Drahos, 229 N.W.2d 741, 742 (Iowa 1975):

The assessment of damages is traditionally a jury function. Its decision should be disturbed only for the most compelling reasons. We will reduce or set aside a jury award only if it (1) is flagrantly excessive or inadequate; or (2) is so out of reason as to shock the conscience or sense of justice; or (3) raises a presumption it is a result of passion, prejudice or other ulterior motive; or (4) is lacking in evidentiary support.

Viewing the evidence of the present case most favorably toward plaintiff's claim, we are satisfied that the damages awarded are not excessive. We have considered all issues presented and find no basis for reversal.

AFFIRMED.