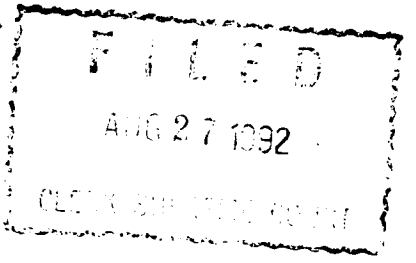
IN THE COURT OF APPEALS OF IOWA



No. 2-238 / 91-1416

DENNIS R. RUZICKA; KARAN L. RUZICKA; and COREY LEE RUZICKA, By his Father and Next Friend DENNIS R. RUZICKA,

Appellants,

vs.

DONALD J. BIEDENBACH and RICHARD LEIDIGH,

Appellees.

Appeal from the Iowa District Court for Linn County, William R. Eads, Judge.

Plaintiffs appeal, following a jury verdict which awarded damages for injuries sustained in a boating accident. **AFFIRMED.**

David Baker and David L. Baker of Riccolo & Baker, P.C., Cedar Rapids, for appellants.

Minor Barnes and Terry J. Abernathy of Pickens, Barnes & Abernathy, Cedar Rapids, for appellee Biedenbach.

J. Michael Weston and Paul D. Gamez of Moyer & Bergman, Cedar Rapids, for appellee Leidigh.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

OXBERGER, C.J.

On June 27, 1987, Corey Ruzicka, age thirteen, was riding on an inner tube being towed behind a boat operated by Donald J. Biedenbach on Lake Delhi in Delaware County, Iowa. He was struck by a boat owned by Richard Leidigh and driven by Chad Leidigh, age ten. Chad was attempting to retrieve a fallen water skier. Chad noticed the Biedenbach boat across the river but believed it would not interfere with the turn of his boat. The inner tube upon which Corey Ruzicka was being towed was obscured from Chad's vision by the profile of the Biedenbach boat. As the Biedenbach boat completed its turn, the tube swung from behind it. Chad continued making his left turn. Corey was pulled into the path of the Leidigh boat. Corey either fell or jumped from the inner tube and was struck across the lower back and buttocks by the Leidigh propeller.

Corey was immediately taken to the hospital and ultimately underwent two surgeries to repair a laceration or shredding of the sciatic nerve. As a result of the accident, Corey's sciatic nerve was injured and he has lost the function of those muscles in his leg that pull the foot up. His condition, commonly known as "drop foot," is permanent. He will always require a brace or high-top shoes to hold his foot up so he can walk.

Corey and his parents instituted this suit against Biedenbach and Richard Leidigh. Biedenbach filed a

cross claim against Leidigh. Defendants brought Brunswick Corporation into this action because it had manufactured the outboard motor on the Leidigh boat. Plaintiffs amended their petition to name Brunswick as a defendant.

After the jury was selected, the plaintiffs settled with Brunswick. The parties agreed Brunswick would not be allocated fault in the verdict forms. The jury determined Corey's damages to be $82,000 and found him ten percent at fault. It made no awards for future pain and suffering or past loss of function of the body. Corey's parents were awarded $25,669.92 for past medical expenses. The jury found Biedenbach to be ninety percent at fault and found Leidigh's negligence was not a proximate cause of damages.

The plaintiffs sought a new trial. They challenge, inter alia, the submission of a general negligence instruction to the jury. The court agreed it erred in failing to give to instruct the jury to compare Corey's negligence to a reasonable child of like capacity. The court granted Biedenbach fifteen days to agree to vacate Corey's ten percent fault. Biedenbach agreed. The district court entered judgment finding Biedenbach 100% at fault unless there was an appeal in which case the judgment would revert back to the original jury verdict. Plaintiffs appealed.

Scope of Review

Our review is upon assigned error. Iowa R. App. P. 4.

I. Motion for New Trial

The Ruzickas' contend the trial court erred in failing to grant a new trial. They claim damages were inadequate and the jury's verdict appeared to be based on passion and prejudice.

In ruling upon motions for new trial, the trial court has broad but but not unlimited discretion in determining whether the verdict effectuates substantial justice. Iowa R. App. P. 14(f)(3). Our task is to determine whether the trial court abused its discretion in not granting a new trial in light of the award made, not whether a higher verdict would have been justified by the evidence. Yoch v. City of Cedar Rapids, 353 N.W.2d 95, 99 (Iowa App. 1984). Ordinarily the jury should be allowed to settle factual disputes and the verdict should not be set aside merely because the reviewing court would have reached a different conclusion. Id. Precedents in this area are of little value; each case must be viewed independently according to certain well-established principles. Kaiser v. Stathas, 263 N.W.2d 522, 523 (Iowa 1978).

We will 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. Olsen v. Drahos, 229 N.W.2d 741, 742 (Iowa 1975). The most important of the above numerated tests is support in the evidence. Yoch, 353 N.W.2d at 98. When the verdict is within a reasonable range as shown by the evidence, we will not interfere with what is primarily a jury question. Id. We view the evidence in a light most favorable to the verdict and give weight to the trial court's refusal to interfere after hearing and seeing the witnesses. Id. at 98, 99.

Ruzickas' urge us to adopt the result reached by the supreme court in Witte v. Vogt, 443 N.W.2d 715 (Iowa 1989). In Witte, the court found uncontroverted facts showing the amount of the verdict had no relationship to the loss suffered. Id. at 716. However, in that case, the party was awarded approximately $800.00 more than his medical expenses and lost wages, even though he was seriously injured and would likely require additional surgery. Id.

We do not find that the case here. Corey's parents received $25,669.22 for past medical expenses and $2000.00 for loss of companionship. Corey's physician testified he would not likely require additional medical treatment or surgery. Corey may require additional leg braces and was awarded $5000.00 in future medical expenses. Corey received $75,000.00 for his permanent disability and

$2000.00 for past pain and suffering. While Ruzickas' contend there is no basis for the jury's failure to award damages for loss of body function or future pain and suffering, we disagree. There was substantial evidence in the record which indicated Corey was active and able to participate in a variety of activities. He works, is able to ride his bicycle at least 30 miles on a given day, and participates in other sports. His physician has not placed any restrictions on his activities and he is not on any medications. He no longer requires a brace when he is wearing high top shoes and complains only of minimal discomfort. In light of the evidence, we find the jury's verdict bears an adequate relationship to the loss suffered and was not based on passion or prejudice.

II. Jury Instruction

Ruzickas also contend the trial court's error in instructing the jury on general negligence when a child was involved is reversible error. We disagree. The trial court cured its error when it allowed the defendants to agree to assume the ten percent fault allocated to Corey. The impact of the error was thus eliminated and we find no need to interfere further.

Ruzickas further contend the court erred in refusing to instruct the jury on scarring and disfigurement as a proper element of damages and over instructed the jury to not be influenced by sympathy. We reverse the trial court only

when the instructions considered as a whole mislead the jury. Moser v. Stallings, 387 N.W.2d 599, 603-605 (Iowa 1986). We have reviewed the jury instructions in their entirety and find the jury was sufficiently instructed on all issues.

III. Jury Strikes

Ruzickas next contend the court erred in allowing each defendant four jury strikes while permitting Corey and his parents a total of four strikes. Iowa Rule of Civil Procedure 187(g) allows the court discretion when authorizing strikes to be exercised when two or more parties are represented by different counsel. The supreme court recently examined the effect of error in granting excessive peremptory challenges to defendants. Nichols v.Schweitzer, 472 N.W.2d 266, 273 (Iowa 1991). Relying on Wilson v. Ceretti, 210 N.W.2d 643, 646 (Iowa 1973), the court held the offended party is entitled to relief only upon a showing of actual prejudice or a clear and convincing probability of resultant prejudice. Id.

We find no probability of prejudice. Ruzickas' were represented by one attorney and shared the same interest. Defendants were represented by separate counsel and had cross-claims against each other. In addition, sufficient evidence supported the jury's damage awards such that prejudice was not likely. We find no abuse of discretion.

AFFIRMED.

Donielson, J., concurs; Sackett, J., specially concurs without opinnion.