

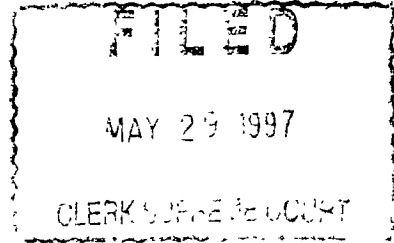
IN THE COURT OF APPEALS OF IOWA

No. 6-441 / 95-0896

000211

DAVID KELLER,
Plaintiff-Appellant,

and
CRYSTAL KNIGHT and
JOHN THORTON, JR.,
Plaintiffs,



vs.

UDOM KANYAVIMONH and
SAIYAVONG KANYAVIMONH,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble,
Judge.

David Keller appeals from the judgment entered in his lawsuit against the
defendants Oudom and Saiyavong Kanyavimonh alleging injuries he suffered as a
result of Oudom's negligent driving of Saiyavong's car. **AFFIRMED.**

Michael L. Jankins of Murray, Jankins & Noble, Des Moines, for appellant.

Mark D. Sherinian and Clark G. McDermott of Hanson, Bjork & Russell,
L.L.P., Des Moines, for appellees.

Considered by Huitink, P.J., and Streit and Vogel, JJ.

HUITINK, P. J.

Plaintiff David L. Keller appeals from an adverse judgment in his lawsuit against the defendants, Oudom Kanyavimonh and Saiyavong Kanyavimonh. We affirm.

I. Background Facts and Proceedings.

The record describes the following events: On November 28, 1991, Keller's vehicle was involved in an automobile accident in Des Moines with a vehicle owned by Saiyavong Kanyavimonh. Oudom was driving the car with Saiyavong's consent.

Keller sustained injuries to his left knee, neck, back, and shoulder. Following the accident, he sought treatment from Dr. Patrick Sullivan who diagnosed a mild bruising of the knee. He later received a second opinion from Dr. Rodney Johnson who performed surgery on Keller's knee in September 1992.

Dr. Johnson advised Keller to lose excess weight that was aggravating his condition. No specific weight-loss program was prescribed. Keller testified he changed his diet and joined a health club but was unsuccessful in his efforts to lose weight. He also testified that he weighed more at the time of trial than he did at the time of the accident.

In November 1993, Keller filed a petition against the Kanyavimonhs asserting negligence. The Kanyavimonhs raised the affirmative defense of failure to mitigate damages in their answer.

In February 1995, Keller filed a motion in limine to prohibit any reference to a previous lawsuit filed by him in connection with a 1985 automobile accident. The medical records admitted at trial indicate that Keller was rear ended in an automobile accident in 1985 and was treated for sore knees, a stiff neck, and back and shoulder problems. The trial court overruled the motion and later overruled Keller's objection to questioning by the defense on this issue as well as the admission of interrogatory answers by Keller concerning the previous litigation.

The jury returned a verdict in Keller's favor finding the Kanyavimonhs sixty percent at fault for Keller's damages and attributing forty percent of the fault to Keller with fifteen percent allocated for his failure to maintain a proper lookout and twenty-five percent for his failure to mitigate his damages. Keller was awarded \$2832.28 in damages which did not include the expenses incurred from his knee surgery in September 1992.

Keller filed a motion for judgment notwithstanding the verdict and a motion for new trial in March 1995. In April 1995 the trial court overruled the motions.

Keller appeals asserting the trial court improperly submitted two jury instructions on the Kanyavimonhs' affirmative defense of failure to mitigate damages. Keller also appeals the court's ruling on its his motion for directed verdict. Finally, Keller argues the court erred in overruling his motion in limine concerning the evidence of his prior lawsuit.

II. Jury Instructions.

Keller asserts the trial court erred in submitting instruction no. 23¹ and 24² which instructed the jury on the Kanyavimonhs' affirmative defense of mitigation of damages. He also objects to the verdict form which refers to the issue of mitigation of damages as a percentage of fault.

Keller argues the record lacks evidentiary support for the instructions. While he concedes his physician advised him to lose weight, he contends his physician did not recommend any specific method for weight loss nor did he indicate that weight

¹ Instruction No. 23:

Defendants claim Plaintiff David Keller failed to exercise ordinary care to follow reasonable medical treatment and is, therefore, at fault by unreasonable failure to mitigate damages.

If you find weight loss would mitigate or reduce David Keller's damages, you may assess as fault any unreasonable attempt to lose weight pursuant to medical advice. A plaintiff is not required to actually lose weight in order to mitigate damages. However, he must make a reasonable attempt to do so if so advised by a doctor.

A plaintiff has no duty to undergo serious or speculative medical treatment, but, if by reasonable expense and by reasonable inconvenience a person in the exercise of ordinary care could have reduced his damages by weight loss, David Keller had a duty to reasonably attempt to do so.

Defendants must prove (a) David Keller's doctor advised him to lose weight; (b) requiring David Keller to lose weight was reasonable under the circumstances; (c) weight loss would have mitigated his damages; and (d) David Keller unreasonably failed to attempt to lose weight.

If you find Plaintiff David Keller unreasonably failed to mitigate his damages, you will include this fault in the total fault when answering the special verdicts.

² Instruction No. 24:

Concerning the claim of Plaintiff David Keller, the Defendants allege Plaintiff David Keller was at fault in one or more of the following particulars:

...

(b) Plaintiff David Keller unreasonably failed to mitigate damages.

loss would reduce his pain or improve his condition. Keller further submits the evidence demonstrates he made a reasonable attempt to lose weight by changing his diet and exercising at a health club. He contends the fact that he was unsuccessful in losing the weight is insufficient to justify the submission of the instructions at issue.

When the question is whether the trial court erred in giving a requested instruction, our review is limited to the correction of legal errors. *See Sanders v. Ghrist*, 421 N.W.2d 520, 521 (Iowa 1988).

Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. *State v. Freeman*, 267 N.W.2d 69, 71 (Iowa 1978). Submission of issues that have no support in the evidence to the jury is error. *W. T. Rawleigh Medical Co. v. Bane*, 181 Iowa 734, 739, 165 N.W. 42, 43-44 (1917); *accord Borough v. Minneapolis & St. L. R. Co.*, 191 Iowa 1216, 1223, 184 N.W. 320, 323 (1921); *see Miller v. International Harvester Co.*, 246 N.W.2d 298, 301 (Iowa 1976). The sufficiency of the evidence to warrant submission of a pleaded issue to the jury is decided by giving the evidence the most favorable construction it will reasonably bear in favor of the party urging submission. *Collegiate Mfg. Co. v. McDowell's Agency, Inc.*, 200 N.W.2d 854, 858 (Iowa 1972); *Campbell v. Martin*, 257 Iowa 1247, 1251, 136 N.W.2d 508, 511 (1965).

The Supreme Court has held that the “unreasonable failure to attempt to lose weight pursuant to medical advice can be assessed as fault if weight loss will mitigate

damages.” *Tanberg v. Ackerman Investment Co.*, 473 N.W.2d 193, 196 (Iowa 1991).

A plaintiff is not required to lose weight in order to mitigate damages, but rather must make a reasonable attempt to do so. *Id.* Before a mitigation instruction on weight loss may be given, “the defendant has the burden of showing substantial evidence that plaintiff’s weight loss would have mitigated his damages and that requiring plaintiff to lose weight was reasonable under the circumstances.” *Id.*

Upon careful review of the trial court record, we conclude the defendants have met their burden to show substantial evidence that weight loss would have mitigated Keller’s damages and that requiring him to do so was reasonable under the circumstances. Testimony at trial by Dr. Johnson and by Keller’s chiropractor indicated Keller’s excess weight aggravated both his knee and back conditions. Keller admitted Dr. Johnson had advised him his weight placed stress on the knee joint. We also note no evidence was presented indicating any medical reason explaining why Keller was not capable of losing the weight. The evidence is sufficient to support a causal relationship between the excess weight and the aggravation of his injuries.

We reject Keller’s arguments asserting there was insufficient evidence that his doctors advised him how to lose the weight. Keller testified about his attempts to reduce his fat and sugar intake and also to start an exercise program. Under the circumstances, we find that a prescribed weight-loss plan was not necessary. *See*

McDonnell v. Chally, 529 N.W.2d 611, 614 (Iowa App. 1994) (court held that where doctors were aware plaintiff had been successful at weight loss in the past, it was unnecessary that medical advice include specific directions as to how to lose additional weight).

Finally, we conclude that, like the plaintiff in *Tanberg*, the evidence suggests Keller was not as faithful to his weight-loss plan as he should have been. *See Tanberg*, 473 N.W.2d at 196. His testimony indicated he was not consistent in his health club attendance and he stopped exercising for long periods of time. He also testified that he has experienced weight gain since the accident. The jury could have inferred from the evidence that Keller did not make a reasonable effort to lose weight. Accordingly, we find the trial court correctly instructed the jury on the issue of mitigation of damages.

III. Motion for Directed Verdict.

Keller challenges the denial of his motion for directed verdict on the issue of failure to mitigate damages. He asserts the Kanyavimonhs failed to satisfy their burden to establish that he did not make a reasonable attempt to lose weight pursuant to medical advice.

Appellate review of the denial of a motion for directed verdict is for correction of errors of law and is limited to the grounds raised in the motion. *Hill v. Winnebago Industries, Inc.*, 522 N.W.2d 326, 328 (Iowa App. 1994); Iowa R. App. P. 4.

We have already determined the evidence supported the submission of an instruction to the jury on mitigation of damages. Accordingly, we reject Keller's arguments that the Kanyavimonhs failed to present substantial evidence on this issue.

IV. Admission of Prior Lawsuit.

Keller argues the trial court erred when it denied his motion in limine seeking to exclude any reference to a previous lawsuit brought by him in 1985. He asserts the 1985 lawsuit contained no admissions of permanent injury related to his claims in this case. Keller contends the Kanyavimonhs' only purpose in introducing the pleadings from the 1985 suit and the answers to interrogatories was to portray him as litigious.

As a general rule, decisions concerning relevance and materiality are discretionary. *Sanford v. Meadow Gold Dairies, Inc.*, 534 N.W.2d 410, 412 (Iowa 1995). We reverse only upon a showing that such discretion has been abused to the prejudice of the complaining party. *Id.* Evidence is relevant if it renders the existence of a fact more probable or less probable than without it. *Garren v. First Realty L.T.D.*, 482 N.W.2d 335, 339 (Iowa 1992). Even otherwise relevant evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice. Iowa R. Evid. 403; *Sunrise Developing Co. v. Iowa Dep't of Transportation*, 511 N.W.2d 641, 644 (Iowa App. 1993).

The disputed evidence suggests Keller may have suffered permanent injuries in a prior automobile accident similar to those claimed in this case. Accordingly, the

trial court correctly determined the evidence was relevant. The record indicates the sole purpose for introducing the pleadings and the interrogatories was to demonstrate the relationship between the 1985 injuries and the present injuries claimed by Keller. We do not agree that the evidence unduly suggests Keller is a litigious party and find no resulting prejudice. *See* Iowa R. Evid. 103(a) (“error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, . . .”). We affirm on this issue.

AFFIRMED.