IN THE COURT OF APPEALS OF IOWA

No. 1-308 / 10-1679
Filed May 25, 2011

RUTH CARTER, Individually and as Parent and Next Friend of BRANDON CARTER, A Minor,
Plaintiff-Appellant,

vs.

DAVENPORT COMMUNITY SCHOOL DISTRICT,
Defendant-Appellee.

Appeal from the Iowa District Court for Scott County, Mark J. Smith, Judge.

Ruth Carter appeals from a jury verdict in favor of the Davenport Community School District on the negligence claim she brought for herself and on behalf of her son. **AFFIRMED.**

Michael K. Bush of Bush, Motto, Creen, Koury & Halligan, P.L.C., Davenport, for appellant.

Rand S. Wonio and Ian J. Russell of Lane & Waterman, L.L.P., Davenport, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

POTTERFIELD, J.

Ruth Carter appeals from a jury verdict in favor of the Davenport Community School District on her negligence claim she brought for herself and on behalf of her son. Because the district court did not err in instructing the jury or in denying the motion for new trial, we affirm.

I. Background Facts and Proceedings.

Brandon Carter has been diagnosed with Foix-Cavany-Marie syndrome, a degenerative disease of his central nervous system. Brandon is described by his physician, Daniel J. Bonthius, as a teenager "who has a neurologic disturbance that has been slowly progressive and that causes him to be quite ataxic [poorly coordinated] and dysarthric [great deal of difficulty articulating words with his mouth]."

On July 13, 2006, while attending summer school, fifteen-year-old Brandon was using his gait trainer (a specialized walker), failed to negotiate a curb, and fell. As a result of that fall, Brandon had "several extraoral and intraoral lacerations," lost four permanent teeth (one at the accident site and three in surgery), lost one baby tooth, fractured his maxillary anterior alveolar bone (the area above the front teeth), and underwent oral surgery.

Ruth Carter (hereinafter "Carter"), individually and as next friend of Brandon, filed this suit against the Davenport Community School District (District) alleging Brandon was severely injured while walking outdoors in the company of his teacher, Sarah McGlynn, an employee of the District. Carter claimed McGlynn failed to properly supervise Brandon.

At trial, Brandon's private duty nurse, Diane Skiles, testified that she was at school with Brandon on July 13, 2006. Brandon and Skiles had not had a restful night because Carter was in the hospital. Skiles stated McGlynn insisted on walking outside with Brandon on July 13, though Skiles objected, saying it was too hot. Skiles stated she was walking back into the school when she turned to see Brandon face-down on the ground some twenty to thirty feet away, and McGlynn standing some five to six feet away from Brandon. Skiles testified Brandon was "not what I call independent in [his gait trainer]." She explained, "I hang onto him as well as the trainer itself." She testified that Brandon was not able to lift the front wheels of the gait trainer because he had no balance.

Plaintiff's expert, Lynda Mayster, the director of hospital and evening school for the office of special education and support for the Chicago public schools, testified over the District's objection that "when a child is a really seriously compromised child, the district is absolutely responsible for the child's safety." She testified Brandon's Individualized Education Plan (IEP) stated Brandon required adult supervision at all times, was independent in his gait trainer outside for up to 100 yards, and required standby assistance. She also stated Brandon "needed assistance in being supervised to walk appropriately in his gait trainer." Mayster testified that "whomever was supervising Brandon at the time, that you have to hang onto him because he has the ability to just go. . . . Not really anticipating what the terrain was going to be like."

Mayster stated she had reviewed Brandon's records and summarized the different versions offered by McGlynn and Skiles as to how Brandon fell:

> According to Ms. McGlynn, when they walked out in front of the school and they walked across the sidewalk, Brandon had to negotiate—there was a curb there. Brandon did not negotiate this curb, Ms. McGlynn did not lift his walker over this curb, he—his wheel, I assume, got caught in the curb. I'm not quite sure how it happened, but he did fall forward. The gait trainer was in a reverse position, meaning all of the equipment and the bars behind him. He did fall forward and trip over this curb. And according to Ms. Skiles, she thought that they were following her back into the building. And when she didn't really hear them following her back into the building, she turned around and saw Brandon on the ground and she saw Ms. McGlynn standing over him.

Mayster opined McGlynn did not appropriately supervise Brandon on July 13, 2006. The basis for her opinion was that McGlynn

> shouldn't have taken him out and she should not have taken him on a surface that he was not familiar with. The terrain was such that if Brandon walked to the curb and tried to lift his walker over it, he couldn't do it. Ms. Keller, his teacher, says you have to lift the front wheels. One of his aides said you have to lift the front wheels, walk two steps and lift the back wheels over a curb. This wasn't done. So there was every opportunity for him to trip and fall and get injured because the supervision was not adequate.

On cross-examination, Mayster acknowledged that the September 2005 IEP noted Brandon "requires minimal assist in transfers, standby assist in Rifton gait trainer, verbal and touch cuing to maintain him on task and for safety." Standby assist was understood to mean "somebody would be standing by, like spotting him, making sure that everything was okay. Q. Someone would be alert, available, nearby, in close proximity to the gait trainer, correct? A. Correct."

Kirk Koster testified he was a paraeducator who had worked with Brandon in the past. He testified he had taken Brandon outside on a number of occasions, but always held onto the gait trainer and did not take Brandon on curbs.

Melissa Tolle testified she was physical therapist with the Area Education Agency (AEA) and had worked with Brandon. She stated standby assist is "one arm's length distance." She testified as to the meaning of Brandon's IEP, which stated "Brandon requires the close physical proximity of his para[educator] when he is moving about in the gait trainer." She explained that the paraeducator needed to be within "arm's distance" "so that you're there to grab it if he gets off task and you're able to help him get back on task."

Bea Flahive was also a physical therapist with the AEA and had worked with Brandon from 1996 to 2005. She characterized Brandon's ability to use the gait trainer "[w]ith stand-by assistance only for safety reasons, you know, for the people surrounding him." She testified that there was no concern that Brandon was at risk of falling in the gait trainer "[b]ecause he was stable. He was independent. He had good ambulation ability, good steppage." Flahive was the person who configured Brandon's use of the gait trainer in the reverse position

> [b]ecause he had the ability to transfer in and out of the gait trainer. He had enough standing endurance to ambulate that way. He had enough postural control to be more upright, because when you're in reverse, you have an improved posture ability to increase strength. It actually provided him better access to more independence, to tables, sinks, drinking fountains, and the doorways.

Flahive stated that Brandon was capable of negotiating a curb. When asked to describe that process, she stated, "Well, physically I would have to put the front wheels up the curb. He would then take two steps. And then I would assist the back wheels up the curb."

Nancy Keller was Brandon's teacher for five years and described him has having severe mental and physical disabilities. She testified he used the gait

trainer in reverse configuration and needed to be supervised at all times while using it.

McGlynn testified she taught resource special education classes in the District from 2005 through 2008. During the summer of 2006, beginning July 10, McGlynn worked the Extended School Year program for the District. McGlynn stated she taught Brandon daily for two-hour sessions working on various goals set out in his IEP. McGlynn read Brandon's IEP before she started to work with him, which included the notation that Brandon was independent in his gait trainer throughout the building and outside up to 100 yards with standby assistance. McGlynn stated that during her schooling, she had worked closely with a physical therapist who dealt with persons with spinal cord injuries and there learned how to work with someone in a gait trainer.

McGlynn stated she accompanied Brandon on a walk in the school building on July 10 and saw him negotiate around obstacles left in the hallway "[s]everal times." She again walked with Brandon on July 11, this time outside. Both days, Skiles was present throughout the day, assisted Brandon, and accompanied them on the walks. McGlynn again walked outside with Brandon on July 12.

On July 13, McGlynn stated Brandon and she again went for a walk, but Skiles sat on a bench because she was tired from the night before. They walked a different route that day to allow Brandon to see cars. She testified:

> Well, again, some of the skills that he was working on in his IEP were functionally related, so learning how to cross the street or learning to look left or right to ensure your safety. And it's summertime, so nobody is really coming in and out of there. At the same time we stopped, we looked to make sure nobody was

coming and walked across the sidewalk and up onto the curb that was right there.

Q. Now this curb—you know, when I think of the normal curb alongside the roadway, is this curb— A. Sloped.

Q. —more sloping than a normal curb? A. Yes.

Q. So tell the jury what happened. You're approaching the curb, and tell us about the accident. A. Okay. We're approaching the curb, and I am walking in front of him, sort of walking backwards, facing him, and he gets to the curb, has picked up the walker, gait trainer, has picked up the walker, and I thought had picked it up all of the way, and hadn't. And I think, you know, in an instant we had both fallen. I tried to catch him. He's as big, if not, I'm sure at this point, much bigger than me. And I was there to try to break his fall and did the best that I could to, you know, help him, catch him, so.

. . . .

Q. What was the weather like that day? A. I remember it being sunny and a nice day.

Q. Did you think it was especially hot? A. No.

Q. We've had Nurse Skiles testify that it was 95 degrees that day. Would you agree with that? A. No. I wouldn't have gone out if it was 95 degrees. [The District offers an exhibit showing the temperature was 82 degrees at time of the fall.]

. . . .

Q. Thank you. Sarah, when you went toward that curb with Brandon, why did you walk with him in that direction and have him go over the curb? A. Again, I walked as kind of an incentive, thinking that he would like to see the cars. I was pretty confident that that would've never, never been a problem. If I didn't think that he could negotiate the curb, I would've never taken him. It would've just not made sense. So I thought it would be a very easy walk we could do and turn around and come right back and lighten the mood a little bit.

. . . .

Q. Did you feel that you were capable of doing these things with Brandon during the school day? A. Absolutely.

Q. Why did you feel that you were capable? A. Again, I had the experience. I saw how well he was able to use it. I felt that I came into the situation with a background in working with people who had ambulatory issues or concerns. And like I said, if I didn't feel comfortable with that whole little walk, then I would've never taken him.

Q. And if in the IEP there were instructions to hold onto the walker— A. Then I would have held on. And when we walked before, no one ever held onto the walker.

When proposed jury instructions were submitted, counsel for Carter objected to Instruction 13—"The mere fact an accident occurred or a party was injured does not mean a party was negligent." Counsel for Carter argued:

> While I recognize this is almost always an applicable generalized instruction, I think this is one of the rare cases where it is not applicable, primarily because of the condition of Brandon Carter being incapable of protecting himself and incapable of exercising reasonable care, and as a result relied upon his supervising teacher to provide that reasonable care for him. Further, there was no evidence in this record that there was any type of independent force or person that would have contributed to this fall and injury in the way of an act of God, windstorm, a rainstorm, or a third party where they came around the corner suddenly and that would basically exculpate the party supervising Brandon, so I don't believe that Instruction 13 in this particular fact scenario is a—is an accurate statement of the law.

The District responded that the instruction had been approved by the supreme court, was a stock instruction, and there was no indication anyone had acted intentionally. The district court ruled:

> I think the standard is reasonable care. Under the circumstances, if the jury were to believe Ms. McGlynn, the jury could find that she was within distance to do what an ordinary person in those circumstances would have done, and that's within reaching distance of the plaintiff. And also if the jury believes she tried to place herself between the plaintiff and the ground, it's up to the jury as to whether or not reasonable care was exercised in those circumstances, so the Court will continue to use the instruction.

The jury was instructed in Instruction 14 that Carter must prove the District, through its employee, Sarah McGlynn, was at fault in "one or more of the following particulars," that the District's fault was the factual cause of plaintiffs' damages, and the amount of damages.

The jury answered "No" to the question "Was the Davenport Community School District at fault?" The district court entered judgment for the defendants.

Carter filed a motion for a new trial claiming the verdict was not sustained by sufficient evidence, and that the giving of Instruction 13 was in error. *See* Iowa R. Civ. P. 1.1004(6), (8). The motion was denied and this appeal followed.

On appeal, Carter argues Brandon's fall was foreseeable and easily preventable, and the jury was required to find the defendant negligent because Brandon fell. Carter also contends the district court abused its discretion in reading Instruction 13.

II. Standard of Review.

Iowa Rule of Civil Procedure 1.1004(6) authorizes the trial court to grant a new trial when the verdict "is not sustained by sufficient evidence." "Because the sufficiency of the evidence presents a legal question, we review the trial court's ruling on this ground for the correction of errors of law." *Estate of Hagedorn ex rel. Hagedorn v. Peterson*, 690 N.W.2d 84, 87 (Iowa 2004).

We review alleged errors in jury instructions for correction of errors at law. *Deboom v. Raining Rose, Inc*., 772 N.W.2d 1, 5 (2009).

III. Discussion.

A. Sufficiency of the evidence. Carter contends the undisputed facts do not support a verdict for the defendant. In essence, Carter asserts Brandon could only have been injured if McGlynn was negligent. We disagree that the conclusion is required.

Reading the instructions together, the jurors were instructed the plaintiff had to prove the District was "at fault," which "means one or more acts or omissions towards the person of . . . another which constitutes negligence." Negligence was further defined as "failure to use ordinary care." The plaintiff

asserted the District was at fault in the following particulars: "Failure to have a trained para-professional to supervise Plaintiff Brandon Carter in his gait trainer"; "Failure to use the gait trainer in the forward configuration"; "Failure to maintain physical contact and to appropriately spot Brandon while he is in the gait trainer"; "Failure to lift the front wheels of the gait trainer over the curb"; and "Failure to assess and assist Brandon Carter's safety by allowing Brandon to navigate a curb rather than using a handicap accessible ramp." However, there was evidence from which a reasonable fact finder could determine there was no failure to use ordinary care. McGlynn testified she was trained to assist persons in a gait trainer. More than one witness testified the use of the gait trainer in the forward configuration was not required and that its use in the reverse configuration provided the user more accessibility and better posture. Brandon's IEP called for adult supervision and standby assistance, which meant within arm's distance. Nothing in the IEP required constant physical contact with the gait trainer. The IEP stated Brandon was independent in his gait trainer and McGlynn stated she had observed Brandon negotiate obstacles prior to July 13, 2006.

Although there was conflicting testimony about McGlynn's obligations and the cause of Brandon's fall, the jury is ordinarily allowed to settle disputed fact questions. *Cowan v. Flannery*, 461 N.W.2d 155, 157 (Iowa 1990). Generally, questions of negligence are for the jury and it is only in exceptional cases that they may be decided as a matter of law. Iowa R. App. P. 6.904(3)(*j*). We do not believe this is such an exceptional case. Fact questions were generated requiring this case to be submitted to the jury. *See City of Cedar Falls v. Cedar*

Falls Cmty. Sch. Dist., 617 N.W.2d 11, 16 (Iowa 2000) (finding it was a question for the jury whether one with responsibility of supervising children used ordinary care). The verdict is the jury's finding that Carter failed to carry her burden of proof. "'It is not for us to invade the province of the jury.'" *Kautman v. Mar-Mac Cmty. Sch. Dist.*, 255 N.W.2d 146, 147 (Iowa 1977) (citation omitted). Even if we were to assume that the evidence might support a finding that the District was negligent, we cannot say, in view of the conflicting testimony, that the burden was so strong, so overwhelming, as to compel a finding of negligence as a matter of law. *See Meirick ex rel. Meirick v. Weinmeister*, 461 N.W.2d 348, 350 (Iowa Ct. App. 1990). The district court thus did not err in denying Carter's motion for a new trial.

B. The court did not err in giving Instruction 13. "Under Iowa law, a court is required to give a requested instruction when it states a correct rule of law having application to the facts of the case and when the concept is not otherwise embodied in other instructions." *Herbst v. State*, 616 N.W.2d 582, 585 (Iowa 2000).

"Negligence is fault, and it is the plaintiff's burden to prove fault by a preponderance of the evidence. It is not to be assumed from the mere fact of an accident and an injury." *Easton v. Howard*, 751 N.W.2d 1, 5 (Iowa 2008) (citations omitted). Instruction 13 restates the principles enunciated in *Easton*: "The mere fact an accident occurred or a party was injured does not mean a party was negligent." The instruction is thus a correct statement of the law. *See id.*

The instruction was discussed in *Smith v. Koslow*, 757 N.W.2d 677, 680 (Iowa 2008), where our supreme court stated,

> It is a fundamental tenet of tort law that the fact that a plaintiff has suffered an injury, without more, does not mean the defendant was negligent. Instead, to recover for an injury, our law requires an injured person to establish the existence of a duty of care, breach of the duty of care, and that the breach was the cause of the injuries suffered.
>
> . . . [T]he uniform jury instructions authored by the special committee on uniform court instruction of the Iowa Bar Association includes an instruction for general negligence cases that incorporates this general proposition. It provides that the "mere fact of an accident or injury does not mean a party was negligent." *See* Iowa Uniform Jury Instruction 700.8.

The court went on to state the instruction "reflects a correct statement of the law." *Smith*, 757 N.W.2d at 681. However, the court cautioned "the instruction could constitute reversible error in a particular case if it would unduly emphasize a particular theory or otherwise distract the jury in performing its responsibilities to decide the issues in the case." *Id.*

Carter complains this is "a classic case" where the instruction "unduly emphasiz[es] a particular theory or otherwise distract[s] the jury." However, beyond quoting Justice Hecht's dissent in *Smith*, *see id.* at 683–84, Carter offers no analysis why such is the case. To the contrary, the facts here reveal that this injury could have occurred in the absence of any of the specifications of negligence, a situation which makes the "mere happening" instruction a proper statement of the law.

Here, despite Carter's acknowledgement that the District was not an insurer of Brandon's safety, her argument on appeal in essence *is* that the fact that Brandon suffered an injury while in the District's care means the District was

negligent.[1] Her expert, Lynda Mayster, testified as much stating, "when a child is a really seriously compromised child, the district is absolutely responsible for the child's safety."

The jury was instructed plaintiff had to prove that defendant was at fault, that the defendant's fault was the cause of injury, and damages. It was also instructed that the "mere fact an accident occurred or a party was injured does not mean a party was negligent." The instructions were correct statements of the law and under the circumstances presented here did not unduly emphasize a particular theory or distract the jury. We find no error.

AFFIRMED.

[1] Carter states in her brief,

> The relationship between the parties was unique. The Plaintiff's ward was under the direct supervision of the Defendant's employee, Sara[h] McGlynn. . . . Despite the supervision by the Davenport Community School District employee, Brandon fell and seriously injured his face, mouth and brain. What caused Brandon's injury?
>
> . . . Brandon could be injured while being supervised by the Davenport Community School District employee and no liability would attach if, and only if, there was another explanation for Brandon's fall and injury which did not include negligent supervision.