IN THE COURT OF APPEALS OF IOWA

No. 2-1012 / 12-0754
Filed January 9, 2013

PATRICK J. O'BRYAN and KATHY A. YINGLING,
Plaintiffs-Appellees,

vs.

HENRY CARLSON COMPANY and WAL-MART STORES, INC.,
Defendants-Appellants.

Appeal from the Iowa District Court for Clinton County, John D. Telleen, Judge.

Defendants appeal a jury verdict awarding the plaintiff damages for an injury alleged to have occurred near a construction site on Wal-Mart, Inc. property. **AFFIRMED ON BOTH APPEALS.**

Jeffrey Stone, West Des Moines, for appellant Henry Carlson Company.

David Hammer, Dubuque, for appellant Wal-Mart Stores, Inc.

John Frey of Frey, Haufe & Current, P.C., Clinton, for appellees.

Heard by Doyle, P.J., and Mullins and Bower, JJ.

MULLINS, J.

Henry Carlson Company (HCC) and Wal-Mart, Inc. appeal a jury verdict awarding Patrick J. O'Bryan damages for an injury alleged to have occurred near HCC's construction site on Wal-Mart property. HCC and Wal-Mart contend the district court erred in denying their respective motions for judgment notwithstanding the verdict and motions for a new trial. We affirm.

I. Background Facts & Proceedings

When viewed in a light most favorable to the verdict, the facts are as follows:

On June 20, 2008, O'Bryan stepped into a hole located outside of the vendor receiving door at a Wal-Mart store in Clinton, Iowa. At the time, O'Bryan, standing six-foot three-inches tall and weighing 400 pounds, was delivering bread to Wal-Mart for his employer, Sara Lee Bakery. On his way into the store, O'Bryan passed several covered holes in a construction area near the door. After O'Bryan unloaded the cargo inside the store, he stacked the empty crates onto a dolly. Pulling the dolly with both hands and looking over his left shoulder, O'Bryan navigated his way through the plastic strips hanging inside the doorway and over one or more extension cords. After he exited the store, his left foot fell into an uncovered hole, causing his right ankle to twist and his body weight to pull down on his arms and shoulders as he hung onto the dolly. O'Bryan felt a sharp pain on his right side, but did not think he was seriously injured.

HCC was responsible for the construction area at the Wal-Mart. HCC hired Superior Concrete to drill sixteen holes, each sixteen inches in diameter.

Twelve of the holes were drilled for a cage near the delivery entrance and two holes were drilled on either side of the delivery door. One HCC employee testified the holes were drilled and bollards installed in the holes prior to June 20, 2008. Another employee testified the holes were drilled and covered with plywood prior to June 20, 2008.

On Monday, June 23, 2008, O'Bryan reported the incident to his supervisor. The supervisor sent O'Bryan to Dr. Jundi at the Sterling Rock Falls Clinic. Dr. Jundi recommended O'Bryan rest, ice, compress, and elevate his ankle and remain off work for two days.

On Wednesday, June 26, 2008, O'Bryan filed an incident report with Sara Lee. He complained of pain in his right ankle and in his shoulder. He also described two holes drilled into the concrete. That same day, O'Bryan's supervisor investigated the construction site at Wal-Mart. He noticed two holes in the construction site near the receiving door entrance. The supervisor was unable to recall the exact location of the holes and whether or not they were covered. He spoke with two Wal-Mart employees—the employee stationed at the receiving door and the assistant manager—about his investigation. The assistant manager was already aware of the injury.

Dr. Liakos treated O'Bryan on October 21, 2008. Initial treatments were conservative and included placing the right foot in an immobilizing boot and undergoing physical therapy. After no significant improvement, Dr. Liakos recommended surgical intervention.

In March 2009, Dr. Liakos performed surgery on O'Bryan's right ankle. Dr. Liakos indicated O'Bryan suffered from a longitudal split in his peroneus brevis tendon. To correct the split in his tendon, Dr. Liakos sutured the tendon together and removed some inflammatory tissue. Dr. Liakos then used a bone saw to cut off a portion of O'Bryan's heel. After he removed a portion of the heel, he realigned the bone to decrease stress on the outside part of the ankle and secured the bone using two titanium screws. After surgery, O'Bryan required the use of a wheelchair and scooter until April 24, 2009.

On May 7, 2010, O'Bryan filed a petition alleging Wal-Mart and HCC were negligent in causing his injuries. HCC and Wal-Mart denied the allegations.

On January 30, 2012, the case was tried to a jury. At the close of O'Bryan's case, both HCC and Wal-Mart moved for a directed verdict. The district court denied both motions. Throughout the six-day jury trial involving twenty-four witnesses and over sixty exhibits, HCC and Wal-Mart presented testimony disputing every element of O'Bryan's negligence claim, including the existence and location of the hole in question, the cause of O'Bryan's injury, the amount of damages incurred, and whether O'Bryan failed to mitigate those damages. The jury returned a verdict for O'Bryan. The jury found Wal-Mart 35% at fault, HCC 30% at fault, and O'Bryan 35% at fault. The jury awarded O'Bryan $344,000 in damages in the following amounts:

Past medical expenses:	$64,000
Future Medical expenses:	$10,000
Loss of Time-Earning Past	$20,000
Loss of Future Earning Capacity:	$100,000
Loss of Full Mind and Body—Past:	$0
Present Value of Loss of Full Mind and Body—Future:	$75,000

Physical and Mental Pain and Suffering—Past:	$0
Physical and Mental Pain and Suffering—Future:	$75,000
Total:	$344,000

On February 9, 2012, the court entered judgment against HCC and Wal-Mart in accordance with Iowa's comparative fault rules. Both HCC and Wal-Mart filed motions for judgment notwithstanding verdict and motions for a new trial. On March 1, 2012, the district court denied the respective motions. The court reasoned, "There was substantial evidence introduced on both sides of each hotly contested issue relating to liability and damages and it is not for the Court to substitute its judgment for the jury's judgment with respect to these fact issues." Both HCC and Wal-Mart appeal.

II. Error Preservation

Defendants contend the district court erred in denying their respective motions for directed verdict and motions for judgment notwithstanding the verdict or, alternatively, a new trial. Pursuant to Iowa Rule of Civil Procedure 1.1003(2), "If the movant was entitled to a directed verdict *at the close of all the evidence*, and moved therefor, and the jury did not return such verdict, the court may then either grant a new trial or enter judgment as though it had directed a verdict for the movant." (Emphasis added.) Our courts have long held that "a motion for judgment notwithstanding the verdict serves to afford the district court an opportunity to correct any error in failing to direct a verdict." *Rife v. D.T. Corner, Inc.*, 641 N.W.2d 761, 767 (Iowa 2002). "Error must be raised with some specificity in a directed verdict motion. A motion for judgment notwithstanding the verdict must stand on grounds raised in the directed verdict motion." *Royal*

Indem. Co. v. Factory Mut. Ins. Co., 786 N.W.2d 839, 845 (Iowa 2010) (internal citations omitted). It is improper in all but "the most obvious cases" to grant a directed verdict at the close of the plaintiff's case. *Id.* at 846. However, "[e]rror in overruling a motion to direct a verdict at the close of the plaintiff's evidence is waived unless the motion is made again at the close of all the evidence."[1] *Mueller*, 465 N.W.2d at 660; *see also Luddington v. Moore*, 155 N.W.2d 428, 430 (Iowa 1968) ("[D]efendant's motion for directed verdict was not renewed at the close of all the evidence. Hence, any error in the ruling was waived by failure to renew the motion at the close of all the evidence.").

HCC moved for a directed verdict at the close of O'Bryan's case. Wal-Mart joined the motion. The district court overruled the motion. Neither HCC nor Wal-Mart renewed the motion for directed verdict at the close of all the evidence. Thus, we find both HCC and Wal-Mart waived any alleged error in the motion for directed verdict, and accordingly any error in the motions for judgment notwithstanding the verdict. *See* Iowa R. Civ. P. 1.1003(2); *Rife*, 641 N.W.2d at 767; *Mueller*, 465 N.W.2d at 659–60; *Luddington*, 155 N.W.2d at 430.

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[1] It is well-settled that a plaintiff must move for a directed verdict at the close of all evidence to preserve error. *Mueller v. St. Ansgar*, 465 N.W.2d 659, 660 (Iowa 1991).

> In 1915 this court held this rule was "settled" in Iowa. Later, we recognized the court had "repeatedly" held the failure to renew the motion amounts to a waiver, and error in overruling the motion cannot be a basis for reversal in this court. We have "consistently" held an error in overruling a motion to dismiss or for directed verdict made at the close of claimant's evidence and not renewed at the end of the trial is deemed waived. It is obviously the generally accepted and recognized rule in Iowa.

Id. (internal citations omitted).

III. Standard of Review

We review claims of error regarding admission of evidence for abuse of discretion. *Scott v. Dutton–Lainson Co.*, 774 N.W.2d 501, 503 (Iowa 2009). "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Iowa R. Evid. 5.103(a).

Our review of a trial court's "ruling on a motion for a new trial depends on the grounds asserted in the motion. To the extent the motion is based on a discretionary ground, we review for an abuse of discretion. But if the motion is based on a legal question, our review is on error." *Roling v. Daily*, 596 N.W.2d 72, 76 (Iowa 1999).

We review a motion for a new trial based on excessive or inadequate damages that appear to have been influenced by passion or prejudice for abuse of discretion. Iowa R. Civ. P. 1.1004(4); *WSH Props., L.L.C. v. Daniels*, 761 N.W.2d 45, 49 (Iowa 2008). Our review of a motion for a new trial based on a verdict not sustained by sufficient evidence is for corrections of errors of law. Iowa R. Civ. P. 1.1004(6); *Estate of Hagedorn ex rel. Hagedorn v. Peterson*, 690 N.W.2d 84, 87 (Iowa 2004). In addition to the grounds for a new trial set forth under rule 1.1004, the trial court has the authority to order a new trial when "the verdict fails to administer substantial justice." *Hagedorn*, 690 N.W.2d at 87. We review the trial court's decision about whether the verdict administers substantial justice for abuse of discretion. *Id.*

IV. Analysis

A. Admission of Photograph

HCC and Wal-Mart contend the court's admission of a photograph of a couch on which O'Bryan slept constitutes reversible error because the photograph was not relevant, and any probative value was clearly outweighed by its prejudicial effect. "Evidence is relevant when it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would without the evidence.'" *McClure v. Walgreen Co.*, 613 N.W.2d 225, 235 (Iowa 2000) (quoting Iowa R. Evid. 5.401). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Iowa R. Evid. 5.403.

The exhibit in question is a photograph of a couch and a small American flag pillow. O'Bryan offered the exhibit on direct examination during the following exchange:

> Q. What are your present living arrangements? A. I live with a close friend of mine.
> Q. And who is that? A. Destry Prader.
> Q. Where do you sleep when you are at Destry's? A. On a couch.
> Q. How long have you been living there? A. I believe since June or July of 2011.
> Q. I'll show you Exhibit 36, do you recognize that? A. Yes.
> Q. What is that? A. That would be my bed.
> Offer Exhibit 36, your Honor.

HCC and Wal-Mart objected to the exhibit, and asserted grounds of relevance, foundation, and prejudice in support of the objection. The trial court overruled the objection, and admitted the exhibit into evidence.

O'Bryan maintains the photograph was introduced as evidence of his mental suffering following the injury. It is within the court's discretion to allow evidence of post-accident financial concerns relevant to the issue of mental anguish in personal injury cases. *Beachel v. Long*, 420 N.W.2d 482, 487 (Iowa Ct. App. 1988).

HCC and Wal-Mart argue the photograph was introduced as evidence of O'Bryan's financial status to elicit sympathy from the jury. References to the respective worth or poverty of a litigant are generally improper. *See Hackaday v. Brackelsburg*, 85 N.W.2d 514, 518 (Iowa 1957). Even if improper, "[n]ot every ruling admitting evidence requires reversal." *McClure*, 613 N.W.2d at 235.

The trial court considered the defendants' argument that the photograph allows the jury to conclude that O'Bryan is in "poverty straits" despite his receipt of a workers' compensation settlement. Although the parties stipulated to a jury instruction indicating O'Bryan received a worker's compensation settlement, the jury was instructed not to consider the payment in rendering a verdict and were not informed of the settlement amount. Upon consideration of the defendants' argument, the district court declined to reverse its previous ruling on the admissibility of the photograph. Prior to the admission of the photograph, O'Bryan testified—without objection—that he slept on a couch at a friend's home. As a general rule, cumulative evidence is non-prejudicial. *Kuta v. Newberg*, 600 N.W.2d 280, 289–90 (Iowa 1999). We cannot say the trial court abused its discretion in admitting the photograph into evidence.

B. Motion for New Trial

HCC and Wal-Mart moved for a new trial pursuant to Iowa Rule of Civil Procedure 1.1004(4), (6), and (9). Under rule 1.1004(4), a party may move to have an adverse verdict, or some portion thereof, vacated and new trial granted if the jury awarded "[e]xcessive or inadequate damages appearing to have been influenced by passion or prejudice." Pursuant to rule 1.1004(6), a party may move for a new trial if "the verdict . . . is not sustained by sufficient evidence, or is contrary to law." As we find the defendants waived any alleged error set forth in their motion for judgment notwithstanding verdict, we will focus our review on whether the court erred in denying motions for a new trial pursuant to rules 1.1004(4) and (6). *See* Iowa R. Civ. P. 1.1004(9).

HCC and Wal-Mart allege the jury's verdict is inconsistent, and contend this inconsistency evidences the jury's prejudice.[2] On oral argument, HCC and Wal-Mart expressly waived any challenge to the verdict as internally inconsistent. Thus, we need not decide whether the jury's verdict is internally inconsistent, and if so, whether such inconsistency would warrant a new trial. Rather, our review will examine the record to determine whether the jury awarded excessive damages appearing to be the result of passion or prejudice in accord with rule 1.1004(4).

"[A] flagrantly excessive verdict raises a presumption that it is the product of passion or prejudice." *WSH Props.*, 761 N.W.2d at 50. Where the verdict is

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[2] HCC and Wal-Mart assert the jury's award of damages for future pain and suffering and future loss of full mind and body, but no damages for past pain and suffering and past loss of full mind and body, is internally inconsistent.

not excessive and prejudice is not presumed, "passion or prejudice must be found from evidence appearing in the record." *See Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 771 (Iowa 2009); *WSH Props.*, 761 N.W.2d at 50 (finding within the meaning of rule 1.1004(4), "passion" includes anger, rage, sudden resentment, or terror, among similar sentiments). Under the facts presented in this case, we find the jury award not so flagrantly excessive as to raise a presumption of prejudice. Thus, we must look to the record for evidence of passion or prejudice.

Under rule 1.1004(4), HCC and Wal-Mart argue that the district court abused its discretion in failing to grant their respective motions for a new trial because the verdict appears to have been influenced by the jury's passion or prejudice. HCC and Wal-Mart point to two areas alleged to have evoked the passion or prejudice of the jury. First, they argue O'Bryan's remarks during opening arguments regarding O'Bryan's inability to afford future shoulder surgery improperly painted O'Bryan as poverty stricken. Second, they allege the admission of the photograph of the couch on which O'Bryan slept coupled with counsel's improper opening remarks had a synergistic effect on the jury. HCC and Wal-Mart argue the introduction of this evidence impassioned the jury to redistribute wealth between the litigants.

As a condition of reviewing improper argument of counsel, a party generally must move for mistrial or take exception to the alleged misconduct, rather than await a jury's verdict. *Vachon v. Broadlawns Med. Found.*, 490 N.W.2d 820, 825 (Iowa 1992); *Pose v. Roosevelt Hotel Co.*, 208 N.W.2d 19, 31 (Iowa 1973). A motion for a new trial is not an avenue to assert motions that

could have been decided upon prior to the jury's discharge. *Top of Iowa Coop. v. Sime Farms, Inc.*, 608 N.W.2d 454, 470 (Iowa 2000). However, "misconduct in argument may be so flagrantly improper and evidently prejudicial it may be a ground for new trial even though no exception was taken when the argument was made." *Id.* (citing *Shover v. Iowa Lutheran Hosp.*, 107 N.W.2d 85, 91 (Iowa 1961)).

Although HCC and Wal-Mart assert for the first time on appeal that they complained about O'Bryan's opening remarks in a sidebar with the court, we find no objection on the record. Neither HCC nor Wal-Mart moved for a mistrial; nor did they request a limiting instruction based on any alleged improper argument. Upon our consideration of O'Bryan's opening remarks in conjunction with his testimony and the photograph depicting his current living conditions, we find the alleged misconduct insufficient to arouse the passion and prejudice of the jury necessary to justify a new trial.

Pursuant to rule 1.1004(6), HCC and Wal-Mart argue the verdict is not supported by substantial evidence. In determining whether substantial evidence supports the jury's verdict, "[w]e review evidence in the light most favorable to the verdict and need only consider the evidence favorable to plaintiff whether it is contradicted or not." *Estate of Pearson ex rel. Latta v. Interstate Power & Light Co.*, 700 N.W.2d 333, 345 (Iowa 2005).

At trial, O'Bryan testified he fell in a construction zone at Wal-Mart and sustained an injury to his right ankle and his shoulders. He presented medical support for his injuries. Dr. Liakos, an orthopedic specialist, testified O'Bryan

suffered a torn peroneous brevis tendon in his right ankle. Dr. Perona, an orthopedic surgeon, testified O'Bryan suffered bilateral shoulder injuries due to the fall, both requiring future treatment and surgery. Dr. Perona opined O'Bryan suffered a 76.9% loss of future earning capacity as a result of his injuries. Dr. Hagman, another orthopedic surgeon, testified there was a causal relationship between the fall and O'Bryan's injuries, and opined O'Bryan suffered a 95.3% loss of future earning capacity. Dr. Eilers, a specialist in physical medicine and rehabilitation, also testified O'Bryan's ankle and bilateral shoulder injuries were caused by the fall, and testified O'Bryan suffered a 93.8% loss of future earning capacity. Finally, Michael Sandberg, an economist, testified O'Bryan suffered a lost future earning capacity of $291,682.

It is well within the jury's province to determine disputed questions of fact. *See* Iowa R. App. P. 6.904(3)(j) ("Generally questions of negligence, contributory negligence, and proximate cause are for the jury."); *Cowman v. Flannery*, 461 N.W.2d 155, 157 (Iowa 1990). Although HCC and Wal-Mart presented evidence tending to contradict O'Bryan's version of events, the jury was free to accept or reject that evidence and assess the credibility of the witnesses. We will not substitute our own judgment for that of the jury's when questions of fact are supported by substantial evidence. *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 539 (Iowa 1996). We agree with the trial court that O'Bryan presented substantial evidence to support the issue of liability and damages, and find the jury's verdict administers substantial justice between the parties.

V. Conclusion

We find the defendants' respective motions for judgment notwithstanding the verdict were not preserved for appellate review. The jury's verdict does not appear to be the result of passion or prejudice, is supported by substantial evidence, and administers substantial justice between the parties. Accordingly, we affirm on both appeals.

AFFIRMED ON BOTH APPEALS.