IN THE COURT OF APPEALS OF IOWA

No. 9-047 / 08-0771
Filed March 11, 2009

JEANNA FOSTER,
Plaintiff-Appellee/Cross-Appellant,

vs.

CASEY SCHARES,
Defendant-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Buchanan County, Jon C. Fister, Judge.

A defendant appeals from a district court order granting the plaintiff a new trial on the issue of damages, and the plaintiff cross-appeals from the court's ruling denying her motion for a new trial on all issues. **AFFIRMED ON BOTH APPEALS.**

Henry J. Bevel III of McCoy, Riley, Shea & Bevel, P.L.C., Waterloo, for appellant/cross-appellee.

David J. Dutton and Erin P. Lyons of Dutton, Braun, Staack & Hellman, P.L.C., Waterloo, for appellee/cross-appellant.

Considered by Mahan, P.J., and Miller and Doyle, JJ.

DOYLE, J.

A defendant appeals from a district court order granting the plaintiff a new trial on the issue of damages, and the plaintiff cross-appeals from the court's ruling denying her motion for a new trial on all issues. Upon our review, we affirm on both appeals.

***I. Background Facts and Proceedings*.**

On September 14, 2004, Foster was headed to a ten o'clock class on the campus of Hawkeye Community College in Waterloo. Before attempting to cross Campus View Drive, she stood in the roadway in order to look down the street to see oncoming traffic. There were no sidewalks or crosswalks in the area. She stood for two to three minutes waiting for traffic to clear before she started to cross the street. At the same time, Schares was leaving the campus in his pickup truck. As he pulled out from a parking lot onto Campus View Drive his truck struck Foster in about the middle of the street.

Schares claimed he did not see Foster before his truck struck her. Foster claimed when she started walking across the street there were no vehicles waiting at a stop sign to go onto either Campus View Drive or Arboretum Drive. Foster testified that when there was an opening in traffic on Campus View Drive, she looked down and walked briskly into the street. Foster stated she took two to four steps and then heard a vehicle accelerate. She looked up and saw the grill of Schares's truck, and was struck and knocked down to the pavement.

After being struck, Foster picked herself up and walked back to the side of the street where she had previously been standing. She testified that she wasn't in great pain, but thereafter began to feel pain down her left arm and left leg. An

ambulance and the police were called and came to the scene. Foster testified that she went on to attend her classes that day.

As the day progressed, Foster began to feel worse physically. She became sick to her stomach and had pain on the left side of her body. She told the classmate who witnessed the incident that she was feeling sore from the impact. Foster then went to urgent care at about 3:30 p.m. She was assessed with "(1) Status post MVA, (2) chest pain, (3) Left shoulder, elbow, and forearm and hip and leg pain." She was given a pain reliever and advised to take Advil or Ibuprofen. Bruising over Foster's body showed up the next day.

Five days later, Foster went to Allen Memorial Hospital complaining of head pain, vision changes, and lightheadedness. She was prescribed an anti-inflammatory and pain reliever and a muscle relaxant. At the direction of the urgent care physician, Foster followed up with her family physician ten days after the incident. The doctor observed bruising on Foster's body. Foster's doctor prescribed non-steroidal anti-inflammatory medication and low heat, and a follow-up if there was no improvement.

Foster was next seen by her physician in December 2004 for rib pain in her left side. The doctor related this pain, as well as her left hip pain, to the accident and prescribed a course of treatment that included anti-inflammatory medication with low heat alternating with ice. Foster continued to have pain and was referred to and treated by a physiatrist. She also underwent a regimen of physical therapy. Foster continued to experience pain in multiple areas of her body, including the right side in February 2005. She was referred to and treated by a rheumatologist and diagnosed with myofascial pain. Foster continued with

physical therapy. During her September 2005 visit with her primary care physician, Foster was still having pain in her back, shoulder, and arm. The physician opined that at that time, Foster's "complaints and problems and [the] pain that [Foster] was expressing" were permanent in nature. Foster continued to undergo physical therapy treatment as well as chiropractic treatment in 2006 and 2007. In February 2008, after a referral by her family physician, she was seen by another physiatrist and continued rehabilitative treatment.

On April 24, 2006, Foster filed a negligence action against Schares. At trial Foster testified that she still had pain in numerous areas of her body. She also testified as to how her injuries affected her daily and work activities. Foster's primary care physician opined that for the rest of Foster's life she would require medical care and treatment and would have pain in her left neck, shoulder, rib cage, hip, thigh, and right ankle areas. It was the doctor's opinion that Foster would probably require pain medications, analgesics, and other painkillers for the rest of her life. Additionally, the doctor testified that the charges Foster incurred for her medical treatment were fair and reasonable. Foster's physiatrist similarly opined that Foster would have some residual problems for years to come, that she would have a certain amount of pain for the rest of her life, and that his findings were consistent with Foster's recitation of the accident and trauma. Schares presented no conflicting medical testimony. The parties stipulated that Foster's medical bills from the date of her injury were $23,368.86 and that $14,943.54 was the amount actually owed by her for those charges. The parties did not stipulate to causation.

The jury found Foster forty-nine percent at fault and Schares fifty-one percent at fault. The jury awarded Foster $10,000 for past medical expenses and $1500 for past pain and suffering. The jury did not award Foster damages for future medical expense, past loss of use of body, future loss of use of body, future pain and suffering, past lost earnings, or future loss of earning capacity. After making the reduction for comparative fault, the district court entered judgment in favor of Foster in the amount of $5865.

Foster then filed a motion for new trial, asserting various grounds. The district court concluded Foster was entitled to a new trial on the issue of damages only, finding the damages award was not sustained by sufficient evidence. The court explained:

> The award for present medical expense was less than the awards stipulated by the parties (although causation was not stipulated), but the testimony concerning future medical expense and future pain and suffering was uncontroverted and [Foster] should have been awarded some amount for past and future loss of use of body.

Schares appeals, contending the district court erred in granting Foster a new trial on the issue of damages. Foster cross-appeals, contending the district court erred in denying her motion for a new trial on all issues.

***II. Scope and Standards of Review*.**

Our review of a district court's ruling on a motion for a new trial depends on the grounds raised in the motion. *Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 609 (Iowa 2006). When the motion and ruling are based on discretionary grounds, our review is for abuse of discretion. *Id*. However, when the motion and ruling are based on a claim that

the district court erred on issues of law, our review is for correction of errors of law. *Id*.

If a verdict "is not sustained by sufficient evidence" and the movant's substantial rights have been materially affected, it may be set aside and a new trial granted. Iowa R. Civ. P. 1.1004(6); *Olson v. Sumpter*, 728 N.W.2d 844, 850 (Iowa 2007). "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 at law." *Estate of Hagedorn ex rel. Hagedorn v. Peterson*, 690 N.W.2d 84, 87 (Iowa 2004). We note that we are slower to interfere with the grant of a new trial than with its denial. Iowa R. App. P. 6.14(6)(*d*); *Lehigh Clay Prods., Ltd. v. Iowa Dep't of Transp.*, 512 N.W.2d 541, 543 (Iowa 1994).

***III. Discussion*.**

***A. Appeal*.**

On appeal, Schares argues the district court erred in granting a new trial on the issue of damages. Schares contends the jury's verdict on the issue of damages was supported by substantial evidence. We disagree.

In reviewing the grant of a new trial, we are mindful that a court has no right to set aside a verdict just because it might have reached a different conclusion. *Lubin v. Iowa City*, 257 Iowa 383, 385, 131 N.W.2d 765, 767 (1965); *see also Lantz v. Cook*, 256 Iowa 409, 413, 127 N.W.2d 675, 677 (1964). On the other hand, the district court is in the best position to determine whether something went awry. The district court, in deeming a new trial appropriate, is "aided by seeing and hearing the witnesses, observing the jury, and having before it all incidents of the trial." *Kalvik ex rel. Kalvik v. Seidl*, 595 N.W.2d 136,

140 (Iowa App. Ct. 1999) (citing *Kautman v. Mar-Mac Cmty. Sch. Dist.*, 255 N.W.2d 146, 148 (Iowa 1977)). Therefore, we are slower to interfere with the grant of a new trial than with its denial. *See* Iowa R. App. P. 6.14(6)(*d*).

The district court concluded a new trial on damages was warranted because the verdict was not sustained by sufficient evidence. Specifically, the court found the medical expense awarded was less than the amount stipulated by the parties (noting causation was not stipulated). The court found the testimony concerning future medical expense and pain and suffering to be uncontroverted, and Foster was awarded nothing for these items of damage. Further, the court felt Foster should have been awarded something for past and future loss of use of body. We agree.

No inflexible rule applies here. The granting of a new trial has been affirmed where the evidence material to the damage award is undisputed and the damage award was approximately equal or less than the special damages. *Cowan v. Flannery*, 461 N.W.2d 155, 159 (Iowa 1990) (citations omitted). A court's denial of a new trial has been reversed where the evidence material to the damage award was nearly equal to or less than the special damages. *Id*. A court's denial of a new trial has been affirmed where the evidence of the cause or extent of injury was disputed. *Id*. The grant of a new trial has been reversed where the evidence as to the nature, extent, and severity of the injuries were disputed. *Id*.

Upon our review, we cannot say Foster's medical testimony was "so contrary to natural laws, inherently improbable or unreasonable, opposed to common knowledge, inconsistent with other circumstances established in the

evidence, or contradictory within itself'" so as to be the subject of rejection by the jury. *Kaiser v. Stathas*, 263 N.W.2d 522, 526 (Iowa 1978). While it is true a jury is not absolutely bound by the testimony of experts, the experts' opinions are intended as an aid to the jury, and the jury may not arbitrarily, without cause, disregard them. *See Larew v. Iowa State Highway Comm'n*, 254 Iowa 1089, 1093, 120 N.W.2d 464, 464 (1963).

A jury's itemization of damages required by a special verdict form must be supported by the evidence. *Cowan*, 461 N.W.2d at 158. If the jury's findings are not supported by the evidence, a new trial must be granted. *Id*. Here, the jury's finding of no damages for Foster's future pain and suffering and no damages for future medical expense is unsupported by the evidence and contrary to the uncontroverted expert testimony. Additionally, the jury's award for past medical expense was substantially less than the amount stipulated by the parties. We therefore conclude the district court did not err in granting a new trial on the issue of damages.

B. Cross-Appeal.

On cross-appeal, Foster argues she is entitled to a new trial on all issues. She contends (1) the jury's finding that she was forty-nine percent at fault was not sustained by sufficient evidence, (2) the district court erred in allowing an alleged profane statement into evidence, and (3) the district court erred in overruling her objections to several jury instructions. For the following reasons, we disagree.

***1. Liability*.**

Foster argues the jury's finding that she was forty-nine percent at fault was not sustained by sufficient evidence. However, both parties had a duty to keep a proper lookout. *See Ackerman v. James*, 200 N.W.2d 818, 826 (Iowa 1972); *McCoy v. Miller*, 257 Iowa 1151, 1156, 136 N.W.2d 332, 336 (1965). Schares testified he did not see Foster before his truck knocked her down. There was nothing to block his view of the road. Foster admitted there was nothing blocking her view of the road, that she crossed the roadway in an area where no crosswalk existed, and that she was looking down as she crossed the street. As a pedestrian crossing where no crosswalk existed, Foster had a duty to yield to vehicular traffic. *See* Iowa Code § 321.328 (2005). At the motion for new trial hearing, the district court concluded:

> It seems to me that it was clear that when [Schares] pulled out of the parking lot into the roadway, he had been looking to the right for oncoming traffic, he wasn't looking ahead where [Foster] was, and he wasn't keeping a good lookout.
>
> I think there's more than sufficient evidence that after [Foster] initially looked around for traffic, she put her head down and was jaywalking across the intersection and she wasn't keeping a good lookout. And the fact that the jury didn't simply find a 50-50 verdict and favored [Foster] by a couple of percentage points suggests to me that they did follow the instruction that said that even though the motor vehicle has the right of way in this kind of a pedestrian situation, the driver can't ignore a hazard and put the plaintiff at risk that way. And I think that's how it came out.

This mirrors our assessment of the evidence. We therefore find the jury's allocation of fault was supported by sufficient evidence and conclude the trial court did not err in denying a new trial on this ground.

2. Admission of Profane Statement.

Foster next claims the trial court erred in allowing testimony regarding a profane statement attributed to her. Schares testified at trial that after his truck struck Foster, he went up to her and "asked her how she was doin'." He further testified "[s]he said I better have F'ing[1] insurance." Foster testified she did ask Schares "what the hell he was lookin' at," but denied she uttered the profanity. In asserting the statement's probative value was outweighed by its prejudicial effect, Foster claims the alleged statement "included our language's most powerful and offensive word" and suggests the word would have been shocking and offensive to many jurors' sensibilities.

In denying a new trial on this ground, the district court explained:

> The court admitted [Foster's] statement to [Schares] immediately after she was struck for the purpose of showing that she was less concerned about any injuries she might have sustained than with doing something to [Schares] because of what he had done to her. The fact that she used an expletive that is in common use in this day and age was not unduly prejudicial and the 200-year-old precedent she relies on for the claimed error [*State v. Cross*, 68 Iowa 180, 26 N.W. 62 (1885)] reflects an era when people's sensibilities were far more refined that they are today. The court has heard this same expletive in court not infrequently and it has had no noticeable effect on juries generally or on this jury in particular.

We agree with the district court's observations. It is no longer, and never was for most, a *Leave It to Beaver* world.[2] Unfortunately, today's culture has coarsened to the point where the profanity in question has become commonplace

[1] Schares was referring to a curse word.

[2] *Leave It to Beaver*, an American television show which aired from 1957 to 1963, centered upon the adventures of Theodore "Beaver" Cleaver. His family, as depicted on the show, has come to epitomize the idealized wholesome suburban family of that time.

throughout all segments of society.[3] Consequently, we find no abuse of discretion in the admission of the statement and the court's denial of a new trial on this ground.

3. Jury Instructions.

Finally, Foster contends the district court erred in overruling her objections to jury instructions 13, 14, and 15. She specifically claims these instructions unduly emphasized her duty of care and were repetitive, causing her prejudice and warranting a new trial. We disagree.

It is the district court's duty to "see that a jury has a clear and intelligent understanding of what it is to decide." *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994). Nevertheless, we will not reverse a verdict due to an erroneous instruction unless the error was prejudicial. *Waits v. United Fire & Cas. Co.*, 572 N.W.2d 565, 569 (Iowa 1997). Prejudice results when the instruction "materially misstates the law, confuses or misleads the jury, or is unduly emphasized." *Anderson v. Webster City Cmty. Sch. Dist.*, 620 N.W.2d 263, 268 (Iowa 2000).

Here, Schares pled that Foster was comparatively at fault. Consequently, the court had a duty to instruct the jury concerning each party's duties. Instruction 13 incorporates Iowa Uniform Jury Instructions 600.72 and 700.12, and defines the separate and distinct duties of "lookout" imposed upon the driver of a vehicle and upon a pedestrian. Instruction 14 incorporates Iowa Uniform Jury Instructions 600.48 (duty of pedestrian crossing at other than a marked

[3] Most recent and highly publicized examples include the utterances of the impeached governor of Illinois, and a well known Hollywood entertainer. Our comments are in no way to be construed as acceptance, tacit or otherwise, of the use of the word, they are merely an observation.

crosswalk) and 600.52 (duty of driver to exercise ordinary care to avoid hitting a pedestrian and yielding if necessary). Instruction 15 acknowledges that a pedestrian may cross a roadway at a point other than at a marked crosswalk, but in doing so, must exercise "greater care" than when crossing in a marked crosswalk. Instruction 15 embodies the recognition that reasonable care and prudence require greater vigilance on the part of a jaywalking pedestrian. *Orth v. Gregg*, 217 Iowa 516, 520, 250 N.W. 113, 115 (1933). "This does not alter the rule that both the pedestrian and the driver must each exercise ordinary care for his own safety and the safety of the other. With increased hazards, ordinary care exacts greater vigilance." *Id*. This principle fits squarely within current comparative fault law, and it was proper for the court to call attention to this principle. *Id*. We therefore conclude that these instructions did not materially misstate the law, confuse or mislead the jury, and did not unduly emphasize Foster's duty of care. Accordingly, we conclude the district court did not err in giving Instructions 13, 14 and 15, nor did the court err in denying a new trial on this issue.

***IV. Conclusion*.**

Because we conclude the district court did not err in granting a new trial on the issue of damages, and the district court did not err in denying Foster's motion for a new trial on other grounds, we affirm on both appeals.

AFFIRMED ON BOTH APPEALS.