

IN THE COURT OF APPEALS OF IOWA

No. 9-999 / 08-1642
Filed February 10, 2010

MARY FOSS and ROBERT FOSS,
Plaintiffs-Appellants,

vs.

ALLSTATE INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Robert J. Blink,
Judge.

Plaintiffs appeal from the district court's denial of their motion for new trial.

AFFIRMED.

James W. Carney and George W. Appleby, Des Moines, for appellants.

Barbara A. Hering of Hopkins & Huebner, P.C., Des Moines, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

Plaintiffs, Mary Foss and Robert Foss, appeal from the district court's denial of their motion for new trial. We affirm.

I. Background Facts and Proceedings.

On January 13, 2003, at a time Mary Foss was insured by Allstate Insurance Company (Allstate), Ms. Foss was driving an automobile in the 3200 block of Indianola Avenue in Des Moines, Iowa. An automobile driven by an uninsured motorist, Eleazar Melendez collided with Ms. Foss's vehicle. Ms. Foss was wearing her seatbelt when the collision occurred. The force of the collision activated the airbags. Ms. Foss did not lose consciousness, and she was able to get out of the vehicle on her own. Ms. Foss's husband, Robert Foss, was called and he came to the scene and transported Ms. Foss to her chiropractor, Dr. Brett Rohlfen, for treatment.

The Fosses filed suit against Allstate in April 2007 seeking damages from their uninsured motorist coverage. Ms. Foss alleged she suffered permanent injuries as a result of the 2003 collision.

At trial, the Fosses introduced evidence that Ms. Foss suffered from back, shoulder, neck complaints and headaches. Ms. Foss, a harpist, testified that the injuries compromised her ability to play the harp. She testified she received numerous chiropractic treatments from Dr. Rohlfen following the accident. Dr. Rohlfen's medical records indicate she was released from treatment as of May 28, 2003 (although he continued to provide periodic chiropractic treatments). He testified that he had recommended in 2003 that she see an orthopedist. Ms. Foss did consult with Dr. William Jacobson, an orthopedist, in May 2005, two

years later. In August 2005, she was seen by Dr. Steven Adelman, a neurologist. In May 2007, Ms. Foss was also seen by Dr. Donna Bahls, a physiatrist (a physical medicine rehabilitation specialist). Each of these doctors testified, based upon the patient's subjective reporting, that Ms. Foss's current physical ailments were caused by the automobile accident of 2003.

Dr. Douglas Brenton, Allstate's expert witness, testified as to Ms. Foss's medical history prior to the accident, which included her first treatment with Dr. Rohlfen in 1992; treatment by her primary care physician, Dr. Alda Knight, beginning in 1997, for hypothyroidism (Dr. Knight described Ms. Foss as "physically, mentally and emotionally drained" and noted neck pain and tendonitis related to harp playing in September 2001); continued intermittent chiropractic treatment for neck and shoulder pain in 2001; and complaints of depression in January 2002. Dr. Brenton also noted that the time between the January 2003 accident and Ms. Foss's visit to Dr. Jacobson was more than two years. Dr. Brenton testified:

[T]he thing I'm struck by is the intermittency of treatment with anyone, other than perhaps Doctor Rohlfen, and the time between things and the progressive nature of symptoms as described over time, which doesn't fit well with my expectations following a motor vehicle accident or any kind of traumatic injury.

....
[H]ere we are four and a half years later, so it doesn't gel for me that this sequence of events makes sense as caused by the single incident of trauma.

....
Well, I felt that at the time I saw her, she was suffering with muscle contraction headaches, which are sometimes referred to as tension type headaches. I thought she very likely had a mild depression going on, and I also felt that she complained of symptoms that were musculoskeletal in origin in the thoracic and scapular region, and she also had what we call paresthesia, which

is an altered sensation in the arms, and that was of unknown cause.

Now those are the symptoms and what we found on [March 11, 2008]. How I would diagnose those various problems, I have great difficulty relating her headache disorder to the accident since it was progressive. The depression, I'm not an expert in psychiatry, but she's had difficulty with depression in the past and apparently was worse in earlier 2007 than it was at the time I was seeing her, so I would not be able to, as a neurologist, correlate that directly to the accident.

Her musculoskeletal thoracic pains, to the extent that she has a low-grade, persistent ache there, that could be related to the accident, but I could not relate these episodic spasms to the accident.

As far as the tingling, I have no idea where that's coming from and neither did anyone else, apparently.

So when I boil it down, the relationship between the current symptoms and the accident is tenuous in most of these areas, and I was not able to find any objective residual signs of injury nor document any objective signs of injury in the records seen at the time of the accident.

The jury returned a verdict finding no proximate cause. The Fosses moved for a new trial, which was denied by the district court. They now appeal.

II. Scope and Standard of Review.

Our review of a denial of a motion for new trial depends on the grounds asserted in the motion and ruled upon by the court. *WSH Prop., L.L.C. v. Daniels*, 761 N.W.2d 45, 49 (Iowa 2008). If the motion is based on a discretionary ground, we review it for an abuse of discretion. *Roling v. Daily*, 596 N.W.2d 72, 76 (Iowa 1999). In ruling on motions for a new trial, "the district court has broad but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties." Iowa R. App. P. 6.14(6)(c). A trial court's ruling will not be disturbed unless the evidence clearly shows the court has abused its discretion. *Benson v. Richardson*, 537 N.W.2d 748, 762 (Iowa 1995). We will find an abuse of discretion if the trial court clearly exercised

its discretion on untenable grounds or acted unreasonably. *Id.* This court is slower to interfere with a grant of a new trial than with its denial. Iowa R. App. P. 6.14(6)(d).

III. Analysis.

The Fosses moved for a new trial contending the jury's finding—that the motor vehicle accident on January 14, 2003, was not a proximate cause of bodily injuries to Mary Foss: (1) was contrary to the admission of defendant; (2) was not sustained by sufficient evidence or was contrary to law; (3) failed to afford substantial justice between the parties; and (4) resulted in a wholly inadequate verdict. Allstate resisted.

The district court ruled, first, that Allstate did not admit causation by paying some of Ms. Foss's medical bills.¹ The court then noted several reasons why the jury could have reasonably reached its conclusion:

Plaintiff's husband, who was the primary (although not the only) witness corroborating her testimony as to damages may have displayed a demeanor before the jury that was not conducive to his credibility.

Secondly, the Plaintiff herself was impeached rather effectively on several pertinent issues, both medical and financial. Based on this the jury may well have discounted her testimony correlating her damages to the tortfeasor's conduct.

Third, Plaintiff had a history of carrying a large musical instrument that logically, over time, may have led to her present complaints. And there was some credible evidence in the record of another incident after the one in dispute that may have caused her claimed damages.

¹ Plaintiffs' reliance on *Johnson v. Knoxville Community School District*, 570 N.W.2d 633 (Iowa 1997), is misplaced. In *Johnson*, the supreme court ruled a new trial was required upon the jury's failure to find proximate cause and award damages "in light of the defendant's admission of negligence and *the record made that some damages were proximately caused by the negligence.*" 570 N.W.2d at 642 (emphasis added). Defendant made no such concession here.

Fourth, Defendant tendered medical evidence that may have diminished the force of Plaintiff's causation evidence.

The district court noted it was "loath to substitute its view for [the jury's.] To do otherwise would render the effort of these citizens without worth. This is particularly true when dealing with questions of proximate cause."

The first question the jury was to determine was, "Was the motor vehicle accident on January 14, 2003 a proximate cause of bodily injuries to Mary Foss?" The jury answered "no." The district court concluded it would not substitute its judgment for that of the jury and gave cogent reasons for its decision.

Our rules of appellate procedure state that the following proposition is so well established that authorities need not be cited in support: "Generally questions of negligence, contributory negligence, and proximate cause are for the jury; it is only in exceptional cases that they may be decided as matters of law." Iowa R. App. P. 6.14(6)(j). The Fosses do not suggest this is one of those exceptional cases in which proximate cause can be decided as a matter of law. We find no abuse of discretion.

AFFIRMED.

Vaitheswaran, P.J., concurs. Doyle, J., dissents.

DOYLE, J. (dissenting)

I respectfully dissent. It is very difficult for me to believe, in the context of ordinary human activity, that Ms. Foss did not sustain *some* personal injury in the crash. The trial court conceded it expected a plaintiffs' verdict, but in citing to *Gorden v. Carey*, 603 N.W.2d 588, 590 (Iowa 1999), the court was loathe to substitute its view for the jury's. It appears something went awry in the jury room, and I believe this is one of those exceptional cases where the verdict does not effectuate substantial justice between the parties. I would reverse the trial court's denial of the motion for new trial.