IN THE COURT OF APPEALS OF IOWA

No. 8-1013 / 07-1810
Filed March 26, 2009

JAMES STUDER,
Plaintiff-Appellee,

vs.

DHL EXPRESS (USA), INC.,
TODD B. MCCLENDON and
ROWLAND EXPRESS, INC.,
Defendants-Appellants.

Appeal from the Iowa District Court for Polk County, Don Nickerson, Judge.

The defendants appeal from an adverse jury verdict in a motor vehicle accident case. **AFFIRMED.**

Maria P. Sears and Christopher Bruns of Elderkin & Pirnie, P.L.C., Cedar Rapids, for appellant Todd McClendon.

Stephen Doohen, Des Moines, for appellant Rowland Express.

Richard S. Fry and Nancy J. Penner of Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, for appellant DHL Express.

Brian Galligan, Des Moines, for appellee.

Heard by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

VOGEL, P.J.

The defendants appeal from an adverse jury verdict in a motor vehicle accident case. Negligence was undisputed and the major issues at trial concerned damages and the relationship of the various defendants to each other.

I. Background Facts and Proceedings

James Studer was seriously injured in a car accident on August 11, 2004. He was a passenger in a vehicle that collided with a van driven by Todd McClendon when McClendon ran a stop sign. At the time of the accident, McClendon was working as a delivery driver for Rowland Express, Inc., (Rowland Express), a delivery company that contracted with DHL Express (USA) Inc., (DHL), to perform local delivery services. Studer filed suit against McClendon, Rowland Express, and DHL, to recover damages he suffered as a result of this accident. Both Rowland Express and McClendon admitted liability. DHL contested vicarious liability.

The matter was tried before a jury beginning on March 19, 2007. The jury found in favor of Studer, and against McClendon, Rowland Express, and DHL for a total of $1,573,105.27.[1] Following the denial of various post-trial motions, the defendants separately appeal.[2]

[1]Specifically: $114,529.31 past medical expenses; $82,575.96 future medical expenses; $100,000 past lost earnings; $535,000 lost future earnings capacity; $150,000 past loss of function; $216,000 future loss of function; $225,000, past physical and mental pain and suffering; and $150,000 future physical and mental pain and suffering.

[2] McClendon joins all issues specifically addressed by DHL and Rowland; Rowland joins the arguments addressed by McClendon and DHL. DHL does not request to join arguments.

II. Evidentiary Objections

We review evidentiary rulings for an abuse of discretion. *State v. Helmers*, 753 N.W.2d 565, 567 (Iowa 2008). "An abuse of discretion occurs when the trial court exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable." *State v. Henderson*, 696 N.W.2d 5, 10 (Iowa 2005).

a. Admission of Expert Opinion Testimony

Designated as expert witnesses for Studer were economist David M. Frankel, Ph.D., and vocational rehabilitation expert, Carma Mitchell. Designated for Rowland Express, and adopted by McClendon and DHL, was Karen Stricklett, also a vocational rehabilitation expert. Dr. Frankel's initial report of September 2006 based his calculation of Studer's economic damages on Mitchell's opinion that Studer would not be able to work for the rest of his life. After Stricklett was deposed, on March 6, 2007, Dr. Frankel supplemented his original opinion to reflect Stricklett's opinion that Studer could perform "some light or sedentary type jobs." Defendants assumed through pretrial discussions that Dr. Frankel's trial testimony would align with his supplemental report. Defendants admit they did not depose Dr. Frankel; they concluded that his report, as supplemented, did not require further pretrial probing. During Dr. Frankel's testimony, over defendant's objections, he was allowed to testify as to what Studer's past lost earnings and loss of future earning capacity would be if Studer could never return to the job

market.[3] Defendants objected, and after a hearing was held outside the presence of the jury, the district court allowed the testimony.

On appeal McClendon, joined by Rowland Express, asserts the district court abused its discretion in allowing Dr. Frankel to testify to previously undisclosed economic damage figures, in violation of Iowa Rule of Civil Procedure 1.508, claiming this resulted in unfair surprise. Rowland Express enhances that assertion, claiming the district court further abused its discretion by admitting defense expert Stricklett's deposition into evidence, as offered by Studer, as well as allowing Dr. Frankel to testify using Sticklett's opinions.[4] Rowland Express contends this amounted to "expert shopping" and that the discovery rules would have no meaning if the parties were allowed to "steal" the experts of other parties.

In allowing the testimony, the district court observed that, "a lot of late discovery has happened in this case . . . so I'm not going to penalize any party." To remedy any possible prejudice to the defendants, the district court stated:

> And if you need an opportunity—I'll make sure that this witness can be recalled, if you need the opportunity, after getting his updated report, to cross-examine. I'll give you an opportunity to do that . . . . I'll just keep him under the arm of the Court. And if we end early today, I'll try to give you an opportunity to look at his updated figures and—but I really don't think it's that much of a surprise. I'm not relying on the supplementation rule and saying that the plaintiff's counsel timely supplemented—or had no duty to supplement. I'm focusing more so on what I believe to be the

[3] In addition, Frankel removed prejudgment interest and adjusted his calculations to the actual trial date.

[4] Rowland also contends that the district court erred in allowing Studer's testimony concerning his medical diagnosis, arguing that this violated the motion in limine ruling. It failed to cite any case law to support this proposition. Even if it did, his arguments have no merit.

> methodology. And I believe the methodology was known to all parties. And because the methodology was known to all parties, I don't think even if it is an untimely disclosure, prejudices the defendants in any respect . . . . We'll have two competing opinions and defense counsel will be able to argue to the jury . . . I do think this initial opinion is relevant.

We find no abuse of discretion in the district court's admission of the testimony of Dr. Frankel, as the district court found, he had not changed his methodology in his trial testimony. *See* Iowa R. Civ. P. 1.508(4) (stating expert's testimony at trial may not go beyond the "fair scope" of testimony in the discovery proceedings). Further, the district court, to head off any possible prejudice to the defendants, gave the defendants wide latitude to later recall Dr. Frankel after they had the opportunity to study his revised calculations. They did not take advantage of this offer.

The district court allowed the deposition testimony of Stricklett under Iowa Rule of Civil Procedure 1.704. The rule provides in part:

> "Any part of a deposition, so far as admissible under the rules of evidence, may be used upon the trial . . . in the same action against any party who appeared when it was taken, . . . [f]or any purpose, if it was taken of an expert witness specially retained for litigation."

In addition, we note that in their pretrial filings, the parties reserved the right to read portions of deposition testimony of the other parties' experts. We find no abuse of discretion in the admission of Stricklett's deposition.

Rowland Express also contends that Stricklett's deposition was inadmissible hearsay, yet made no formal hearsay objection in the record to support this. Failure to assert a prompt and specific objection to the offer of evidence at the time offer is made is waiver upon appeal of any ground of complaint against its admission. *State v. Pardock*, 215 N.W.2d 344, 348 (Iowa

1974). One attempting to exclude evidence by either objection or motion, has a duty to indicate specific grounds to the court so as to alert it to questions raised, and enable opposing counsel to take proper corrective measures to remedy defect, if possible. *Id.* By failing to make a specific hearsay objection when Studer introduced the deposition testimony of Stricklett, Rowland Express did not preserve error for our review.

b. Social Security and Private Disability Insurance

Rowland Express next contends that the district court erred in not allowing it to inquire into specific amounts of social security and private disability received by Studer, in order to determine whether those figures played into Dr. Frankel's calculations.[5] The district court found that probing into that arena with respect to the testimony of an expert witness on economic losses "could confuse the jury with regards to the collateral source rule." *See Collins v King*, 545 N.W.2d 310, 312 (Iowa 1996) (finding disability payments are not statutorily excepted from the collateral source rule). In a prior hearing on a motion in limine, the court did rule that the subject of whether Studer was receiving disability benefits could be approached, but only as it may affect his motivation to pursue employment. As to the specific amounts of any benefits Studer was receiving, the court properly determined the probative value would be outweighed by the danger of unfair prejudice as well as confusion for the jury. *Graber v. City of Ankeny*, 616 N.W.2d 633, 637-38 (Iowa 2000). We find no abuse of discretion by the district court.

[5] In its brief, Rowland sites merely to a range of pages, rather than specifically pointing us to how error was preserved. See Iowa R. App. P. 6.14.

III. Jury Instructions

Rowland Express and DHL object to various jury instructions. Our review of a claim regarding the court's giving or failure to give a requested instruction is for the correction of errors at law. Iowa R. App. P. 6.4; *State v. Coffin*, 504 N.W.2d 893, 894 (Iowa 1993). Parties are entitled to have their legal theories submitted to the jury when the instructions expressing those theories correctly state the law, have application to the case, and are not otherwise covered in other instructions. *Vasconez v. Mills*, 651 N.W.2d 48, 52 (Iowa 2002). Proposed instructions must be supported by the pleadings and substantial evidence in the record. *Id.* Evidence is substantial if a reasonable person would accept it as adequate to reach a conclusion. *Id.*

a. Failure to Mitigate Damages: Seatbelt Defense

Rowland Express contends that the district court erred in denying its requested seatbelt defense jury instruction; asserting that the jury be instructed with the stock jury instruction and verdict form questions concerning failure to use a seatbelt. Iowa Code section 321.445 (2007) states that failure to wear a safety belt in violation of this section shall not be considered evidence of comparative fault, but may be considered to mitigate damages. However, in order to introduce evidence of the failure to wear a safety belt, one must first introduce substantial evidence that the failure to be belted contributed to the injury claimed by the plaintiff. *Id.*

It is defendant's burden to prove a fact that would mitigate damages. *Vasconez*, 651 N.W.2d at 53-54. Studer testified that he did not remember whether he was wearing his seatbelt at the time of the accident. However, his

daughter, Abby Helm, who was driving the car, testified that both she and her father were wearing their seatbelts. Rowland Express points to Studer's medical expert, Dr. Marsh, who testified that Studer's injuries were primarily "posterior wall," which is an injury which can occur from a blow to the knee. This can be caused by being thrown forward into the dash, or if the person is wearing a seatbelt, from a "dash intrusion." The district court found that based on this theory, there was not substantial evidence sufficient to establish that Studer failed to wear his seatbelt. We agree. The only evidence Rowland Express points us to is a photo of the *exterior* of Helm's vehicle after the collision, shedding no light on the question of whether there was any "dash intrusion." Because defendants failed to carry their burden to establish Studer's non-use of his seatbelt, any suggestion was merely speculative, and insufficient for the jury to receive the requested instruction.

b. Failure to mitigate damages: following medical advice

Rowland Express next contends the district court erred in refusing to specifically instruct the jury on Studer's failure to exercise ordinary care in following medical advice to mitigate past and future damages. There was some evidence in the record that doctors had instructed Studer that it was necessary for him to lose weight and increase his physical activity, and that he had not been able to satisfactorily comply with either. The jury was given a general instruction on mitigation of damages, but without specific mention of failing to follow medical advice. In a post trial ruling, the district court found that Rowland Express did not offer the necessary proof to justify the instruction. While there is no dispute as to the medical advice given, there is also no showing that Studer acted

unreasonably in failing to heed the advice. Further there is no proof of the causal connection between failing to follow that advice and its effect on Studer's damages, past or future. *Greenwood v. Mitchell*, 621 N.W.2d 200, 205 (Iowa 2001). The burden to demonstrate all of these factors rested with defendants. *Id*. The district court did not err by not giving the requested instruction.

IV. Liability of DHL- Directed Verdicts

DHL argues the district court erred in denying its motion for a directed verdict on Studer's vicarious liability claim. The standard of review from a denial of a motion for a directed verdict is for errors at law. *Jackson v. State Bank of Wapello*, 488 N.W.2d 151, 155 (Iowa 1992). In reviewing rulings on a motion for a directed verdict, we simply need ask whether there was sufficient evidence to generate a jury question. *Id.* We, like the district court, view the evidence in the light most favorable to the party against whom the motion for a directed verdict is directed. *Id.* The evidence is considered in the light most favorable to the nonmoving party. *Heinz v. Heinz*, 653 N.W.2d 334, 338 (Iowa 2002).

a. Vicarious Liability of DHL

DHL asserts the Cartage Agreement between DHL and Rowland Express clearly established that Rowland Express is an independent contractor of DHL and not its agent. It further asserts McClendon was an independent contractor of Rowland Express. Therefore, due to the independent relationship of the defendants, DHL claims a lack of substantial evidence that it should be held vicariously liable for Studer's injuries.

Before denying DHL's motion for directed verdict, the court heard arguments as to whether DHL exercised control over Rowland Express, and over

McClendon in his work for Rowland Express. In ruling on the motion, the court stated: "I find that there's sufficient evidence to generate a jury question on the question of whether McClendon was liable or at fault in connection with the subagency relationship running from DHL to Rowland and then to McClendon." We agree. The evidence consisted of both the independent contractual relationship spelled out in the Cartage Agreement as well as the seemingly contrary evidence of the level of control DHL maintained over both Rowland Express and McClendon in terms of how its delivery services were to be carried out and how its image was to be represented. The district court concluded the question of agency was a fact question to be sorted out by the jury. See *Smith v. Air Feeds, Inc.*, 519 N.W.2d 827, 831 (Iowa Ct. App., 1994) (finding that the existence of an agency is ordinarily a fact question, but there must be substantial evidence to generate a jury question). As there was substantial evidence to submit the issue to the jury, and the jury decided that DHL was vicariously liable for McClendon's injuries to Studer, we will not upset that finding by reversing the district court's denial of the motion for directed verdict.

b. Subagency, Jury instructions

In a related issue, DHL claims the district court erred by misstating the law regarding subagency in the jury instructions, and should have included a reference to subagency in the verdict form. The jury concluded that McClendon was acting as an agent of Rowland Express and Rowland Express was an agent of DHL at the time of the collision, and therefore, DHL was vicariously liable for Studer's injuries. DHL claims that had the jury been properly instructed on subagency, it would not have found DHL vicariously liable. The district court

found that the instructions given were proper and the term "sub-agency" was consistent with the evidence presented.[6]

DHL more specifically asserts that jury instruction eighteen did not accurately state the law of subagency, and DHL was therefore prejudiced by the fact that the jury was improperly instructed. DHL claims that they preserved error by making an objection at trial and by filing a post-trial motion to that effect. Iowa Rule of Civil Procedure 1.924 provides when a party objects to the giving or failing to give a jury instruction, the party must specify the matter objected to and on what grounds. This rule requires an objection "'sufficiently specific to alert the trial court to the basis of the complaint so that if error does exist the court may correct it before placing the case in the hands of the jury.'" *Boham v. City of Sioux City*, 567 N.W.2d 431, 438 (Iowa 1997) (quoting *Moser v. Stallings*, 387 N.W.2d 599, 604 (Iowa 1986)).

When the district court provided all counsel the opportunity to object to the proposed jury instructions, DHL objected to instruction eighteen by stating, "there's not sufficient evidence to warrant submission of these issues to the jury." While DHL objected to other instructions relating to agency, as being confusing or lacking in evidentiary support, the claimed error now being asserted on appeal was not raised nor ruled on below. The court was left to speculate as to why DHL claimed there was "not sufficient evidence" to submit instruction number eighteen. The court's ruling was, "I believe that there is sufficient and substantial evidence in the record to support all the instructions on agency, as well as

[6] In its motion for new trial, DHL argued that its proposed instruction should have been given to the jury, but does not raise this again on appeal.

subagent." Error has clearly not been preserved on the specific objection DHL now raises on appeal regarding instruction number eighteen. *State v. Maghee*, 573 N.W.2d 1, 8 (Iowa 1997) ("A party's general objection to an instruction preserves nothing for review."). Further, there was no mention before the district court of any inconsistency between the other jury instructions given, and the verdict form regarding agency and subagency.

c. Past and future lost earnings to jury

Finally, DHL contends that the district court erred in not granting its motion for directed verdict, and all defendants joined this claim. DHL asserts that the district court erred in submitting the past lost earnings and loss of future earning capacity claims to the jury, claiming there was no evidence to support either award the jury made.

Both sides presented witnesses, experts, and documentation during trial in support of their claim or in defense of the claim of damages. Studer argued that the evidence was unambiguous to support the damages award. Because prior to the accident Studer had been employed on a full-time basis, with overtime, and because from the time of the accident until February 2006, he was not employable, he contends this entitled him to the benefits awarded. DHL, on the other hand, believes that the cumulative testimony and expert reports discussed above do not provide the requisite evidentiary support for the damages award. The district court found that there was sufficient evidence for this issue to go before a jury, and we agree that sufficient evidence was presented on both sides

such to warrant the issue to be presented to the jury; thus we will not upset that decision on appeal.

AFFIRMED.