IN THE COURT OF APPEALS OF IOWA

No. 0-283 / 09-1254
Filed August 11, 2010

LARRY GUDENKAUF,
Plaintiff-Appellant,

vs.

DOUGLAS CARLYLE and SAMANTHA CARLYLE,
Defendants-Appellees.

Appeal from the Iowa District Court for Linn County, Marsha M. Beckelman, Judge.

Larry Gudenkauf appeals from the denial of his motions for new trial and judgment notwithstanding the verdict following a jury verdict in favor of the defendants, Douglas and Samantha Carlyle, on his claim of negligence. **AFFIRMED.**

Stephen Fieweger of Katz, Huntoon & Fieweger, P.C., Moline, Illinois, for appellant.

E. Cummings, Sara Kouri, and Scott J. Idleman of Law Office of Scott J. Idleman, Des Moines, for appellees.

Heard by Sackett, C.J., and Eisenhauer and Mansfield, JJ.

EISENHAUER, J.

The plaintiff, Larry Gudenkauf, appeals from the district court order denying his motions for new trial and judgment notwithstanding the verdict following a jury verdict in favor of the defendants, Douglas and Samantha Carlyle, on his claim of negligence. He contends the jury's finding the Carlyles' negligence was not the proximate cause of his injuries is irreconcilable with the evidence.

I. Background Facts and Proceedings. Larry Gudenkauf was working in his capacity as a substitute postal carrier on November 8, 2005, when he slipped and fell on property belonging to Douglas and Samantha Carlyle. Gudenkauf had walked up the Carlyles' driveway to deliver their mail to the mailbox located alongside the front door of their home. He then walked across the yard as he continued on the postal route to the apartment complex next door. Because a fence ran along the property line and blocked the most direct path across the lawn to the apartment complex, Gudenkauf attempted to reach the sidewalk by traveling down a set of steps located on the Carlyles' property. As Gudenkauf traveled down the last few steps, his foot slipped off the edge of one of the bottom steps, which was covered in leaves. His right foot lodged on the step and he fell to the ground.

On November 8, 2007, Gudenkauf filed a petition alleging the Carlyles were negligent in maintaining their property by failing to clear their sidewalk and hill from leaves and debris, exposing invitees to slip and trip hazards. The matter proceeded to trial in May 2009.

The Carlyles' regular postal carrier, Nadyne Conrad, testified the steps on the Carlyles' property "always" had leaves on them and she had slipped on the steps before because although the leaves may have appeared dry,

> it's wet underneath there. You hit those leaves. You can't see it.
> Their steps are not straight. They slant down. The top one is the worst and it's broken, and then they all kind of slanted down, but the bottom two to three always have leaves on them and they are always covered with leaves, always . . . .

Conrad had left two postcard notices with the Carlyles asking them to clear their steps, but the condition had not changed.

Gudenkauf testified regarding the various routes available to him off the Carlyles' property. He stated he could have walked off the property down the sloped front lawn, but found it covered with leaves that were wet from dew. He decided then to use the steps, although he testified he could not see the bottom two or three steps because they were covered in leaves. Gudenkauf stated the top layer of leaves appeared to be dry, but after falling he noticed they were wet underneath. He also testified he did not leave the property in the direction from which he had come—the driveway—because of his employer's emphasis on efficiency in delivering the mail.[1]

The Carlyles testified they did not have direct knowledge of the incident, and in fact had not learned of Gudenkauf's fall until they received his petition. Neither was able to testify as to whether they had removed leaves from their property in the fall of 2005 prior to November 8.

[1] Rory Sullivan, a supervisor for the station that covers the route in question, testified postal carriers are to take the shortest available shortcuts "unless it is unsafe to do so."

At the close of trial, the jury returned a verdict finding the Carlyles were at fault, but not the proximate cause of Gudenkauf's injuries. Accordingly, the district court entered judgment in favor of the Carlyles. Gudenkauf filed a motion for judgment notwithstanding the verdict or for new trial, alleging the finding of fault against the Carlyles could not be reconciled with the jury's finding of no proximate cause. The district court denied the motion for judgment notwithstanding the verdict because Gudenkauf failed to move for directed verdict. The court denied the motion for new trial, finding the jury could have reasonably concluded an alternate safe route was available to Gudenkauf. Gudenkauf appeals.

II. Motion for New Trial. We first consider Gudenkauf's claim the district court erred in denying his motion for new trial.

Our review of a district court's ruling on a motion for 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 the trial court erred on issues of law, our review is for correction of errors at law. *Id*. We review the court's ruling as to whether the verdict was sustained by sufficient evidence for correction of errors at law. *Estate of Hagedorn ex rel. Hagedorn v. Peterson*, 690 N.W.2d 84, 87 (Iowa 2004).

The district court may grant a new trial under Iowa Rule of Civil Procedure 1.1004(6) when "the verdict, report or decision is not sustained by sufficient

evidence, or is contrary to law." A new trial may be ordered if a jury verdict is not supported by sufficient evidence and fails to effectuate substantial justice. *Olson v. Sumpter*, 728 N.W.2d 844, 850 (Iowa 2007). Evidence is substantial if reasonable minds could find the evidence presented adequate to reach the same findings. *Midwest Home Distrib., Inc. v. Domco Indus., Inc.*, 585 N.W.2d 735, 738 (Iowa 1998). The reason for granting a new trial must fairly appear in the record. *Bredberg v. Pepsico, Inc.*, 551 N.W.2d 321, 326 (Iowa 1996).

Gudenkauf's motion for new trial alleged the verdict was not sustained by sufficient evidence and was contrary to law. He argued there was no evidence to establish any proximate cause of his injury other than the Carlyles' failure to properly maintain their steps.

The questions of fault and proximate cause are questions of fact and only in exceptional cases may these questions be taken from the jury and decided as a matter of law by the court. *Ten Hagen v. DeNooy*, 563 N.W.2d 4, 7 (Iowa Ct. App. 1997). Even though fault is established, it does not necessarily follow that proximate cause exists. *Id.* Proximate cause must be separately determined. *Id.* The concepts of fault and proximate cause have been explained thusly:

> In order to be a [proximate] cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent . . . . [T]his is necessary but it is not of itself sufficient. The negligence must also be a substantial factor in bringing about the plaintiff's harm. The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense," which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called "philosophic

> sense," yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.

Id. at 8 (quoting *Pedersen v. Kuhr*, 201 N.W.2d 711, 713 (Iowa 1972)). Therefore, the two-part test for proximate cause is: (1) But for defendant's fault, plaintiff's injuries would not have occurred; and (2) defendant's fault must be a substantial factor in bringing about plaintiff's harm. *Id.*

In denying the motion, the district court found the Carlyles' affirmative defense of an alternate safe route provided a means by which the jury could find they were at fault for failing to maintain the steps, but were not the proximate cause of Gudenkauf's damages. Regarding the alleged alternate safe route of the driveway from which Gudenkauf entered the property, the court stated:

> At trial, Plaintiff repeatedly insisted that he did not go back the way he came because it was not United States Postal service (USPS) policy to backtrack. However, Rory Sullivan, Plaintiff's supervisor at the time of the accident, testified that mail carriers are instructed to take all available short cuts long as it is safe to do so. USPS mail carrier Nadyne Conrad also testified that mail carriers cut through yards whenever it is safe, but that they have to take the safest way.
>
> Notwithstanding the testimony of Mr. Sullivan and Ms. Conrad, Plaintiff contends that Defendants never introduced evidence that going back the way he had come would have been any safer than going down the steps. Plaintiff specifically notes that no evidence was provided regarding the safety of Defendants' driveway, as Plaintiff had cut across a neighboring yard to reach Defendants' residence and to return to the path without going through Defendants' yard would have required Plaintiff to use Defendants' driveway. According to Plaintiff, Defendants offered no proof that the condition of the driveway was any safer than the condition of the steps and, therefore, did not prove that it was an alternate safe route.
>
> It is true that Defendants did not offer specific evidence on the safety of Plaintiff's original route or the modified route needed to keep Plaintiff on his delivery path. However, the Court believes that a jury could reasonably infer that since Plaintiff was able to make it to the Defendants' mailbox safely using that original route, he would

> have been able to return safely using the same route. Such a path may have required backtracking, but as Mr. Sullivan and Ms. Conrad testified, mail carriers are instructed to use only safe routes. The Court thus finds that the jury could have reasonably concluded that, because an alternate safe route was available, the Defendants' negligence in not removing the leaves from their steps was ultimately not a substantial factor in bringing about Plaintiff's injuries and therefore was not the proximate cause of Plaintiff's injuries.

We concur in the district court's assessment of the evidence. The exhibits (which included photographs of the premises) and testimony provided sufficient evidence, when viewed in the light most favorable to the jury's verdict, to sustain a finding an alternate safe route was available to Gudenkauf, and therefore the Carlyles' negligence was not a proximate cause of his injuries.

Gudenkauf argues the jury's verdict is irreconcilable with a finding of no proximate cause given the way the jury was instructed. Instruction No. 19 addressed the alternative safe route affirmative defense. It instructed the jury that if it found (1) Gudenkauf was negligent by failing to take an alternate safe route and (2) his negligence was a proximate cause of his injury, it was to assign a percentage of fault to Gudenkauf and include his fault in the total percentage of fault when apportioning fault in the special verdicts. However, the jury's inquiry did not go farther than a finding the Carlyles were not the proximate cause of Gudenkauf's injuries and, therefore, the special verdicts were never completed. Gudenkauf argues if the jury found an alternate safe route was available to him, they necessarily had to answer "yes" on the question of whether the Carlyles were a proximate cause of his injuries. Because they did not, he claims the

alternate safe route theory is not a possible reason for finding the Carlyles were not a proximate cause.

We conclude the jury's failure to apportion fault in a separate instruction is not fatal to the verdict. A verdict is not inconsistent if it can be harmonized in a reasonable manner consistent with the jury instructions and the evidence in the case, including fair inferences drawn from the evidence. *Clinton Physical Therapy Servs.*, 714 N.W.2d at 613. Here, there was evidence by which the jury could have concluded retracing his original path would have provided Gudenkauf an alternate safe path. By failing to do so, the jury could conclude he was the proximate cause of his injuries. Accordingly, we affirm the district court order denying Gudenkauf's motion for new trial.

III. Motion for Judgment Notwithstanding the Verdict. Gudenkauf also contends the district court erred in denying his motion for judgment notwithstanding the verdict. The district court found Gudenkauf failed to make a motion for directed verdict and therefore was precluded from seeking judgment notwithstanding the verdict, stating:

> Plaintiff argues that he effectively moved for directed verdict during the jury instruction conference and therefore judgment notwithstanding the verdict under Rule 1.1003(2) is appropriate given the facts of this case. Plaintiff states that he moved to strike Defendants' affirmative defense, thereby moving for directed verdict on said defense.
>
> During the conference on jury instructions, Plaintiff objected to certain language in paragraph two of the Statement of the Issues and to Instructions Nos. 19 and 20. The statements were in reference to Defendants' theory of an alternate safe route, their affirmative defense to the negligence claim. However, Plaintiff did no more than object to the inclusion of certain language in the statement and jury instructions. The Court is unwilling to construe an objection to jury instructions as a motion for directed verdict.

> The Court therefore will not entertain Plaintiff's Motion for Judgment Notwithstanding the Verdict as it first requires that he move for directed verdict, which was not done.

We find no error in this ruling. *See Field v. Palmer*, 592 N.W.2d 347, 351 (Iowa 1999) ("Because the issue the defendant raised in its posttrial motion and on appeal had not been raised in its motions for directed verdict, the defendant could not rely on that issue on appeal.").

Gudenkauf now argues he could not have raised the issue in a motion for directed verdict because its basis—an inconsistent verdict—was not known until after the jury returned its verdict. However, in his motion for judgment notwithstanding the verdict, Gudenkauf argued "there was no evidence or facts presented at trial creating an issue to resolve by the trier of facts as to Larry Gudenkauf's contributory or comparative negligence or fault." This basis was known to Gudenkauf at the close of evidence and the jury's verdict had no bearing on the motion. We affirm the district court's denial of his motion for judgment notwithstanding the verdict.

AFFIRMED.

Mansfield, J., concurs; Sackett, C.J., concurs specially.

SACKETT, C.J. (concurs specially)

I agree with the well-written majority opinion. I write specially to the extent that it is relevant here to advance my belief that a party who agrees to a sealed verdict and/or does not assure that the district court will not dismiss the jury before the parties have the opportunity to examine the verdict waives a challenge to its inconsistency. The inconsistency should first be urged before a jury has been discharged when the district court can send the case back to the jury with instructions to address the inconsistency.