IN THE COURT OF APPEALS OF IOWA

No. 1-1006 / 11-1167
Filed February 15, 2012

CONSTANCE M. MAIERS,
Plaintiff-Appellee,

vs.

PRISCILLA GANSEN, a deceased person, and PETER J. GANSEN, as Executor of the ESTATE OF PRISCILLA GANSEN,
Defendants-Appellants.

Appeal from the Iowa District Court for Dubuque County, Michael J. Shubatt, Judge.

Defendant appeals an evidentiary ruling and damages awarded to plaintiff for injuries sustained by tripping on defendant's sidewalk. **AFFIRMED.**

Brian R. Kohlwes of Law Office of Scott J. Idleman, Des Moines, for appellants.

Davin C. Curtiss of O'Connor & Thomas, P.C., Dubuque, for appellee.

Considered by Danilson, P.J., and Tabor and Mullins, JJ.

TABOR, J.

Plaintiff Constance Maiers fractured her left elbow when she tripped on a raised portion of sidewalk in front of Priscilla Gansen's home. Maiers filed a negligence suit against Gansen.[1] This appeal follows a jury verdict awarding Maiers $191,916.20—reduced to $163,128.77 based on the finding that Maiers was fifteen percent at fault. On appeal, Gansen challenges the district court's decision to allow the jurors to see photographs of the sidewalk taken after Maiers's fall showing the raised portion had been ground down to make the area safer for other pedestrians. Gansen also argues the verdict was excessive.

While the plaintiff's photographs depict subsequent remedial measures, Maiers did not offer them to prove Gansen's negligence. She offered them only to show the sidewalk's condition, which was contested at trial. The district court cautioned the jurors to disregard the repair when determining fault. Accordingly, we find no violation of Iowa Rule of Evidence 5.407. As for Gansen's second claim, we decline to disturb the jury's verdict on damages because it was supported by substantial evidence of the pain and ongoing physical limitations suffered by Maiers as a result of her fall.

I. Background Facts and Procedures

Constance Maiers regularly met her cousin Joan Riniker for walks along Asbury Road in Dubuque. On September 26, 2007, the pair had been walking for only a few blocks when Maiers caught her foot on a raise in the sidewalk in

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[1] Gansen, who was ninety-one years old, died five months after Maiers's fall. Her estate is defending the lawsuit. For convenience, we will refer to her estate as Gansen throughout the remainder of the opinion.

front of Priscilla Gansen's home. Maiers dropped to her right knee and hands, and when her left hand "gave out" she "ended up on her elbow." The impact of the fall fractured the sixty-six-year-old's left elbow and forearm.

In November 2007, Maiers's daughter, Patti Behning, and Maiers's attorney, Davin Curtiss, photographed the portion of the sidewalk where Maiers fell. By that time, the raised portion of the concrete pad had been ground down so that it was more even with the adjoining pad.

On September 11, 2009, Maiers filed a petition alleging Gansen was negligent in maintaining her sidewalk and that her negligence resulted in Maiers's trip and fall.

On May 12, 2011, Gansen filed a motion in limine requesting that pursuant to rule 5.407, the district court exclude any photographs or other proof that Gansen repaired the sidewalk after Maiers's fall. The district court denied Gansen's motion regarding the photographs of the sidewalk just before opening statements. The court recognized "without question that this is a remedial measure taken on the part of Ms. Gansen or someone acting on her behalf." But the court noted previous cases have allowed in similar evidence to show a condition of the property. Because no photographs depicting the sidewalk before the subsequent remedial measure were available, and given that the parties disagreed as to the extent of the sidewalk's unevenness, the court overruled the defendant's limine motion and advised that it would give a limiting instruction when the plaintiff offered the exhibits. The court admonished plaintiff's counsel that the photographs could be admitted only to show the condition of the

sidewalk, and not for any other purpose, and that the repair was to be mentioned as little as possible throughout witness testimony.

Over Gansen's objection, the court admitted the photographs into evidence, issuing the following curative instruction:

> Ladies and Gentlemen of the Jury, the photographs that have been admitted into evidence are to be used by you for the sole purpose of determining the condition of the property at the time of Plaintiff's fall. You should disregard the fact that a repair was made, as the repair itself may not be considered by you as evidence of negligence on the part of Defendant.

The district court also included Jury Instruction No. 25, which read: "You have received evidence that a repair was made to the sidewalk after Constance Maiers fell. You may not consider that fact as evidence that Priscilla Gansen was negligent."

The jury found Gansen liable, and returned a verdict of $191,916.20 in damages. The court adjusted the damages to reflect the jury's finding that Maiers was fifteen percent at fault. In a motion for new trial or remittitur, Gansen revived her argument regarding the admission of the photographs and alleged the verdict awarded by the jury was excessive. She also filed a motion for judgment notwithstanding the verdict, arguing Maiers failed to present substantial evidence for both negligence and damages. The district court denied all post-trial motions.

Gansen's challenge on appeal is two-fold. First, she contests the district court's decision to allow in photographs of the sidewalk after the repair, arguing that because the photographs depict a subsequent remedial measure, they

should be barred under rule 5.407. Second, she contends the jury's damages verdict is excessive.

II. Standards 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). We also review a district court's denial of a new trial or remittitur of excessive damages for an abuse of discretion. *Ort v. Klinger*, 496 N.W.2d 265, 269 (Iowa Ct. App. 1992). In such rulings, the district court enjoys broad, but not unlimited, discretion in deciding whether the verdict achieves substantial justice. *Riniker v. Wilson*, 623 N.W.2d 220, 230 (Iowa Ct. App. 2000). Determining damages is a function of the jury and not the court; we will not invade the province of the jury. *Id.* Courts should not set aside a verdict simply because they would have reached a different conclusion than the jury. *Ort*, 496 N.W.2d at 269. In determining whether the verdict is excessive, we view the evidence in the light most favorable to the plaintiff. *Triplett v. McCourt Mfg. Corp.*, 742 N.W.2d 600, 602 (Iowa Ct. App. 2007).

III. Analysis

A. The District Court Properly Admitted the Photographs of the Ground-Down Sidewalk into Evidence

Iowa Rule of Evidence 5.407[2] excludes evidence of subsequent remedial measures undertaken by the defendant for purposes of proving negligence or

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[2] Iowa Rule of Evidence 5.407 reads:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the

culpable conduct. This rule encourages defendants to make remedial efforts after an injury occurs, uninhibited by the concern that evidence of the improved condition would be used against them at trial. *Bangs v. Maple Hills, Ltd.*, 585 N.W.2d 262, 266 (Iowa 1998); *see also* Iowa R. Evid. 5.407, advisory committee's comment (1983).

Gansen contends admitting the photographs violated rule 5.407. Specifically, she argues the photographs were not admissible under the exceptions listed in the rule. In her estimation, because the parties disagreed about the extent of the unevenness of the sidewalk, photographs of the ground-down portion did not assist the jury in assessing the difference in elevation on the day of the fall.

Maiers counters that Gansen's argument oversimplifies rule 5.407. Maiers asserts she introduced the photographs to show not only the height of the sidewalk pad, but the overall condition and color of the sidewalk and to rebut Gansen's argument that the hazard was open and obvious. She concludes that because her exhibits were offered for legitimate purposes, and not to prove Gansen's negligence, the district court properly admitted them at trial.

We start our analysis from the accepted premise that rule 5.407 does not function as a general rule of exclusion. *See McIntosh v. Best Western*

> subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered in connection with a claim based on strict liability in tort or breach of warranty or for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Steeplegate Inn, 546 N.W.2d 595, 597 (Iowa 1996). Instead, it operates to preclude the evidentiary use of subsequent remedial measures to prove negligence. *Id.* Consequently, the rule does not bar evidence from being admitted to prove other legitimate matters. *Id.* Evidence of a subsequent remedial measure need not necessarily fit within one of the specifically stated exceptions in rule 5.407 to be properly admitted at trial. *See Eldridge v. Casey's Gen. Stores, Inc.*, 533 N.W.2d 569, 570 (Iowa Ct. App. 1995). When evidence is relevant and essential to showing the condition upon which plaintiff's claim depends, it should not be excluded under rule 5.407 on the basis that the evidence might also tend to establish negligence. *McIntosh*, 546 N.W.2d at 597.

In the present action, the disputed issue was not merely that a displacement existed between the two sidewalk pads, but the extent of the displacement. Peter Gansen, Priscilla's son, testified the change in elevation was "three-quarters, maybe seven-eighths of an inch at the worst part." But several witnesses for Maiers testified the height difference between the two pads was two inches at the time of the fall.[3] A Dubuque city ordinance prohibits changes in height or separation of three-quarters of an inch or greater. Maiers's purpose in offering the photographs was not to highlight Gansen's remedial efforts, but to show the condition of the sidewalk at the time of her fall—a contested issue at trial.

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[3] The two-inch gap was mentioned in the testimony of the following witnesses: Maiers; her cousin and walking partner Joan Riniker; her daughter Patti Behning, who went to the scene the day after the fall; and Kevin Eipperle, an architect retained as an expert witness in the matter.

We considered a similar set of circumstances in *Eldridge*. In that case, a plaintiff sought to admit photographs of a crack in the pavement which the defendant subsequently spray painted orange. *Eldridge*, 533 N.W.2d at 570. Two days after the fall, the plaintiff's husband photographed the crack, using a ruler to measure the unevenness; the photographs also revealed the defendant's efforts to warn others of the tripping hazard by virtue of the orange spray paint. *Id.* Like the case at bar, the photographs showing the defendant's remedial measure were the only images available. *Id.* The district court noted Eldridge's right to depict the location of the fall, as well as the business operator's interest in excluding evidence of subsequent remedial measures because of the possible prejudicial effect. Because the court admitted the pictures to show the measurements, and advised Eldridge not to rely on the photos to draw attention to the operator's remedial measure, we concluded the decision "was a sensible compromise to balance the parties' competing interests." *Id.*

Gansen argues *Eldridge* should not govern because the elevation in the pavement had not been altered, whereas here, the act of grinding down Gansen's sidewalk hindered the ability to measure the rise. We do not believe that this distinction undermines the applicability of the *Eldridge* holding. In the instant case, the district court admitted seventeen photographs, each showing different angles of the sidewalk. Some of the photographs included points of reference, such as a ruler, keychain, and shoe. In some of the photographs, the plaintiff placed a hardcover book across the surface of the unground portion of the sidewalk pad, aligning the book so that its edge would simulate the lip of the

cement before the repair. Doing so demonstrated the extent of the elevation before the remedial measure. The district court was correct in deciding that the exhibits assisted the jury by approximating the extent to which one sidewalk pad rose above the other. The photos not including measurements were properly admitted to show the similarity in color of the sidewalk segments. They corroborated witness testimony that the two surfaces, as well as the sides of the pads, were the same shade of grey, making it more difficult to perceive the change in surface height.

In denying Gansen's post-trial motions, the district court properly followed the *Eldridge* framework. The court balanced Maiers's right to portray the scene of her fall against the danger of unfair prejudice to Gansen, reasoning: "The defense disputed the condition of the sidewalk, and to prevent plaintiff from offering any visual evidence would, in the Court's view, have raised insurmountable questions in the jury's mind, unfairly prejudicing Plaintiff in her effort to prove her case." Moreover, the curative instruction accurately stated the law. The photographs were not so unduly prejudicial that it would be impossible for the jury to abide by the instruction. *See McIntosh*, 546 N.W.2d at 597 (noting proper procedure, according to the official comment to rule 5.407, is to include a limiting instruction when such evidence is entered at trial). The court admitted the photographs for the narrow purpose of showing the sidewalk's condition, warned both parties not to use the evidence for any other purpose, and instructed witnesses not to mention the repair unless absolutely necessary.

We also reject Gansen's argument that the district court's decision was contrary to the rationale in *Bangs* and *Scott*. Both of those cases are distinguishable from the instant facts. In *Bangs*, the court allowed evidence showing subsequent remedial measures under the feasibility exception to rule 5.407, not because the condition of the grate or sidewalk was disputed by the parties. *Bangs*, 585 N.W.2d at 267 (admitting evidence after defense denied feasibility of welding sidewalk during closing arguments). In this case, the condition of the sidewalk is at the heart of the dispute.

In *Scott*, the plaintiff attempted to present evidence that after he was injured by a jack that collapsed and crushed his foot, the defendant manufacturer modified the jack's design. *Scott*, 774 N.W.2d at 503. Our supreme court analyzed the strict liability exception to rule 5.407; that analysis does not shed light on the question in this negligence case. *See id.* at 508. Moreover, unlike *Scott*, where the defective and redesigned products were both available to the parties, the only evidence of the condition leading to Maiers's injury depicts the sidewalk after remedial action was taken.

Under our prior interpretations of rule 5.407, a defendant's interest in not disclosing subsequent remedial efforts to the jury may be trumped by a plaintiff's genuine need to offer the evidence to show the hazard. In this case, the proffered photographs tended to show the condition as it existed at the time of Maiers's injury. Because no photographs existed showing the sidewalk before it was ground down, the exhibits were the only depiction of the condition giving rise

to Maiers's claim. The evidence was relevant, as the parties disagreed as to the extent of the displacement of the pads.

Courts in other jurisdictions have employed similar reasoning when determining whether to allow in photographs of subsequently repaired sidewalks. *See E.V.R. II Assoc., Ltd. v. Brundige*, 813 S.W.2d 552, 557 (Tex. App. 1991) (admitting photographs of cracked sidewalk that had since been repaired because they were the only known photographs of the scene and accurately portrayed location so that jury would understand lay of land, proximity of nearby structures, and material used in walkway); *cf. Bushie v. City of Crookston*, 368 N.W.2d 424, 425–26 (Minn. Ct. App. 1985) (excluding photographs when parties agreed on the two-inch rise in the sidewalk at the time of accident and a diagram of the sidewalk was entered into evidence). Because Maiers used the exhibits for a legitimate purpose and not to show Gansen's negligence, the district court did not abuse its discretion by allowing the photographs into evidence.

B. The Jury's Damage Award Was Not Excessive.

In her next assignment of error, Gansen argues the district court wrongfully denied her motion for new trial or remittitur on the basis that the jury's damages verdict was excessive and not supported by the evidence. Awarded damages should fairly and reasonably compensate the plaintiff for any injuries sustained. *Blume v. Auer*, 576 N.W.2d 122, 125 (Iowa Ct. App. 1997). We will not disturb a jury's verdict unless it is: (1) either flagrantly excessive or inadequate; (2) so out of reason as to shock the conscience or sense of justice; (3) presumptively the result of the jury's passion, prejudice or other ulterior

motive; or (4) lacking in evidentiary support. *Riniker*, 623 N.W.2d at 230. In ruling on Gansen's post-trial motions, the district court declined to revise the verdict, noting that although the damages were more than Gansen expected, they did not fit into any of the above-enumerated categories.

Gansen alleges the jury arrived at the $191,916.20 damage award based on an interrogatory requiring Maiers to list the dollar amounts she was claiming, rather than the evidence presented at trial. Maiers replies that she presented substantial evidence at trial to support the verdict, and that the interrogatory had no effect on the jury's verdict. Moreover, Maiers argues that because Gansen not only admitted the interrogatory into evidence, but also insisted the jurors have access to the interrogatory during their deliberations, that her argument as to lack of evidence should be considered waived.

Before trial, Gansen propounded "Interrogatory No. 10," which requested an itemized listing of damages Maiers claimed to have suffered as a result of her fall. *See Gordon v. Noel*, 356 N.W.2d 559, 564 (Iowa 1984) (recognizing defendant's right to be apprised of the amount of plaintiff's claim, separated into each category of damages). With the help of her attorney, Maiers listed the following amounts:

(a) $11,178.68 for past medical and hospital services;
(b) $0 for future medical and hospital services;
(c) $35,000 to $50,000 for past mental and physical pain and suffering;
(d) $25,000 to $40,000 for future mental and physical pain and suffering;
(e) $11,000 for past lost earnings;
(f) $4525 annually for future lost earnings;
(g) $0 for lost property;

(h) $35,000 to $50,000 for past loss of use of left elbow/forearm, and $35,000 to $50,000 for future loss of use of left elbow/forearm.

At trial, Gansen offered the interrogatory into evidence, and requested the jury have access to the interrogatory during its deliberations. The jury returned a verdict awarding damages in the following amounts:

(a) $5916 for past medical expense;
(b) $6000 for past lost wages;
(c) $0 for loss of future earning capacity
(d) $40,000 for past physical and mental pain and suffering;
(e) $40,000 for future physical and mental pain and suffering;
(f) $50,000 for past loss of function of body;
(g) $50,000 for future loss of function of body

The jury's total award of $191,916.20 was reduced to reflect the fifteen percent fault apportioned to Maiers.

Without more, Gansen's claim that the jury reached its verdict by relying on the interrogatory is not persuasive. Although some figures fell within the range Maiers claimed in her interrogatory, some of the jury damages were lower than she listed. We disagree with Gansen's theory that Maiers's request for arbitrary damage amounts dictated the jury's findings.

We find Maiers's position more convincing, that is, the jury arrived at its damage figures by embracing the plaintiff's evidence, including lay witness testimony, medical records, and expert opinions. As the finder of fact, the jury is free to accept or reject evidence presented on the issue of Maiers's damages. *See Blume*, 576 N.W.2d at 125.

Both Joan Riniker and Patti Behning testified to Maiers's pain and physical limitations following the fall. Beth Maiers, the plaintiff's daughter who has lived

with her mother for the past sixteen years, offered a detailed description of the changes the plaintiff experienced in her day-to-day life, as well as the pain her mother endured as a result of the injuries. Constance Maiers gave her own account of how the injury has affected her activities. She still experiences pain in her left elbow and forearm, as well as numbness and tingling in her pinky and ring finger on a daily basis.

In addition to medical records submitted into evidence, the jury received depositions from Dr. Scott Schemmel and Dr. Brian Adams. Dr. Schemmel testified Maiers suffered fractures to her left elbow and forearm as a result of the September 2007 fall, and that she was referred to him because her injuries were healing slower than expected and with complications. He noted her pain and limited mobility, and that he referred her to Dr. Adams because her injuries continued to heal improperly. Dr. Adams is an orthopedic specialist. He operated on her elbow on February 14, 2008, after diagnosing Maiers with malunion of the left elbow joint specific to her radial head and neck fracture, as well as injury to her ulnar nerve. Both doctors testified to the medical setbacks during Maiers's recovery, the pain she experienced, as well as the physical limitations that resulted from the injury. Dr. Adams testified this pain and limitation would last the rest of her life.

Viewing the evidence in the light most favorable to the plaintiff, we agree with the district court's conclusion that the jury verdict was not excessive. Maiers presented substantial evidence from which the jury could assess damages based on her pain and suffering throughout the healing process, as well as her limited

range of motion, which is expected to continue to impede her day-to-day activities. Because there is no exact or mathematical standard to measure damages for mental and physical pain and suffering, we leave that appraisal to the sound discretion of the jury. *See Estate of Pearson ex rel. Latta v. Interstate Power & Light Co.*, 700 N.W.2d 333, 347 (Iowa 2005). Here, the jury's verdict was substantiated by the record evidence; the district court did not abuse its discretion in denying Gansen's motion for new trial or remittitur.

AFFIRMED.