IN THE COURT OF APPEALS OF IOWA

No. 6-057 / 04-1710
Filed April 26, 2006

LAURIE FEATHERSTONE and
LAURIE FEATHERSTONE, as Mother,
Guardian and Next Friend of CIERRA
NICOLE FEATHERSTONE, a Minor,
Plaintiff-Appellant,

vs.

HY-VEE, INC.,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

The plaintiff appeals from the district court's order granting partial summary judgment and the jury verdict on her negligence claim. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

J. Russell Hixson of Hixson & Brown, P.C., Clive, for appellant.

Kenneth R. Munro of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellee.

Heard by Sackett, C.J., and Vogel and Mahan, JJ.

VOGEL, J.

Laurie Featherstone appeals the grant of partial summary judgment by the district court and subsequent verdict after a jury trial on her petition against Hy-Vee, Inc. We affirm the grant of partial summary judgment as to the punitive damages claim, but reverse the jury's verdict as to damages and remand for a new trial due to the admission of improper and unfairly prejudicial evidence.

I. Background Facts and Proceedings.[1]

At approximately 9:00 p.m. on October 5, 2000, Featherstone tripped and fell due to a hole in the parking lot paving of a Hy-Vee grocery store in Des Moines. The hole was approximately seven inches wide, twelve inches long and one and three-quarters inches deep. Featherstone suffered injuries to her knees and lower back, several contusions, and a broken tooth. She filed suit claiming Hy-Vee was negligent, causing her to incur damages for medical expenses, pain and suffering, emotional pain, loss of past and future wages, and loss of earning capacity. She also filed a loss of consortium claim on behalf of her daughter.[2]

After extensive and contentious discovery, Hy-Vee stipulated that it would admit negligence and proceed to trial solely on damages. The district court granted Hy-Vee's motion for partial summary judgment, dismissing Featherstone's claim for punitive damages. The district court also ruled in limine that evidence of Featherstone's abortion five months prior to the fall was relevant

[1] We note the massive appendix contained some duplicative material. We prompt appellant to comply with Iowa Rule of Appellate Procedure 6.15(*a*), by including only relevant portions of the record in the appendix, thereby reducing both printing expense and the burden on the appellate courts in referencing points on appeal. *See State v. Oppelt*, 329 N.W.2d 17, 21 (Iowa 1983).

[2] Her husband's loss of consortium claim was dismissed prior to trial.

as an alternative cause of her emotional distress claim and not unduly prejudicial under Iowa Rule of Evidence 5.403. The parties proceeded to trial on damages which included expert testimony on both sides concerning the existence and extent of Featherstone's injuries and the consortium claim of Featherstone's daughter.

Although the parties agreed to a sealed verdict under Iowa Rule of Civil Procedure 1.931(3), the district court read the verdict with both trial counsel appearing by telephone before the jury was discharged. The jury awarded Featherstone $10,000 past medical expenses, $5500 past lost wages, and $5000 past physical and mental pain and suffering. The jury also awarded Featherstone's daughter loss of consortium damages, $5000 for past loss and $20,000 for future loss. Neither attorney objected to the verdict or otherwise indicated that there was a problem, and the district court confirmed that they were finished making a record so the jury could be discharged. Featherstone then filed a motion for new trial arguing the jury's verdict was inconsistent and failed to administer substantial justice between the parties, claiming it was not supported by substantial evidence. The district court, noting "the nature and extent of plaintiff's injuries and damages were hotly contested at trial," overruled the motion. Giving deference to the jury's findings, the court concluded the verdict was internally consistent, supported by evidence, and effected substantial justice between the parties. Featherstone appeals.

II. Punitive Damages on Partial Summary Judgment.

Featherstone first asserts that the district court erred by granting partial summary judgment dismissing her punitive damage claim. She based her claim

for punitive damages on Hy-Vee's alleged prior knowledge of the parking lot hazard that she claimed rose to the level of willful and wanton disregard for her safety.[3] Under Iowa Rule of Civil Procedure 1.981(3), summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. In ruling upon a motion for summary judgment, the court considers "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." Iowa R. Civ. P. 1.981(3). "No fact question exists if the only dispute concerns the legal consequences flowing from undisputed facts." *McNertney v. Kahler*, ___ N.W.2d ___, ___ (Iowa 2006) (citing *Estate of Beck v. Engene*, 557 N.W.2d 270, 271 (Iowa 1996)). We therefore examine the record before the district court in deciding whether the court correctly applied the law. *McNertney*, ___ N.W.2d at ___.

Punitive damages are appropriate when "[w]hether, by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another." Iowa Code § 668A.1(1)(a) (1999). Willful and wanton means:

> [T]he actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.

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[3] Featherstone also asserted that Hy-Vee's subsequent conduct in failing to repair the parking lot and/or alleged misrepresentations during discovery should be considered as a basis for allowing a punitive damages award. However, Featherstone cites no support in Iowa law for this application. Moreover, chapter 668A does not support such an assertion but rather ties the issue of punitive damages to "the conduct of the defendant from which the claim arose." Iowa Code § 668A.1(1)(a) (1999).

Kuta v. Newberg, 600 N.W.2d 280, 288 (Iowa 1999) (citations omitted). Under the Restatement,

> [t]he actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Restatement (Second) of Torts § 500, at 587 (1965). To receive punitive damages, the plaintiff must offer evidence of defendant's persistent course of conduct to show that the defendant acted with no care and with disregard to the consequences of those acts. *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co. of Des Moines, Inc*., 510 N.W.2d 153, 156 (Iowa 1993) (citing *Beeman v. Manville Corp. Asbestos Disease Comp. Fund*, 496 N.W.2d 247, 255 (Iowa 1993)).

Featherstone argues Hy-Vee had prior knowledge of the parking lot hazard, and its failure to fix the hole entitles her to the jury's consideration of punitive damages. We agree with the district court that there was an issue of whether Hy-Vee knew or should have known of this particular hole in the paving. However, Featherstone offered proof of only one other person falling at the same Hy-Vee store, some nine months before her accident. Hy-Vee's store director, Michael Kueny, estimated in his deposition that over 30,000 shoppers traverse the same parking lot each week, 9000 of which walk there after dark. According to section 668A.1 and our case law, one incident prior to the accident in question simply does not amount to a persistent course of conduct such that punitive

damages would attach. *See generally McCarthy v. J. P. Cullen & Son Corp.*, 199 N.W.2d 362, 369 (Iowa 1972). As the district court concluded, this only raised an issue of negligence, which was already admitted. We therefore conclude the district court did not err by granting summary judgment on the punitive damages claim. *Cf. McClure v. Walgreen Co.*, 613 N.W.2d 225, 231 (Iowa 2000) (finding thirty-four incident reports in evidence occurring within a three-year period before the incident in question supported submission of a punitive damage claim to the jury); *Lovick v. Wil-Rich*, 588 N.W.2d 688, 699 (Iowa 1999) (holding that evidence Wil-Rich failed to institute a warning campaign for numerous years despite knowledge of numerous similar incidents involving its cultivator warranted submission of punitive damage claim); *McCarthy*, 199 N.W.2d at 369 (holding there was substantial evidence the defendant "knowingly and intentionally persisted in a course of conduct despite repeated protests and complaints of its harmful consequences, thereby disclosing such willful disregard for plaintiffs' rights as to create a jury issue relative to punitive damages."). We affirm on this issue.

III. Motion in Limine—Evidence of Prior Abortion.

Because Featherstone's petition contained a claim for "emotional pain" caused by the fall, Hy-Vee sought to introduce evidence of other causes of Featherstone's emotional wellbeing. Featherstone contends that the district court erroneously admitted evidence of her prior abortion over her objections to both relevance and undue prejudicial effect. We review evidentiary claims for an abuse of discretion. *Jensen v. Sattler*, 696 N.W.2d 582, 585 (Iowa 2005). An abuse of discretion occurs when the court's decision is based on a ground or

reason that is clearly untenable or when the court's discretion is exercised to a clearly unreasonable degree. *Wilson v. Vanden Berg*, 687 N.W.2d 575, 581 (Iowa 2004).

Ordinarily, emotional distress damages must be proven by expert testimony—

> It must be remembered that damages are not recovered because one has experienced a horrific event, no matter how wrenching. The recovery is not for the event itself, but for the impact the event is shown to have had in terms of the later emotional condition of the claimant.

Roling v. Daily, 596 N.W.2d 72, 76 (Iowa 1999).

Evidence of the abortion came in through the deposition testimony of Featherstone's treating physician, Dr. Malea Jensen, D.O.:

> Q. [D]octor, but May 9th, 2000, she came in to see you with regards to the pregnancy, didn't she? A. Yes.
> Q. And did she tell you at that time that she was unwilling to bring another life into the world at this time due to her complications with her marriage as well as her jobs? (the question was repeated) A. Yes.
> Q. All right. And then, Doctor, I take it that you referred her out after that and didn't have anything else to do with the pregnancy or whatever happened with that pregnancy; is that correct? A. Correct.

The district court found the evidence of the prior abortion relevant to Featherstone's claims of emotional distress which could have resulted in difficulties with her marriage and her ability to maintain employment. While Featherstone asserted throughout discovery that the accident and subsequent depression affected her marriage, her counsel stated at the hearing that Featherstone would not be testifying that her injuries led to her marital breakup. Nonetheless, Hy-Vee argued for inclusion of the abortion evidence as relevant to

Featherstone's claim for emotional distress damages to which the district court stated:

> Once the plaintiff makes a claim for damages for mental anguish, emotional distress, she places her mental health at issue. And unless the plaintiff wishes to withdraw her claim for mental anguish completely, rather than cherry-picking certain elements of her claim of mental anguish, then I think the defendant is entitled to cross-examine her about her mental health history, the things in her life that may have contributed to her mental anguish, and so forth. And I really don't see how you can keep it out. I think the only way to keep these issues from the jury is to withdraw your claim completely for mental anguish, and I don't hear you doing that.

Although the district court ruled the abortion evidence relevant, there is no articulation in the record of the balancing test under rule 5.403, determining the evidence is more probative than prejudicial.

We begin by analyzing the relevance of the abortion evidence in light of the pretrial expert medical opinions. *See* Iowa R. Evid. 5.402. When presented with records from Planned Parenthood, Featherstone's treating psychiatrist, Dr. James Gallagher, stated in a letter that her previous history of an abortion was not significant to her current mental health issues. Even Hy-Vee's own expert, Dr. Michael Taylor, denied at deposition that the prior abortion contributed to Featherstone's current presentation and severe depression, stating:

> Q. Line 20 please. A. [Featherstone] estimated that the onset of her depression was about a year later [after the fall in October 2002]. . . . She said that she had the therapeutic abortion because of financial problems that she and her husband were experiencing due to her previous gambling and the fact that they were at that point living with her sister.
> Q. You further indicate here in your report that Ms. Featherstone denied that she experienced depressive symptoms either following past miscarriages or a therapeutic abortion, do you see that? A. Yes.

> Q. Do you find that any of those things are contributing to her current major depressive disorder and her current presentation? A. No.

No medical evidence tied her depression to her prior abortion. Moreover, the uncontradicted expert evidence presented at trial concluded that her major depressive disorder was a result of the alleged physical injuries caused by her fall at Hy-Vee.

There is some evidence that Featherstone was upset by her deteriorating marriage which predated the fall, however there is no evidence that Featherstone suffered from depression prior to the fall; Moreover, the defense was able to present evidence at trial that Featherstone had prior miscarriages, a gambling problem, financial difficulties, and a marital breakdown including her husband's infidelity that resulted in her contracting a sexually transmitted disease through the medical records, reports, and deposition testimony of Dr.'s Taylor, Jensen, and Gallagher. The evidence of the abortion, which occurred five months prior to the accident, had minimal probative value considering the undisputed expert testimony denying its connection to her claim for emotional distress and the other evidence available at trial to show an outside cause unrelated to the fall at Hy-Vee. We therefore find the evidence of Featherstone's abortion not relevant to her claimed injuries and damages. *See Nichols v. American Nat'l Ins. Co.*, 154 F.3d 875, 885 (8th Cir. 1998) (refuting the admissibility of the plaintiff's prior abortion when the defense claimed it would be relevant on damages, but neither expert gave an opinion that the abortion had contributed to emotional distress, only that it could have).

A presumption of prejudice arises when the trial court has received inadmissible evidence over proper objection. *In re Estate of Kelly*, 558 N.W.2d 719, 723 (Iowa Ct. App. 1996); *Stumpf v. Reiss,* 502 N.W.2d 620, 623 (Iowa Ct. App.1993). The presumption, however, is insufficient to support a reversal if the record demonstrates a lack of prejudice. *Kelly*, 558 N.W.2d at 723. In addition, Federal Rule of Evidence 403, upon which Iowa's rule 5.403 is based, contains an Advisory Committee note stating,

> In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction . . . . The availability of other means of proof may also be an appropriate factor.

Fed. R. Evid. 403.

There was no limiting instruction guiding the jury that the abortion evidence was to be used only in determining causation of emotional distress damages. Furthermore, plaintiff was put in the untenable position of having to decide whether to voir dire the jury on the possible prejudicial effect any abortion testimony would have on its consideration of damages, or remain silent on the issue until it would be likely raised later by Hy-Vee. Featherstone chose to bring up the subject as an offensive tactic during voir dire. *See also State v. Daly*, 623 N.W.2d 799, 800-01 (adopting the dissent position of *Ohler v. United States*, 529 U.S. 753, 760, 120 S. Ct. 1851, 1855, 146 L. Ed. 2d 826, 833 (2000), and holding a defendant's preemptive tactical introduction of evidence in response to an adverse in limine ruling does not waive error of that evidence on appeal). Informing the jury that the plaintiff had had an abortion presents the danger of provoking "the fierce emotional reaction that is engendered in many people when

the subject of abortion surfaces in any manner." *Nichols*, 154 F.3d at 885 (quoting *Nickerson v. G.D. Searle & Co.*, 900 F.2d 412, 418 (1st Cir. 1990)).[4]

We conclude the district court abused its discretion in admitting the abortion evidence when there was no pretrial indication through discovery that the prior abortion had an impact on Featherstone's emotional condition subsequent to the fall. Due to our disposition of the case, we need not reach Featherstone's remaining assignments of error but reverse and remand for a new trial on damages only.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Mahan, J. concurs; Sackett, C.J., concurs in part and dissents in part.

[4] Other jurisdictions also support a finding that abortion evidence is unfairly prejudicial. *See State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977) (stating complainant's previous abortion was manifestly prejudicial); *Davila v. Bodelson*, 704 P.2d 1119, 1125 (N.M. Ct. App. 1985) (stating "abortion is an issue which sparks emotional controversy in society" and "has potential for inflaming passions of a jury"); *Garcia v. Providence Med. Ctr.*, 806 P.2d 766, 771 (Wash. Ct. App. 1991) (noting strong and opposing attitudes concerning abortions and the extremely prejudicial effect on jury).

SACKETT, C.J. (concurring in part and dissenting in part)

I concur in part and dissent in part. I would affirm the district court in all respects.

The majority has reversed contending the district court abused its discretion in admitting certain evidence. First, I do not believe error was preserved on the issue, and second, the evidence admitted showed little more than plaintiff by her own admission suffered emotional distress before her fall. The district court did not abuse its discretion. I would affirm.