

IN THE COURT OF APPEALS OF IOWA

No. 6-315 / 05-1040
Filed June 28, 2006

STEVEN J. FABER,
Plaintiff-Appellee/Cross-Appellant,

vs.

DOUGLAS D. HERMAN,
Defendant-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Jones County, L. Vern Robinson,
Judge.

Douglas D. Herman appeals the jury's finding of negligence and award of damages in a legal malpractice suit against him. Steven J. Faber cross-appeals, challenging the sufficiency of the evidence supporting comparative fault.

**AFFIRMED ON APPEAL; REVERSED AND REMANDED ON CROSS-
APPEAL.**

Robert Hogg and Patrick Roby of Elderkin & Pirnie, P.L.C., Cedar Rapids,
for appellant.

Max Kirk of Ball, Kirk, & Holm, P.C., Waterloo, for appellee.

Heard by Mahan, P.J., and Hecht and Vaitheswaran, JJ.

MAHAN, P.J.

Douglas D. Herman appeals the jury's finding of negligence and award of damages in a legal malpractice suit against him. He challenges the sufficiency of the evidence to support the verdict, the sufficiency of the evidence to support the jury instructions on negligence, and the amount and foreseeability of alleged damages. Faber cross-appeals, challenging the sufficiency of the evidence supporting the jury instructions on comparative fault. We affirm the appeal and reverse and remand the cross-appeal.

I. Background Facts and Proceedings

Steven Faber and Karen Faber were married on April 21, 1979. Faber began working for Anamosa State Penitentiary in 1981. On August 13, 1998, Karen filed a petition for dissolution. Karen was represented by Karl Moorman. Faber was represented by Douglas Herman. The proceedings of the dissolution were marked by contention and involved custody, child support, visitation, attorney fees, the family home, contact issues, and property distribution. The last included Faber's benefits through the Iowa Public Employees Retirement System (IPERS), the subject of this suit.

At the time of the dissolution, Faber's latest statement from IPERS showed an investment value of \$38,179, a death benefit of \$63,785.94, and a monthly benefit at age sixty-five or older of \$1210.59 per month. "Investment value" means that, had Faber chosen to quit working at the time of the dissolution, he would have been entitled to a lump sum of \$38,179.

The parties decided to split the value of the IPERS. Their settlement stipulation read as follows: "The Respondent shall immediately pay \$19,100.00 to

the Petitioner from his I.P.E.R.S. retirement account pursuant to a separate Qualified Domestic Relations Order.” Moorman submitted a draft Qualified Domestic Relations Order (QDRO) to IPERS. It read as follows: “The Plan Administrator is directed to recognize an independent interest of the Alternate Payee in the accrued benefit/account and/or retirement plan of the Participant under said Plan in the amount of \$19,100.00.” IPERS, however, rejected the proposed QDRO as inconsistent with IPERS policy.¹ IPERS also sent Moorman a model QDRO. Moorman changed the language and format of the Fabers’ QDRO, and resubmitted it on May 28, 1999. IPERS accepted the QDRO. Thus, the QDRO filed July 6, 1999, and signed by Moorman and Herman reads as follows:

IPERS is directed to pay benefits to the Alternate Payee as a marital property settlement under the following formula: Fifty percent (50%) of the gross monthly or lump sum benefit payable at the date of distribution to the Member multiplied by the “service factor.” The numerator of the service factor is 70 and the denominator is the Member’s total quarters of service covered by IPERS.

Herman wrote Faber on September 1, 1999, to tell him the QDRO, which “divide[d] your IPERS consistent with the Stipulation filed in the Dissolution action” had been approved.² He included a copy of the QDRO with the letter.

In 2000 the Iowa Legislature enacted Iowa Code section 97B.50A allowing in-service disability benefits under IPERS. Sometime later, Faber was disabled from exposure to mace and secondhand smoke at the prison. Without consulting an attorney, he filed an application with IPERS for in-service disability benefits.

¹ As written, the initial QDRO attempted to establish independent rights of the Alternate Payee.

² This is known as the “service method” of dividing IPERS.

On January 24, 2001, IPERS notified Faber he would begin receiving benefits of \$2172.08 per month on February 1, 2001. On February 28, 2001, however, Faber received a letter from IPERS stating that, due to the QDRO on file, his monthly benefits would be reduced. He would receive \$1209.77, while Karen would receive \$962.31.

Faber contacted Herman by letter about the notification from IPERS. He explained that he only resigned because IPERS told him he would receive the full monthly amount. He wrote that he did not know the QDRO applied to special service disability. He wanted to know if IPERS could be held liable for initially misinforming him. He also wanted to know if he could contact Karen about a cash settlement. He ultimately offered her \$30,000 in exchange for her interest in the IPERS. She refused.

On March 28, 2001, Herman wrote to Moorman to withdraw Faber's settlement offer. He explained Faber's position regarding IPERS, and wrote that unless Karen agreed she was ineligible to receive benefits until Faber was sixty-two, he would seek modification of the dissolution requesting reduced child support, a change in health insurance, elimination of alimony, and an injunction prohibiting Karen from spending any of the IPERS money. According to testimony, sometime later Herman filed a declaratory judgment action arguing it was unfair to allow Karen to receive an early distribution based on a disability Faber did not contemplate at the time of the dissolution.

On March 14, 2002, Herman wrote to Dan Swift, Karen's new attorney, as follows:

[U]pon reviewing the file with my client I have discovered that the language of the QDRO does not appear to be consistent with the parties' agreement within the Judgment and Decree of Dissolution of Marriage. The Judgment and Decree specifies an exact amount of the IPERS account to which your client was entitled. For whatever reason the QDRO was not worded in a manner consistent with the Stipulation.

On April 18, 2002, Herman filed a motion for an order nunc pro tunc to correct the QDRO. He testified later that he did not personally believe the positions he advocated in the motion for nunc pro tunc, but that he asserted them in an effort to help his client.³ The motion for declaratory judgment and the motion for nunc pro tunc were both denied on July 8, 2002. Herman reported the result to Faber, writing:

The court found that everything about the language used by the court and the parties evidence an intention to award the IPERS account in the normal and ordinary fashion, i.e.: a one-half (1/2) percentage of the account value accumulated during the marriage of the parties. The Court specifically stated, "The Dissolution Court and the parties intended the division of the IPERS account that has resulted. . . ."

Herman filed a motion for reconsideration, which was denied. He discouraged Faber from appealing due to both expense and likelihood of success.

Faber brought this action for legal malpractice against Herman on November 24, 2003. He alleged Herman was negligent both in advising him and in drafting the dissolution stipulation and QDRO. He also alleged damages

in an amount which includes the extent to which the alternate payee, Karen J. Faber, will receive benefits from Plaintiff [Faber's] retirement plan with IPERS in excess of the amount to which the alternate payee is legally entitled to recover pursuant to the parties' dissolution of marriage Stipulation and Decree.

³ Herman testified, "Again, I believed the QDRO as signed by the judge was consistent with [the Fabers'] agreement."

Herman denied the claims.

After the jury's verdict finding Herman seventy-percent negligent and Faber thirty-percent negligent, the district court entered judgments against Herman for \$20,984.47, with interest from the date of filing, and \$88,349.93 with interest from the date of judgment.⁴ Faber filed a motion for judgment notwithstanding the verdict on May 10, 2005. Herman filed a motion for judgment notwithstanding the verdict and a motion for new trial on May 16, 2005. The district court denied all motions on May 24, 2005. Herman appeals and Faber cross-appeals.

II. Standard of Review

Herman's motion for judgment notwithstanding the verdict asserts a sufficiency-of-the-evidence claim, while Faber's motion asserts error in the jury instructions regarding comparative fault. We review the rulings on a motion for judgment notwithstanding the verdict for errors at law. See *Estate of Pearson ex rel. Latta v. Interstate Power & Light Co.*, 700 N.W.2d 333, 340 (Iowa 2004) (“[W]e review rulings on motions . . . for judgment notwithstanding the verdict for correction of errors at law.”); see also *Boyle v. Alum-Line, Inc.*, 710 N.W.2d 741, 748-49 (Iowa 2006) (reviewing a challenge to jury instructions for errors at law); *Estate of Hagedorn ex rel. Hagedorn v. Peterson*, 690 N.W.2d 84, 87 (Iowa 2004) (reviewing sufficiency of the evidence claim as legal question). In our analysis, we inquire whether substantial evidence exists to support submission of the claim to the jury. *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 859

⁴ The first award reflects damages up to the date of trial, while the second reflects future damages.

(Iowa 2001). We view the evidence in the light most favorable to the nonmoving party. *Id.*

We review a motion for new trial according to the grounds on which it is based. *Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc.*, ___ N.W.2d ___, ___ (Iowa 2006). Herman's motion is based on both sufficiency of the evidence and an error in jury instructions. Thus, we review the ruling on his motion for errors at law. See *Hagedorn*, 690 N.W.2d at 87; *Boyle*, 710 N.W.2d at 748-49.

III. Merits

A. Sufficiency of the Evidence

In his sufficiency-of-the-evidence claim, Herman argues Faber failed to show proximate cause. In order to show negligence in a legal malpractice action, the plaintiff must show that, but for the attorney's alleged negligence, the loss would not have occurred. "In an action based upon the negligent handling of a law suit, the plaintiff must prove that absent the lawyer's negligence, the underlying suit would have been successful." *Blackhawk Bldg. Sys., LTD v. Law Firm of Aspelmeier, Fisch, Power, Warner & Engberg*, 428 N.W.2d 288, 290 (Iowa 1988). Thus, in order to show negligence, Faber must show Karen would have originally agreed to settle the IPERS issue. The question of proximate cause is generally one of fact; if the facts are so compelling such that rational people could not differ in their conclusions, proximate cause may be determined as a matter of law. *Schmitz v. Crotty*, 528 N.W.2d 112, 115 (Iowa 1995).

In support of his argument, Herman points out that (1) at the time of the dissolution, Karen wanted the IPERS for retirement assets; (2) the written

stipulation showed Karen would receive “one-half” of the IPERS; (3) Faber did not believe he would be limited to \$19,100, even though the IPERS account was to be split equally; (4) Karen rejected Faber’s proposal to “cash-out” of the IPERS account for \$30,000; (5) in the prior declaratory judgment and nunc pro tunc action, the district court determined the parties intended the division of the IPERS account that resulted; (6) neither Karen nor Moorman were called to testify; and (7) because the IPERS account was not valued by an expert, it would have been malpractice for Moorman to accept any division other than the one ordered.

Faber’s contention that Karen would have accepted a \$19,100 buyout is not without support. First, the written stipulation signed by Karen and Faber and accepted by the district court reads, “[Faber] shall immediately pay \$19,100.00 to [Karen] from his I.P.E.R.S. retirement account pursuant to a separate Qualified Domestic Relations Order.” Steve Lytle, a family law attorney who testified on Faber’s behalf, stated the use of the word “immediate” indicated to him that the parties believed there would be a lump-sum payment. Second, in a fax to Herman, Moorman, Karen’s attorney, requested Karen’s share of the IPERS be rolled over into an IRA or 401(k) plan. Third, in the initial QDRO he sent for approval, Moorman, Karen’s attorney, provided for an immediate lump-sum payment. That QDRO stated, “The plan administrator is directed to recognize an independent interest of the alternate payee [Karen] in the accrued benefit/account and/or retirement plan of the participant [Faber].” It was not until IPERS refused the QDRO that Moorman found out such a payout from IPERS itself was impossible.

When evaluating the sufficiency of the evidence, “we view the evidence in the light most favorable to the party in whose favor the verdict was rendered.” *Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 593 (Iowa 1999). Evidence is substantial enough to support a jury verdict if reasonable minds would find it adequate to reach the same conclusion. *Id.* Evidence is not insubstantial simply because we may draw different conclusions from it. *Fischer v. City of Sioux City*, 695 N.W.2d 31, 33-34 (Iowa 2005). Ultimately, the question is whether the evidence supports the findings made, not whether it may support different findings. *Id.*

Jury members are free to give testimony whatever weight they believe it deserves. *State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006). They may accept or reject any given testimony. *Id.* Given the ambiguous nature of some of the evidence and our deferential standard of review, we conclude the evidence was sufficient for the jury to determine proximate cause.

B. Jury Instruction No. 10

Herman argues the district court erred in giving the jury the following Instruction No. 10:

Instruction No. 10

Plaintiff, Steven Faber, must prove the following propositions:

1. That Defendant Douglas Herman was negligent in one or more of the following ways:

A. By failing to prepare a Qualified Domestic Relations Order (QDRO) which provided a specific dollar amount of benefit to Karen J. Faber;

B. By failing to advise Plaintiff Steven Faber that he could have paid \$19,100 directly to Karen Faber, thus preserving 100% of Mr. Faber’s IPERS benefits;

C. By failing to advise Plaintiff Steven Faber that the QDRO submitted to IPERS on May 28, 1999, did not provide for a specific

dollar amount benefit to Karen J. Faber, but instead provided for a fractional percentage distribution to Karen Faber.

D. By drafting a Stipulation in the dissolution of marriage action which sought to provide an immediate payment to Karen Faber of \$19,100 from Steven Faber's IPERS plan contrary to the provisions of Steven Faber's IPERS plan.

2. The negligence of Douglas Herman was a cause of damage to the Plaintiff.

3. The amount of damage.

If the Plaintiff has failed to prove any of these three numbered propositions, the Plaintiff is not entitled to recover damages. If the Plaintiff has proved all of these propositions, you will consider the defense of comparative fault as explained in Instruction No. 12.

Herman argues the district court should not have instructed the jury on all four specifications of negligence. He claims there was no support for any of these specifications. Alternatively, if we find support for one or more but not all of the specifications, he argues the submission of all four prejudiced him. He claims the alleged error entitles him to a new trial.

Jury instructions must be supported both by the pleadings and by substantial evidence. *Vasconez v. Mills*, 651 N.W.2d 48, 52 (Iowa 2002). Parties are entitled to have their legal theories submitted as instructions as long as the instructions correctly state the law, have application to the case, and are not otherwise covered in other instructions. *Wolbers v. The Finley Hosp.*, 673 N.W.2d 778, 732 (Iowa 2003). When determining the sufficiency of the evidence to support an instruction, we view the evidence in the light most favorable to the party urging the instruction. *Greenwood v. Mitchell*, 621 N.W.2d 200, 204-05 (Iowa 2001). Evidence is sufficient if it a reasonable person would find it adequate to reach a conclusion. *Id.* at 204.

1. No. 10(1)(A)

Herman argues the first element of Instruction No. 10, telling the jury to consider whether he was negligent in failing to prepare a QDRO that provided Karen a specific dollar amount, was in error. He claims the instruction is erroneous because there is not sufficient evidence to show Karen would have agreed to a cap of \$19,100 in IPERS benefits paid in the future. For all the reasons stated in our discussion above on the sufficiency of the evidence, we conclude the evidence was sufficient to support the instruction.

2. No. 10(1)(B)

Herman argues the second element of Instruction No. 10, telling the jury to consider whether he was negligent in failing to advise Faber “he could have paid \$19,100 directly to Karen Faber, thus preserving 100% of [his] IPERS benefits,” was in error. He claims again that there is insufficient evidence to support the contention Karen would have agreed to a buyout. He states that Karen specifically wanted retirement assets. Moorman, however, asked for a “roll over” of half the IPERS account at the time of the dissolution. If IPERS would have agreed to such a scheme, that rollover would have amounted to \$19,100. Either situation would have limited Karen to a certain sum: \$19,100. This point, in addition to all the reasons stated above, leads us to conclude there is sufficient evidence to support the instruction.

3. No. 10(1)(C)

Herman argues the third element of Instruction 10, telling the jury to consider whether he was negligent in failing to advise Faber that the QDRO approved a fractional percentage distribution to Karen rather than a specific

dollar amount, was in error. He claims the element lacks sufficient evidence to show proximate cause.

Faber's expert witness testified that once an attorney learns IPERS benefits cannot be divided as the attorney has represented to the client, the attorney has a duty to advise the client of the newly acquired knowledge. Evidence, in the form of a letter from Faber to Herman indicates if Faber had known that his IPERS were going to be split by a percentage, he "would have tried to pay Karen off before [he] began to draw it." Therefore, we conclude there is sufficient evidence supporting the instruction.

4. No. 10(1)(D)

Herman argues the fourth element of Instruction 10, telling the jury to consider whether Herman was negligent in drafting the stipulation contrary to the provisions of Faber's IPERS plan, was in error. He again argues sufficiency of the evidence to show proximate cause.

Faxes and notes traded between Moorman and Faber both indicate neither attorney knew a direct payout or rollover of \$19,100 was not available from IPERS. Further, as mentioned above, an expert testified that the inclusion of the word "immediate" in the written stipulation indicated a lump-sum payment. We therefore conclude there was sufficient evidence for the jury to consider whether Herman was negligent in drafting the stipulation contrary to the provisions of Faber's IPERS plan.

C. Damages

Herman argues Faber's damages were speculative, excessive, and not reasonably foreseeable. He claims that Faber's damages cannot be based on

in-service IPERS disability because in-service IPERS disability did not legally exist until after the Fabers' dissolution. In the alternative, he argues Faber's condition has improved and he could work in farming and construction.

We find Herman's argument unpersuasive. Generally in a legal malpractice action, the measure of damages is the amount of loss sustained as a proximate result of the attorney's conduct. *Benton v. Nelson*, 502 N.W.2d 288, 291 (Iowa Ct. App. 1993). Where there is uncertainty or speculation whether damages have been suffered, we must deny recovery. *Shannon v. Hearity*, 487 N.W.2d 690, 693 (Iowa Ct. App. 1992). However, evidence of damage may be sufficient if damages can be estimated. *Id.* at 692. Evidence of damage is considered sufficient if there is "a reasonable basis in the evidence from which an amount of damage can be inferred or approximated." *Id.* "The goal in legal malpractice suits is to put clients in the position they would have occupied had the attorney not been negligent." *Sladek v. K Mart Corp.*, 493 N.W.2d 838, 840 (Iowa 1992).

Faber provided sufficient evidence that he was damaged by Herman's negligence. A certified public accountant who testified for Faber calculated the present value of payments Karen would be expected to receive if Faber lived to a full life expectancy. Testimony at trial indicates the present value of future payments ranged between \$148,000 and \$181,000. The jury awarded him a total of \$109,334.40.

Herman's argument about in-service disability is inapposite. His negligence was independent of when or how Faber collected his IPERS. He needed only to foresee that Karen would have received in excess of \$19,100

under any scenario. Based on evidence Herman supplied, it appears conceivable that Karen could have collected over \$19,100 if Faber had retired at either fifty-five or sixty-two and lived to full life expectancy.

There is also sufficient evidence to conclude Faber will not be able to return to regular employment. He has constant pain due to failed neck surgery. He still has trouble climbing stairs, extensive walking, and running due to his lung condition. He is also limited by his inability to lift heavy loads.

For these reasons, we conclude Faber's damages are not excessive, speculative, or unforeseeable.

D. Comparative Fault

Faber cross-appeals, arguing the district court erred in instructing the jury it could consider comparative fault and in giving Instructions No. 7 and 12. He too argues insufficiency of the evidence to support the instructions. The instructions read as follows:

Instruction No. 7

In this case Steven Faber claims Douglas Herman was professionally negligent. An attorney must use the degree of skill, care, and learning ordinarily possessed and exercised by other attorneys in similar circumstances.

A violation of this duty is negligence

Also in this case Douglas Herman claims Steve Faber was negligent. "Negligence" in these circumstances means failure to use ordinary care. Ordinary care is the care which a reasonably careful person would use under similar circumstances. "Negligence" is doing something a reasonably careful person would not do under similar circumstances, or failing to do something a reasonably careful person would do under similar circumstances.

Instruction No. 12

Defendant, Douglas Herman, must prove both of the following propositions:

1. Plaintiff, Steven Faber, was negligent in one or both of the following ways:

A. By failing to consult counsel prior to electing disability retirement to determine the effect on IPERS pension;

B. By failing to pursue a workers' compensation claim for his disability.

2. Steven Faber's negligence was a cause of his damages.

If the Defendant has failed to prove either of these propositions, the Defendant has not proved his defense. If the Defendant has proved both of these propositions, then you will assign a percentage of fault against the plaintiff and include the Plaintiff's fault in the total percentage of fault found by you answering the special verdicts.

Faber testified that, at the time of the dissolution, he believed his IPERS benefits would be split in half based on the dollar amount indicated in his last IPERS statement. In other words, out of approximately \$38,000, Karen would immediately receive \$19,100. He was unaware of the attorneys' communications with IPERS and the impossibility of paying or transferring to Karen a lump sum. When he finally received a copy of the final QDRO from Herman, it was nearly two months too late to challenge its language. At that point, the damage was done. Even if Faber had retired at the normal age, the possibility that Karen would receive more than \$19,100 was great. There is not substantial evidence to show Faber could have succeeded in a workers' compensation claim, or what good contacting an attorney before selecting in-service disability would have done. Therefore, we cannot conclude he was under any duty to file a workers' compensation claim or to contact an attorney before selecting IPERS in-service disability. We therefore reverse the jury's allocation of thirty-percent fault against Faber, and remand to the district court for entry of full judgment against Herman.

IV. Conclusion

First, we conclude there was sufficient evidence to support the verdict. Second, there is sufficient evidence to support the submission of all four theories

of Herman's negligence to the jury. Further, Herman is not prejudiced by the submission of the instructions. Third, Faber's damages were not speculative, excessive, or unforeseeable. Finally, there was not sufficient evidence to submit the issue of Faber's comparative fault to the jury. The portion of the district court's order denying Herman's motion for judgment notwithstanding the verdict and motion for new trial is affirmed, while the portion denying Faber's motion for judgment notwithstanding the verdict is reversed and remanded. Costs are taxed to Herman

AFFIRMED ON APPEAL; REVERSED AND REMANDED ON CROSS-APPEAL.