

**IN THE COURT OF APPEALS OF IOWA**

No. 9-800 / 09-0087  
Filed November 25, 2009

**GREGORY A. MIDDLETON and  
LINDA K. MIDDLETON,**  
Plaintiffs-Appellants,

**vs.**

**TIMOTHY S. MYERS,**  
Defendant-Appellee.

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Appeal from the Iowa District Court for Scott County, David J. Sivright,  
Judge.

Gregory and Linda Middleton appeal the district court's denial of their motion for new trial claiming error in the instructions to the jury and the jury's award of damages for injuries sustained in a motorcycle accident. **AFFIRMED AND REMANDED.**

Glenn Ruud, Rock Island, Illinois, for appellants.

Eric Knoernschild and Kenza Nelson, Muscatine, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

**VOGEL, P.J.**

Gregory and Linda Middleton appeal from the district court's denial of their motion for new trial following jury verdicts awarding them damages for injuries they sustained in a motorcycle accident. We find the district court erred in submitting an aggravation instruction for Gregory, likely interfering with the jury's ability to find the facts, resulting in prejudice to Gregory. We therefore remand for a new trial on damages for Gregory. As to Linda's similar claims, we find no error, and affirm the district court.

**I. Background Facts and Proceedings**

On September 3, 2004, while on their motorcycle and stopped at a traffic light, Gregory and Linda were hit from behind by a Dodge Durango driven by Timothy Myers. Both Gregory and Linda were immediately treated in an emergency room for injuries sustained in the accident. Linda complained of pain in her neck, shoulders, knees, arms, and elbow, but was discharged with pain medication after a CT scan did not reveal any acute injury. Gregory was also discharged with medication for soreness and pain in his neck, shoulders and back. Both Gregory and Linda sought further treatment from their primary care physician, James E. Petre, M.D. Linda had been a patient of Dr. Petre's since 1997 and had been previously treated for a variety of symptoms including neck strain and low back pain. Gregory had been a patient of Dr. Petre's since 1999.

A brief review of the medical examinations and treatment of the parties following the accident begins with Dr. Petre, who diagnosed Gregory with a neck and low-back sprain, prescribing pain medicine and a muscle relaxer. On September 9, 2004, Gregory began treatment for his low back pain with

chiropractor Leroy Anthony Dietrich, D.C., who opined the pain was caused by the accident. Gregory continued to see Dr. Dietrich periodically up to the time of trial.

In January 2005, Gregory complained of a constant dull ache in his neck, and following x-rays, Dr. Petre diagnosed Gregory as having mild degenerative joint disease. An MRI revealed a broad base disk protrusion at C5-C6 with mild to moderate pushing of the disk against the spine. Dr. Petre believed the accident directly related to the symptoms and problems for which he was treating Gregory, as these pain symptoms were not present prior to the accident, even if the protrusion may have existed in an asymptomatic state.

In March 2006, following aggressive but unsuccessful physical therapy, Dr. Petre referred Gregory to a neurosurgeon, Srinivasan Purighalla, M.D., who after reading an MRI, diagnosed Gregory with degenerative disk disease and associated disk herniation at C4-5, C5-6, and mild degeneration at L5-S1. Dr. Purighalla opined the degeneration preceded the collision but the herniation was caused by the collision. Gregory had surgery to resolve the herniation in June 2006.

Gregory was also referred to David Staub, M.D., a rheumatologist in May 2007, in order to manage his pain. After a bone density test, Dr. Staub diagnosed Gregory with osteoporosis, and stated that the condition pre-dated the accident. In July 2007, Dr. Petre confirmed “the osteoporosis itself wouldn’t be caused—or any relationship to the accident, although it would increase his risk of having a fracture for any trauma.” He further opined that Gregory continued to complain of pain in his neck, shoulder, and back; all of which was caused or

exacerbated by the accident. Gregory was also seen by neurologist Brian J. Anseeuw, M.D. in May 2007, who opined Gregory's pain was caused by the accident.

In January 2008, Morris Soriano, M.D., expert witness for the defense, examined Gregory and opined that his injuries were "soft tissue" injuries, which should have healed with conservative treatment in six to twelve weeks after the accident.

A review of Linda's medical examinations and treatments includes her visit to Dr. Petre's office on September 7, 2004, where a nurse practitioner examined Linda for her complaints of pain in her right elbow. On September 10, 2004, Dr. Petre diagnosed Linda with whiplash, prescribed pain medication, muscle relaxers and referred her for physical therapy. With ongoing complaints, Dr. Petre referred Linda to an orthopedic surgeon, Michael Dolphin, D.O., in October 2004.

Dr. Dolphin performed a MRI, which revealed inflammation in the shoulders, cervical and lumbar strain, and some tendinitis, all related to the accident. He gave her cortisone injections and recommended physical therapy. Dr. Dolphin took some x-rays of the neck and found some evidence of degenerative disk disease. He opined that the degenerative condition preexisted the accident. Dr. Dolphin believed some symptoms, such as neck pain, were due to the accident and some symptoms such as nausea, vomiting, and headache could not be definitively attributed to before or after the accident and were potentially from the degenerative condition. Linda was given pain medication and instructed to continue physical therapy.

Dr. Dolphin referred Linda to Bruce McElhinney, D.O., who in May 2005 diagnosed her with a “sprain/strain kind of injury in the back, shoulder, neck area,” and treated her with osteomanipulation. Linda saw Dr. Anseeuw in August 2005, who found that she had a decrease in range of motion in the cervical and lumbar spine, with some vertigo, neck and back pain, and headaches. In January 2006, on Dr. Dolphin’s suggestion, Linda saw John Hoffman, M.D., who diagnosed her with a frozen shoulder, likely a result of the accident. Linda was also seen by Dr. Soriano in January 2008, who diagnosed her with a “soft tissue” injury, and opined that she did not sustain damage to her disks but suffered from whiplash. Linda continued to see Dr. Hoffman through early 2008 and underwent various treatments to release the shoulder and ease her pain. Linda also continued to see Dr. Petre for complaints of joint irritation, shoulder, and back problems.

After a trial, the jury awarded Gregory \$8000 damages and Linda \$35,360. They appeal.

## **II. Standard of Review**

Our review is for correction of errors at law. Iowa R. App. P. 6.907 (2009). We find reversible error when the instructions given to the jury, viewed as a whole, fail to convey the applicable law. *Benn v. Thomas*, 512 N.W.2d 537, 538-39 (Iowa 1994). An erroneous instruction does not entitle the party claiming error to reversal unless the error was prejudicial. *Waits v. United Fire & Cas.*, 572 N.W. 2d 565, 569 (Iowa 1997). Instructions may be considered erroneous if they contain a material misstatement of the law, are not supported by the evidentiary record, or are conflicting and confusing. *Id.* at 575. An aggrieved party may, on

motion, have an adverse verdict or decision vacated and a new trial granted for errors of law occurring in the proceedings only if the errors materially affected the party's substantial rights. *Benn*, 512 N.W.2d at 539.

### **III. Gregory's Claims**

The district court submitted an aggravation instruction to the jury for Gregory based on his preexisting but asymptomatic degenerative disk disease and an eggshell plaintiff instruction based solely on his post-accident diagnosis of osteoporosis. The aggravation instruction, instruction eleven, read:

If you find plaintiff Gregory A. Middleton had degenerative disk disease before this incident and this condition was aggravated or made active by this incident causing further suffering, then he is entitled to recover damages caused by the aggravation. He is not entitled to recover for any physical ailment or disability which existed before this incident or for any injuries or damages which he now has which were not caused by the defendant's action.

The eggshell plaintiff instruction, instruction thirteen, read:

If plaintiff Gregory A. Middleton had osteoporosis making him more susceptible to injury than a person in normal health, then the defendant is responsible for all injuries and damages which are experienced by Gregory A. Middleton proximately caused by defendant's actions, even though the injury claimed produced a greater injury than might have been experienced by a normal person under the same circumstances.

Gregory asserts the court erred in submitting instruction eleven, aggravation, which identified conditions that were neither active nor symptomatic prior to the accident; he requested the court submit an eggshell instruction for the degenerative disk disease, similar to instruction thirteen, rather than aggravation.<sup>1</sup>

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<sup>1</sup> Myers asserts that error was not preserved for the eggshell plaintiff instruction because Gregory did not object to instruction thirteen. At trial, Gregory argued, "we feel that with

### A. Aggravation

In order to determine whether prior symptoms or conditions give rise to either an aggravation or eggshell plaintiff instruction, we look to the first instance when the pain or disability for which compensation is sought arose. *Waits*, 572 N.W.2d at 577-78. As a general rule, a defendant is liable only for injuries caused by the defendant's fault, and not for pain or disability resulting from other causes. *Id.* at 577.

An aggravation instruction is proper when a person has a prior condition which results in pain or disability before the second injury; this makes the tortfeasor liable only for the additional pain and disability arising after the second injury. *Id.* at 578. With respect to any pain or disability arising after the second injury, the tortfeasor is fully responsible, even though that pain and disability is greater than the injured person would have suffered in the absence of the prior condition. *Id.*

Thus, if a plaintiff had a prior back injury that caused pain and a ten percent disability before the injury inflicted by the defendant occurred, the defendant would not be responsible for the disability and pain that predated the current injury, but only for any additional pain and disability caused by the current injury. Under these circumstances, an aggravation instruction is appropriately submitted to the jury.

*Id.*

Gregory claims no evidence was presented from which the jury could determine he suffered pain or disability before the collision related to

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regard to any degenerative disk disease issues, that should be covered in an instruction similar to Instruction No. 13, which relates to Gregory Middleton's osteoporosis." We find Gregory made the argument for an eggshell instruction on degenerative disk disease, and therefore preserved error on appeal.

degenerative disk disease, warranting an aggravation instruction. It is undisputed that Gregory had some preexisting, yet undiagnosed degenerative disk disease unrelated to the accident. Dr. Purighalla testified that degenerative disk disease was something that just developed naturally or normally in his body and was not caused by any trauma. Upon questioning, Dr. Purighalla responded that the only way he could connect the symptoms in the neck area relating to the herniations to the accident, was Gregory's statement that he did not have complaints of neck pain until after the accident. Also, when visiting Dr. Petre prior to the accident, Gregory remarked that he had "recurrent back pain" on his medical history form. Dr. Petre testified that while Gregory circled "yes" on recurrent back pain, he had no other previous history of back problems, and "people put down any possible discomforts that they have or problems when they fill out these forms." Dr. Petre testified that when he questioned Gregory as to why he circled "yes" on the form, Gregory just said he had occasional back pain. It is important to note Gregory never received any treatment or medication for any such complaint. The district court nonetheless concluded, "It's my opinion that preexisting, even if it's asymptomatic, has to be dealt with in the preexisting language."

In order for the district court to instruct the jury on an aggravation instruction, the evidence must be substantial. See *Sleeth v. Louvar*, 659 N.W.2d 210, 215 (Iowa 2003). The evidence presented did not show that Gregory had a prior condition that resulted in pain or disability before the accident; further, any degenerative disk disease was asymptomatic. The only evidence presented was his indication on a medical questionnaire of "recurrent back pain" and a post-



accident diagnosis of degenerative disk disease. His primary doctor, Dr. Petre, testified that he had never treated Gregory for back or neck pain, and Gregory did not have a history of back problems until after the accident. We conclude Gregory's rather generic indication of back pain on a medical questionnaire form does not yield a quantifiable level of pre-accident pain or disability such that the jury could assess his post-accident pain or disability.

The jury was not bound, of course, to believe [Gregory] or [his] witnesses. But, even the establishment of a lack of credibility in [Gregory's] case cannot fill the void in the defendant's proof of a preexisting disability as opposed to a mere preexisting condition.

*Id.* Without proof of an active or symptomatic impairment prior to the accident, we find the district court erred in submitting an aggravation instruction.<sup>2</sup>

### **B. Prejudice**

Gregory claims that the district court's erroneous aggravation instruction was prejudicial and entitled him to a new trial. See *Waits*, 572 N.W.2d at 569. In order to apportion disability, the jury must make a distinction between the recent trauma and a preexisting condition, which is a difficult task. See *Sleeth*, 659 N.W.2d at 215. Gregory was awarded damages in the sum of \$8000: \$3000 for past medical expenses, \$2500 for past pain and suffering, and \$2500 for past loss of function of body, compared with the documented past medical expenses

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<sup>2</sup> Gregory also asserts the district court erred in submitting an eggshell instruction to the jury for only his osteoporosis, and not instructing on all of his pre-accident, asymptomatic conditions, which became active or symptomatic post-accident, including his degenerative neck and back condition. An eggshell plaintiff instruction is proper when a person has a health condition prior to the disputed injury, which is non-disabling and asymptomatic. *Waits*, 572 N.W.2d at 576. The jury could have concluded that Gregory's degenerative disk disease was a nondisabling, asymptomatic condition that made him more susceptible to injury than a normal person. *Sleeth*, 659 N.W.2d at 213. An eggshell instruction could therefore be appropriate.

of \$60,744.04. The aggravation instruction that was given to the jury advised that Gregory could recover only that portion of his damage which was due to aggravation. Without substantial evidence of a preexisting, symptomatic condition on which the jury could make such apportionment, the district court's improper aggravation instruction therefore likely interfered with the jury's ability to find the facts and apply the proper law in awarding Gregory's past medical damages. We therefore remand for a new trial solely as to damages for Gregory.<sup>3</sup>

#### **IV. Linda's Claims**

Linda also asserts the court erred in submitting an aggravation instruction, claiming that while there was evidence of her degenerative disk disease, the court failed to quantify the extent of her pre-accident pain and disability. Dr. Dolphin testified that evidence of Linda's degenerative disk disease indicated it preexisted the accident. Dr. Petre testified that his records between March 1997 through the accident indicated that he had seen Linda for neck spasms, dizzy spells, low backaches, and back pain. She was given medications and referred to a physical therapist in May 2004, where an electronic stimulator was used to help with the muscle spasms in her lower back.

While a district court may submit both an eggshell and aggravation instruction to the jury as to a given plaintiff, on our review we find the evidence did not establish a factual basis for both. See *Waits*, 572 N.W.2d at 578 (explaining that the jury can receive both instructions if they are instructed that

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<sup>3</sup> Gregory also argued that jury instructions eleven (aggravation) and thirteen (eggshell plaintiff) were inconsistent and confused the jury. Because we are remanding for a new trial on damages, we need not reach this issue.

the aggravation rule excludes liability for pain and disability existing prior to the accident and the eggshell plaintiff is applicable only for pain and disability arising after the accident). We agree with the district court that there was sufficient evidence for the jury to find that Linda suffered from neck and back pain prior to the accident, warranting an aggravation instruction, not an eggshell instruction, as she also requested. The jury was properly instructed on aggravation for degenerative disk disease for Linda.

### **V. Jury Award**

Linda argues the jury award for damages was grossly inadequate as a result of prejudice or passion necessitating a new trial.<sup>4</sup> Courts will not set aside a verdict unless excessive or inadequate damages appear to have been influenced by passion or prejudice. Iowa R. Civ. P. 1.1004(4). We agree with the trial court's conclusion (as to Linda) that

[t]he jury in this case determined the weight and value to be given the testimony of each witness, including plaintiffs' experts. The verdicts indicate much of such testimony was rejected, while the opinions of defendant's expert witness were given greater weight. The Court finds the verdicts in this case cannot be considered inadequate, not sustained by sufficient evidence, nor contrary to law. Plaintiffs have not shown the verdicts are flagrantly . . . inadequate, so out of the reason so as to shock the conscience, the result of passion or prejudice, or lacking in evidentiary support. . . . The Court finds the verdicts fairly and reasonably compensate the plaintiffs for the injuries sustained, and effectuate substantial justice between the parties.

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<sup>4</sup> Gregory also argues the jury award for damages was inadequate, but we need not reach this claim as we have remanded for a new trial on damages.

## **VI. Conclusion**

The district court erred in giving the jury an aggravation instruction for Gregory, and we therefore remand for a new trial on damages for Gregory. As to Linda's similar claims, we find no error, and affirm the district court.<sup>5</sup>

**AFFIRMED AND REMANDED.**

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<sup>5</sup> We note noncompliance with the rules of appellate procedure requiring an appendix to contain relevant portions of the transcript. See Iowa R. App. P. 6.905(2)(b)(3). Appellants' injuries are central to their appeal, but the parties' appendix failed to include any of the medical testimony presented at trial.