

**IN THE COURT OF APPEALS OF IOWA**

No. 9-835 / 08-1815  
Filed December 30, 2009

**KARLY K. ROSSITER,**  
Plaintiff-Appellee,

**vs.**

**ALAN B. EVANS,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Muscatine County, Mark Smith,  
Judge.

Defendant appeals the \$1.5 million jury verdict for negligent transmission  
of sexually transmitted disease. **AFFIRMED.**

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

Jeffrey R. Tronvold and Matt J. Reilly of Eells & Tronvold Law Offices,  
P.L.C., Cedar Rapids, for appellee.

Considered by Eisenhauer, P.J., and Potterfield, J. and Zimmer, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

**POTTERFIELD, J.**

Alan Evans appeals from a jury verdict in this negligent-transference-of-a-sexually-transmitted-disease claim. We affirm.

**I. Background Facts & Proceedings.**

Alan Evans is a dentist. Karly Rossiter came to see Evans because Evans had purchased Rossiter's dentist's practice. Evans and Rossiter entered into a sexually intimate relationship shortly after Rossiter's first appointment with Evans. They discussed sexually transmitted diseases (STDs) prior to becoming sexually intimate and Evans claimed to be STD-free. Neither was a virgin. Rossiter testified that after their first sexual encounter, Evans called her and suggested she should get tested for human papilloma virus (HPV). Rossiter did get tested and was diagnosed with HPV, and later, dysplasia or pre-cancerous cervical cells for which she had to undergo a surgical procedure. Additionally, Rossiter testified that Evans had bumps on his penis that were consistent with genital warts.<sup>1</sup> She also testified that during the course of her relationship with Evans, she developed genital warts and was treated three times for bacterial vaginitis. When she asked Evans to be treated for bacterial vaginitis, Evans's response was that he did not have a vagina, so he did not need to be treated. Dr. Gregory Brotzman opined that it was more likely than not that Evans transmitted cancer-causing HPV and genital warts to Rossiter.

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<sup>1</sup> Dr. Gregory Brotzman, Rossiter's expert witness, testified there is no FDA approved test to determine if a male carries HPV. However, "the most common way for someone to know they had HPV is if they have genital warts."

Evans disputed he ever had, knew he had, or should have known he had HPV or bacterial vaginitis, such that he had a duty to warn or to avoid transmitting either to Rossiter. He denied ever having genital warts. Although Evans denied knowledge of being exposed to any STDs, he testified that when he began seeing Rossiter, he was also seeing two other women, one of whom eventually gave birth to his child. He described that woman to Rossiter as having a distinct odor related to bacterial vaginitis. Evans's expert, Dr. Kenneth Naylor, opined that unless one of the partners was a virgin, it is impossible to say whether the other introduced HPV. Naylor opined that it was "very unlikely that Alan Evans transmitted an HPV infection" to Rossiter.

The case went to the jury for consideration of Rossiter's claims of negligence, battery, assault, and fraudulent misrepresentation and damages, including punitive damages. The jury was instructed that punitive damages could be awarded "if the plaintiff has prove[d] by a preponderance of clear, convincing and satisfactory evidence the defendant's conduct constituted a willful and wanton disregard for the rights or safety of another." Evans did not object to the instruction or verdict forms submitted.

The jury found Rossiter had proved her claim of negligent transference of HPV. However, the jury found Rossiter had not proved her claims of battery, assault, and fraudulent misrepresentation. They awarded Rossiter damages in

the amount of \$700,000.<sup>2</sup> The jury answered the punitive damage interrogatory in the affirmative and awarded \$800,000 in punitive damages.

Evans now appeals. He contends there was insufficient evidence that he knew or should have known that he had human papilloma virus (HPV) or bacterial vaginitis such that he had a duty to warn about or avoid transmittal of those diseases to Rossiter. He also contends there was insufficient evidence that he was the source of Rossiter's dysplasia. Evans contests the propriety of punitive damages in light of the jury's findings on Rossiter's claims of battery, assault, and fraudulent misrepresentation. Finally, he argues the damages awarded were excessive and unsupported by the evidence.

## **II. Analysis.**

### *A. Sufficiency of the evidence.*

The court reviews a challenge to the denial of a motion for a directed verdict for correction of errors at law. The evidence is considered in the light most favorable to the nonmoving party. If there is substantial evidence in the record to support each element of a claim, the motion for directed verdict must be overruled. Additionally, if reasonable minds could reach different conclusions based upon the evidence presented, the issue is properly submitted to the jury.

*Wolbers v. Finley Hosp.*, 673 N.W.2d 728, 734 (Iowa 2003) (citations omitted).

Evans moved for directed verdict and judgment notwithstanding the verdict or for new trial. He argues:

[T]here was insufficient evidence that he had, or knew he had, or should have known that he had, either HPV that could cause dysplasia or genital warts, or bacterial vaginitis. Without such knowledge, Evans had no duty to warn Rossiter or otherwise

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<sup>2</sup> The verdict form indicates the jury's award was broken down as follows: \$50,000 for past physical pain and suffering, \$150,000 for past mental pain and suffering, and \$500,000 for future mental pain and suffering.

protect her from the transmission of these sexually transmitted diseases.

We believe this statement is indicative of the confusion concerning the role of foreseeability of risk in the assessment of duty in negligence actions, which our supreme court has recently addressed in *Thompson v. Kaczinski*, \_\_\_ N.W.2d \_\_\_, \_\_\_ (Iowa 2009).

“An actionable claim of negligence requires the existence of a duty to conform to a standard of conduct to protect others, a failure to conform to that standard, proximate cause, and damages.” *Thompson*, \_\_\_ N.W.2d at \_\_\_ (citations omitted). Whether a duty arises out of a given relationship is a matter of law for the court’s determination. *Id.* at \_\_\_. “An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.” *Id.* at \_\_\_ (quoting Restatement (Third) of Torts: Liab. for Physical Harm § 7(a), at 90 (Proposed Final Draft No. 1, 2005)). We do not read Evans’s brief to suggest there is no duty to exercise reasonable care not to transmit a communicable disease.<sup>3</sup> Such a duty is clearly found in Iowa law. See Iowa Code § 139A.20 (2007) (“A person who knowingly exposes another to a communicable disease . . . with the intent that another person contract the communicable disease, shall be liable for all resulting damages and shall be punished as provided in this chapter.”).<sup>4</sup>

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<sup>3</sup> Sexually transmitted diseases are “communicable diseases” in that they are spread from person to person. See Iowa Code § 139A.2(4).

<sup>4</sup> The *Thompson* court went on to say that “in exceptional cases, the general duty to exercise reasonable care can be displaced or modified.” *Id.* at \_\_\_ (citing Restatement (Third) § 6 cmt. f, at 81–82). This is not such an exceptional case.

Here, the jury was instructed that in order to prove her claim of negligent transference of HPV, Rossiter had to prove Evans was negligent in one or more of the following ways: “(a) Transmitting HPV . . . (b) Transmitting bacterial vaginitis . . . (c) Failing to warn [Rossiter] prior to having intimate relations of [Evans’s] exposure to HPV and/or bacterial vaginitis.” Evans contends there is insufficient evidence that he knew or should have known<sup>5</sup> that he had HPV or bacterial vaginitis. The district court concluded that “[w]hether Defendant knew or should have known he carried the STDs is a question of fact properly in the province of the jury.” This is in accord with *Thompson*.

Noting that “this boils down to a case of credibility,” the trial court concluded there was evidence from which the jury could find that if the defendant did not know, he should have known that he carried HPV. We agree. From the evidence presented at trial, viewed in the light most favorable to the verdict, a rational juror could find Evans represented to Rossiter that he was disease-free

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<sup>5</sup> The majority of courts that have dealt with this issue have concluded that constructive knowledge of a sexually transmitted disease is sufficient for the imposition of liability. See, e.g., *Endres v. Endres*, 968 A.2d 336, 340 (Vt. 2008) (“To establish an actionable breach of that standard of care, the plaintiff must show that the defendant had actual or constructive knowledge that he or she was infected with the transmitted STD.”); see generally, *John B. v. Superior Ct.*, 137 P.3d 153, 160 (Cal. 2006) (collecting cases and concluding, at 166, that “we are not persuaded that California should be the first jurisdiction in the country to limit liability for the negligent transmission of HIV only to those who have actual knowledge they are HIV positive”). We note that the *John B.* court addressed this issue as one of foreseeability, which was a “‘crucial factor’ in determining the existence and scope of that duty.” 137 P.3d at 160. *Thompson* rejects foreseeability as part of the duty analysis.

Foreseeable risk is an element in the determination of negligence. In order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time of the defendant’s alleged negligence. The extent of foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small changes in the facts may make a dramatic change in how much risk is foreseeable. . . . [C]ourts should leave such determinations to juries unless no reasonable person could differ on the matter. *Thompson*, \_\_\_ N.W.2d at \_\_\_ (quoting and adopting Restatement (Third) analysis).

and monogamous. However, Evans had genital warts, which Dr. Brotzman testified was “the most common way for someone to know they had HPV.” The morning after their first sexual encounter, Evans told Rossiter she should be checked for HPV. Nor was Evans monogamous. Evans was “seeing” two other women at the time he first became involved with Rossiter. One of these women, who later bore Evans’s child, evinced symptoms of bacterial vaginitis. He declined to be tested or treated for bacterial vaginitis, despite Rossiter’s request that he do so. Dr. Brotzman testified it was more likely than not that Evans transmitted cancer-causing HPV and genital warts to Rossiter.

We conclude substantial evidence supports the jury’s findings.

*B. Availability of punitive damages.*

Evans claims he was entitled to judgment notwithstanding the verdict because, once Rossiter’s intentional tort claims were rejected by the jury, punitive damages were no longer available. Rossiter argues that because Evans did not challenge the propriety of punitive damages in his motion for directed verdict, this claim is not preserved for our review.

We review a district court’s ruling on a motion for judgment notwithstanding the verdict for correction of errors at law. *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 859 (Iowa 2001). A motion for judgment notwithstanding the verdict must stand or fall on the grounds asserted in the motion for directed verdict. *Id.* Appellate review is limited to those grounds. *Id.*

The claim Evans raises was not raised in his motion for directed verdict. In his motion for directed verdict, Evans did assert generally that because he had no knowledge, he had no duty, and thus all Rossiter’s claims failed, including

punitive damages. This generalized claim for directed verdict did not adequately advise the court and opposing counsel of the particular grounds for the motion. *See Randa v. U.S. Homes, Inc.*, 325 N.W.2d 905, 909 (Iowa Ct. App. 1982) (concluding that defendant's failure to raise a timely objection to the introduction of allegedly objectionable evidence, coupled with its failure specifically to articulate such grounds at the time of the motion for a directed verdict, did not preserve error). He did not object to the jury instructions or to the verdict form submitting the claim of punitive damages. *Cf. Bergquist v. Mackay Engines, Inc.*, 538 N.W.2d 655, 658 (Iowa Ct. App. 1995) (noting that where a motion for directed verdict has been made, a party does not waive error by agreeing to jury instructions, which correctly state the law). Like the district court, we conclude Evans's argument that there was not sufficient evidence to submit Rossiter's claim for punitive damages was not preserved for our review.

*C. Motion for new trial.*

Evans contends he is entitled to a new trial or remittitur of the damage awards because the awards were excessive.

We review a ruling on a motion for new trial for an abuse of discretion. In reviewing claims of excessive damages, we view the evidence in the light most favorable to the plaintiff. A court must not disturb a jury verdict for damages unless it is flagrantly excessive or inadequate, so out of reason so as to shock the conscience, the result of passion or prejudice, or lacking in evidentiary support.

*Kuta v. Newberg*, 600 N.W.2d 280, 284 (Iowa 1999) (citations omitted); *see also WSH Props., L.L.C. v. Daniels*, 761 N.W.2d 45, 50 (Iowa 2008). We are mindful, too, that the amount of damages awarded is peculiarly a jury, not a court, function. *Gorden v. Carey*, 603 N.W.2d 588, 590 (Iowa 1999).



The district court denied the motion for new trial citing Rossiter's proffered evidence that Evans consistently acted without regard for her safety over the course of their one and one-half year-long relationship, misled Rossiter as to whether he had knowledge that he may have been exposed to STDs, misled her as to his sexual activity with other women, including his observations about the sexual health of his other partners, and declined to be tested or treated for STDs. Evans exposed her to STDs, which resulted in her contracting genital warts and pre-cancerous lesions. She offered evidence of the surgical procedure she underwent for removal of the lesions, as well as the year she spent waiting to determine if she developed cervical cancer. Finally, Rossiter presented evidence she must inform all future sexual partners of the HPV infection, as well as her now lifelong concern that she may one day develop another form of cancer related to HPV. We agree with the district court that the amount of the compensatory damages awarded by the jury, including the amount for future damages, was consistent with the evidence.

Here, the jury found that Evans's conduct constituted a willful and wanton disregard for the rights or safety of another. See Iowa Code § 668A.1(1)(a). The trial court concluded, and we agree, the punitive damages award was not inconsistent with a negligence claim. See *McClure v. Walgreen Co.*, 613 N.W.2d 225, 231 (Iowa 2000) (affirming punitive damage award in negligence action, noting the issue was for the jury).

We review de novo the claim that the amount of punitive damages awarded was excessive. *Wolf v. Wolf*, 690 N.W.2d 887, 894 (Iowa 2005). We consider three guideposts:

(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the [trier of fact] and the civil penalties authorized or imposed in comparable cases.

*Wolf*, 690 N.W.2d at 894 (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418, 123 S. Ct. 1513, 1520, 155 L. Ed. 2d 585, 601 (2003)). Because punitive damages are intended to punish and deter, see *Beeman v. Manville Corp. Asbestos Disease Compensation Fund*, 496 N.W.2d 247, 255 (Iowa 1993), of these factors, the degree of reprehensibility of Evans's conduct is the most important. See *Wolf*, 690 N.W.2d at 894.

In determining reprehensibility, the court considers a number of factors including whether the harm caused was physical as opposed to economic, the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others, the conduct involved repeated actions or was an isolated incident, and the harm was the result of intentional malice, trickery, or deceit, or mere accident. *Id.* On our de novo review of the record, we find all of these factors were established in the evidence. The harm caused was not only physical, it concerns the most intimate and private interests, including sexuality and childbearing. Evans's conduct demonstrated a reckless disregard for Rossiter's health and safety. Evans is a dentist. He has received medical training and should be aware of the risks associated with communicable diseases. Yet, Evans engaged in numerous sexual acts with Rossiter, repeatedly exposing her to genital warts, HPV, and bacterial vaginitis. The harm was not a result of mere accident.

We next consider the disparity between the actual harm and the punitive damage award. We are to ensure that the measure of punishment is both reasonable and proportionate to the amount of harm and the general damages recovered. See *id.* at 895. There is not a great disparity here between the compensatory and punitive damages award such that it raises a suspicion of inflamed passions on the part of the jurors. Rather, the amount of the punitive damages award reflects the jurors' determination that conduct like Evans's should be deterred in an amount greater than the actual damages caused.

Finally, we are to consider the disparity between the punitive-damage award and the civil or criminal penalties authorized or imposed in comparable cases. See *id.* Evans contends that "no damage award for negligent transmission of an STD in any reported case in any jurisdiction in the United States comes remotely close" to the award in this case. We first note that the cases Evans cites are all more than fifteen years old. Inflation alters what once may have seemed a large award. Additionally, the cases do not concern the transmission of HPV, several types of which can lead to cancer. *Meany v. Meany*, 639 So. 2d 229 (La. 1994) (remitting award from \$125,000 to \$93,676 where evidence showed husband transmitted herpes, but not venereal warts, to his wife); *M.M.D. v. B.L.G.*, 467 N.W.2d 645, 648 (Minn. Ct. App. 1991) (transmission of genital herpes); *Doe v. Roe*, 267 Cal. Rptr. 564, (Cal. Ct. App. 1990) (herpes). The trial court concluded that the amount of damages awarded, both actual and punitive, were within the range of evidence and did not warrant the grant of a new trial. We find no abuse of discretion.

**III. Conclusion.**

We conclude there was sufficient evidence to sustain the jury's finding of negligent transference of an STD. Evans failed to preserve his claim that punitive damages were not warranted in light of the jury's findings on Rossiter's claims of battery, assault, and fraudulent misrepresentation. The trial court did not abuse its discretion in denying Evans's motion for new trial based on his claims that the compensatory and punitive damage awards were excessive. We therefore affirm.

**AFFIRMED.**