



IN THE COURT OF APPEALS OF IOWA CLERK SUPREME COURT

DAVID B. CAHILL,	)	
Appellant,	)	Filed November 10, 1977
v.	)	
GJELLEFALD CONTRACTORS, INC.,	)	
Appellee.	)	$\frac{277}{2-59459}$

Appeal from the Webster District Court - R. K. Richardson, Judge.

Appeal by plaintiff - motorcyclist from a judgment notwithstanding the verdict in a personal injury negligence action. Reversed and remanded.

John W. Gailey of Gailey, Breen and Breen, of Fort Dodge, for appellant.

James L. Kramer, of Johnson, Burnquist, Erb, Latham & Gibb, of Fort Dodge, for appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

This is an action by a motorcyclist against a public improvement contractor for personal injuries sustained when his motorcycle was driven into an open hole in a city street in Fort Dodge. Trial to a jury resulted in a substantial verdict for the plaintiff. Following the filing of post-trial motions the trial court granted the defendant's motion for judgment notwithstanding the verdict. We reverse and direct that judgment be entered for plaintiff on the verdict.

While defendant on this appeal seeks to save the result achieved below by reliance upon plaintiff's contributory negligence, this issue was not preserved in the trial court. Defendant's motion for judgment notwithstanding the verdict did assert as one of the grounds thereof that the evidence established plaintiff's contributory negligence as a matter of law. But, rule 243(b), Rules of Civil Procedure, has been construed to prohibit the inclusion of grounds in such a motion which have not been included in a motion for directed verdict. *Dutcher v. Lewis*, 221 N.W.2d 755, 760 (Iowa 1974); *Miller v. Young*, 168 N.W.2d 45, 50 (Iowa 1969).

We cannot construe defendant's motion for directed verdict in the trial court as asserting grounds based upon plaintiff's contributory negligence. The only reference in the record to contributory negligence is made after the motion was concluded and was stated parenthetically. Accordingly, the only issue presented on appeal is whether the evidence in the court below, when viewed most favorably to the plaintiff, created an issue for the jury as to defendant's negligence.

It is well settled regarding motions for judgment notwithstanding the verdict and for directed verdict, that a reviewing court is required to view the evidence in the light most favorable to the party against whom such motions are made regardless of whether such evidence is contradicted, and every legitimate inference that may be drawn therefrom must be carried to the aid of the verdict. *Winter v. Honegger's & Co.*, 215 N.W.2d 316, 321 (Iowa 1974); *Leasing, Inc. v. Gage*, 199 N.W.2d 43, 44 (Iowa 1972). A corollary to this rule in negligence cases is that generally questions of negligence, contributory negligence and proximate cause are for the jury and it is only in exceptional cases that they may be decided as matters of law. Rule 14(f)(10), Rules of Appellate Procedure; *Ehlinger v. State*, 237 N.W.2d 784 (Iowa 1976); *DeYarman v. State*, 226 N.W.2d 26 (Iowa 1975); *McCaull v. Universal Mfg. Co.*, 218 N.W.2d 592 (Iowa 1974).

In passing on the issue before us we start with the proposition that it has long been recognized as the law of the state that one who digs holes in an area where vehicular or pedestrian traffic is to be anticipated has a duty to anticipate and protect against injury from persons falling into such excavations. *McKee v. Iowa Railway & Light Co.*, 204 Iowa 44, 214 N.W. 564 (1927). The defendant in the present case admits having dug the hole in the street and leaving it uncovered. It seeks to avoid liability by showing it complied with its duty to protect the public by the use of barricades, signs and flashing signals. It appears from the record that in spite of barricades and warning signs the public had been driving on the street in question during the period of this construction. It was possible for motor vehicles to pass through the area in question by driving along one side or the other of this hole. The evidence indicates this occurred on several occasions. The street in question is a heavily traveled north-south artery in Fort Dodge.

We believe that the jury could have found that defendant should have anticipated that traffic would pass in the area of and by this excavation in spite of the warning signs or barricades and should have taken special precautions to guard against the hazard which it had created.

Plaintiff, in his petition, alleged that defendant was negligent "in failing to adequately light or illuminate said area so as to warn the approaching plaintiff and others of the aforesaid condition." Illumination is a form of warning. Whether notice or warning of a reasonable foreseeable danger is adequate, like most questions bearing on negligence, is ordinarily for the jury. *Lakatosh v. Diamond Alkali Co.*, 208 N.W.2d 910, 913 (Iowa 1973). Plaintiff testified that he saw no flashing lights in front of the snow fence which surrounded this hole, and that motorcycle headlights did not reveal the fence plainly. Another witness testified that you could not see this hole "until you got right on it." She further testified that when she drove by the hole on the evening of the accident, there were no barricades or warning flashers directly in front of the hole although there were reflectors on the snow fence. Defendant's construction superintendent testified that later that same evening when he drove by the construction site there were flasher lights working on the barricades immediately in front of the hole. The jury of course was not bound to credit this testimony.

Viewing the evidence most favorably to the plaintiff we hold that a jury issue was presented as to the sufficiency of the illumination provided by defendant and that a jury could have found negligence on defendant's part, in this particular respect, which proximately caused plaintiff's injury. Accordingly, we reverse the judgment and direct that judgment be entered for the plaintiff on the jury's verdict.

REVERSED AND REMANDED.