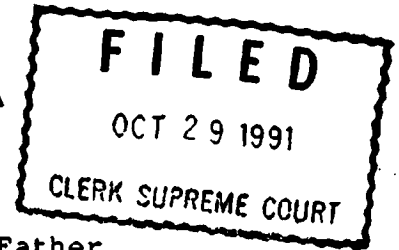


IN THE COURT OF APPEALS OF IOWA

No. 1-269 / 90-1512



RACHEL A. SMITH, A Minor, By and Through Her Father
and Guardian, JOSEPH J. SMITH, Individually,

Appellants,

vs.

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LINDA C. McQUILLEN,

Appellee.

Appeal from the Iowa District Court for Dubuque County,
L. John Degnan, Judge.

Plaintiff appeals the district court's refusal to grant
her a new trial after a jury verdict for defendant on her
tort claims. **AFFIRMED.**

Mark S. Beckman of Fitzsimmons & Beckman, Dubuque, for
appellant.

William C. Fuerste of Fuerste, Carew, Coyle, Juergens &
Sudmeier, P.C., Dubuque, for appellee.

Considered by Oxberger, C.J., and Donielson and Habhab,
JJ.

HABHAB, J.

On May 5, 1987, at about 5:00 p.m., Rachel Smith, a minor, was driving her moped on Aurora Street in Dubuque, Iowa. Rachel was accompanied by her friend, Christy Kuennen, who was also driving a moped.

Rachel was driving slightly ahead of Christy, and Christy called out "Rachel," to get Rachel to slow down. Rachel looked back momentarily, but did not slow down. Christy then called out "Rachel" again because she saw gas fumes coming from Rachel's moped. Rachel looked back again. Before Rachel could turn her head to look forward, Christy yelled "Rachel!" for a third time because she saw a car in the street. By the time Rachel turned her head forward, there was not sufficient time for her to stop, and she collided with the car being driven by defendant Linda McQuillen.

McQuillen testified that she had been backing out of her driveway onto Aurora Street. She stated she had looked both ways before pulling out into the street and had not seen the two girls on their mopeds. McQuillen stated the car was stopped and she was preparing to put the car into drive when the collision occurred.

Rachel's jaw was broken in the collision. She also lost four of her teeth. Oral surgery was required to put in permanent replacements.

Rachel and her father, Joseph Smith, brought this tort suit against McQuillen. The case was tried before a jury.

The jury returned a verdict which found McQuillen negligent, but also found her negligence was not a proximate cause of Rachel's injuries. Plaintiffs filed a motion for a new trial which was denied by the district court. Plaintiffs then filed this appeal.

This case was tried at law. Our review is for correction of errors of law. Iowa R. App. P. 4. We review the record to determine if there is substantial evidence to support the decision of the trial court. Recruiter, Inc. v. Brenco Automation Center, Inc., 354 N.W.2d 245, 246 (Iowa App. 1984). If that quantum of evidence exists, we are bound thereby. Id.

Plaintiffs contend the evidence does not support the jury's finding that McQuillen's negligence was not a proximate cause of Rachel's injuries. They claim the district court should have granted them a new trial.

In ruling on a motion for a new trial, broad but not unlimited discretion is vested in the trial court. Kiner v. Reliance Insurance Co., 463 N.W.2d 9, 13 (Iowa 1990). Only when the evidence clearly shows an abuse of discretion by the trial court will we interfere with a ruling upon a motion for a new trial, such rationale being based upon the trial court's better position to evaluate the motion. Thompson v. Rozeboom, 272 N.W.2d 444, 447 (Iowa 1978).

Proximate cause is still a required element in a negligence suit under comparative tort theory. Kaiser Agricultural Chemicals, Inc. v. Peters, 417 N.W.2d 437, 439

(Iowa 1987). The element of proximate cause must be determined separately from negligence. Blackhawk Building Systems, Ltd. v. Law Firm of Aspelmeier, Fisch, Power, Warner & Engberg, 428 N.W.2d 288, 290 (Iowa 1988). In order to show proximate cause, the injured must show that, but for the defendant's negligence, the loss would not have occurred. Id.

Plaintiffs apparently are arguing that McQuillen's negligence should be found a proximate cause of Rachel's injuries as a matter of law. Plaintiffs state in their brief, "The jury determined that the Defendant was at fault yet not a proximate cause of the injuries to Plaintiff. This amounts to saying that one is at fault but not at fault."

The general rule is that questions of proximate cause are generally for the jury and only in exceptional cases may they be decided as matters of law. Woods v. Schmitt, 439 N.W.2d 855, 864 (Iowa 1989).

We find the question of proximate cause was properly submitted to the jury in this case. We cannot find that as a matter of law McQuillen's negligence should be found a proximate cause of Rachel's injuries. The Plaintiffs have not claimed the jury was improperly instructed on the issue of proximate cause. We hold the district court did not abuse its discretion in denying the motion for new trial.

AFFIRMED.