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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

BARBARA OLDHAM and
JANICE R. REILAND,

Appellants,

vs.

GARY E. BEEM,

Appellee.

Filed November 10, 1977

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2-59251 &
2-59312

Appeal from Polk District Court - John N. Hughes, Judge.

Plaintiffs appeal adverse jury verdict in negligence action, assigning as error the refusal of the trial court to submit certain jury instructions and to grant a mistrial.

AFFIRMED.

David Wiggins and Louis A. Lavorato, of Williams, Hart, Lavorato & Kirtley, of West Des Moines, counsel for appellants.

Thomas W. George and Donald C. Hohnbaum, of Cosson, Christianson, Hohnbaum & George, of Des Moines, counsel for appellee.

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

DONIELSON, J.

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Plaintiffs-Barbara Oldham and Janice Reiland, pedestrians who were struck by an automobile driven by defendant-Gary Beem, appeal from an adverse jury verdict and judgment. They assign as error the refusal of the trial court to submit certain instructions to the jury and to grant a mistrial.

Plaintiffs were crossing East 30th Street in a westerly direction near the intersection of Grand Avenue in Des Moines on May 20, 1972, when they were struck by defendant's automobile, which was traveling in a southerly direction on East 30th Street. In essence, plaintiffs alleged in their separate petitions that Beem was negligent in (1) failing to keep a proper look out; (2) failing to have said motor vehicle under proper control; (3) driving at a rate of speed that was unsafe under the conditions then and there existing; and (4) failing to yield the right-of-way to a pedestrian crossing the roadway within a crosswalk at an intersection. By way of answer, Beem alleged that the negligence of the plaintiffs was the proximate cause of their injuries. At the conclusion of trial, plaintiffs' motions to amend their pleadings to conform to the evidence were granted. Consequently, plaintiffs further alleged Beem's negligence in (1) traveling at a rate of speed greater than that which would permit him to stop within the assured clear distance ahead; (2) failing to give a signal as he approached the intersection; and (3) traveling at a rate of speed in excess of the stated speed limit of 30 miles per hour.

I. Jury Instructions.

A. Plaintiffs first argue that it was error for the trial court to refuse to instruct the jury that any speed by Beem's auto in excess of 30 miles per hour was unlawful and constituted negligence. In denying the request for this instruction, the trial court stated that there was no competent evidence that the statutory speed limit was exceeded.

The rule regarding the submission of specifications of negligence to the jury is well-settled. In *Nolte v. Case*, 221 N.W.2d 741, 745 (Iowa 1974), the court stated:

"Whether a specification of negligence should be submitted to the trier of fact depends on the evidence which supports it. . . .

"There is, of course, no duty to instruct upon an issue without substantial support in the evidence or with support resting only on speculation or conjecture. A mere scintilla of evidence is not sufficient. . . ." (citations omitted)

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Upon a review of the record, we find that the trial court was correct in concluding that the record does not contain substantial evidence to justify the submission of the requested instruction. See Miller v. International Harvester Co., 246 N.W.2d 298, 300-301 (Iowa 1976); Hedges v. Conder, 166 N.W.2d 844, 856 (Iowa 1969). In view of the evidence adduced, the trial court instructed the jury regarding reasonable speed under the circumstances. We find that the court was correct in so doing, and did not err by refusing to instruct as to a violation of statutory speed.

B. Plaintiffs also assert that they were entitled to an instruction that under § 321.329, The Code, a driver of a motor vehicle has a duty to sound his horn when necessary, and that a violation of that duty constitutes negligence. However, the trial court refused to give that instruction on the ground that this matter had never been pled. Although plaintiffs moved to amend their pleadings to conform with the proof on this point, they did so after objections to the jury instructions and defendant's closing arguments were made. See rules 88 and 196, Rules of Civil Procedure. The amendment, which was permitted, stated: "failure to give a signal as he approached the intersection." However, after that amendment was made, the plaintiffs did not renew their request that the instruction be given, and therefore they cannot complain now. Any further objection, not raised, was waived. Rule 196, R.C.P.; State v. Still, 244 N.W.2d 805, 807 (Iowa 1976); Porter v. Iowa Power and Light Co., 217 N.W.2d 221, 237 (Iowa 1974). Since plaintiffs failed to timely plead the signal issue so as to place it before the court, instruction on the issue was not justified.

C. Plaintiffs urge that the court should have instructed the jury regarding possible negligence under the last clear chance doctrine. In refusing to do so, the trial court indicated that the last clear chance doctrine had never been pled and, regardless of that fact, the evidence did not provide all of the elements necessary for submission.

The rule regarding this doctrine was set forth in Menke v. Peterschmidt, 246 Iowa 722, 725, 69 N.W.2d 65 (1955):

"There is also the rule that last clear chance, like other negligences, must be pleaded and the burden is upon the pleader to prove the facts making it applicable by a preponderance of the evidence..." (citations omitted) (emphasis added).

Accord, Albrecht v. Rausch, 193 N.W.2d 492, 496-497 (Iowa 1972). In other words, the injured party must plead the doctrine or allege facts essential to its application.

Ackerman v. James, 200 N.W.2d 818, 830-831 (Iowa 1972). Since plaintiffs did not do so, instruction on this doctrine was inappropriate.

The trial court also indicated that the evidence adduced did not provide all of the elements necessary for the submission of the last clear chance doctrine. After a review of the entire record, we conclude, as did the trial court, that substantial evidence did not exist which would justify submission of the doctrine to the jury. See, Ackerman v. James, supra, at 827; Dorcas v. Aikman, 259 Iowa 63, 72-73, 143 N.W.2d 396 (1966).

D. Oldham and Reiland contend that the court should have instructed regarding the assured clear distance rule, as codified in § 321.285, The Code. In refusing to give the instruction, the court found that there was not sufficient competent evidence to justify its submission.

In Coppola v. Jameson, 200 N.W.2d 877, 880 (Iowa 1972), the court indicated that a jury question as to a violation of the assured clear distance rule is generated when there is substantial evidence:

" (1) That the object with which the operator collided was located ahead of him in his lane of travel;
 (2) That such object was reasonably discernible; and
 (3) That the object was (a) static or stationary, (b) moving ahead of him in the same direction as such operator, or (c) came into his lane of travel within the assured clear distance ahead at a point sufficiently distant ahead of him to have made it possible to bring his vehicle to a stop and avoid a collision. " (citations omitted) (emphasis added)

See Nolte v. Case, supra, at 745.

Defendant argues that this general rule is inapplicable because a sudden emergency existed and because the third requirement expressed in Coppola was not complied with. In support of his assertion that a "sudden emergency" situation existed so as to make the assured clear distance rule inapplicable, Beem argues that since his car left only 54 feet of skid marks and was traveling at 30 miles per hour at most, he could have only been aware of the plaintiffs' presence for one or two seconds. He places reliance upon Vanderheiden v. Clearfield Truck Rentals, Inc., 210 N.W.2d 527, 531 (Iowa 1973), where the court stated:

"The assured-clear-distance rule is not applied where there are extraordinary or disconcerting circumstances affecting the operator's judgment and actions, as where the motorist is confronted with a sudden emergency not of his making or where the motorist encounters a dangerous situation which

in the exercise of reasonable care he had no reason to expect. So, a sudden and unexpected entry of a person, motor vehicle, or other object into the path of travel will take the case out of the assured-clear-distance statute or rule. . . . (emphasis added)."

We agree with the defendant that a "sudden emergency" existed so as to make the requested jury instruction inappropriate. Accord, *Nolte v. Case*, supra, at 747.

However, we also agree that plaintiffs did not fully satisfy requirement (3) under the Coppola standard. Beem correctly argues that neither (a) nor (b) of (3) apply in the instant case. He further asserts that the evidence does not indicate that (c) was satisfied either. In *Nolte v. Case*, supra, at 745, the court construed the term "ahead" in requirement (3)(c) as meaning to the front of and within the directional line of travel of the motorist.

The record reflects that Beem had already begun to apply his brakes before the plaintiffs entered his lane of travel and that they had only taken one or two steps into his lane when they were struck. Consequently, since (3) was not satisfied, the court did not err by refusing to instruct on the assured-clear-distance doctrine.

II. Motion for Mistrial.

Plaintiffs assert that the court abused its discretion in denying their motions for mistrial and new trial on the basis of improper closing argument by defense counsel. According to the objection made at trial and the findings made by the court, defense counsel alluded to the fact that the plaintiffs' counsel had been successful in keeping out testimony of Officer Dove as to his opinion of impact. The trial court sustained plaintiffs' objection to this statement. The record indicates that this testimony was excluded after much debate and an offer of proof outside the presence of the jury.

Defendant argues that the statement was legitimately made in response to statements made by plaintiffs' counsel in closing argument. He further asserts that the comment was not prejudicial and that he had the right to comment upon the evidence or lack thereof, the failure of the opposing party to call any witness, and his interpretation of physical facts.

In *Andrews v. Struble*, 178 N.W.2d 391, 402 (Iowa 1970), the court restated the applicable rule:

"The trial court has broad discretion in passing on the propriety of jury argument and we will not reverse unless there has been a clear abuse of such discretion. Before a new trial will be granted for misconduct in argument it must appear prejudice resulted or a different result could have been probable but for such misconduct. . . ."

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In our evaluation of this issue, we are aware that it is permissible for counsel to comment on the lack of evidence, *Johnson v. Kinney*, 232 Iowa 1016, 1025-1027, 7 N.W.2d 188 (1942), and that the trial court is in the best position to determine the ill effect, if any, of defense counsel's remarks. *Hein v. Waterloo C. F. & N. R. Co.*, 180 Iowa 1225, 1232, 162 N.W. 772 (1917).

Having concluded that the plaintiffs did not show prejudice or that a different result could have been probable but for the statements made, we affirm the judgment of the district court.

AFFIRMED.

All judges concur except Oxberger, J., and Carter, J., who dissent.

OXBERGER, J. (dissenting)

I dissent. The trial court refused to instruct on the defendant's alleged traveling in excess of the stated speed limit of thirty miles per hour.

An eyewitness motorist, Dave Paglai, testified in answer to a question as to his estimation of defendant's speed: "I would say between thirty and thirty-five, maybe."

The supreme court has said: "It is not for us to pass upon the weight and credit of the evidence. These are questions of fact from which reasonable minds might draw varying conclusions — and the determination is for the jury." *Youngs v. Fort*, 252 Iowa 939, 943, 109 N.W.2d 230, 232 (1961).

I would reverse and remand for new trial.

Carter, J. joins in this dissent.