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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STEVEN J. DELANEY,	)	
Plaintiff-Appellant,	)	Filed September 24, 1985
vs	)	
CRST, INC., An Iowa Corporation; VINER'S, INC., An Iowa Corporation; and GEORGE ALLIE FIFER,	)	5-342 / 84-1670
Defendants-Appellees.	)	

Appeal from the Iowa District Court for Linn County - William R. Eads, Judge

Plaintiff appellant appeals an adverse ruling by the trial court in a negligence action against defendant truck company and its employee driver. **AFFIRMED.**

John A. Pabst of the Pabst Law Firm, Albia, Iowa, and Richard Fry of Shuttleworth and Ingersoll, Cedar Rapids, Iowa, for plaintiff-appellant.

Robert E. Konchar and J. Michael Weston of Moyer & Bergman, Cedar Rapids, Iowa, for defendants-appellees.

Considered by Donielson, P.J., Schlegel, and Sackett, JJ.

SCHLEGEL, J.

Plaintiff appellant appeals an adverse ruling by the trial court in a negligence action against defendant truck company and its employee driver. We affirm the trial court.

Plaintiff Delaney was pulling a homemade livestock trailer with his pickup on U.S. Highway 34 when he was struck from the rear by a semi truck owned by the defendant CRST, and being driven by its employee, defendant Fifer. The facts in this case are greatly disputed. The trial court, however, found that the plaintiff's actions were the proximate cause of his injuries and the vehicular collision. Plaintiff, on appeal, alleges that the facts do not support the trial court's findings. He also alleges that the trial court failed to administer substantial justice.

I. **Scope of Review.** This is an action at law. The trial court's findings of fact bind this court if supported by substantial evidence. Iowa R. App. P. 14(f)(1). When as here the trial court determines that a party has failed to carry the burden of proof on an issue, we will not interfere unless we find the burden was carried as a matter of law. Chown v. USM Corp., 297 N.W.2d 218, 220 (Iowa 1980).

II. **Factual Finding Supported by Substantial Evidence.** Plaintiff filed a negligence claim against defendants, therefore he assumed the burden of proof in this action. The trial court's factual findings are supported by the following evidence.

The incident occurred July 7, 1981, at aproximately 10:20 a.m. on U.S. Highway 34, an east-west, two-lane, concrete highway with shoulders. The weather and the pavement were both dry at the time of the collision. Plaintiff was driving a pickup and was pulling his homemade 16-foot farm trailer. The trailer had six-foot-high gate sides, which formed a two-compartment confine-

ment pen around its exterior. A six-foot board running horizontally across the wheel base of the trailer separated the two compartments.

Plaintiff left his ranch and was travelling west on Highway 34 to an abandoned farm and corral when Fifer, driving his employer's semi truck, overtook and commenced following plaintiff at a distance from 150 to 300 feet. Both vehicles were travelling approximately 40-45 miles per hour when they passed a mailman parked on the north side of the highway approximately a quarter of a mile from where the collision took place. The mailman testified that he looked in his rearview mirror while checking traffic before he might pull out onto the highway. He did not see plaintiff's turn signal flashing when he looked in the mirror, but did see the right taillight flashing on the pickup as plaintiff passed him. He did not notice any brake lights, taillights, or turn signals operating on the rear of plaintiff's trailer. He also stated that he heard the collision but did not actually see it.

Plaintiff testified that he noticed defendant Fifer approaching behind him and was concerned about whether defendant might be able to pass him. Approximately a quarter of a mile from his destination, plaintiff attempted to steer his vehicle onto the shoulder of the highway and let defendant pass. He stated his pickup and trailer were at least two-thirds off the travel portion of the highway. Plaintiff testified that he knew he was going too fast to turn to his right into the driveway at the abandoned corral. He also admitted that he panicked, fearing that defendant would not be able to pass. He then tried to wiggle down to the floor, and in doing so, attempted to take the pickup out of gear by moving the floor-mounted gearshift forward. He testified that at that point he waited several seconds until impact occurred.

Defendant Fifer testified that he saw plaintiff slow down, so he took his foot off the accelerator to increase the distance between the two vehicles to

approximately 300 feet. After an eastbound car passed, defendant began to pass plaintiff's pickup and trailer, which at this time had moved over to the right. Fifer checked his mirrors, raised his arm to check his watch, and began to move his vehicle left. At no time did Fifer's vision leave the area in which plaintiff was travelling. Although Fifer was in a position to see any lights which might have come on ahead of him, he did not see any because the lights in the rear of plaintiff's trailer were not working and the partition board on the trailer blocked the vision of the rear lights of the pickup. When Fifer returned his gaze straight ahead, it appeared to him that plaintiff had stopped in his path. He slammed on his brakes and swerved his unit further to the left. The right one foot of Fifer's aluminum truck cab hit the rear left one foot of plaintiff's trailer. Fifer testified that he never saw plaintiff's alleged hand signals or any brakes lights, taillights, or turn signals operating on the rear of plaintiff's trailer.

A highway patrolman, with nineteen years' experience, testified that the point of impact was approximately three and one-half feet north of the centerline of the highway. This evidence contradicts plaintiff's testimony as to the position of his vehicle at impact. The evidence supports the trial court's conclusion that plaintiff's vehicle swung onto the highway in front of defendant's vehicle while defendant was commencing his passing movement.

We agree with the trial court that defendant is not liable to plaintiff for improperly passing plaintiff. Iowa Code section 321.299 requires only that the passing driver "... overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance ...." We concur with the trial court that defendant Fifer could reasonably have assumed that plaintiff would stay over on the shoulder and that he could safely pass without going over completely into the left lane.

We are not persuaded by the plaintiff that he was de facto run off onto the shoulder. Plaintiff was in control of how fast he was going. Moreover, we are persuaded from the evidence that if indeed plaintiff had stayed on the shoulder and had not panicked and abandoned control of his vehicle in order to get to the floor, the defendant could have safely passed and no collision would have occurred.

Plaintiff has failed to prove in any way that defendant Fifer was following too closely at the time of the collision. He also has failed to carry his burden that defendant Fifer did not keep a proper lookout while following plaintiff's trailer.

In evaluating sufficiency of evidence, we view it in its light most favorable to sustaining the court's judgment. We need only consider evidence favorable to the judgment, whether or not it is contradicted. Briggs Transportation Co. v Starr Sales Co., 262 N.W.2d 805, 808 (Iowa 1978).

The trial court's factual findings are supported by substantial evidence in the record. Plaintiff's argument that the trial court failed to administer substantial justice is without merit. The decision of the trial court is affirmed.

AFFIRMED.