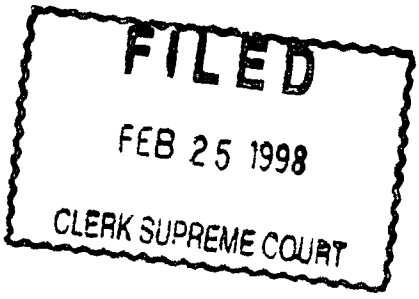
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IN THE COURT OF APPEALS OF IOWA



No. 7-656 / 96-1692

BILL NICKEL and **MELONIE NICKEL,**
Appellants,

vs.

WILLIAM CAMPIDILLI,
Appellee.

Appeal from the Iowa District Court for Boone County, William C. Ostlund, Judge.

The plaintiffs, Bill and Melonie Nickel, appeal entry of a district court judgment, following a jury trial, denying their claim for damages sustained in an automobile accident wherein Melonie, while driving Bill's car, struck a cow owned by the defendant, William Campidilli. **AFFIRMED.**

Steven L. Udelhofen of Marks, Marks & Marks, Urbandale, for appellants.

Theodore T. Duffield of Patterson, Lorentzen, Duffield, Timmons, Irish, Becker & Ordway, L.L.P., Des Moines, for appellee.

Heard by Cady, C.J., and Sackett and Vogel, JJ.

VOGEL, J.

The plaintiffs, Bill and Melonie Nickel, appeal entry of a district court judgment, following a jury trial, denying their claim for damages sustained in an automobile accident wherein Melonie, while driving Bill's car, struck a cow owned by the defendant, William Campidilli. Plaintiffs contend the district court erred in: (1) excluding the testimony of two independent witnesses who previously collided with cattle owned by the defendant; (2) failing to admit the testimony of Mr. and Mrs. Douglas Johnson, who would have testified they were aware that defendant's cattle had escaped on the day in question; (3) failing to sustain their objection to the court's jury instructions on comparative fault; and (4) failing to allow the jury to examine the premises and clearly understand the issue of how the cattle escaped.

Background facts. On October 26, 1993, Melonie Nickel, the seventeen-year-old daughter of the plaintiff, Bill Nickel, was driving home on a rural highway near Woodward, Iowa, following an evening of babysitting. While driving east on the highway, she entered a low spot in the road. As she crested the hill toward an intersection, Melonie was suddenly confronted with several cows which had wandered across the road from the pasture on the north side of the highway. Nickel collided with a cow which landed on top of her car and totaled it. The car came to rest approximately 125 feet east of the intersection. She was tossed through the sunroof, causing extensive head and facial injuries. The Nickels claimed the accident

was caused by Campidilli's negligence in allowing his cattle to be out on the open highway. Campidilli argued the cattle could have gotten out of the pasture when a former lessee opened a gate while retrieving some personal property. The jury rendered a verdict in favor of defendant Campidilli, from which verdict the Nickels now appeal.

Scope of review. We review the district court's rulings for correction of errors at law. Iowa R. App. 4. Trial court rulings on the admissibility of evidence are generally within the trial court's discretion and we will not reverse unless there has been an abuse of that discretion. *State v. Hubka*, 480 N.W.2d 867, 868 (Iowa 1992).

I. Inadmissible testimony. A. The Nickels attempted to introduce the testimony of Kim Springer and Brian Holz, who would have testified they hit a cow owned by Campidilli in January 1991 and that Campidilli had paid for the damage to their car. Nickels wanted this evidence admitted in an effort to establish habit and routine practice under Iowa Rule of Evidence 404. The trial court declined to admit this testimony into evidence.

The Nickels cite Rule 404(b) and generally argue relevancy. Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Id. However, the Nickels specifically and consistently argue "habit," "pattern of activity," and "similar accidents" which fall within the purview of Rule 406 which pertains to habit and routine practice. Rule 406 states:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Id. Because the Nickels address habit, albeit without referring specifically to Rule 406, we address their argument under Rule 406 as the more pertinent provision.

The use of Iowa Rule of Evidence 406, as per the committee comment, is conditioned on the habit or routine practice as being "numerous enough to base an inference of sytematic conduct," and the prior acts "should have occurred under substantially similar circumstances, so as to be naturally accountable for by a system only, and not as casual recurrences." Iowa R. Evid. 406 commitee comment. The evidence of one prior occurrence where one cow owned by Campidilli escaped a different pasture operated by Campidilli approximately two years prior to the Nickel accident would not constitute a routine practice or habit under our rules of evidence. We accordingly find the trial court did not abuse its discretion in declining to admit the testimony of Springer and Holz.

B. The Nickels next argue the district court erred in failing to admit Douglas and Donna Johnson's testimony. They claim the Johnsons would have testified they

saw cattle outside the fence earlier in the day of the accident and saw several places in the fence line where the cattle could have escaped.

The Johnsons were not identified as potential witnesses in the answers to interrogatories, nor included on the witness list. However, a summary of what they would testify to was given to Campidilli in other discovery documents. Initially, the court withheld ruling on whether the Johnson's testimony would be allowed. Nickel preserved his position by making an offer of proof. During the course of the trial, the court ruled that the Johnsons would be allowed to testify. However, as the Johnsons were no longer available, the offer of proof was read into the record. The Nickels do not cite any authority for its proposition the trial court erred in failing to initially admit the testimony. Furthermore, we do not find any prejudice resulted as the jury heard the offer of proof read into the record. Moreover, the trial court could have properly excluded the Johnson testimony because of Nickel's failure to comply with discovery and pretrial orders. *See Rowen v. LeMars Mut. Ins. Co.*, 282 N.W.2d 639, 646 (Iowa 1979). We find the trial court acted within its discretion.

II. Comparative fault instruction. The Nickels next assert the trial court erred in submitting instructions regarding comparative fault to the jury, as there were no facts in the record which would have generated a comparative fault instruction.

We recognize that "there must be substantial evidence in the record to support the instruction submitted." *Duncan v. City of Cedar Rapids*, 560 N.W.2d 320, 327

(Iowa 1997) (quoting *Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 150 (Iowa 1992)).

However, even if a jury instruction should not have been given, reversal is not required unless the error is prejudicial. *Gore v. Smith*, 464 N.W.2d 865, 868 (Iowa 1991). The Nickels cannot claim prejudice resulted from the comparative fault instruction given. This case was submitted to the jury on special interrogatories. The first question the jury answered on the verdict form was, "Was the defendant at fault?" Answer: NO. When a plaintiff fails to establish the fault of the defendant, an error in a damage instruction cannot be held to have prejudiced the plaintiff. *Ladeburg v. Ray*, 508 N.W.2d 694, 696 (Iowa 1993). We affirm on this issue.

III. Examination of premises by jury. The Nickels lastly argue the court erred in failing to allow the jury to view the accident site, as per the jury's request, so the jury could get a better grasp of the layout and topography of the land.

Nickels' counsel raised the issue of the propriety of the trial court's refusal to allow the jury to view the accident site in a motion for new trial . "However, a motion for a new trial is not a substitute for objecting at the time of the offending conduct." *State v. Romeo*, 542 N.W.2d 543, 552 (Iowa 1996). Nevertheless, we address this matter as the trial court considered the issue and ruled on its merits.

The fact finder is permitted to view physical property to assist in better applying testimony and understanding evidence. Iowa R. Civ. P. 194; *Hyler v. Garner*, 548 N.W.2d 864, 869 (Iowa 1996). The trial court is cloaked with discretion

as to whether to permit the jury to view the place where a material fact occurred. *Humphrey v. Happy*, 169 N.W.2d 565, 569-70 (Iowa 1969).

In this case, the trial judge denied the jury's request stating:

> Additionally, the affidavit of Stephen Vinson suggests that the jury was denied access to view the site. This is a matter that could have been taken up at pretrial and was an option of the plaintiffs that was never presented to the court. Further, the time element and conditions of the site were changing and to have allowed the jury to have viewed the scene at the time of trial may have been misleading as to the conditions on the date of the accident.

There is testimony in the record from Campidilli indicating the fence is in the same condition as it was at the time of the accident, more than two and one-half years earlier. However, we are unable to conclude the trial court abused its discretion in not allowing the jury to view the accident site as the court articulated reasonable concerns that may have adversely affected the jury's ability to carry out its duties.

Having carefully reviewed the record adduced at trial and the arguments before us on appeal, we affirm the trial court's decision in all regards.

AFFIRMED.