F I L E D
AUG 26 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

401

EDMUND KELLEY,

Plaintiff-Appellee,

vs.

NELSON HENRY ANTHOINE and JAMES H. WILSON,

Defendants-Appellants.

Filed August 26, 1980

0-149
2-62858

Appeal from Iowa District Court - John L. Hyland, Judge.

Defendants appeal from trial court's judgment entered on an adverse jury verdict in a guest statute case alleging that trial court erred: 1) in allowing plaintiff to amend his petition during trial; 2) in submitting the issue of joint enterprise to the jury; and 3) in overruling their motions for directed verdict, judgment notwithstanding the verdict, and new trial. AFFIRMED.

Raymond R. Stefani of Silliman, Gray & Stapleton, Cedar Rapids, Iowa, for defendants-appellants.

Lester B. Munson, Jr., of Smith & Munson, Wheaton, Illinois; and Thomas M. Buchanan of Elwood, Elwood & Buchanan, Williamsburg, Iowa; attorneys for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendants, Nelson Henry Anthoine and James H. Wilson, appeal from trial court's entry of judgment on a $19,000 jury verdict award in favor of plaintiff, Edmund Kelley, for injuries he suffered as a result of a one-car accident. Defendants allege that trial court erred 1) in allowing plaintiff to amend his petition during trial, 2) in submitting the issue of joint enterprise to the jury, and 3) in overruling their motions for directed verdict, judgment notwithstanding the verdict, and new trial. We affirm.

At approximately 10:15 p.m. on June 17, 1974, plaintiff was one of four persons in a 1973 Chevrolet Blazer owned by defendant Wilson. Defendant Anthoine was driving the westbound vehicle on Interstate 80 in Iowa County when he fell asleep at the wheel, causing the vehicle to enter the grass median strip. Anthoine attempted to steer the vehicle out of the median but it collided with the backside of the guardrail, overturned, and stopped with its wheels upward. Plaintiff sustained serious injuries as a result of the accident.

Plaintiff filed his petition on June 3, 1976, alleging that he was riding as a guest in the Wilson vehicle when it overturned, that Anthoine drove the vehicle with Wilson's knowledge and consent, that Anthoine drove the vehicle recklessly while under the influence of a drug and after he became drowsy, and that the negligence of Anthoine was the proximate cause of plaintiff's injuries. Both defendants filed answers admitting plaintiff's allegation that he was "riding as a guest." They also raised the guest statute, section 321.494, The Code 1975, as an affirmative defense.

During presentation of plaintiff's evidence, defendants objected to questions regarding who paid for gas and what arrangements were made for driving in shifts. These objections were overruled by trial court. Defendants thereafter asked similar questions on cross-examination and in presentation of their evidence.

At the close of plaintiff's evidence, on August 9, 1978, plaintiff moved for leave to amend his petition by substituting a new petition alleging three counts — negligence, recklessness, and negligent entrustment. Defendants resisted on the grounds that the amendment introduced new legal theories and that the statute of limitations barred any cause of action thereon. Trial court allowed amendment on the counts of negligence and recklessness, but sustained defendants' subsequent motion for directed verdict on the recklessness count only.

After receiving a copy of trial court's final instructions, defendants objected to instruction no. 14 regarding the joint enterprise exception to the guest statute on the

grounds that there was no support in the evidence to warrant giving the instruction. Trial court gave the instruction, however. Defendants also renewed their motion for directed verdict, which was overruled. Following the adverse verdict, trial court overruled defendants' motion for judgment notwithstanding the verdict and for new trial. Defendants' appeal followed.

I. Scope of Review. Our review of this appeal is on assigned error only. Iowa R. App. P. 4.[1]

II. Leave to Amend. Defendants assert that trial court abused its discretion in permitting plaintiff to amend his petition to conform to the proof and that the amendment was barred by the statute of limitations. The importance of the amendment is obvious in this case as it afforded the only basis for the jury's verdict. See Smith v. Village Enterprises, Inc., 208 N.W.2d 35 (Iowa 1973).

We first find defendants' assertion that plaintiff's amendment is barred by the statute of limitations has no merit.[2] Iowa R. Civ. P. 89 provides, in part: "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." See also Pease v. Zazza, No. 63850, slip op. at 10 (Iowa, filed July 16, 1980).

We continue our analysis with Iowa R. Civ. P. 88 which grants trial court broad discretion in determining whether to permit or to deny amendments to conform to prove during trial. W & W Livestock Enterprises, Inc. v. Dennler, 179 N.W.2d 484, 488 (Iowa 1970). We will interfere only upon a showing of abuse. Id. The rule is to allow such amendments. An amendment to conform to proof, however, "can be permitted only if it does not substantially change the claim or defense." Id.

Upon examination of the pertinent pleadings, we conclude plaintiff's amendment introduced a new theory of liability. Although plaintiff alleged that Anthoine's negligence was the proximate cause of his injuries, the theory of recovery in plaintiff's original petition was based on recklessness and the host/guest relationship. The amended claim was based on negligence and joint enterprise. This goes beyond mere

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[1] The court's ruling in Bierkamp v. Rogers, 293 N.W.2d 577 (Iowa 1980), does not apply to this case because constitutionality of the guest statute was not raised in trial court.

[2] The accident occurred on June 17, 1974. Trial court granted plaintiff's amendment on August 9, 1978. See § 614.1(2), The Code 1977.

amplification of the matters alleged in the original petition. McCornack, 229 Iowa at 460, 294 N.W. at 748. See also Page v. Koss Construction Co., 219 Iowa 1017, 1023, 257 N.W. 426, 429 (1935); Cornick v. Weir, 212 Iowa 715, 721, 237 N.W. 245, 247 (1931); In re Estate of Skiles, 210 Iowa 935, 937, 229 N.W. 235, 236 (1930); Pease v. Citizens State Bank, 210 Iowa 331, 340, 228 N.W. 83, 87 (1930). Such cases as Rosin v. Northwestern States Portland Cement Co., 252 Iowa 564, 107 N.W.2d 559 (1961); Emeny v. Farmers Elevator Co. of Iowa Falls, 194 Iowa 282, 189 N.W. 720 (1922); and Basham v. Chicago Great Western Railroad Co., 178 Iowa 998, 154 N.W. 1019, 157 N.W. 192 (1916), also support our conclusion. Thus, if our analysis ended at this point, we would find that trial court abused its discretion in allowing the amended petition.

We, however, must examine applicability of the Iowa rule which holds that "[w]here the parties voluntarily offer evidence on an issue the denial of an amendment to conform to such proof would be beyond fair discretion." Galbraith v. George, 217 N.W.2d 598, 601 (Iowa 1974) (quoting Laverty v. Hawkeye Security Insurance Co., 258 Iowa 717, 725, 140 N.W.2d 83, 88 (1966)). See also Mooney v. Nagel, 251 Iowa 1052, 1059, 103 N.W.2d 76, 80 (1960); Thorne v. Reiser, 245 Iowa 123, 128, 60 N.W.2d 784, 788 (1953). Applying this principle to the facts, we find that the issue of joint enterprise was tried by mutual consent. Although defendants initially objected to testimony of plaintiff's witness regarding who paid for the second tank of gas, defendants thereafter proceeded to cross-examine extensively on the issue of the purpose of the trip and the arrangements among the parties. Defendants also introduced independent evidence on these issues. Defendants' position is further weakened by the fact that they did not ask for a continuance, although they argued to trial court that granting of the amendment would deprive them of any opportunity to make investigations and to discover evidence on the new issues. See Ackerman v. Lauver, 242 N.W.2d 342, 344 (Iowa 1976). In light of this record, we find no merit in defendants' contention that trial court erred in permitting plaintiff's amendment.

III. Instruction on Joint Enterprise. Defendants further assert that trial court erred in instructing the jury on the issue of joint enterprise because there was no credible evidence in the record from which the jury could determine such a relationship existed. We do not agree.

A rebuttable presumption exists under Iowa law that a vehicular passenger is a guest. Boge v. Jack Link Truck Line, Inc., 200 N.W.2d 544, 546 (Iowa 1972); Wharff v. McBride, 183 N.W.2d 700, 703 (Iowa 1971). The party claiming that a passenger is other

than a guest must overcome the presumption. Id. A passenger is not a guest when he or she is riding in the vehicle for the mutual, tangible benefit of the owner (or operator) and himself or herself. Id. Benefits accruing to the owner (or operator) must be a substantial factor motivating that person to furnish the transportation. Id. See also Loudon v. Hill, 286 N.W.2d 189, 193 (Iowa 1979).

In our review, therefore, we must determine whether there is sufficient evidence that the defendants' expectations of benefit were a substantial motivating factor to warrant trial court's submission of this question to the jury. Wharff, 183 N.W.2d at 705. "If the facts are in dispute concerning the purpose of the transportation or the conditions under which the carriage is made, a jury question is presented." Zwanziger v. Chicago & Northwestern Railway, 259 Iowa 14, 20, 141 N.W.2d 568, 572 (1966). We view the evidence in the light most favorable to plaintiff as the party having the burden of proof. Wharff, 183 N.W.2d at 705.

Evidence of benefit is sufficient if it shows that "the presence of the occupant directly compensates the operator or owner in a substantial and material or business sense, as distinguished from mere social benefit or nominal or incidental contribution to expenses." Ritter v. Dexter, 250 Iowa 830, 836, 95 N.W.2d 280, 283 (1959) (quoting McUne v. Fuqua, 42 Wash.2d 65, 70-71, 253 P.2d 632, 635-36 (1953)). "Monetary gain to the driver . . . is not a sine qua non to tangible benefit." Wharff, 183 N.W.2d at 705 (quoting Zwanziger, 259 Iowa at 23, 141 N.W.2d at 573).

In light of these principles, we conclude that there was sufficient evidence to generate factual issues regarding the purpose of the transportation and the conditions under which it was made. Peter Kelley, plaintiff's brother, testified that he, plaintiff, and Anthoine were going out west to travel and hopefully to find work. He further testified that he believed he paid for the second tank of gas. Anthoine ultimately stated that he agreed that Peter paid for the gas. He also testified that the four occupants had an arrangement to drive in two or three hour shifts. Defendant Wilson stated that it was possible plaintiff or his brother had paid for some of the gasoline, that he had been making trips west for fifteen years, and that it was one of his procedures to have a "talker" who would sit in the passenger seat to talk to the driver and try to keep the driver awake. Plaintiff testified that, based on his communications with his brother, Peter, he assumed the four occupants would share the expenses and the driving. Trial court committed no error in submitting the issue of joint enterprise to the jury.

IV. Motions for Directed Verdict, Judgment Notwithstanding the Verdict and New Trial. Our conclusion that the evidence generated a factual issue on joint enterprise is dispositive of defendants' challenge to trial court's refusal to grant their motions for directed verdict, judgment notwithstanding the verdict, and new trial. See Beitz v. Horak, 271 N.W.2d 755, 757 (Iowa 1978); Paulsen v. Des Moines Union Ry. Co., 262 N.W.2d 592, 594 (Iowa 1978); and Wirtanen v. Provin, 293 N.W.2d 252, 257 (Iowa 1980).

We therefore affirm trial court's judgment.

AFFIRMED.