FILED
AUG 31 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ELIZABETH L. HENKEL,

Appellant,

vs.

CLARA HERI, As Executor of the Estate of Clarence Heri,

Appellee.

Filed August 31, 1978

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2-60682

Appeal from Dubuque District Court - T. H. Nelson, Judge

Plaintiff passenger appeals from jury verdict for defendant in motor vehicle accident case claiming errors in admission of evidence and in instructions. - Affirmed.

Donald R. Breitbach, Dubuque, and Russel Neuwoehner, Dubuque, for Appellant.

William C. Fuerste and Robert Sudmeier, Dubuque, for Appellee.

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

PER CURIAM

Plaintiff Elizabeth Henkel appeals from a jury verdict in favor of defendant Clara Heri in her action for damages as a result of a motor vehicle accident between an automobile driven by Daniel DeMaio, in which she was a passenger, and an automobile driven by Clarence Heri. Clarence Heri died as a result of the accident and his wife Clara, as executor of his estate, was substituted as defendant. Plaintiff claimed her injuries were a proximate result of the negligence of defendant's decedent in the operation of his motor vehicle. On appeal, Henkel claims errors in admission of evidence, in instructions and in overruling her motion for new trial.

Plaintiff's initial contention concerns evidence of driver DeMaio's possible intoxication. She initially alleges error in not granting her motion in limine and subsequently in admitting the results of a blood test into evidence over proper objection. Henkel also alleges the trial court erred in overruling her motion for new trial because the results of the blood test were not competent, relevant and material to the issues of the case and that a proper foundation had not been laid for the admissibility of the results of the test.

Initially we note that where a motion in limine is denied, no reversible error exists. State v. Garrett, 183 N.W.2d 652, 655 (Iowa 1971). It is only where the opposing party attempts to offer the objectionable evidence and a proper objection is made that the alleged error is preserved for appeal. Stated otherwise, where the motion is denied, the movant must base his complaint on the trial record. Twyford v. Weber, 220 N.W.2d 919, 925 (Iowa 1974). See also State v. Langley, 265 N.W.2d 718, 720-21 (Iowa 1978).

At trial, plaintiff objected on the same grounds urged in her motion in limine, that the evidence was not competent, relevant or material to any issue and that the issue of sole proximate cause was not pled or properly in the case. The test of relevancy is whether the challenged evidence makes the desired inference more probable than it would be without the evidence. This determination is a matter for exercise of trial court discretion. Kalianov v. Darland, 252 N.W.2d 732, 735 (Iowa 1977); State v. Engeman, 217 N.W.2d 638, 639 (Iowa 1974).

In the instant case, defendant claims the issue of DeMaio's possible intoxication is relevant and material to its defense, that the sole proximate cause of plaintiff's injuries was the negligence of driver DeMaio and not the negligence, if any, of defendant's decedent. Plaintiff on the other hand argues that the issue of sole proximate cause was an affirmative defense, was not specifically pled by defendant in her answer and was therefore not in issue. Accordingly, plaintiff argues any evidence of De Maio's alleged intoxication was irrelevant and immaterial and therefore should have been excluded (plaintiff's second assignment of error on appeal).

In Iowa, the rule is clear that under a general denial a defendant is not required to specifically allege in his responsive pleading the negligence of a third party as the sole proximate cause of plaintiff's injuries in order to rely on that defense and may properly introduce evidence that the negligence of the third party was in fact the sole proximate cause of plaintiff's injuries. Dickman v. Truck Transport, Inc., 224 N.W.2d 459, 467 (Iowa 1974); Mora v. Savereid, 222 N.W.2d 417, 421 (Iowa 1974); Schmitt v. Jenkins Truck Lines, Inc., 170 N.W.2d 632, 642 (Iowa 1969). The intoxication of an operator of a motor vehicle is always relevant on the issue of negligence and proximate cause. See 60A C.J.S. Motor Vehicles § 265 pp. 117-9 (1969).

Additionally, we note that the issue of sole proximate cause was discussed and included in the Order issued after the pretrial conference. One of the purposes of the pretrial conference is to discuss the necessity of amending pleadings by formal amendment or pretrial order. Rule 136, Rules of Civil Procedure. Once issued, the pretrial order controls the subsequent course of the action relative to the matters it concludes. Rule 138, R.C.P. Therefore, the trial court did not err in admitting evidence on the issue of DeMaio's intoxication or in instructing on the issue of sole proximate cause. See Gray v. Schlegel, 265 N.W.2d 156, 158-59 (Iowa 1978).

The final assertion alleged by plaintiff in her initial assignment of error is that the trial court erred in admitting the testimony of DeMaio's blood test over a timely objection that a proper foundation had not been laid for its admission under

chapter 321B, The Code. In Lessenhop v. Norton, 261 Iowa 44, 52-3, 153 N.W.2d 107 (1967), the supreme court established a nine point foundation formula for the introduction of results of a blood test taken pursuant to § 321B.4, The Code. In the instant case, defendant failed to show the blood was withdrawn from De Maio's body by " a licensed physician, or a medical technologist or registered nurse designated by a licensed physician as his representative." Section 321B.4, The Code (emphasis added). Defendant also failed to show DeMaio consented or was incapable of giving consent under § 321B.5, The Code, before the test was administered.

Defendant argued and the trial court agreed these two requirements of chapter 321B were personal to the tested person and could not inhere to the benefit of other persons such as plaintiff in actions outside the immediate criminal or civil scope of chapter 321B. Defendant cites Brooks v. Engel, 207 N.W.2d 110 (Iowa 1973), for the proposition that the Lessenhop foundation requirements apply only under "321B circumstances". Defendant argues that the instant case does not present 321B circumstances because DeMaio, the driver, was not involved as a party.

Evidence of the amount of alcohol in a person's blood as shown by a chemical analysis is declared by § 321B.10 to be admissible. The section's language is written in terms of admissibility rather than of prohibiting evidence that fails to meet all of the requirements of § 321B.4. Moreover, § 321B.12 states: "Other evidence. The provisions of this division shall not be construed as limiting the introduction of any other competent evidence bearing on the question of whether the person was under the influence of an alcoholic beverage."

In State v. Charlson, 261 Iowa 497, 505, 154 N.W.2d 829 (1967), the court reasoned: "Further, this section expresses a legislative intent. The chapter is not to be construed as limiting the introduction of competent evidence bearing on whether an accused was intoxicated." See also State v. Hraha, 193 N.W.2d 484, 491 (Iowa 1972) (Dissent discussing purpose of implied consent statute).

In Brooks v. Engel, 207 N.W.2d 110 (Iowa 1973), the issue concerned a blood test taken from the body of a person who drowned. Operation of a motor vehicle on the highway was not involved and the court held chapter 321B was not

applicable. Referring to Lessenhop the court determined the nine point foundation formula did not apply. However, the court did apply the requirement of Lessenhop that the blood be drawn by an authorized person as part of general foundational requirements. A mortitian was determined to be an authorized person and the evidence held admissible. Cf. State v. Myers, 215 N.W.2d 257 (Iowa 1974), where the court found substantial compliance with § 321B.4; see also State v. Sloan, 203 N.W.2d 225 (Iowa 1972).

In the instant case DeMaio, although participating as a witness, was not a party in the action. His personal rights were not at stake nor were they an issue in the case. The cited authorities interpret the legislative intent of chapter 321B to admit evidence of blood tests otherwise admissible rather than to broadly apply foundational requirements not necessary to protect the rights of the parties. We find the legislative purpose of chapter 321B is not maintained by requiring the nine point foundational requirements of Lessenhop where a driver's rights are not involved in the action. The general foundational requirements stated in Lessenhop were met. Accordingly, we hold admitting the evidence obtained from the blood test of DeMaio was proper.

The other issues presented by plaintiff contain nothing for reversal. Plaintiff's discontent with the testimony of Dr.Brown, an accident reconstruction expert, is more properly characterized as a disagreement as to what facts are important to a determination of speed based upon a conservation of momentum-vector analysis rather than a lack of proper foundation. Plaintiff's task was to discredit Brown's testimony through cross-examination; as an expert, he was properly qualified. Ganrud v. Smith, 206 N.W.2d 311, 314 (Iowa 1973). Further, the trial court did not err in giving instruction No. 14 over plaintiff's objection. It would have been error not to instruct on intervening or superceding cause. Finally, the trial court was justified in overruling plaintiff's motion for new trial because the verdict did render substantial justice between the parties.

AFFIRMED.