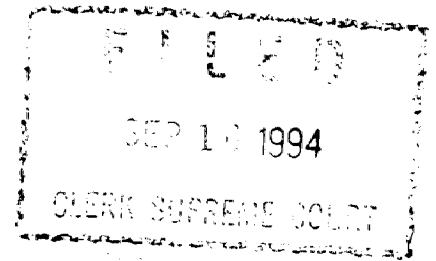


IN THE COURT OF APPEALS OF IOWA

No. 3-427 / 92-1657



MARK R. MEIER,
Plaintiff-Appellant,

vs.

BRAD KORANDA and CITY
OF PRESTON, IOWA,
Defendants-Appellees.

BRAD KORANDA and CITY
OF PRESTON, IOWA,
Third-Party Plaintiffs-Appellees,

vs.

NANCY LOUISE KELLY,
Third-Party Defendant-Appellee.

Appeal from the Iowa District Court for Jackson County,
Max R. Werling, Senior Judge.

The plaintiff appeals the district court's entry of judgment on a jury verdict finding the defendants/appellees not at fault in an automobile accident. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Joseph J. Bitter, Dubuque, for appellant.

William C. Fuerste, Michael J. Shubatt and Theresa M. Scannell of Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C., Dubuque, for appellees.

Nancy L. Kelly, Bellevue, pro se.

Considered by Hayden, P.J., and Habhab and Cady, JJ.

HAYDEN, P.J.

On June 20, 1990, shortly before midnight, Mark Meier was driving his pickup truck northbound on highway Z-34 in rural Jackson County, Iowa. At the same time, Nancy Kelly was driving southbound on the same highway. Before she came to her driveway, she slowed down and turned on her left turn signal. She noticed a car coming very quickly behind her. She got into the northbound lane in order to let this car go around her. However, she then saw Meier's lights coming toward her in the northbound lane. She turned back into the southbound lane.

Brad Koranda was driving the car in the southbound lane behind Kelly. He was working as a police officer in Preston on the evening in question and was driving a marked police vehicle. He stated he had been driving between fifty-five to sixty miles per hour and had been gaining on Kelly. He slowed down when he saw her slow down and turn on her turn signal. When he saw Kelly move into the northbound lane, he accelerated his vehicle. When Kelly moved back into the southbound lane, he went into the right-hand ditch. He then lost control of his car, came onto the highway, and struck Meier in the northbound lane. Koranda admitted he did not brake his vehicle before the collision.

Meier filed this suit against Koranda and the City of Preston, claiming Koranda's operation of the police vehicle was negligent. He also claimed Koranda's actions were

reckless, willful, and wanton, which would entitle him to punitive damages. Defendants' answer did not claim comparative negligence. Defendants did file a third-party action against Kelly, alleging it was her negligence which caused the accident.

The case was tried before a jury. A default judgment was entered against Kelly because of her failure to appear for the first day of trial. The district court granted a directed verdict to defendants on the punitive damages claim. The special verdict form considered only the fault of Koranda and the City. The jury found Koranda and the City were not at fault. The district court entered judgment on the verdict.

Meier filed a motion pursuant to Iowa Rule of Civil Procedure 179(b) and a motion for new trial. The district court denied the motions. Plaintiff appealed.

I. Plaintiff contends the district court erred by admitting irrelevant evidence of his feelings of anger towards the City and Koranda. Police Officer Patrick Cullen and Deputy Sheriff Steven Schroeder each testified to statements made by Meier which exhibited anger toward the City and Koranda after the accident.

Defendants claim plaintiff failed to preserve error on this issue. Plaintiff objected at the time the statements were made. The district court overruled his objections. Later, plaintiff sought to show he became angry because criminal charges against Koranda arising from the accident

were dismissed. The district court did not permit plaintiff to introduce this evidence, but considered granting a mistrial because the evidence of Meier's anger had already been introduced and plaintiff had no means of explaining to the jury the reason for the anger. Instead, the court permitted Meier to make an offer of proof and admonished the jury to disregard the evidence of Meier's feelings towards the City and Koranda. We determine plaintiff has preserved error on this issue.

Evidence is relevant if it renders the existence of a fact more probable or less probable with it than without it. Briner v. Hyslop, 337 N.W.2d 858, 869 (Iowa 1983). The basic test of relevancy is the question whether the challenged evidence makes the desired inference more probable than it would be without the evidence. Id.

We determine evidence of Meier's anger against the City and Koranda was not relevant to any issue in this case. The main issue in the case was whether Koranda had been negligent. Meier's feelings about Koranda and his employer after the accident have no bearing on the allegations of negligence. There is a presumption of prejudice which accompanies the admission of improper evidence over proper objection. Vine Street Corp. v. City of Council Bluffs, 220 N.W.2d 860, 863 (Iowa 1974). Prejudice is presumed when error appears unless the contrary is affirmatively established. Id.

Here, after reconsideration, the district court admonished the jury not to consider the irrelevant evidence. Under the general rule, improper testimony is not unduly prejudicial if the jury is admonished to disregard it. Berg v. Des Moines Gen. Hosp., 456 N.W.2d 173, 178 (Iowa 1990). There are instances, however, when improper testimony is so prejudicial an admonition to disregard it is an insufficient curative. Id. In these instances a new trial is the proper remedy. Id.

Here, there was more than just a single reference to the improper subject. Two different witnesses answered several questions detailing Meier's angry statements after the accident. The trial court's admonition to the jury here did not cure the prejudice to plaintiff, and plaintiff is entitled to a new trial. We reverse on this issue.

II. Plaintiff contends the district court improperly admitted hearsay evidence concerning the condition of Koranda's squad car. Officer Cullen testified the car did not run very well and the top end speed was not very high. By voir dire examination, plaintiff found out Officer Cullen had no personal knowledge about the condition of the vehicle and his statements were based on what people had told him. Plaintiff then asked for Officer Cullen's statements to be stricken because they were hearsay. The district court overruled the objection.

By definition, hearsay is a statement other than one made by the declarant while testifying at the trial which

is offered in evidence to prove the truth of the matter asserted. Kalianov v. Darland, 252 N.W.2d 732, 736 (Iowa 1977). We determine Officer Cullen's statements concerning the condition of the car are hearsay because he was merely relaying out-of-court statements of others. As hearsay, the statements should not have been admitted into evidence.

As noted above, there is a presumption of prejudice which accompanies the admission of improper evidence over proper objection. Vine Street, 220 N.W.2d at 863. We conclude plaintiff was prejudiced by the admission of this improper evidence. We reverse on this issue.

III. The third issue raised by plaintiff is whether the district court erred in granting a directed verdict to defendants on his claim for punitive damages based on Koranda's alleged willful and wanton conduct. Under Iowa Code section 668A.1(1)(a), in order to receive punitive damages a plaintiff must show:

Whether, by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another.

Iowa Code § 668A.1(1)(a) (1993).

Under this section, to receive punitive damages, plaintiff must offer evidence of defendant's persistent course of conduct to show no care by defendant with disregard to the consequences. Beeman v. Manville Corp. Asbestos Disease Compensation Fund, 496 N.W.2d 247, 255 (Iowa 1993). Willful and wanton conduct have been defined

as where an actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk which was so great as to make it highly probable harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences. Fell v. Kewanee Farm Equip. Co., 457 N.W.2d 911, 919 (Iowa 1990).

When considering the propriety of a motion for directed verdict, the court views the evidence in the light most favorable to the opposing party. Tratchel v. Essex Group, Inc., 452 N.W.2d 171, 176 (Iowa 1990). The trial court has a duty to submit to the jury any issue supported by substantial evidence. Id.

We determine there was not sufficient evidence in the record to submit the issue of Koranda's willful and wanton conduct to the jury. Koranda admitted he had been exceeding the speed limit prior to the accident. "Unquestionably, 'speed alone is not sufficient to engender a jury question on recklessness, but this statement is subject to qualification depending upon the circumstances in each case.'" Pieper v. Harmeyer, 235 N.W.2d 122, 128 (Iowa 1975) (quoting Vogel v. Reeg, 225 N.W.2d 134, 136 (Iowa 1975)).

Looking at the other circumstances of this case, we determine the evidence is not sufficient to engender a jury question on recklessness. In the case at bar, the evidence demonstrates after Koranda saw Kelly move into the northbound lane, he accelerated. When Kelly moved back

into her proper lane, Koranda did not attempt to stop his vehicle, but attempted to pass on the right shoulder. While Koranda was driving on the right shoulder, he lost control of his vehicle and went into the northbound lane, where he struck Meier's vehicle. Koranda admitted he did not attempt to brake his vehicle prior to the accident. These actions do not constitute reckless conduct.

We hold there is not substantial evidence on the issue of willful and wanton conduct. The district court is affirmed on this issue.

IV. Plaintiff claims the district court should not have instructed the jury on the issue of sudden emergency. He claims there was insufficient evidence in the record to submit this issue to the jury. In the alternative, he claims the instruction should be more closely tailored to the evidence in this case.

The elements of sudden emergency are: (1) the driver is confronted with a sudden emergency; (2) the emergency was not created by the driver's own negligence; and (3) the driver conducted himself or herself as a reasonable person in a similar emergency. Miller v. Eichhorn, 426 N.W.2d 641, 644 (Iowa App. 1988).

The sudden emergency doctrine is an expression of the reasonably prudent person standard of care. Weiss v. Bal, 501 N.W.2d 478, 481 (Iowa 1993). It expresses the notion that the law requires no more from an actor than is reasonable to expect in the event of an emergency. Id.

The doctrine does not include "emergencies" a reasonably prudent driver must be prepared to meet. Id. at 482. The supreme court has stated there is an emergency in every collision of motor vehicles. Wachter v. McCuen, 250 Iowa 820, 827, 96 N.W.2d 597, 600 (1959). But to be a legal excuse, the emergency must be one to which the violator did not contribute. Id.

Ordinarily, whether one has established a legal excuse is a question for the jury. Paulsen v. Mitchell, 252 Iowa 65, 74, 105 N.W.2d 603, 608 (1960). Upon review, in determining whether the doctrine of sudden emergency was properly submitted, we construe the evidence in a light most favorable to the defense. Jones v. Blair, 387 N.W.2d 349, 352 (Iowa 1986). Here, we determine there was substantial evidence to submit the issue of sudden emergency to the jury. Kelly's decision to move back into the southbound lane could be considered to create a sudden emergency for Koranda.

However, a general jury instruction on legal excuse is erroneous because it does not fully and fairly instruct the jury on the issue of legal excuse. Id. at 353. The instruction should be tailored to the facts of the case. Id.

The instruction submitted was not tailored to the facts of this case. The instruction given only contained two specifications of negligence, failure to maintain control and failure to yield half of the roadway. The instruction

did not contain plaintiff's other allegations of negligence: failure to maintain proper lookout, operating at an improper speed, and operating at a speed greater than would permit stopping within the assured clear distance ahead. We conclude there was substantial evidence of these allegations and they should have been included in the instruction concerning sudden emergency. On remand, the jury instructions should include all specifications of negligence supported by the evidence.

V. Finally, plaintiff contends the district court abused its discretion in failing to grant a new trial. We have already determined plaintiff is entitled to a new trial based on errors in the trial court proceedings. We reverse the decision of the district court and remand for a new trial. Costs of this appeal are assessed to defendants Koranda and City of Preston.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Cady, J., concurs; Habhab, J., dissents.

HABHAB, J. (dissenting)

I respectfully dissent. I would affirm the trial court. I dissent for the reasons that follow:

1. Meier's Anger Against the City. For the purposes of this dissent I will assume without deciding the evidence complained of under this heading was improperly received. Even so, I would find no error.

When the problems surfaced as to this evidence, the trial judge called counsel into chambers to discuss the objections made by the plaintiff. After recognizing a problem existed, the trial judge informed counsel that a mistrial may be in order. Plaintiff's counsel stated, "Well, we're certainly not asking for a mistrial."

As I read the record, it was then agreed that the jury be admonished. Both counsel made suggestions to the court as to how the admonition should be stated. The admonition was given and the objectionable testimony stricken from the record. Thus, there was nothing for Meier to explain as to his reason for his anger toward the city and Koranda. I believe the admonishment cleared the error, thus, the plaintiff was not prejudiced.

2. Hearsay testimony concerning the condition of Koranda's squad car. I agree with the majority that Officer Cullen's statements as to the condition of the car were hearsay and that part objected to should have been stricken. However, I do not believe the plaintiff was prejudiced by the admission of this improper evidence.

The testimony was cumulative to that of other witnesses, more particularly Officer Koranda's testimony and Officer Schroeder's testimony. I would not reverse on this ground.

3. Sudden emergency. I agree with the majority that it was proper to give the sudden emergency instruction. I also agree with the majority as to the elements of sudden emergency.

However, I believe the instruction as submitted by the trial court was tailored to the facts of the case. As it relates to defendant's theory of sudden emergency, the defendant is only entitled to the submission of those claims that are supported by substantial evidence.

In any event, as the appellant admits in his brief, his objection was not that the trial court erred in failing to set forth all of his specifications of negligence in the sudden emergency instruction. Rather, his objection was to the effect that the sudden emergency instruction should not have been given.

Having agreed with the majority that the sudden emergency instruction was proper, it is difficult for me to see how the plaintiff was prejudiced by not including all of his specifications of negligence in the sudden emergency instruction. It is the defendant's burden under a sudden emergency instruction to carry the proof.

It seems to me that the plaintiff, under the instruction given, is in a much more favorable position when the court did not include all the elements of negligence he alleged. This is so, for those grounds of negligence submitted to the jury (under the separate negligence instruction) that are not included in the sudden emergency instruction are not impaired or hindered by the defendant's claim of sudden emergency. We must bear in mind that when a sudden emergency exists, the defendant is held only to the standard of care under those circumstances posed by the emergency. It follows the defendant is not entitled to the benefit of the sudden emergency instruction as to those grounds of negligence not posed by the emergency. Under these circumstances, I am unable to see how the plaintiff is prejudiced. I would affirm.