



IN THE COURT OF APPEALS OF IOWA

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LINDA A. JOHNSON-LUNDQUIST and)
SCOTT A. JOHNSON,)

Plaintiffs-Appellants,)

Filed September 30, 1987

vs.)

JOHN ROBERT SEDDON, IOWA COAL)
TRANSPORTATION, INC., WENDELL E.)
ODEN, ILLADEAN ODEN, PHILLIP E.)
ODEN, and TERRI M. ODEN,)

6-187
85-902

Defendants-Appellees.)

Appeal from the Iowa District Court for Johnson County (No. 47005 & 47204), Paul J. Kilburg, Judge.

Plaintiffs appeal from a judgment finding the defendant driver fifteen percent at fault and the plaintiff driver eighty-five percent at fault. Plaintiffs challenge evidentiary rulings and jury instructions. **AFFIRMED.**

Davis L. Foster of Barker, Cruise & Kennedy, Iowa City, for plaintiffs-appellants.

Robert D. VanHorne of Wilkinson & VanHorne, Cedar Rapids, for defendants-appellees.

Heard by Donielson, P.J., and Schlegel and Hayden, JJ.

DONIELSON, P.J.**131**

In this lawsuit arising from a car-truck accident, the jury found the defendant driver 15 percent at fault and the plaintiff driver 85 percent at fault. Because the plaintiffs received much less in damages than they sought, they have appealed from the resulting judgment. Plaintiffs challenge several issues on appeal; the majority of their contentions consist of errors on evidentiary rulings and jury instructions. We affirm.

The plaintiffs' car and the defendants' truck were involved in a "side-by-side" or "sideswiping" type of collision while both vehicles were travelling in the same direction on an interstate highway. The plaintiffs sued to recover for their injuries. A jury found the plaintiff Scott Johnson (car driver) 85 percent at fault and the defendant Seddon (truck driver) 15 percent at fault. The jury found that the plaintiffs had suffered damages totalling \$50,000; however, the plaintiffs' actual awards were much less than this because of the percentages of fault noted above.

Plaintiffs have appealed from the judgment upon the jury's verdict. They have raised many issues, most of them categorized as challenges to evidentiary rulings and challenges to the jury instructions.

Our scope of review is for the correction of errors at law. Iowa R. App. P. 4.

I. Plaintiffs first argue that the district court erred by admitting testimony by a defense expert which allegedly exceeded the scope of the defendants' answers to interrogatories concerning that witness. Plaintiffs' objection during trial was that the witness "was not identified as an expert witness with regard to anything leading up to the collision points" of the accident. Plaintiffs now claim surprise resulting in prejudice to them. They claim defendants should have supplemented their interrogatories by stating that the witness would be

testifying from photographs, which plaintiffs allegedly did not know about until after the witness was deposed.

We find this contention to be without merit. Defendants' answers to interrogatories indicate they were going to call as an expert witness, R. L. Large, an accident reconstructionist. It is unrealistic for us to think that plaintiffs' counsel would not realize his testimony would include "anything leading up to the collision points," even if such testimony was based on certain photographs. Plaintiffs admit that they knew of the photographs after the expert was deposed, and plaintiffs further admit the photographs were listed as exhibits at the pretrial conference.

Consequently, because we find there was no surprise to plaintiffs, we find there was no prejudice to plaintiffs.

II. Plaintiffs' second objection concerns the following question posed by plaintiffs' counsel to plaintiffs' witness, Trooper Thompson: "Did you reach a conclusion as to who was at fault in the accident?" The objection made by defendants' counsel was as follows:

... I don't know whether it's a yes or no answer, or if he's asking for some opinion I may object to. I'm going to object to it on the basis that this witness is not qualified to determine the fault involved in the accident, that there's a lack of foundation, factually; and I ask that if that's the question, asking for his opinion, then I do object to it.

The court sustained the objection, assuming it was the witness's opinion which was sought. Plaintiffs in their brief state this objection refers to "an opinion by the witness concerning an issue to be decided by the jury." Defendants in their brief contend it relates to an opinion upon which the "witness is not qualified to determine the fault involved in the accident, that there's a lack of foundation, factually."

We find plaintiffs' interpretation of the objection to be misguided; and, as such, their argument is not on point. We also note after a review of the testimony following the sustained objection, that plaintiffs were not prejudiced: the witness proceeded to testify about a traffic charge being filed against defendant driver for an improper lane change. In addition, we note that plaintiffs did not make an offer of proof to preserve any alleged error on this issue.

III. Plaintiffs contend the district court erred by excluding three exhibits which were offered as summaries of voluminous writings, pursuant to Iowa Rule of Evidence 1006.

With regard to Exhibit 58, a purported summary of plaintiff driver's claim for lost wages, the record discloses an objection was made by defendants, although no basis for the objection was made, and, furthermore, no ruling was made by the court; instead, the court recessed for the day. From the transcript before us, there is no indication that plaintiffs ever re-offered the exhibit or that a ruling was ever requested or made on admission of the exhibit. A trial court may not be put in error unless an issue was presented and a timely request is made for a ruling, and the failure to obtain a ruling is inexcusable unless the court refuses to rule after a ruling is requested. Linge v. Ralston Purina Co., 293 N.W.2d 191, 195 (Iowa 1980). We therefore deem Exhibit 58 to have been withdrawn; consequently, there remains no issue for review with regard to this exhibit.

The court refused admission of plaintiffs' Exhibit 23, a purported property damage summary, apparently because some of the listed items were not proper elements of damage. We find there was no prejudice to plaintiffs: the major item of damage of the alleged \$7,423.80 total was the vehicle value listed at \$7,200.00, which was stipulated to by the parties. The remaining items were

covered in the testimony. Thus, we find the trial court did not abuse its discretion in denying admission of this exhibit.

Lastly, the court refused to admit plaintiffs' Exhibit 98, a letter containing alleged summaries of calculations, on the grounds of hearsay. Plaintiffs submit Iowa Rule of Evidence 1006 allows summaries of mathematical equations.

We agree with defendants that this exhibit does not attempt to summarize any voluminous documents but instead is a repetition of the witness's testimony and hence its exclusion is not prejudicial to plaintiffs' case. Furthermore, the letter refers to the Society of Automotive Engineers and its recommended practices; and, as such, the court properly denied its admission into evidence based on hearsay.

IV. Plaintiffs contend the district court improperly excluded evidence that the defendant driver was not properly licensed to drive the truck. Plaintiffs concede Iowa holds that absence of a valid driver's license is immaterial in finding negligence. See Ruckman v. Cudahy Packing Co., 230 Iowa 1144, 1146, 300 N.W. 320, 321 (1941). Plaintiffs are asking this court to overrule that case law based on the following policy justification: failure to have a valid license often means that the driver is unqualified to operate a vehicle.

Based on stare decisis, we decline to overrule prior case law on this issue. We also take note that defendant driver did hold a valid chauffeur's license at the time of the accident, although the license restriction was for a different type rig.

V. Plaintiffs argue the district court erred in excluding a physical therapist's one-page medical record as evidence. Defendants' objections to the exhibit were based on hearsay and the cumulative and repetitious nature of the exhibit; the basis of the court's denial of the exhibit's admission was based on hearsay.

Plaintiffs assert that this record should be admitted under the hearsay exception for hospital records.

A trial court is given broad discretion in determining whether an exhibit should be admitted. We will not interfere with the trial court's decision in excluding evidence unless it has clearly abused its discretion to the prejudice of the complaining party. Henkel v. R & S Bottling Co., 323 N.W.2d 185, 193 (Iowa 1982). Upon review of the proffered exhibit, we note that it includes plaintiff driver's own opinion regarding his progress and a recitation of the medical opinions held by the various doctors who had treated plaintiff driver in the past eleven months. There is no mention as to the type of treatment, if any, his physical therapist would recommend. We find the record allegedly could be relevant to pain and suffering; however, there appears to be much other evidence in the record on this aspect. Accordingly, we find the trial court did not abuse its discretion in denying admission of this exhibit. The exhibit appears to contain hearsay within hearsay. In addition, we find no prejudice to plaintiffs resulted therefrom.

VI. & VII. Plaintiffs' next contentions concern a drawing of the accident scene prepared by defendants' engineer and accident reconstructionist. Plaintiffs' first argument goes to the correctness of the drawing.

The admission or exclusion of demonstrative exhibits rests largely in the discretion of the trial court. Schuller v. Hy-Vee Food Stores, Inc., 328 N.W.2d 328, 331 (Iowa 1982). Exhibits which help to explain an issue in the case are generally admissible. Davis v. Walter, 259 Iowa 837, 842, 146 N.W.2d 247, 250 (1966). A contour map may be admitted even though it contains minor inaccuracies. See Allely v. Fickel, 49 N.W.2d 544, 546 (Iowa 1951).

We find that the diagram was an aid to the jury. The trial court did not abuse its discretion in admitting the exhibit into evidence.

Plaintiffs' second argument is that the witness's placing of rectangles on the map to demonstrate the positions of the vehicles was tantamount to being the witness's opinion and conclusion, thereby invading the province of the jury.

An exhibit is not automatically excluded on the basis that it is marked by the witness in some manner. Hamdorf v. Corrie, 251 Iowa 896, 905, 101 N.W.2d 836, 842 (1960).

We do not find that the marks made on the drawing indicating placement of the vehicles were invading the province of the jury. The marks were an aid; we assume that testimony was elicited to explain the markings. Moreover, there is nothing in the record before us that indicates plaintiffs objected to these markings to preserve this issue for review.

Thus, we find no merit in plaintiffs' sixth and seventh arguments.

VIII. The remaining issues of error alleged by plaintiffs concern the jury instructions.

Plaintiffs requested the court change Instruction 12 to read "that the defendant was negligent in one or more particulars as charged by the plaintiffs" rather than "...in some particular" Plaintiffs allege the given language confused the jurors. We do not agree. The given language was the same as that found in the Iowa Uniform Jury Instructions.

IX. Plaintiffs argue Instruction 35 should have stated plaintiffs' award "may be reduced" rather than "should be reduced" with regard to a potential reduction of the damages for lost wages by the amount of likely income taxes. We find after reviewing the record made with regard to the exceptions to the jury instructions that no objection was made at that time; hence, plaintiffs failed to properly preserve this error for appeal and we deem it waived.

X. Plaintiffs argue the district court erred in allowing Instructions 18-25 relating to possible negligent acts of plaintiff driver because the allegations of negligence in question had never been pled by defendants. Plaintiffs' argument is without merit: defendants in their answer to the petition raised the defense of comparative negligence and further requested contribution or set-off. We find this pleading, in and of itself (without reference to the discovery proceedings which referred to plaintiffs' potential negligent acts), is sufficient to put plaintiffs on notice of the negligence allegations made against them.

Therefore, we conclude Instructions 18-25 were properly allowed for the jury to consider.

XI. Plaintiffs contend there was no factual support in the record for Instruction 23, which permitted the jury to find that the plaintiff driver had negligently failed to drive in such a way that he could stop in the assured clear distance ahead. Plaintiffs argue this theory cannot apply to a situation involving vehicles in parallel lanes, but rather it applies to vehicles in the same lane. The defendants state that the "assured clear distance" instruction was appropriate because this theory was supported by evidence in the form of testimony by the plaintiffs themselves, the reconstruction expert, photographs, and other evidence.

Both plaintiffs and defendants submitted theories on how the accident occurred. The trial judge heard the testimony during the lengthy trial; we have before us only excerpts of the trial transcript. Because we do not have all the facts before us, we cannot and do not hold that the district court abused its discretion in allowing Instruction 23.

XII. Plaintiffs also argue that even if the "assured clear distance ahead" instruction was appropriate, it should have been coupled with an instruction permitting the jury to find that plaintiff driver had been confronted by a sudden

emergency not of his own making. Defendants argue that the plaintiffs received several instructions adequately stating their theory of sudden emergency, albeit in different language.

On review of the record of the exceptions to the instructions, we find that plaintiffs did not preserve error on this particular concern. Therefore, we do not consider it.

XIII. Plaintiffs contend the district court erred by refusing to instruct the jury on the subject of imputing the liability of the defendant driver to the other defendants, his employers. There is no dispute that Seddon was employed by the other defendants, was acting within the scope of his employment, and was driving with the consent of the other defendants; the defendants admitted these matters in pretrial documents. The district court stated that an instruction on employer liability would merely confuse the jury, since the matter was not contested, since the jury had heard no evidence on the subject, and since the purpose of this trial was only to determine the extent of Seddon's liability. (The district court also cited a "complicated" business relationship between the defendant Iowa Coal and the defendants Oden.) The plaintiffs contend they were prejudiced by the absence of an instruction on employer liability because the jury was deprived of an opportunity to consider the greater resources of the employers in determining the amount of damages to be awarded to the plaintiffs.

We find that there was no need to instruct the jury on this issue: as a matter of law, the defendant Iowa Coal was liable to the same extent that defendant Seddon, the driver, was liable. See Hoyt v. C.R.I.P.R., 206 N.W.2d 115, 119 (Iowa 1973). Plaintiffs' argument that the jury verdict is a result of passion or prejudice is totally without merit.

XIV. Plaintiffs complain the district court erred by failing to give a more detailed instruction on pain and suffering. Plaintiffs state in their brief that the court ruled that pain and suffering was limited to physical manifestations. We cannot so find after a review of the record before us. The instruction given by the district court was in accord with the Iowa Uniform Jury Instructions on pain and suffering and adequately stated the appropriate standards.

XV. Plaintiffs contend the district court erred by refusing to give their requested instruction on the doctrine of legal excuse. The district court stated that such an instruction was not supported by the evidence and that, in any event, under comparative negligence the doctrine of legal excuse ceases to exist as a separate doctrine because it is subsumed under the concept of proximate cause.

We agree with the trial court as to its second reason. Any alleged error was not prejudicial to plaintiffs because other instructions covered this topic sufficiently.

For all of the foregoing reasons, we hold that plaintiffs' appeal lacks substance to warrant a new trial in this case. We find no error in the rulings of the district court and find that no prejudice resulted to the plaintiffs from such rulings.

We therefore affirm the judgment of the district court.

AFFIRMED.