

FILED

APR 24 1984

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

KERRY W. KNAUSS,

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257

Plaintiff-Appellee,

)

Filed April 24, 1984

vs.

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CITY OF DES MOINES, IOWA,

)

4-20
83-607

Defendant-Appellant.

)

Appeal from the Iowa District Court for Polk County - Anthony M. Critelli,
Judge.

Defendant appeals from a jury verdict for the plaintiff in this action for negligence in failing to provide medical treatment following an automobile collision. **AFFIRMED IN PART; REVERSED IN PART.**

J. M. Sullivan, Assistant City Attorney, for defendant-appellant.

Alfredo Parrish, Des Moines, Iowa, for plaintiff-appellee.

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

Defendant, City of Des Moines, appeals from a jury verdict for the plaintiff in this action for negligence in failing to provide medical treatment following an automobile collision. Defendant asserts that the trial court erred in several of the instructions given to the jury and that it is entitled to a credit for the amount of settlement with the driver of the automobile who was dismissed prior to trial. We affirm in part and reverse in part.

Plaintiff sustained injuries resulting from a collision involving an automobile in which he was a passenger. Plaintiff and the driver had been drinking together prior to the incident. Following the collision, the driver appeared to be seriously injured and was taken to a hospital. Harold Glan, a police officer employed by the defendant, testified that plaintiff declined medical attention at the scene of the collision and that from his observations of plaintiff, he did not believe the plaintiff to be seriously injured. Glan, however, testified on cross-examination that in a police report he had reported that the plaintiff "had slurred speech and could hardly walk." Apparently this was believed to be consistent with intoxication because the plaintiff was arrested for public intoxication. Plaintiff testified that he did not remember the police officer asking him if he needed medical assistance at the scene of the collision, but that he requested medical treatment on the way to jail and thereafter while confined. After plaintiff was released from police custody the next morning, his wife took him to a hospital where it was determined that plaintiff had sustained fractured ribs, internal injuries, and numerous contusions and abrasions. Plaintiff also underwent surgery to determine the extent of his internal injuries.

Plaintiff's petition sought damages from the driver, alleging that he was negligent in his operation of the automobile, and from the city, alleging negligence with regard to its failure to provide medical treatment after the accident. Plaintiff settled with the driver prior to trial for \$10,000. Plaintiff

sought \$18,000 at trial from defendant city for pain suffered by plaintiff during the period of time he was confined by defendant city. The trial court overruled the city's posttrial motion for a credit in the amount of the settlement following the jury's verdict for plaintiff in the amount of \$12,000.

Our review of this ordinary action at law is on assigned error. Iowa R. App. P. 4. The jury's findings of fact are binding on us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). We view the evidence in the light most favorable to the judgment. R.E.T. Corporation v. Frank Paxton Co., Inc., 329 N.W.2d 416, 419 (Iowa 1983). Our deference to the jury's findings of fact does not extend to the trial court's determinations of law. Id.

I. Jurisdiction of the Appeal. The trial court received the jury's verdict on March 9, 1983, but did not order judgment entered in the amount of the verdict. The court subsequently overruled defendant's motion for a new trial and denied plaintiff's motion to tax as court costs a part of the expert witness's expenses on April 22, 1983. On April 28, 1983, the court overruled the defendant's motion for credit in the amount of the settlement with the driver. The trial court reconsidered and sustained plaintiff's motion to tax as court costs a portion of the expert witness's fee on May 13, 1983. Defendant served its notice of appeal on plaintiff on May 23, 1984, by mailing a copy to plaintiff's attorney. No judgment entry is shown by the record.

A party may not appeal of right without entry of a final judgment. In re the Marriage of Steenhoek, 305 N.W.2d 448, 450 (Iowa 1981); Recker v. Gustafson, 271 N.W.2d 738, 739 (Iowa 1978). This jurisdictional question may be raised, on our own motion, at any stage of the proceedings. Id. We find it unnecessary to decide whether the parties appealed from a final judgment, however, because we believe that under the circumstances it is appropriate for us to entertain the appeal under Iowa Rule of Appellate Procedure 1(c).

One of the policy considerations underlying Iowa Rule of Appellate Procedure 1(c) is to avoid the problem of appeals being aborted as premature or denied as too late, due to misapprehension as to their finality. Smith v. Korf, Diehl, Clayton and Cleverley, 302 N.W.2d 137, 139 (Iowa 1981). The jury returned a verdict for plaintiff and the trial court denied defendant's motion for a new trial. Under these circumstances, consideration of the substantive issues raised in this case is appropriate. We consider this "appeal" as an application for interlocutory appeal under Iowa Rule of Appellate Procedure 2, grant it, and proceed to resolve the issues raised.

II. Instructions. Defendant asserts on appeal that the trial court erred in not giving a requested instruction on estoppel based on plaintiff's statement to the police officer at the scene of the collision that he was not injured, that the court gave an erroneous instruction to the jury on mitigation of damages based on plaintiff's refusal of medical attention at the scene of the collision, and that the court gave an erroneous instruction to the jury on the proper burden of proof and the proper standard of proof for damages.

Parties to a lawsuit have a right to have their legal theories submitted to the jury as long as they are supported by the pleadings and substantial evidence. Anderson v. Low Rent Housing Commission of Muscatine, 304 N.W.2d 239, 249 (Iowa), cert. denied, 454 U.S. 1086, 102 S. Ct. 645, 70 L. Ed. 2d 621 (1981). Even when the evidence is not in dispute, it is viewed in the light most favorable to the party requesting the instruction, and if reasonable minds might draw different inferences from the evidence, a jury question is engendered. Id. Also, in order to pursue on appeal an objection to the instructions as given by the trial court, the objection to the instruction must be specific enough to alert the trial court to the basis for complaint so that, if there is error, it may be corrected before the case goes to the jury. Wambsgans v. Price, 274 N.W.2d 362, 365 (Iowa 1979). The defendant pleaded both estoppel and mitigation defenses. It also specifically

objected to the instructions as given by the trial court on the grounds that it was entitled to those instructions as requested and that the court's "incorporation" of those defenses in other instructions was inadequate. We must, therefore, determine whether substantial evidence existed to engender a jury question on the defense of estoppel (Anderson, 304 N.W.2d at 249), and whether the court gave erroneous instructions on the issues of mitigation and damages.

A. Estoppel. The defendant sought to present the issue of estoppel before the jury on the basis of Officer Glann's testimony that the plaintiff stated to the officer that he was not injured and the officer reasonably relied upon that representation. Defendant's requested instruction number nine would have submitted this theory to the jury. The court, however, denied the instruction as requested, noting that the issue was incorporated to some extent in its instruction number eight.

The principles of equitable estoppel are well established in Iowa. The elements of estoppel are stated in Johnson v. Johnson, 301 N.W.2d 750, 754 (Iowa 1981), as follows:

These elements are generally delineated as (1) a false representation or concealment of material facts; (2) a lack of knowledge of the true facts on the part of the actor; (3) the intention that it be acted upon; and (4) reliance thereon by the party to whom made, to his prejudice or injury.

The doctrine of equitable estoppel is applicable in either law or equity. Manson State Bank v. Diamond, 227 N.W.2d 195, 200 (Iowa 1975); Dart v. Thompson, 261 Iowa 237, 244, 154 N.W.2d 82, 86 (1967). There can be no estoppel if any of the elements are lacking. Khabbaz v. Swartz, 319 N.W.2d 279, 286 (Iowa 1982); Holden v. Construction Machinery Co., 202 N.W.2d 348, 355 (Iowa 1972).

We agree with the trial court that the theory of equitable estoppel is inapplicable to these facts. The third element, as stated above, requires that plaintiff intended the defendant's police officer to rely upon his alleged statement

that he was not injured. This element requires plaintiff to have knowingly taken the position that he was not injured with the intention that it be relied upon. Dierking v. Bellas Hess Superstore, Inc., 258 N.W.2d 312, 316 (Iowa 1977); In re MacVicar's Estate, 251 Iowa 1139, 1144, 104 N.W.2d 594, 598 (1960).

It is generally indispensable to the application of the doctrine of equitable estoppel that the person claimed to be estopped shall have had full knowledge of the real facts at the time of his representation, concealment or other conduct relating thereto and alleged to constitute the basis of estoppel. Equitable estoppel cannot be successfully asserted against a person who was ignorant of the facts and the true state of affairs, or who acted under a mistake of fact, unless his ignorance or mistake was the result of gross culpable negligence, or otherwise involves gross culpability, as where he was consciously ignorant of the facts at the very time of professing full knowledge of them.

31 C.J.S. Estoppel § 70, p. 423-25 (1964).

The plaintiff, in this case, had been in a collision immediately prior to the police officer's inquiry. Plaintiff testified that he had hit the windshield of the car when it collided with the tree and that he could not recall events after the collision. The plaintiff's treating physician testified that when he examined the plaintiff the next day he was pale, which indicated "a shocky condition or some type of significant trauma." The evidence, taken in the light most favorable to the defendant, does not show that plaintiff had full knowledge of his injuries at the time of the alleged misrepresentation.

Thus, there was not substantial evidence that plaintiff knowingly took the position that he was not injured with the intention that the police officer rely upon that statement. Because there can be no estoppel where one of the elements is missing, it is unnecessary for us to determine whether or not other elements of estoppel were also absent. See, e.g., Pyland v. Astley, 324 N.W.2d 323, 327 (Iowa 1982) (estoppel requires reasonable reliance).

B. Mitigation. The defendant sought in its requested instruction number ten to set out its theory of plaintiff's failure to mitigate his damages by

his alleged refusal to accept medical assistance at the scene of the collision. The trial court refused to give the instruction as requested by defendant. Instead it gave its own instruction on mitigation. The defendant asserts on appeal that the court's instruction improperly stated the standard for determining whether plaintiff failed to mitigate his damages as requiring a conscious, intentional and continuous refusal by plaintiff of medical services, instead of applying the reasonable diligence standard to plaintiff's actions as set out in R.E.T. Corporation v. Frank Paxton Co., 329 N.W.2d at 422. We disagree.

Instruction twelve, as given, reads as follows:

If under the evidence and these instructions you find that the Plaintiff is entitled to recover damages herein, you are instructed that it was the duty of the Plaintiff to make use of reasonable means to effect as speedy and complete a cure of his injury as could be reasonably accomplished under all of the circumstances. If you find from all the evidence that Plaintiff consciously, intentionally, and continuously refused to ask for aid or to accept it if ordered or suggested to him, then in that event you shall reduce Plaintiff's claimed damages for pain and suffering consistent with such period of time and that he did not ask for or accept aid as above qualified.

We believe that the first sentence of this instruction clearly sets out a reasonableness standard in requiring the plaintiff to mitigate his damages. The second sentence of the instruction conforms the instruction to the evidence as presented by the parties at trial. The plaintiff was removed from the collision site by a police "paddy wagon" and transported to jail. There he was processed and put in a cell for the remainder of the night. He was removed from the cell the next day and taken to a court appearance. Instruction twelve above, while stating the reasonableness requirement, incorporated the continuing duty of the defendant's officers to give the plaintiff first aid after they knew or had reason to know that the plaintiff was ill or injured. See Lang v. City of Des Moines, 294 N.W.2d 557, 560-61 (Iowa 1980). So long as the issues are covered by the instructions, a trial court is free to choose its own language and need not couch terms suggested by the parties. Moser v. Brown, 249 N.W.2d 612, 616 (Iowa 1977).

Thus, defendant's contention that instruction twelve was erroneous is without merit.

C. Damages. The defendant also contends on appeal that the trial court erroneously instructed the jury on the plaintiff's burden of proof in proving damages and the standard of proof. Specifically, defendant contends the court's instructions did not require the plaintiff to prove his damages by a preponderance of the evidence and the court's instructions permitted the jury to determine damages by speculation rather than from the evidence. We disagree.

The court defined "preponderance of evidence" in instruction six and placed the burden of proof squarely on the plaintiff to show liability and damages in instructions eight, nine, and eleven. The court required the jury to consider only the evidence that had been presented in reaching its decision in instructions eleven, twelve, fifteen, and sixteen. The court also instructed the jury on the definition of "evidence" in instruction four. We believe the issues contained in defendant's requested instructions were more than adequately contained in the instructions as formulated by the trial court. As stated above, the court is not required to submit its instructions as formulated by the parties, but may submit its own formulations so long as the issues are covered in its instructions. Moser, 249 N.W.2d at 616. Defendant's contentions are without merit.

III. Credit on Settlement. Finally, defendant asserts that it is entitled to a credit on the judgment against it for the amount of the settlement made by plaintiff with the driver of the automobile. Plaintiff originally sued both the driver and the defendant city for injuries arising out of the collision and incarceration. Prior to trial, plaintiff settled with the driver for \$10,000. Defendant sought credit for the amount of settlement at trial, and continues to do so on appeal.

The trial court, in denying the credit, found that it was not the intention of the parties that the consideration received by the plaintiff constitute

compensation for pain and suffering during the time plaintiff was in police custody. The court stated as follows:

Throughout these proceedings, the Court meticulously separated out and permitted jury consideration in the matter of damages only those proved damages that resulted to Plaintiff as a result of his being confined in the Des Moines city jail for a period inconsistent with his state of health. No evidence of or consideration was permitted by the jury for other injuries or damages sustained by the Plaintiff, nor was any evidence permitted of actual hospital, medical and related expenses that were incurred by the Plaintiff as a result of the accident which occurred prior to his aforementioned incarceration in the city jail.

The court further noted that its instructions to the jury limited the "dimensions and period of damage" to the pain and suffering incurred during incarceration. The motion for credit was denied on this basis.

The defendant asserts that the case of Wadle v. Jones, 312 N.W.2d 510 (Iowa 1981), requires that it be given credit for the settlement. The court in Wadle retained the pro tanto credit rule which dictates that consideration received from a joint tortfeasor reduces pro tanto (to that extent) any recovery against the other tortfeasors. Id. at 512. The trial court recognized that rule but held that it did not apply in this case because the consideration received from the driver was not "for the same damages as were the subject matter and the basis for the judgment rendered against the nonsettling Defendant." Plaintiff, in support of the trial court's ruling, also asserts on appeal that the defendant city and driver were not joint tortfeasors and, therefore, the pro tanto credit rule does not apply in this case.

First, we reject the plaintiff's contention that the driver and the defendant city were not joint tortfeasors. We believe that their actions, although separate, contributed to causing a single, indivisible injury. Rozevink v. Faris, 342 N.W.2d 845, 846 (Iowa 1983). It is impossible to separate the pain and suffering arising out of the driver's negligent conduct in causing the collision and the pain and suffering arising out of the police officer's negligent conduct in not promptly providing the

medical assistance to the plaintiff. Moreover, a finding that a settling party was ²⁶⁶ in fact a joint tortfeasor and actually liable to the plaintiff is not necessary; it is sufficient if it appears that the plaintiff could have sued the settling party. Wadle v. Jones, 312 N.W.2d at 515. Plaintiff, in fact, sued the settling party.

We, likewise, do not believe the compensation received in settlement may be restricted to only the portion of pain and suffering damages arising only as a result of the driver's negligence, medical expenses, and other compensatory damages not relating to the period of incarceration. All payments, with the exception of payments in the nature of gratuity or arising from contract, fall under the pro tanto credit rule. Wadle v. Jones, 312 N.W.2d at 514. The court in Wadle rejected the plaintiff's argument that the intention of the settling parties should determine what portion of the settlement is to be treated as damages. Similarly, we believe that where there is an indivisible injury, as in this case, the intention to pay only a portion of those damages in settlement does not prevent the application of the pro tanto credit rule.

Accordingly, we reverse the trial court's decision denying defendant credit against the verdict for the settlement with the driver and remand for entry of judgment not inconsistent with this opinion. We affirm the trial court's rulings in all other respects. The costs of this appeal shall be taxed to the defendant.

AFFIRMED IN PART; REVERSED IN PART.