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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

285

RONALD J. MICHAELSEN, MARCIA MICHAELSEN, DAVIS A. MICHAELSEN, JORDAN A. MICHAELSEN, and TYLER J. MICHAELSEN,	)	
Plaintiffs/Cross-Appellants,	)	Filed May 28, 1985
vs.	)	
ARNA K. ELBERT, f/k/a ARNA K. REYNOLDS,	)	5-18 84-142
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Grundy County - Forest E. Eastman, Judge.

Defendant appeals and plaintiffs cross-appeal from judgment in a negligence action arising from an accident when plaintiff, who was herding cattle at night on a county road, was struck by defendant's car. REVERSED AND REMANDED.

David S. Dutton and Bruce L. Braley of Mosier, Thomas, Beatty, Dutton, Bruan & Staack, Waterloo, for defendant-appellant.

John R. Walker, Jr. of Beecher, Beecher, Holmes & Rathert, Waterloo, for plaintiffs/cross-appellants.

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

SNELL, P.J.

Plaintiff Ronald Michaelsen was in the traveled portion of a rural highway after dark attempting to herd straying cattle when he was struck from behind by a car driven by defendant. Defendant had been traveling on the right side of the road. She struck the plaintiff when she pulled into the left lane to pass a vehicle moving ten to fifteen miles per hour slower than the 55-mile-per-hour speed limit. At the time he was hit, plaintiff was running on the left side of the road herding cattle which were running along the road in the ditch. Plaintiff's attention was focused primarily on his cattle and a more distant vehicle approaching from his front. Defendant was not expecting anyone to be in the road and did not see plaintiff in time to stop before hitting him. The record indicates that the moon was not out that night and that the plaintiff was wearing dark clothing.

Plaintiffs' negligence action seeking recovery for damages included claims for loss of spousal and parental consortium. Defendant counter-claimed for property damage to her car. Apportioning fault equally between plaintiff and defendant, the jury found damages in the following amounts: plaintiff - $300,000; plaintiff's wife - $30,000; plaintiff's children - $6,000; defendant - $2,266.33. Plaintiffs' petition was amended to include a claim based on emotional distress suffered by the children. Defendant's pleadings expressly sought contribution or indemnity only with regard to that claim, which was subsequently dismissed by plaintiff. The trial court granted defendant's request for contribution with regard to the children's loss of parental consortium claim.

Plaintiffs introduced tax returns and other evidence showing a drop in income following the accident from livestock and Amway products businesses operated jointly by plaintiff and his wife. The jury was permitted to take the tax returns to the jury room during deliberation.

During closing argument, the court overruled objection to remarks made by plaintiffs' counsel suggesting that the jurors use their common sense and exper-

ience in determining the present value of a loss of future earning capacity. Defendant also made numerous unsuccessful requests concerning instructions.

Defendant has appealed and on appeal asserts several grounds of error. Her first claim is based on the trial court's failure to properly instruct the jury on a number of issues. Secondly, she claims that a mistrial should have been granted due to improper references by opposing counsel during closing arguments concerning reduction of damages to present value. Finally, she claims that the evidence was insufficient to support the award of damages relating to loss of future earning capacity.

Plaintiff cross-appeals claiming the trial court should have granted the motion for a directed verdict or judgment notwithstanding the verdict because the plaintiff, as a matter of law, had a right and duty to be on the road. Plaintiff also claims that the trial court erred in permitting contribution with regard to the children's claim for loss of parental consortium and asks that if a retrial is ordered, the issue be limited to liability.

I. Jury Instructions. On appeal, the defendant driver asserts that the court erred in failing to instruct the jury on several different matters. We find that the trial court erred in failing to give an instruction on a sudden emergency which the defendant requested.

In Vanderheiden v. Clearfield Truck Rentals, Inc., 210 N.W.2d 527 (Iowa 1973), the supreme court discussed the sudden emergency doctrine:

> An emergency has been variously defined as (1) an unforeseen combination of circumstances which calls for immediate action; (2) a perplexing contingency or complication of circumstances; (3) a sudden or unexpected occasion for action; exigency; pressing necessity.
>
> We have stated many times there is an emergency in every collision of motor vehicles. But the emergency which excuses a violation of a statute must be one to which the violator did not contribute; it must be one "not of his own making."

> Of course one who claims excuse on the ground of sudden emergency not created by his own act has the burden to prove it.

Id. at 529 (citations omitted).

The Vanderheiden case is somewhat analogous to the case before this court. In Vanderheiden, the plaintiff had stopped his truck along the shoulder of the interstate and was attempting to return to the paved section when he was hit by the defendant's truck. There was evidence that the defendant's attention had been diverted momentarily while he was lighting a cigarette. The court concluded:

> The jury might well have pondered the question of whether a sudden emergency was shown. Had they concluded a sudden emergency existed they might well have determined it was of defendant's own making. We believe these matters were for the jury to determine as a matter of fact, not for the court to determine as a matter of law.

Id.

In this case there is evidence that the driver looked into the other lanes to check for lights of oncoming traffic. Seeing only headlights of a car two miles in the distance, she pulled out to pass the slow-moving vehicle. It was only when she pulled into the lane the second time to actually complete the pass that she saw the plaintiff.

We believe there was sufficient evidence to generate a jury question on the existence of a sudden emergency. There is a question of whether the plaintiff was running on the white line immediately before the accident and then stepped closer to the center of the lane just as the defendant pulled out to pass. In addition, there is a question of whether the plaintiff was carrying a lighted flashlight and wearing a orange hat, which would have made him visible to other traffic on the highway.

Plaintiff argues that the driver was not entitled to this instruction because she contributed to the emergency. Plaintiff's argument is that the plaintiff was "traffic" under Iowa Code section 321.1(65), and that the defendant did not have

the right to be on the left side of the highway because it was not "clearly visible and free of oncoming traffic." Iowa Code § 321.303. We reject this argument because there is a factual question of where the defendant was on the paved part of the road and what the driver's visibility was.

We conclude a jury question was generated on the existence of a sudden emergency and the trial court committed reversible error in failing to give this instruction.

Defendant also claims that the trial court erred in failing to give an instruction on a safe alternative route. The trial court denied this instruction because it was not specifically pled. Defendant made a motion to amend his pleadings to allege this specification in order to conform to the proof presented and the trial court denied this motion.

Allowance of an amendment to conform to the pleadings is the rule and denial the exception; however, the trial court has broad discretion in ruling on this motion and will only be reversed if a clear abuse of discretion is shown. Mora v. Savereid, 222 N.W.2d 417, 422 (Iowa 1974).

The safe alternative route doctrine was discussed in Lindloff v. Duecker, 217 Iowa 326, 251 N.W. 698 (1933). In Lindloff, the plaintiff had been walking down the middle of the paved road at night. The court stated:

> It is true that a pedestrian has the same right on a pavement as an automobile, subject to a qualification that a pedestrian can step aside quicker than a car. . . .
>
> Several ways were open for the decedent to avoid such a dilemma. One was to step over to the right side of the road, from where he could step off the pavement to the right shoulder; another was to step over to the left side of the pavement, from where he could step to the left shoulder; or he could remain in the center of the road and take the chance of being hit. It is a well-settled rule of law that where a person has two or more places in which to walk, one of which is dangerous, and where in the exercise of ordinary care it would have been known to be unsafe, and where another road is safe, he is guilty of contributory negligence, if he voluntarily chooses the unsafe course.

> We think it is a matter of common knowledge that it is hazardous undertaking for a pedestrian clad in dark clothes . . . to travel between the center lines of a pavement . . . and deliberately maintain that position, with swiftly moving cars approaching from both directions. He may have a right so to do, but if in the exercise of this right he is placing himself in a perilous position, he must take adequate precaution to guard against injury. We can reach no other conclusion that that no such precaution was taken by decedent, and it necessarily follows that he was not exercising ordinary care.

Lindloff v. Duecker, 217 Iowa 326, 328-29, 334-35, 251 N.W. 698, 700, 702-03 (1933).

In this case there was evidence that the plaintiff could have been running on the shoulder instead of on the highway. On the basis of the record we believe that the trial court should have granted the motion to amend the pleadings. There was sufficient evidence to generate a jury question on the safe alternative route and an instruction should have been given.

Defendant argues that the court erred in giving an instruction regarding the ability of a motorist to stop a motor vehicle within the assured clear distance.

Iowa Code section 321.285 (1983) states:

> Any person driving a motor vehicle on a highway shall drive the same at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other conditions then existing, and no person shall drive any vehicle upon a highway at a speed greater than will permit the person to bring it to a stop within the assured clear distance ahead, such driver having the right to assume, however, that all persons using said highway will observe the law.

Defendant argues that a jury question on the applicability of this statute was not generated because there was insufficient evidence that the plaintiff was reasonably discernable and that there was substantial evidence that the plaintiff entered the lane in such a manner that it was impossible for the defendant to stop.

Because there is a factual question as to where the plaintiff was on the pavement when the defendant checked the lane before passing and whether he was

carrying a flashlight, we find that the trial court properly instructed the jury on this issue.

Defendant also asserts that the trial court erred in striking an allegation that the plaintiff-pedestrian was negligent in "standing, walking or running on the traveled portion of a heavily traveled highway after nightfall in an area designated for the passing of vehicles." The trial court did allow an allegation that the defendant was negligent in "standing, walking or running on the traveled portion of a heavily traveled highway after nightfall to herd cattle."

The ruling on the motion to strike a pleading will not constitute reversible error unless it is shown that the trial court abused its discretion. Holbert v. Keller, 161 Iowa 723, 734, 142 N.W. 962, 966 (1913). We conclude that the trial court did not abuse its discretion in granting the motion to strike. Plaintiff's presence on the road was directly related to the fact that he was herding cattle and the limitation of the negligence question to that issue did not constitute an abuse of discretion.

After examining the other instructions requested by the defendant, we conclude that the trial court did not commit reversible error in denying these instructions. The instructions given in this case presented an accurate representation of the applicable law and the failure to give the additional instructions did not constitute reversible error.

II. Plaintiff's Motion for Directed Verdict and Judgment Notwithstanding the Verdict. In his cross-appeal, plaintiff claims that the trial court erred in refusing to grant his motion for a directed verdict and for judgment notwithstanding the verdict. Plaintiff claims that, as a matter of law, he had a legal right and duty to be on the left side of the road, and that his presence preempted the defendant's right to attempt to pass.

On appeal from a judgment notwithstanding the verdict, review by the appellate court is limited to those grounds raised in the directed verdict motion.

Watson v. Lewis, 272 N.W.2d 459, 461 (Iowa 1978). The court will view the evidence in the light most favorable to the plaintiff to determine if there was sufficient evidence to generate a jury question. Id.

We reject the plaintiff's argument that he had a legal right to be on the left side of the road and that by first occupying the road, he preempted the defendant's right to pass.

Plaintiff bases his argument on the fact that Iowa Code section 321.1(65) which defines traffic to include "pedestrians, ridden or herded animals." He then refers to Iowa Code section 321.303, which defines the rights and limitations of a car overtaking another on the left:

> A vehicle shall not be driven to the left side of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction unless the left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit the overtaking and passing to be completely made without interfering with the safe operation of a vehicle approaching from the opposite direction or a vehicle overtaken.

Iowa Code § 321.303 (1983).

We hold that "vehicle" and "traffic" as referred to in this statute do not include pedestrians. The tenor of the statute indicates the legislature did not intend it to include pedestrians.

Plaintiff also argues as a matter of law he had a duty to be on the road in order to restrain his cattle and prevent them from entering the road. Iowa Code section 188.2 (1983), requires that "All animals be restrained by the owners thereof from running at large." This issue is raised for the first time on appeal and therefore will not be considered. Ke-wash Co. v. Stauffer Chemical Co., 177 N.W.2d 5, 9 (Iowa 1970).

III. Damages. Defendant argues that the trial court erred in allowing the plaintiff to present evidence of the gross income and net profit and loss of his livestock and Amway business as a result of his injuries. The record indicated that

the defendant worked full-time for a company in Cedar Falls and had additional income from the livestock and Amway sales.

We conclude that the trial court did act improperly in admitting evidence of the loss of profits resulting from both the livestock and the Amway businesses. The foundation needed to show loss of earnings in businesses was insufficient. The only evidence presented on the livestock business was that Michaelson had raised livestock prior to the accident. There was no evidence of the time he spent, the capital invested, or the additional labor involved.

In terms of the Amway business, there is some question of the extent of Michaelson's personal involvement. The only evidence presented was that Michaelson was a "motivator," inspiring other sub-distributors to sell products on a regular basis. There was no evidence of the capital he invested, if any, the time he spent, or the extent of his actual activities.

The question of whether evidence of the Amway sales income would be admissible turns on the extent of "personal exertions" of Michaelson. See, Truscheff v. Abell-Howe, Co., 239 N.W.2d 116, 123 (Iowa 1976).

If it is shown that the profits of the Amway business were "mainly dependent on [the] personal exertions" of Michaelson, the evidence of those profits would be admissible. Id.

IV. Contribution. We conclude that the trial court properly allowed the defendant's request for contribution on the children's claim for loss of parental consortium. In his original petition, plaintiff sought recovery on behalf of his children for loss of parental consortium. He later amended his pleadings to include a request for damages for emotional distress caused the children by witnessing the accident. Defendant counter-claimed seeking contribution for the emotional distress claim, but not on the loss of consortium claim. Plaintiff later voluntarily dismissed the emotional distress claim.

We conclude that under notice pleading the contribution claim on the

emotional distress action was sufficient to give the plaintiff fair notice of the contribution claim on the consortium action. The order allowing contribution was correct.

V. Partial Trial. We reject plaintiff's request that a retrial be limited to the issue of liability.

The findings of the trial court are reversed and the case is remanded for new trial.

REVERSED AND REMANDED.

SACKETT, J. (specially concurring)

I concur with the majority that this cause should be reversed and remanded. I cannot, however, agree with the majority's determination that traffic under Iowa Code section 321.303 (1983) does not include pedestrians, but I concur in their opinion. A jury question was presented on the defendant's right to pass because there was a question of plaintiff's location on the road.