FILED
AUG 25 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

THOMAS BOOTH, Administrator of the Estate of SHERRY BOOTH, Deceased,

Plaintiff-Appellee,

vs.

GENERAL MOTORS CORPORATION,

Defendant-Appellant.

Filed August 25, 1981

1-109
2-64776

Appeal from Carroll District Court - James C. Smith, Judge.

Defendant appeals from judgment on jury verdict for plaintiff in action for wrongful death of plaintiff's decedent. AFFIRMED.

M. Carter, Jr. and Paul C. Peglow of Johnson, Sudenga, Carter & Latham, Marshalltown, Iowa, for appellants.

M. Gene Blackburn of Murray, Blackburn & Stockdale, P.C., Fort Dodge, Iowa, for appellees.

Raymond O. Snook and John A. Beltz, Glidden, Iowa, for appellees.

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

Defendant, General Motors Corporation, appeals from judgment on jury verdict for a personal representative in an action for wrongful death of Sherry Booth, deceased. The material allegations of the petition allege that defective design of an automobile manufactured by defendant was the cause of decedent's death. Several legal issues are raised on appeal which we consider separately.

Some of the evidence introduced at trial was as follows. On October 9, 1974, the decedent was involved in a motor vehicle collision which resulted in her death. At the time she was operating a 1972 Chevrolet Vega automobile, manufactured by the defendant, which she had purchased as a used car in 1974. She was driving east on a paved road at the time the accident occurred. The road was straight and level with a slight grade. Prior to the collision the automobile decedent was operating swerved to the left of the center line, then made a sharp turn back into the proper lane of traffic, and then swerved back across the center line where it collided with a semi-truck approaching from the opposite direction. The semi passed over the top of the Vega, which was dragged underneath the semi, over a gravel shoulder, and into a ditch and field. The Vega was demolished and decedent was killed instantly.

After the accident the Vega was stored in several locations. This action was commenced in September of 1976. In July of 1979, Merle Hardy, a mechanic who was preparing the Vega for inspection in preparation for the litigation, saw a rock fall from the front cross member in the area of the tie rod and steering guide linkage. Dr. Leo Peters, a professor of mechanical engineering, inspected the Vega for plaintiff, apparently first in 1976, and took a picture revealing a rock in the brake caliper and an object between the steering relay rod and cross member. Dr. Peters, testifying as an expert witness at the trial, stated that because of faulty design of the Vega's front end suspension, said suspension could act like a scoop which would pick up material from gravel surfaces and that such material could affect the steering and braking of the automobile. He also testified that he had made certain experiments with the rock which fell from the front cross member in July of 1979. Such experiments indicated to the witness that the rock would fit above the front end cross member supports of decedent's 1972 Vega in a manner that would cause binding of the drag link assembly or relay rod in the steering system. The witness further testified that certain configurations were found on the rock which matched configurations found on the relay rod and cross member supports of the Vega. Over defendant's objection, this witness

was permitted to testify that in his opinion the cause of the accident "was the inability to control the car due to one or a combination of the items of the rock in the brake, the possibility of something being in the steering area adjacent to the steering box, or the rock that was in the vicinity of the relay rod." The witness stated that a rock in the brake caliper would cause the Vega to swerve to the left if the brakes were applied. He stated that it was unlikely that the rock entered the braking system during the accident when it slid through the gravel.

A geology professor called by plaintiff testified that the rock falling from the steering mechanism did not come from the scene of the accident or any places where the car had been stored subsequent to the accident. He did testify, however, that the rock was consistent with the kind of driveway gravel located at decedent's parents' farm home, a place the Vega had been driven.

The decedent's father testified that on a prior occasion while driving decedent's Vega, he had to jerk the steering wheel in order to turn into a field drive. The decedent's aunt testified that on one occasion when she was riding with the decedent in the Vega, decedent found it necessary to jerk the steering wheel in order to negotiate a left turn.

Defendant called two expert witnesses to testify at trial: Jerald Confer, an engineer employed by the defendant, and J. Stannard Baker, a traffic engineer and accident reconstruction specialist. Both of these witnesses testified that the path of the automobile which decedent was driving indicated that it was being steered very sharply and that the cause of the accident was an overcorrection of steering error by decedent. Other facts will be stated later as necessary for discussion of the legal issues presented for review.

I. The first issue which we must consider concerns our jurisdiction to hear this appeal. Plaintiff asserts that the appeal should be dismissed because defendant's notice of appeal was not filed within the time provided in Iowa R. App. P. 5. The record reveals that the appeal was not taken within thirty days of judgment but was taken within thirty days of the order denying defendant's motion for judgment notwithstanding the verdict and motion for new trial. Plaintiff, however, challenges the timeliness of defendant's post-trial motions and correctly points out that if the motions were not timely, they do not serve to enlarge the time for filing notice of appeal. See Hogan v. Chesterman, 279 N.W.2d 12, 13-15 (Iowa 1979).

The timeliness of the post-trial motion depends upon the validity of an order of the trial court extending the time for filing such motions. The record reflects that a written application for an enlargement of time to file post-trial motions was served by defendant on November 6, 1979, and filed with the clerk the following day. An order granting such enlargement was filed on November 14, 1979. Because the ten-day period for filing a motion for judgment notwithstanding the verdict or a motion for new trial expired on November 5, 1979, both the written application and the order filed with the clerk would appear to be too late to be given legal effect.

The trial court nevertheless considered said post-trial motions and in its ruling on the motions, stated the following: (1) that within the ten-day period for filing post-trial motions under Iowa R. Civ. P. 247, the court had received an oral request for an extension of time for filing a motion for new trial and a motion for judgment notwithstanding the verdict. Said oral motion requested that the time for filing said motions be extended to November 12, 1979; (2) that such request established good cause; (3) that also within the ten-day period, plaintiff's counsel consented to said extension and the court orally agreed to grant said extension. Based upon this state of events, the trial court determined that the time was validly extended so as to make defendant's motions served on November 12, 1979, timely.

Were this a matter of first impression, we would perhaps be more receptive to the suggestion that oral requests for extensions of time and the oral rulings of the court granting such extensions are not effective until reduced to writing and filed of record. In this regard we note that rule 119 and rule 120, Iowa R. Civ. P., contemplate that orders be in writing and become effective "when filed with the clerk." But any reservations which we might hold in this regard are dispelled by Blessum v. Howard County Board of Supervisors, 295 N.W.2d 836, 839-41 (Iowa 1980), wherein an oral extension of time for filing post-trial motions was held to validly extend the time for filing notice of appeal. Accordingly, we reject plaintiff's argument that we do not have jurisdiction to hear this appeal.

II. Defendant urges that reversible error was committed when the trial court on the morning trial commenced granted a motion by plaintiff to amend his petition so as to materially change the issues. The record reflects the following with respect to this contention. This action was commenced on September 17, 1976. The petition alleged that there was a defect in the steering mechanism which proximately caused the death of plaintiff's decedent. No mention was made in the petition for any defect in the design of the brake caliper or braking system. On May 21, 1979, a pretrial conference

was held and the trial court ordered that the deadline for amending pleadings would be 30 days prior to October 16, 1979 (the date upon which trial was to commence). On October 11, 1979, five days before trial, plaintiff moved to amend his petition so as to allege that the vehicle in question was defective in that the brake mechanism was designed in such a manner that a rock could be lodged in the caliper of the brake. The trial court, on the morning trial commenced, permitted said amendment over defendant's resistance.

While it has been said that allowance of an amendment to a pleading is the rule and denial is the exception, there are limitations on the right to file untimely amendments which change the issues. See Madison Silos v. Wasson, 215 N.W.2d 494, 497 (Iowa 1974); Board of Adjustment v. Ruble, 193 N.W.2d 497, 507 (Iowa 1972). We are inclined to view the trial court's actions in the present case as extending beyond these limitations, particularly in light of the pretrial order and plaintiff's failure to excuse his noncompliance with said order. The issue is not, as plaintiff suggests, whether defendant knew of the rock in the brake caliper, but rather what the litigants might reasonably expect the issues to be as trial approached. This is one of the purposes to be served by a pretrial order. The action of the trial court in the present case essentially rendered the pretrial order meaningless in this regard.

But having concluded this much, we cannot accept defendant's argument that a reversal is required as a result of the untimely amendment. The recent cases seem clear that in order to perfect a claim of prejudice in the face of such circumstance, the aggrieved party must first seek the opportunity to prepare to meet the newly injected issue by asking for a continuance or similar relief. Ackerman v. Lauver, 242 N.W.2d 342, 345 (Iowa 1976); Smith v. Village Enterprises, Inc., 208 N.W.2d 35, 38 (Iowa 1973). No such attempt was made by defendant in the present case to so condition the effect of the amendment. In light of this circumstance, we hold that defendant's claim of prejudice is without merit. See Smith v. Village Enterprises, Inc., 208 N.W.2d at 38.

III. We next consider together three contentions of defendant which are interrelated. These are the claims that (a) the trial court erred in admitting the testimony of Dr. Leo Peters as to his opinion of the cause of the accident; (b) the evidence of causation from a defect in the braking system was insufficient to permit any issue concerning brakes to be considered by the jury; and (c) the evidence, as a whole, was insufficient to sustain the verdict.

The objection lodged by defendant to the hypothetical question calling for Dr. Leo Peters's opinion as to the cause of the accident was as follows:

> Your Honor, at this point I'd like to interpose an objection that the opinion of the witness at this point would constitute speculation and conjecture. There has been no indication that, for example, the speculation that a rock might interfere with a steering relay rod movement was ever confirmed by an experiment establishing with moving parts that that theory could, in fact, hold water. The exhibits that Dr. Peters has identified for us with specific reference to the K-brace which I think he's referred to as the cross member shows absolutely no indication of any disturbing of the grease and road grime. The only disturbance is where Dr. Peters has wiped the K-brace clean, apparently in an attempt to find scratches. And apparently that attempt was not successful.
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> . . . the gravel in the brake caliper, which appears identical to what the pictures show was at the shoulder of the highway and over which the witnesses have testified the Booth vehicle was dragged immediately following the accident after the semi ran over it.
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> The explanation with respect to the rock that has been conditionally received in evidence completely leaves out the first eighteen months immediately following the accident and numerous places where that vehicle was, not to mention the ditch where the vehicle was dragged right after the accident.
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> The photographs that Dr. Peters has pointed to as illustrating an object on their face show that nobody could discern what those are. And permitting this opinion at this point, we believe, would bring before the jury matters which are purely conjectural and speculative, and that's the basis for our objection.

We will assume that this objection preserves for our consideration the matters now being urged by defendant. The claim now made on appeal is stated in terms of:

> The record clearly shows that there was not sufficient data upon which Dr. Peters could testify that the brake design was a cause of the accident. This is because there was no showing by the plaintiff: (1) that the pebble found in the brake caliper was there at the time of the accident; and (2) that the brakes were ever applied prior to the collision.

From our examination of the record, we conclude that neither of these reasons serves as a basis for excluding the challenged opinion testimony.

There is substantial evidence in the record through the testimony of the geologist from which a jury might conclude that the pebble found in the brake caliper did not get there after the accident. This would support an inference that it was there when the accident occurred.

As to the matter of whether the brakes had been applied, this is concededly not established by direct evidence. But we do not believe that this was essential in order

for the challenged opinion testimony to be admissible. Here, the expert witness was asked to testify concerning that which seemed likely as a result of that which was known. More specifically, Dr. Peters's testimony concerning potential problems with the brakes is based upon his expert assessment of the most likely causes of the accident given evidence that the type of automobile involved would react in a particular manner under certain conditions which were shown by the evidence to have been present.

One of the unstated but warranted assumptions the witness was making in formulating his opinion was that it is likely that a person faced with a situation confronting plaintiff's decedent would have applied the car's brakes. In this regard we note that defendant's arguments relating to causation all assume that plaintiff's claims must be based on vehicular defects which caused his decedent to change her course of travel from a straight and direct course to the erratic swerving movements which immediately preceded the collision. This is not necessarily so. Plaintiff's claims also embrace the possibility that the initial change of course resulted from other causes and that vehicular defects only came into play during efforts to correct the errant course of the Vega automobile.

We note that defendant is only challenging that portion of Dr. Peters's testimony which relates to the brakes being a potential cause of the collision--it does not challenge that portion of his opinion concerning steering system failure as a potential cause. The opinion with respect to the brakes was presented by the witness as an alternative to his conclusion that a steering system malfunction was a likely cause of the accident. Taking his testimony as a whole, it was the witness's opinion that one or both of these causes were the most likely cause of the accident. Under the record the jury could have found either to be attributable to a design error on defendnat's part.

In Dickinson v. Mailliard, 175 N.W.2d 588, 591 (Iowa 1970), the court stated:

> If an expert is qualified, he should be allowed to state his opinion, either as to probable or merely possible causation. The subsequent question of its sufficiency to establish a sufficient showing of causation to submit to the jury depends on the nature of the opinion given together with other evidence bearing on the question.

Applying these considerations to the present case, we conclude that the testimony of Dr. Peters was not improperly received for any of the reasons suggested by defendant. See also Cody v. Toller Drug Co., 232 Iowa 475, 481, 5 N.W.2d 824, 827(1942).

We next consider defendant's contention that the evidence was insufficient to sustain the jury verdict as a whole or to sustain the submission to the jury of any issue relating to defective brakes. We reject both contentions.

We believe the expert opinion testimony offered by plaintiff, which has been determined to be admissible, is sufficient when considered with other evidence bearing on the question to generate a jury issue both on the specific issue of defective brakes and defendant's liability in general. In Hutchinson v. Des Moines Housing Corp., 250 Iowa 1306, 1320, 99 N.W.2d 81, 89 (1959), concerning conflicting expert testimony on the cause of a fire, the court stated: "The answer as between the experts is for the jury." The court also quoted approvingly from 20 Am. Jur., Evidence, section 1206:

> It is generally recognized that the relative weight and sufficiency of expert and opinion testimony is peculiarly within the province of the jury to decide, considering the ability and character of the witness, his actions upon the witness stand, the weight and process of the reasoning by which he has supported his opinion, his possible bias in favor of the side for whom he testifies, the fact that he is a paid witness, the relative opportunities for study or observation of the matters about which he testifies, and any other matters which serve to illuminate his statements."

In the same case, the court went on to state (250 Iowa at 1322, 99 N.W.2d at 90):

> We quote from Lunde v. Cudahy Packing Co., supra [139 Iowa 688, 117 N.W. 1067]:
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> "It is true . . . that no eyewitness was produced to testify to the particulars of the accident . . . . This, say counsel, leaves the cause of the accident a mere matter of speculation or surmise, but such is not the case. More frequently than otherwise the truth or falsity of any disputed fact proposition is dependent, in greater or less degree, upon circumstantial evidence.
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> "Proof of proximate cause is subject to no more burdensome rule than is applied to the proof of any other essential fact in an ordinary law action. It must be established by a preponderance of the evidence, direct or circumstantial. If there be shown any facts bearing upon the question and they afford room for fair-minded men to conclude therefrom that one theory of the case is better supported than the other, the question cannot be properly withdrawn from the jury.

Applying these principles in the present litigation, we conclude that the issues submitted to the jury had adequate evidentiary support and that the verdict should not be disturbed.[1]

IV. Defendant also claims that the trial court erred in allowing Carl Stich, a witness for plaintiff on rebuttal, to testify concerning the witness's experience with

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[1] For instructive cases in which circumstantial evidence was held to be sufficient to sustain the causation elements in products liability litigation, see Fernandez v. Chios Shipping Co., 542 F.2d 145, 154 (2d Cir. 1976); Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 631, (8th Cir. 1972); Franks v. National Dairy Products Corp., 414 F.2d 682 (5th Cir. 1969); North American Aviation v. Hughes, 247 F.2d 517 (9th Cir. 1957), cert. denied, 355 U.S. 914, 78 S.Ct. 341, 2 L.Ed.2d 273 (1958).

steering problems on a Vega automobile which had a front end suspension system similar to the automobile of plaintiff's decedent. The primary thrust of defendant's argument in this regard is that the testimony was not rebuttal.

The dispute as to whether Stich's testimony was in fact rebuttal relates to the testimony given by defendant's expert witness, Jerald Confer. Plaintiff claims that Confer testified that it was improbable that a stone would interfere with the free motion of the steering relay rod on vehicles such as that of plaintiff's decedent. Stich's testimony indicated that this had occurred on his Vega. Defendant, on the other hand, insists that Confer's testimony was that it was improbable that this occurred in the present case for reasons given by the witness. It is further urged by defendant that the rebuttal testimony of Stich was in no way related to problems incurred under circumstances similar to those involved in the death of plaintiff's decedent.

In resolving the respective contentions made regarding Stich's testimony we note at the outset that ordinarily if evidence received in rebuttal is otherwise admissible, error may not be predicated upon the fact that it was improperly offered as rebuttal. Karr v. Samuelson, 176 N.W.2d 204, 212 (Iowa 1970); Robson v. Barnett, 241 Iowa 1066, 1071, 44 N.W.2d 382, 384 (1950); Hoegh v. See, 215 Iowa 733, 740, 246 N.W.2d 787, 791 (1933). The relevant inquiry thus becomes whether Stich's testimony would have been admissible as part of plaintiff's case-in-chief. We conclude that it would have been.

Stich had been identified in a report prepared by the National Highway Transportation Safety Administration with respect to its investigation of steering problems on Chevrolet Vega automobiles. This report identified Stich as having experienced such problems after driving on gravel roads. This report was admitted in evidence in plaintiff's case-in-chief. We think plaintiff was entitled to elaborate upon or clarify any hearsay attributable to Stich in this report by means of his personal presence at trial.

In addition, we believe Stich's testimony was otherwise relevant and material evidence with respect to the issues confronting the court and jury. Under plaintiff's theory of the case, it had to show (1) that the design of the automobile was defective in the manner claimed and (2) that this circumstance caused the accident in which his decedent lost her life. As to the first of these issues, it was plaintiff's theory that the design of the particular Vega automobile was defective because it could collect and accumulate rocks and gravel in the vicinity of the vehicle's steering system. Stich, a mechanic, who has driven on gravel roads, testified that this had occurred on a Vega

automobile of similar design owned by him and that he had thereafter experienced steering difficulties with this vehicle. On this appeal, defendant seeks to exclude Stich's testimony because it does not relate to all of the elements of proof which plaintiff is required to establish. We believe it sufficiently relates to some of the elements of proof to be admissible. Stich's testimony is direct evidence on the tendency of automobiles with the particular design of plaintiff's decedent's automobile to accumulate rocks and gravel in the area of the steering system and what might happen as a result thereof. The use of relevant examples of design problems experienced by third persons has been approved in product design litigation. See Wojcerchowski v. Long-Airdox Division, 488 F.2d 1111, 1116 (3rd Cir. 1973); Annot. 42 A.L.R.3d 780, 784-89. We find no error in the admission of the testimony of this witness.

V. Lastly, we consider plaintiff's claim on cross-appeal that the trial court erred in ordering a remittitur which served to reduce the verdict for plaintiff from $106,120 to $101,600. This contention is based solely on the ground that defendant's motion for new trial was untimely. That contention is premised on the same considerations which we rejected in our previous discussion relating to jurisdiction. What we said there serves to determine that the motion for new trial was timely. The case is affirmed on both appeals.

AFFIRMED.