FILED
MAY 31 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

PAUL C. JACKSON,

Appellant,

vs.

ARTHUR J. KOKENGE,

Appellee.

Filed May 31, 1978

495
2-59600

Appeal from Woodbury District Court - Robert Brannon and James P. Kelley, Judges.

Plaintiff appeals a jury verdict for defendant asserting the trial court erred in overruling his motion for directed verdict as to liability. - Affirmed.

Robert B. Deck, of Deck & Deck, Sioux City, for Appellant.

Marvin Heidman, of Gleysteen, Harper, Kunze, Eidsmoe & Heidman, Sioux City, for Appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Plaintiff Paul Jackson appeals from judgment entered on a jury verdict for defendant in an action for personal injuries sustained by plaintiff when the car driven by defendant Arthur Kokenge collided with the rear of the car plaintiff was driving. Plaintiff asserts the trial court abused its discretion in overruling his motion for directed verdict as to liability, made at the close of all of the evidence, when the trial court acknowledged the motion would have been granted if it had been made before the jury instructions had been drafted. Plaintiff also asserts his motion for new trial, alleging error in overruling his motion for directed verdict, should have been granted by the judge who succeeded the presiding first judge who retired subsequent to the trial.

Plaintiff's cause of action in negligence was based upon the allegations that defendant failed to have his car under control, to operate in a careful and prudent manner, to stop in an assured clear distance ahead and to keep a proper lookout. Defendant pled contributory negligence as an affirmative defense. The evidence discloses that plaintiff's car was stopped when his car was struck from the rear by the front of defendant's car. The weather was clear and the road surface was generally dry although there were occasional spots of slush and packed snow on the roadway.

Plaintiff testified that while he was stopped he observed defendant's car approaching from the rear at an approximate speed of 30 m.p.h. When defendant's car came within approximately 25 feet of plaintiff, Jackson observed that Kokenge was not watching the road ahead of him, but looking to the side. Plaintiff honked his horn to warn defendant; but, when defendant turned around, it was too late.

Defendant testified he had been following plaintiff at a distance of approximately forty feet for several blocks. He testified they were both traveling at approximately 20 to 25 m.p.h. As defendant approached a series of railroad tracks, he stated his attention was diverted for an instant by a construction man operating a jackhammer. Kokenge testified that when he first heard the noise from the jackhammer, he thought it was a train coming to the intersection and that his attention was only diverted for an instant, perhaps two seconds. When he turned

his attention back to the roadway, plaintiff's car was stopped in front of him at a distance of 10 to 12 feet. Although he immediately applied his breaks, defendant was unable to stop.

I. On appeal, plaintiff alleges as error the trial court's failure to grant his motion for directed verdict made at the close of all of the evidence. Trial was adjourned after both parties rested. When trial was resumed two days later, both sides were given an opportunity to object to the proposed jury instructions. Before stating any objections, plaintiff moved for a directed verdict and moved the trial court instruct the jury that they must find defendant liable and return a verdict in favor of plaintiff. The trial court refused stating that the motion was too late, that it would have been granted had it been made earlier, that the instructions were already drawn and that to change them now would delay the trial another day. Plaintiff alleges this was an abuse of discretion.

In considering the propriety of a motion for directed verdict the court views the evidence in the light most favorable to the party against whom the motion was made. Rule 14(f)(2), Rules of Appellate Procedure. Generally questions of negligence, contributory negligence and proximate cause are for the jury; it is only in exceptional cases that they may be decided as matters of law. Rule 14(f)(10), R. App. P. Even when the facts are not in dispute or contradicted, if reasonable minds might draw different inferences from them a jury question is engendered. Rule 14(f)(17), R. App. P. The party who so alleges must, unless otherwise provided by statute, prove negligence and proximate cause, by a preponderance of the evidence. Rule 14(f)(8), R. App. P. It is seldom proper, in the absence of an admission, for the court to instruct the jury that a party with the burden of proof has established his claim as a matter of law. Gunnison v. Torrey, 216 N.W.2d 361, 365 (Iowa 1974).

Although defendant admitted colliding with plaintiff's automobile, he did not admit he was negligent or that he failed to have his car under control, maintain a proper lookout or stop within an assured clear distance ahead. He testified his attention was only diverted by the jackhammer for an instant. He also testified he had been following plaintiff's automobile at a distance of approximately 40 feet and that he didn't recall seeing any red tail lights while plaintiff was stopping.

While plaintiff alleged and testified to certain neck injuries received in the accident, defendant testified that immediately after the accident he asked plaintiff if he was hurt and his response was negative. Defendant also stated plaintiff did not make any claim of injury to the investigating police officer. Finally, there were several inconsistencies in the plaintiff's testimony as to the length of time plaintiff's car was stopped prior to the collision and whether plaintiff had received similar neck injuries in a previous automobile accident.

From a review of the record, we find the trial court was correct in overruling plaintiff's motion for directed verdict, even though the trial court indicated it would have granted the motion had it been made earlier. The evidence created a jury question on the issue of defendant's negligence. This is not one of the exceptional cases where plaintiff established defendant's negligence as a matter of law. There was no error.

II. Plaintiff also alleges error in overruling his motion for new trial on the ground the trial court erred in overruling his motion for directed verdict. The new trial motion was heard before a different judge because the judge who presided over the original trial had subsequently retired. Plaintiff argues that because the succeeding judge did not have the same familiarity with the facts of the case, he should have granted a new trial. See rule 367 (a), Rules of Civil Procedure. Because of our holding in division I, that the trial court did not err in overruling plaintiff's motion for directed verdict, we need not reach this issue.

AFFIRMED.