IN THE COURT OF APPEALS OF IOWA

No. 8-497 / 97-2300
Filed October 29, 1998

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CLERK SUPREME COURT

JOHN SCHMITT, Individually and as Administrator of the Estate of BENJAMIN SCHMITT, Deceased,
Appellants,

vs.

AMERICAN STANDARD INSURANCE COMPANY,
Appellee.

Appeal from the Iowa District Court for Muscatine County, Patrick J. Madden, Judge.

John Schmitt appeals from a district court ruling granting American Standard's motion for a directed verdict on his claim for underinsured motorists benefits.

REVERSED.

Mark F. Cyr of Cyr/Robertson, Moline, Illinois, for appellants.

Ted J. Wallace, Bettendorf, for appellee.

Considered by Sackett, P.J., and Huitink and Vogel, JJ.

HUITINK, J.

I. Background Facts and Proceedings.

Benjamin Schmitt, age twelve, was killed when his bicycle collided with a car driven by Raymond Alvarado. Alvarado's insurance carrier settled with Benjamin's estate for $20,000, the maximum policy limits. Because the settlement amount did not compensate Benjamin's estate for its entire loss, Benjamin's father, John Schmitt sued American Standard Insurance Company, his automobile insurer, to recover underinsured motorist benefits.

At the conclusion of Schmitt's evidence, American Standard moved for a directed verdict citing insufficient evidence of Alvarado's negligence and Schmitt's failure to offer the relevant insurance policy into evidence. The district court sustained the motion noting eyewitness testimony that Alvarado could not have seen Benjamin, Alvarado's testimony that he did not see Benjamin, and evidence indicating Benjamin's bicycle struck the side of Alvarado's car. The district court subsequently overruled Schmitt's motion for a new trial again citing both the absence of any evidence Alvarado was negligent and Schmitt's failure to offer the relevant insurance policy into evidence.

On appeal, Schmitt argues the jury could have found Alvarado was negligent by failing to keep a proper lookout, failing to maintain control of his vehicle, and failure to use ordinary care where conditions required a reduced speed. Schmitt also

contends American Standard admitted the relevant facts concerning his insurance policy in its answer, and there was no need to offer the insurance policy at trial.

II. Standard of Review.

A grant of a motion for directed verdict is reviewed for correction of errors of law. *Spaur v. Owens-Corning Fiberglass Corp.*, 510 N.W.2d 854, 858 (Iowa 1994). The evidence is viewed in the light most favorable to the nonmovant and it is determined whether sufficient evidence existed to warrant submission of the issues to a jury. *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682, 684 (Iowa 1990). To grant a directed verdict, a trial court must find the evidence, when considered in the light most favorable to the opposing party, is insufficient as a matter of law to sustain the allegations brought. *Nash v. Schultz*, 417 N.W.2d 241, 243 (Iowa App.1987). The trial court is vested with considerable discretion in determining whether evidence is sufficient to submit the issue to the jury. *Oberreuter v. Orion Industries, Inc.*, 398 N.W.2d 206, 209 (Iowa App.1986).

We also consider whether reasonable minds could differ on the issues in controversy. *Spaur*, 510 N.W.2d at 858. If they could, the issue should be submitted to the jury. *Schiltz v. Cullen-Schiltz & Assoc., Inc.*, 228 N.W.2d 10, 17 (Iowa 1975). To successfully resist a motion for directed verdict the plaintiffs must show merely there is evidence sufficient to submit the question to the jury; they do not need to prove their claims. *Miller v. Young*, 168 N.W.2d 45, 51 (Iowa 1969).

III. Negligence.

Schmitt's theories of liability included failure to maintain a proper lookout. Keeping a proper lookout is not a statutory duty in Iowa but motorists have a common-law duty to exercise ordinary care under the circumstances in maintaining a lookout. *Bradt v. Grell Const., Inc.*, 161 N.W.2d 336, 341 (Iowa 1968). Proper lookout means more than merely to look and see an object. *Schneider v. Swaney Motor Car Co.*, 257 Iowa 1177, 1180, 136 N.W.2d 338, 342 (Iowa 1965). It implies being watchful of the movements of the driver's own vehicle as well as the movements of things seen or seeable. *Id.* It involves care, watchfulness, and attention of the ordinarily prudent person under the circumstances. *Id.*

As noted earlier, the district court found, as a matter of law, Alvarado was not negligent. This finding was predicated on the district court's assessment of evidence indicating Alvarado could not have seen Benjamin within sufficient time to avoid their collision. Although the record includes evidence supporting this conclusion, there is also photographic evidence from which the jury could have reached a contrary conclusion.

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 a matter of law. Iowa R. App. P. 14(f)(11). Because the record contains conflicting evidence of Alvarado's negligence, we hold the district court erred by resolving this factual issue as a matter of law.

IV. Failure to Offer Insurance Policy.

American Standard contends we can rely upon Schmitt's failure to offer his insurance policy as an alternate basis for affirming the district court. *See Regent Ins. Co. v. Estes Co.*, 564 N.W.2d 846, 848 (Iowa 1997)(when reason given by district court for its adjudication is erroneous, adjudication will nevertheless be sustained if a separate ground, properly urged, is correct). For reasons discussed below, we find this argument to be without merit.

American Standard argues in order to recover under an underinsured motorist cause of action, the plaintiff must necessarily prove the existence and terms of the insurance contract. *See Leuchtenmacher v. Farm Bureau Mut. Ins. Co.*, 461 N.W.2d 291, 294-95 (Iowa 1990). Schmitt counters that American Standard, in its answer and settlement conference materials, admitted the existence of the relevant portions of the contract at issue.

We believe American Standard has admitted both its contractual relationship and relevant terms of its contract with Schmitt. *See Hofer v. Bituminous Cas. Corp.*, 260 Iowa 81, 83, 148 N.W.2d 485, 486 (Iowa 1967)("A judicial admission is a formal act, done in the course of judicial proceedings, which waives or dispenses with the production of evidence, by conceding for purposes of litigation that the proposition of fact alleged by the opponent is true."). The admissions by American Standard of the existence of the insurance contract and its underinsured motorist endorsement dispensed with the need for other evidence to prove the contract's existence.

We reverse the district court and remand for a new trial.

REVERSED.