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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-161 / 89-1961

BETTY JANE MOSELL and **LESTER MOSELL,**

Appellants,

vs.

THE ESTATE OF LEONARD MARKS,

Appellee.

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Appeal from the Iowa District Court for Polk County, Gene L. Needles, Judge.

Plaintiffs appeal jury verdict finding the defendant was not negligent. Plaintiffs contend the trial court erred by admitting certain opinion testimony by the accident investigator. **REVERSED AND REMANDED.**

Joseph G. Bertogli, Des Moines, for appellants.

Mark J. Wiedenfeld of Grefe & Sidney, Des Moines, for appellee.

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

PER CURIAM

A deer ran in front of a car driven by Leonard Marks. In an attempt to avoid the deer, Marks steered his vehicle to the left and applied his brakes. These maneuvers, combined with the contact with the deer, caused the Marks car to slide across the center line. The Marks car collided with an oncoming pickup truck driven by Betty Mosell. Marks and his passenger were both killed in the collision. Betty Mosell was injured.

Betty Mosell later filed the present petition against Marks' estate, seeking to recover for her injuries. Mosell's husband was also named as a plaintiff. He sought recovery for loss of consortium and for damage to his vehicle. The petition alleged Marks had been negligent in failing to maintain a proper lookout, in failing to keep his vehicle under control, and in failing to yield half the roadway.

The Marks estate submitted a defense of sudden emergency. The estate argued the deer in the roadway presented Marks with a sudden emergency not of his own making. The suit was tried to a jury. The jury returned a verdict in favor of the defendant. The plaintiffs have appealed from the resulting judgment.

The plaintiffs contend the district court erred by admitting into evidence certain opinion testimony by a deputy sheriff who investigated the accident. The deputy sheriff's testimony tended to support the view Marks had

been confronted with a sudden emergency. The testimony also supported the assertion Marks had not violated any statutes or rules of the road. The plaintiffs argue the deputy's testimony exceeded the proper scope of opinion evidence. They contend the testimony invaded the province of the jury because it addressed the ultimate issues of fault, standard of care, and legal liability.

I. Standard of Review.

In reviewing the objectionable testimony we keep in mind the well established standard of review:

> The admission of opinion evidence rests largely in the sound discretion of the court and considerable leeway is allowed in this field of evidence for the reason that no matter how the opinion question is phrased or formulated, it remains an opinion which the trier of fact is at liberty to reject. Therefore, only in clear cases of abuse would admission of such evidence be found prejudicial.

Bengford v. Carlem Corp., 156 N.W.2d 855, 865-66 (Iowa 1968).

II. Expert Testimony on Legal Issues.

The Iowa Supreme Court has long set the standards for the admission of expert witness testimony. In the leading case on the subject, the supreme court stated:

> No witness should be permitted to give his opinion directly that a person is guilty or innocent, or is criminally responsible or irresponsible, or that a person was negligent or not negligent, ... But the reason is that such matters are not subjects of opinion testimony. They are mixed questions of law and fact. When a standard, or a measure, or a capacity has been fixed by law, no

> witness whether expert or non-expert, nor however qualified, is permitted to express an opinion as to whether or not the person or the conduct, in question, measures up to that standard. On that question the court must instruct the jury as to the law, and the jury must draw its own conclusion from the evidence.

Grismore v. Consolidated Products, 232 Iowa 328, 361, 5 N.W.2d 646, 663 (1942).

We recognize the courts in recent years have adopted more liberal standards on expert testimony. See Harari v. Morse Rubber Products Co., 465 N.W.2d 546, 548-49 (Iowa App. 1990). However, the present case does not fit within these more liberal standards. We first set out the testimony in question.

III. Objectionable Testimony.

The Mosells object to a series of questions and answers. The defense attorney asked the expert police investigator, Deputy Sheriff Mark Breneman, these questions on cross-examination. The pertinent portion of the transcript reads:.

> Q. Now, in this case, based on your investigation, would you agree with me, sir, that Leonard Marks was faced with a sudden emergency in the form of a deer suddenly appearing in front of the road in front of his car.
>
> MR. NELSON: Your Honor, I would object to that question. Again, that calls for an opinion which is not a proper subject matter for expert opinion.
>
> THE COURT: Overruled. You may answer.
>
> A. Could you repeat the question for me?
>
> (The last question was read by the reporter.)

A. Yes, I would agree with that.

Q. And that this emergency, the deer appearing in front of him, obviously was not something that was brought about by Mr. Marks, was it?

MR. NELSON: Your Honor, I would make the same objection again. Counsel is asking this witness for an opinion which is not properly the subject of expert testimony. It is, in fact, a question to be determined by the jury.

THE COURT: Overruled. You may answer that question.

A. It's been my experience that, particularly with animals, no one has control over that.

Q. When the deer appeared in front of the right front of Mr. Marks' car, he was in a position where a speedy decision needed to be made, wasn't he?

MR. NELSON: Objection, your Honor. I raise the same objection. Again, he is asking this witness to give an opinion on subject which is not subject for expert opinion.

THE COURT: Overruled. You may answer.

A. When a deer appeared in front of his car, he was faced with a situation where he had to make an immediate decision what to do.

Q. Whether to go left, go right, do something else?

A. Yes.

Q. And the shortness of the time prevented him from making an accurate assessment of the possible consequences of the various options, didn't it?

MR. BERTOGLI: Your Honor, I am going to object again. Sorry. The same objection that Mr. Nelson made. Also, this question calls for this witness to testify as to the matter of opinion as to domestic law, which is clearly--

THE COURT: I am sorry. I didn't hear that last part.

MR. BERTOGLI: This witness is being asked to comment on a question of law, which is improper,

any kind of subject matter, opinion of an expert or non-expert to comment on a standard of law.

THE COURT: Mrs. Curry, may I hear the question back?

(The last question was read by the reporter.)

THE COURT: Overruled. You may answer.

A. I would agree with that. Yes.

Q. Would you agree, based on your conclusions, that Mr. Mark did not do anything that violated any of the rules of the road that you are called upon to enforce in your job?

MR. NELSON: Objection, your Honor. Again, the question asks for an opinion on the subject which is not properly the subject of expert testimony.

THE COURT: Mrs. Curry, would you read the question back to me?

(The last question was read by the reporter.)

THE COURT: Overruled. You may answer.

A. I saw no violation of state code.

Q. Do you feel that Mr. Marks, placed in that position when a speedy decision had to be made immediately, that he acted as an ordinarily careful person would act when suddenly placed in a similar position?

MR. NELSON: Objection, your Honor. The same objection. Again, this is asking for an opinion on a subject which is not proper subject of expert testimony or lay testimony.

THE COURT: Objection will be sustained.

Q. Did you reach any conclusion from your investigation as to whether either driver, Betty Mosell or Leonard Marks, had operated their vehicles in a careless fashion in connection with this accident?

MR. NELSON: Again, your Honor, I raise the same objection. Mark is asking Officer Breneman for an opinion on a subject which is not proper subject matter for expert opinion or lay opinion.

THE COURT: Objection will be overruled. You may answer that question.

MR. BERTOGLI: Your Honor, if I might, that's the same--Mr. Wiedenfeld just asked the same question, except adding Mrs. Mosell's name to the question.

THE COURT: He used the term "careless".

MR. BERTOGLI: Which is the standard of care contained in the domestic law and this witness is being asked to comment on the standard of care which goes to his opinion as to fault which, of course, is the ultimate issue to be determined, and improper for the subject matter of any witness testimony.

THE COURT: I hope I have ruled right, but I know I have ruled. Am I am not going to change it.

So you may answer the question is you remember it.

A. Yes, I did form an opinion.

Q. And what was your opinion?

MR. NELSON: Same objection, your Honor.

THE COURT: Overruled. You may answer.

A. There was no indication to me that either driver had operated carelessly.

Q. Did you see this as a tragic accident resulting from a deer, that had not been caused by operator error on the part of either driver?

MR. NELSON: Objection, your Honor. Again, the question asks for an opinion on a subject which is not a proper subject for expert opinion or lay opinion.

THE COURT: Sustained...

IV. Improper Expert Testimony.

We address each category of objection separately and in the order presented in the testimony.

A. Witness's Opinion on Legal Defense.

We first address the testimony on the legal defense of sudden emergency. It is clear in Iowa that a violation of a rule of the road normally constitutes negligence per se. Bannon v. Pfiffner, 333 N.W.2d 464, 469 (Iowa 1983) (citing Kisling v. Theirman, 214 Iowa 911, 915, 243 N.W. 552, 554 (1932)). However, "a violation of a statutory rule of the road may be legally excused in four situations, one of which is when the driver is confronted by an emergency not of his own making, and by reason thereof he fails to obey the statute." Id.; see Miller v. Eichhorn 426 N.W.2d 641, 644 (Iowa App. 1988). This constitutes the doctrine of sudden emergency. Sudden emergency is a legal excuse or defense for the action of the party against whom relief is sought. See Jones v. Blair, 387 N.W.2d 349, 352 (Iowa 1986); Eichhorn, 426 N.W.2d at 644.

The Iowa Supreme Court has held the question of sudden emergency is for the jury. Jones, 387 N.W.2d at 352-53; Bannon, 333 N.W.2d at 471. Recent cases have followed this reasoning. See Eichhorn, 426 N.W.2d at 644. Expert testimony directly on this legal defense is impermissible. See Grismore, 232 Iowa at 361, 5 N.W.2d at 663. While an expert witness may testify about the facts surrounding the accident, he or she may not opine as to the occurrence or non-occurrence of a legal excuse. This is a matter solely for the jury, applying proper instructions from the trial court.

We determine the trial court abused its discretion in allowing expert testimony on the existence of the legal excuse of sudden emergency. We reverse on this issue.

B. Witness's Opinion on Violation of State Law.

The Mosells object to the expert witness's testimony the decedent had not violated any rules of the road. Our reasoning on this issue tracks closely our reasoning on the negligence issue.

> A question is objectionable which calls for a witness's conclusion on domestic law. ... []To avoid confusion, there can only be one law-giver at trial. Only the trial judge is permitted to define the law for the jury, and the jury has a prerogative and responsibility to apply the law to the facts.[].

Schlichte v. Franklin Troy Trucks, 265 N.W.2d 725, 730 (Iowa 1978).

The trial court in Schlichte allowed the expert witness to testify regarding the decedent's violation of the speed laws. The expert testified the speed laws were not violated. The supreme court reversed, stating:

> This question necessarily called for a legal conclusion, defendants objected that the question called for a legal conclusion, the pleadings and instructions directly involved the speeding law, and the trial court erred in overruling the objection.

Id.

We determine Schlichte is controlling in the present case. The defense attorney asked the expert whether the decedent had violated any rules of the road. The expert

witness, a police officer investigating the accident like the expert witness in Schlichte, replied in the negative. As the testimony is essentially the same in both cases, our conclusion likewise must be the same. We determine the trial court abused its discretion in allowing this testimony. We reverse on this issue.

C. Witness's Opinion on Negligence.

The use of the word "careless" and "carelessly" triggered objections. The Mosells argue the use of these words is paramount to asking an opinion on negligence. Additionally, the construction of the questions themselves appear to solicit the witness's opinion as to the decedent's negligence. We now must decide if this expert testimony is within the parameters permitted by law.

The principal issue in the case was the negligence of the decedent. The underlying question: Did the decedent breach the standard of care required of a reasonable driver under similar circumstances? This is precisely the question asked by the defense attorney on his cross-examination of the expert witness. This is the impermissible territory clearly demarked by Grismore and other cases. See, e.g., Aller v. Rodges Machinery Mfg. Co., Inc., 268 N.W.2d 830, 840 (Iowa 1978); Hegtvedt v. Prybil, 223 N.W.2d 186, 190 (Iowa 1974).

In testifying as he did, the expert witness took the main question away from the jury. The expert directly

testified the decedent, the defendant in this case, was not negligent in causing the accident in question. Under the circumstances here, we conclude the trial court abused its discretion by permitting this line of questioning.

V. Cross-Examination.

We find no merit in the defendant's contention the expert witness was called by the plaintiffs and during the course of direct examination the door was opened so as to permit this line of questioning on cross-examination. In this respect, the defendant has failed to direct us to any portion of the record to support this argument.

VI. Harmless Error.

The defendant next argues that even if the court abused its discretion in overruling the plaintiffs' objections, the plaintiffs nonetheless are not entitled to a new trial. In support of this position, the defendant contends that even if plaintiffs' objections had all been sustained, the remaining evidence failed to create a jury question on the issue of negligence. We disagree and hold that a jury question on the issues presented was generated.

We also disagree with the defendant's second argument that even if the court erred, such error was harmless. As to this contention, we must look to determine if the admitted testimony affected the outcome of the trial.

> The judgment should not be reversed and litigation prolonged unless error appears which we may reasonably suppose affected the result to the prejudice of the losing party.

Beujsinger v. Haney, 261 Iowa 577, 155 N.W.2d 496, 499 (1968). It is clear from the testimony that this line of questioning had an impact on the jury.

We reverse and remand for a new trial not inconsistent with this opinion.

Costs of this appeal taxed to appellee.

REVERSED AND REMANDED.