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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-213 / 93-1217

RONALD KETTON and LISA KETTON,
Husband and Wife,

Plaintiffs-Appellants,

vs.

RUDOLPH BERNHARD,

Defendant-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Leonard D. Lybbert, Judge.

Plaintiffs appeal from a judgment of the district court, following a jury trial, denying them damages for injuries suffered as a result of a motorcycle-car accident. **AFFIRMED.**

Heidi L. Noonan and John R. Walker, Jr., of Beecher, Rathert, Roberts, Field, Walker & Morris, P.C., Waterloo, for appellants.

David L. Riley of Lindeman, Yagla, McCoy & Riley, Waterloo, for appellee.

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

HABHAB, J.

This is an appeal from a verdict for the defendant, following a jury trial, for injuries sustained in a collision between a car and a motorcycle. We affirm.

On October 27, 1990, plaintiff Ronald Ketton was thrown from his motorcycle when he collided with a car driven by the defendant, Rudolph Bernhard. Ketton struck his head in the resulting fall. He also received multiple contusions and abrasions, and suffered from temporary paralysis in his feet and hands and deafness in his right ear.

On September 11, 1991, Ketton filed a personal injury lawsuit against Bernhard, alleging Bernhard negligently entered the intersection without yielding to oncoming traffic. Ketton claimed he suffered severe and permanent injuries as a result of the accident. He sought damages for past and future medical expenses, loss of earnings and loss of earning capacity, loss of services as a husband and father and damages for pain, suffering and mental anguish. Ketton's wife, Lisa, also joined the petition, seeking damages for loss of consortium.

At trial, Ketton testified to his actions just prior to the accident. He stated he followed a car around the corner of Ridgeway and Ansborough, onto Ansborough, and the car pulled over into the curb lane. Ketton accelerated to go around that car, and characterized his rate of acceleration as: "Like shooting me out of a .44 Magnum. And shooting out with a slingshot. I am flying and she is

just setting there trying to get up speed." He admits that he "got on it" from 0 to 40 m.p.h., and further admits he left the car behind.

Jackie Walton was driving the automobile that Ketton passed just prior to the accident. She believed she was going very close to the speed limit when the motorcycle passed her. She testified it sounded like the motorcycle driver "opened it up" when he got next to her, and it seemed like he left her in his dust.

Ketton argued he began to slow down at the intersection where the accident occurred because he was going to make a left turn on Meadow Lane into his apartment complex. Ketton stated he observed a white Corvette pull up to the stop sign. Ketton maintained that Bernhard, the driver of the car, saw him approach the intersection and had eye contact. Ketton alleged that Bernhard proceeded into the intersection and suddenly stopped in the middle. Ketton also stated that Bernhard had nearly 200 feet of clearance before the motorcycle reached that spot, but Bernhard failed to move. Ketton crashed into Bernhard's vehicle, flying into the windshield and over the top of the car. Ketton maintained he could not remember the events immediately following the accident.

Bernhard claimed when he reached the intersection, he looked both ways and did not see anyone coming from either direction. Then as he pulled into the intersection he heard a loud noise. Bernhard observed Ketton traveling at

a high rate of speed over the crest of the hill on Ansborough. Bernhard insisted he stopped immediately but, given the nature of his car's reaction time, Bernhard ended up in the lane in which Ketton was traveling. Bernhard testified Ketton was traveling at least 70 m.p.h. in an area where the posted speed limit was 35 m.p.h. Bernhard testified he did not believe he had time to get out of Ketton's way.

Eyewitness Scott Schmitz testified he believed Ketton was going double the lawful speed limit just before the accident. He also stated he saw no indication Ketton was trying to turn left on Meadow Lane.

Prior to their submission to the jury, Ketton objected to several of the jury instructions including the instructions on sudden emergency, excessive speed, and mitigation of damages. The district court overruled Ketton's objections.

The jury found Ketton to be fifty-one percent at fault and Bernhard to be forty-nine percent at fault. The jury also rejected Lisa Ketton's claim for loss of consortium. The Kettons filed a motion for a new trial, which the district court refused to grant. The Kettons appeal.

I. Jury Instructions on Legal Excuse.

Ketton claims the district court erred by improperly allowing Bernhard a jury instruction on sudden emergency.

Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. State v. Freeman, 267 N.W.2d 69, 71 (Iowa 1978). Submission of issues that have no support in the evidence to the jury is error. W. T. Rawleigh Medical Co. v. Bane, 181 Iowa 734, 739, 165 N.W. 42, 43-44 (1917); accord Borough v. Minneapolis & St. L. R. Co., 191 Iowa 1216, 1223, 184 N.W. 320, 323 (1921); see Miller v. International Harvester Co., 246 N.W.2d 298, 301 (Iowa 1976). Conversely, failure to submit issues that are supported by substantial evidence also is error. See Borough, 191 Iowa at 1223, 184 N.W. at 323; see also Miller, 246 N.W.2d at 301.

> Legal excuse is a doctrine by which one seeks to avoid the consequences of one's conduct by showing justification for acts that would otherwise be considered negligent. Legal excuse includes (1) anything that would make it impossible to comply with the statute or ordinance; (2) anything over which the driver has no control which places the driver's motor vehicle in a position contrary to the provisions of the statute or ordinance; (3) where the driver of the motor vehicle is confronted by an emergency not of the driver's own making, and by reason of such an emergency, the driver fails to obey the statute; and (4) where a statute specifically provides an excuse or exception.

Meyers v. City of Des Moines, 475 N.W.2d 181, 185 (Iowa 1991).

One of the ways Ketton claims Bernhard is negligent is by stopping his automobile within the intersection in violation of Iowa Code section 321.358(3). This theory is reflected in instruction numbers 16 and 21. Absent legal

excuse, a violation of a statutory rule of the road constitutes negligence per se. Machmer v. Fuqua, 231 N.W.2d 606, 607 (Iowa 1975); Bangs v. Keifer, 174 N.W.2d 372, 374 (Iowa 1970). Bernhard argues that even though he stopped in the intersection, he had a legal excuse for doing so, the sudden emergency of Ketton's motorcycle approaching at a high rate of speed.

We are mindful that it is ordinarily up to the jury to decide whether, in fact, a party was faced with a sudden emergency and that we view the evidence in the light most favorable to the party asserting the defense. Weiss v. Bal, 501 N.W.2d 478, 481 (Iowa 1993) (citation omitted).

At trial, Bernhard described how the accident occurred. He stated he came to a complete stop at the intersection of Meadow Lane and Ansborough. He looked both ways before pulling out on to Ansborough, and there was no traffic coming in either direction. When he pulled out, he heard a noise which sounded like a motorcycle. He looked up to his left and observed Ketton coming at him, in a crouched position at a high rate of speed. He immediately began to stop, but the car's momentum, coupled with his reaction time, took him into the next lane before he came to a complete stop. We find substantial evidence in the record supports a jury instruction on sudden emergency as a legal excuse for Bernhard stopping in the intersection.

Ketton also claims the sudden emergency instruction which was submitted to the jury was prejudicial because it unduly emphasized one aspect of the case.

Instruction number 21 1/2, the challenged instruction, is taken nearly verbatim from Iowa Uniform Instruction 600.75. Our supreme court recently criticized this instruction in Weiss. Id. Our supreme court expressed concern for the use of this uniform instruction when only common-law negligence is alleged. Id.

> The question is whether the instruction retains its validity when only common-law negligence is alleged and the court has already instructed the jury to compare the fault of both parties. Unlike the doctrine of legal excuse--which exonerates a party from liability for negligence per se--the sudden emergency doctrine is merely an expression of the reasonably prudent person standard of care. It expresses the notion that the law requires no more from the actor than is reasonable to expect in the event of an emergency.
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> We share the concern of courts that have criticized the sudden emergency instruction for its tendency to unduly emphasize one aspect of the case. Our own instruction is particularly susceptible to that critcism. We believe, however, that a jury may be aided by a succinct and narrowly drafted instruction that tells it the actor is held only to the standard of reasonable care under the circumstances posed by the emergency. Thus we reject plaintiffs' argument that such an instruction has no place in a comparative fault scheme.

Id. (citations omitted).

We find Weiss distinguishable. Here, instruction number 21 1/2 specifically limited the legal excuse of sudden emergency to the claim Bernhard violated statutory law by stopping his vehicle within the intersection. It did not apply to the other allegations of fault against Bernhard. We find the instruction given adequately reflects the applicable law when dealing with a legal

excuse of a statutory violation. We do not believe it unduly emphasized one aspect of the case.

Ketton next argues if Bernhard was entitled to an instruction on sudden emergency, he also should have been entitled to such an instruction. Ketton's argument appears to be that it does not matter what speed he was going because Bernhard pulled out in front of him suddenly and, therefore, there was not time for him to stop.

We believe this theory of how the accident occurred is adequately covered by instruction number 15, the proximate cause instruction. A jury instruction on sudden emergency excusing Ketton from speeding is not appropriate. Under the circumstances here, a car pulling out in front of you is not a legal excuse for exceeding the speed limit.

We affirm the district court on its instructions to the jury on the legal excuse of sudden emergency.

II. Jury Instructions on Speed.

Ketton's next argument is that jury instruction number 17 gave undue influence to the speed Ketton was traveling at the time of the accident.

The trial court must "instruct with reasonable fullness on pleaded issues supported by substantial evidence." Clinton Land Co. v. M/S Assocs., 340 N.W.2d 232, 234 (Iowa 1983). Our supreme court has consistently and frequently held that "[e]ven correct statements of law, if repeated to the point of undue emphasis, may constitute reversible

error." Id. (citing Eickelberg v. Deere & Co., 276 N.W.2d 442, 447 (Iowa 1979)); accord Andrews v. Struble, 178 N.W.2d 391, 400 (Iowa 1970).

Ketton complains jury instruction number 17 lists speed three different times. Paragraph "c" covered traveling at a speed above the speed limit, paragraph "d" covered traveling at a speed greater than was reasonable and proper under the traffic conditions then exisiting, and paragraph "e" covered failure to reduce the speed of his motorcycle to a reasonable and proper rate when approaching an intersection. Paragraph "d" is explained further in instruction number 24, which talks about how a driver must have his vehicle under control and reduce its speed to a reasonable and proper rate when approaching and traveling through an intersection.

At trial, several witnesses testified Ketton was going over the posted speed limit. Ketton denied this. He testified he was going under the speed limit and was attempting to make a left turn at the intersection when the accident occurred. Witnesses Scott Schmitz and Jackie Walton, as well as Bernhard, saw no indication Ketton was attempting to turn left, and all testified he was going too fast to make such a turn. Schmitz also stated he observed the back of the motorcycle fishtail a little just before impact. It appeared to him the motorcycle was going to pass to the rear of the car, but Ketton could not control the bike enough to go in that direction. It then appeared

Ketton tried to maneuver back to the left, to pass in front of the car, but Ketton could not get enough control of the motorcycle to accomplish that manuever either.

On appeal, Ketton concedes he was speeding at the time of the accident and claims it was not an issue at trial. We disagree. Due to the conflicting testimony at trial, there was several possible ways Ketton could have been negligent. We find the district court did not unduly emphasize speed in instruction number 17. The paragraphs Ketton complains about are separate ways Ketton could be found negligent under the facts of this case.

III. Ketton's Failure to Mitigate Damages.

Ketton also asserts the district court improperly instructed the jury he could be found at fault for failing to exercise ordinary care to obtain reasonable medical treatment. Ketton claims his failure to take his medication should not have been considered by the jury when considering comparative fault.

Iowa Code section 668.1 states, "As used in this chapter, . . . [t]he term ["fault"] also includes . . . unreasonable failure to avoid an injury and mitigate damages." See also Tanberg v. Ackerman Inv. Co., 473 N.W.2d 193, 196 (Iowa 1991) (unreasonable failure to attempt to lose weight pursuant to medical advice can be assesed as fault if weight loss will mitigate damages); Fuches v. S.E.S. Co., 459 N.W.2d 642, 643-44 (Iowa App.

1990) (failure to undergo an operation that would mitigate damages may be assessed as fault); Miller v. Eichhorn, 426 N.W.2d 641, 643 (Iowa App. 1988) (failure to undergo additional chiropractic treatment may be assessed as fault). We believe Iowa Code section 668.1 and the related case law allows the jury to consider a plaintiff's unreasonable refusal to take his medication when assessing fault.

We now look at whether there was substantial evidence in the record to support Bernhart's claim that Ketton unreasonably failed to mitigate his damages by not taking his medication.

Dr. Verduyn testified he prescribed Tegretol, an anticonvulsive medication, to Ketton on January 27, 1992. The doctor warned Ketton of the possible side effects and that once started, if Ketton decided he wanted to discontinue taking it, he would have to do so gradually. The doctor stated an abrupt discontinuation of Tegretol can lead to seizures. In a follow-up visit on February 4, 1992, Ketton was showing signs of improvement on the Tegretol.

However, Lisa Ketton testified her husband did not take the medication as prescribed, but instead took it like aspirin, whenever he got a headache. On April 23, 1992, Ketton suffered a seizure-like spell when he was working on the railroad. Ketton had stopped taking Tegretol prior to that incident. Ketton's doctors recommended he restart

Tegretol. They informed him if he went on Tregetol, as previously described, and stayed on it, his seizure activity could be controlled and he could continue his job with the railroad. Despite doctors' recommendations to the contrary, Ketton was not taking medication at the time of trial.

We find a jury question was generated on whether Ketton unreasonably failed to mitigate his damages by not taking his medication.

IV. Loss of Consortium Claim.

Lisa Ketton also contends the district court erred in denying her motion for a new trial based on the jury's refusal to award her damages on her loss of consortium claim.

An inadequate award merits a new trial as much as an excessive one. Iowa R. Civ. P. 244(d). When the verdict is manifestly inadequate, we consider the refusal of the district court to grant a new trial an abuse of discretion that is subject to reversal. Grodt v. Darling, 472 N.W.2d 845, 847 (Iowa App. 1991) (citation omitted). The question of whether damages in a particular case are inadequate turn on the particular facts of the case. Id. (citation omitted). If uncontroverted facts show the amount of the verdict bears no reasonable relationship to the loss suffered, the verdict is inadequate. Id. If a reasonable jury could determine from the facts presented the loss was

insufficient to support a money award, the court has not abused its discretion in refusing to grant a new trial. Id. (citation omitted).

> Spousal consortium is the fellowship of the husband and the wife and the right of each to the intangible benefits of company, cooperation, affection, and aid of the other in every marital relationship. Spousal consortium also includes the tangible benefits of general usefulness, industry, and attention within the home and family. It does not include the loss of monetary support from the injured spouse.

Gail v. Clark, 410 N.W.2d 662, 667 (Iowa 1987) (citation omitted). A consortium claim is the separate property right of each spouse; it is an independent, nonderivative claim. Huber v. Hovey, 501 N.W.2d 53, 57 (Iowa 1993) (citing Schwennen v. Abell, 430 N.W.2d 98, 101 (Iowa 1988)). Under principles of comparative fault, an injured spouse's negligence does not bar a consortium claim brought by the deprived spouse. Id.

The evidence shows that prior to the accident Ronald Ketton worked for the railroad and was out of town five days a week. The couple saw each other only on weekends when Lisa did not have to work. There was testimony at trial that because of the head injury he suffered, Ronald had a hard time controlling his temper. However, there was also evidence that Ronald's bad temper predated the accident. Although Lisa testified the accident had caused stress in her and Ronald's relationship, she admitted Ronald did not believe there was a problem. When Ronald was asked about how his wife and he were currently getting

along he stated they were "like every other married couple." Lisa also testified other events were occuring in the couple's life which were creating a stressful environment. Ronald's two nephews came to live with them. This meant five people were staying in a two-bedroom apartment.

In October of 1992, Lisa took their son and moved into her parents' house in St. Louis. Ronald moved in with another woman. The Kettons were separated for six weeks. They reconciled in the beginning of December around the time the trial began.

We find the district court did not abuse its discretion in refusing to grant a new trial.

AFFIRMED.