**IN THE COURT OF APPEALS OF IOWA**

No. 6-012 / 95-22

FILED
JUN 27 1996
CLERK SUPREME COURT

**STATE OF IOWA,**

Plaintiff-Appellee,

**vs.**

**JOHN FREDERICK FUESSEL,**

Defendant-Appellant.

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Appeal from the Iowa District Court for Scott County, David J. Sohr, Judge.

John Fuessel appeals from his conviction, following a jury trial, of two counts of vehicular homicide in violation of Iowa Code section 707.6A (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Sharon R. Stevens, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, William E. Davis, County Attorney, and Joe Grubisich, Assistant County Attorney, for appellee.

Heard by Hayden, P.J., Sackett, Habhab, Cady and Huitink, JJ., but decided by Sackett, C.J., Habhab, Cady, Huitink, Streit, and Vogel, JJ.

**CADY, J.**

John Fuessel appeals his convictions for two counts of vehicular homicide in violation of Iowa Code § 707.6A (1993). He claims the district court erred at trial in refusing to grant his motion for judgment of acquittal based on insufficient evidence and in refusing to instruct the jury on intervening and superseding causation. We affirm.

On March 4, 1994, Laura Gross, Julie Edwards, and Gail Peshek left the Gross family home in rural Scott County in an older model station wagon owned by Laura's parents. It was approximately eight o'clock in the evening. The three high school girls planned to pick up a friend from her place of work. The Gross home was located on a county highway called St. Ann's Road. Laura drove the vehicle down the driveway of the family home, and began to turn onto the roadway. Tragedy would strike within seconds.

As the station wagon left the driveway, John Fuessel was driving his pick-up truck along St. Ann's Road in front of the Gross home. He had been at a bar in Donahue, Iowa since 4:00 in the afternoon, five miles from the Gross home. Fuessel's vehicle slammed into the rear portion of the station wagon, causing the station wagon to erupt into flames. Gail managed to escape the burning vehicle through a window. Laura and Julie did not.

The station wagon had a hole in the gas tank prior to the fatal accident. This was known by the Gross family. Consequently, they limited the amount of gasoline placed in the tank to prevent leaking.

A blood specimen was taken from Fuessel two and one-half hours after the accident. Later testing revealed a blood alcohol level of .130. It was most likely higher at the time of the accident. An expert witness opined the Fuessel pick-up was exceeding the fifty-five mile per hour speed limit at the time of the collision. Fuessel did not attempt to stop before striking the station wagon.

The State's accident reconstructionist believed there were three causes to the accident. These causes included the failure of Laura to properly yield to the pick-up, the excessive speed of the pick-up, and the intoxication of Fuessel. The county medical examiner testified the two girls died from intensive burning. There was conflicting evidence as to whether a sober driver could have avoided the accident.

The jury convicted Fuessel of two counts of vehicular homicide. On appeal, he asserts there was insufficient evidence to establish his intoxication was a proximate cause of the death of the two girls. He also claims the trial court erred in refusing to instruct the jury on intervening and superseding cause.

## I. Proximate Causation

The crime of vehicular homicide based on operating while intoxicated requires the predicate conduct be a proximate cause of the victim's death. *See State v. Wieskamp*, 490 N.W.2d 566, 567 (Iowa App. 1992); Iowa Code § 707.6A (1)(a)

(1993). A defendant's conduct is a proximate cause of the death of another if the conduct is a substantial factor in bringing about the death and no other rule relieves the defendant of liability due to the manner in which the conduct resulted in the harm. *See State v. Hubka,* 480 N.W.2d 867, 869 (Iowa 1992).

Fuessel asserts the State failed to produce sufficient evidence of proximate causation in light of the evidence introduced at trial that Laura failed to yield the right-of-way, as well as the testimony indicating a sober driver could not have avoided the accident. We disagree and conclude the verdict was supported by the evidence.

Our standard of review for a challenge to the sufficiency of evidence to support a verdict of guilty is to consider all the evidence in the light most favorable to the State, without regard to contradiction or inconsistencies, and assisted by all reasonable inferences. *State v. Propp,* 532 N.W.2d 784, 785 (Iowa 1995). If the verdict is supported by substantial evidence, it must be upheld. Substantial evidence is evidence which could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *Id.*

We acknowledge Fuessel produced evidence indicating a sober driver could not have avoided the accident. Yet, there is also ample evidence in the record a sober driver could have avoided the accident. Furthermore, there is evidence Fuessel's ability to react was impaired because of his intoxication. We conclude substantial

evidence supports the verdict, including the requirement that Fuessel's operation of a vehicle while intoxicated caused the death of the two girls.

## II. Superseding Cause

Fuessel contends the trial court erred in failing to instruct the jury on intervening and superseding cause. He claims the jury should have been allowed to consider whether the hole in the gas tank, as well as Laura's failure to yield, relieved him of responsibility for the deaths.

We reject the notion that evidence of Laura's negligence would support Fuessel's requested instruction on intervening and superseding cause. A defendant cannot escape criminal responsibility for homicide merely because factors other than his or her acts contributed to the death, provided the other factors were not the sole proximate cause of death. *State v. Hubka*, 480 N.W.2d at 869. *See State v. McFadden*, 320 N.W.2d 608, 611 (Iowa 1982) (participation by deceased motorist in drag race did not vitiate other racer's conviction for involuntary manslaughter). Clearly, the negligence of a homicide victim is not a defense to vehicular homicide. *State v. Williams*, 238 Iowa 838, 843, 28 N.W.2d 514, 518 (1947). The fighting question is whether the faulty fuel tank can be considered a superseding cause.

The principles of causation normally associated with civil tort litigation are also applicable to criminal cases. *State v. Murray*, 512 N.W.2d 547, 550 (Iowa 1994). Thus, the concepts of intervening cause and superseding cause found in tort law apply to criminal cases.

Our law may relieve a defendant from liability for his or her criminal conduct, even if such conduct was a substantial factor in producing the injury, if a subsequent event breaks the chain of events between the defendant's original wrongful conduct and the ultimate injury. *See State v. Hubka,* 480 N.W.2d at 869 (Iowa 1992). When the break occurs, the intervening event becomes the superseding cause. *Weems v. Hy-Vee Food Stores, Inc.*, 526 N.W.2d 571, 573 (Iowa App. 1994). The doctrine is based on public policy and reflects a legal judgment. *Sumpter v. City of Moulton,* 519 N.W.2d 427, 435 (Iowa App. 1994). However, in order for an intervening cause to be a superseding cause, it must not have been a normal consequence of the original wrongful act of the defendant or have been reasonably foreseeable. *Haumersen v. Ford Motor Co.*, 257 N.W.2d 7, 10 (Iowa 1977).

It is normally the function of the jury or fact finder to decide whether an intervening act constitutes a superseding cause. *Weems,* 526 N.W.2d at 574. The court, nevertheless, must initially decide whether these rules of law are applicable to a particular case. *Id. See also State v. Henning,* 545 N.W.2d 322 (Iowa 1996) (whether circumstances call for application of rules relating to superseding cause is a question of law for the court). The issue of superseding causation should only be considered by the jury when supported by substantial evidence. *See State v. Lucas,* 368 N.W.2d 124, 127-28 (Iowa 1985)

We conclude the trial court properly rejected the requested instructions on superseding cause based on the existence of a faulty fuel tank. Our decision is guided by two central considerations.

We first recognize there may be more than one proximate cause of an injury in a case. *Johnson v. Interstate Power Co.*, 481 N.W.2d 310, 323 (Iowa 1992). Whether intervening conduct will be regarded as a mere concurrent cause or a superseding cause will depend on the particular circumstances of the case. *Schnebly v. Baker*, 217 N.W.2d 708, 728 (Iowa 1974). The mere presence of a concurrent cause does not relieve a defendant from criminal responsibility. However, an independent, superseding cause will. *See State v. Marti*, 290 N.W.2d 570, 586 (Iowa 1980).

The defective fuel tank in this case was not an independent force constituting a superseding cause. It was in existence prior to the time Fuessel collided with the vehicle, and it contributed to the fire which resulted in the victims deaths only after the operation of Fuessel's conduct. Forces set in motion by the operation of the defendant's conduct upon an existing situation are not intervening. *See* William L. Prosser, *Law of Torts*, § 44 at 271 (4th ed. 1971); Restatement (Second) of Torts § 441 (1965) (an intervening force is one which actively operates in producing harm to another after the actors negligent act on omission has been committed); *State v. Henning*, 545 N.W.2d 322 (Iowa 1996) (factors such as road and lighting conditions are not active forces that produce a superseding cause).

Furthermore, the facts of this case do not give rise to a superseding cause analysis because the death of or injury to the occupants of the station wagon was within the scope of Fuessel's wrongful conduct. Even if the defective fuel tank was an unforeseeable intervening cause, the ultimate harm which occurred was foreseeable. This is the critical perspective.

The concept of foreseeability in a superseding cause analysis does not require the defendant to foresee the precise nature of the injury or the specific manner in which it occurred. Prosser, § 44 at 286. Foreseeability only means the harm which occurred must be the same type as the foreseeable risk created by defendant's wrongful conduct. *Id.*

We conclude it is foreseeable an intoxicated driver will cause a collision with another vehicle. It is also foreseeable collisions between vehicle's cause death or injury to the occupants. Thus, the deaths in this case were within the scope of the risk created by Fuessel. As such, the case was properly analyzed by the jury under the proximate causation standard. There was no basis for instructing the jury on superseding cause and the jury was not entitled to consider whether Fuessel should be relieved of liability due to the faulty fuel tank. *See Sumpter*, 519 N.W.2d at 435.

**AFFIRMED.**

Habhab, Cady, Streit and Vogel, JJ., concur; Sackett, C.J., and Huitink, J., partially dissent.

**SACKETT, C.J.** (concurring in part; dissenting in part)

I concur with the majority that there is evidence which, if believed, would support a finding defendant's failure to avoid the accident was a substantial factor in bringing about the harm. I therefore concur with the majority's decision to affirm on the first issue.

I dissent from the majority's holding the trial court correctly refused to give an instruction on superseding cause. There is evidence which, if believed, would support a finding the accident and resulting deaths were caused not by defendant's conduct in failing to avoid the accident but by the negligence of the driver of the station wagon -- first in her failure to yield to defendant, who was driving on a through road; and second because she drove a car with a faulty gas tank which caused the resulting fire. For this reason, I believe defendant's requested instruction on intervening cause should have been given. I find it was error not to give the instruction and would reverse and remand for a new trial.

The instruction defendant requested is as follows:

> The defendant is relieved of criminal responsibility if you find that there was an intervening and superseding cause, such that the consequences of defendant's actions were not the normal consequences or would not be reasonably foreseeable by the defendant.
>
> An "intervening cause" is an independent force which actively operates in producing harm to a person after the other actor's negligent act or omission has been committed.
>
> For an intervening cause to be a "superseding" cause, it must be an act of another person or force which results in a consequence not normally resulting from the defendant's actions, or such resulting consequences were not reasonably foreseeable.

> "Reasonably foreseeable" means that the consequences must be the kind and nature which one could expect would result from the actions of defendant.

The definition of "proximate cause" in a criminal case is identical to its definition in a civil case. *State v. Hubka*, 480 N.W.2d 867, 869 (Iowa 1992). A defendant's conduct is the proximate cause of an injury or death if (1) his or her conduct is a "substantial factor" in bringing about the harm, and (2) there is no other rule of law relieving the defendant of liability because of the manner in which his or her conduct resulted in harm. *Id.*; *Kelly v. Sinclair Oil Corp.*, 476 N.W.2d 341, 349 (Iowa 1991).

Superseding causes flow from (a) the act of third persons, or (b) some other active force that operates in producing the harm with which the party on trial is charged. *State v. Henning*, ___ N.W.2d ___ (Iowa 1996); *State v. Murray*, 512 N.W.2d 547, 550-51 (Iowa 1994).

Intervening cause happens when conduct or forces occur after a defendant's conduct. *Hubka*, 480 N.W.2d at 869. The defendant may be relieved of criminal responsibility if a court finds the intervening events are such to break the chain of causal connection between the defendant's conduct and the victim's death. *Id.* However, a defendant cannot escape criminal responsibility for homicide merely because factors other than his acts contributed to the death, provided such other factors are not the sole proximate cause of death. *Id.*; *see also State v. Ayers*, 478 N.W.2d 606, 608 (Iowa 1991); *Sinclair Oil*, 476 N.W.2d at 349-50; *State v.*

*Wieskamp*, 490 N.W.2d 566, 567 (Iowa App. 1992); *State v. Cunningham*, 463 N.W.2d 887, ___ (Iowa App. 1990). There may be an intervening cause even though defendant's conduct constitutes a cause-in-fact of the injury or death. *Sinclair Oil*, 476 N.W.2d at 349. The State must prove more than defendant's intoxication made the injury or death possible. *See Sinclair Oil*, 476 N.W.2d at 350. Where intoxication does nothing more than furnish a condition by which an injury is made possible by subsequent independent intervening events, the intervening events, not the intoxication, are the direct and immediate cause of the injury. *Id.; see generally* 45 Am. Jur. 2d *Intoxicating Liquors* § 585, at 876 (19___). However, a homicide victim's negligence may not be used as a defense in a subsequent prosecution. *State v. Williams*, 238 Iowa 838, 843, 28 N.W.2d 514, 518 (1947).

The driver's father testified the station wagon had a hole in the gas tank, and if more than five dollars' worth of gas were in the tank of the station wagon, it would leak. Defendant's expert testified the women could have survived from the crash but for the holes in the station wagon's gas tank. Defendant's expert believed the fire burned more quickly because the holes allowed a large amount of gasoline fumes to be injected into the passenger compartment.

There is evidence to support submission of the requested instruction. The evidence was not that defendant caused the accident; only that he failed to avoid it. The driver of the station wagon failed to yield and drove a vehicle with a gas tank that had been faulty for some time, knowing the gas tank was faulty. While there was

evidence to support a finding defendant could avoid the accident, there also was evidence to support a finding he could not avoid the accident. There is evidence to support a finding defendant's conduct in driving with a blood alcohol level of .130 was not a substantial factor in this particular accident. There is substantial evidence to support a finding the acts of failure to yield the right-of-way and driving a vehicle with a faulty gas tank were superseding events. *See Sinclair Oil*, 476 N.W.2d at 350; *see also Gremmel v. Jannie's Lounge, Ltd.*, 397 N.W.2d 717, 719 (Iowa 1986). That is, the failure to yield and the faulty gas tank were some other active forces that operated in producing the harm for which defendant was charged. *Henning*, ___ N.W.2d at ___; *Murray*, 512 N.W.2d at 550-51.

The requested instruction should have been given. I would remand for a new trial.

Huitink, J., joins in this partial dissent.