

FILED

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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

JOHN MARTIN SPOO, JR., et al,)

Plaintiff-appellee,)

vs.)

Filed February 26, 1980

PAUL HENRY ADAMS,)

Defendant-appellee)

and)

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2-61617

EMIL ARTHUR KUNERT,)

Defendant-appellant.)

Appeal from Humboldt District Court -- Newt Draheim, Judge.

Defendant, Emil A. Kunert, appeals adverse judgments in action arising from automobile collision and on cross-petition against defendant, Paul H. Adams, for contribution or indemnity. Affirmed.

William G. Enke, Fort Dodge, and Arthur Johnson of Johnson, Erb, Latham & Gibb, Fort Dodge, for defendant-appellant.

David A. Opheim of Kersten, Opheim, Carlson & Trevino, Fort Dodge, for defendant-appellee.

Francis Fitzgibbons of Fitzgibbons Brothers, Estherville, Iowa for plaintiff-appellee.

Heard by Oxberger, C.J., Donielson, Snell, Carter and Johnson, JJ.

DONIELSON, J.

Defendant, Emil Kunert, appeals adverse judgments in action arising from automobile collision and on cross-petition against defendant, Paul H. Adams, for contribution or indemnity. On appeal, Kunert contends: Instruction concerning driver's duty to have car under control erroneously imposed absolute duty to avoid accidents rather than relative duty of exercising reasonable care under the circumstances; instruction on left-turning driver's "duty to yield" was inconsistent and confusing; instructions on sudden emergency doctrine and duty to signal left-turn were erroneously granted; and exhibit showing computer-calculated average wages of persons other than plaintiff was inadmissible hearsay and erroneously admitted into evidence. Adams contends the appeal against him should be dismissed because Kunert's first notice of appeal did not name him and his second notice of appeal was not filed timely. We affirm.

Our review is limited to correction of errors at law. Iowa R. App. P. 4.

I.

Plaintiffs filed their petition December 8, 1975, asserting Adams and Kunert, jointly or individually, were liable for injuries sustained by John and Susan Spoo and the death of Clara Spoo. Plaintiffs alleged Kunert in turning left was struck by Adams' oncoming car; the collision knocked Adams' car into Spoo's car, causing their injuries. Defendants denied plaintiffs' allegations and filed cross-petitions against each other for indemnity or contribution. Adams later amended his answer to assert affirmative defenses of contributory negligence and sudden emergency. After jury trial, trial court entered, on November 16, 1977, judgment for plaintiffs against Kunert for \$155,000.

Trial court overruled Kunert's motion for new trial on January 12, 1978. Kunert filed, on January 30, 1978, a notice of appeal naming only plaintiffs, not Adams. On March 13, 1978, the trial court entered judgment on the cross-petitions, stating "in accordance with [jury's] verdict" judgment was entered for Adams against Kunert. By affidavit, the trial court states this second judgment was entered on Kunert's request and was unnecessary. On March 20, 1978, Kunert filed a second notice of appeal, naming plaintiffs and Adams, appealing the judgment for plaintiffs and the judgment on the cross-petitions.

II.

Adams requests the appeal against him be dismissed because Kunert's notices of appeal failed to confer jurisdiction on this court as to him. The first notice of appeal failed, according to Adams, to confer appellate jurisdiction because it was directed only to the plaintiffs, not himself. While not a recommended practice, this omission does not invalidate the first notice of appeal or prevent it from conferring jurisdiction on this court to hear Kunert's appeal against Adams.

Iowa R. App. P. 6(a) governs the taking and perfecting of appeals:

(a) An appeal . . . is taken and perfected by filing a notice with the clerk of court where the order, judgment or decree was entered, signed by appellant or his attorney. It shall specify the parties taking the appeal and the decree, judgment, order or part thereof appealed from

The notice of appeal need not be directed to the adverse party. Halverson v. Hageman, 249 Iowa 1381, 1391, 92 N.W.2d 569, 575 (1958) (construing Iowa R. Civ. P. 336, predecessor to Iowa R. App. P. 6), cited in State v. Fees, 250 Iowa 163, 166, 93 N.W.2d 103, 105 (1958) (holding, however, that failure to address notice of appeal in a criminal case to the adverse party or attorney renders it fatally defective). The fighting issue here is whether a notice of appeal naming one party is defective in conferring jurisdiction as to another party not named.

Considering the underlying principles of Iowa R. App. P. 6, we hold this notice of appeal is valid as to Adams and does confer jurisdiction on us to hear Kunert's appeal against him. In considering the sufficiency of the notice, we must determine if Kunert's intent to appeal on the cross-petition may be inferred from the notice and if Adams was misled by not being named. Blink v. McNabb, No. 62629, slip op. at 4-5 (Iowa, filed Jan. 23, 1980) (quoting Hawkeye Security Insurance Co. v. Ford Motor Co., 199 N.W.2d 373, 378 (Iowa 1972)). Although Kunert's notice of appeal did not name Adams, it did state Kunert was appealing the final judgment, all orders, decrees and rulings therein, and "each and every adverse order, decision and ruling of said District Court made during the pendency and progress of said cause and trial" This statement would reasonably seem to include the cross-petition.

In light of this language, the failure to specifically name Adams resulted in no prejudice to him nor should he have been unduly confused regarding Kunert's intent to appeal. The substantial compliance with Iowa R. App. P. 6 required by Blink, slip op. at 4-5, is minimally satisfied here. This result is consistent with the oft repeated preference for disposition of cases on the merits and not on mere technicalities. Id. Furthermore, Kunert's second Notice of Appeal, which was filed within 30 days of entry of the separate final judgment on the cross-petition, was directed to Adams. Adams' motion to dismiss the appeal as to him is overruled.

III.

Kunert challenges Instruction No. 9 on various grounds. Plaintiffs contend, however, Kunert failed to preserve any error for appeal due to his failure to object to the final Instruction No. 9 as required by Iowa R. Civ. P. 196. Although this is a close and difficult issue, we conclude counsel for Kunert sufficiently preserved these alleged errors for appeal.

Proceeding under Iowa R. Civ. P. 196, the trial court submits two sets of instructions, perhaps identical in content, to counsel, one "preliminary" and one in "final form". State v. Wright, 274 N.W.2d 307, 311 (Iowa 1979). "Counsel are not required to make any record after the first stage but must after the last under penalty of waiving any possible objections for purposes of appeal." Id.; see State v. Baskin, 220 N.W.2d 882, 885 (Iowa 1974); Anderson v. Wilcox, 189 N.W.2d 541, 545-46 (Iowa 1971); State v. Clark, 187 N.W.2d 717, 719 (Iowa 1971); State v. Schmidt, 259 Iowa 972, 979-80, 145 N.W.2d 631, 636 (1966), cert. denied, 386 U.S. 965, 87 S. Ct. 1046, 18 L. Ed. 2d 115 (1967); In re Will of Soderland, 239 Iowa 569, 583, 30 N.W.2d 128, 136 (1948).

Here, the trial court submitted its preliminary draft of instructions on November 8, 1977. Counsel for the parties discussed and excepted to various instructions. Counsel for Kunert raised the objections to Instruction No. 9 he now asserts, which the trial court then overruled. At the conclusion of this discussion, the trial court stated:

Well, gentlemen, I will proceed with your recommendations and consider those matters you requested and tomorrow morning I will give to you, then, the final copies of the draft. You can then make any further record at that time or make it after you have had the arguments, but I just as soon you make it prior to that time.

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After reconvening on November 9, 1977, the court stated:

Well, gentlemen, after your exceptions to the proposed instructions, the Court made some changes; and at this time rather than reiterating those instructions, I have given you the final instructions and will enumerate or identify a few of the changes that were made so you can take exceptions to those, and perhaps if there is any additional ones you want to make that you did not make as to the proposed instructions, you may do so.

Counsel for Kunert failed to renew his objections to Instruction No. 9, but objected to certain changes and to some matters he had not raised before.

In doing this, counsel for Kunert did not comply with Iowa R. Civ. P. 196 in making his objections. Anderson, 189 N.W.2d at 545. Except for counsel's apparent reliance on the trial court's instructions, this technical noncompliance would prevent Kunert from preserving for appeal any errors in Instruction No. 9. Id. The trial court's closing remarks on November 8 and opening remarks on November 9, however, could be reasonably interpreted as eliminating the need to make the same objections to the final instructions that were made the previous day to the proposed instructions and only new objections or objections to changes were to be made. Although such a procedure is not recommended and does not satisfy Iowa R. Civ. P. 196, we believe it would be unfair to penalize Kunert because of the trial court's inappropriate or, at least, imprecise language and will address the merits of his appeal. See Soderland, 239 Iowa at 581-82, 30 N.W.2d at 136. See also Wright, 274 N.W.2d at 312; Baskin, 220 N.W.2d at 885-86. The purpose of Iowa R. Civ. P. 196 is to give the trial court an opportunity to correct any erroneous instructions before they are submitted to the jury. Vint v. Ashland, 258 Iowa 591, 600, 139 N.W.2d 457, 463 (1968); see Wright, 274 N.W.2d at 312. Counsel's objections to the preliminary objections satisfied this purpose.

IV.

Kunert contends trial court erred in granting one part of Instruction No. 9 because it imposes an absolute duty on Kunert to avoid an accident rather than the relative duty of exercising reasonable care under the circumstances. The challenged part of Instruction No. 9 reads:

Regarding plaintiffs' allegation of negligence, item (b), such has been explained in a prior Instruction; however, for a vehicle making a turn, control also includes the

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time and manner of turning the vehicle and avoiding any oncoming vehicles from the opposite direction.

We find no error in this part of the instruction.

Jury instructions must be read together and related to each other to determine the rights of the parties. Miller v. International Harvester Co., 246 N.W.2d 298, 306 (Iowa 1976). The issue is not whether an isolated part of the instructions could mislead the jury but whether the instructions as a whole clearly set out for the jury the issues to be determined. State v. Conner, 241 N.W.2d 447, 462 (Iowa 1976). The test of whether an instruction is misleading or confusing is whether a full and fair reading of the instructions leads to the inevitable conclusion the jury could not have misapprehended the issue presented. Mora v. Savereid, 222 N.W.2d 417, 422 (Iowa 1974).

Reading the disputed part of Instruction No. 9 in conjunction with Instruction No. 2 and Instruction No. 8, we do not believe the jury could have been confused or misled regarding Kunert's duty. Instruction No. 8, incorporated by reference in Instruction No. 9, defines control as a matter of reasonable conduct. Instruction No. 2 defines negligence as the breach of the duty of reasonable care. Viewed in this manner, Instruction No. 9 was correctly given as it did not impose an absolute duty on Kunert to avoid all accidents, but was consistent with the other instructions in only requiring Kunert to have acted with reasonable care.

V.

Kunert challenges that part of Instruction No. 9 concerning section 321.320, The Code 1975, as inconsistent and confusing regarding his duty and liability. The challenged part of that instruction reads:

[T]he operator of a vehicle intending to turn to the left within an intersection shall yield the right-of-way to all vehicles approaching from the opposite direction which are within the intersection or so close as to constitute an immediate hazard, then the operator having so yielded and having given required signals, may make such left turn.

....

The operator who desires to make a left turn is not under an obligation to wait the passage through the intersection of a vehicle approaching from the opposite direction regardless of relative distances and speed, but if such operator reaches the intersection in such time as

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it is reasonably apparent that the turn can be made before the other vehicle reaches the intersection, such operator may proceed to make the left turn.

We find nothing inconsistent or confusing about these instructions, each correctly stated the applicable law. While they may be redundant, this is not a ground for reversible error. See Andrews v. Struble, 178 N.W.2d 391, 400 (Iowa 1970).

VI.

Kunert contends the trial court erred in giving that part of Instruction No. 9 concerning duty to signal when making a left turn, as found in sections 321.314 and 321.315, The Code 1975. Kunert argues any failure to signal for a distance of not less than the last 300 feet travelled by the vehicle was and could not be a proximate cause of the accident and plaintiffs' injuries. The question of whether negligence is a proximate cause of injury is for the jury. Davis v. Cook, 261 N.W.2d 500, 504 (Iowa 1978). Here, the jury's function was to determine after listening to the substantial evidence in the record whether Kunert's failure to signal was a proximate cause of the accident and injuries. The jury could have reasonably found Adams would have observed Kunert's vehicle earlier had Kunert signaled according to law. See Weber v. Hansen, 241 Iowa 904, 908-09, 43 N.W.2d 766, 768-69 (1950); Carlson v. Meusberger, 200 Iowa 65, 72, 204 N.W. 432, 435 (1925). We find no reversible error in this part of Instruction No. 9.

VII.

Kunert contends the trial court erred in granting Adams' requested instruction on the sudden emergency doctrine in Instruction 8(A) because any sudden emergency was brought about by Adams' own fault and thus cannot operate as an excuse. Kunert's objection to this instruction was timely, but a question exists as to its sufficiency. We conclude his objection, taken in the context it was said, was minimally sufficient, and sufficient evidence existed to submit the instruction to the jury.

A party objecting to an instruction has the duty to specifically state the alleged defect so the trial court has an opportunity to rule or correct any error. Wright, 274 N.W.2d at 312, Baskin, 220 N.W.2d at 886; Iowa R. Civ. P. 196. Here, the trial court after reconsidering its initial denial of Adams' request for an instruction on sudden emergency, granted it. When this initial request was made during the discussion on the final instructions, Kunert's counsel stated his objection:

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Mr. Blackburn: I think I expressed myself on it yesterday, Your Honor.

Mr. Fitzgibbons: You are opposed to it?

Mr. Blackburn: I really didn't feel it was in the case.

Kunert's counsel was referring to his objection made the previous day during the discussion on the proposed instructions, an objection that was sufficiently specific. After the trial court granted the instruction, Kunert's counsel stated: "Defendant Kunert objects and excepts to the giving of the instruction on sudden emergency." While certainly not a preferred procedure, this sequence of events provided a sufficient explanation of Kunert's objection to allow the trial court to rule on it; error was preserved for appeal.

Substantial evidence existed in the record supporting a finding an emergency had developed and Kunert's actions were the cause. Since the extent and nature of an emergency is usually a fact question, if substantial evidence of an emergency exists, then the jury should be instructed on it. Bangs v. Keifer, 174 N.W.2d 372, 374 (Iowa 1970). We find no reversible error in submitting this instruction to the jury. Larson v. Johannsen, 220 N.W.2d 872, 874 (Iowa 1974).

VIII.

Lastly, Kunert contends the trial court erred in admitting over his proper objection Exhibit 17 because it was inadmissible hearsay and based on the average wages of other workers, not the plaintiff. Exhibit 17 was a computation showing the wages Spoo would have earned if he had worked at Farmland Foods during the period of his convalescence. Even if Exhibit 17 was improperly admitted, which we do not decide, it did not prejudice Kunert because other exhibits and testimony were offered and received into evidence, from which the jury could establish the value of Spoo's loss at or above that arrived at in Exhibit 17. See Linge v. Iowa State Highway Commission, 260 Iowa 1226, 1236, 150 N.W.2d 642, 648 (1967). We find no reversible error here.

We affirm the trial court's judgment.

AFFIRMED.