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CLERK SUPREME COURT

53

IN THE COURT OF APPEALS OF IOWA

WAYNE NOVAK,	)	
Plaintiff-Appellant,	)	Filed October 18, 1979
vs.	)	
ENGEL W. DeKOCK and AL MILLER PROMOTIONS, INC.,	)	213 2-62275
Defendants-Appellees.	)	

Appeal from Linn District Court - Robert Osmundson, Judge.

Plaintiff in negligence action appeals from judgment for defendants following adverse jury verdict. REVERSED.

David F. McGuire, Cedar Rapids, Iowa, for plaintiff-appellant.

Ronald W. Wendt and John D. Randall, Cedar Rapids, Iowa, for Miller Promotions, Inc.

Raymond R. Stefani, Cedar Rapids, Iowa, for Engel W. DeKock.

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

PER CURIAM

Plaintiff in this negligence action appeals from judgment for defendants following adverse jury verdict. We consider only those assignments of error which we deem material.

I. Plaintiff asserts that the trial court erred in failing to submit his requested instruction whereby defendants might be found negligent on the ground of driving with excessive speed. The evidence revealed that plaintiff was struck by a car driven by defendant DeKock, while said defendant was acting within the scope of his employment with defendant Miller. This accident and plaintiff's resulting injuries occurred on the track during a stock car race promoted by defendant Miller.

The race had been temporarily halted due to an unrelated accident which preceded DeKock's collision with plaintiff. Plaintiff was a pit crew employee for a driver entered in the race. DeKock was a flagman who had been assisting in clearing the track. There was evidence that immediately prior to the collision DeKock was driving 55-60 miles per hour.

Plaintiff urges that such act might be found by the jury to constitute negligence on DeKock's part for which Miller would be vicariously liable under the doctrine of respondeat superior. He further urges that the trial court erred in failing to so instruct. The trial court rejected plaintiff's proposed instruction as to possible negligence based on speed on the ground that the instruction related to a statutory duty not applicable to the present situation. We disagree.

It is true that the language of defendant's requested instruction was cast in the form of Uniform Jury Instruction 4.1 which relates to a statutory violation not applicable to the present case. But plaintiff's objection was specific enough to alert the trial court that he was entitled to a similar instruction based on a common law duty of reasonable care. See, e.g., Jarvis v. Stone, 216 Iowa 27, 32-33, 247 N.W. 393, 396 (1933); 60A C.J.S. Motor Vehicles §290(1) at 180-81.

The evidence was clearly such that a jury might have found defendant DeKock failed to exercise reasonable care by reason of driving at an excessive speed under the existing circumstances. We conclude that the failure to give plaintiff's requested instruction on speed was error sufficient to require reversal. In so holding, we reject defendants' contentions that the matter of the common law duty with respect to speed was adequately covered in the trial court's instruction on control. The duties involved are not the same.

Because a retrial is warranted, we give consideration to certain of the other issues presented on appeal.

II. Plaintiff requested an instruction on the doctrine of last clear chance which the trial court declined to give. We believe the trial court properly construed Ackerman v. James, 200 N.W.2d 818 (Iowa 1972), as relegating the doctrine of last clear chance to issues of proximate cause. It is doubtful that error was preserved on this issue as a result of plaintiff's failure to object to the instructions which were given on proximate cause.

For purposes of retrial, we do not read the subsequent decision of Stewart v. Madison, 278 N.W.2d 284 (Iowa 1979), as mandating the giving of an instruction couched in the language of last clear chance even in actions commenced before the date of that decision. That case only held that to do so may not constitute reversible error. On retrial of this case, any issues which would have been considered as part of the doctrine of last clear chance prior to Ackerman shall be instructed upon only as they are material to the issues of proximate cause.[1]

III. We next consider plaintiff's argument as to the admissibility of evidence of a blank copy of a waiver and release form allegedly signed by plaintiff. For purposes of retrial, we hold that the record was sufficient to permit introduction of this evidence on behalf of defendant Miller as an attempt to prove the terms of an instrument which had been destroyed and was therefore not available. See, e.g., Schroedl v. McTague, 256 Iowa 772, 129 N.W.2d 19 (1964). We do not consider or determine the legal effect of such instrument if the same be established or whether it enures to the benefit of defendant DeKock.

IV. Plaintiff asserts that the trial court erred in instructing on the custom of pit crew members with respect to going on the track. His objection at trial was not sufficient to preserve this issue for appeal.

For purposes of retrial, we hold that the evidence of custom in this regard did not apply to an emergency situation such as the one presented and that the instruction should not have been given for this reason.

V. We also consider but reject plaintiff's contentions that an instruction should have been given with respect to the defendant Miller's duty of due care in the operation of the track. Nor did the trial court err in failing to instruct that the duty of the plaintiff to maintain a proper lookout was less than that required of the defendant DeKock.

For the reasons stated, a new trial is required.

REVERSED.

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[1] Uniform Jury Instruction 2.7D purports to deal with what were formerly the elements of the last clear chance doctrine under the rubric of proximate cause. We express no opinion as to the legal sufficiency of this uniform instruction.