FILED
JAN 24 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

205

VICTOR J. WERNIMONT and FLORENCE A. WERNIMONT,

Plaintiffs-Appellants,

vs.

STATE OF IOWA,

Defendant-Appellee.

Filed January 24, 1984

3-378
83-81

Appeal from Iowa District Court for Pottawattamie County—Keith E. Burgett, Judge.

Plaintiffs appeal from the judgment entered for defendant after trial to the court. AFFIRMED.

Robert Kohorst of Louis, Moore, Kohorst, Louis, Murtaugh & Kohorst, Harlan, for plaintiffs-appellants.

Thomas J. Miller, Attorney General, and Robert J. Huber, Assistant Attorney General, for defendant-appellee.

Heard by Oxberger, C.J., and Donielson, and Sackett, JJ., but considered en banc.

Plaintiffs appeal from the judgment entered for defendant after trial to the court. Plaintiff Victor Wernimont was injured when the semi-truck he was driving jackknifed on an icy interstate and slid off the road, through a guardrail, and into a bridge abutment. We affirm.

I. Scope of Review

Appellate review of a trial court's ruling on a claim under the tort claims act is by determination of assigned errors at law. Hubby v. State, 331 N.W.2d 690, 694 (Iowa 1983). Findings of fact are binding upon the appellate court if supported by substantial evidence. Iowa R. App. P. 14(f)(1). We construe the evidence in the light most favorable to the trial court's judgment and will not weigh the evidence or pass upon the credibility of witnesses. Hubby at 694. A finding of fact is supported by substantial evidence if the finding may be reasonably inferred from the evidence. Id. at 694.

II. Contributory Negligence

Appellant alleges that the trial court's finding of contributory negligence was not supported by substantial evidence. We do not agree.

The evidence indicates that there were blizzard warnings in the morning and that Mr. Wernimont did not ascertain any weather and road conditions. Mr. Wernimont testified that it was windy, icy, snowy, and slick. He also testified that he was familiar with "clear ice" and had encountered it on many earlier occasions. Mr. Wernimont stated at an earlier proceeding that his truck started to skid at 30-31 miles per hour while traveling uphill toward the overpass. Mr. Wernimont later testified that he was almost stopped when he hit the guardrail and that he did not start to skid until he reached the top of the hill while trying to brake the truck.

The trial court in evaluating the evidence was not required to accept Wernimont's later version of the accident. We agree with the trial court that while skidding on ice is not negligence per se, it is negligence if due to excessive speed. See Schaben v. Kohles, 186 N.W.2d 598, 600 (Iowa 1971). The weight of the evidence indicates that before Mr. Wernimont went into a skid, he was traveling at least 30 miles per hour, not 5 or 6 miles per hour. Therefore, we find the trial court's finding of contributory negligence was supported by substantial evidence.

III. Comparative Negligence

Appellant alleges the trial court erred when it failed to apply the comparative negligence doctrine. The doctrine, per Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 198), applies to: (1) present cases, (2) all cases tried or retried after the date of filing of this opinion, and (3) all pending cases, including appeals, where the issue has been preserved. Id. at 754 (emphasis added). Wernimont contends that this issue was preserved through a filing of a motion for a new trial. In Sechler v. State, _____ N.W.2d _____ (Iowa 1983), the plaintiff stated in a motion to amend conclusions at law and in a motion for a new trial that contributory negligence was an improper defense. However, the court found that error was not preserved on that issue. We find that case controlling and hold that error was not preserved in the case at bar.

IV. Negligence as Applied to Guardrail

Wernimont argues that the doctrine of contributory negligence (or comparative negligence) is unjustifiable in a guardrail case. His rationale is that the presence of a guardrail anticipates negligence and "the leaving of the roadway, in effect, institutes a new chain of events or circumstances, entirely separate from that which initiated the vehicles course away from the road." However, Wernimont cites no authority for his proposition. We find failure to cite authority to support this issue is deemed a waiver of the issue. Iowa R. App. P. 14(a)(3).

Even assuming such was not the case, under this theory, negligent drivers would not be responsible for their own injuries attained through their carelessness. We refuse to insulate such a driver.

V. Guardrail Adequacy

The State has a duty to place proper barriers, railings, guards and danger signals at obstructions and dangerous places on a highway, when necessary for travelers' safety. Koehler v. State, 263 N.W.2d 760, 765 (Iowa 1978). The performance of that duty is measured by a reasonableness standard in light of the totality of circumstances. Id. at 766. The trial court concluded that the guardrail design was adequate, and that the State was not negligent in its construction or installation.

The trial court chose to agree with the findings of the State's expert, Dr. Ivey. Dr. Ivey testified that the guardrail met all the present day specifications; that the embedment depth was adequate; that the fact that some of the posts were broken indicates that the posts absorbed the maximum pressure possible; and that the tearing of the rail in two places indicates that the maximum tensile strength of the rail was developed before it failed. Further evidence indicated that guardrails are basically designed for passenger vehicles which constitute the majority of the traffic. Wernimont puts great weight on the fact that there have been impact tests on new design beam guardrails involving larger vehicles, i.e., buses and trucks, traveling at low speeds, and such tests were conducted prior to this accident with some success. He contends, therefore, that the State breached its duty by not conforming to the newer state of the art designs. We reject this argument and conclude there was substantial evidence to support the findings of the trial court. (See Butler v. State, 336 N.W. 2d 416, 421 (Iowa 1983), for a discussion of the everchanging state of the art in guardrail design).

VI. Maintain Roadway and Warning Signs

We find no merit to Wernimont's contentions that the State failed to maintain the roadway or erect warning signs. The State has the duty to exercise due care under the circumstances to warn traffic of changing or dangerous road conditions. Schmitt v. Clayton Co., 284 N.W.2d, 186, 189 (Iowa 1979). Decisions of when to close roads or put up warning signs is a discretionary function. See Seiber v. State, 211 N.W.2d 698, 700 (Iowa 1973). The trial court found there was little, if any evidence evinced in support of Wernimont's contentions. We are convinced that the trial court did not err in its ruling.

Therefore, we affirm the trial court's determination in its entirety.

AFFIRMED.

All judges concur except Snell, J., and Schlegel, who concur specially.

SNELL, J. (specially concurring)

I concur in the result reached in this case but dissent from the majority's conclusion in Division III regarding comparative negligence.

The trial court found the State was not guilty of negligence. That finding is supported by substantial evidence. Thus, the question of comparative negligence is not reached.

If this issue was viable, I believe it was properly preserved by the motion for new trial. This was a court-tried case; the decision was filed December 23, 1982. The day before, on December 22, 1982, the Iowa Supreme Court filed its decision in Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982), rehearing denied January 13, 1983. In that decision, the supreme court changed the law that had been the fixed law of this state for over 100 years. See id. at 753. I believe lawyers and litigants are entitled to rely on the stability of the law of such long standing and are not required to plead that some other version or versions of the rule regarding plaintiff's negligence should apply. The sword of Damocles should not sever a plaintiff's rights without warning that anticipatory pleading was required to have favor in the law.

The Goetzman decision would allow the doctrine of comparative negligence to be applied to all pending cases, including appeals, in which the issue has been preserved. The case at bar was clearly pending since the judge's decision was not filed until the day after Goetzman was filed. The issue was preserved by the plaintiff's motion for new trial under R.C.P. 244(h), which specifically stated as a ground that the trial court had applied the doctrine of contributory negligence after the supreme court had abandoned that doctrine and changed the law. The trial court was alerted to the error of law as required by Dutchen v. Lewis, 221 N.W.2d 755, 759 (Iowa 1974). Cf. Sechler v. State, ____ N.W.2d ____ (Iowa 1983) with Schuller v. Hy-Vee Food Stores, Inc., 328 N.W.2d 328, 333 (Iowa 1982). See also Bruns v. City of Sioux City, No. 2-69612, slip op. at 3 (Iowa Ct. App. Dec. 27, 1983).

Schlegel, J., joins this special concurrence.