

IN THE COURT OF APPEALS OF IOWA

FILED

DEC 26 1984

CLERK SUPREME COURT

KENNETH BATES, As Natural Parent)
and Next friend of Shawn Lee Bates,)
a Minor; and)
KENNETH BATES, Individually,)

338

Plaintiff/Appellant/Cross-Appellee,)

Filed December 26, 1984

vs.)

GUTHRIE COUNTY, IOWA,)

Defendant/Appellee/Cross-Appellant.)

ART MALLOY, As Natural Parent and Next)
Friend of)
RANDY EUGENE MALLOY and)
RONALD ERWIN MALLOY, Minors; and)
ART MALLOY, Individually,)

4-240
2-68615

Plaintiff/Appellant/Cross-Appellee,)

vs.)

GUTHRIE COUNTY, IOWA,)

Defendant/Appellee/Cross-Appellant.)

Appeal from the Iowa District Court for Guthrie County, Richard D. Morr,
Judge.

Appeal from a trial court finding for defendant in an action by the minor
plaintiff and his father against the county after a one-car accident in Guthrie
County. Plaintiff asserts: (1) the statement of a county engineer was improperly
allowed into evidence, (2) the finding of the court that the county did not have
notice of the sign misplacement was not supported by substantial evidence,

(3) failure to follow a sign manual was negligence per se, and the court erred in ruling it was only prima facie evidence, and (4) the finding of the court that the signs used by the county warning of the intersection were sufficient was not supported by substantial evidence. On cross-appeal the county claims the action should have been dismissed pursuant to rule 215.1 of the Iowa Rules of Civil Procedure. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

William J. Hamilton of Hamilton Law Firm, P.C., Storm Lake, for plaintiffs-appellants/cross-appellees.

Donald H. Mackaman, Jr., Greenfield, for defendant-appellee/cross-appellant.

Considered by Oxberger, C.J., Donielson, and Schlegel, JJ.

OXBERGER, C.J.

This appeal results from a trial court finding for defendant in an action by the minor plaintiff and his father against the county after a one-car accident in Guthrie County. Shawn Bates was thirteen years old and a passenger in a vehicle on May 10, 1978, when it went through a T-intersection and into a ditch. Bates was among those injured in the accident, and he and his father have brought action against the county, claiming negligence for its failure to discover a yield sign had been misplaced, and for failing to erect proper signs warning of the hazardous intersection. The court found that the county did not have notice of the misplaced sign, and was not under a duty to use different signs than had been placed near the intersection. The county was not negligent, the trial court ruled. On appeal plaintiff asserts: (1) a statement of a county engineer was improperly allowed into evidence, (2) the finding of the court that the county did not have notice of the sign misplacement was not supported by substantial evidence, (3) failure to follow a sign manual was negligence per se, and the court erred in ruling it was only prima facie evidence, and (4) the finding of the court that the signs used by the county warning of the intersection were sufficient was not supported by substantial evidence. On cross-appeal the county claims the action should have been dismissed pursuant to rule 215.1 of the Iowa Rules of Civil Procedure. We affirm in all respects except as to the court's finding that the signs posted by the county were adequate. On this point we reverse and remand.

I. Rule 215.1 Dismissal

On cross-appeal defendant contends the trial court abused its discretion in allowing continuance of plaintiff's cause, and the case should have been dismissed pursuant to Iowa Rule of Civil Procedure 215.1. A notice under rule 215.1 was given to plaintiff August 1, 1980, stating the case would be dismissed unless tried by

January. Depositions were taken in October and an application for continuance granted December 15, 1980. Reasons given for the continuance were commitments by counsel in other counties and the congested court docket. Both parties agreed to this continuance. Another application for continuance was made December 14, 1981, and granted at a hearing December 28, 1981. The reasons given for this continuance were that additional pleadings and discovery were contemplated, counsel was committed in other counties, the cross-petition had not been ruled upon, and attempts to contact defendant had failed. Defendant claims that three attempts to telephone defendant's attorney and a letter sent to the attorney do not constitute diligent efforts to bring the case to trial. Defendant asserts it is this type of delay that warrants dismissal under rule 215.1.

As the Iowa Supreme court has pointed out, the trial court does not have discretion in dismissing an action for want of prosecution, but does have discretion in granting continuances when a timely application is made. Miller v. Bonar, 337 N.W.2d 523 (Iowa 1983). Absent a clear abuse of such discretion, appellate courts will not interfere in the ruling upon application for continuance. State v. R. M. Boggs Co., Inc., 336 N.W.2d 408 (Iowa 1983). The facts outlined fall well short of clear abuse of discretion, and we affirm the trial court grant of continuance. Grant of continuance stays dismissal under section 215.1, and the court properly proceeded to trial.

II. Evidentiary Ruling

Plaintiff on appeal claims the court erred in allowing testimony to be given by the county engineer regarding his actions near the intersection. The testimony given was as follows:

Q. Mr. Schultz, with regard to this T-intersection that we have been talking about, have you had the occasion to drive across at that intersection at night? A. Yes, sir.

Q. Have you driven by heading north? A. Yes, sir.

Q. When you did that, did you make some observations concerning what you could see? A. Yes, sir.

Q. Would you please tell the Court what those observations were. A. As previously stated the top of the yield sign comes visible at 885 feet. The bottom of the yield sign is in full visibility 35 feet later.

Q. And is that at night? A. Yes, sir.

Q. Is that with your high beams or low beams on? A. Both of them are just about the same distance.

Q. In driving an automobile? A. Yes, sir.

Q. When heading north on that road, is there any point where the yield sign becomes obscured? A. If you are driving down the road and you're dead in the middle of the centerline at the end of the bridge, it will be obscured all but the—

Q. At what distance? A. About 60 to 70 feet south of the bridge.

Q. As you continue to proceed north, does the yield sign come back into view? A. Yes, sir.

Q. Mr. Schultz, would you have an opinion whether if when you come off the north end of the bridge if you were traveling 25 miles per hour, if you could stop prior to crossing the north edge? A. Yes, sir.

MR. HAMILTON: Your Honor, I would like to interpose an objection and move to strike his answer as being made before I could open my mouth.

No. 1, he is asking for an expert opinion from this witness from which this man is not qualified to give.

No. 1, he does not know the friction of the road. No. 2, the weight of the road. Three, the tread depths of the tires. Fourth, the conditions of the brakes or anything that would qualify him to give an opinion as to whether or not the car would be able to stop at a certain rate of speed or in a certain amount of distance. And I think for this witness to testify—to give that opinion would be pure speculation on his part. He is not qualified or been educated as an accident reconstruction expert and I think for all these reasons he is not competent to qualify to offer an opinion on that issue.

THE COURT: The objection may precede that part of the answer that the witness gave. The objection is overruled. You may answer.

A. I was able to stop.

The county engineer then went on to relate other observations he made while driving over the bridge. We include this transcript of the testimony to illustrate our point. Although the question was phrased to ask for an opinion, we do not believe Mr. Schultz was giving opinion testimony at the time. He was merely

relating his first-hand observations of his drive over the bridge and through the intersection. In addition, plaintiff adequately brought out on cross-exam any difference that might have existed between the drive of the county engineer and conditions the night of the accident. We affirm the trial court in its evidentiary ruling.

III. Negligence Issues

I. Finding Regarding Notice

The car went down the hill, over the bridge, through the T intersection, and into a ditch. The county had placed a yield sign just after the bridge and before the intersection. The county engineer testified that when the sign was in its proper place, it could be seen for 885 feet, except for a time while crossing the bridge when it is partially obscured. A one-lane bridge sign in its proper place faced the other direction and was also located after the bridge and before the intersection. When the accident occurred, the signs had been removed by unknown persons so that the yield sign was on the other side of the road and faced the wrong direction. The one-lane bridge sign was also changed to the other side of the road and faced the wrong direction.

Kenneth Bates testified he lived one-half mile from the intersection ten days before the accident and in using the intersection several times had not noticed the signs being out of position. Neither his son, Shawn, or a maintainer operator for the county who worked near the intersection at various times noticed the signs. A farmer nearby testified he had seen the signs out of place at least two months prior to the accident. The court found the farmer was not a credible witness, and inferred that if the signs had been out of place, one of the other three witnesses would have noticed. Based on this, the court held that the signs

were switched only a short time before the accident, and that Guthrie County could not have had notice of the misplacement until after the accident. Plaintiff says the trial judge's findings are not supported by substantial evidence, and that the inference is unreasonable.

Appellate courts have limited review of the findings of the trier of fact. The evidence is construed in the light most favorable to the judgment and given liberal interpretation toward supporting the result. Koehler v. State, 263 N.W.2d 760 (Iowa 1978). Only those facts which are favorable to the successful party are to be considered in deciding if a fact finding is proper, even when there is contrary evidence. Id. If there is substantial evidence supporting the finding, it will be upheld. Schumacher v. McDonald, 320 N.W.2d 640 (Iowa Ct. App. 1982). This case was tried to the court, and we have noted the trial court's findings of fact have the effect of a special verdict and are the same as a jury verdict. Id. at 642. We have further indicated that a finding of fact is supported by substantial evidence if it may reasonably be inferred from the evidence. Id. The credibility of witnesses will not be considered. Id. An inference is not support for substantial evidence when it is based on evidence that is speculative or raises only a conjecture or possibility. Soreide v. Vilas & Co., 247 Iowa 1139, 1144, 78 N.W.2d 41, 43 (1956). An inference is upheld if it can be fairly drawn from the evidence. Tuttle v. Longnecker, 258 Iowa 393, 138 N.W.2d 851 (Iowa 1964). When different inferences may be drawn from the facts, the findings are binding on us. Hobbs v. Martin Marietta Co., 257 Iowa 124, 131 N.W.2d 772 (Iowa 1964).

In viewing only those facts favorable to the successful party, we look only at the testimony of the three witnesses who said they did not notice the changed signs. While a different conclusion could have easily been reached, the inference of the trial judge that the witnesses would have noticed any changes is not

unreasonable. We cannot say it is based on conjecture, or not supported by substantial evidence. Although the testimony of the farmer contradicts this conclusion, the court was free to determine his credibility. Our courts have upheld decisions of the lower court on such a basis even though there is contrary direct evidence rebutting the circumstantial evidence. Soreide v. Vilas & Co., 247 Iowa 1139. We affirm the trial court finding of fact.

2. State Manual as Negligence Per Se

Plaintiff says the court erred when it decided the Manual on Uniform Traffic Control Devices did not show failure to erect a different warning sign was negligence per se. Plaintiff points out the directive of section 321.255 of the Iowa Code:

Local authorities in their respective jurisdiction shall place and maintain such traffic-control devices upon highways under their jurisdiction as they may deem necessary to indicate and to carry out the provisions of this chapter or local traffic ordinances or to regulate, warn, or guide traffic. All such traffic control devices hereafter erected shall conform to the state manual and specifications.

However, we do not reach this issue of whether noncompliance with the manual is negligence per se, because, as defendant points out, the statute requires compliance only with "traffic control devices hereafter erected." The statute was passed in 1937, but there is no evidence in the record as to when the signs at the intersection in question were placed. The county engineer could only testify that he had not placed the signs at the intersection since he began working in Guthrie County in 1973. Therefore, we agree that the manual can only be evidence of negligence.

3. Finding Regarding Duty to Place Warning Signs

In reviewing the trial court's finding of fact that the county was not under a duty to place additional or different warning signs at the intersection, we again

look to the evidence in favor of the successful party.

In our search for such supporting evidence, we find very little. The trial court based its decision on testimony by the county engineer that if the yield sign had been in its proper place, it could have been seen for 885 feet, except for a time when it was obscured while crossing the bridge. The driver testified he would have known he should have slowed down if he had seen a yield sign, and knew he was looking for a T-intersection, although he did not know where it was. The court decided that if the sign had been in its proper place, the driver would have seen it and slowed down, and that therefore the yield sign was adequate. However, the question involved in this negligence issue is not whether the driver would have seen the yield sign, but whether the county was under a duty to place different signs, and was negligent in that duty. Defendant also argues that the distance the yield sign was visible was 385 feet more than that necessary for the visibility required for a large double-arrow. Again, we are asking not whether the driver would have seen the sign, but what sign would have given adequate warning of the intersection. The sign that would have been in place, had it not been removed, was a yield, not a double arrow.

Therefore, we are to inquire whether the yield sign provided adequate warning, or whether different or additional signs should have been placed. As to the county's duties in this regard, the supreme court has stated, "The ultimate question is whether the public had reasonable warning of the road conditions it would face, not whether the county engineer acted within the bounds of professional discretion. . ." Schmitt v. Clayton County, 284 N.W.2d 186, 189 (Iowa 1979).

It is inconceivable to this court that a yield sign could give the public reasonable warning that the road would end. A yield sign would warn to watch out for merging traffic, an unprotected intersection, a change to fewer lanes of

traffic, or the like. No driver could reasonably expect with such a warning that he or she would suddenly run out of road.

The plaintiff has shown by a preponderance of the evidence that a T sign, not a yield sign, should have been posted. The State Manual on Uniform Traffic Control, which we have referred to as evidence of negligence, states the following:

The T symbol sign is intended for use to warn traffic approaching a T-intersection on the road that forms the stem of the T, i.e., where traffic must make a turn either to the right or to the left. The sign should not generally be used on an approach where traffic is required to stop before entering the intersection, nor at a T-intersection that is channelized by traffic islands, nor where Junction signing or Advance Turn Arrows are present.

The relative importance of the intersecting roads may be shown by different widths of line in the diagram.

It may be desirable to place a double-headed Large Arrow sign at the head of the T, directly in line with approaching traffic (sec. 2C-9).

The intersection described above fits the description of the intersection where the accident occurred. Although the word "may" is used in indicating a double arrow sign might be used, no such permissive language appears with respect to posting of a T sign. Instead the engineer is told the T-sign must be posted. Further, the county engineer testified a T sign and a double arrow sign are now posted at the intersection and indicated other warning signs should have been placed there. He said the manual had not been consulted prior to the accident, but testified as follows:

Q. But you still misunderstand my question. Regardless of whether an accident occurred or not, upon examination of the manual you determined at some later time that a sign should be placed there, correct? A. Yes, we looked at that.

Q. Had you made that examination and consultation before the accident you would have placed it on there before the accident? A. Probably.

Later, the following testimony was received from the engineer:

Q. All right. Now, you spoke about sight distance. That, of course, is true in the daytime? A. Yes, sir.

Q. It would deteriorate between day and night some? A. To some extent, yes, sir.

Q. And when you look back on the accident, do you feel a T warning sign should have been placed at that intersection? A. Based on this one I am afraid, yes.

The evidence supports the fact that the county should have posted, at a minimum, a T sign at the intersection.

We hold that the court's finding regarding additional signs was based on an erroneous ruling of law, that there was no duty on the part of the county to place the additional signs. Accordingly, we remand for a determination of negligence, proximate cause and damages, if any, in a manner consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.