

JAN 31 1978

CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

MARY SQUIRES AND PAMELA SQUIRES)
by Clarence Squires, father and next Friend
and individually,)

Filed January 31, 1978

Appellees,)

vs.)

ADLIA PAYNE AND DONALD PAYNE,)

267
2-59222

Appellants,)

and)

DOUGLAS BESLER,)

Defendant.)

Appeal from Linn District Court - William R. Eads, Judge.

Defendants appeal jury verdict in personal injury suit objecting to the voluntary dismissal of a party defendant, the refusal to instruct on their yellow caution light theory under § 321.257(2), The Code, and the submission to the jury of a chiropractor's opinion regarding the effect of accident injuries upon the plaintiff child's pre-existing spinal condition. - Affirmed.

Robert D. Houghton, of Shuttleworth & Ingersoll, Cedar Rapids, for Appellants.

David F. McGuire and Richard D. Holden, Cedar Rapids, for Appellees.

Heard by Alibee, C.J., and Donielson, Snell and Oxberger, JJ. Carter, J. takes no part.

PER CURIAM

Defendants Adlia and Donald Payne appeal the jury verdict awarding the plaintiff Squires family total damages of \$44,776 in a negligence action brought against the drivers of vehicles colliding in a city intersection. We affirm.

The plaintiff mother and daughter, Mary and Pamela Squires, were pedestrians struck by the Besler vehicle as it careened into them after impact with the Paynes' vehicle. At the close of all evidence the Squires were allowed to dismiss without prejudice their suit against Besler. The Paynes claim this dismissal is reversible error.

We believe the trial court rightly refused on its own motion to invoke rule 102, Rules of Civil Procedure, against Besler. Unquestionably Besler's failure to appear and answer placed him in a default status under rule 230(a), R.C.P. However, no motion for default was made prior to the Squires' motion for dismissal. Rule 230(a) does not operate automatically nor on the sua sponte motion of the trial court. The trial court ruled after the facts were fully developed at trial that the jury could decide the question of the Payne's liability without deciding the question of Besler's liability. We cannot say with the testimony of Adlia Payne acknowledging he was at fault in the collision with the Besler vehicle that the trial court erred in its decision to allow voluntary dismissal of Besler under rule 215, R.C.P.

The Paynes claim they were entitled to an instruction that Adlia Payne could have entered the intersection on a yellow light since 1) Adlia Payne was unable to state what color the light was at the point he entered the intersection; 2) Gary Hein's testimony was that Besler's light was red; and 3) their exhibit D, the engineering form used in regulating the intervals for the traffic signals at the intersection, indicates if Besler's light was red, Adlia Payne's could have been yellow. No witness testified the traffic light was yellow when the Payne vehicle entered the intersection. There is no duty to instruct "... upon an issue without substantial support in evidence, or which rests on speculation or conjecture." *Walker v. Sedrel*, 260 Iowa 625, 632, 149 N.W.2d 874, 879 (1967). Further, under *Mora v. Savereid*, 222 N.W.2d 417, 419 (Iowa 1974) it is error to submit issues which

do not conform to the dual conditions that they be pled and have substantial support in the evidence. The Paynes filed no pleading alleging Adlia Payne had entered the intersection in circumstances controlled by § 321.257(2), The Code, and no substantial evidence of such circumstances was introduced at trial. The instruction was properly refused.

The Paynes also argue since Dr. Munger, a chiropractor, never treated Pamela for the idiopathic scoliosis condition or the accident injuries and never took x-rays of her spine, he is disqualified from giving an opinion regarding any aggravation of the spinal condition occasioned by the accident. Without Dr. Munger's testimony in their view the issue could not be submitted to the jury since Dr. Robb, the orthopedic surgeon, testified only that the shortening of Pamela's leg "could" have an effect upon her spinal condition. We cannot agree the issue of aggravation of the preexisting spinal injury was improperly submitted to the jury. *Becker v. D. & E. Distributing Co.*, 247 N.W.2d 727, 733 (Iowa 1976) identified the test for whether a chiropractor is qualified to express an opinion is whether he does so within the bounds of his special field. In addition to this general qualification, as with all expert testimony, it must be shown that the chiropractor is qualified to answer the particular question propounded. *Ganrud v. Smith*, 206 N.W.2d 311, 314 (Iowa 1973). We rule here, where Dr. Munger 1) had a lengthy history of treatment of Pamela, including treatment of her spine both before and after the accident, 2) exhibited a familiarity with her particular spinal condition - he had ultimately diagnosed her need for specialized medical treatment and surgery and referred her to an orthopedic surgeon, and 3) testified without objection that the issue of the effect upon the spine of variations between leg lengths was a general and recurrent topic dealt with in his chiropractic practice, the testimony is properly submitted to the jury. It was, of course for the jury to accept in whole, in part, or not at all Dr. Munger's opinion testimony. *Miller v. International Harvester Co.*, 246 N.W.2d 298, 302 (Iowa 1976).

Finally, we find any claim of improper closing argument by the Squires' counsel was cured by the trial court's admonishment of counsel out of the jury's presence and by the subsequent statement of counsel to the jury clarifying his

remarks regarding Adlia Payne's testimony concerning entering the intersection on a red light. We find the trial court was at least within its fair discretion in refusing to declare a mistrial on this record. *Oldsen v. Jarvis*, 159 N.W.2d 431, 436 (Iowa 1968). As in *Oldsen*, we find no clear resort to the "Golden Rule" argument.

AFFIRMED.