

IN THE COURT OF APPEALS OF IOWA

No. 7-531 / 96-1146

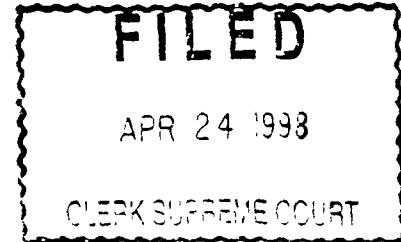
JOHN McMEEKIN, JR.,

Appellant,

vs.

OLIVER RUHLOW,

Appellee.



Appeal from the Iowa District Court for Woodbury County, Phillip S. Dandos,
Judge.

John McMeekin, Jr., appeals the judgment entered in this negligence action
arising out of an automobile collision. **AFFIRMED.**

Daryl L. Hecht of Crary, Huff, Inkster, Hecht & Sheehan, P.C., Sioux City, for
appellant.

William G. Deck of the Deck & Deck Law Office, Sioux City, for appellee.

Considered by Sackett, P.J., Mahan, J., and Perkins, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

PERKINS, S.J.

At approximately 2:00 p.m. on November 19, 1992, plaintiff John McMeekin and defendant Oliver Ruhlow were involved in an automobile collision. The collision occurred at the intersection of Gordon Drive and Virginia, which is controlled by a traffic light. As Ruhlow was turning left at a green light, his car and McMeekin's car collided in the intersection. Ruhlow was charged with and pleaded guilty to failure to yield while making a left turn.

McMeekin filed a petition alleging Ruhlow's negligence caused his injuries. At trial, McMeekin presented the deposition testimony of Dr. Michael Jung and the video deposition of Dr. Quentin Durward. Both doctors testified in regard to McMeekin's lower back injuries. Durward stated the original cause of the injury was the accident of November 19, 1992. McMeekin also presented evidence his medical bills amounted to \$5895.

Ruhlow's expert, Dr. Joel Cotton, gave his opinion McMeekin achieved maximum medical recovery from any symptoms caused by the accident in late December 1992 or early January 1993. By May 21, 1993, he would have definitely made a full medical recovery from all symptoms with or without regard to having been caused by the accident.

McMeekin testified about his injuries from the accident and treatment. He stated he was in another automobile accident in March 1995; however, he did not have any injuries from this accident. McMeekin estimated he was traveling at a speed

of thirty to thirty-five miles per hour as he approached the intersection of Gordon Drive and Virginia.

Ruhlow was allowed to testify, over McMeekin's objections on grounds of lack of foundation, hearsay, and Iowa Rule of Evidence 403, that when he got out of his car after the accident he heard a bystander declare Ruhlow had been "hit by a latecomer." Ruhlow could not state whether the comment came from a man or a woman; he assumed it was a man.

The district court denied McMeekin's objections to the submission of an instruction on his comparative negligence on the grounds of speed and lack of control and to an instruction on his subsequent injury. He maintained the evidence presented did not support such instructions.

The jury returned a verdict finding Ruhlow was negligent; however, it further found Ruhlow's negligence was not the proximate cause of McMeekin's injuries. The district court denied McMeekin's motion for new trial.

McMeekin appeals. He asserts the jury's verdict finding Ruhlow's negligence was not the proximate cause of his injuries was not supported by the evidence where he showed he was injured from the collision. McMeekin further argues the court erred in allowing Ruhlow to provide hearsay evidence where the declarant could not be identified, in submitting instructions on his comparative fault where there was no evidence of his speeding or lack of control, and in submitting an instruction on his

subsequent injury from a subsequent accident where there was no evidence he was injured in the later accident.

Scope of Review

The scope of review in actions at law is assigned error. Iowa R. App. P. 4. A jury's findings of fact in this law action are binding on appeal if supported by substantial evidence. *Strong v. Rothamel*, 523 N.W.2d 597, 600 (Iowa App. 1994) (citing Iowa R. App. P. 14(f)(1)). Evidence supporting a verdict is substantial or sufficient if a reasonable mind could find it adequate to reach the same conclusion. *Id.*

Issues

The appellant raises four issues:

1. Whether or not there is substantial evidence to support the jury's finding that defendant's negligence was not a proximate cause of the damage to plaintiff?

The jury found defendant was at fault. When asked if the defendant's fault was a proximate cause of plaintiff's damage, the jury answered "no." The verdict could mean plaintiff had failed to prove by a preponderance of the evidence that the proximate cause of the collision was defendant's fault. The jury heard testimony from plaintiff that he was driving thirty to thirty-five miles an hour as he approached the intersection and that he had a green light. The jury heard testimony from defendant that he had stopped his car while intending to make a left turn. He said there was a car headed in the opposite direction also making a left turn. As that car

turned north, defendant turned south. He further testified the traffic light had turned from green to yellow as he made the turn.

Officer Marc Hein who investigated the accident testified he found no skid marks left by plaintiff's car and could not say whether or not plaintiff applied the brakes before the collision. He did testify plaintiff had an unobstructed view as he approached the intersection.

Leonard Johnson, an eye witness, testified he could not say what color the traffic light was for either plaintiff or defendant. He could not say whether or not plaintiff had applied the brakes before the collision.

The jury was given written instructions by the court on the burden of proof. Negligence was defined, proximate cause was explained and the jury was told "you must try to reconcile any conflicts in the evidence, but if you cannot you will accept the evidence you find more believable."

Presented with the evidence in this case, the jury may have concluded plaintiff had failed to prove defendant's fault was the proximate cause of the accident. In considering the testimony and the credibility of the witnesses the jury may have found defendant's testimony "more believable."

Based upon the record, we find there was substantial evidence to support the jury's verdict that defendant's negligence was not a proximate cause of the accident. In evaluating whether the verdict is supported by evidence, the Supreme Court views

evidence in a light most favorable to the prevailing party. *Burton v. Theobald*, 216 N.W.2d 299, 300 (Iowa 1974).

The verdict of the jury could also be a finding plaintiff had not proven that the injuries he claimed were a result of defendant's negligence.

Plaintiff said *after* the accident he looked down and did not see any "blood or bones sticking out." He did not seek medical attention at once but later, after going home, he felt kind of dazed and numb and decided to go to a doctor. He was examined by Dr. Julie Hamann. According to a history taken by her, plaintiff reported he had been in an accident earlier in the afternoon, he was the driver, he was wearing a seat belt, and totaled his car. There was no other history about the accident. He said he was feeling fine except his neck was stiff and he wanted to have it checked out.

Dr. Hamann examined plaintiff and noted some spasm in the cervical or neck area of the cervical muscles and there was tenderness to palpation in the cervical or neck area. There was good range of motion, no tenderness. The rest of the exam was normal. Dr. Hamann did not testify in the case.

On November 23, 1992, plaintiff appeared at the doctor's office asking to have x-rays taken. The left ribs were x-rayed but the doctor did not see plaintiff on that day. On December 3, 1992, he saw Dr. Michael Jung and complained of pain in front of his chest, the low part of his ribs, and his low back. On December 17, 1992, he again saw Dr. Jung and said he had not felt right since the accident. He said he had

noticed the left lower rib cage had clicking and pain. He had also noticed the left collar bone was larger and was tender and he had pain when taking deep breaths. About five days later, Dr. Jung referred plaintiff to an orthopedic surgeon, Dr. Livdahl.

On March 18, 1993, plaintiff saw Dr. Jung and was complaining of pain in his left hip that he felt was caused in the accident. An x-ray of his left hip revealed "no other injury there." The x-rays of the left ribs taken on November 23, 1992, are not mentioned in the record we have before us, and we assume they revealed no significant abnormality. On February 7, 1995, he again saw Dr. Jung and said he was having a lot of pain in his neck, shoulders, and down his left arm, both hips and left leg. On August 24, 1994, plaintiff saw Dr. Jung, complaining of pain in the right groin area.

Dr. Jung was subjected to a cross-examination and reference was made to a degenerative disc disease that is common among persons forty years of age or older that is not caused by trauma. Plaintiff was age forty-seven. Dr. Jung was questioned about plaintiff's exercise practices and history available that indicated as early as December 24, 1992, plaintiff had been lifting weights.

The jury also heard testimony from plaintiff himself that before the accident he exercised by jogging, walking, rollerblading, cross-country skiing, and lifting weights two or three times a week. When asked by his attorney why he was doing that, he answered one reason was a family history of diabetes and one way to fight

diabetes is through exercise and weight control. "So I was maybe a little bit of a hypochondriac back then." This reference may have given the jury reason to scrutinize his medical testimony closely. There was further testimony from plaintiff that after the accident he was riding his bike once or twice a week seventeen or eighteen miles. He was rollerblading once a week seven to ten miles at a time and had a weight-lifting routine two or three times a week.

The jury may have concluded there were no injuries to plaintiff which were caused by defendant's fault. Or they may have concluded the injuries, if any, that were caused in the accident were so minor and inconsequential they were insufficient to support a money award. The jury may have based its verdict on the statement of plaintiff contained in Dr. Hamann's notes that "he was feeling fine except his neck was stiff," and they did not believe the many subsequent additional complaints were related to the accident. If a reasonable jury could determine from the facts presented that the loss was insufficient to support a money award, we must affirm.

2. Whether or not the trial court erred in submitting the issue of plaintiff's comparative negligence on the grounds of speed and control to the jury?

There was evidence that plaintiff approached the intersection at a speed of thirty to thirty-five miles per hour, evidence that the traffic light had turned from green to yellow, and evidence that no skid marks were left by plaintiff's car. These factors combined to raise the issues of speed and control. The court did not err in so instructing.

3. Whether or not the trial court erred in ruling an out-of-court statement by an unidentified declarant was admissible over foundation, hearsay, or Rule 403 objections?

The statement “you have been hit by a latecomer” was made according to defendant’s testimony by an elderly man, about sixty. It was made in response to defendant’s question after he got out of his wrecked car, “What the hell happened?” Defendant in his brief argues that an excited utterance made while declarant was perceiving an event or immediately thereafter is not excluded by the hearsay rule. It is our finding the trial judge did not exceed his discretion in admitting this evidence, and in any event it was harmless error. We will reverse the trial court’s determination on the issue of admissibility of evidence only when we find a clear abuse of discretion. *Gail v. Clark*, 410 N.W.2d 662, 672 (Iowa 1987).

4. Whether or not the trial court erred in submitting instruction 25 on the issue of subsequent injury?

There was evidence that degenerative disc disease can cause back pain. There was evidence that plaintiff had degenerative disc disease. There was medical testimony that physical exercise such as rollerblading and weight lifting can cause such disease to become symptomatic. Thus, instruction number 25 was submitted as follows:

If you find John McMeekin was injured by another act after this incident, he cannot recover for any later injury not caused by this incident.

The instruction was correctly given under the facts of this case. Even if we found the instruction to be erroneous, there was no prejudice as the jury's negative response to the question "Was the fault of the defendant a proximate cause of damage to the plaintiff?" establishes there is no liability and the question becomes moot. *Gore v. Smith*, 464 N.W.2d 865, 868 (Iowa 1991).

We think the trial court correctly overruled the motion for a new trial. We agree that the verdict of the jury was based upon substantial evidence. We affirm.

All appellate costs taxed to appellant.

AFFIRMED.