IN THE COURT OF APPEALS OF IOWA

No. 1999-203 (9-427) / 98-1925
Filed November 23, 1999

JANICE MARIE HERSHEY, Individually and as Administrator of the Estate of RUSSELL HERSHEY, Deceased,
Plaintiffs-Appellees,

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CLERK SUPREME COURT

vs.

NETTIE CHAFFIN,
Defendant-Appellant.

Appeal from the Iowa District Court for Franklin County, Bryan H. McKinley, Judge.

Defendant appeals from the district court ruling denying her motion for new trial following a jury verdict in favor of plaintiffs in their tort suit arising from an automobile accident. Defendant contends the court erred by failing to instruct the jury on comparative fault. **AFFIRMED.**

Karla J. Shea of Yagla, McCoy & Riley, P.L.C., **Waterloo, for appellant.**

Edward J. Gallagher, Jr., and Linda Hall of **Gallagher, Langlas &** Gallagher, **P.C., Waterloo, for appellee.**

Considered by Huitink, P.J., and Mahan and Hecht, JJ.

HECHT, J.

Plaintiffs sued defendant alleging personal injuries arising from a motor vehicle collision which occurred on October 11, 1995. After a jury verdict in plaintiffs' favor, defendant alleges on appeal that the district court erred in failing to instruct the jury on plaintiff's comparative fault, and in failing to grant her motion for new trial. We affirm.

I. Background Facts and Proceedings. This case arises out of an automobile accident that occurred on October 11, 1995, at the intersection of 12th Avenue N.E. and Highway 65 in Hampton, Iowa. Plaintiff Janice Hershey ("Hershey") was operating her vehicle in a northerly direction on Highway 65. Defendant Nettie Chaffin ("Chaffin") stopped her car in obedience to a stop sign on 12th Avenue N.E. facing west. After stopping at the stop sign approximately ten feet from the curb line, Chaffin drove forward into the path of Hershey's vehicle and the crash occurred. Hershey's husband, Russell, was a passenger in the front seat. He sustained severe bodily injuries (including a closed head injury and loss of an eye) in the accident, and died February 24, 1998, of unrelated causes. Hershey also sustained injuries to her chest and her finger.

Hershey testified, prior to the accident, she was driving at a speed of thirty to thirty-five miles per hour in a thirty-five mile per hour speed zone. The investigating police officer testified Hershey told him she first saw Chaffin's car as it began to pull out from the stop sign. Hershey testified she slammed on the brakes and tried

unsuccessfully to swerve to avoid a collision with Chaffin's vehicle as it entered the northbound lane of Highway 65. The driver's side front fender of Chaffin's vehicle collided with the passenger front corner of the Hersheys' vehicle. The investigating officer observed no skid marks or gouge marks on the roadway at the scene of the crash. Chaffin testified she did not see the Hershey vehicle before the impact.

A disinterested witness, Lowell Lange ("Lange"), testified he had stopped on 12th Avenue N.E. facing east prior to the collision. He saw the crash occur after Chaffin's car had moved forward approximately six to nine feet. Lange testified, in view of how quickly the impact occurred after Chaffin's vehicle began moving, and considering reaction time, Hershey "really couldn't have avoided [the impact]." He did not observe whether Hershey attempted evasive action such as braking or swerving.

The district court concluded there was not sufficient evidence of Hershey's negligence in the record to support the submission of comparative fault to the jury. Chaffin objected to the court's failure to instruct on comparative fault and claimed one interpretation of the evidence could be Hershey failed to maintain a proper lookout. The jury returned a verdict finding Chaffin's negligence caused damages to Hershey in the amount of $154,076, and to Russell's estate in the amount of $310,046.55.

In her motion for new trial, Chaffin renewed her objection to the court's failure to instruct the jury on Hershey's failure to keep a proper lookout. The district court

denied the motion for new trial on the ground there was insufficient evidence of Hershey's comparative fault to submit a lookout instruction to the jury. On appeal, Chaffin assigns as error only the district court's failure to give a comparative negligence instruction on the negligence specification of lookout and the failure to grant a new trial for the same alleged error in the jury instructions.

II. Standard of Review. Our review is on error. Iowa R. App. P. 4. We review jury instructions to decide if they are a correct statement of the law and are supported by substantial evidence. *Collister v. City of Council Bluffs*, 534 N.W.2d 453, 454 (Iowa 1995). The court is required to instruct the jury as to the law applicable to all material issues in the case. Iowa R. Civ. P. 196. Evidence is substantial enough to support a requested instruction when a reasonable mind would accept it as adequate to reach a conclusion. *Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 150 (Iowa 1992). In weighing the sufficiency of the evidence, we give it the most favorable construction it will bear in favor of the party seeking submission. *Id.* Error in giving or refusing to give jury instructions is reversible only if prejudicial. *Stover v. Lakeland Square Owners Ass'n*, 434 N.W.2d 866, 868 (Iowa 1989). We review a denial of a motion for new trial for abuse of discretion. *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d 612, 618 (Iowa 1991).

III. Sufficiency of the Evidence on Lookout. The fighting issue in this case is whether the evidence in the record could lead a reasonable mind to conclude

Hershey failed to keep a proper lookout and such failure was a proximate cause of plaintiffs' injuries. We conclude the district court correctly determined there was not sufficient evidence to support a comparative negligence instruction on the theory of failure to keep proper lookout.

Hershey had the right-of-way at the intersection. She also had the right to assume Chaffin would not fail to yield the right-of-way and pull into her pathway until she knew or, in the exercise of due care, should have known otherwise. Iowa R. App. P. 14(f)(9); *Guinn v. Millard Truck Lines, Inc.*, 257 Iowa 671, 677, 134 N.W.2d 549, 553 (1965); *Geisking v. Sheimo*, 252 Iowa 37, 43, 105 N.W.2d 599, 602 (1960). Hershey was, however, required to exercise ordinary care under the circumstances even though she was on the favored highway at the intersection. *Paulson v. Haker*, 250 Iowa 532, 537, 95 N.W.2d 47, 50 (1959).

In support of her contention a comparative fault instruction should have been given on the lookout theory, Chaffin emphasizes the investigating officer's testimony Hershey stated at the scene of the crash she hadn't seen Chaffin's vehicle "until after it had pulled out." Chaffin argues, if Hershey had been exercising proper lookout, she would have (1) been aware of Chaffin's vehicle sooner, (2) anticipated Chaffin might not yield the right-of-way at the intersection, and (3) been able to take evasive measures to avoid the impact. The disinterested witness, Lange, clearly refutes Chaffin's assertions with respect to lookout. It is undisputed Chaffin stopped in obedience to the stop sign. When she then negligently failed to yield, she had a very

short distance to move prior to the impact with the passenger's side front fender of the Hershey car. Lange testified the Chaffin car moved a distance of only six to nine feet prior to impact and, in view of the reaction time required by Hershey, there was nothing that could have been done to avoid the collision.

The district court correctly concluded Hershey's failure to see the Chaffin vehicle before it began moving from its resting point at the stop sign on 12th Avenue N.E. had nothing to do with proximate cause of the collision as a matter of law. Hershey had the right to assume Chaffin would obey the rules of the road and yield the right-of-way until it started moving just prior to impact. By the time the Chaffin vehicle began to move forward into Hershey's lane of traffic, as Lange aptly pointed out, there was nothing Hershey could have done to avoid the collision. Hershey testified she applied her brakes and attempted to swerve, but she couldn't avoid the crash. Under these circumstances, when we view the evidence in the light most favorable to Chaffin, we conclude the district court correctly declined to instruct the jury on the comparative negligence specification of lookout. For the same reasons, we conclude the district court did not abuse its discretion when it denied Chaffin's motion for new trial.

AFFIRMED.