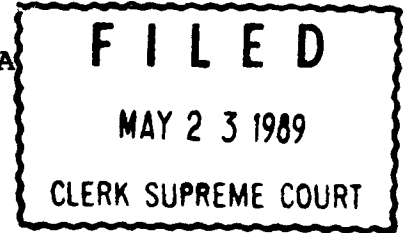


IN THE COURT OF APPEALS OF IOWA



WAYNE MUMM,)
Plaintiff-Appellant,)
vs.)
DONA LYNN DeVOL and CORROSION)
CONTROL CORPORATION, INC.)
Defendants Appellees.)

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9-119
88-914

Appeal from the Iowa District Court for Scott County
(73205), James Sohr, Judge.

Plaintiff, who was injured by a car while crossing the
street, appeals from a jury verdict finding the driver not
at fault. **REVERSED AND REMANDED.**

Anthony Jamison, of Braud/Warner, Ltd., Rock Island,
Illinois, for plaintiff-appellant.

Charles E. Miller and Carole J. Anderson, of Lane &
Waterman, Davenport, for defendants-appellees.

Heard by Oxberger, C.J., and Schlegel and Sackett, JJ.

SACKETT, J.

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Plaintiff-appellant Wayne Mumm raises a series of errors following a jury verdict for defendants-appellees Donna Lynn DeVol and Corrosion Control Services, Inc., in his suit for injuries he received when he made contact with a car driven by defendant DeVol and owned by defendant Corrosion Control, Inc. We reverse and remand.

Plaintiff suffered injuries when he was struck or walked into a car while attempting to cross a Davenport, Iowa street. Plaintiff contended he was in the crosswalk and was hit by the car. Defendant DeVol denied plaintiff was in the crosswalk and contended he stepped from the curb into the side of her car. The primary dispute was where on the roadway the accident took place.

Plaintiff first claims the trial court erred in refusing to instruct the jury as to certain grounds under which defendant could be found negligent. Plaintiff had requested the court to instruct on certain specifications of negligence, including the failure of defendant DeVol to have her vehicle under control. The trial court refused plaintiff's request. Plaintiff contends this was error.

Parties to a lawsuit have a right to have a legal theory submitted to the jury so long as it is supported by the pleadings and by substantial evidence. Carter v. Wiese Corporation, 360 N.W.2d 122, 132 (Iowa App. 1984). In determining whether a jury question is raised, the evidence

must be viewed in the light most favorable to the party having the burden of proof. Coppola v. Jameson, 200 N.W.2d 877, 879 (Iowa 1972). Any issue without evidentiary support should not be submitted to the jury. Dutcher v. Lewis, 260 N.W.2d 404, 406 (Iowa 1977). The trial court is vested with considerable discretion in determining whether evidence is sufficient to submit it to the jury. Business Ventures, Inc. v. Iowa City, 234 N.W.2d 376, 383 (Iowa 1975); Oberreuter v. Orion Industries, Inc., 398 N.W.2d 206, 209 (Iowa App. 1986). Circumstantial evidence may be sufficient to engender a jury question. Schermer v. Miller, 380 N.W.2d 684, 689 (Iowa 1986). All instructions must be read and construed together. Clinton Land Co. v. M/S Assoc., Inc., 340 N.W.2d 232, 234 (Iowa 1983).

Defendant argues there was no evidence defendant DeVol did not have the car under control. Iowa Code section 321.288 (1987), provides in relevant part:

1. A person operating a motor vehicle shall have the vehicle under control at all times.

There is evidence the accident took place in a crosswalk. Plaintiff heard a motor wind and thought from the sounds of the motor of the car defendant was driving very fast. We agree with plaintiff the trial court should have instructed on failure to have control. It does not conclusively appear defendant had her car under control. Arenson v. Butterworth, 243 Iowa 880, 887, 54 N.W.2d 557, 561 (1952). The question of control of a motor vehicle

largely depends upon the surrounding circumstances of each case and is ordinarily for the jury. Id. See Rogers v. Jefferson, 226 Iowa 1047, 1051, 285 N.W. 701, (1939); Dorman v. Service Sales Co., 241 Iowa 1182, 1184, 44 N.W.2d 716, 717 (1950). See also Altphilisch v. Wessel, 208 Iowa 361, 367, 225 N.W. 862, 864 (1929), where a pedestrian was struck on a crosswalk by a car making a left turn and the court held it was proper to submit to the jury the issue of defendant's negligence in failing to keep a proper lookout for pedestrians, although the only direct evidence of speed fixed it at about six miles per hour, the car was stopped in five or six feet. The court held the district court was therefore obligated to instruct on defendant's failure to have control and it was prejudicial error not to do so. Doser v. Interstate Power Co., 173 N.W.2d 556, 559 (Iowa 1970); Fratzke v. Meyer, 398 N.W.2d 200, 204 (Iowa App. 1986).

Plaintiff's second alleged error is the trial court was wrong in sustaining objections to certain questions propounded to defendant DeVol on cross-examination. Plaintiff contends the propounded questions were for the purpose of impeaching the witness. On cross-examination plaintiff asked a series of questions directed to an alleged contradiction between defendant DeVol's deposition and trial testimony about whether she ran over plaintiff with her tires. The trial court sustained the objection to two questions as being argumentative.

A witness may be impeached by showing his testimony is inconsistent with a prior statement. State v. Bishop, 387 N.W.2d 554, 559 (Iowa 1986). An attorney should be given some latitude in questioning the witness to clarify current testimony as well as to give the witness an opportunity to admit or deny the prior statement. See State v. Oshinbanjo, 361 N.W.2d 318, 322 (Iowa App. 1984). Because of our holding, we need not decide whether the trial court was correct in its ruling. Plaintiff should have ample opportunity to cover the impeachment issue on retrial.

Plaintiff contends the trial court erred in the admission of certain opinion testimony of the investigating officer. The officer was asked where the area of impact was and plaintiff made the objection a proper foundation had not been laid to enable him to render an opinion. No ruling was made on plaintiff's objection. Defendant's attorney then asked a series of additional questions which ultimately resulted in the officer giving an opinion as to point of impact. Plaintiff did not make any further objection to this line of questioning. Error on this issue was not preserved.

Plaintiff also contends the officer should not have been allowed to testify as to speed. The officer was asked what he determined the minimum speed to be and plaintiff objected there was improper foundation. The objection was sustained. The officer, however, did not answer the

question. Defendant's attorney then asked a series of questions further bolstering foundations. The subsequent answers all came in without objection. Error was not preserved on this issue.

Iowa is committed to a liberal rule allowing opinion testimony if it will aid the jury and is based on special training, experience, or knowledge with respect to the issue in question. State v. Dvorsky, 322 N.W.2d 62, 64 (Iowa 1982); Haumersen v. Ford Motor Co., 257 N.W.2d 7, 11 (Iowa 1977); Doe v. Ray, 251 N.W.2d 496, 501 (Iowa 1977); Bernal v. Bernhardt, 180 N.W.2d 437, 438-39 (Iowa 1970). These cases will guide the trial court on retrial. We reverse and remand.

REVERSED AND REMANDED.