FILED
AUG 26 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

WILLIAM CRAIG CUMMINGS,)

Plaintiff-Appellant,) Filed August 26, 1982

269

vs.)

WESLEY JOHN RENKEN,) 2-239
2-67603

Defendant-Appellee.)

Appeal from Benton District Court - Robert E. Ford, Judge.

Plaintiff appeals from judgment entered on a jury verdict for defendant in this negligence action arising from an automobile accident. AFFIRMED.

Morris L. Eckhart, Vinton, Iowa, for plaintiff-appellant.

John K. Von Lackum, Cedar Rapids, Iowa, for defendant-appellee.

Considered en banc.

Plaintiff appeals from judgment entered on a jury verdict for defendant in this negligence action arising from an automobile accident. He claims the trial court erred in failing to give his requested instruction regarding whether defendant had the last clear chance to avoid the accident but negligently failed to do so. We affirm.

On September 16, 1979, plaintiff was driving his automobile north on U.S. Highway 218 near Vinton. He slowed down to a speed of 15-20 miles per hour to make a left turn off the highway. Defendant's car came up from behind, was unable to stop in time, and collided with plaintiff's car. Plaintiff filed his petition on March 27, 1980, seeking personal injury and property damages, and alleging defendant's negligence in five particulars, including failure to maintain proper lookout and following too closely. Defendant's answer asserted plaintiff was contributorily negligent as an affirmative defense. Trial was held to a jury which returned a verdict for defendant. After plaintiff's motion for a new trial was overruled, he brought this appeal.

The only issue raised by plaintiff on appeal is whether the trial court erred in failing to give his requested instruction regarding the last clear chance theory of proximate cause. That instruction read, in part, as follows:

> If you find from the evidence (1) that just prior to the collision Plaintiff was in a position of peril by reason of his own negligence, (2) that Defendant had knowledge of Plaintiff's presence, (3) that Defendant realized or in the exercise of reasonable care should have realized that Plaintiff was in a position of peril, and (4) that thereafter Defendant had the time and ability to avoid the collision through the exercise of ordinary care and failed to do so, then under such circumstances any negligence of the Plaintiff would not be a proximate cause of his injury and damage.

This instruction sets out the elements of the last clear chance as they existed prior to the decisions in Ackerman v. James, 200 N.W.2d 818 (Iowa 1972), and

Stewart v. Madison, 278 N.W.2d 284 (Iowa 1979). "Last clear chance" was abolished as a separate doctrine in Stewart, 278 N.W.2d at 293. In so doing, the court stated that, as a result of the Ackerman decision, "submitting a separate issue of last clear chance . . .adds nothing to the basic concept of proximate cause . . . . The elements previously applied as a part of the last clear chance doctrine shall, in all cases where they are applicable, be submitted as issues of proximate cause."

The issue in the present case turns on whether the words "in all cases where they are applicable" refer to elements applicable under the doctrine of last clear chance as it existed prior to Ackerman and Stewart, or whether it refers to elements applicable under traditional notions of proximate cause as discussed in Winter v. Honnegers & Co., 215 N.W.2d 316, 320 (Iowa 1974). We conclude that the reference is to elements which are applicable under traditional definitions of proximate cause. As so viewed, not all situations in which a claimant's negligence would have been excused under the now abolished doctrine of last clear chance may be eliminated as a proximate cause of the claimant's accident or injury under Ackerman and Stewart. The instruction which plaintiff proposed would have required the jury to find that if all elements of the abolished doctrine were established there would be, as a matter of law, no proximate cause. As so proposed, the instruction did not present a correct statement of the law and was properly refused by the trial court. We have considered all issues presented and find no ground for reversal.

AFFIRMED.