IN THE COURT OF APPEALS OF IOWA

No. 3-589 / 92-1808

FILED
MAR 24 1994
CLERK SUPREME COURT

TINA GOSSELINK, Individually,
RICHARD GOSSELINK, Individually,
and TINA GOSSELINK As Mother and
Next Best Friend of BRENT GOSSELINK,
TREVOR GOSSELINK and JESSICA GOSSELINK,
Minor Children,

Plaintiffs-Appellants,

vs.

ROBERT WILLIAM HUMBERT and
WERNER ENTERPRISES,

Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Gene L. Needles, Judge.

Plaintiff appeals a jury verdict finding defendant-appellee not at fault for a three-vehicle accident which caused injuries to plaintiff. **AFFIRMED.**

Donald G. Beattie and Ed Skinner of Skinner, Beattie & Wilson, P.C., Altoona, for appellants.

Charles D. Hunter and Robert P. Sharp of Belin Harris Lamson McCormick, P.C., Des Moines, for appellees.

Heard by Oxberger, C.J., Habhab, J., and McCartney, S.J.*, but decided by Donielson, C.J., Hayden, Sackett, Habhab, Cady, and Huitink, JJ.

*Senior judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

HABHAB, J.

This case concerns an automobile accident that occurred on eastbound Interstate 235 near the 63rd Street entrance ramp in Des Moines. The accident involved three vehicles: an automobile driven by Mary Fitzgerald; a passenger van driven by Richard Gosselink, in which Tina Gosselink was a passenger; and, a semi-trailer driven by Robert Humbert, an employee of Werner Enterprises, Inc.

The accident occurred as Fitzgerald entered onto Interstate 235 from 63rd Street. She attempted to merge into traffic in front of the semi-trailer driven by Humbert. Her left rear wheel struck the front of Humbert's semi causing her to lose control. Fitzgerald's vehicle then struck the passenger van driven by Richard Gosselink causing the Gosselinks' van to lose control and strike the semi. Tina Gosselink suffered injuries as a result of the accident

Gosselink[1] brought suit against Fitzgerald, Humbert and Werner seeking damages for her injuries. Gosselink settled with Fitzgerald prior to trial. The matter proceeded to a jury trial against Humbert and Werner.

The jury returned a verdict finding Humbert and Werner

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1. Tina and Richard Gosselink sought damages for personal injuries suffered by Tina in the accident as well as loss of consortium by Richard and the two minor children. We will refer to all the plaintiffs as "Gosselink."

not at fault.[1] Gosselink appeals. We affirm.

Gosselink argues the trial court erred in (1) admitting the accident report of the investigating officer; (2) refusing to instruct the jury that Humbert had a duty to sound his horn; and (3) instructing the jury that Fitzgerald had a duty to yield, as opposed to merge, as she entered the interstate where the accident occurred. As it relates to the three assignments of error, we will consider only those parts thereof that were properly preserved at the trial court level.

I. Accident Report.

Gosselink claims the district court erred in admitting Officer Ogle's report. In making our determination as to the errors that have been preserved for appellate review, we look to the objections that were made during the course of the trial. As it relates to the objection concerning the accident report, Gosselink refers us to appendix pages 81-83. There we find Gosselink's objection was directed, not so much as to the admissibility of the report itself, as it was to certain portions of the report which Gosselink claims are based on the officer's opinions and conclusions. At trial Mr. Beattie, Gosselink's attorney, stated:

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1. We will refer to both Robert William Humbert and Werner Enterprises, Inc., as "Humbert."

> [T]he investigating officer, I believe, clearly based his opinions and conclusions, which to us is the objectionable part of the police investigative report, in part upon the statements of other persons. And I think [Nichols v. Schweitzer, 472 N.W.2d 266 (Iowa 1991)] would render it inadmissible.
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> Furthermore, the investigative report contains opinions and conclusions arguably concerning the officer's opinions as to who is at fault. And in the box which Mr. Hunter [Gosselink's attorney] made reference to, it's asked this officer to opine who's at fault, by saying the contributing circumstances. The driver -- what did each driver contribute to causing this collision? And the officer Ogle stated in there regarding Mrs. Fitzgerald, I think, failure to yield and something else. And I believe that --
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> MR. SKINNER: Failure to have vehicle under control.
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> MR. BEATTIE: And failure to have vehicle under control. I believe that that impermissibly invades the province of the fact-finder as to who is at fault. He can, I believe, testify based on what he knows as to what happened. But to say why it happened or what fault of any particular driver caused or contributed to this accident, that's for the fact-finder to decide. And I believe also that it's not even the subject of an expert opinion.

Error may not be predicated upon a ruling which admits evidence unless a substantial right of the party is affected. Iowa R. Evid. 103(a). The admission of hearsay evidence is presumed to be prejudicial error unless the contrary is affirmatively established. Madison v. Colby, 348 N.W.2d 202, 204 (Iowa 1984); Stumpf v. Reiss, 502 N.W.2d 620, 623 (Iowa App. 1993). That presumption will not suffice if the record demonstrates a lack of prejudice. Shawhan v. Polk County, 420 N.W.2d 808, 810 (Iowa 1988).

We agree with Gosselink that under Nichols, 472 N.W.2d at 276, and Miller v. Bonar, 337 N.W.2d 523, 528 (Iowa

1983), an officer's opinion is inadmissible hearsay if it is based on out-of-court interviews with witnesses. An officer can give a chronological description of the events, the occurrence of which the evidence supported, if he does not state the "cause" of the accident in the sense of direct testimony allocating fault. Nichols, 472 N.W.2d at 276; Gavlock v. Coleman, 493 N.W.2d 94, 98 (Iowa App. 1992).

From our review of the record as a whole, we determine, even if the officer's statements could be seen as being directed at the relative fault of the parties or based on out-of-court interviews with witnesses, Gosselink was not prejudiced by the admission of the police report.

Gosselink states that the police officer's report is prejudicial because it conveys the opinion that Mary Margaret Fitzgerald is 100% at fault for the accident. We disagree with that characterization of the report.

In the narrative portion of the report, Officer Ogle states:

> Vehicle #1 [Humbert's truck] was eastbound in the curb lane 6200 blk, vehicle #2 [Fitzgerald's vehicle] was eastbound on the 63rd on ramp eastbound for I-235 attempting to merg[e] into traffic, vehicle #3 [Gosselink's vehicle] was eastbound beside #1 in the center lane 6200 blk east. As #2 was merging she struck #1 in the right front tire causing her to loose [sic] control of her vehicle and spinning the vehicle across all three lanes and striking #3 in the fender from the inside lane and then spinning into the ditch. Vehicles #1 and #3 collided during the accident with #2 it is believed the collision with #2 pushed #3 into #1. No witnesses, no citations issued, no injuries.

In addition, under the section "Driver Vehicle Related Contributing Circumstances" in the accident report, Officer Ogle numbers 21 and 29 relative to Mary Margaret Fitzgerald. Tracing those numbers to the key reveals that number 21 is improper lane change and number 29 was failure to have control. For both Humbert and Gosselink, Officer Ogle marked number 01 which the key reveals is "none apparent."

We find the Officer's account of the accident is very similar to evidence which was admitted without objection. In the general factual recitations of the petition, Gosselink's paragraph 5 stated:

> 9. That the Defendant, Mary Margaret Fitzgerald, operated her vehicle in such a negligent manner so as to cause her vehicle to strike Robert William Humbert, in the right front tire, causing her motor vehicle to loose control and spin 180 degrees across all three lanes of traffic and striking the vehicle driven by Richard Gosselink. The force of the impact caused the vehicle driven by Richard Gosselink to collide into the semi-truck driven by Robert William Humbert, causing the hereinafter injuries and damages.

This paragraph was read to the jury without objection.

The accident report does show Fitzgerald contributed to the accident by improperly changing lanes and failing to have control of her vehicle, however, these facts do not appear to be in dispute. Therefore, we find Gosselink was not prejudiced by the improper admission of the objected to portions of the accident report. See State v. McKettrick, 480 N.W.2d 52, 60 (Iowa 1992) (In the criminal context,

prejudice will not be found where substantially the same evidence is in the record without objection.)

II. Jury Instructions.

Gosselink claims the trial court erred in instructing the jury that Fitzgerald had a duty to yield to through traffic on I-235.

Jury instruction 19 states:

> The driver of a vehicle shall yield at the entrance to a through highway and shall yield the right-of-way to other vehicles which have entered the intersection from the through highway, or which are approaching so closely on the through highway that they are a danger. Then the driver, having yielded, may proceed cautiously and carefully to enter the through highway.
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> A violation of this law is negligence.

We find Instruction #19 accurately reflects the law. Instruction #19 is almost identical to the language of Iowa Code section 321.321, which sets out the law with respect to entering through highways. We also find that Interstate 235 is a through highway. Iowa Code section 306.3 states a freeway-expressway is defined as a primary road. In Iowa Code section 321.350 a primary road is defined as a through highway.

Gosselink also claims the trial court erred by not instructing the jury Humbert had a duty to sound his horn as Fitzgerald entered Interstate 235.

To give a proposed instruction, the theory or cause must have been pleaded or properly litigated. Gunnison v.

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Torrey, 216 N.W.2d 361, 364 (Iowa 1974). The evidence must be sufficient to warrant submission to the jury. Id. The trial court must give the evidence the most favorable construction it will reasonably bear in favor of the party urging submission. Id.

> All issues which are pled and for which there is substantial support in the evidence must be submitted. It is error not to do so, just as it is error to submit those which do not conform to both these conditions.

Seaway Candy, Inc. v. Cedar Rapids YMCA, 283 N.W.2d 315, 316 (Iowa 1979) (citing Mora v. Savereid, 222 N.W.2d 417, 419 (Iowa 1974)) (emphasis added).

Iowa Code section 321.432 states in part:

> The driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with the horn but shall not otherwise use such horn when upon a highway.

We find the trial court properly rejected Gosselink's proposed jury instruction. There is no showing in this record that it was reasonably necessary for Humbert to sound his horn when Fitzgerald entered Interstate 235. See Iowa R. App. P. 14(f)(9) (motorist has right to assume others using the road will obey the rules of the road until motorist knows or should have known otherwise).

AFFIRMED.