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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

Filed January 24, 1984

JUDY RUMLEY,	)	
Plaintiff-Appellee,	)	
vs.	)	3-386 / 83-339
CITY OF MASON CITY,	)	
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Cerro Gordo County--John F. Stone, Judge.

Plaintiff sued the city of Mason City for damages suffered when her car was hit by a Mason City police car responding to an emergency. The jury returned a verdict for the city, but the trial court then granted the plaintiff a new trial. AFFIRMED.

Warren L. DeVries and John Stuart Scoles, Mason City, for defendant-appellant.

R. Michael Sweesy, Mason City, for plaintiff-appellee.

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

The plaintiff sued the city of Mason City for damages suffered when her car was hit by a Mason City police car responding to an emergency. The jury returned a verdict for the city, but the trial court then granted the plaintiff a new trial. We affirm.

I. Motion for a New Trial

A motion for a new trial may be granted if errors of law occurred in the proceedings. Iowa R. Civ. P. 244(h). In ruling on a motion for a new trial, the trial court has broad discretion to determine whether the verdict effectuates substantial justice between the parties. Iowa R. App. P. 14(f)(3). This court is slower to interfere with a grant of a new trial than with its denial. Iowa R. App. P. 14(4). Only when the evidence clearly shows that the trial court abused its discretion will we interfere. In re Marriage of Johnson, 311 N.W.2d 697, 699 (Iowa app. 1981). We find there is sufficient evidence in the record to support the trial court's ruling.

II. City's Defense

The trial court concluded it had erred by submitting to the jury the city's defense of "authorized emergency vehicles," Iowa Code section 321.231, because there was not sufficient evidence permitting the jury to find that the police car's signal lights were approved by the department. Iowa Code section 321.231 states in part:

> The exemptions granted to an authorized emergency vehicle . . . shall apply only when such vehicle is making use of an audible signaling device meeting the requirements of section 321.433, or a visual signaling device approved by the department. . .

Iowa Code § 321.231(4)(emphasis added). Therefore, in order to take advantage of the exemption allowed in that section, it is necessary for defendant city to show that one or the other required devices was utilized. The evidence in the case at

bar is as follows: defendant's Exhibit 2 shows that the defendant purchased two Model 2200 light bars; said light bars are referred to as "Code 3": such purchase was made on September 30, 1976; evidence indicates that one such light bar was placed upon the police car involved in this action; evidence also reveals that such light bar was red, yellow and white in color. Defendant's Exhibit 3 shows that on June 28, 1977, two months prior to the accident, the Director of Transportation approved the following: " 'PSE 2200/2600 Light Bar with 360-Degree Revolving Emergency Warning Lamp and 180-Degree Warning Lamp—Red, Yellow and Blue in Color—for use on authorized motor vehicles. In compliance with the SAE J 845 Safety Standard.' " The light bars referred to in both Exhibits 2 and 3 were manufactured by Public Safety Equipment Inc., of Maryland Heights, Missouri.

Defendant city argues there was substantial evidence that the light bar on the police car at the time of the accident was approved by the department. However, the record does not support that argument. Iowa Code sections 321.424 and 321.428 control the approval of lighting devices. The only evidence that the lighting device purchased in Exhibit 2 was approved by the Department is Exhibit 3; however, the two exhibits do not coincide. Nor was there any evidence that the light bar on the police car involved in the action was mounted, adjusted and aimed in accordance with instructions from the director. See Iowa Code § 321.424. The Certificate of Approval cited PSE 2200/2600 light bar with red, yellow and blue lights as the approved light. The record shows that the police car involved in the action was Model 2200, Code 3, with red, yellow and white lights. We find the record contains no evidence that the light bar on the police car involved in the action was approved by the department as required by sections 321.231, .424 and .428.

An 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 correctly concluded that it was error to submit the defense of authorized emergency vehicle to the jury. As such, it was an error in law and a grant of a new trial is proper. Iowa R. Civ. P. 244(h).

III. Instructions

The court further concluded that it erred in failing to give an instruction as to the duty required by section 321.433. Defendant city alleges that Rumley failed to except to the instructions on that ground. However, Rumley read section 321.433 to the court and stated that there was no showing in the record that the requirements of that section had been met. Rumley reiterated that belief when making exceptions to the instructions. We find this sufficiently preserves error on that ground.

The city contends, alternatively, that Rumley was not entitled to an instruction. Its rationale is that, even if the instruction was properly requested, the court cannot consider a theory not raised in the pleadings: this theory was not raised in Rumley's petition. However, the theory of "emergency vehicle" was raised in the city's answer. Therefore, we find it a proper issue to consider on appeal. See Aetna Casualty and Surety Co. v. Jewett Lumber Co., 209 N.W.2d 48, 50 (Iowa 1973).

Furthermore, we agree that an instruction on audible signaling devices should have been given to the jury as sections 321.231 and 321.433 must be read in conjunction with each other. Rush v. Sioux City, 240 N.W.2d 431, 445 (Iowa 1976). This is because in order to fix the obligation imposed by law giving precedence to emergency vehicles, it must be determined whether a reasonable opportunity to stop or yield the right-of-way has been given. Rush at 444.

Therefore, when the instructions are insufficient or wrong in their application to the evidence, the granting of a new trial is proper. See Petitt v. City of Belle Plaine, 162 Iowa 726, 731, 144 N.W. 1015, 1017 (Iowa 1913)

AFFIRMED.