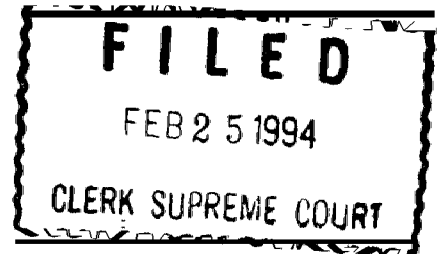


IN THE COURT OF APPEALS OF IOWA

No. 3-313 / 92-1508



MARY JO MARSH, A Minor By Her Parents and Next Friend,
LINDA R. MARSH; and LINDA R. MARSH, Individually,

Appellees,

000231

vs.

JOHN M. MUSGRAVE,

Appellant,

LARRY D. MARSH,

Appellee.

Appeal from the Iowa District Court for Pottawattamie
County, Leo F. Connolly, Judge.

Defendant appeals the judgment against him in this
personal injury action arising from a traffic accident.

AFFIRMED.

Philip Willson of Smith, Peterson, Beckman & Willson,
Council Bluffs, for appellant.

Michael G. Reilly of Perkins, Sacks, Hannan, Reilly &
Petersen, Council Bluffs, for appellees Mary Jo Marsh and
Linda R. Marsh.

William R. Hughes, Jr., of Stuart, Tinley, Peters, Thorn, French & Hughes, Council Bluffs, for appellee Larry D. Marsh.

Considered by Oxberger, C.J., Hayden, J., and Critelli, S.J.*

*Senior judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

CRITELLI, S.J.

This case involves an automobile accident between two vehicles. The accident occurred at the intersection of a north-south four-lane road and an east-west cross-street. Traffic on the cross-street was required to stop before it crossed both the northbound and the southbound lanes of the four-lane road.

One vehicle was driven by John Musgrave. The Musgrave vehicle was traveling north on the four-lane road. The other vehicle was driven the Larry Marsh. His daughter, Mary Jo Marsh, was a passenger. The Marsh vehicle was traveling east on the cross-street.

The accident occurred just after the Marsh vehicle pulled away from the stop sign located before the northbound lanes of the four-lane road. The Musgrave vehicle struck the passenger side of the Marsh vehicle injuring Mary Jo. It was raining at the time of the accident. The speed limit on the four-lane road was forty-five miles per hour.

Mary Jo and her mother, Linda, brought suit against Musgrave and Larry seeking damages related to Mary Jo's injuries. The matter proceeded to a jury trial.

Musgrave objected to the submission of jury instruction Nos. 18, 21, and 25. Instruction No. 18 instructed the jury that the driver of a vehicle must maintain a reasonable and proper speed given the existing conditions. Instruction no. 21 stated that a driver must

reduce the speed of the vehicle if the circumstances warrant it. Instruction No. 25 stated that a driver must illuminate the vehicle's headlights when there is insufficient lighting to see five hundred feet ahead. All of the instructions stated that "a violation of this law is negligence."

The jury returned a verdict finding Musgrave and Larry to be equally at fault. It found the plaintiffs' damages to be \$53,233.28. Musgrave appeals.

Our scope of review in this case is for the correction of errors at law. Iowa R. App. P. 4. "Any issue without evidentiary support should not be submitted to the jury for determination . . . More than a mere scintilla of evidence is required to avoid a directed verdict. [citations omitted]" Shannon v. Hearity, 487 N.W.2d 690, 692 (Iowa App. 1992).

The test is whether there is substantial evidence to support the instructions submitted. The possibility that two inconsistent conclusions might be drawn from the same evidence does not prevent a finding from being supported by substantial evidence . . . Evidence is substantial when a reasonable mind could accept it as adequate to reach a conclusion. . . . Nevertheless error in giving or refusing to give an instruction does not require reversal unless the error is prejudicial. [Citations omitted]

Nichols v. Schweitzer, 472 N.W.2d 266, 274 (Iowa 1991);
Dubuque Comm. Sch. Dist. v. Public Employment Relations Bd., 424 N.W.2d 427, 431 (Iowa 1988).

The trial court should submit to the jury all pleaded issues supported by substantial evidence, and it constitutes error to instruct on an issue

having no substantial evidentiary support. . . .
 In weighing the sufficiency of the evidence we
 give it the most favorable construction possible
 in favor of the party urging the submission.
 [citations omitted]

Hoekstra v. Farm Bureau Mut. Ins. Co., 382 N.W.2d 100,
 107-08 (Iowa 1986). See Miller v. International Harvester
Co., 246 N.W.2d 298, 300-01 (Iowa 1976).

This appeal is concerned with the sufficiency of
 evidence or lack of same to support the submission to the
 jury of three instructions. These instructions were all
 requested by plaintiffs' counsel and objected to by
 defendant's counsel. Number 18 states:

Any person driving a vehicle on a highway shall
 drive at a careful speed not greater than nor less
 than is reasonable and proper having due regard
 for the traffic, service, and width of the highway
 and of any other existing conditions.

A violation of this law is negligence.

It is agreed that this instruction is the same as Iowa
 Civil Jury Instruction 600.1.

Instruction Number 21 states:

Road conditions may be such that speed should be
 less than the legal limit. Traffic laws call for
 the minimum of care and not the maximum. Drivers
 should not operate a vehicle up to the legal speed
 limit of forty-five miles per hour if the
 circumstances are such that ordinary care requires
 a lesser speed.

A violation of this law is negligence.

This instruction is the same as Iowa Civil Jury Instruction
 600.9.

Musgrave was driving on a road that afforded him a
 forty-five-mile-per-hour speed limit. In support of

plaintiffs' request for Instructions 18 and 21, plaintiff points to the facts in the record indicating the weather conditions at the time of this accident. It would appear that as Musgrave approached the intersection at which the crash occurred he was driving to some extent uphill, or upgrade, and he was approaching the cross-street from which Larry was to enter Musgrave's lane of traffic from the left. There is evidence that Larry had come to a complete stop before beginning to proceed into the road on which Musgrave was driving.

On direct examination, Larry testified that the weather conditions at the time and date of the accident were "Overcast, raining, rather cool."

He remembered he had his windshield wipers on.

In response to whether he could see the defendant vehicle approaching him, he stated: "There was a vehicle down there. I can see it he [sic] down there but quite some distance down the hill what I could see through the mist and rain."

In referring to how it was raining, he testified: "It wasn't coming down in sheets, but it wasn't a sprinkle. It was better than moderate, but it was heavy. But not extremely heavy."

On cross-examination, again in reference to the amount of rain, he testified: "It wasn't a deluge, but it was pretty good rain, yes. Q. How was the light? Was it --

A. The light was very similar to the weather we have outside today. It was overcast, rather dark and dreary."

In addition to these statements concerning the weather conditions, we are referred to a series of photographs that were offered and received into evidence. These photographs showed the condition of the two colliding vehicles after the accident. Exhibit 17 is a photograph of Musgrave's vehicle, showing substantial damage to the front end and left front area of his vehicle. Exhibits 37, 38, and 53 through 60 all show the condition of Larry's vehicle after the collision. The right side of the cab and the passenger side door of this pickup were completely caved in. These photographs are evidence of an extremely hard collision between these two vehicles. There is also evidence that Larry's vehicle was pushed a substantial distance across the intersection after the collision. This is also supporting evidence of a severe collision.

The evidence of the weather conditions, the amount of light that existed at that time, and the severity of the collision between the vehicles all would be supportive of submitting Instruction 18 requiring operation of the vehicle at a speed giving due consideration to existing conditions and giving Instruction 21 requiring a speed at less than the legal speed because of particular circumstances. In addition, the severity of the collision and the fact that plaintiffs' vehicle was pushed a substantial distance after the collision would also be

000200

supportive of the fact that Musgrave was operating his vehicle at a substantial speed, which the jury could find was excessive considering the circumstances.

There was substantial evidence to support the giving of Instructions 18 and 21.

Instruction Number 25, that was given to the jury over the objection of defendant Musgrave, states:

Every motor vehicle on the highway at all times when conditions such as fog or rain provide insufficient lighting to render clearly noticeable persons and vehicles on the highway five hundred feet ahead shall display lighted headlights bright enough to reveal persons and vehicles at a safe distance ahead.

A violation of this law is negligence.

This instruction is the same as Iowa Civil Jury Instruction 600.79 with modifications.

In his direct examination, Larry testified that Musgrave did not have his vehicle lights on at the time of the collision. We have already noted the conditions of weather and degree of light, and based on said testimony, the jury could find that under such conditions Musgrave should have had adequate and sufficient lighting operable on his vehicle.

There was sufficient evidence to support the submission of Instruction Number 25 to the jury.

We concur with the trial court in its decision to give Instructions 18, 21, and 25, and deny Musgrave's request on appeal for a new trial based on improperly submitted jury instructions.

AFFIRMED.