FILED
AUG 27 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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**CAROLE A. McFARLIN** and **MYRON E. McFARLIN**,

Plaintiffs-Appellants,

vs.

**MYRNA J. BATTLES** and **ROBERT J. BATTLES**,

Defendants-Appellees.

Filed August 27, 1986

6-249
85-1454

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Appeal from the Iowa District Court for Polk County (No. 51-29996) - Joel D. Novak, Judge.

The plaintiffs appeal from judgment upon a jury verdict for the defendants, contending the district court erred in the wording of its instruction on proximate cause, by denying their motion for new trial based upon newly-discovered evidence and by denying their motion for a new trial based upon the insufficiency of the evidence to support the verdict. **AFFIRMED.**

H. Alan Bowers of Baird, Bowers, Holliday & Wilson, Des Moines, for plaintiffs-appellants.

Richard G. Langdon of Herrick, Langdon & Langdon, Des Moines, for defendants-appellees.

Considered by Oxberger, C.J., and Snell and Sackett, JJ.

*PER CURIAM*

On March 8, 1982, the plaintiff in this action, Carole A. McFarlin, was driving her car on U.S. Highway 69 in Ankeny, Iowa. While stopped for a traffic light, she was struck from behind by a vehicle driven by the defendant, Myrna J. Battles. Both drivers then pulled off the roadway and exchanged driver information. Carole did not obtain Myrna's license number. The police were not summoned and there are no known witnesses to the accident.

Carole drove from the accident scene to the office of her family physician, Dr. Craig S. Gerhart, M.D., where she was examined. She was hospitalized from July 5 through August 4, 1982, allegedly for injuries resulting from the collision with Myrna's vehicle.

On March 11, 1982, the collision was reported to the Ankeny Police Department, which conducted an accident investigation. During that investigation, Myrna told the investigating officer that she had been driving a 1980 Chevrolet Citation at the time of the accident. The same information was given by the defendants in their Answer filed in response to the plaintiffs' Petition at Law.

This matter proceeded to trial on April 8, 1985, and the jury returned a verdict in favor of the defendants three days later. Following the entry of judgment, plaintiffs filed a motion for a new trial pursuant to Iowa R. Civ. P. 244 and a petition to vacate the judgment and order a new trial under Iowa R. Civ. P. 252. After a hearing on August 22, the district court overruled both the motion and the petition. Plaintiffs then filed a timely notice of appeal. Our review is limited to the correction of errors at law. Iowa R. App. P. 4.

The McFarlins first contend that the trial court erred in giving its Instruction No. 13 defining proximate cause rather than Iowa Uniform Civil Jury Instruction No. 2.6 as they had requested. The McFarlins allege that the instruction given by the trial court failed to properly appraise the jury of the appropriate

Iowa law concerning proximate cause and was confusing and misleading both with respect to the second paragraph of that instruction and when taken as a whole.

As concerns the McFarlins' claim that the instruction failed to properly appraise the jury of the appropriate Iowa law concerning proximate cause, we think that this contention was not properly preserved for appellate review. Rule 196 of the Iowa Rules of Civil Procedure states in pertinent part:

> Before jury arguments, the Court shall give to each counsel a copy of its instructions in their final form, noting this fact of record and granting reasonable time for counsel to make objections, which shall be made and ruled on before arguments to the jury. Within such time, all objections to giving or failing to give any instruction must be made in writing or dictated into the record, out of the jury's presence, specifying the matter objected to and on what grounds. No other grounds or objections shall be asserted thereafter, or considered on appeal.

(emphasis added). Objections to instructions must be specific enough to alert the trial court to the basis for complaint so that, if there is error, it may be corrected before the case goes to the jury. Wambsgan v. Price, 274 N.W.2d 362, 365 (Iowa 1979). In determining the sufficiency of an objection to preserve error, the test is whether the exception taken alerted the trial court to the error which is urged on appeal. Goetzman v. Wichern, 327 N.W.2d 742, 745 (Iowa 1982). We will not consider claims of allegedly erroneous instructions that are raised for the first time on appeal. Poulsen v. Russell, 300 N.W.2d 289, 294 (Iowa 1981).

At trial, the following colloquy took place between counsel for the McFarlins and the trial court:

> [Mr. Bowers]: Plaintiff would object to the Court's proposed instruction No. 13, that being the instruction respecting the difference [sic] of proximate cause and would move the Court that in lieu of that particular instruction that the Court give the stock of the Iowa State Bar Association, Instruction 2.6, proximate cause

defined and the basis for this request is the fact that plaintiff believes that the instruction as set out in the uniform instructions, I believe, Your Honor, with a date of September, 1984, as I recall, will be a much clearer indication, particularly for the jury in this case as to what the real definition of proximate cause is. Plaintiff's concern is the fact that we are dealing with a minor property damage matter. Proximate cause of any serious resulting injuries could be the subject of a great deal of confusion in the minds of the jury and for that reason plaintiff would urge the Court to make that substitution to the definition on proximate cause.

The Court: Plaintiff is not stating to the Court that proposed Instruction No. 13 is a misstatement of proximate cause, are you?

Mr. Bowers: Your Honor, I don't — Quite frankly, on the record, I can't say that by virtue of the facts I thought they were giving stock instruction out of the uniform instructions and there are cases cited there maybe some changes as shown by the cases cited under the stock instruction that would make some variances with that but frankly I am unprepared to come in and say yes or no on the record.

The Court: What you are saying is the stock, the uniform stock, you think is a clearer instruction than the one I am giving?

Mr. Bowers: That's right, Your Honor.

(emphasis added).

As counsel for the McFarlins was unprepared to lodge his objection on the grounds that the trial court's instruction was a misstatement of the law of proximate cause, so we will not hear on appeal the McFarlins' argument that the instruction "erroneously defined proximate cause under Iowa law for the jury."

We do believe, however, that the McFarlins' objection at trial was sufficient to preserve their contention that the trial court's instruction was misleading, confusing, and ambiguous with respect both to the second paragraph and to the instruction when considered as a whole. As to this contention, we note that an instruction that is sufficiently ambiguous and confusing as to inadequately inform the jury of the appropriate legal standard to be applied constitutes revers-

ible error. See, i.e., Mills County State Bank v. Fisher, 282 N.W.2d 712 (Iowa 1979); Hartwig v. Olson, 261 Iowa 804, 158 N.W.2d 81 (Iowa 1968).

The instruction given by the trial court read as follows:

> By "proximate cause" is meant a moving or producing cause, and an act or omission is a proximate cause of a condition or injury sustained only when it appears that if it had not been for such act or omission the said condition would not have been brought about, or the said injury sustained.
>
> An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case, that the act or omission played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

The McFarlins agree that the first paragraph of the instruction is a straightforward and unconfusing statement, so far as it goes, of the law of proximate cause. They allege, however, that in the second paragraph the instruction's use of the phrase "substantial part" does not refer to, or define, the "substantial factor" component of proximate cause discussed by the Restatement (Second) of Torts and adopted by the Iowa Supreme Court in Petersen v. Kuhr, 201 N.W.2d 711, 713 (Iowa 1972). Therefore, argue the McFarlins, this part of the instruction was ambiguous and confusing. We disagree.

In Petersen, our supreme court adopted the following analysis of the "substantial factor" component of proximate cause from the Restatement (Second) of Torts, section 431, comment (a) at 429:

> In order to be a legal cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent. . . . [T]his is necessary but it is not of itself sufficient. The negligence must also be a substantial factor in bringing about the plaintiff's harm. The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea or responsibility, rather than

> in the so-called "philosophic sense", which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called "philosophic sense", yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.

Our supreme court, in Jones v. City of Des Moines, 355 N.W.2d 49 (Iowa 1984), dealt with the following jury instruction on proximate cause:

> By "proximate cause" is meant a moving [or] producing cause, and an act or omission is the proximate cause of a condition or injury sustained only when it appears that if it had not been for such act or omission the said condition would not have been brought about, or the said injury sustained.

Appellants in Jones argued that this instruction did not sufficiently explain the "substantial factor" component of proximate cause. The court, although noting the instruction might well have expanded on the substantial factor requirement, rejected appellant's argument by holding that the phrase "moving or producing cause" sufficiently informed the jury of the substantial factor requirement of proximate cause. We think, in the present case, the fact that the trial court's instruction used the terminology "substantial part" in lieu of the "substantial factor" terminology of the Restatement does not render it defective. It follows the court's suggestion in Jones in that it expands on the substantial factor requirement. It is consistent with the Restatement's position and is certainly as clear as the language upheld in Jones.

Neither are we persuaded that the trial court's instruction, when considered as a whole, is so confusing, misleading, and ambiguous as to require a new trial. Compare, Bauman v. City of Waverly, 164 N.W.2d 840 (Iowa 1969). The first paragraph properly sets forth the "but for" component of proximate cause and the second paragraph, as we have noted, adequately informs the jury of the "substantial factor" component.

The McFarlins' next contention is that the trial court erred in overruling both their motions for a new trial based upon newly-discovered evidence pursuant to Iowa R. Civ. P. 244(g) and their petition to vacate judgment and order a new trial based on newly-discovered evidence under Iowa R. Civ. P. 252(f). The evidence upon which the McFarlins base their claim to a new trial consists of facts they allege demonstrate that Myrna Battles was driving a different automobile at the time of the collision than the one she stated both during pretrial proceedings and during the course of trial she had been driving.

Generally, a trial court has broad discretion in passing on motions for new trial and only when there is clear abuse of that discretion will an appellate court interfere with the trial court's ruling. Houvenagle v. Wright, 340 N.W.2d 783, 785 (Iowa Ct. App. 1983). A party moving for a new trial on the ground of newly-discovered evidence must show that the evidence is discovered following trial and could not, in the exercise of due diligence, have been discovered prior to the conclusion of the trial; that the evidence is material and not merely cumulative or impeaching; and that the evidence would probably change the result if a new trial was granted. Miller v. AMF Harley-Davidson Motor Co., 328 N.W.2d 348, 353 (Iowa Ct. App. 1982). The district court found that the McFarlins had failed to show both "due diligence" and that the new evidence would probably change the result if a new trial were ordered. We think these findings were well within the discretion of the trial court.

As the McFarlins admit in their brief, it was not until after the trial that Carole "considered for the first time the remote possibility" that Myrna had been driving an automobile other than the 1980 Citation. We agree with the trial court that the McFarlins were aware prior to trial, based upon the Battles' Answer and depositions, that it was the Battles' position that Myrna had been driving the 1980 Citation when the accident occurred. The sole reason for the

failure of the McFarlins to discover the evidence they now seek to present prior to the conclusion of the trial is that the "remote possibility" of its existence was not acted upon sooner. All the evidence that led the McFarlins to speculate as to this remote possibility subsequent to trial was present prior to the trial's completion. We think that, under the facts of this case, the failure of the McFarlins to develop an alternate theory relevant to their case until after the conclusion of the trial is an insufficient showing of due diligence.

Additionally, the McFarlins failed to show that this newly-proffered evidence would probably change the result if a new trial was granted. Even if admitted at a new trial, the evidence would serve only to create a factual dispute as to which automobile Myrna had been driving at the time of the accident. The McFarlins have persuaded us neither that this dispute would have been resolved in their favor nor that, even assuming the jury credited their evidence, the outcome would probably be different.

Finally, the McFarlins contend that the trial court erred when it overruled their motion for a new trial based upon their claim that the jury's verdict was not sustained by sufficient evidence.

In ruling upon motions for new trial based upon insufficiency of evidence the trial court has broad but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties. Thomas Truck and Caster Co. v. Buffalo Caster and Wheel Corp., 210 N.W.2d 532, 536 (Iowa 1973); Iowa R. App. P. 14(f)(3). There is evidence in the record that the traffic accident between Carole McFarlin and Myrna Battles was quite minor and that Carole was not injured as a result of the accident. It was apparently this evidence that was credited by the jury in reaching its verdict. The trial court did not abuse its discretion when it allowed that verdict to stand.

**AFFIRMED.**