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CLERK, SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JUDITH ANNETTE COLEMAN,)
Plaintiff-Appellant,)
vs.)
JANICE ANN BAKER,)
Defendant-Appellee.)

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5-79
84-204

Appeal from the Iowa District Court for Polk County - Richard Strickler, Judge.

The plaintiff appeals from a judgment in her favor in this lawsuit arising from a traffic accident. REVERSED AND REMANDED.

Donald W. Baird of Baird, Bowers, Holliday & Wilson, Des Moines, for plaintiff-appellant.

Ronald A. Riley and David L. Brown of Hansen, McClintock & Riley, Des Moines, for defendant-appellee.

Considered by Donielson, P.J., and Snell and Sackett, JJ.

PER CURIAM

Plaintiff appeals from a judgment in her favor in this lawsuit arising from a traffic accident. She challenges instructions permitting the jury to find her partially negligent, and contends that the damages awarded were inadequate. We reverse and remand.

On July 30, 1981, plaintiff Judith Coleman was involved in an automobile/motorcycle accident at the intersection of an Interstate 235 exit ramp and East Euclid Avenue in Des Moines. She was riding her motorcycle eastbound on Euclid when she was struck by defendant Janice Baker's car. Baker had exited the interstate, stopped at a stop sign, and was making a left turn in front of Coleman's motorcycle when the accident occurred. As a result of the accident, Coleman sustained injuries.

Plaintiff subsequently brought this action to recover for her personal injuries. A jury found that the plaintiff had sustained damages of $5,527.30, and that each party was 50 percent at fault in causing the accident. Accordingly, Coleman was awarded half the damages or $2,763.65. She has appealed from the resulting judgment.

Plaintiff first argues that the trial court erred in giving instructions which permitted the jury to find her partially negligent and partially at fault in causing the accident. She contends the record did not support those instructions because there was no evidence of her negligence. The defendant claims that we need not reach the merits of this argument since error was not preserved.

In determining whether an objection at trial was sufficient 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 1983) (quoting Dutcher v. Lewis, 221 N.W.2d 755, 759 (Iowa 1974)). The purpose is "to afford the trial judge an opportunity to catch exactly what is in counsel's mind and thereby determine whether the objection possesses merit to an extent the

instruction should be recast." State v. Baskin, 220 N.W.2d 882, 886 (Iowa 1974).

In examining the record, we conclude that error was preserved. Initially trial counsel objected to the statement of issues,

> for the reason that there is no record evidence in this cause which would allow the giving of such comparative negligence instruction, and to the contrary, the Defendant herself has testified there were no contributing facts except her failure to see the Plaintiff that caused this accident.

Counsel also objected to four other instructions and the form of the verdict on similar grounds. This type of objection was sufficient to alert the trial judge to the error which is now urged on appeal. Accordingly, we reach the merits of plaintiff's claim.

In Iowa, the doctrine of comparative negligence is an affirmative defense. Goetzman v. Wichern, 327 N.W.2d 742, 754 (Iowa 1982). It is thus the defendant's burden to present sufficient evidence to engender a jury question. The trial court has a duty to instruct with reasonable fullness on all issues pleaded which are supported by substantial evidence. Clinton Land Co. v. M/S Assocs., 340 N.W.2d 232, 234 (Iowa 1983). It is error, however, for the court to instruct upon an issue having no substantial support or which rests on speculation. Id. In considering whether an instruction or issue was properly submitted to the jury, we view the evidence in a light most favorable to the party requesting the instruction. Franken v. City of Sioux Center, 272 N.W.2d 422, 428 (Iowa 1978).

Applying these principles, we conclude that the trial court erred in submitting instructions relating to comparative negligence. The jury was asked to consider whether the plaintiff was negligent in the following respects:

1. In failing to keep a proper lookout for other vehicles lawfully on the roadway.

2. In failing to have her motor vehicle under control.

3. In operating her vehicle at a speed greater than proper for existing circumstances.

A careful review of the record, however, reveals that these claims are not supported by substantial evidence.

Judith Coleman testified that she saw the reflection of the defendant's headlights as the vehicle was coming up the exit ramp. At the time Coleman was approximately 60 feet from the intersection. Undisputed evidence reflects that Coleman was traveling at a speed of between 30 and 35 miles per hour; the speed limit was 35 miles per hour. There is no evidence to indicate that this speed was excessive under the circumstances.

The defendant points to the fact that Des Moines police officer Richard Schuett stated that Coleman "might have been able to avoid the accident." This phrase, however, cannot be viewed in isolation. Schuett's entire statement was as follows:

> If she had perceived the vehicle at the stop sign and depending on the distance that the vehicle pulled out in front of her, she might have been able to avoid it, depending on the distance that it pulled out. The braking on the motorcycle is not that of a car.

Even viewing this testimony in a light most favorable to the defendant, we cannot say it would constitute evidence of negligence. It is far too speculative to say that based on this statement a question is raised as to whether the plaintiff should have been able to avoid the accident. Schuett's statement to this effect is contingent on the distance between vehicles at the time the defendant pulled in front of Coleman. There is nothing in the record which indicates at what particular distance Coleman should have been able to avoid the accident. Absent this, a jury question is simply not raised.

Finally, we note that even the defendant's own testimony would not indicate that Coleman was negligent. During cross-examination of Janice Baker, the following interchange took place:

> Q. Well, let me ask you this. Do you know of any other factors other than the fact that you didn't see her which contributed to the accident? A. I feel that that

> intersection is a very dangerous one. You go down in a dip and there is weeds and there is signs, and if you look to your left looking up the hill, it's an obscured — you have to pull past the sign to be able to see. I feel that's a very contributing factor are the positions of those signs.
>
> Q. Do you recall at the time I took your deposition, page 12, line 3, I asked you, "Was there any other contributing factor to this accident except the fact that you just did not see the other car? Answer: I don't believe so, no." You recall telling me that on that occasion, don't you? A. Yes.

It is apparent from this testimony that, in Janice Baker's opinion, the only contributing factors were the dangerousness of the intersection and the fact that she did not see the motorcycle.

We find no evidence that the plaintiff to this action was negligent. Any conclusion to this effect would necessarily be based on speculation. Coleman was traveling within the speed limit, saw the defendant's vehicle, and reasonably expected that she would stop at the stop sign.

> A motorist upon a public highway has a right to assume that others using the road will obey the law, including statutes, rules of the road, and necessity for due care, at least until he knows, or in the exercise of due care should have known otherwise.

Matuska v. Bryant, 260 Iowa 726, 734, 150 N.W.2d 716, 721 (Iowa 1967); Iowa R. App. P. 14(f)(9). Certainly a statutory right of way is not a guaranty of safety. Yet absent some showing that plaintiff breached a duty of care under existing circumstances, we cannot say a jury question was raised.

Accordingly, we reverse and remand for a new trial. Because of our conclusion in this respect, we find it unnecessary to address the plaintiff's remaining arguments.

REVERSED AND REMANDED.

Donielson, P.J., and Snell, J., concur; Sackett, J., dissents.

SACKETT, J. (dissenting)

I would affirm There is evidence to support a finding of comparative negligence on the part of Coleman