FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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MARY JANE CRANE,

Plaintiff-Appellant,

vs.

DAVID DEVINE, ROBERT DEVINE and LAVINE DEVINE,

Defendants-Appellees.

Filed August 9, 1979

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2-61993

Appeal from Cerro Gordo District Court - L. E. Plummer, Judge.

Plaintiff appeals from jury verdict for defendant in an action for negligence contending trial court erred in instructing the jury on the issue of contributory negligence and in failing to direct a verdict for plaintiff. AFFIRMED.

Herman Folkers of Nelsen & Folkers, Mason City, Iowa for plaintiff-appellant.

Don Burington of Laird, Burington, Bovard & Heiny, Mason City, Iowa for defendants-appellees.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Plaintiff Mary Jane Crane appeals from jury verdict for defendant David Devine in an action for negligence involving an intersection accident, contending trial court erred in instructing the jury on the issue of her contributory evidence and in failing to direct a verdict in her favor. We affirm.

The accident occurred on September 17, 1976, at the intersection of Winnebago Way and U.S. Highway #18 in Mason City, Iowa, around 1 p.m. There were no traffic control signals on Highway #18 where two eastbound and two westbound lanes intersect with Winnebago Way. Defendant-appellee, operating an automobile owned by his parents, Robert and Lavine Devine, was traveling in an easterly direction on Highway #18 and attempting to execute a left-hand turn onto Winnebago Way. His car was struck by an automobile driven by plaintiff-appellant which had been traveling westerly on Highway #18, and which was preceding through the intersection at the time of the collision.

Plaintiff's suit for damages made allegations of general negligence. Defendant answered and raised the affirmative defense of contributory negligence. Trial was held before a jury, which found for the defendants.[1] Plaintiff maintains that there was insufficient evidence in the record of her alleged contributory negligence due to failure to control her automobile and failure to maintain a proper lookout to warrant instructing the jury on these issues and that the trial court erred in denying her Motion for Directed Verdict.

I. Generally questions of negligence, contributory negligence (or freedom therefrom), and proximate cause are for the jury; it is only in exceptional cases that they may be decided as matters of law. Iowa R. App. P. 14(f)(10). However, there must be substantial evidence to warrant submission of an issue to the jury. See Dobson v. Jewell, 189 N.W.2d 547, 555 (Iowa 1971); Greenwell v. Meredith Corp., 189 N.W.2d 901, 907 (Iowa 1971). On review, this court does not make a determination of contributory negligence or lack thereof, but only examines the record to determine if a jury question were generated. McCaull v. Universal Mfg. Co., 218 N.W.2d 592, 594 (Iowa 1975).

Defendant has the initial burden of going forward with sufficient evidence of plaintiff's failure to maintain a proper lookout and to have her vehicle under control to

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[1] Although the trial court file does not show actual entry of final judgment, the jury's verdict is contained therein, as well as a timely notice of appeal therefrom.

satisfy the trial court that the jury, acting as persons of reasonable minds, would be justified in reaching such a conclusion. Nolte v. Case, 221 N.W.2d 741, 745 (Iowa 1974).[2]

At trial, defendant testified that as he approached the intersection, with the intention of turning left, he observed an orange van approaching from the east and stopped in the intersection, waiting to execute a left-hand turn. He further testified that when the van's driver observed defendant's car slow down and signal a left turn, the van completed its turn. Defendant admits his vision was obstructed by the van, but that he had observed that the traffic light east of the intersection had turned red and that conditions appeared clear for his turn. Plaintiff, on the other hand, testified that she saw no van (which, if defendant's observations were accurate, would have been directly in front of her in the inside lane), was not certain she remembered a light-controlled intersection immediately prior to the one where the collision occurred, did not recall if traffic was heavy or light around her, and did not become aware of defendant's car until "all of a sudden a car was in front of me."[3] A disinterested witness testified that he had no recollection of a van, but stated that he did observe defendant come to a complete stop in the intersection before attempting to complete the left turn.

"Keeping a proper lookout is not a statutory duty in Iowa, but is a common-law duty imposed on motorists to exercise ordinary care under the circumstances . . . ." Christensen v. Kelley, 257 Iowa 1320, 1325, 135 N.W.2d 510, 513 (1965). Additionally, proper lookout ". . . implies being watchful of the movements of the driver's own vehicle as well as the movements of the thing seen or seeable, and involves the care, watchfulness and attention of the ordinarily prudent person under the circumstances." Id.[4] See also, Paulsen v. Des Moines Union Ry. Co., 262 N.W.2d 592, 597 (Iowa 1978). In light of the testimony in the instant case, plaintiff's failure to observe either the alleged orange van or defendant's automobile could constitute a question as to proper

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[2] The burden of proof by a preponderance of the evidence as to contributory negligence also is on the defendant. See § 619.17, The Code 1977; Greenwell v. Meredith Corp., 189 N.W.2d 901, 907 (1971).

[3] Tr. p. 66.

[4] Emphasis in the original.

lookout, the lack of which could be evidence of contributory negligence. Thus, Instruction 10[5] regarding proper lookout was correctly given to the jury.

Plaintiff contends that Instruction 11, regarding control of the vehicle,[6] also was improperly given but, if properly given, actually expresses the "assured clear distance rule" of section 321.285, The Code 1977,[7] and that the instant case falls within the exception to that rule.[8] While we consider Instruction 11 as to control to be broader than one which would be required under a charge of violation of section 321.285, we hold that the "...common-law duty to exercise ordinary care under the circumstances ... rests upon the motorist at all times, that statutory rules of the road are cumulative, that they may enlarge but not abrogate this common-law duty, that they set a minimum, rather than a maximum, standard of care, and that compliance with a statute is not all that is required" of a motorist. Christensen v. Kelley, 257 Iowa 1320, 1324, 135 N.W.2d 510, 512 (1965). Accordingly, we believe control to be a proper element of that common-law duty of ordinary care and find that Instruction 11 properly was given.

We find from the record that there is sufficient evidence to generate a question on which reasonable minds may differ as to plaintiff's possible contributory negligence, and that trial court did not err.[9] Iowa R. App. P. 14(f)(17); McCaull v. Universal Mfg. Co., 218 N.W.2d 592, 594 (Iowa 1975).

II. In considering the propriety of a motion for directed verdict, this court views the evidence in the light most favorable to the party against whom the motion was

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[5] See App. p. 92.

[6] See App. p. 92-93. Instruction 11 reads in part: "A driver may be said to have his [or her] car under control when [s]he has the ability to guide and direct its course of movement, fix the speed and bring it to a stop with a reasonable degree of celerity."

[7] Section 321.285 reads in part: "...and no person shall drive any vehicle upon a highway at a speed greater than will permit him [or her] to bring it to a stop within the assured clear distance ahead...." See Nolte v. Case, 221 N.W.2d 741, 744 (Iowa 1974), which defines the elements of that rule.

[8] See Coppola v. Jameson, 200 N.W.2d 877 (Iowa 1972) (exception established) "...where an established assured clear distance is suddenly and unexpectedly shortened and obstructed by some not unreasonably anticipated instrusion by another rapidly approaching or converging vehicle...." Id. at 880.

[9] Instruction 12 defined the defense of contributory negligence and stated that "defendants charge that plaintiff ... was negligent in those particulars or specifications of negligence which have been explained to you in Instructions 10 [lookout] and 11 [control]." App. pp. 93-94.

made. Iowa R. App. P. 14(f)(2). McCaull v. Universal Mfg. Co., 218 N.W.2d at 593. Inasmuch as we have determined that the record shows sufficient evidence of possible contributory negligence on the part of the plaintiff to warrant jury instruction on that issue, we find that same evidence provided sufficient basis for trial court's denial of plaintiff's Motion for Directed Verdict. Under the evidence adduced at trial in this case, it was for the jury to determine whether the facts showed failure to maintain proper lookout or control on plaintiff's part, and to determine the question of contributory negligence and proximate cause. Holden v. Hanner, 231 Iowa 468, 475, 1 N.W.2d 671, 672-73 (1942). See also Turner v. Detrick, 257 Iowa 1197, 1201, 136 N.W.2d 253, 256 (1965).

We affirm trial court's judgment.

AFFIRMED.