IN THE COURT OF APPEALS OF IOWA

No. 1-034 / 90-964

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CLERK SUPREME COURT

MARVIN BOKHOVEN,

Appellant/Cross-Appellee,

15

vs.

VIRGINIA KLINKER,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Mahaska County, Robert Bates, Judge.

Plaintiff appeals a judgment on a jury verdict finding him fifty-one percent at fault for his injuries and contends the court erred in refusing to instruct the jury on the doctrine of last clear chance. Defendant cross-appeals and contends the trial court erred in taxing a portion of costs to her. **AFFIRMED.**

Lloyd E. Keith of Keith, Orsborn, Bauerle, Milani & Neary, Ottumwa, for appellant/ cross-appellee.

James Blomgren, Marion H. Pothoven, Randall C. Stravers, and Mindy J. Morse of Pothoven, Blomgren & Stravers, Oskaloosa, for appellee/cross-appellant.

Heard by Oxberger, C.J., and Schlegel and Habhab, JJ.

SCHLEGEL, J.

Plaintiff Marvin Bokhoven appeals a judgment on a jury verdict finding him fifty-one percent at fault and finding defendant Virginia Klinker forty-nine percent at fault for injuries suffered by Bokhoven. Plaintiff contends that the trial court erred in refusing to instruct the jury on the doctrine of last clear chance. Defendant cross-appeals and contends the trial court erred in taxing a portion of costs to her because she claims she was the successful party. We affirm.

I. Plaintiff Bokhoven was an employee of third party defendant Paul Renaud. Bokhoven and Renaud were servicing the augers in a grain bin on the farm Renaud rented from defendant Klinker. The bin has three auger systems. The transfer auger takes grain from the top of the bin to other bins. The sweep auger on the floor rotates like the hands on a clock and is unguarded. The discharge auger is under the floor of the bin and discharges grain to a wagon. One motor runs all three augers, and a system of clutches allows the operator to engage individual augers.

Bokhoven and Renaud wanted to test the transfer auger. Remaining inside the bin, they asked Klinker to help them check their work by starting the auger motor. Klinker was not acquainted with the controls and did not know the sweep auger could be disengaged. Klinker told Bokhoven and Renaud that she did not want to turn the motor on with them in the bin. Everyone recognized at that point that,

regardless of Klinker's knowledge of the controls, the sweep auger would be engaged when the motor started. All knew the sweep auger would pose a danger to the men standing on the floor of the bin, but only Bokhoven and Renaud knew there would be no danger to them if only the transfer auger were engaged. Bokhoven and Renaud discussed Klinker's warning but decided they would not have any trouble. Klinker ran the motor briefly, and the sweep auger turned.

The transfer auger did not operate long enough for them to make sure it was working properly, so Bokhoven and Renaud told Klinker to start the motor again. They had picked up their tools and a ladder they had been using in anticipation of the sweep auger running again. They ordered Klinker to start the motor again. This time the sweep auger caught Bokhoven's foot before he could jump over it.

Bokhoven sued Klinker to recover for his injuries. A jury assessed fifty-one percent of the fault to Bokhoven and forty-nine percent to Klinker. Bokhoven, therefore, recovered no damages. See Iowa Code § 668.3(1). The district court entered a judgment and assessed costs to both parties.

II. Bokhoven appeals, contending that he was entitled to an instruction on last clear chance. Bokhoven requested the following instruction:

> The Defendant, Klinker, asserts that the Plaintiff was negligent and that his negligence was a proximate cause of his injury and damage, as

> explained in Instruction No. _____, but Plaintiff asserts that under the facts and circumstances shown by the evidence that his own negligence, if any, was not a proximate clause.
>
> If you find from the evidence (1) that just prior to the accident Plaintiff was in a position of peril by reason of his own negligence, (2) that Defendant had knowledge of Plaintiff's presence, (3) that Defendant realized or in the exercise of reasonable care should have realized that Plaintiff was in a position of peril, and (4) that thereafter Defendant had the time and ability to avoid the accident through the exercise of ordinary care and failed to do so, then under such circumstances any negligence of the plaintiff would not be a proximate cause of his injury and damage.

The numbered elements in the proposed instruction accurately reflect the elements of the doctrine of "last clear chance." See Stewart v. Madison, 278 N.W.2d 284, 291 (Iowa 1979) (quoting Tilghman v. Chicago & N. W. Ry., 253 Iowa 1339, 1343, 115 N.W.2d 165, 168 (1962)). Instead, the trial court instructed the jury only on the meaning of proximate cause:

> The conduct of a party is a proximate cause of damage when it is a substantial factor in producing damage and when the damage would not have happened except for the conduct.
>
> "Substantial" means the party's conduct has such an effect in producing damage as to lead a reasonable person to regard it as a cause.

Our courts have not passed on the issue of whether the doctrine of last clear chance survived the adoption of comparative fault in Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982), or the enactment of our modified comparative fault law in Iowa Code chapter 668. The question before us reduces to whether the adoption of comparative fault subsumes the doctrine of last clear chance such that an

instruction relating to last clear chance is unnecessary or superfluous. We think that the doctrine of last clear chance was subsumed by comparative fault and, therefore, hold that the trial court did not err in submitting such an instruction to the jury.

The doctrine of last clear chance was designed to mitigate the effects of contributory negligence. Thus, a plaintiff who finds herself in harm's way by her own negligence could escape contributory negligence's complete bar on damages if the defendant recognized the peril, had the ability to avoid it, and failed to do so. See Tilghman v. Chicago & N. W. Ry., 253 Iowa 1339, 1343, 115 N.W.2d 165, 168 (1962); W. Prosser & W. Keeton, Prosser and Keeton on the Law of Torts § 66, at 463-64 (5th ed. 1984). Numerous courts have abolished the doctrine because it "fails to serve any further purpose and indeed conflicts with the basic principles of comparative negligence." W. Prosser & W. Keeton, supra, § 67, at 477.

In Stewart v. Madison, 278 N.W.2d 284, 292 (Iowa 1979), several years before Geotzman v. Wichern, the supreme court declined an invitation to adopt comparative negligence and retained the doctrine of last clear chance as an aspect of proximate cause. The court held that it was not reversible error to submit the last clear chance instruction along with a proximate cause instruction. The court emphasized that a prior decision, Ackerman v. James, 200 N.W.2d 818,

830 (Iowa 1972), indicated that "it was preferable to couch the concept solely in terms of proximate cause."

The Florida Supreme Court led the way in changing to the use of comparative fault in Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973). The California Supreme Court quickly followed in Li v. Yellow Cab Co. In adopting comparative fault, the California court stated that "the better reasoned position seems to be that when true comparative negligence is adopted, the need for last clear chance as a palliative of the hardhips of the 'all-or-nothing' rule disappears and its retention results only in a windfall to the plaintiff in direct contravention of the principle of liability in proportion to fault." 13 Cal. 3d 804, 824, 532 P.2d 1226, 1240, 119 Cal. Rptr. 858, 872 (1975). Only last month, the Michigan Supreme Court in Petrove v. Grand Trunk Western R.R., ___ Mich. ___, ___, 464 N.W.2d 711, (1991), held that a trial court erred in instructing the jury on last clear chance. In so doing, the court in Petrove adopted the reasoning of its court of appeals in Callesen v. Grand Trunk Western R.R., 175 Mich. App. 252, 437 N.W.2d 372 (1989), wherein the court stated:

> If the jury is instructed that a defendant is liable if it had the last clear chance to avoid the injury, it would then have to apportion damages based on comparative negligence. That is precisely what a jury would do in a comparative negligence situation even in the absence of a last clear chance instruction. The last clear chance instruction is, therefore, superfluous. . . . Certainly it would be a contradiction to say to a jury that a defendant is liable only if it had the

> last clear chance and then to say that, in any event, plaintiff may recover damages based upon comparative fault. If the purpose of the doctrine of last clear chance is to mitigate the harshness of contributory negligence, that goal has been accomplished by the adoption of pure comparative negligence . . . .

Id. at 262-63, 437 N.W.2d at 377.

While at the outset we recognize that the jurisdictions described above are operating under pure comparative fault systems, we find no principled reason not to apply the same reasoning in our modified comparative fault system. See, e.g., Cushman v. Perkins, 245 A.2d 846, 850-51 (Me. 1968). Our comparative fault statute embodies a legislative policy that "any damages allowed shall be diminished in proportion to the amount of fault attributable to the claimant," Iowa Code § 668.3(1), and that "[i]n determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party and the extent of the causal relation between the conduct and the damages claimed," Iowa Code § 668.1(3). This statutory language, in no uncertain terms, subsumes the concept of last clear chance.

The plaintiff's argument is seductive: (1) The doctrine of last clear chance was alive and well as an aspect of proximate cause under Stewart and Ackerman; (2) the concept of proximate cause is unchanged after the adoption of the comparative fault regime; therefore, (3) the doctrine of last clear chance is alive and available for use under the comparative fault regime. It is important to recognize, however, that the minor premise is false and causes the entire syllogism to fall.

A review of our comparative fault statute and the principles underlying the concept of comparative fault belies the notion that proximate cause is still encumbered with the archaic devices courts used to prevent the harsh effects of contributory fault. Comparative fault is designed to be a fairer system. See, e.g., Goetzman, 327 N.W.2d at 753. Under Iowa Code section 668.1(3), the fact finder must weigh the conduct and the relative fault of the parties. Nowhere does the legislature call for special treatment of one party over another, but rather a simple weighing of relative fault.

Our courts, moreover, have long held that it is error to favor one party over another by slanted or superfluous instructions. The trial court has a duty to ensure that the jury understands the issues it must decide. Clinton Land Co. v. M/S Assocs., Inc., 340 N.W.2d 232, 234 (Iowa 1983). Thus, the court must "instruct with reasonable fullness on pleaded issues supported by substantial evidence." Id. The trial court also has a duty to ensure that the jury understands the law it must apply. Sanders v. Ghrist, 421 N.W.2d 520, 522 (Iowa 1988). In evaluating this, we read all of the instructions together, not piecemeal or in artificial isolation. Id.; Clinton Land Co., 340 N.W.2d at 234. Nevertheless, the supreme court has consistently and frequently held that "[e]ven correct statements of law, if repeated to the point of undue emphasis, may constitute reversible error." Clinton Land

Co., 340 N.W.2d at 234 (citing Eickelberg v. Deere & Co., 276 N.W.2d 442, 447 (Iowa 1979)); accord Andrews v. Struble, 178 N.W.2d 391, 400 (Iowa 1970).

This "undue emphasis" rule is traceable to a concern that the instructions fairly and fully give the jury the general rule of law which they must apply in the case. See Kelly v. Rock Island & P. Ry., 138 Iowa 273, 277-78, 114 N.W. 536, 538 (1908); see also Vance v. Grohe, 223 Iowa 1109, 1118, 274 N.W. 902, 906 (1938). The supreme court in Kelly stated:

> The office of an instruction is to state the rule of law applicable and pertinent to the matter to be determined, and not to marshal the evidence, or by special mention to give undue prominence to any particular phase or feature of the fact-case made by either party to the controversy. Nor can the court be expected to give express or special warning against every possible mistake or misapprehension into which the jury may fall in the discharge of its functions. Something must be left to the intelligent apprehension and application by the jurors themselves of the general rules stated in the court's instructions.

138 Iowa at 277-78, 114 N.W. at 538. The sentiment expressed in Kelly seems particularly appropriate in the present situation. With the new level playing field created under our comparative fault statute, we need no longer concern ourselves with palliating the ills of contributory negligence. Given the present state of the law, the requested instruction clearly would be superfluous and would unduly emphasize that feature of the case.

We hold that the proximate cause instruction given the jury fully and fairly apprised them of the law which they

were to apply to the facts of this case. Because the adoption of a comparative fault tort system subsumed the ameliorative doctrine of last clear chance, the trial court thus properly declined to instruct the jury further on that doctrine. We agree with the Utah and Michigan courts that

> Our decision here does not preclude argument to the jury as to whether a party may or may not have had the "last clear chance" to avoid injury. However, the old "all-or-nothing" doctrine is now subsumed within comparative negligence and, as bearing on which party was guilty of the greater negligence, "last clear chance" becomes just one of many factors to be weighed in the comparison by the finder of fact.

Callesen, 175 Mich. App. at 262, 437 N.W.2d at 377 (quoting Dixon v. Stewart, 658 P.2d 591, 598-99 n.7 (Utah 1982)); accord Cushman v. Perkins, 245 A.2d 846, 850-51 (Me. 1968); see Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858, (1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981); Ogden v. Dalton, 501 So. 2d 1071 (La. App. 1987); Petrove v. Grand Trunk Western R.R., ___ Mich. ___, 464 N.W.2d 711 (1991), Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981); French v. Grigsby, 571 S.W.2d 867 (Tex. 1978); Cunningham v. Western Liquid Propane Gas Serv., Inc., 39 Wash. App. 185, 639 P.2d 123, rev. den., 103 Wash. 2d 1029 (1984); Britton v. Hoyt, 63 Wis. 2d 688, 218 N.W.2d 274 (1974); Danculovich v. Brown, 593 P.2d 187 (Wyo. 1979).

III. Klinker cross-appeals assessment of part of the costs against her. After the jury returned a verdict finding Bokhoven fifty-one percent at fault and Klinker

forty-nine percent at fault, the trial court assessed part of the costs to each party. She argues that she was the successful party and that Iowa Code section 625.1 therefore requires all court costs to be assessed to Bokhoven. We disagree. Klinker filed a third party petition against Renaud, making this a multiple party action. The apportionment is supportable on the ground that Klinker failed when the third party petition was dismissed. Under Iowa Code section 625.3 or 625.4, the trial court may make an equitable apportionment. See Lake v. Schaffnit, 406 N.W.2d 437, 442 (Iowa 1987); Woody v. Machin, 380 N.W.2d 727, 729 (Iowa 1986). We find no abuse of discretion in the taxation of trial costs.

IV. We hold that the trial court did not err in refusing to submit an instruction to the jury on the doctrine of last clear chance, and therefore, affirm the appeal. We also hold that the trial court did not err in its apportionment of trial costs, and therefore, affirm the cross-appeal. Costs of this appeal shall be taxed one-half to each party.

AFFIRMED.