



IN THE COURT OF APPEALS OF IOWA

LENA FREESE,)

Appellant,)

v.)

Filed December 28, 1977

NORMAN F. LEMMON and)

KAY ELLANN LEMMON and)

MERWIN R. DIECKMANN,)

Appellees,)

JO ANN FREESE, Administrator)

of the Estate of John R. Freese, Deceased,)

Appellant,)

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2-58567

v.)

NORMAN F. LEMMON and)

KAY ELLANN LEMMON and)

MERWIN R. DIECKMANN,)

Appellees.)

Appeal from Black Hawk District Court - Peter Van Metre, Judge.

Action arising out of automobile accident and alleged medical malpractice. All parties appeal. Reversed in part, affirmed in part, and remanded.

R. Kurt Swaim and John L. Butler, of Lundy, Butler, Wilson & Hall, of Eldora, for appellants.

Larry J. Cohrt, of Swisher & Cohrt, of Waterloo, for appellees Norman F. and Kay Ellann Lemmon.

David A. Elderkin, of Wadsworth, Elderkin, Pirnie & von Lackum, for appellee Merwin R. Dieckmann.

Heard by Allbee, C.J., and Donielson, Shell, Oxberger and Carter, JJ.

PER CURIAM

Plaintiffs appeal from adverse judgments on their claims for personal injuries and related damages arising out of an automobile accident and alleged medical malpractice. All defendants cross-appeal. The facts relating to defendant Dieckmann were set out in the opinion rendered in a prior appeal. *Freese v. Lemmon*, 210 N.W.2d 576 (Iowa 1973).

Plaintiffs' petition against the Lemmon defendants stated that Norman F. Lemmon drove his car so as to strike plaintiff Lena Freese and pin her against a parked car. Plaintiffs specified defendant's negligence in five particulars, accusing him of driving at an excessive speed, failing to control his automobile, failing to warn, operating his vehicle off the traveled way, and failing to keep a proper lookout. An amendment to the petition added the sixth specification that Mr. Lemmon was negligent in operating a motor vehicle when he knew or should have known that he was prone to seizures which would make him incapable of controlling his vehicle.

The case was tried to a jury. Trial court directed a verdict in favor of defendant Dieckmann at the close of plaintiffs' evidence. When the case against the Lemmon defendants was submitted to the jury, that panel was instructed that Mr. Lemmon had violated the rules of the road, and that such violation was caused by "a sudden seizure rendering Mr. Lemmon unconscious. . . ." (Instruction No. 8, X. 117.) Trial court's treatment of the legal excuse issue was not entirely clear. However, it submitted to the jury the issue of whether Mr. Lemmon was negligent in driving when he knew or should have known of his physical disability. The jury returned a verdict for defendants.

I. The appeal involving the Lemmons.

A. The burden of proof on legal excuse. Plaintiffs, in their first assignment, insist that trial court erred by instructing the jury that plaintiffs had the burden to show Mr. Lemmon's negligence was not legally excused. Defendants contest this assignment first by denying that any such instruction was given. In their view, trial court found that legal excuse had been established as a matter of law and instructed on the entirely independent sixth specification of negligence. This view finds support in trial court's Ruling pursuant to plaintiff's "Request for Specific Ruling." (X. 136.)

In its discussion with counsel (X. 116), trial court declared its understanding of the case to be that, while the cerebral hemorrhage by itself might provide defendant with the defense of legal excuse, they could not avail themselves of that defense if Mr.

Lemmon had knowledge of his condition "such that it would constitute a lack of due care on his part to be driving at all." (X. 116.) It is not clear that defendants' view is consistent with this earlier explanation of trial court's understanding of the case, or with the instructions actually given. We are, however, less concerned with either party's perceptions of what actually happened than we are with what should have occurred.

There seems to be no serious dispute on the question of whether Mr. Lemmon violated the rules of the road. Nor is there any doubt expressed as to whether Mr. Lemmon's seizure caused him to violate those rules. The open factual question is whether Mr. Lemmon knew or should have known of his potentially hazardous physical condition. If he had such knowledge, he could not claim legal excuse as a defense. *Gibbs v. Wilmeth*, 261 Iowa 1015, 1020, 157 N.W.2d 93, 96 (1968). *Cf. Winter v. Moore*, 255 Iowa 1, 4, 121 N.W.2d 82, 83 (1963); W. Prosser, *Handbook of the Law of Torts*, § 29 (4th ed. 1971). There can be no doubt that there was a factual dispute on this question which should have been resolved by the jury.¹ Trial court apparently agreed, as it submitted that precise issue to the jury under the guise of an instruction on the sixth specification of negligence. The legal issue, then, is which party should have borne the risk of non-persuasion on Mr. Lemmon's knowledge of his physical condition.

The burden of showing legal excuse was upon defendants. *Bangs v. Keifer*, 174 N.W.2d 372, 377 (Iowa 1970). After instructing the jury that Mr. Lemmon had violated the rules of the road as a matter of law and that such violation was, as a matter of law, the result of his seizure, the court should have instructed on the appropriate elements of legal excuse. *Gibbs v. Wilmeth*, *supra*. The jury should have been informed that the burden of showing such excuse was on defendants. Failure to do so was error.

Defendants claim trial court's allocation of the burden on excuse was justified by plaintiffs' sixth specification of negligence, added to the petition by amendment. This argument neglects § 619.9, The Code, and the cases which have construed it. See

¹ Thus defendants could not be entitled to a directed verdict. Their cross-appeal is without merit.

Sandhorst v. Mauk's Transfer, Inc., 252 N.W.2d 393, 400 (Iowa 1977) (Uhlenhopp, J., concurring specially); Barnes v. Gall, 251 Iowa 921, 925, 103 N.W.2d 710 (1960); Raine v. City of Dubuque, 169 Iowa 388, 391, 151 N.W. 518 (1915). Rule 14(f)(5), Rules of Appellate Procedure, is in accord. Defendants will suffer loss if legal excuse is not established. Rule 14(f)(5) superceded rule 344(f)(5), Rules of Civil Procedure, on July 1, 1977 and is a more accurate statement of the rule of law intended to be expressed in the earlier rule. Nevertheless, rule 344(f)(5) was merely a rule of thumb for the ordinary situation, and could not determine the outcome of this rather extraordinary case. Hawkeye Clay Works v. Globe & Rutgers Fire Ins. Co., 202 Iowa 1270, 211 N.W. 860 (1927), cited by defendants, is of no aid to them. It stands for the unrelated proposition that pleading without proof is not sufficient to carry an affirmative defense.

Upon an examination of the full record, we cannot hold that defendants established their defense of legal excuse as a matter of law. Therefore, trial court must be reversed and plaintiffs granted a new trial against the Lemmons. Trial court is affirmed on defendants' cross-appeal.

B. Exclusion of portions of Dr. Miller's October 28, 1974 deposition testimony. As the second part of their Lemmon appeal plaintiffs also assert trial court erred in excluding from admission into evidence certain deposition testimony of Dr. Ross Miller of the Mayo Clinic. Defendants' challenge to the relevance of Dr. Miller's proffered testimony was sustained. The testimony, in effect, is that Dr. Miller's practice is to advise patients who have experienced a seizure not to drive for two years. Dr. Miller's practice was, however, unknown to Mr. Lemmons prior to the accident in issue. Dr. Miller's practice lacks any connection with the propriety of Mr. Lemmon's conduct, and, as a consequence, also lacks in probative value. See Vine Street Corporation v. City of Council Bluffs, 220 N.W.2d 860, 862 (Iowa 1974); Schroedl v. McTague, 169 N.W.2d 860, 864 (Iowa 1969); see also E. Cleary, McCormick's Handbook of the Law of Evidence § 185 (2d ed. 1972). Under the circumstances presented, trial court acted within its discretion in excluding those portions of Dr. Miller's testimony. See Kalianov v. Darland, 252 N.W.2d 732, 735 (Iowa 1977).

C. Exclusion of Dr. Miller's April 15, 1971 deposition testimony. Trial court sustained objections to the admission of Dr. Miller's first deposition. The fact that this deposition was taken before Dieckmann was joined as a defendant does not render it inadmissible per se. Deposition testimony admissible against the Lemmon defendants

should have been permitted subject to a limiting instruction restricting the evidence to its proper scope. *Hanson v. Kline*, 136 Iowa 101, 108, 113 N.W. 504 (1907); see also *Lemke v. Mueller*, 166 N.W.2d 860, 871 (Iowa 1969); *Fed. R. Evid.* 105.

II. The appeal involving Dieckmann.

Plaintiffs also appeal from trial court's direction of a verdict for defendant Dieckmann at the close of plaintiffs' evidence. Dieckmann has cross-appealed, complaining that it was error for trial court to overrule the third ground of his motion for directed verdict. (X. 115.) Our disposition of the appeal will make consideration of the cross-appeal unnecessary.

Trial court found that no jury issue had been generated on the specifications of negligence in diagnosis and treatment. (X. 115.) Plaintiffs do not seem to contest this portion of the ruling. Instead, their energies are directed toward the specifications dealing with the duty to warn.²

The duty to warn was covered by the second, third and sixth specifications of negligence in division three of plaintiffs' petition. (X. 5; ; see *Freese v. Lemmon*, 210 N.W.2d 576, 578 (Iowa 1973).) Trial court was correct in ruling that there was no substantial evidence to support these specifications because there was no showing of the proper standard of care for a general practitioner in the Waterloo area at the time.

We are fully aware that *Speed v. State*, 240 N.W.2d 901, 908 (Iowa 1976), rejected the locality rule. Plaintiffs did not argue to trial court that the locality rule should not apply to this case. Therefore, they may not avail themselves of the rule in *Speed v. State*. *Gordon v. Pfab*, 246 N.W.2d 283, 289 (Iowa 1976). We therefore apply, as did trial court, the rule stated in *Sinkey v. Surgical Associates*, 186 N.W.2d 658, 660 (Iowa 1971).

There was no showing, even including the deposition testimony which trial court excluded, that the proper standard to be followed by a physician of ordinary skill and learning under like circumstances and in like localities would require Dieckmann to warn Mr. Lemmon not to drive. The doctors giving testimony on whether such warning would be required uniformly opined that before such a warning would be necessary facts

² The duty to consult a specialist alleged in the seventh specification is also neglected, except as a question subsumed in the advising to drive specification.

which were not available to Dieckmann should be available to the doctor giving such advice. (See, e.g., X. 112-113.)

The rule that in some instances expert testimony should not be required to establish a professional standard of care cannot be applied here. The testimony of the doctors reveals that Mr. Lemmon's disorder involves a difficult and complex area of medicine. Neurological experts were candid in describing the uncertainties which Mr. Lemmon's case presented. In light of the difficulty encountered by experts, we are unwilling to say that a jury could independently fashion an appropriate standard.

Plaintiffs also claim that Dieckmann was negligent in misconstruing Dr. Kyle's reports regarding the drug Periactin. Whether Dieckmann believed that Kyle thought the first seizure was a result of Periactin is not important. There is no question that, whatever his reasons, Kyle suggested that Mr. Lemmon be taken off of Periactin and that Dieckmann acted on that suggestion. There is no allegation that Dieckmann was negligent in following Kyle's recommendation, and the record would not support one.

Finally, trial court's action is sustainable upon a ground which it did not consider. There is no showing that Mr. Lemmon relied upon Dieckmann in reaching the conclusion that he could drive a car. The evidence is entirely to the contrary. Mr. Lemmon's reliance was placed on Dr. Kyle. Without such reliance on Dieckmann, no recovery could be had. See *Freese v. Lemmon*, 210 N.W.2d 576, 581 (Iowa 1973) (Uhlenhopp, J., concurring). Trial court was correct in directing a verdict for Dieckmann.

Reversed in part, affirmed in part, and remanded.