



287

IN THE COURT OF APPEALS OF THE STATE OF IOWA

MELBA KOLLN,
Appellant,
v.
EUGENE SWANSON,
Appellee.

Filed March 29, 1973

400
2-59846

Appeal from Crawford District Court - R. Kent Martin, Judge.

Plaintiff appeals from order denying new trial after a jury verdict adverse to her claim arising from a motor vehicle rear-end collision. Affirmed.

James R. Van Dyke, of Wunschel Law Firm, P.C., Carroll, for appellant.

David E. Green, Carroll, for appellee.

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

ALLBEE, C.J.

Plaintiff Melba Kolln appeals trial court's overruling of her motion for a new trial. Assignments of error are considered in the order briefed.

I. Plaintiff first contends that the jury verdict which denied her claim for damages is not sustained by the evidence. It is uncontroverted that late in the afternoon of December 31, 1974 an automobile driven by plaintiff was struck from behind by a truck operated by defendant. The impact occurred within the intersection of Highway 30 and Crawford County road M-14, near the east city limits of Dow City. Plaintiff testified that she was attempting to turn left from her easterly direction of travel on Highway 30 to the north on M-14. The record indicates both vehicles were moving within the speed limit. Plaintiff also testified that she had her left turn signal operating for approximately 300 feet prior to attempting her turn. She could not complete the turn without stopping due to oncoming traffic.

Much of defendant's evidence conflicted with plaintiff's. He and his passengers declared they never saw any signal of plaintiff's intention to turn; they claimed that she stopped suddenly and unexpectedly with only a brake light warning over the last 50 to 60 feet before the collision.

There was conflicting evidence in this case, which presented factual disputes. The jury is to decide such disputes; that is what was done here. There is substantial evidence in the record to support the jury's resolution of the facts. See Lappe v. Blocker, 220 N.W.2d 570, 573 (Iowa 1974); Lantz v. Cook, 256 Iowa 409, 413, 127 N.W.2d 675, 677 (1964). Trial court did not abuse its wide discretion when denying plaintiff's motion for a new trial on the first ground urged. Rule 14(f)(3), Rules of Appellate Procedure; see Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850, 860-61 (Iowa 1973).

II. Prejudicial misconduct on the part of both the jury and trial court is plaintiff's next assigned error. With respect to juror misconduct, several specific acts are asserted in plaintiff's brief and need not be repeated here. Both parties submitted juror affidavits, and a hearing was conducted at which the testimony of three jurors was taken.

We are guided in our review by familiar principles applicable to allegations of jury misconduct summarized in State v. Jackson, 195 N.W.2d 687, 689-90 (Iowa 1972):

(1) A trial court is not justified in sustaining a motion for new trial on the basis of jury misconduct unless it is shown such misconduct influenced the jury in reaching its verdict.

(2) A juror may not, by affidavit, testimony, or otherwise, state what influenced the jury in reaching its decision or verdict, as such showing inheres in the verdict.

(3) A juror, however, may state by affidavit or other means what actually took place in the jury room since actual happenings do not inhere in the verdict.

(4) In determining whether the evidence of claimed jury misconduct justifies a trial court in ordering a new trial, the court is vested with broad discretion.

The record before us reveals that most of the information gathered from the jurors concerning claimed misconduct consists of subjective opinions which inhere in the verdict; each of several jurors offered what he or she thought had influenced jurors other than himself. Regarding the specific conduct of juror Frazier in asking his insurance agent whether he had automobile insurance coverage for payment of medical bills without consideration of fault for an accident, the jurors agreed that in reporting this finding to them Frazier made clear that he did not know whether plaintiff had like coverage. No juror acknowledged that this incident affected his or her personal vote. We cannot say it appears that any misconduct complained of was calculated to, or that it is reasonably probable that it did, influence the verdict. Cf. Fischer, Inc. v. Standard Brands, Inc., 204 N.W.2d 579, 584-86 (Iowa 1973). Trial court was justified in so finding.

Turning to the purported misconduct of trial court, plaintiff's motion for new trial does not include any such ground. Consequently, trial court was never afforded the opportunity to consider the merits of this charge. A contention raised for the first time on appeal will not be considered. Maier v. Illinois Central Railroad Co., 234 N.W.2d 388, 395-96 (Iowa 1975); Ganrud v. Smith, 206 N.W.2d 311, 316 (Iowa 1973); Quad County Grain, Inc. v. Poe, 202 N.W.2d 118, 119 (Iowa 1972).

III. Plaintiff insists trial court committed reversible error when including in Instruction 21 the requirement of § 321.315, The Code, that a continuous signal of intention to turn shall be given during not less than the last 300 feet when the speed limit is in excess of 45 miles per hour. Counsel excepted to the instruction, stating:

The Court sets forth its understanding of the law as to the allegations of contributory negligence; and while part of the instruction is a correct statement of the law, part of it is not

applicable to this particular case and the plaintiff objects to the giving of the instruction in total.

Further, the instruction states what signal is required when the speed limit is 45 miles per hour. It indeed would be nice if the defendant could take his choice as to the speed limit. However, his own witnesses testified 35 miles an hour and he is in the unfortunate position he has to elect and therefore that part of the instruction, though maybe a correct statement of the law, is not applicable to this case.

It is essential that the objecting party point out wherein he contends the instruction is wrong or has no factual support so the trial court may have an opportunity to correct any error. *Miller v. International Harvester Co.*, 246 N.W.2d 298, 301 (Iowa 1976); *Rush v. Sioux City*, 240 N.W.2d 431, 441 (Iowa 1976). This plaintiff failed to do. Nothing in her objection can be said to have alerted trial court to the error now claimed: that the inclusion of the statutory mandate governing turn signals where the speed limit is in excess of 45 miles per hour confused the jury. Consequently, plaintiff preserved nothing for review.

Even if plaintiff had preserved the error, it was harmless. The jury found, in answering the second interrogatory as it did, that the manner in which plaintiff stopped her vehicle amounted to contributory negligence. That finding was consistent with, and capable of supporting, the general verdict. Any error involving the turn signal instruction could not, therefore, affect the verdict. See, e.g., *Iowa Mutual Ins. Co. v. Combes*, 257 Iowa 135, 139-40, 131 N.W.2d 751 (1964).

Plaintiff also asserts there was no evidence to support submission of the specifications of her contributory negligence to the jury. Pursuant to § 619.17, The Code, defendant alleged as a defense that plaintiff had failed to give appropriate signals of her intention to turn and stop her automobile, contrary to §§ 321.315 - .316, The Code. Defendant had the burden of establishing that plaintiff was negligent in one or both of the respects pleaded and that such negligence was a proximate cause of her injuries; the jury was so instructed. Based on the facts presented by the record we are satisfied the evidence generated jury issues on both specifications. Under rule 14(f)(10), R. App. P., trial court properly submitted the specifications to the jury.

We note, finally, that on plaintiff's request two special interrogatories asking questions of fact embodied in the issues presented by the specifications of contributory

negligence were submitted to the jury. The jury answered both interrogatories "yes," thereby finding plaintiff failed to signal of her intention to turn, that she stopped in violation of law, and that each violation was a proximate cause of the accident. These answers were harmonious with the general verdict. It was trial court's duty to enter the appropriate judgment. Rule 206, Rules of Civil Procedure.

We have examined the entire record. All errors asserted have been considered and found to lack merit.

AFFIRMED.

CARTER, J., concurs; SNELL, J., concurs in Divisions I and II and concurs only in the result of Division III; DONIELSON and OXBERGER, JJ., dissent.

- 1 -

DONIELSON, J. (dissenting)

Since I disagree with Divisions II and III of the majority opinion, I am compelled to dissent. In the instant case, there appears to be a plethora of close legal questions. Each standing alone might be excusable on the theory that an individual is generally entitled to only one day in court. However, in my view, the cumulative effect of the various legal errors committed during the course of this trial looms much larger and dictates a reversal and new trial.

Although I agree with the majority's conclusion in Division II regarding juror misconduct, I cannot subscribe to the views expressed in the majority opinion with regard to the judge-jury communications. In essence, the majority concludes that plaintiff did not properly preserve error in the trial court.

In paragraph five of plaintiff's motion for new trial, she alleged that she did not receive a fair trial. See Rule 244(a), Rules of Civil Procedure. During the hearing on that motion, the following colloquy took place between plaintiff's attorney and Ben Atzen, foreman of the jury:

"Q. (By Mr. Wunschel). You were the foreman of the jury that deliberated the matter of Kolln versus Swanson, were you not? A. I was.

Q. And the deliberations occurred on May 12, 1976, and continued to the morning of May 13th of 1976? A. That's right.

Q. Just before noon and just prior to your arriving at your verdict on May the 13th, 1976, did you not as foreman tell the Court that you felt the jury was hung because it was then 9 to 3? A. That's right.

Q. And were you not then told by the Court to arrive at a verdict because the person winning or losing would have the right of appeal? A. Yes.

Q. And did that -- A. In fact, I asked about that.

Q. All right. A. Can I mention this?

Q. Sure, I'd like to hear. A. In fact, I asked about it. 'If they don't come to an agreement,' I says, 'then they have another jury -- another trial?' And the Court said, 'Yes.'

Q. And did that advice from the Court influence your decision on your vote? A. It influenced mine, yes.

Q. Was that, in fact, a big factor in the decision to vote with the 9 that were presently voting for the verdict? A. Yes, because I thought we should come to a decision of some kind, and I thought that you could have another trial and that's why I changed my vote.

Q. Were you aware, as foreman of the jury, of others on the jury who were influenced by the information that you conveyed to them from the Court? A. I feel as though when I mentioned that the defendant -- no, wait a minute -- Mrs. Kolln, that she could have appealed for another trial if she lost this case, and I believe that might have had some bearing on the members of the court. I think that I might have had some effect on the members of the court.

The problem of improper judge and jury communications was recently addressed by our supreme court in *State v. Hahn*, 259 N.W.2d 753, 757 (Iowa 1977):

"... In *Maier v. Illinois Central Railroad Company*, 234 N.W.2d 388, 395 (Iowa 1975) we said:

"... Few occurrences during trial or deliberations are quite so likely to cause reversal as a private communication between anyone, including a judge, and a juror. *State v. Register*, 253 Iowa 495, 504-505, 112 N.W.2d 649, 653 (1962); *Daniels v. Bloomquist*, 258 Iowa 301, 306-307, 138 N.W.2d 868, 872 (1965); *State v. Grady*, 183 N.W.2d 707 (Iowa 1971); *State v. Snyder*, 223 N.W.2d 217, 221-222 (Iowa 1974); 75 Am. Jur.2d, Trial, § 1601, pages 842-844; 89 C.J.S. Trial § 473, pages 115-117." (emphasis in original).

In *Blackwell* we held the complete record made of the judge-jury communications revealed there was no reasonable possibility of prejudice and, hence, defendant's absence during the communications was harmless error. It is urged we should reach the same conclusion in the instant case. But here we cannot say there was no possibility of prejudice."

In the instant case, although the judge-jury communication was not specifically mentioned in the Motion for New Trial, there was nothing in the record which would indicate that plaintiff was aware of it either at the time the motion was filed or at the time the affidavits of the jurors were obtained. Certainly, it would have been preferable for plaintiff to have filed an amended motion so as to incorporate this newly obtained information. However, I do not believe that her failure to do so should serve as a bar to appellate review of this issue. The total absence of any improper judge-jury communications is such a crucial and inherent aspect of one's right to a fair trial that a trial judge should be obligated to assure himself that no such communications occurred once an allegation of denial of fair trial is made.

I believe that the allegation of a denial of a fair trial was sufficient, when viewed along with the record as a whole, to apprise the trial court of the potential denial of plaintiff's right to have a fair trial, unencumbered by improper judicial communications. After reviewing this record in light of *State v. Hahn*, supra, I am convinced that the trial court violated Rule 197, R.C.P. and that a new trial is required. See also § 793.18, The Code.

I would also reverse on the further ground that the trial court committed reversible error by giving Instruction No. 21 to the jury.¹ The majority concludes that

¹ Instruction No. 21 reads as follows:

The law of Iowa provides that if a person who has been injured or damaged was himself negligent and such negligence was a proximate cause of his injury or damage, then he cannot recover from another. This is known as the defense of contributory negligence, and the burden of proof of such defense is upon the defendant.

The defendant asserts that the plaintiff was negligent in the following particulars:

plaintiff did not preserve error, and assuming that she did, the error was harmless. I cannot agree with either conclusion. While I would concede that plaintiff's objection to this instruction is not a model of clarity or specificity, her objection did state that "part of the instruction is a correct statement of the law, part of it is not applicable to this particular case, and the plaintiff objects to the giving of the instruction in total." Although this objection is far from specific, I believe it was sufficient to preserve the error under the circumstances of this case.

Since the record is totally devoid of any evidence to indicate a speed in excess of 45 miles per hour, requiring a continuous signal of 300 feet, that portion of the instruction is erroneous and should not have been given. I do not subscribe to the position adopted by the majority that whatever error which may have been committed was cured by the special interrogatories answered by the jury. I do not believe that a basic and fundamental error of law can be cured by such an interrogatory since the jury may very well have been adversely affected by the erroneous instruction in answering the interrogatory. Furthermore, I am not persuaded that this error was harmless under the facts of this case. Consequently, I would reverse the district court.

OXBERGER, J., joins in this dissent.

1. In failing to give a continuous signal of her intention to turn in violation of Section 321.315 of the 1973 Code of Iowa.

2. In stopping said vehicle in violation of Section 321.316 of the 1973 Code of Iowa.

The law of Iowa provides that no person shall turn a motor vehicle from a direct course upon a highway without a signal of intention to turn right or left. Said signal shall be given continuously during not less than the last 100 feet traveled by the vehicle before turning when the speed limit is 45 miles per hour or less and a continuous signal during not less than the last 300 feet when the speed limit is in excess of 45 miles per hour.

A failure to comply with this provision of law constitutes negligence. . . .