FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JOHN R. BRUNS,

Plaintiff-Appellant/
Cross-Appellee,

vs.

THE CITY OF SIOUX CITY,

Defendant-Appellee/
Cross-Appellant.

Filed December 27, 1983

3-301
2-69612

Appeal from Woodbury District Court - Louis L. Beisser, Judge.

Plaintiff appeals and defendant cross-appeals from a judgment for defendant, entered after trial to the court, in this personal injury tort case arising out of a fall on a city sidewalk. Plaintiff seeks a retrial under the comparative negligence doctrine, the trial court having barred his recovery based on a finding of contributory negligence. AFFIRMED BY OPERATION OF LAW.

Daryl L. Heckt of Crary, Huff, Clem, Raby & Inkster, Sioux City, for plaintiff-appellant.

Patrick Nugent and Bryan J. Arneson, Assistant City Attorneys, for defendant-appellee.

Heard by Oxberger, C.J., and Snell and Hayden, JJ., but considered en banc.

PER CURIAM

Plaintiff appeals and defendant cross-appeals from a judgment for defendant, entered after trial to the court, in this personal injury tort case arising out of a fall on a city sidewalk. Plaintiff seeks a retrial under the comparative negligence doctrine, the trial court having barred his recovery based on a finding of contributory negligence. Three judges would affirm the order of the trial court and three would reverse. Pursuant to Iowa Code § 684.36(1), the order of the trial court is affirmed by operation of law.

AFFIRMED BY OPERATION OF LAW.

SNELL, J. (dissenting from the result)

Because I believe the criteria set out in Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982), for granting a new trial have been satisfied, I would reverse and remand for the limited purpose of establishing damages under the doctrine of comparative negligence.

In Goetzman, the supreme court abandoned the doctrine of contributory negligence after applying the rule for 100 years as a complete bar to recovery. In its stead, the doctrine of comparative negligence was adopted. In order to assuage the dramatic effect of this change, the court made the new doctrine effective to pending cases, including appeals, in which the issue has been preserved. The question here concerns the satisfying of that criterion.

Plaintiff, John Bruns, was walking on a public sidewalk in Sioux City, Iowa, about 6:00 P.M. on his way to attend a softball game at Roberts Stadium. He stumbled over a raised area of sidewalk where a crack had occurred. In falling to the sidewalk, he broke his wrist; the wrist now may be permanently impaired.

Plaintiff sued the City of Sioux City claiming negligence in maintaining the sidewalk. The city asserted that plaintiff was contributorily negligent and therefore was barred from recovering. Trial was held to the court. The court found that the city was negligent in failing to keep the sidewalk in a safe condition, but that plaintiff was contributorily negligent and therefore could not recover. Plaintiff's case was dismissed.

In a motion for new trial under Iowa Rule of Civil Procedure 244, plaintiff for the first time in the case alleged error by the court in failing to apply the doctrine of comparative negligence. In denying the motion, Judge Beisser indicated that he was not ruling on the substantive merits of the issue but was required to follow the law as it then existed. He said:

> How this court would rule upon the question is moot. It is the prerogative of the Supreme Court to determine the law. If it has made a pronouncement it is the duty of the

> trial court to follow it even though the trial court may disagree. . . . Kersten Co., Inc. v. Ia. Dept. of Social Services, 207 NW2d 117, 121 (Iowa 1973) [sic]. From the latter case one can determine the attitude of the appellate court toward the trial court who divines when the Supreme Court should reverse a previous holding. "The words of the wise are as goads, . . ." Ecclesiastes, 12.11. The Supreme Court has spoken and this court requires no further directions.

In citing Kersten, the trial court no doubt had in mind the supreme court's advice:

> If trial courts venture into the business of predicting when this court will reverse its previous holdings—an exercise which has long exasperated the lawyers of this state—they are engaged in a high risk adventure which we strongly recommend against.

Kersten Co., 207 N.W.2d at 121. Sixteen days after Judge Beisser's ruling the supreme court changed the law. See Goetzman.

On appeal, defendant city urges that error has not been preserved because the comparative negligence doctrine was not raised in the pleadings and cannot be raised by motion for new trial under Iowa Rule of Civil Procedure 244. Defendant, in answering the petition, claimed that plaintiff was barred by his own negligence, which was the proximate cause of his accident. Plaintiff was not required under our rules to deny this claim by written pleading. Nor did the court order a reply. See Iowa R. Civ. P. 73. Moreover, in my view, plaintiff was entitled to rely on one hundred years of fixed legal doctrine without risking the sword of Damocles for failing to claim in his petition that the law was wrong.

Defendant argues that under Linge v. Iowa State Highway Commission, 260 Iowa 1226, 1232, 150 N.W.2d 642, 646 (1967), error may not be preserved by initially raising the issue in a motion for new trial. However, in Linge, the preservation issue concerned matters of evidence on which the trial judge had had no opportunity to rule in a trial to the jury. The issue of comparative negligence in the case at bar was not such that the trial judge would have ruled differently had the matter been raised earlier. Iowa Rule of Civil Procedure 244 allows the

aggrieved party, on motion, to have a decision vacated and a new trial granted for: "(h) Errors of law occurring in the proceedings . . . ."

In determining the sufficiency of an objection to preserve error, "the test is whether the exception taken alerted the trial court to the error which is urged on appeal." Goetzman, at 745 (quoting Dutcher v. Lewis, 221 N.W.2d 755, 759 (Iowa 1974)). Under this test, error was preserved because the trial judge clearly based his ruling on the doctrine of contributory negligence then in effect, which was the essence of the defense throughout the trial. Although it can hardly be said that Judge Beisser erred by following law as it existed at the time of his ruling concerning the doctrine of contributory negligence, nevertheless, I believe the supreme court made allowances for this situation by recognizing the harshness of the change in the law and by granting relief liberally to plaintiffs who meet the requirements established by Goetzman. Granting a new trial in the case at bar would be entirely consistent with Sechler v. State, ___ N.W.2d ___ (Iowa 1983), in which the court found error was not preserved. In Sechler, the plaintiff claimed that contributory negligence was an improper defense to actions based on gross negligence. Cf. Schuller v. Hy-Vee Food Stores, Inc., 328 N.W.2d 328, 333 (Iowa 1982) (appellant had specifically referred to comparative negligence by motion, thus preserving error). In Sechler, the Iowa Supreme Court stated:

> These references to the impropriety of contributory negligence as a defense fall short of preserving error on the issue of comparative negligence. In particular, the attack by the plaintiff on the defense of contributory negligence did not sufficiently alert the trial court that rather than considering the decedent's negligence as a complete bar to recovery, it should substitute the standard of comparative fault.

___ N.W.2d at ___. In the case at bar, Judge Beisser was fully alerted to the comparative negligence issue. I would grant plaintiff a new trial on the issues of plaintiff's negligence and the extent of his damages.