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CLERK SUPREME COURT

63

IN THE COURT OF APPEALS OF IOWA

DUANE K. LAU and DONNA M. LAU,

Appellants,

vs.

CARL D. SMITH, JAMES L. SMITH and LEONA W. SMITH,

Appellees.

Filed May 20, 1977

84
2-58250

Appeal from Fayette District Court - Dennis D. Damsgaard, Judge.

Appeal from jury verdict in favor of defendants in personal injury action. - Judgment affirmed.

R. L. Donohue, of Donohue Law Office, of West Union, for Appellants.

Mark D. Buchheit, of West Union, for Appellees.

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

PER CURIAM

This is a personal injury action arising out of a collision between two vehicles at a graveled secondary road intersection. Plaintiffs are husband and wife seeking damages for injuries to the husband-driver for loss of his services and companionship to his wife. Defendants are the driver and owners of the other vehicle. The case was tried to a jury which found for defendants. Plaintiffs appeal. We affirm.

Plaintiffs seek a new trial on the grounds that defendants' negligence was proved as a matter of law, that there was not sufficient evidence to sustain the verdict and that it failed to render substantial justice.

Plaintiffs' car was going south while defendants' truck traveled west. Both roads were graveled; there were no stop signs at the intersection. There were no witnesses to the accident other than the parties. The path of plaintiffs' vehicle showed no skid marks. Defendants' truck left skid marks about 128 feet. Speeds were disputed. It was not clear whether plaintiffs' driver failed to look or couldn't see defendants' truck because of standing corn. Defendant-driver testified he shifted down, braked and drove so that his back wheels went off the road in trying to avoid the accident.

Plaintiffs acknowledge that it is an unusual case where a court directs a verdict against defendants establishing negligence as a matter of law. Rule 344(f)(10), Rules of Civil Procedure. Only where reasonable men can draw but a single conclusion from facts do courts determine the question of negligence of either party as a matter of law. Becker v. City of Waterloo, 245 Iowa 666, 63 N.W.2d 919 (1954). In reviewing the record, we find this is not such a case. *See also* Kaus v. Scott, 174 N.W.2d 446 (Iowa 1970).

The review of the record on appeal is in the light most

favorable to the judgment. If it is supported by substantial evidence and is justified as a matter of law the judgment will not be disturbed on appeal. Rule 344(f)(1), Rules of Civil Procedure. Northrup v. Foster, 204 N.W.2d 889 (Iowa 1973). We find the evidence presented a jury question as to defendants' negligence and plaintiffs' contributory negligence and supports the judgment.

Plaintiffs also assign error in the trial court's handling of admission of photographs offered by defendants. Although initially admitted, they were subsequently withdrawn by the court prior to submission of the case to the jury. Plaintiffs complain that the court should have specifically instructed to disregard them. This is not required. *See* Reidy v. Chicago, Burlington and Quincy Railroad, 220 Iowa 1386, 258 N.W. 675 (1935).

Plaintiff suggests that the photographs were considered by the jury and cite the affidavit of one juror to that effect. Other juror affidavits state the photos were not considered. We do not find evidence of misconduct here to prejudice plaintiffs and warrant a new trial. *See* State v. Hall, 235 N.W.2d 702 (Iowa 1975).

A final assignment of error arises from a jury request for information after starting deliberations. A question was raised regarding the testimony of a state trooper. The court had told the court reporter his work was completed for the day so he went home. The court, with the agreement of counsel, advised the jury "This is a fact question to be determined by the jury from the evidence and the court cannot comment on same."

Even if the reporter had been available the court was not required to have portions of evidence transcribed and read to the jury. There is considerable discretion vested in trial

court as to what is reasonable and proper. Unless that discretion was abused its decision will not be disturbed by this court. Hutchinson v. Fort Des Moines Com. Servs., 252 Iowa 536, 107 N.W.2d 567 (1961). Trial court properly handled this request. Judgment affirmed.

Oxberger, J. concurs specially.

Oxberger, J. (concurring specially)

I agree the judgment below must be affirmed. I write to clarify the issue regarding the request directed to the judge during jury deliberations. The jury question was couched in the following terms:

> "Did the patrolman testify that Mr. Lau could not have seen an oncoming vehicle because of the corn field?"

Having dismissed the court reporter, the judge after consultation and agreement with counsel for both parties responded:

> "This is a fact question to be determined by the jury and the Court cannot comment on the same."

On appeal, plaintiffs assert Hutcheson v. Fort Des Moines Community Services, Inc., 252 Iowa 536, 107 N.W.2d 567 (1961) requires reversal and new trial. *Hutcheson* merely observed that "a reasonable and specific request by the jury directed to the court to have a portion of the testimony read to it after its deliberation is permissible and proper." 252 Iowa at 546, 107 N.W.2d at 573. The trial court in its discretion decides the reasonableness and propriety of such a jury request.

In this case the jury question was not a specific request for a reading of a portion of testimony. Although, obviously, the request could have elicited such a response from the judge, the dismissal of the court reporter precluded the judge from so responding. He could exercise no discretion in deciding whether to have testimony reread to the jury. State v. Jackson, 204 N.W.2d 915, 916 (Iowa 1973). The response given by the judge represented the considered judgment of the judge and counsel for both parties. Plaintiffs waived any appeal of this issue when counsel failed to request that the trial court send the jury home for the evening to await the availability of the court reporter the next morning.

Trial counsel for plaintiffs cannot use the appellate

process to rectify judgment calls below which prove to have been illconsidered. Without timely and specific objection below, no error at law is preserved for correction on appeal. Rule 344, Rules of Civil Procedure.