FILED
NOV 19 1979
CLERK SUPREME COURT

204

IN THE COURT OF APPEALS OF IOWA

JUDY A. MILLER,

Plaintiff-Appellant,

vs.

VIRGINIA ACKERMAN and ODIN CONSTRUCTION, INC.,

Defendants-Appellees.

Filed November 19, 1979

221
2-62605

Appeal from Polk District Court - A. M. Critelli, Judge.

Plaintiff appeals judgment for defendants in personal injury suit, alleging trial court improperly instructed the jury. - Reversed and remanded.

Jeff H. Jeffries, of Hopkins & Huebner, Des Moines, for plaintiff-appellant.

Ronald A. Riley and David L. Brown, of Hansen, McClintock & Riley, Des Moines, for defendants-appellees.

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

OXBERGER, C.J.

Plaintiff Judy A. Miller appeals judgment in personal injury suit for defendants Virginia Ackerman and Odin Construction, Inc. alleging the trial court improperly instructed the jury. Reversed and remanded.

I. Instructions should fully present the issues to the jury so it will have a proper understanding of the law to be applied in reaching a verdict. Robeson v. Dilts, 170 N.W.2d 408, 414 (Iowa 1969). Theories of both parties in a lawsuit, as far as supported by the pleadings and substantial evidence, must be submitted to the jury and it is prejudicial error not to do so. Doser v. Interstate Power Co., 173 N.W.2d 556, 559 (Iowa 1970). Further, if the trial court improperly included or excluded theories of claims or defenses, new trial is warranted. See Doser, Id.; Koll v. Manatt's Transportation Co., 253 N.W.2d 265, 269 (Iowa 1977). Plaintiff alleges six grounds for reversal; all are based on instructions the trial court gave or refused to give.

II. Sudden emergency instruction. Plaintiffs appeal trial court's failure to give the "sudden emergency" instruction. Defendants claim the driver's act of diverting his eyes from the roadway created the emergency. In Vanderheiden v. Clearfield Truck Rentals, Inc., 210 N.W.2d 527, 529 (Iowa 1973) the court held the fact the driver diverted his eyes from the roadway while reaching for a package of cigarettes did not preclude inclusion of the sudden emergency instruction. Similarly, the instruction should have been given here.

III. Mere accident instruction. Plaintiff asserts the trial court improperly instructed the jury that the "mere fact" a collision occurred and resulted in damage was not sufficient to show negligence by either party. In Greninger v. City of Des Moines, 264 N.W.2d 615, 617 (Iowa 1978) the court said the giving of the instruction was discretionary depending on the circumstances of the case. The court noted the appellant had not raised the arguments that caused the court to abolish the "unavoidable accident" instruction in Koll, 253 N.W.2d at 269. Here the appellant has raised the Koll arguments. We decline to anticipate the supreme court's ruling and hold to the Greninger discretionary rule. We find no abuse of discretion in giving the instruction in this case.

IV. Sole proximate cause instruction. Plaintiff claims no evidence was presented

to raise a jury question on the negligence of a third party other than Ray Miller, her driver. The only possible third party who could have been negligent was Holmes, yet the trial court instruction permitted the jury to consider negligent acts of any and all inhabitants of the earth with respect to this claim. Thus, the instruction was far too broad and warrants reversal.

V. Passenger's contributory negligence instruction. Rules on passenger's duty of care are expressed in Ehlinger v. State, 237 N.W.2d 784, 790 (Iowa 1976); Glandon v. Fiala, 261 Iowa 750, 755, 156 N.W.2d 327, 331 (1968) and as stated in Wiedenfeld v. Chicago & N.W. Transp. Co., 252 N.W.2d 691, 698 (Iowa 1977), are "in conformity with Prosser's statement of a passenger's obligation." See Prosser, Torts, § 74, at 489 (1971).

In light of these rules, we believe the instruction misstated the duties of the passenger. The duties of the passenger are so stated in Young v. Wlazek, 262 N.W.2d 300, 307 (Minn. 1977).

> A passenger in an automobile assumes a duty not to ride with an incompetent driver, not to obstruct the driver, and to warn the driver of hazards which (1) he perceives his driver does not perceive. He is under no other duties.

VI. Lookout to the rear instruction. Plaintiff claims error due to trial court's refusal to instruct on defendant's duty to maintain a lookout to the rear. We find Vanderheiden, 210 N.W.2d at 530, controlling. The jury could have agreed with the defendant that she was faced with the need for a sudden stop but it was not bound to do so. The jury could have found defendant executed a "panic stop" and this did not excuse her duty to lookout to the rear. The instruction should have been given.

VII. Stopping with reasonable safety instruction. We believe sufficient evidence was presented to require the requested instruction concerning sudden stopping and duty to signal intent to stop.

Because of the errors in trial court's instructions, indicated in divisions II, V, VI and VII, we reverse and remand for new trial.

Donielson and Carter, JJ., concur in part and dissent in part.

DONIELSON, J. (concurring in part; dissenting in part)

I dissent. I do not agree with the majority that the sudden emergency instruction, the lookout to the rear instruction, and the reasonable safety instruction should have been given, or that the instruction on the duties of a passenger misstated the law. I would affirm the judgment of the trial court.

The sudden emergency instruction need not have been given because plaintiff did not prove by a preponderance of the evidence that an emergency, not created by her or her driver's act, existed. Golden v. Springer, 238 N.W.2d 314, 321 (Iowa 1976).

A sudden emergency has been defined as:

> "(1) [A]n unforseen combination of circumstances which calls for immediate action; (2) a perplexing contingency or complication of circumstances; (3) a sudden or unexpected occasion for action; exigency; pressing neccesity.

Young v. Hendricks, 226 Iowa 211, 215, 283 N.W. 895, 898 (1939) (citations omitted).

Under this definition, the record does not generate a jury question on the issue of sudden emergency. See Golden, 238 N.W.2d at 321. Unlike the situation in Vanderheiden v. Clearfield Truck Rentals, Inc., 210 N.W.2d 527, 529 (Iowa 1973), where plaintiff suddenly pulled onto the road, defendant's truck was on the road and plaintiff was aware of its presence. The crowded traffic conditions, due to the football game traffic, created the reasonable likelihood a vehicle would stop, and stop rather abruptly. Such an expected occurrence would hardly be an emergency. It was the action of the driver of plaintiff's car in diverting his eyes to the side of the road to see a sign pointed out by plaintiff that turned the expected into the unexpected. The only emergency situation present resulted from plaintiff's driver's own act and indirectly an act of plaintiff; the instruction on a sudden emergency need not have been given. Vanderheiden, 210 N.W.2d at 531-32 (Moore, C.J., specially concurring).

The majority finds reversible error in trial court's instruction 13, concerning the passengers duty of care and contributory negligence, because it misstates the duties of a passenger under Iowa law. This instruction, while perhaps not a perfect instruction on Iowa law as applied to these facts, accurately states the law concerning the duties of a passenger. See Wiedenfeld v. Chicago Northwestern Transportation Co., 252 N.W.2d 691, 698 (Iowa 1977); Ehlinger v. State, 237 N.W.2d 784, 790 (Iowa 1976). A hypercritical analysis of any instruction will always find certain errors or ambiguities, but this is less than useful in the practical realities of a trial. The correct standard of review is

whether the instruction reasonably and fairly states the law in relation to the relevant facts. Hackman v. Beckwith, 245 Iowa 791, 801, 64 N.W.2d 275, 281 (1954). Here, there was sufficient evidence in the record to submit this instruction, which in my view correctly stated Iowa law.

The question as to the propriety or sufficiency of a lookout to the rear is determined by the particular surrounding circumstances found in the record. Duffy v. Harden, 179 N.W.2d 496, 500 (Iowa 1970). The majority concludes the instruction on lookout to the rear was incorrectly refused. A jury, however, may consider only issues properly pleaded and supported by evidentiary support in the record. Wong v. Waterloo Community School District, 232 N.W.2d 865, 870 (Iowa 1975). I would hold there was insufficient evidence in the record to support an instruction on this issue; a mere scintilla of evidence is insufficient to authorize an instruction on that evidence. Wiedenfeld, 252 N.W.2d at 695. At the time the majority would impose a duty of lookout to the rear, defendant was attempting to avoid a collision with a car parked in front of her. It is unreasonable to impose such a duty under those circumstances. Defendant had no opportunity to warn plaintiff's driver or to manuever her vehicle to avoid being hit by plaintiff's vehicle ; the duty to maintain a lookout to the rear in such a situation is meaningless. Duffy, 179 N.W.2d at 500. It was correct to refuse to submit this instruction to the jury and plaintiff was not prejudiced thereby.

Likewise, I cannot agree with the majority that it was reversible error to refuse to submit plaintiff's requested instruction concerning sudden stopping and the duty to signal intent to stop. Reversal is called for only when it is shown that the refusal to give the requested instruction was not supported by evidence in the record, and the requesting party has been prejudiced. See McKenna v. Noy, 76 Iowa 322, 324, 41 N.W. 23, 30 (1888). While prejudice is presumed on a showing of error, Jones v. Iowa State Highway Commission, 185 N.W.2d 746, 751 (Iowa 1971), the facts of this case overcome this presumption. Plaintiff's driver was not watching the roadway when defendant was braking; when he looked back to the roadway, defendant's vehicle was stopped. Thus, a hand signal made by defendant would have had no warning or deterring effect. Until plaintiff's driver resumed looking straight ahead, such a signal would have been meaningless; after that time the brake lights of defendant's vehicle provided sufficient warning of defendant's stopped condition. Plaintiff suffered no prejudice by not having

209

this instruction given. Thus, I would affirm the trial court's decision not to submit this instruction to the jury.

Concurring in Divisions III and IV of the majority's opinion, and for the reasons set forth in this dissent, I would affirm the judgment of the trial court.

CARTER, J. (concurring in part and dissenting in part)

I. I concur in Divisions III, IV and VII of the majority opinion and in the result. My concurrence in the result is based entirely upon the error discussed in Division VII of the majority opinion. This specification of negligence was the gravamen of plaintiff's case against defendants and should have been submitted to the jury.

II. Because of the theories under which negligence was attributed to the defendant in this action, the failure to give a sudden emergency instruction was not error.

III. I believe that the instruction suggested in Division V is proper, but the trial court's instruction was adequate and no ground for reversal exists on this issue.

IV. I do not believe a lookout to the rear instruction was required.