

FILED

MAR 31 1980

CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

WAYNE JOHNSON,

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Plaintiff-Appellee,

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Filed March 31, 1980

vs.

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STATE OF IOWA,

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2-62501

Defendant-Appellant.)

Appeal from Louisa District Court - Harlan W. Bainter, Judge.

State appeals from judgment for plaintiff in personal injury suit arising out of one-vehicle highway accident. - Affirmed.

Thomas J. Miller, Attorney General of Iowa, and Robert W. Goodwin, Special Assistant Attorney General and Counsel to Iowa Department of Transportation, Ames, for defendant-appellant.

Verne Lawyer and Richard H. Doyle, IV., Des Moines, and A. Fred Berger, of Berger & Lane, Davenport, for plaintiff-appellee.

Heard by Donielson, Snell, Carter and Johnson, JJ. Oxberger, C.J., takes no part.

SNELL, J.

The State of Iowa appeals from a judgment for plaintiff in a personal injury suit arising out of a single-vehicle highway accident involving a pickup truck in which plaintiff was a passenger. The State asserts that the trial court erred in finding that the State did not give adequate warnings of a road construction hazard; that the decisions regarding warning signs and road construction were within the discretionary function exception to the State Tort Claims Act; and that there was no substantial evidence to support the trial court's finding that the driver of the truck in which plaintiff was a passenger swerved to the right to avoid an oncoming vehicle and went off the road. We affirm.

The case was tried to the trial court at law. Thus, the trial court's fact findings have the force of a jury verdict, Koehler v. State, 263 N.W.2d 760, 761 (Iowa 1978); Iowa R. App. P. 4, and are binding on the appellate court if supported by substantial evidence. Stanley v. State, 197 N.W.2d 599, 604 (Iowa 1972); Iowa R. App. P. 14(f)(1). We review the evidence in the light most favorable to the judgment and construe the court's findings liberally to support the result. Koehler, 263 N.W.2d at 761; Hunt v. State, 252 N.W.2d 715, 717 (Iowa 1977). We are required only to consider evidence favorable to the successful party, even if it is contradicted by other evidence. Koehler, 263 N.W.2d at 761-62; Hunt, 252 N.W.2d at 717. With these principles in mind we review the trial court's findings of fact.

Plaintiff was a passenger in a pickup truck that was traveling on a highway under construction. On entering a curve in the road where construction was in progress, both plaintiff and the driver observed an oncoming vehicle encroaching on their side of the road. The driver swerved to the right to avoid the vehicle and the right wheels of the pickup went off the road, down a nine to twelve inch drop-off created by recent reconstruction of the shoulder. The pickup then went into a skid and as the driver attempted to bring the pickup back onto the road surface, the pickup rolled over. Plaintiff was thrown out of the pickup during the rollover and suffered injuries that have rendered him a permanent quadriplegic.

The trial court concluded that the State failed in its duty to adequately warn of the nine to twelve inch drop-off hazard created by the road construction. In so ruling,

the trial court stated that the warnings would have been adequate if the duration of the hazard was only hours, or a day or two, however, with the contemplation that the hazard would exist for over seventeen days (the time from the creation of the hazard to the time of the accident), the State had a duty to increase the warnings to minimize the risk. The trial court also ruled that the discretionary function exception to the State Tort Claims Act, § 25A.14(1), The Code 1977, did not apply to relieve the State of liability, since although discretionary functions were involved in setting the standards for road construction and adequate warnings, the failure to follow those standards was beyond the discretionary function exception. The trial court further found that the State's negligence was the proximate cause of the accident and plaintiff's resultant injury. The trial court awarded \$966,000 to plaintiff for his injuries, of which \$500,000 was offset by settlements with other defendants.

I. The State challenges the trial court's conclusion that the warnings provided were inadequate and especially assails the trial court's statement that the warnings may have been adequate for one or two days, but not for seventeen days. We are convinced the trial court was correct in ruling that the warnings were inadequate. The State has a duty to maintain its highways in a safe condition and to warn the traveling public of conditions that endanger travel. Koehler, 263 N.W.2d at 764; Hunt, 252 N.W.2d at 717. The performance of that duty is measured by a reasonableness standard in light of the totality of the circumstances. Koehler, 263 N.W.2d at 766.

Warning signs for construction and maintenance projects must notify drivers of specific hazards that may be encountered. Iowa State Highway Commission, Manual on Uniform Traffic Control Devices § 6B-12 (1971). In the case at bar, the signs consisted of a "Road Construction Ahead" sign approximately 1100 feet before the curve, followed by a "Curve" sign and a "No Passing" sign on the left side of the highway. There were also flashing barricades at 150 to 200 foot intervals on the shoulders around the outside edge of the curve. These signs were quite similar to the warning signs held to be inadequate in the factually similar case of Stanley v. State, 197 N.W.2d 599, 604-05 (Iowa 1972). The warning signs did not notify drivers of the specific hazard of a low or unfinished shoulder. Thus, the State failed to comply with a procedure delineated in a manual of the Iowa State Highway Commission. Such a failure constitutes evidence of

negligence. Hunt, 252 N.W.2d at 718-19. The trial court concluded that the State's failure to provide adequate warnings as delineated in its own manual was sufficient to establish the State's negligence under the circumstances.

However, in so concluding, the trial court made the statement that the warnings may have been adequate for one or two days, but the State had a duty to increase the warnings with the knowledge that the hazardous condition would continue to exist for seventeen days or longer. The State contends this statement was error, on the ground that "since warning signs are primarily for the protection of the driver who is unacquainted with the road", Iowa State Highway Commission, Manual on Uniform Traffic Control Devices § 2C-3 (1971), if the warning signs were adequate to warn unacquainted drivers for two days, they would be equally adequate for seventeen or more days. However, the trial court could have concluded that although unacquainted drivers are the primary concern, that concern only establishes the minimum warning standards, while consideration of other factors such as the speed and volume of traffic, the duration of the operation, and exposure to hazards may reveal that warnings in addition to those established by the minimum standards are required. Iowa State Highway Commission, Manual on Uniform Traffic Control Devices § 6A-3, at 268 (1971). These factors prompt a consideration of the sufficiency of warnings to the acquainted as well as the unacquainted driver. In considering the driver who is acquainted with the road through regular travel, consideration should be accorded the theory that warning signs left up over an extended period of time tend to lose their effectiveness, particularly for drivers who travel the road with regularity. Brandon v. State, 367 So.2d 137, 143 (La. App. 1979). Thus, although the trial court's statement may have been illogical when focused only on a consideration of the driver who is unacquainted with the particular road, the statement is quite appropriate when considering the vast number of motorists who traverse the particular road on a regular basis. Such a consideration appears to be adequately supported by and quite consistent with the provision requiring consideration of the speed and volume of traffic, duration of the operation, and exposure to hazards. Iowa State Highway Commission, Manual on Uniform Traffic Control Devices § 6A-3, at 268 (1971). We cannot conclude that the trial court erred in its statement regarding the adequacy of warnings.

II. The State contends that the Highway Commission decisions on what signs to place at the construction site that were found to constitute negligence were within the discretionary function exception to the State Tort Claims Act. § 25A.14(1), The Code 1977. Here, however, as in Stanley v. State, 197 N.W.2d 599, 604 (Iowa 1972), the exercise of any discretion had ceased before the commission of the acts found to be negligent. The discretionary function involved setting the standards for adequate warnings. The implementation of that discretionary function involved the compliance with those standards at the operational level. The trial court determined that the State was negligent in its implementation of the discretionary warning standards, rather than any actual exercise of discretion. Thus, the discretionary function exception was not available to the State in the case at bar. Lewis v. State, 256 N.W.2d 181, 195 (Iowa 1977). The trial court did not err in concluding that the discretionary function exception was not applicable.

III. Lastly, the State contends that its negligence was not the proximate cause of the accident, since there was insufficient evidence to support the trial court's finding that the driver of the pickup swerved to the right to avoid an oncoming vehicle, and there was substantial evidence that the driver of the pickup negligently steered the pickup off the roadway and that negligence was the proximate cause of the accident. The issues of negligence, contributory negligence, and proximate cause are matters of determination that normally are exclusively within the province of the trier of fact, and may be settled as questions of law only in exceptional cases. Ehlinger v. State, 237 N.W.2d 784, 787 (Iowa 1976). Both plaintiff and the driver testified that they saw an oncoming vehicle moving across the center line onto their side of the highway. The trial court apparently gave credibility to their testimony and accepted it as true. We conclude that there was substantial evidence supporting this finding of fact. We cannot conclude that the driver's decision, when confronted with the sudden emergency of an oncoming vehicle crossing the center line onto his side of the road, to swerve to the right in an attempt to avoid the oncoming vehicle constituted negligence as a matter of law. Stanley, 197 N.W.2d at 604. Neither can we conclude that the driver's actions in attempting to return the vehicle to the roadway surface were sufficiently negligent to relieve the State from liability for the creation of this hazardous road condition, and the failure to adequately warn of its existence. Brandon, 367 So.2d at 142-43.

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Consequently, we conclude that the trial court correctly determined that the State was negligent in failing to provide adequate warnings of a hazardous road condition, and that the State's negligence was the proximate cause of the damages suffered by plaintiff.

AFFIRMED.