

IN THE COURT OF APPEALS OF IOWA

No. 2-050 / 91-1033

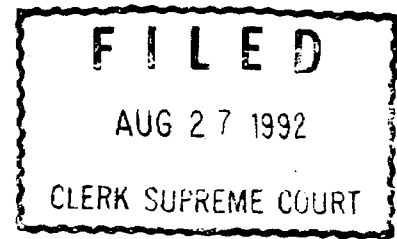
GEORGE F. TISCHLER, JR. and ELLEN TISCHLER,

Plaintiffs-Appellants,

vs.

DANTE SALVUCCI,

Defendant-Appellee.



Appeal from the Iowa District Court for Story County,
Carl J. Baker, Judge.

Plaintiffs appeal following a district court judgment
awarding them damages. **AFFIRMED.**

Donald Hohnbaum of Christianson, Hohnbaum & George,
Des Moines, for appellants.

Mark D. Sherinian and Joseph J. Mowry of Hanson, Bjork
& Russell, Des Moines, for appellee.

Considered by Schlegel, P.J., and Hayden and Sackett,
JJ.

PER CURIAM

Plaintiffs-appellants George F. Tischler, Jr., and Ellen Tischler appeal the trial court's denial of their motion for a new trial following a jury verdict granting them damages in their suit against the defendant-appellee Dante Salvucci. We affirm.

Defendant was driving a car that collided with a car driven by plaintiff George Tischler. The accident happened in Huxley, Iowa, at the intersection of U.S. Highway 69 and Oak and Main Street. George was driving on Highway 69 in a northwesterly direction. At that point, Highway 69 is a through road but the intersection is marked with a hanging flashing yellow light. The defendant was approaching the intersection on Main Street and stopped at the stop sign where Main Street intersects with Highway 69. Defendant then proceeded into the intersection and the front portion of the defendant's car hit the left front quarter-panel of George's vehicle. George claimed to have suffered injuries in the accident, including injuries to his thumb.

Plaintiffs first contend under the facts of the accident the trial court erred in giving an instruction regarding stopping in the assured clear distance ahead. The following instruction was given:

ASSURED CLEAR DISTANCE

No person shall drive any vehicle on a highway at a speed greater than will permit them to stop within the assured clear distance ahead. The words "within the assured clear distance ahead" mean the distance from which noticeable objects,

reasonably expected or anticipated to be upon the highway, may be seen.

The plaintiffs raised this issue in a motion for new trial. The trial court in denying the motion for new trial found even if the assured clear distance instruction should not have been given, it made no difference because the lookout and flashing yellow light instruction it did give, and to which the plaintiffs are not objecting, created an equal or greater duty. The trial court also gave the following instructions:

LOOKOUT

Proper lookout is the lookout a reasonable person would keep in the same or similar situation. It means more than looking and seeing. It includes being aware of the operation of the driver's vehicle in relation to what the driver saw or should have seen.

FLASHING YELLOW LIGHT

The driver of a vehicle approaching an intersection indicated by a flashing yellow light shall proceed through the intersection with caution.

We agree with the trial court these two instructions created an equal or greater duty than the assured clear distance instruction. We therefore need not decide if it was error to give the assured clear distance instruction because the plaintiffs have not shown they were prejudiced by giving the instruction. A party must show an alleged erroneous instruction deprived the plaintiff of a fair trial before we will grant a new trial. See Moser v. Stallings, 387 N.W.2d 599, 605 (Iowa 1986). We affirm the trial court on this issue.

The plaintiffs next argue the trial court erred in rejecting the plaintiffs' proposed instruction on disability. The plaintiffs asked the following instruction be given:

Past disability is the loss, in whole or in part, of one's use of full mind and/or body to date. Future disability is the loss of use of full mind or body in the future.

The instruction given by the trial court was:

Past disability is the loss, in whole or part, of one's use of full mind and/or body to date. Future disability is the loss of use of full mind and/or body in the future.

The objection made to the instruction at trial did not clearly call to the trial court's attention the challenge the plaintiffs now make. To preserve error for appeal, the objection must be clearly called to the trial court's attention when the instruction is submitted. See State v. LeCompte, 327 N.W.2d 221, 223 (Iowa 1982). Issues not properly preserved at the trial court level may not be raised for the first time on appeal. See Conner v. State, 362 N.W.2d 449, 457 (Iowa 1985). We therefore reject this challenge.

The plaintiffs' last assigned error is the trial court rejected the plaintiffs' requested instruction of loss of future earning capacity where there was substantial evidence the plaintiff injured his thumb.

The plaintiffs submitted no evidence George had missed work to date because of his thumb injury. George is a

cheese merchandiser and carves large rounds of cheese. There is evidence George may suffer discomfort when he carves cheese. The evidence at trial shows the plaintiff's sales and income had increased significantly following the accident. An instruction should be given only if the record contains substantial evidence to support the instruction. See Anthes v. Anthes, 139 N.W.2d 201, 208 (Iowa 1965).

The trial court did not err in failing to give the requested instruction.

AFFIRMED.

Schlegel, P.J., concurs; Hayden, J., specially concurs.

HAYDEN, J. (specially concurring)

I concur in the result only.