IN THE COURT OF APPEALS OF IOWA

No. 6-435 / 95-621

RICHARD HUNT and KARLEEN HUNT,

Appellees,

vs.

DAVID B. LEWIS,

Appellant.

FILED
MAR 28 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Montgomery County, J.C. Irwin, Judge.

David Lewis appeals entry of judgment against him in this law action arising out of a vehicle collision. **AFFIRMED.**

David B. Lewis, Stanton, pro se, appellant.

David J. McCann of Dippel & McCann, P.C., Council Bluffs, for appellees.

Considered by Sackett, P.J., Huitink, J., and Peterson, S.J.*

*Senior judge from the First District serving on this court by order of the Iowa Supreme Court.

PETERSON, S.J.

David Lewis appeals the entry of a judgment against him, in a law action tried to the court, that arose out of a motor vehicle collision. He contends the district court failed to follow proper pretrial procedure and did not have jurisdiction in this matter in that its findings of fact are not supported by the evidence.

I. Scope of Review. The scope of review is for the correction of errors of law. Iowa R. App. P. 4. Findings of fact in a law action are binding on us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). We construe the district court's findings broadly and liberally. *Grinnell Mut. Reinsurance Co. v. Voeltz*, 431 N.W.2d 783, 785 (Iowa 1988). In case of doubt or ambiguity, we construe the findings to uphold rather than defeat the district court's judgment. *Id.* We are prohibited from weighing the evidence or the credibility of the witnesses. *Id.*

A finding of fact is supported by substantial evidence if the finding may be reasonably inferred from the evidence. *Briggs Transp. Co. v. Star Sales Co.*, 262 N.W.2d 805, 808 (Iowa 1978). In an evaluation of the sufficiency of the evidence, it is viewed in the light most favorable to sustaining the court's judgment. *Id.* It is only necessary to consider the evidence favorable to the judgment, whether or not it was contradicted. *Id.*

Evidence is substantial or sufficient when a reasonable mind could accept it as adequate to reach the same findings. *Waucon Auto Supply v. Farmers and Merchants Sav. Bank*, 440 N.W.2d 844, 846 (Iowa 1989). Evidence is not

insubstantial merely because it could support contrary inferences. *Hawkeye Land Co. v. Iowa Power & Light*, 497 N.W.2d 480, 483 (Iowa App. 1993).

The appellant has elected to proceed on a pro se basis, both during the trial and for appeal. Courts do not utilize a deferential standard when persons choose to represent themselves. *Metropolitan Jacobson Dev. Venture v. Board of Review*, 476 N.W.2d 726, 729 (Iowa App. 1991). The law does not judge by two standards, one for lawyers and the other for laypersons. *Id.* Rather, all are expected to act with equal competence. *Id.* If a layperson chooses to proceed on a pro se basis, they do so at their own risk. *Id.* Thus, we resolve the issues without regard as to whether a party did or did not choose to employ legal counsel.[1]

II. Background. On November 11, 1991, there was motor vehicle accident between a 1991 Lincoln automobile being driven by Karleen R. Hunt and a 1981 Chevrolet Luv pickup being driven by David B. Lewis. The accident happened at the intersection of U.S. Highway 34 and Montgomery County Highway M63. At that location, County Highway M63 runs in a north-south direction and U.S. Highway 34 runs from the southeast to the northwest. County Highway M63 has stop signs on both sides of U.S. Highway 34. There are median strips on the east and west sides of

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[1]The appellant's brief cites authority for only three of the issues he raises and does not argue the authority cited. Failure in the brief to state, to argue, or to cite authority in support of an issue may be deemed waiver of that issue. Iowa R. App. P. 14(f)(3). However, we have elected to consider the issues raised by the appellant.

the intersection on U.S. Highway 34. There is a turning lane outlined by the median strip on U.S. Highway 34 on the east side of the intersection.

On the day in question, Karleen Hunt was proceeding in a northwesterly direction on U.S. Highway 34, and David Lewis was proceeding in a northerly direction on County Highway M63. Karleen Hunt was alone in her vehicle and Christina Lewis was a passenger in the Davis Lewis's vehicle.

Karleen Hunt was traveling from Atlantic to Red Oak, Iowa. As she approached the intersection, she was going approximately fifty-five miles an hour and observed the defendant's pickup truck going in a northerly direction on County Highway M63 to her left. She believed the defendant's vehicle stopped at the intersection and she then checked her right-hand side to make sure that lane was clear, and all of a sudden the defendant's pickup truck pulled out in front of her. She applied her brakes and attempted to veer to the right, however, the vehicles collided. The front left end of her vehicle struck the right front side of the defendant's vehicle. The defendant's vehicle then spun around and struck the left side of her vehicle.

She described the weather conditions as "kind of misty." It had been very foggy in the morning and she had driven with her fog lights on in the morning, but it wasn't a particularly dark day. By the time of the accident, she contended the fog had started to clear. As a result of the accident, she injured her knee slightly, and her elbow from grabbing so hard on the steering wheel, and pinched a nerve in her neck.

David Lewis was driving his motor vehicle in a northerly direction on County Highway M63 south of the intersection with U.S. Highway 34. His daughter, Christina Lewis, was in the front seat with him. He stopped at the intersection; however, he contended because it was real foggy and there was a misty rain coming down, he rolled down his window to see if he could hear any traffic coming from the west. He then proceeded into the intersection and asked his daughter if it was clear. She said it was as far as she could see. As he came to the turning lane, his daughter said, "There is a car." At that moment the two vehicles collided. The record does not indicate if he was injured; however, it does indicate that Christina hit her head and was stunned for a moment or two. David Lewis contends the visibility was approximately 200 feet at the time of the accident because of the fog.

Iowa Highway Patrolman Tim Huntington arrived on the scene at 1:30 p.m., approximately ten minutes after he received the report of the accident. When he arrived, he described the weather conditions as overcast with a slight haze. He testified there was very little visibility problems. It had been raining and was raining lightly at the time. He described it as between a light rain and a mist. He said it was not foggy at the intersection when he arrived.

Christina Lewis testified there was fog at the intersection at the time of the accident. She did not recall telling her father there was a car; however, she believed she was unconscious for a period of time.

Richard Burke, who is a farmer and a trucker in that area, had driven through that intersection approximately a half an hour after the accident. He said it was a foggy, dreary day. However, it had gotten lighter, but it was still "visibly obstructing." He described the area of the intersection as "still hazy."

The trial court found that the defendant was negligent in the operation of his vehicle in that after stopping at the stop sign, he proceeded into the intersection and failed to yield to plaintiff's vehicle which was approaching so closely as to constitute an immediate hazard and that this negligence was the proximate cause of the collision and damage to the plaintiffs. The court conceded that the evidence was disputed as to whether there was fog at the intersection at the time of the accident, but found that the fog had lifted. The court entered judgment in favor of Richard K. Hunt and Karleen R. Hunt and against David Lewis in the sum of $18,784.56. This consisted of the cost of repair to the Lincoln automobile of $18,387.23, $156.00 in towing charges, and car rental expenses in the sum of $241.33. The court further entered judgment in favor of Karleen R. Hunt and against the defendant David B. Lewis in sum of $1,658.06. This consisted of $185.00 in medical expenses, $973.06 in lost wages, and $500.00 for pain and suffering. The court further found the plaintiffs had received $18,000.00 from State Farm Insurance Company in settlement of their claim for damage to their vehicle.

III. Ruling on Pretrial Motions. The defendant initially contends the trial court erred in failing to exercise its duty to administer justice equitably including timely ruling on pretrial matters. In argument, he raises four issues.

He first contends an application for an order setting scheduling conference filed on February 7, 1995, was not placed on the calendar and was not ruled on. The burden is on a party filing a motion to see that it is ruled upon. A motion that is never decided or ruled upon in the trial court presents nothing for review in the appellate court. *Harper v. Cedar Rapids Television Co.*, 244 N.W.2d 782, 786 (Iowa 1976).

He next contends that a jury demand filed on February 6 was not heard or ruled upon until the day of the hearing. The record shows that the defendant filed two jury demands—one on January 3, 1995, and the other on February 6, 1995. Both of these were untimely pursuant to Iowa Rule of Civil Procedure 177(b). The record does not reveal any effort by the appellant to demonstrate good cause for granting his late jury demands. *Egan v. Egan*, 212 N.W.2d 461, 464 (Iowa 1973).

The defendant next contends that a resistance to the plaintiffs' application for a rule 215.1 continuance was not heard. We believe this motion was ruled on by the court on January 3, 1995. We would also note that the burden is upon the party filing the motion to see that it is ruled upon. *Harper*, 244 N.W.2d at 786.

The defendant next contends that the motion filed on February 7, 1995, for failure to dismiss for failure to sufficiently reply to interrogatory was not ruled upon.

The record reveals that the trial judge ruled on this motion on the day of trial.

We conclude no error was committed in these issues.

IV. Real Party in Interest. The defendant, in his trial brief, in Issues II and IV, raised the same question. He contends the trial court erred in viewing this matter as a subrogation claim and that it erred in making an enrichment award of damages unsupported in the record and in duplication of an insurance settlement. This is a real party in interest issue.

The appellant also contends the court erred by viewing this matter as a subrogation matter on his own initiative. We believe the trial court's reference to subrogation in the record was an attempt to explain this concept to the defendant. We do not believe it acted on its own to view the matter as alleged by the defendant.

The record shows that State Farm Mutual had made payments to the plaintiffs under a policy of insurance issued to them. The record also shows that the insured was required to assume the loss to the extent of a $500 "deductible" which was provided in the policy.

It is true that every action must be prosecuted in the name of the real party in interest. Iowa R. Civ. P. 2; *Leasing, Inc. v. Gauge*, 199 N.W.2d 43, 44 (Iowa 1972). A defendant may question whether plaintiff is the real party in interest when it is necessary to protect him or her from multiple suits or to permit a defendant to assert defenses or counterclaims available against the real party in interest. *Grings v. Great Plains Gas Co.*, 260 Iowa 1309, 1320-21, 152 N.W.2d 540, 546 (1967). The rules

which govern whether the insured or the insurer or both are real parties in interest are many and differ greatly in several jurisdictions. The applicable law that prevails in Iowa is

> [A]n insurer who has paid a loss is thereby subrogated (to the extent of the payment) to the rights of the insured; that, where the insurance payment covers the entire loss, the insurer becomes the party in interest and may bring an action; that, where the insurance covers only a portion of the loss, the right of action remains in the insured for the entire loss, the insured becoming a trustee for the insurer (to the extent of the loss paid by the insurer) in the recovery secured by it; that the right of an action for the entire loss is single and cannot be split and separately maintained by the owner and the various insurers who have paid parts of the loss.

United Security Ins. Co. v. Johnson, 278 N.W.2d 29, 30-31 (Iowa 1979). We conclude that the trial court did not err as alleged in issues II and IV in defendant's brief.

V. Continuance Past December 31, 1994. The defendant next contends the trial court erred in preserving jurisdiction in a matter that was not prosecuted within one year of the filing and which was not properly before the court on a date certain, December 31, 1994. In essence, the defendant's contending the trial court erred in granting plaintiffs' application for a 215 continuance on December 19, 1994.

The case was set for trial on December 27, 1994, at 9:30 a.m. by an order entered on November 28, 1994. On December 19, 1994, a calendar sheet entry was entered by Judge Smith resetting the matter for trial on January 3, 1995, because no judge was available on December 27, 1994. On January 3, 1995, the defendant filed

a motion to recuse Judge Glen McGee, which was granted by Judge McGee. That calendar sheet entry directed the court administrator reset the matter for trial. On January 6, 1995, the matter was reset for trial on February 17, 1995, at 9:30 a.m., when the trial was held.

A case will not be dismissed under rule 215.1 when the case is set within the parameters of that rule but is not reached by the court and the court takes charge of the management of the case and is reset by the administrative office at another time. *Dolezal Commodities v. City of Cedar Rapids*, 387 N.W.2d 572, 575-76 (Iowa 1986). A defendant cannot seek dismissal under Iowa Rule of Civil Procedure 215.1 where the defendant is responsible for the delay. *Gold Crown Properties v. Iowa District Court*, 375 N.W.2d 692, 698-99 (Iowa 1985). We conclude there was no error committed by the court in continuing this matter for trial.

VI. Error in Findings of Fact. The defendant next contends in three issues that the trial court erred in making certain findings. Initially, he contends the trial court erred in assessing liability when the record showed the defendant was waiting in the turning lane for traffic to clear and that the court erred in holding the plaintiff faultless in the face of speeding and control in violation of Iowa Code Chapter 321 and in determining the atmosphere was free of fog.

We have reviewed the record in this case and find there is substantial evidence to support the findings the trial court made on each of these issues. We are prohibited

from weighing the evidence. *Hawkeye Land Co. v. Iowa Power & Light*, 497 N.W.2d 480, 483 (Iowa App. 1993).

VII. Credibility of Tim Huntington. The defendant next contends the trial court erred in relying on the credibility of a state trooper who had prepared two inconsistent reports of the accident.

The record will show that a report was prepared by Tim Huntington and signed by him and a subsequent report was prepared in his office and also signed by him. These two reports had some inconsistencies.

This was a law action, and the appellate court is prohibited from weighing the credibility of witnesses. *Grinnell Mut. Reinsurance Co. v. Voeltz*, 431 N.W.2d 783, 785 (Iowa 1988).

In conclusion, we find the defendant did not preserve error on motions that were not ruled upon and the plaintiffs were the real parties in interest and the trial court did not err in continuing this matter and in making certain findings.

Finding no error, we affirm the trial court.

AFFIRMED.

Huitink, J., and Peterson, S.J., concur; Sackett, P.J., specially concurs.

SACKETT, P.J. (specially concurring)

I concur in the result only.