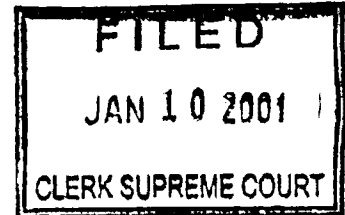


IN THE COURT OF APPEALS OF IOWA

No. 0-702 / 99-1476
Filed January 10, 2001



**THE ESTATE OF MARILYN DIANE SCHILLING, Deceased,
RALPH W. SCHILLING, Administrator, GLEN M. SCHILLING, by his
father and next friend, RALPH W. SCHILLING, and
RALPH W. SCHILLING, Individually,
Plaintiffs-Appellants,**

vs.

**THE ESTATE OF HAROLD EDWARD SCHIRM, Deceased,
ALLEN J. BROWN, Administrator, and THE FIRST UNITED
METHODIST CHURCH OF WINTERSET, IOWA, an Iowa Corporation,
Defendants-Appellees.**

Appeal from the Iowa District Court for Adair County, James W. Brown,
Judge.

Plaintiffs appeal from the jury verdict in defendants' favor in their
negligence action. **AFFIRMED.**

Glenn L. Norris, Carla T. Schemmel, and David N. May of Hawkins &
Norris, P.C., Des Moines, for appellants.

Douglas A. Haag and Theodore T. Duffield of Patterson, Lorentzen,
Duffield, Timmons, Irish, Becker & Ordway, Des Moines, for appellees Estate of
Schirm and Allen Brown.

Leroy R. Voigts of Nyemaster, Goode, Voigts, West, Hansell & O'Brien,
P.C., Des Moines, for appellee church.

Heard by Sackett, C.J., and Mahan, J., and Habhab, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code § 602.9206
(1999).

MAHAN, J.

Plaintiffs appeal from the jury verdict in defendants' favor in their negligence action. They contend the trial court erred in (1) mentioning evidence favorable to the defendants seven times in the jury instructions, but failing to mention evidence in support of their theory; (2) instructing the jury the defendants could be excused without proving a heart attack was the sole proximate cause of the collision; (3) allowing a medical doctor to testify as an expert on issues involving accident reconstruction; and (4) allowing speculative testimony and then refusing to instruct the jury speculation could not be a proper basis of decision. We affirm.

I. Background Facts and Proceedings. On January 6, 1996, Rev. Harold Schirm and Marilyn Schilling were killed when their cars collided head-on on Highway 92 near Winterset. Glen Schilling, Marilyn's eight-year-old son, was riding in the car with his mother and sustained serious injuries. Rev. Schirm was returning from Des Moines, where he had been visiting hospitalized members of First United Methodist Church of Winterset, for which he worked. Rev. Schirm's vehicle crossed the center line and struck the Schilling vehicle nearly head-on. The two cars were traveling at about the same speed. Officers investigating the crash found no physical evidence that would indicate either car made an attempt to avoid the collision.

Plaintiffs filed suit against Rev. Schirm's estate and the First United Methodist Church in Winterset, his employer, alleging negligence. Defendants raised an affirmative defense, alleging Rev. Schirm was "physically incapacitated

and deprived of his own volition by reason of a sudden and unanticipated catastrophic 'act of God,' which caused the defendant's decedent to cross the center line and enter into the path of the vehicle operated by the plaintiffs' decedent, Marilyn Diane Schilling."

Plaintiffs presented testimony at trial to support their theory Rev. Schirm was making a sandwich while driving just prior to the accident. Iowa State Trooper Richard McCormick testified he observed a loaf of bread, a table knife, and sandwich material in the vehicle. Rev. Frank, another employee at First United Methodist of Winterset, told the trooper Rev. Schirm had a long-time habit of eating on the road. Rev. Frank testified Rev. Schirm ate while driving, but he would not make a sandwich while driving.

In support of their theory Rev. Schirm had a heart attack just prior to the collision, defendants presented the expert testimony of Dr. Thomas Bennett, a forensic pathologist and the State's medical examiner at the time of the accident; and Dr. Craig Stark, an interventional cardiologist. Dr. Bennett performed an autopsy on the body of Rev. Schirm. He discovered "a fresh blood clot occluding the proximal left anterior descending coronary artery." In his autopsy report, Dr. Bennett concluded, "The cardiovascular findings could certainly explain why this man did cross the center line and not try to avoid the crash." During his testimony, Dr. Bennett opined Rev. Schirm, with his enlarged heart, narrowed coronary arteries and fresh blockage, "could have incapacitation from the pain or from lack of blood supply to his vital organs and then lose either his attentiveness

or ability, physical ability to continue driving and would not respond appropriately to the road or other demands of driving itself.”

Dr. Craig Stark reviewed Rev. Schirm's autopsy and medical records at defendants' request. In Dr. Stark's opinion, “the heart blockage probably was responsible for primary cardiac arrhythmia that caused Reverend Schirm to unfortunately not be able to willingly control his actions.” When asked during deposition testimony if there was a “reasonable medical probability that this blood clot that was disclosed by Dr. Bennett's autopsy did produce an arrhythmia which in turn produced some period of unconsciousness where he was unable to control the operation of his motor vehicle,” Dr. Stark responded, “I believe there is.” He defined a “reasonable probability” as over fifty percent, and probably over eighty percent likely an arrhythmia took place.

The jury found defendants had established their affirmative defense, and judgment was entered on behalf of defendants. The court overruled plaintiffs' timely motion for new trial, and plaintiffs appealed.

II. Jury Instructions. We review objections to jury instructions on assigned error. Iowa R. App. P. 4; *Grefe & Sidney v. Watters*, 525 N.W.2d 821, 824 (Iowa 1994). The only grounds for objections we may consider on appeal are those specified in objections to the trial court. *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d 612, 618 (Iowa 1991). To preserve error for our review, a party must specify the subject and grounds of the objection. Iowa R. Civ. P. 196; *Sievers v. Iowa Mut. Ins. Co.*, 581 N.W.2d 633, 638 (Iowa 1998). The objection must be sufficiently specific to alert the district

court to the basis for the complaint so, if error does exist, the court may correct it before placing the case in the hands of the jury. *Grefe & Sidney*, 525 N.W.2d at 824. A party therefore may not amplify or change the grounds on appeal. *Sievers*, 581 N.W.2d at 638.

We read the court's instructions as a whole when determining whether there has been error. *Grefe & Sidney*, 525 N.W.2d at 824. We review to decide if the jury instructions are correct statements of the law and are supported by substantial evidence. *Id.*; *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996). As long as a requested instruction correctly states the law, has application to the case, and is not stated elsewhere in the instructions, the court must give the requested instruction. *Foggia v. Des Moines Bowl-O-Mat, Inc.*, 543 N.W.2d 889, 892 (Iowa 1996). If the trial court errs in submitting or refusing to submit an instruction, we will reverse only if the error has caused prejudice. *Kessler v. Wal-Mart Stores, Inc.*, 587 N.W.2d 804, 806 (Iowa App. 1998).

A. Use of "Heart Attack." Plaintiffs contend the court committed reversible error by using the term "heart attack" seven times in its instructions to the jury, while failing to mention evidence in support of plaintiffs' theory Rev. Schirm crossed the center line because he was busy making a sandwich.

After a careful review of the record, we conclude plaintiffs failed to preserve error on this issue. At trial, plaintiffs objected to "submission of the instructions that discuss heart attack as such." Plaintiffs argued the court should not permit a legal excuse instruction based upon a heart attack because no Iowa cases hold a heart attack is a legal excuse. Plaintiffs never claimed they were

being denied a fair trial because the use of "heart attack" in the instructions overemphasized the defendant's defense. Plaintiffs may not change their grounds for objecting to the instructions on appeal. Iowa R. Civ. P. 196. We affirm the district court on this issue.

B. Proximate Cause. Plaintiffs contend the trial court erred in failing to place upon defendants the burden of proving Rev. Schirm's heart attack was the sole proximate cause of the collision.

Again, a careful review of the record reveals plaintiffs failed to preserve error on this issue. In their objections to jury instructions, plaintiffs offered two proposed instructions concerning the "act of God" defense. Plaintiffs asserted, "... act of God which places, we believe, more of a burden on the Defendant would be the proper submission in the instructions." Plaintiffs' objection was not "sufficiently specific to alert the district court to the basis for the complaint." See *Grefe & Sidney*, 525 N.W.2d at 824.

Even if plaintiffs did preserve error, the trial court did not err in failing to include plaintiffs' proposed "act of God" instructions in its instructions to the jury. At trial, defendants moved to amend their answer to conform to the proof and allege legal excuse. The court sustained the motion and submitted the defendants' affirmative defense theory to the jury as a legal excuse, not an "act of God." Thus, plaintiffs' "act of God" instructions were unnecessary, and did not properly convey the law of the case. The doctrine of legal excuse concerns the issue of negligence, whereas the theory of act of God deals with the question of proximate cause. *Dickman v. Truck Transp., Inc.*, 224 N.W.2d 459, 466 (Iowa

1974). One of the four recognized legal excuses is the existence of something over which the driver had no control which placed his vehicle in a position contrary to statute. *Id.* The court correctly instructed the jury on legal excuse, and plaintiffs did not object to the submission of the instruction.¹ We affirm the district court on this issue.

III. Expert Witness Testimony. We review the admission of expert testimony for abuse of discretion. *Thavenet v. Davis*, 589 N.W.2d 233, 234 (Iowa 1999). Plaintiffs argue the trial court erred in (1) allowing Dr. Stark to testify as an expert on issues involving accident reconstruction; and (2) allowing Dr. Stark's speculative testimony and then refusing to instruct the jury speculation could not be a proper basis of its decision. Plaintiffs' arguments are without merit.

Plaintiffs contend Dr. Stark, during his deposition testimony, speculated as to why Rev. Schirm crossed the center line. Therefore, plaintiffs argue, his

¹ Instruction 14 instructed the jury as follows:

The defendants claim that if you find that Harold Schirm violated the law in the operation of his vehicle, he was legally justified in doing so because he sustained a sudden, unforeseen heart attack. A party may avoid the consequences of his acts if his conduct, which would otherwise be considered negligent, was justified. The conduct may be justified if it results from circumstances over which the party has no control which places his vehicle in a position contrary to law. The standard of care required of Harold Schirm is that of an ordinary reasonable person in a similar situation.

To establish this defense, the defendants must prove both of the following propositions:

1. Harold Schirm sustained a sudden heart attack preceding the collision which was not foreseen by Harold Schirm, over which he had no control, and of which he had no warning; and,
2. The heart attack prevented Harold Schirm from controlling his vehicle to the point of the collision.

If you find the defendants have proved both of these propositions, they have established legal justification for Harold Schirm's conduct and the defendants can not be negligent. You will then answer the questions in the verdict accordingly. If you find the defendants have not proved both of the propositions, they have not proved this defense and you will answer the questions in the verdict accordingly.

testimony as to the cause of the collision should not have been admitted because he was not qualified to testify as an expert regarding the cause of the collision.

A complete review of the deposition transcript reveals Dr. Stark did not provide accident reconstruction testimony. He did not testify on such matters as speed, location of the accident, effect of skid marks, or vehicle damage. Rather, he provided a medical opinion as to the effect the medical conditions found in the autopsy would have upon Rev. Schirm's ability to control his vehicle. He agreed with Dr. Bennett's conclusion Rev. Schirm's heart attack could explain why he crossed the center line without trying to avoid the collision. Dr. Stark was well qualified to state a medical opinion regarding the manner and extent to which the heart attack would probably affect the functional capacity of a motor vehicle operator. His opinions were not those of an accident reconstructionist.

Furthermore, the court did not err in refusing to instruct the jury regarding "speculation" testimony. Dr. Stark's testimony, taken as a whole, was not speculative. His acknowledgement of some speculation did not relate to his medical opinion as to how the blood clot would affect Rev. Schirm's functional capacity. It was not speculative that, within a reasonable degree of medical certainty, Rev. Schirm suffered a heart attack which effected his ability to drive a vehicle.

AFFIRMED.