

FILED

JUN 24 1980

CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

TRUXTON N. NORRIS, as Executor)
of the Estate of Nickie Dale Norris,)
Deceased; JUDITH LYNN NORRIS,)
Individually; JUDITH LYNN NORRIS,)
as the mother and next friend of)
JASON DALE NORRIS, A Minor,)

Filed June 24, 1980

Plaintiffs-Appellants,)

vs.)

DEWITT LODGE #395 LOYAL ORDER OF)
MOOSE, DeWitt, Iowa, and)
AMERICAN LEGION HOME-A Trust,)

0-122
2-63759

Defendants-Appellees.)

Appeal from Clinton District Court - Margaret S. Briles, Judge.

Plaintiffs appeal judgment for defendants in dram shop action. - AFFIRMED.

Simon W. Rasche, Jr., Camanche, and Gary J. Rolfes, Clinton, for plaintiffs-appellants.

Michael F. Figenshaw, of Bradshaw, Fowler, Proctor & Fairgrave, Des Moines, and
Gerry M. Rinden, of Klockau, McCarthy, Lousberg, Ellison & Rinden, Rock Island, for
defendants-appellees.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

CLINTON DISTRICT COURT

PER CURIAM

Plaintiffs appeal from a judgment for defendants in plaintiffs' dram shop action. Plaintiff alleges that the trial court erred in excluding testimony regarding an offer of a blood test to the driver of the automobile that struck the decedent's vehicle, in excluding the opinion testimony of a lay witness regarding that driver's intoxication, and in improperly instructing the jury. We affirm.

The accident giving rise to this dram shop action occurred during the early morning hours of October 29, 1977. An automobile driven by Eugene Henry Kastler collided with a pickup truck driven by the decedent, Nickie Dale Norris at a "T" intersection of two blacktop roads. Prior to the time of the accident, Kastler had been drinking beer at the local Moose lodge, and alcoholic liquor at the American Legion. Kastler testified that he was en route to another bar when he came to the "T" intersection, realized that he could not stop prior to entering the intersection, and proceeded to skid into the intersection. At that time, his automobile collided with the decedent's pickup truck. Both vehicles went into the ditch, and the decedent was discovered several feet from his truck, lying dead in the ditch. A truckdriver, Ivan English, pulled over to assist Kastler. English contacted an ambulance and the police. Officers Robert Robertson and George Andresen arrived at the scene in response to the call. Kastler was not arrested for operating a motor vehicle while under the influence of an alcoholic beverage, but Robertson orally requested that Kastler submit to a blood test, and Kastler refused. Kastler was subsequently issued a citation for failure to yield at a stop intersection.

Kastler was originally named as a defendant in this case, but prior to trial, a settlement agreement between plaintiffs and Kastler was reached. Trial proceeded with the remaining dram shop defendants and the jury returned a verdict in favor of those defendants.

I. Plaintiffs contend the trial court erred in refusing to allow Kastler to testify regarding Officer Robertson's request of a blood test. Plaintiffs assert the trial court refused to allow the testimony on hearsay grounds. This assertion is erroneous. The pertinent portion of the transcript stated as follows:

REDIRECT EXAMINATION
BY MR. RASCHE: Q. Now, in this conversation
that you had with the police officers at the scene

of the accident, did they offer to give you a blood test to determine the —

MR. RINDEN: I'm going to object to that question as improper, irrelevant and immaterial, and improper under the Iowa law.

THE COURT: Sustained.

Since hearsay was not one of the asserted grounds for the objection that was sustained, plaintiffs' argument that the testimony was admissible under the res gestae exception to the hearsay rule is inapplicable to the issue raised.

We do not think the inquiry into the request for a blood test called for hearsay. Plaintiffs were attempting to ascertain the officer's state of mind regarding whether he thought Kastler was intoxicated. The officer's request for a blood test would circumstantially establish the officer's belief that Kastler was intoxicated through the use of an indirect inference. The hearsay rule would not apply to such an inquiry since the statements would not be offered for the truth of the matter asserted. See McCormick's Handbook of the Law of Evidence § 289 (2d ed. E. Cleary 1972); 6 J. Wigmore, Evidence §§ 1715, 1788-90 (J. Chadbourne rev. 1976).

We think the trial court properly extinguished the inquiry into the conversations regarding the requested blood test because of the danger of delving into areas of inadmissible testimony. Had a blood test been administered to Kastler, the results would have been inadmissible for failure to comply with the set standards of the implied consent law, § 321B.3, The Code 1977, in particular, those standards requiring that the request for a blood test be written and made only after the individual to whom the request has been made has been arrested for operating a motor vehicle while under the influence of an alcoholic beverage. See State v. Jensen, 216 N.W.2d 369, 374 (Iowa 1974). When the results of such a test would be inadmissible, evidence of a refusal to submit to a test is also inadmissible. Id. at 372. Since Kastler's refusal to submit to the blood test would be inadmissible, we think the trial court's decision to cut off questioning leading to inadmissible testimony was a proper exercise of its discretion in light of the danger of unfair prejudice and misleading of the jury that could result if the area of inquiry was opened up and not cut off until the point of inadmissibility was reached. See Kalinov v. Darland, 252 N.W.2d 732, 736 (Iowa 1977).

II. Plaintiffs allege the trial court erred in refusing to allow them to impeach

Kastler with prior inconsistent statements. Kastler testified at trial that he did not stop at the stop sign at the intersection. Plaintiffs attempted to elicit testimony from Kastler to the effect that at the time of the accident, Kastler told the police that he did stop at the stop sign. At that point, defendants objected on hearsay grounds and the trial court sustained the objection.

Plaintiffs contend the trial court should have allowed them to elicit Kastler's prior inconsistent statement for impeachment purposes. However, even if the trial court's refusal to allow the testimony constituted error, it was at best harmless error. Kastler's testimony that he did not stop at the stop sign was clearly against his and defendants' interest. Any prejudice arising out of the trial court's refusal to allow defendants to elicit impeaching testimony after Kastler had already given a truthful compromising statement was minimal under the circumstances.

Plaintiffs contend that by impeaching Kastler with the prior inconsistent statement, they could cast doubt on the credibility of Kastler's testimony that he was not intoxicated at the time of the accident. Plaintiffs made no offer of proof at trial with regard to that contention. Thus, although the trial court may have been aware of Kastler's prior inconsistent statement, the purpose of eliciting that statement may not have been apparent. Consequently, it was plaintiffs' duty to show the materiality of the statement to the issue. Lemke v. Mueller, 166 N.W.2d 860, 871 (Iowa 1969). Since plaintiffs did not make such a showing, we cannot conclude that the trial court's refusal to allow the testimony was reversible error.

III. Plaintiffs assert the trial court erred in refusing to allow them to cross-examine the police officers regarding the request that Kastler take a blood test. Plaintiffs allege the cross-examination would have been solely for impeachment purposes. We herein incorporate our analysis in the last paragraph of division I of this decision, and conclude that the potential danger of prejudice or misleading the jury outweighs any impeachment value. The trial court did not err in refusing to allow cross-examination along the line requested by plaintiffs.

IV. Plaintiffs argue the trial court erred in excluding the offered testimony of the truckdriver, Ivan English, with regard to English's opinion of Kastler's sobriety at the time of the accident. English's offered testimony consisted of his opinion that even

though Kastler walked and spoke normally, the odor of alcohol on his breath indicated that Kastler was intoxicated at the time of the accident, and that the shock of the accident sobered Kastler up to the point that he could walk and speak normally. The trial court sustained defendants' objection to that opinion testimony on the ground of a lack of sufficient foundation. Plaintiffs contend the court erred in not admitting English's opinion testimony, since it did allow the opinion testimony of a police officer who testified that he did not think Kastler was intoxicated at the time of the accident.

A trial court's ruling on the admissibility of opinion testimony will not be disturbed unless a manifest abuse of discretion is shown. Aller v. Rodgers Machinery Mfg. Co., 268 N.W.2d 830, 840 (Iowa 1978). We do not think such a manifest abuse of discretion has been shown in this instance. The record shows that had English testified, he would have stated that on the basis of the odor of Kastler's breath, he concluded that Kastler was intoxicated at the time of the accident, but the shock of the accident sobered him up to the point at which Kastler could walk and speak normally. The trial court's determination that English's opinion lacked sufficient foundation was within its discretion. It was established that the police officer had dealt with intoxicated people in the line of duty. The trial court could have concluded that the police officer's experience established a firmer foundation for his opinion testimony than the foundation for Ivan English's opinion testimony. We cannot conclude that the trial court abused its discretion in excluding the opinion testimony of Ivan English.

V. *Plaintiffs contend the trial court erred in refusing to submit their requested instructions to the jury, and in submitting the instructions to which plaintiffs objected. Plaintiffs assert their requested instructions provided a clear guide to the jury for a correct application of the law to the facts. The trial court drew its dram shop liability and proximate cause instructions substantially from I.S.B.A. Uniform Jury Instructions (Civil), instructions 16.3 and 2.6. Those instructions provided an adequate guide for the jury by fully and accurately covering the legal principles to be applied. That plaintiffs' requested instructions could have been clearer is not determinative. Since the language of the trial court's instructions covered all the legal principles involved, it was free to prefer its language over that requested by plaintiffs. Greninger v. City of Des Moines, 264 N.W.2d 615, 617 (Iowa 1978). We conclude the trial court did not err by not*

submitting plaintiffs' requested instructions to the jury.

Plaintiffs' objections to the instructions submitted to the jury focused on language that plaintiffs contend could have misled the jury into believing that they had to find that Kastler's intoxication was the proximate cause of plaintiffs' injuries, contrary to the holding of Walton v. Stokes, 270 N.W.2d 627, 628-29 (Iowa 1978). While we concede that the objected-to language was not necessary since it was not applicable to the factual situation of the case, we conclude that the inclusion of the language was not necessarily confusing or misleading, and thus, not prejudicial to plaintiffs' case. Nothing in the instructions expressed the requirement of deciding whether Kastler's intoxication was the proximate cause of plaintiffs' injuries.

The instructions, taken as a whole, instructed the jury that they were required to find that Kastler remained or became intoxicated as a result of defendants serving him intoxicating liquor, and that the acts of Kastler, while intoxicated, were the proximate cause of Nickie Dale Norris' death. However, plaintiffs also object to the instructions on the ground that they require the jury to find that Kastler's acts were the proximate cause of Norris' death. Plaintiffs contend they only needed to show that Kastler was intoxicated at the time of the accident. We disagree. The jury must decide the question of the proximate cause of the injury. See Jarozewski v. Allen, 117 Iowa 632, 636, 91 N.W. 941, 943 (1902); Schubert, The Iowa Dram Shop Act -- Causes of Action and Defenses, 23 Drake L. Rev. 16, 20 (1973). Were the rule to be as plaintiffs contend, liability would attach even if, for example, Kastler's vehicle did not collide with decedent's vehicle until after decedent's vehicle had been crushed by a tree falling onto the road. We cannot conclude that this is the law in Iowa, even under the strict liability provisions of the Dram Shop Act, section 123.92, The Code 1977.

AFFIRMED.