

IN THE COURT OF APPEALS OF IOWA

No. 4-063 / 93-0700

FILED

APR 26 1994

CLERK SUPREME COURT

ELIZABETH UMBAUGH, KENNETH UMBAUGH and
ELIZABETH UMBAUGH, On Behalf of ZACHARY
UMBAUGH, DUSTIN UMBAUGH and EME UMBAUGH,

Plaintiffs-Appellants,

vs.

STEEL FABRICATION, INC., DUANE LEON
ZUCK, JOHN J. HERMAN d/b/a JAY HERMAN
TRUCKING and CHRISTOPHER J. BROADY,

Defendants-Appellees.

Appeal from the Iowa District Court for Marshall
County, Carl D. Baker, Judge.

Plaintiffs appeal from a judgment in defendants' favor
entered upon a jury verdict in plaintiffs' action for
damages for personal injuries incurred in a motor vehicle
accident. **AFFIRMED.**

Max H. Buck of Grimes, Buck, Schoell & Beach,
Marshalltown, for appellants.

Sharon Soorholtz Greer of Cartwright, Druker & Ryder,
Marshalltown, for appellees Steel Fabrication, Inc. and
Zuck.

Kevin O'Hare of Johnson, Sudenga, Latham & Peglow,
Marshalltown, for appellees Herman and Broady.

Heard by Donielson, P.J., Sackett, J., and Critelli,
S.J.*, but decided by Donielson, C.J., Hayden, Sackett,
Habhab, Cady, and Huitink, JJ.

*Senior judge from the 5th Judicial District serving on
this court by order of the Iowa Supreme Court.

SACKETT, J.

Elizabeth Umbaugh on behalf of Zachary Umbaugh, Dustin Umbaugh and Eme Umbaugh appeals the dismissal of their action seeking compensation as a result of personal injuries Elizabeth was alleged to have occurred after the vehicle she was driving was hit by a semi-trailer and tractor owned by defendant-appellee Steel Fabrication, Inc., and driven by Duane Leon Zuck. Plaintiffs contend the trial court improperly gave an instruction on sudden emergency and plaintiffs should have a new trial. We affirm.

Defendant-appellee Christopher J. Broady made a left-hand turn into defendant Zuck's lane of travel. Zuck applied his brakes and veered off the road hitting the vehicle Elizabeth was driving that was waiting to go on the roadway.

After the trial, the jury returned a verdict finding defendant Zuck not at fault and defendant Broady at fault 100 percent.

The jury answered the question, "Was the fault of Broady a proximate cause of the injury and damage to Elizabeth Umbaugh?" "No."

Plaintiffs first contend the trial court erred in instructing the jury on sudden emergency over objection.

The trial court told the jury:

Steel Fabrication and Duane Zuck claim a legal excuse because Christopher Broady started to enter Zuck's lane of travel. A person who relies upon sudden emergency to justify his conduct must prove all of the following propositions:

1. He was faced with a sudden emergency.
2. The emergency was not created by his own negligence.
3. He conducted himself as a reasonably careful person would have in a similar situation.

A sudden emergency is a combination of circumstances that calls for immediate action or a sudden or unexpected occasion for action which could not have been anticipated by an ordinarily careful person under the same or similar circumstances.

Someone who is faced with a sudden emergency not brought about by his fault, and is required by such emergency to act without sufficient time to determine the best action to take, is not held to the same accuracy of judgment as would be required if there was time to deliberate. Under such circumstances, a person is only required to act as an ordinarily careful person would act when suddenly placed in a similar position. In deciding this issue, you must take into account the fact that the person is in a position where a speedy decision must be made, and that the shortness of time prevents an accurate assessment of what will happen. If a person's choice turns out to be unfortunate, this does not make it improper even if a different choice would have been made had there been sufficient time to consider all the likely results.

Plaintiffs objected to the instruction as overemphasizing the issue of sudden emergency and the instruction was not warranted under the doctrine of comparative fault. These objections are reargued here as is the objection the instruction is not supported by the evidence.

The sudden emergency instruction given by the trial court here was the same instruction given by the court in

Weiss v. Bal, 501 N.W.2d 478, 479-80 (Iowa 1993). Plaintiffs contend the dictates of Weiss demand reversal. Plaintiffs, in objecting, urged the sudden emergency was not viable. We disagree. Weiss did not reject sudden emergency fault but, rather, said "a jury may be aided by a succinct and narrowly drafted instruction that tells it the actor is held only to the standard of reasonable care under the circumstances posed by the emergency." Id. at 481.

Plaintiffs' next objection is the facts here did not warrant the giving of the sudden emergency instruction. Without deciding whether error was preserved on this issue, we reject the plaintiffs' argument.

Zuck was driving a semi-trailer and tractor traveling on Highway 330 near Melbourne in Marshall County heading to Des Moines. Broady, also driving a semi-trailer and tractor, was coming on the same highway from the other direction and at the driveway to Mike's Quik Stop, on the west side of Highway 330, started a left turn. Zuck, to avoid hitting the Broady vehicle in his lane of traffic, veered off the road and hit the front of plaintiff Elizabeth's vehicle.

Elizabeth testified as follows:

Q. And at that point of your deposition, which was January of 1992, you indicated, did you not, that if he [Zuck] had gone off to his left, he would have either creamed the trailer or ran into the hill that's there, right? A. Correct.

Q. And you were asked if you could have thought of anything that he [Zuck] could have done differently, weren't you? A. Yes, I was asked.

Q. And you said, from your observations, there was nothing that Duane could have done

000000
differently, correct? A. That's what the deposition says, yes.

The only eyewitness to the accident testified as to Zuck's conduct as follows:

You know, there might be a few--I don't know if there is any details I am missing, you know, having it been three years later. But again, the overriding thing was the fact that in my own mind, I thought it was an amazing job of driving to avoid two accidents in the same--within a few split seconds.

Unlike the factual scenario in Weiss where a pedestrian was struck in a parking lot supposedly because the driver of the car swerved to miss another pedestrian, this account happened on a four-lane road where the speed limit was 55 miles per hour and the semi-tractor and truck pulled in Zuck's path. The court in finding there was no sudden emergency in Weiss went on to contrast the Weiss case and said, "This is not a case in which a driver was suddenly confronted with oncoming traffic on the wrong side of the road, . . ." Weiss, 501 N.W.2d at 482.

There clearly was evidence in the record to support the giving of the sudden emergency instruction.

Plaintiffs' third and most difficult challenge is whether the instruction given overemphasized the sudden emergency doctrine and met the directive in Weiss that the instruction be succinct and narrowly drafted and tells it the actor is held only to the standard of reasonable care under the circumstances posed by the emergency. We do not believe under the unique facts of this case the instruction

given overemphasized the sudden emergency doctrine or prejudiced plaintiffs. The only conclusion that can be drawn from this record is that Zuck was traveling in the country on a through highway when Broady made a left-hand turn in front of him. The issue of Zuck's negligence or the absence of it focused on how he dealt with Broady's left turn.

Plaintiffs next contend the trial court erred in refusing to grant a new trial. In ruling on a motion for a new trial the trial court has broad but not unlimited discretion. See Cowan v. Flannery, 461 N.W.2d 155, 157 (Iowa 1990). We are slower to interfere with an order granting a new trial than with a denial of an order granting a new trial. Iowa R. App. P. 14(f)(4). The trial court denied plaintiffs' motion for new trial and found the jury was justified in finding Elizabeth was not injured. The jury returned an interrogatory finding the fault of Broady was not a proximate cause of the injury and made no entry in the question asking them to find the damages she proved. The trial judge in ruling on the motion for new trial said on the damage issue:

This Court concludes that while another jury or judge could have reached a different conclusion based upon the evidence presented at this trial, the jury's verdict has support in the evidence. The evidence is uncontroverted that Elizabeth Umbaugh informed medical personnel that she did not need to be treated after the accident. The jury, in assessing the credibility of all witnesses, could have concluded that the issues of fault and proximate cause were not adequately supported by Elizabeth Umbaugh's assertions that the injury she complained of was caused by the

collision. This is the case, even though the plaintiffs elicited testimony at trial from various witnesses that simply because the plaintiff said she was okay immediately after the accident does not mean she had not been injured.

Elizabeth's testimony was not contradicted. The jury had the discretion to accept or reject it. See Miller v. Eichhorn, 426 N.W.2d 641, 642 (Iowa App. 1988). This court is not required to accept as a verity uncontradicted testimony, but might well scrutinize closely such testimony as to its credibility, taking into consideration all the circumstances throwing light thereon, such as the interest of the witnesses, remote or otherwise. Id.

The jury is the sole judge of the credibility of the witnesses and the weight to be accorded the witnesses' testimony. Tuttle v. Longnecker, 138 N.W.2d 851, 854 (Iowa 1965). We affirm the trial court on this issue.

AFFIRMED.