

FILED

AUG 26 1982

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

SHIRLEY A. WIELAND,

)

Plaintiff-Appellant,

)

Filed August 26, 1982

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vs.

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**DONALDSON CONSTRUCTION
COMPANY,**

)

2-81
2-66349

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Defendant-Appellee.

Appeal from Linn District Court - Clinton E. Schaeffer, Judge.

The plaintiff appeals from judgment entered upon a jury verdict for the defendant in this negligence action arising from the collision of an automobile with a backhoe owned by the defendant and parked near a construction site. The plaintiff contends the trial court erred (1) by refusing to permit her to amend her petition to allege violations of statutes and ordinances; (2) by excluding her evidence concerning the content of various ordinances and the alleged violation of those ordinances by the defendant; and (3) by refusing to give the jury her requested instructions concerning violation of statutes and ordinances.

REVERSED AND REMANDED.

Lloyd E. Humphreys of Humphreys & Associates, Cedar Rapids, for plaintiff-appellant.

James E. Shipman, Richard G. Hileman, Jr., and Gregory M. Lederer of Simmons, Perrine, Albright & Ellwood, Cedar Rapids, for defendant-appellee.

Heard en banc.

The plaintiff appeals from judgment entered upon a jury verdict for the defendant in this negligence action arising from the collision of an automobile with a backhoe owned by the defendant and parked near a construction site. The plaintiff contends the trial court erred (1) by refusing to permit her to amend her petition to allege violations of statutes and ordinances; (2) by excluding her evidence concerning the content of various ordinances and the alleged violation of those ordinances by the defendant; and (3) by refusing to give the jury her requested instructions concerning violation of statutes and ordinances. We reverse and remand.

The action was tried at law and, therefore, our review is on assigned errors. Iowa R. App. P. 4.

I.

The plaintiff, Shirley Wieland, was injured in 1976 when the car in which she was riding struck a backhoe owned by the defendant, Donaldson Construction Company, and parked near the defendant's construction project. In her lawsuit filed in May, 1978, she alleged that the defendant had been negligent in the following particulars:

- (1) Placing its backhoe on the traveled portion of a thoroughfare;
- (2) failing to warn approaching traffic of the backhoe's hazardous location;
- (3) failing to light the area so as to make the backhoe visible;
- (4) failing to inspect and supervise placement of warning signs, barricades, and lights; and
- (5) failing to close the street to traffic.

The defendant denied all negligence and cross-petitioned against the driver. The case was dismissed for want of prosecution pursuant to Iowa R. Civ. P. 215.1

and was subsequently reinstated on plaintiff's motion. On May 30, 1980, the court entered a preliminary pre-trial order scheduling trial for November 17, 1980. The order provided that all motions to amend and any other pre-trial actions were to be filed at least two weeks before the final pre-trial conference to be held November 7. The order also required the parties to submit facts of which the court would be asked to take judicial notice and to set forth their respective theories of recovery. This statement was also to be filed at least two weeks before the final pre-trial conference.

Defendant filed its pre-trial statement on November 5 and plaintiff filed hers on November 7, the day of the conference. That same day, the court entered its final pre-trial order stating that plaintiff's specifications of negligence were as stated in her petition.

On Friday, November 14, 1980, plaintiff moved to amend her petition and the pre-trial statement to include specific counts of negligence claiming violations of statutes and Cedar Rapids city ordinances and seeking to have the court take judicial notice of the same. The following Monday, the day of trial, the defendant filed a combined motion in limine and resistance to amendments requesting plaintiff be restricted in referring to specifications of negligence under statutes or ordinances. The court denied plaintiff's motion to amend because it was untimely and was in violation of the pre-trial order. Moreover, the court granted defendant's motion to exclude evidence of certified ordinances of the City of Cedar Rapids.

During the trial, defendant introduced as evidence its application for a permit allowing defendant to excavate in streets and public property. Among other things, the application provided that the construction work would conform to the city ordinances. At this point, plaintiff made an offer of proof on the ordinances out of the presence of the jury:

We are then requesting that the Court consider allowing these to be introduced into evidence; that the Court take judicial notice of the same, or that in the alternative, that the Court consider them in instructing on the law at a later time.

Plaintiff also moved to amend her petition to conform to proof. The court denied the motion and refused to instruct on the statutes or ordinances. The jury returned a defendant's verdict upon which judgment was entered. Plaintiff then instituted this appeal.

II.

Plaintiff first contends that the court erred in failing to allow her to amend her petition to include additional specifications of negligence based on Cedar Rapids ordinance violations. She contends the ordinances establish standards of conduct for essentially the same generally pleaded counts of negligence and did not materially or substantially alter the issues presented for trial. Defendants assert that the amendment would have provided plaintiff with new theories of recovery based on the alleged violation of the ordinances.

After responsive pleadings have been filed leave of court is required to amend so that the adverse party has an opportunity to object to those amendments which might affect trial preparation. Johnston v. Percy Construction, Inc., 258 N.W.2d 366, 370 (Iowa 1977). The trial court has wide discretion to decide whether to allow the parties to amend their pleadings. Id. We are most reluctant to find an abuse of discretion when reviewing denial of an amendment proposed on the eve of or during trial. Id. at 371. We must, therefore, determine whether the court's failure to allow plaintiff to amend in the instant case was an abuse of discretion.

Pre-trial procedure is governed by Iowa R. Civ. P. 135-39. Rule 136(b)(1) specifically contemplates "[t]he necessity or desirability of amending pleadings by formal amendment or pretrial order." Rule 138 authorizes the court to enter

appropriate orders to govern the "subsequent course" of the action unless the orders are modified to prevent manifest injustice. Inherent in this rule is the court's power to enforce pre-trial orders. Rowan v. LeMars Mutual Insurance Company of Iowa, 282 N.W.2d 639, 646 (Iowa 1979) (testimony of expert witness excluded for violation of pretrial order).

We find that the trial court's denial of plaintiff's motion to amend on the eve of trial was an appropriate way to enforce the pre-trial order and, therefore, was not an abuse of discretion. There is no contention that the ordinances were an improper subject of judicial notice or evidentiary proof, nor that plaintiff had to cite or plead their alleged violation. But plaintiff was required to comply with the pre-trial order requiring each party to specify its theory of recovery and the facts of which the court would be asked to take judicial notice.

Plaintiff did not make any reference to the ordinances or their alleged violations in her pre-trial statement. Indeed, she did not move to amend her petition or pre-trial statement to include the ordinances until late Friday, November 14; the final hour on the eve of the Monday morning trial. The apparent reason for plaintiff's delay is that the ordinances were not discovered in earlier trial preparations. To this the trial court stated:

Well, these ordinances, of course—it always amazes me that you discover something the day before trial—they've been in the books for years. If you prepare the case for trial, you should have discovered them four years ago. But, in any event they are not admissible as evidence. They violate the pretrial order, for one thing. They're also not admissible because they are—the Court has already ruled on your leave to amend, which was the matter pertaining to the ordinance violation.

In the final pre-trial conference plaintiff restricted herself to the specifications of negligence alleged in her pre-trial statement. In light of the importance of the pre-trial conference, see Gray v. Schlegel, 265 N.W.2d 156, 159-

60 (Iowa 1978), the trial court need not have allowed plaintiff to vary from these theories of recovery by amendment. Under these circumstances, the trial court displayed no abuse of discretion in so ruling.

III.

On the other hand, with respect to the denial of her motions to introduce evidence of the content of the ordinances and, subsequently, to amend to conform to proof, we must agree with plaintiff.

Defendant introduced into evidence its application for the permit allowing defendant to excavate on public property and streets. The permit provided in part:

3. The construction work will conform to the ordinances and standard specifications of the City relative thereto.

4. The street pavement shall not be cut by an open trench method unless the permit specifies and if open trenching is allowed, sufficient width must be kept open for the passage of traffic . . .

8. All pavement, sidewalks and other improvements disturbed by the repairs to the opening shall be replaced in accordance with the standard City specifications and ordinances . . .

13. For the purpose of construction barricading, the applicant agrees to furnish the necessary traffic controls such as barricades, flares and flagmen (police officer when agreed on).

Plaintiff claims this opened the matter of the ordinances and, therefore, sought to have them introduced into evidence for use in examining defendant as to their compliance. The court ruled that whether defendant conformed to the ordinances mentioned in the exhibit was a relevant matter and that the witness could be examined as to his knowledge of this fact. Nevertheless, the court refused to allow plaintiff to read from the ordinance in this examination. Instead, it ruled "[h]e can ask questions based on the material contained in the [permit],

but not on some ordinances that have been already ruled on as to their materiality and relevancy." Plaintiff then made an offer of proof with respect to the ordinances.

It has been held that a party becomes entitled to introduced evidence, otherwise inadmissible, when similar or related evidence has been tendered by his opponent. Evans v. Holsinger, 242 Iowa 990, 993, 48 N.W.2d 250, 251-52 (1951). Testimony that is the logical product of a party's own counsel are not a proper ground of complaint by him on appeal since he, himself, is responsible for eliciting the information. Weilbrenner v. Owens, 246 Iowa 580, 588, 68 N.W.2d 293, 298 (1955). Thus, when a party opens the field of inquiry into a particular matter, he cannot object when his opponent pursues the same line of questioning on cross-examination. Star Realty v. Strahl, 261 Iowa 362, 365, 154 N.W.2d 143, 145 (1967). Further, he cannot complain that the line of questioning was outside the issues to be determined since he raised those questions in the lower court. In re Karns, 236 Iowa 932, 939, 20 N.W.2d 474, 478 (1945).

By introducing evidence which specified his duty to comply with ordinances, defendant opened the inquiry into the substance of these ordinances. Having done so, he cannot complain that the evidence was initially inadmissible. See Glatstein v. Grund, 243 Iowa 541, 555, 51 N.W.2d 162, 168 (1952).

Nor does it matter that the ordinances were not judicially noticed. Pursuant to Iowa Code § 627.62(2), plaintiff, in her offer of proof, sought to have the certified copies of the ordinances introduced into evidence. By so doing they were made part of the record even though they were not pled or included in the initial pretrial statement. With regard to the introduction of municipal ordinances, the Iowa Supreme Court recently stated in City of Cedar Rapids v. Cach, 299 N.W.2d 656, 659 (Iowa 1980):

We have said that ordinances which do not qualify for judicial notice must be "made a part of the

record" in the trial court. Weldon v. Zoning Board of the City of Des Moines, 250 N.W.2d at 399; see Worden v. City of Sioux City, 260 Iowa 1219, 152 N.W.2d 192 (1967). These cases do not mention the "pleading and proving" requirement of the general rule, see e.g., McCormick, *supra*, § 355, at 777; 29 Am. Jur. 2d, *supra*, § 37, at 72, nor is it a part of our statutory procedure for admission of ordinances into evidence. § 622.62(2). We believe this omission was intentional and that this simplified procedure reflects the modern, more liberal, view towards judicial construction of municipal ordinances as advocated by the authorities quoted above; and elimination of the common-law requirement that the ordinance be pled is consistent with our concept of "notice" pleading under Iowa R. Civ. P. 69(a). See Lamantia v. Sojka, 298 N.W.2d 245, 247 (Iowa 1980).

Moreover, no "foundation" for the ordinances is required, only the clerk's certificate. Nor is it necessary that they be offered as exhibits at trial

We thus find that plaintiff was entitled to examine defendant as to its compliance with the ordinances referred to in the permit and that, to do so, plaintiff should have been allowed to introduce the relevant statute and ordinances. This would include the ordinances relating to (1) obstructing or endangering the free passage or proper use by the public of a public street; (2) erecting barricades and placing flares or lanterns or other lighted warning devices on all open or accessible sides of such excavation; (3) maintaining an encroachment in a public street; and Iowa Code § 321.395 (1977) relating to having parked equipment properly lighted. We do not believe the ordinance relating to maintaining and failing to abate a nuisance is relevant under the clauses of the permit introduced into evidence by defendant. Plaintiff could not effectively examine defendant on whether it complied with these ordinances unless she was able to introduce the substance of those ordinances. The court was in error by refusing plaintiff this opportunity.

Plaintiff was also not allowed to amend to conform to the proof to add

specifications of negligence based on alleged ordinance violations. We note that allowing amendments to conform to proof is the rule and refusal the exception. Mora v. Savereid, 222 N.W.2d 417, 422 (Iowa 1974). The trial court is vested with great discretion in these matters and we will interfere only if that discretion is abused. Id. Where the parties offer evidence on an issue the denial of an amendment to conform to proof would be beyond fair discretion. Laverty v. Hawkeye Security Insurance Co., 258 Iowa 717, 725, 140 N.W.2d 83, 88 (1966).

Applying these basic principles, we find that the plaintiff should have been allowed to amend the petition to allege specifications of negligence based on alleged violations of the ordinances which we have ruled should have been admitted into evidence. Under these circumstances, failure to do was error.

IV.

Plaintiff's final contention is that the court erred by refusing to instruct the jury regarding the legal duties and responsibilities of defendant under the statute and ordinances, and that violation of such statutes and ordinances would constitute negligence per se. In light of our above ruling, we find plaintiff should receive the benefit of these instructions. Jury instructions are to be read as a whole, each being construed in light of, and in harmony with, the others. Hackman v. Beckwith, 64 N.W.2d 275, 280 (Iowa 1954). We believe the duties of defendant and the rights of plaintiff would be adequately presented when the above instructions are read in harmony with those given.

We, therefore, reverse the judgment entered and remand the cause for a retrial in conformity with this opinion.

REVERSED AND REMANDED.