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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ROBERT F. BRIGGS, JR.
and JACQUELINE BRIGGS,

Appellants,

vs.

J. P. BRENNAN, CO., INC., a
corporation, and MERLE F. GOERDT,
d/b/a M. F. GOERDT CONSTRUCTION
COMPANY,

Appellees.

Filed May 31, 1978

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2-60165

Appeal from Dubuque District Court - Peter Van Metre, Judge.

Plaintiffs appeal from adverse judgment in personal injury action, asserting trial court erred in overruling their motion for new trial. **AFFIRMED.**

R. N. Russo, of Dubuque, counsel for appellants.

H. F. Reynolds, of Reynolds, Kenline, Breitbach, McCarthy & Clemens, of Dubuque, counsel for appellees.

Heard by Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

Plaintiffs Robert F. Briggs, Jr. and Jacqueline Briggs, husband and wife, appeal from a jury verdict and judgment entered for defendants, J. P. Brennan Co., Inc. and Merle F. Goerd, d/b/a M. F. Goerd Construction Co. in this tort action in which plaintiffs sought a total of \$535,720 in damages as a result of injuries sustained by plaintiff-husband on or about August 8, 1972 during the course of his employment for the city of Dubuque, when his head came into direct contact with an electrical transformer line at a pumping station where defendant-construction firms were working. On appeal, plaintiffs argue that the trial court erred in overruling their motion for new trial, contending that (1) their requested instruction admonishing the jury to limit its deliberations concerning liability to the parties to the action should have been given, and (2) the trial court improperly communicated *ex parte* with the jury foreman concerning the type of answers which could be given to two special interrogatories submitted to the jury.

As a result of several amendments to their petition, plaintiffs alleged that defendants, who had been employed by the U. S. Army Corps of Engineers in 1970 to construct a flood wall along the west bank of the Mississippi River in Dubuque, were negligent in removing and failing to replace both a portion of the fence surrounding the electrical transformer at the pumping station in question and the warning signs attached to the fence, in failing to exercise due care in making modifications to the pumping station, and in failing to install insulators after the removal of the fence and warning signs. In their answer, defendants denied, *inter alia*, that they were negligent and that their actions were the proximate cause of Robert's injuries. They also asserted that Robert was contributorily negligent in failing to observe the presence of electrical lines and in failing to exercise due care in avoiding personal contact with the lines.

Testimony at trial established that defendants had removed a fence from the east side of the transformer, which was not replaced with a temporary one until the city so directed after the accident. The record also reflects that Robert approached the transformer platform from the east side, climbed it, and came into contact with a wire, resulting in the injuries for which he now seeks relief. Defendants established during cross-examination of plaintiffs' witnesses that it was the city of Dubuque that

controlled the keys to the gates in the fence surrounding the transformer. These gates were always kept locked and the city keys had to be used to enter the area when the pumping station was to be energized. It was further established that the city was responsible for requesting that the electric company energize the pumping station when it was necessary and had made such a request prior to the accident in question.

Plaintiffs' requested instruction No. 4 was refused by the trial court. That instruction stated:

There has been evidence presented in this case indicating that the United States Government, through the Army Corps of Engineers, and the City of Dubuque, Iowa, were involved in certain matters relating to or connected with the substation where the plaintiff alleged he was injured. You are advised that neither the United States nor the City of Dubuque, nor any other governmental unit is a party to this lawsuit. Your determination as to the liability of any party or as to the amount of any damages must be based upon evidence presented as it relates to the parties to this lawsuit. In making your determination as to any liability by any of the parties or as to the amount of any damages, you cannot take into account the fact that either the United States or the City of Dubuque may have been involved or connected with the substation.

A jury verdict was returned for defendants. Two interrogatories submitted to the jury concerning whether defendants had established their claims of Robert's contributory negligence were answered in the negative.

Initially, plaintiffs argue that the court erred in refusing to give their requested instruction and, in so doing, improperly permitted the jury to consider the liability of other parties, such as the Corps of Engineers and the city of Dubuque, without proper instruction that the liability of third parties was not at issue in the case. Defendants respond that had requested instruction No. 4 been given, the jury would, in effect, have been precluded from considering the energization of the station by the city for its pumping operation and the circumstances under which Robert came upon the premises. They argue that had the instruction been given, they would not have been able to urge their defense theory that the sole proximate cause of the injury was the failure of the city to instruct, warn or protect its employee against the dangers present during pumping operations which were neither understood nor appreciated by Briggs. In their brief, defendants assert that the removal of the fence and warning sign only created a condition upon which the failure and omission of the city operated and that this theory was within the scope of their general denial of causal negligence in their answer. However, plaintiffs respond that defendants should not be permitted to assert this

theory for the first time on appeal, inasmuch as it was not advanced in pleadings, evidence, closing argument, or any instructions requested by defendants.

As a preliminary matter, we observe that an appellate court will not consider a theory or issue not initially raised in the trial court. *Champlin v. Walker*, 249 N.W.2d 839, 842 (Iowa 1977); *Burr v. Apex Concrete Co.*, 242 N.W.2d 272, 274 (Iowa 1976); *Aetna Casualty and Surety Co. v. Jewett Lumber Co.*, 209 N.W.2d 48, 50 (Iowa 1973). In deciding this issue, we are governed by the principle that all instructions given must be read and considered together and related to each other, not piecemeal or in artificial isolation. *Greninger v. City of Des Moines*, 264 N.W.2d 615, 617 (Iowa 1978); *Wiedenfeld v. Chicago & N.W. Transp. Co.*, 252 N.W.2d 691, 698 (Iowa 1977). Further, a court may not unduly emphasize, by repetition or otherwise, issues, theories, defenses, particular evidence, specific or assumed facts, or burden of proof. *Dickman v. Truck Transport, Inc.*, 224 N.W.2d 459, 464 (Iowa 1974); *Rosenau v. City of Estherville*, 199 N.W.2d 125, 133 (Iowa 1972).

Although plaintiffs correctly observe that defendants' theory was not specifically advanced in pleadings, ample evidence was adduced, especially during defendants' cross-examination of plaintiffs' witnesses, which would support a jury determination based upon the theory espoused by defendants. Further, instruction Nos. 3, 9, 10 and 14 given by the court generally informed the jury as to the issue posed here regarding proximate cause. Consequently, it is apparent to us that defendants' theory was adequately presented to the court and jury. As further support for our conclusion, the supreme court, faced with the same issue presented here, stated in *Dickman v. Truck Transport, Inc.*, supra, at 467:

... [T]he opponent is not required to specifically allege in his responsive pleading negligence of a third party or parties was the sole proximate cause of plaintiff's injury in order to rely on that defense but may properly introduce evidence that negligence of a third party or parties was in fact the sole proximate cause of plaintiff's injuries under a general denial. *Mora v. Savereid*, 222 N.W.2d 417, 421 (Iowa 1974) and authorities cited.

On this basis, we conclude that defendants were entitled to present evidence regarding the possible liability of third parties even though making only a general denial of causal negligence and that the record provides a sufficient evidentiary foundation for an adoption by the jury of defendants' theory of the case. Furthermore, we believe that

the giving of the requested instruction would not only have unduly emphasized plaintiffs' version of the case, it would have been highly misleading and incorrect as well. See Iowa Uniform Jury Instructions, Civil, Nos. 2.6, 2.7, 2.7A, and 2.7B. After reviewing all the instructions given the jury, we are satisfied that the jury was adequately informed of all the issues presented in the case. See instruction Nos. 3, 9, 10 and 14.

Finally, plaintiffs argue that the trial court improperly communicated *ex parte* with the jury foreman with regard to the answering of special interrogatories, in violation of rules 196 and 197, Rules of Civil Procedure. They contend that the judge, in effect, improperly gave the jury foreman additional unwritten instructions outside the presence of and without notice to counsel. During the hearing on the motion for new trial, the trial judge gave his account of the events which transpired:

... As I recall it, the foreman asked me if it was necessary for them to answer the Interrogatories, and I replied, "Yes." I don't believe he asked me anything else. I know the only statement I made to him was that they should follow the instructions and answer the Interrogatories. I certainly did not in any way try to tell them how to answer the Interrogatories or anything of that nature.

* * *

... I do recall one further thing. The foreman indicated that they did not want to--when he asked about the Interrogatories, he said, "We don't want to hurt Mr. Briggs' chances of recovering damages from the City or anyone else," I said, "Well, you have to answer the Interrogatories. Answer them anyway you want," words to that effect. I made no comment at all on the situation as to whether or not there would be any liability on the part of the City or anyone else.

The depositions of three jurors whose recollection of the incident corresponded with that of the judge were also introduced into evidence at the hearing.

In overruling the motion for new trial on the basis of the judge-jury communication, the court indicated that it considered the communication which took place to be the same type as that discussed in *State v. Fiedler*, 260 Iowa 1198, 1205-1206, 152 N.W.2d 236 (1967), where the court, quoting from *Burton v. Neill*, 140 Iowa 141, 145, 118 N.W. 302 (1908), held that "general directions to the jurors as to their duty, not having any bearing upon the evidence which they are to consider and the law applicable thereto, are not instructions such as are required to be in writing under statutory provisions..." The trial court also concluded that there had been absolutely no showing of prejudice by plaintiffs regarding the brief discussion between the jury foreman and the judge, especially since the jury found in favor of plaintiffs on the issue posed by the interrogatories.

We agree with the sound analysis of the trial court. Since the jury found in favor of plaintiffs on the contributory negligence question, any error committed as a result of the alleged improper communication was rendered harmless. *Ferris v. Anderson*, 255 N.W.2d 135, 137 (Iowa 1977); *Nassif v. Pipkin*, 178 N.W.2d 334, 337 (Iowa 1970). Since we find no error, we affirm the district court.

AFFIRMED.