

IN THE COURT OF APPEALS OF IOWA

FILED

FEB 26 1986

CLERK SUPREME COURT

ALAN PETERSON,

)

Plaintiff-Appellee,

)

Filed February 26, 1986

vs.

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191

VIRTUS PTTMAN,

)

Defendant-Appellant.

)

5-574
84-1733

Appeal from the Iowa District Court for Sac County (15666) - James C. Smith, Judge.

Defendant appeals an adverse judgment in a negligence action, alleging that the trial court erred in several procedural and evidentiary rulings.
AFFIRMED.

David L. Phipps of Whitfield, Musgrave, Selvy, Kelly & Eddy, Des Moines, Iowa, for defendant-appellant.

Thomas L. McCullough of the McCullough Law Firm, Sac City, Iowa, for plaintiff-appellee.

Heard by Donielson, P.J., Schlegel, and Sackett, JJ.

Defendant appeals an adverse judgment in a negligence action, alleging that the trial court erred in several procedural and evidentiary rulings. We affirm the trial court's rulings and judgment.

Plaintiff Peterson was severely injured while working as an employee of Sac County on a bridge construction site in September 1979. He subsequently brought an action against defendant Pittman alleging that Pittman was an independent contractor hired by the county to operate a dragline, and that defendant's negligent operation of the dragline caused his injuries.

Defendant initially answered the petition and raised the defense of contributory negligence. He later filed an amendment to his answer, affirmatively alleging that because both he and plaintiff were Sac County employees, plaintiff's sole and exclusive remedy was worker's compensation pursuant to Iowa Code section 85.20. Within this affirmative defense, defendant also claimed that plaintiff's failure to give statutory notice to Sac County, pursuant to Iowa Code section 613A.5, effectively barred his action against defendant. After the judicial adoption of pure comparative negligence in the Goetzman decision, defendant filed a second amendment to his answer changing his original affirmative defense from contributory negligence to comparative negligence. In accordance with his second amended answer, defendant moved to join Sac County and Boyd Rodman, plaintiff's foreman, as additional parties for the sole purpose of determining percentages of negligence. The defendant did not claim monetary damages against Sac County or Rodman, but rather served them with an original notice together with copies of plaintiff's petition, defendant's answer, the subsequent amendments to his answer, and the two orders allowing the joinder of the new parties.

Sac County and Rodman responded by filing a special appearance alleging that no "petition" was on file against them at the time of the filing of the original notice nor was there any petition attached to the original notice asking for monetary relief. After oral argument, the trial court sustained the special appearances of Sac County and Rodman.

The case proceeded to trial between plaintiff and defendant Pittman only. The trial resulted in a jury verdict for plaintiff establishing total damages at \$150,000 and allocating 60% of the negligence to defendant and 40% to plaintiff. Judgment was entered for the plaintiff in the amount of \$90,000 plus interest. The court found as a matter of law that defendant Pittman was not a co-employee of plaintiff, and that no claim had been made against Sac County or Boyd Rodman. Therefore, no jury instructions were given concerning defendant's alleged status as a county employee, or whether plaintiff sufficiently complied with section 613A.5 notice provisions.

On appeal, defendant alleges the trial court erred in several respects. Specifically, he asserts the trial court erred in: (1) ruling that section 613A.5 was inapplicable since plaintiff was making no claim against the county; (2) sustaining the special appearances of Sac County and Boyd Rodman; (3) allowing plaintiff's counsel to improperly cross-examine defendant; (4) ruling on the use of a transcribed statement of a witness for examination purposes; and (5) finding, as a matter of law, that defendant was not an employee of the county.

I. Employee Issues. This case is an action at law, and our review is on assigned error only. Iowa R. App. P. 4. Defendant argues that the court erred in ruling that the issue of plaintiff's compliance with the notice provisions of section 613A.5 was inapplicable to the case because plaintiff was making no claim against the county. Defendant contends that because he was an employee of the county, plaintiff was required to comply with the statutory

notice limitations. The fact remains, however, that the only party alleging defendant was an employee of the county was the defendant himself. The plaintiff certainly *did not* allege that defendant was an employee and therefore did not have a reason to sue the county. The only attempt to include the county in the case was through defendant's attempt to join it and the foreman Rodman, for the stated purpose of apportioning liability under the comparative negligence standards. Defendant *did not* allege in his affirmative defense or his amendments that he was an employee of Sac County, and all of the authority he relies upon concerning this issue is premised upon the defendant being an employee or agent of the county before the notice requirements of section 613A.5 apply. Therefore, the validity and persuasiveness of his legal argument depends upon the factual determination of whether or not defendant was an employee of Sac County.

The initial determination by the trial court concerning defendant's status as an employee of *Sac County* as a matter of law was in response to defendant's motion for a directed verdict at the end of plaintiff's case. Defendant also evoked the trial court's same ruling on this factual matter in his requested instructions. Under these circumstances defendant was allowed to bring in evidence that would establish an employer/employee relationship during trial. At the end of trial, however, the trial court determined that there still was insufficient evidence on this issue to instruct the jury. After the verdict, the defendant moved for a judgment notwithstanding the verdict and for a new trial, alleging the court erred in failing to submit instructions on defendant's employee status.

To support defendant's argument as it is framed on appeal would, in effect, be the same as determining the trial court erred in denying defendant's motion for a new trial. In ruling on a motion for a new trial, the trial court has broad discretion to determine whether the verdict effectuates substantial justice

between the parties. Iowa R. App. P. 14(f)(3); Miller v. AMF Harley-Davidson Motor Co., Inc., 328 N.W.2d 348, 351 (Iowa App. 1982). We have reviewed the record and conclude the trial court did not abuse its discretion in denying defendant's motion for a new trial.

In his notice of appeal, defendant included only the plaintiff, Alan Peterson. Therefore, his assignments of error as they apply to the trial court's ruling on the special appearances by Sac County and Rodman are not before us and we cannot address the issue. See Iowa R. App. P. 6(a).

II. Use of Deposition. While cross-examining defendant, plaintiff used and read portions of defendant's deposition to ensure the correct wording of his questions and to ascertain whether defendant remembered giving the responses indicated in the deposition. Defendant answered that he not only remembered the questions, but also agreed that the answers he gave at that time were correct. Counsel for the defendant objected to plaintiff's counsel reading portions of the deposition and asked the court to require additional portions of defendant's deposition to be read to the jury also. Defendant's counsel insisted that Iowa Rules of Civil Procedure 144 and 145, when read together, required plaintiff's counsel to include additional portions of the deposition in his questioning.

We understand defendant's argument to be based upon the premise that plaintiff's counsel was either impeaching defendant on the stand or at the very least was offering portions of the deposition into evidence. After reviewing the record, however, we cannot agree with defendant on either contention. Defendant admitted each of the questions propounded to him and consequently there was nothing for plaintiff's counsel to offer. More importantly, however, the trial court noted the amount of space in the deposition between portions read and the dissimilarity of each question when it decided to overrule defendant's objections and allow plaintiff's counsel to proceed. In conjunction with its ruling,

the trial court expressly informed defense counsel that he could explore the omitted portions on redirect. Defendant, for some unknown reason, evidently decided to forego the opportunity because it does not appear that he covered the issue on redirect. We cannot see how defendant can claim error on this issue. The admissibility of portions of a deposition is within the discretion of the trial court. We will not interfere except where prejudice to the complaining party clearly appears. See Pictorial Review Co. v. Fitz Gibbon & Son, 163 Iowa 644, 650, 145 N.W. 315, ____ (1914). We find no prejudice to defendant and therefore affirm the trial court on this issue.

III. Transcript. During defendant's examination of a Mr. Strong, defense counsel produced a transcript of a tape apparently recorded by an insurance agent who had interviewed Strong earlier. Based upon the questions and answers on the transcript, defendant's counsel questioned Strong whether the questions and the answers were correct. Plaintiff objected to defendant's counsel reading the answers to the jury as well as actually "reading" the questions. The trial court sustained the objection but allowed defendant to ask whatever questions he desired as long as he did not read them from the transcript because it had not been verified and admitted into evidence. When plaintiff began using the same transcript as a basis for questions, defendant objected because the questions were outside the scope of direct examination. Defendant also contended that the transcript was his work product produced in anticipation of litigation and, that it was shown specifically for the purpose as provided by Iowa Rule of Evidence 613. However, the trial court told defendant's counsel that it would allow plaintiff's counsel to examine the witness in question and answer form on the same matters as were contained in the statement, and in the same way defense counsel had done. Defense counsel then volunteered to allow the transcript to come in rather than have the questions asked verbally of the witness.

The barebones of this issue is whether the trial court correctly allowed plaintiff's counsel to use other portions of the tape transcript on redirect. This specific factual and evidentiary issue was addressed by the supreme court in State v. Don, 318 N.W.2d 801, 806 (Iowa 1982). There the court held that the trial court did not abuse its discretion in allowing the State to read other portions of the interview that were consistent with the witness's direct testimony. The holding in the Don opinion is directly on point as to the issue before us today. We therefore affirm the trial court's decision.

Because we find the trial court did not err in any of the issues raised by appellant, we affirm the verdict and judgment below.

AFFIRMED.

Donielson, P.J., concurs; Sackett, J., dissents.

I would reverse. There is evidence in the record from which a fact finder could find the defendant was an agent of Sac County.

If defendant were an agent of Sac County the claim would have been barred because there are no facts to show compliance with Iowa Code section 613A.5 and the petition was filed over 22 months after the accident. The claim against the defendant as an agent of a municipality must be brought within the scope of section 613A.5. See Farnum v. G.D. Searle & Co., Inc., 399 N.W.2d 392, 394 (Iowa 1983).

The trial court erred in not submitting defendant's requested instruction on the agency issue.