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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

THE FIRST NATIONAL BANK OF	)	
MARION, IOWA, as Conservator	)	Filed February 28, 1978
of DENISE DIANE GREAZEL,	)	
Appellant,	)	
vs.	)	
LINN COUNTY, IOWA,	)	<u>258</u>
Appellee.	)	2-58884

Appeal from Jones District Court - Clinton E. Shaeffer, Judge.

Plaintiff conservator appeals jury verdict for defendant Linn County in suit on behalf of passenger injured in car accident occurring on county road. - Reversed and remanded for new trial.

Terry J. Abernathy and Minor Barnes, Pickens, Barnes & Abernathy, of Cedar Rapids, and J. E. Heiserman, Remley & Heiserman, of Anamosa, for Appellant.

Raymond R. Stefani and Keith E. Stapleton, Silliman, Gray & Stapleton, of Cedar Rapids, for Appellee.

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

SNELL, J.

Plaintiff First National Bank of Marion, Iowa, as conservator of Denise Diane Greazel, appeals a judgment by jury holding defendant Linn County not liable for personal injuries sustained by plaintiff's ward in an automobile accident. On appeal plaintiff asserts error in instructions and in failing to grant a short continuance so plaintiff could depose last-minute defense witnesses.

Plaintiff's ward, Greazel, was a passenger in an automobile driven by Christine Vanous when the accident occurred. It was alleged the county and William Harrington, the county engineer, were negligent in not properly marking the road so as to warn the driver of a "T" intersection. Defendant answered plaintiff's petition denying negligence and asserting contributory negligence. The answer was subsequently amended to allege that the negligence of the driver, Vanous, was the sole proximate cause of Greazel's injuries.

On the day the trial began, defendants filed a supplemental answer to one of plaintiff's interrogatories, naming two additional witnesses, both of whom were eventually called at trial. When the two witnesses were called, plaintiff moved the testimony be excluded or, in the alternative, the trial continued for the next two days (Saturday and Sunday) to allow plaintiff an opportunity to depose the witnesses. The trial court overruled plaintiff's motion on the ground the witnesses could have been deposed the day before trial or evenings after the court recessed for the night.

Plaintiff's initial area of concern on appeal is the instructions. In its brief, plaintiff attacks a number of the instructions and specifically includes four such alleged errors for review. First, plaintiff argues that the trial court erred by including in the Statement of Issues defendant's allegations which constituted assumption of the risk and that the Statement of Issues and the instructions allowed the jury to impute the negligence of the driver to the plaintiff-passenger.

Since our supreme court's decision in *Rosenau v. City of Estherville*, 199 N.W.2d 125 (Iowa 1972), the secondary meaning of the defense of assumption of risk, the injured person acting unreasonably in assuming a particular risk, has been abolished as a separate defense where contributory negligence is available. The

reason given is that instructing on assumed risk as a separate affirmative defense results in duplicitous instructions on a single aspect of the case; furthermore even correct statements of the law, if repeated to the point of undue emphasis, may constitute reversible error. 199 N.W.2d at 133; *Andrews v. Struble*, 178 N.W.2d 391 (Iowa 1970); *Clarke v. Hubbell*, 249 Iowa 306, 86 N.W.2d 905 (1957).

The Statement of Issues repeated the claims and allegations of both parties. Specifically, it repeated defendant's claim that plaintiff's ward was contributorily negligent and that the driver, Vanous, was also negligent and said negligence was the cause of Greazel's injuries. The trial court then instructed the jury that the foregoing was a summary of the respective claims of the parties and the fact that a claim was made is not of itself, any proof or evidence of the claim.

From a review of the contents of the Statement of Issues and the instructions generally, we do not find that the trial court impermissibly instructed on assumption of risk as proscribed in *Rosenau*. Neither do we find the trial court invited the jury to impute the alleged negligence of the driver to Greazel. Instruction 17 properly stated the negligence of the driver, if any, would not be imputed to her. However, Greazel was required to exercise reasonable care under the circumstances, and she was not entitled to completely surrender her care to the driver. Instruction 17 is identical to Uniform Instruction 2.5: Standard of Care of Passenger.

Plaintiff's second contention is that the issue of Greazel's contributory negligence was submitted to the jury without evidentiary support. Generally questions of contributory negligence and proximate cause are for the jury; it is only in exceptional cases that they may be decided as a matter of law. Rule 14(f)(10), Rules of Appellate Procedure. However, it is error to submit a charge of negligence upon which there is no support in the record. *Brown v. Lyon*, 258 Iowa 1216, 1222, 142 N.W.2d 536, 538 (1966). In Instruction 16 the court instructed on contributory negligence that plaintiff could not recover if Greazel was herself negligent "... in some particular as alleged by defendant and that such negligence was a proximate cause of her injury or damage." In the statement of issues the court set out defendant's allegation that Greazel was negligent "(d) in failing to

remove herself as an occupant of the Vanouf driven automobile."

There is a factual dispute whether Greazel asked Vanouf to slow down and as to Vanouf's conduct immediately prior to the accident. However, there is no evidence from which a jury could find that a failure to remove herself from the vehicle, even if that constituted negligence, was a proximate cause of her injury. Cf. *Clubb v. Osborn*, 256 Iowa 1154, 1162, 130 N.W.2d 648 (1964). "There is no evidence that plaintiff stopped within five feet of the fire hydrant, and in any event reasonable minds could not conclude that plaintiff's proximity to the fire hydrant could possibly make any contribution to her being struck from the rear by defendant's truck." Submission of this issue in Instruction 16 was reversible error. *Clubb*, supra; see also *Hartwig v. Olson*, 261 Iowa 1265, 1275-6, 158 N.W.2d 81, 87 (1968).

Plaintiff's third assignment of error is that the instructions repeated statements of law relating to duties of the driver to the point of undue emphasis constituting reversible error. *Clarke v. Hubbell*, supra, is cited for the proposition that even correct statements of the law, when repeated to the point of undue emphasis, constitute reversible error. The trial court routinely submitted Uniform Jury Instructions on proper lookout (No. 21), assured clear distance ahead (No. 22), speed less than the statutory limit (No. 23) and control (No. 24).

We find nothing wrong with the trial court's submission of these instructions. One of defendant's affirmative defenses to plaintiff's claim was that Vanous, the driver, was negligent and that her negligence was the sole proximate cause of Greazel's injuries. Before the jury could decide the issue of proximate cause, it first had to find Vanous was negligent. Instructions 21-24 contained the Iowa law on statutory rules of the road, a violation of which constitutes negligence. Defendant was entitled to have his theory of the case submitted to the jury, and the trial court did not err in so instructing.

Plaintiff's fourth contention is that the trial court erred in refusing to submit the substance of a requested instruction that the relative negligence of the driver and the defendant is not to be compared. Plaintiff's requested instruction was taken from Uniform Instruction No. 2.16. Such instruction has support in *Gunnison v. Torrey*, 216 N.W.2d 361, 364 (Iowa 1974), where the supreme court held a failure

to instruct on concurring negligence was error.

The requested instruction did not include defendant's affirmative defense of sole proximate cause as is provided for in the uniform instruction. Defendant also points out that Instruction 18 includes a statement that where there is concurrent negligence each of the negligent persons is liable and the extent to which the damage is attributable to the different causes is immaterial. However, this statement loses most of its impact as a proposition favorable to plaintiff by being buried in an instruction stating defendant's theory that the driver's negligence was the sole proximate cause of the accident. We find it was error not to give a separate instruction substantially in the form of Uniform Instruction No. 2.16.

Plaintiff's final complaint with the instructions is that their repetitious nature unduly emphasizes defendant's theory of the case and constitutes reversible error. Although this contention is not specifically set out as a separate assignment of error, it is contained in each of the foregoing alleged errors. We consider it as a separate assignment.

The rule in Iowa is that all instructions be considered together in order that the jury may get the full impact of the law as given by the trial judge. *Shank v. Wilhite*, 256 Iowa 982, 985, 129 N.W.2d 662 (1964). However, when read in their entirety, defendant's defenses are overemphasized to the point of minimizing plaintiff's original cause of action against defendant Linn County. This is especially true of Instructions 21 through 24 which contain the law respective to Vanous' operation of the automobile. These instructions deal solely with defendant's claim that Vanous' negligence was the sole proximate cause of Greazel's injuries; yet, they represent one seventh of the total instructions.

Defendant argues in its brief that repetition in instructions of the distinction between proximate cause, sole proximate cause and concurring cause is not improper and often needed as jurors frequently do not readily understand such distinctions. See *Wagaman v. Ryan*, 258 Iowa 1352, 1362, 142 N.W.2d 413 (1966). However, even needed repetition should not go to the extent of undermining plaintiff's original cause of action. In such instances, the jury should be cautioned that specific instructions deal only with the limited issue of one party's negligence

and that before they can find for defendant, they must also find such negligence was the sole proximate cause of the injuries.

In the instant case we find the instructions overemphasize the issue of defendant's claim that Greazel was herself negligent or that Vanous' negligence was the sole proximate cause of the accident without equally emphasizing the concept of concurrent negligence. It was reversible error to do so. See Clarke v. Hubbell, supra. Because of our holding, we need not consider plaintiff's other assignment of error. Reversed and remanded for new trial.

Donielson, J. and Oxberger, J. concur. Carter, J. and Allbee, C.J., dissent.

CARTER, J. (dissenting)

I dissent. As to the majority's finding of error in the submission of Denise Greazel's contributory negligence for failing to remove herself from the automobile, this issue was not preserved in the trial court. Nor has it been assigned as error or argued as such in this court. The only objection lodged in the trial court by plaintiff concerning the instructions on contributory negligence was the contention that the evidence was insufficient to support submission of this defense in any respect. Because the evidence was sufficient to support some of the allegations of contributory negligence (and the majority does not suggest it was not) it was incumbent on plaintiff to specifically direct the trial court's attention to which of the several specifications of negligence, if any, were not supported by the evidence. Failing to do so plaintiff has not preserved error under R.C.P. 196. Similarly plaintiff's failure to state, argue or cite authority for this specific issue on appeal is a waiver of that issue under Rule 14(3), R. App. P.

As to the majority's other finding of error, I cannot agree that the trial court was required to repeat in a separate instruction a legal proposition, the substance of which had already been fully covered in another instruction (Instruction no. 18). Plaintiff's purpose in requesting uniform instruction no. 2.16 was obviously to combat defendant's affirmative defense that Vanous's negligence was the sole proximate cause of the injuries sustained by plaintiff's ward. For this reason, the incorporation of the legal proposition which was the substance of plaintiff's requested instruction into the instruction dealing with sole proximate cause was not only proper but was, I submit, the most appropriate of all possible places in which to include it.

I am familiar with the proposition that overemphasis of correct legal proposition by means of repetition may be error, but I know of no corollary requiring repetition of instruction in order to prevent underemphasis. I would reject all of the assignments of error and affirm the trial court.

ALLBEE, C.J., joins in this dissent.