

FILED

MAY 20 1977

55

IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT

LESTER G. KLOUDA, RICKIE)
A. KLOUDA, HOWARD L. BEAN,)
BRAD L. BEAN and PEARL BEAN,)

Appellants,)

Filed

vs.)

109
2-58278

ROY STEWART MCCOY,)

Appellee.)

Appeal from Linn District Court - William R. Eads, Judge.

Appeal by plaintiffs on trial court's refusal to submit instruction on defense of contributory negligence to counterclaim. Reversed and remanded.

David P. McGuire, of Cedar Rapids, for Appellants.

John D. Randall and Robert C. Gross, of Cedar Rapids,
for Appellee.

Heard by Allbee, C.J., and Donielson, Snell and Oxberger, JJ.
Carter, J. takes no part.

PER CURIAM

Plaintiffs, Rickie A. Klouda and Pearl Bean, appeal judgment on jury verdict against them awarding damages of \$2,950 on defendant's counterclaim. The suit was the outcome of personal injuries and property damage sustained in an automobile accident between Rickie Klouda and Roy McCoy, the defendant. The sole issue is whether the trial court erred in failing to submit to the jury plaintiffs' affirmative defense to the counterclaim of contributory negligence. We reverse and remand.

Plaintiffs brought suit to recover for personal injuries and property damage as a result of the accident. Defendant answered and counterclaimed for his personal injuries and property damage, alleging plaintiffs were negligent. Plaintiffs answered alleging defendant's contributory negligence as an affirmative defense and further that defendant's negligence was the proximate cause of the accident. Section 619.17, The Code.

Plaintiffs submitted a requested instruction on contributory negligence, which the court refused. Plaintiffs excepted and objected on the grounds that the evidence supported such an instruction, that contributory negligence had been pled and that the failure to give such an instruction constituted a finding as a matter of law that defendant was not guilty of contributory negligence. During the course of the jury deliberations, the court was handed the following question from the jury: "Can both Defendant and Plaintiff be found negligent? If so, are we to award damages to either one or the other?" In answering, the court referred the jury to the Statement of the Issues and to the written instructions. The jury found for the defendant on the counterclaim and plaintiffs' subsequent motions for judgment n.o.v. and new trial were overruled.

In the instant case, plaintiffs properly preserved error and it is therefore reviewable by this court. *Gunnison v. Torrey*, 216 N.W.2d 361, 363 (Iowa 1974). *See also* rule 196, Rules of Civil Procedure.

"Generally questions of negligence, 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 344(f)(10), R.C.P. Further, even when the facts are not in dispute or contradicted, if reasonable minds might draw different inferences from them, a jury question is engendered. Rule 344(f)(17), R.C.P.

Plaintiffs' primary defense to defendant's counterclaim was that if they were in fact negligent, defendant was contributorily negligent and it was his negligence which was a proximate cause of the accident.

Only in the exceptional cases can matters of negligence, contributory negligence and proximate cause be decided as a matter of law. *See Householder v. Town of Clayton*, 221 N.W.2d 488, 491 (Iowa 1974) and cases cited therein as to what constitutes an "exceptional case." This is not one of the exceptional cases where contributory negligence is found not to exist as a matter of law.

The theories of both parties to a lawsuit as far as they are supported by the pleadings and substantial evidence must be submitted to the jury and it is prejudicial error to fail to do so. *Doser v. Interstate Power Co.*, 173 N.W.2d 556, 559 (Iowa 1970). There was evidence that the plaintiffs swerved to the right to avoid defendant's car which was in the passing lane going the opposite direction. A question arose as to whose fault, if anyone's, existed for the accident. Failing to submit contributory negligence to the jury was prejudicial to

the plaintiffs on the counterclaim. *See also* Gunnison v. Torrey, 216 N.W.2d 361, 365 (Iowa 1974), where the supreme court reversed a jury verdict in favor of defendants on the failure of the trial court to give an instruction requested by plaintiffs. The court held that if the jury rejected the defendant's explanation of the accident, it should have considered whether concurring negligence existed; the failure to so instruct was reversible error.

The case is reversed and remanded for retrial of defendant's counterclaim.