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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

PATRICIA MEUSEL, a/k/a
PATRICE MEUSEL,

Appellee,

vs.

FLOYD COUNTY, IOWA,

Appellant.

Filed November 22, 1978

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2-61474

Appeal from Floyd District Court - B. C. Sullivan, Judge.

Defendant county appeals from a jury verdict for plaintiff passenger alleging the trial court erred in its instructions on the duty of the county in repairing secondary roads and in failing to instruct on specific acts of negligence of the driver claimed by defendant as the sole proximate cause of the accident. - Reversed and Remanded.

Roy W. Meadows, of Whitfield, Musgrave, Selvy, Kelly & Eddy, Des Moines,
for Appellant.

Alfred A. Beardmore, Charles City, for Appellee.

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

PER CURIAM

Defendant Floyd County, Iowa, appeals a jury verdict in favor of plaintiff Patricia a/k/a Patrice Meusel in her claim against defendant county for personal injuries sustained as a result of a one car accident. The automobile in which plaintiff was a passenger allegedly struck ruts and depressions in the highway and a windrow of gravel causing the driver to lose control. The vehicle then left the roadway, turned completely over and came to rest on top of plaintiff, pinning her underneath.

Defendant argued by way of a motion in limine, at trial and now here on appeal, that the notice served upon the county pursuant to § 613A.5, The Code, was insufficient to alert Floyd County to plaintiff's claim of injury as a result of ruts and depressions. Defendant argues the notice made reference only to a windrow of gravel. The purpose of the notice requirement is to enable a municipality to investigate an alleged incident while the facts are still fresh. *Lunday v. Vogelmann*, 213 N.W.2d 904, 907-08 (Iowa 1973). The issue is whether the notice adequately informed the county; that is, did it sufficiently alert the county to enable it to investigate the alleged incident while the facts were still fresh. Substantial compliance with the notice requirement of § 613A.5 is all that is required. *Cook v. City of Council Bluffs*, 264 N.W.2d 784, 789 (Iowa 1978).

In the instant case, the trial court correctly found the notice adequately informed defendant of the probability of a future lawsuit. The county had the opportunity to investigate while the facts were still fresh. Further, the county had the opportunity to demand more specificity as to the circumstances of the accident under § 613A.5, if it so desired. There was substantial compliance with the notice requirement. *Cook*, supra. In any event, defendant argues that in doubtful cases the court should submit the issue of sufficiency of the notice to the jury for a factual determination. We disagree. The issue of the sufficiency of the notice is a question of law for the courts to decide, not a question of fact. The court did not err.

Defendant also complains the trial court erred in failing to supplement Instruction No. 11 by instructing the jury on what constituted negligence on the part

of the driver of the vehicle in which plaintiff was riding. Instruction 11 informed the jury that defendant's contention was that the driver's negligence was the sole proximate cause of the accident. However, that instruction was written simply in terms of negligence and sole proximate cause and did not contain a definition of what would constitute negligence on the part of the driver.

Plaintiff counters by arguing that the instruction was given precisely as defendant requested and that under the well known doctrine of invited error a party may not predicate reversible error on the giving of an erroneous instruction which he has requested. We agree with plaintiff's contention that the doctrine of invited error precludes a party from arguing on appeal the error in an instruction which he has requested. See State v. Overman, 220 N.W.2d 914, 919 (Iowa 1974). However, we do not believe the doctrine is applicable to the instant case.

Defendant alleges that when it submitted the requested instruction to the court, it was unaware as to what testimony might be forthcoming as to the operation of the motor vehicle by a third party. After that testimony, defendant asked the court to supplement the instruction by defining what the county thought was negligence on the part of the driver. Specifically, defendant requested instructing on excessive speed under the circumstances and that the driver did not have her car under control.

In *Mora v. Savereid*, 222 N.W.2d 417, 419 (Iowa 1974), the supreme court stated that "all issues which are pled and for which there is substantial support in the evidence must be submitted. It is error not to do so. . ." Defendant's theory of the driver's negligence being the sole proximate cause was properly in the case under its plea of a general denial. 222 N.W.2d at 421. As such, the trial court should have instructed on defendant's theory of excessive speed and control by supplementing Instruction 11. It erred when it failed to do so.

Next, defendant contends the trial court erred because Instructions No. 7 and 8 failed to inform the jury that defendant's duty was only to use due care. Those instructions informed the jury the laws of Iowa provide that the county, through its agents, is charged with the duty of filling depressions and keeping the road free from ruts and in removing loose stones and other impediments from the traveled

portions of the highway. The trial court instructed the jury that a failure to comply with those provisions of the law constituted negligence. Defendant argues that its duty was only to use due care in fulfilling its statutory obligation while plaintiff argues that this may be the case with ordinary common law negligence but in the instant case, defendant's duty is imposed by statute and a breach of a statutory duty is negligence.

The statutory duty imposed on defendant in this case is found in § 309.67, The Code (1973). Section 309.67 provides:

Repair and dragging. The county board of supervisors and the engineer are charged with the duty of causing the secondary road system to be so repaired and dragged as to keep same in proper condition, and shall adopt such methods as are necessary to maintain continuously, in the best condition practicable, the entire mileage of said system.

In addition to the above they shall specifically:

1. Keep all sluices, culverts, and bridges, and the openings thereof, and all side ditches of the road, free from obstructions.
2. Provide such side ditches with ample outlets.
3. Remove loose stones and other impediments from the traveled part of the highway.
4. Fill depressions and keep the road free from ruts, water pockets, and mud holes.
5. Repair the approaches to bridges and culverts and keep such approaches smooth and free from obstruction. [§13, § 1527-s15; C24, 27, 31, 35, § 4660; C39, §§ 4660, 4778; C46, 50, 54, 58, 62, 66, 71, § 309.67]

Specifically, subsections (3) and (4) are in issue.

The issue before the court is whether § 309.67 imposes a statutory standard of care, the violation of which is negligence per se. In *Jorgensen v. Horton*, 206 N.W.2d 100, 102 (Iowa 1973), the supreme court stated "We have heretofore limited the doctrine of negligence per se to violations of statutes or ordinances which establish the standard of care required under the circumstances" citing *Kisling v. Thierman*, 214 Iowa 911, 915, 243 N.W. 552, 554 (1932). Kisling dealt with rule of the road statutes fixing the standard of care the violation of which, in the absence of legal excuse, is negligence per se. See also *Rosenau v. City of Estherville*, 199 N.W.2d 125, 128 (Iowa 1972).

The Jorgensen court stated that statutes and ordinances such as those under discussion are a legislative prescription of a suitable precaution, or a fixing by law of the standard of care which is required under the circumstances, and it must

follow that a failure to observe the standard of care thus fixed by law is negligence. However, the court in *Rosenau v. City of Estherville*, supra, stated that it had not extended this rigid rule to other tort cases involving breach of a statute or ordinance. In those situations, whether a statute or ordinance prescribes the required standard of care is to be decided in light of the purpose and intent of the pertinent statute or ordinance. See Jorgensen, supra; Rosenau, supra.

Violation of the duty to maintain roads in safe condition results in liability to users of the road. *Conrad v. Board of Supervisors*, 199 N.W.2d 139, 144 (Iowa 1972). In the case of cities and towns, that duty is only to use reasonable care. See Anderson v. City of Fort Dodge, 213 N.W.2d 527, 528 (Iowa 1973); *Hall v. Town of Keota*, 248 Iowa 131, 136-7, 79 N.W.2d 784 (1956). In this case, the board of supervisors and the county engineer clearly had a duty to maintain the county roads in proper condition and this duty runs to all those rightfully using the road.

While there are no cases specifically interpreting subsections (3) and (4) of § 309.67, 1973 Code of Iowa, *Larsen v. Pottawattamie County*, 173 N.W.2d 579, 581-2 (Iowa 1970) is pertinent. Larsen dealt with the county's duty to maintain its bridges in proper condition. There the court was faced with interpreting the meanings of subsections (1) and (5) of § 309.67 and stated that those sections "clearly reveal the legislative intent that a duty be impressed on all counties of this State to repair, maintain and keep in a reasonably safe condition all bridges and their approaches" (emphasis added).

We find that the intent and purpose of § 309.67 was to place responsibility for maintaining, repairing and dragging the secondary road with the board of supervisors and county engineer. Specifically the county is charged with keeping the roadway free of ruts and removing loose stones and other impediments. We do not find the intent and purpose of § 309.67 was to impose a standard of care, the violation of which is negligence per se. Accordingly, the trial court erred in giving Instructions 7 and 8 without informing the jury that defendant's duty was only to use due care.

Because of our holding on the instructional issues we need not discuss the other issues raised by defendant on appeal. However, because this case will have to

be retried, we take the opportunity to comment on two of those additional issues. Defendant argues that it was entitled to a directed verdict because plaintiff failed to establish any negligence. We disagree. The questions of negligence, contributory negligence and proximate cause are for the jury; it is only in the exceptional cases where they may be decided as a matter of law. Rule 14(f)(10), Rules of Appellate Procedure. Defendant also alleges that the trial court erred in excluding testimony of the practice of blading county roads as is commonly done in the State of Iowa. We believe that once a witness is properly qualified and the foundation for his testimony established, he may testify as to custom or common usage. However, the jury should be cautioned that a custom or usage is not a conclusive test of negligence or lack thereof, but only evidence thereof, since the standard is ordinary care under the circumstances and the standard of custom cannot be substituted instead. *Gibson v. Shelby County Fair Assoc.*, 246 Iowa 147, 150-3, 65 N.W.2d 433, 435-6 (1954).

REVERSED AND REMANDED.