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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-513 / 88-1250

KAREN KAY DRECKMAN, Administrator of the Estate of CHARLES JOSEPH DRECKMAN,

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Appellant,

vs.

GAYLE JOYCE GAUNT, ROGERS TRUCK LINES, INC., LARRY A. HANSON and **TY PRUITT TRUCKING, INC.**,

Appellees.

Appeal from the Iowa District Court for Fremont County, J. C. Irvin, Judge.

Appellant appeals from a jury verdict in a wrongful death action which awarded appellant no monetary sum for damages. **AFFIRMED.**

Joseph Cosgrove and Francis J. Cosgrove of Yaneff & Cosgrove, Sioux City, for appellant.

David F. McCann of Dippel & McCann, Council Bluffs, for appellees Gaunt & Hanson.

Philip Willson of Smith, Peterson, Beckman & Willson, Council Bluffs, for appellee Ty Pruitt Trucking.

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

PER CURIAM

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Appellant appeals from a jury verdict in a wrongful death action which awarded appellant no monetary sum for damages. We affirm.

Charles Dreckman was killed when his semi-tractor-trailer rig collided with another semi-tractor-trailer unit driven by appellee Gayle Joyce Gaunt. The Gaunt truck had just entered I-29 from the entrance ramp and was proceeding north at approximately 37 miles per hour when it was struck from the rear by the Dreckman vehicle. Karen Kay Dreckman, Charles's widow and administrator of his estate, brought a wrongful death action against Gaunt, the owners of the Gaunt truck, and Ty Pruitt Trucking, Inc., a trucking firm which was allegedly leasing the Gaunt truck from its owners.

The case came to trial before a jury in April of 1988. The jury returned a verdict in which it first found Gayle Gaunt to be at fault. It further found that this fault was not a proximate cause of damages to appellant. The jury, however, then went on to find that Charles Dreckman was 90% at fault in the accident, Gaunt was 10% at fault, and that these percentages were for fault which was a proximate cause of the accident. The jury awarded no damages. Finally, the jury found, in response to a special interrogatory, that the Gaunt truck was not leased to Ty Pruitt Trucking at the time of the collision. Following

this verdict, the district court entered a judgment in favor of appellees.

Our scope of review is on assigned error. Iowa R. App. P. 4.

I.

The first issue we address concerns appellant's assertion that appellee Ty Pruitt Trucking, Inc. was required to plead as an affirmative defense the termination of its lease of the Gaunt truck. An affirmative defense is defined as "one resting on facts not necessary to support plaintiffs' case." Baker v. Beal, 225 N.W.2d 106, 114 (Iowa 1975). Since appellant was required to plead and prove the existence of a valid lease at the time of the accident, we determine Ty Pruitt Trucking was not required to plead the termination of the truck lease as an affirmative defense. We note further the following official comment of Iowa Rule of Civil Procedure 72, which provides: "Although rules 67 and 72 were intended in part to abolish the general denial, it is said in Fredericks v. Dorman, 1966, 259 Iowa 1050, 147 N.W.2d 478, that: 'Under a general denial defendant may prove anything tending to show plaintiff's allegation is untrue.'" Iowa R. Civ. P. Ann. 72 comment (West 1970).

II.

The next issue we consider is appellant's assertion that the trial court erred in permitting certain evidence concerning the termination of the truck lease. Appellant

argues that Ty Pruitt Trucking could only terminate its lease with the owners of the Gaunt truck in conformity with Interstate Commerce Commission (ICC) regulations and the trial court erred in admitting evidence concerning termination by means not in conformity with ICC regulations.

Iowa Rule of Evidence 103(a)(1) provides:

> (a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
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> > (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.

Pursuant to rule 103(a)(1), when a party seeks to exclude evidence, that party must state the specific grounds on which the objection is lodged. The purpose of this rule is to alert the trial court to issues at hand and "to enable opposing counsel to take remedial steps to cure the alleged defect." Carter v. Wiese Corp., 360 N.W.2d 122, 132 (Iowa App. 1984); see also Nepple v. Weifenbach, 274 N.W.2d 728, 732 (Iowa 1979). In the case at bar, appellant objected to the evidence on the grounds of relevancy, materiality, probative value, and that the evidence went beyond the scope of any issue presented by the pleadings. It is clear appellant's objections did not raise the issue of the ICC regulations. As a result, these objections were insufficient to raise the issue and preserve error.

III. 54

Appellant also asserts the trial court erred as to the jury instructions given in the case.

A. Sudden Emergency. Appellant, who requested an instruction on sudden emergency, contends the trial court erred in failing to give the instruction. The elements of sudden emergency are:

> (1) the driver is confronted with a sudden emergency, (2) the emergency was not created by the driver's own negligence, (3) the driver conducted himself or herself as a reasonable person in a similar emergency.

Miller v. Eichhorn, 426 N.W.2d 641, 644 (Iowa App. 1988); see Jones v. Blair, 387 N.W.2d 349, 352 (Iowa 1986). Appellant was entitled to have the trial court instruct on this issue if supported by the pleadings and substantial evidence. Obviously, awareness of the danger is a prerequisite for application of the doctrine. See Hoth v. Clayton County, 269 N.W.2d 133, 135 (Iowa 1978).

Appellant failed to produce substantial evidence that Charles was aware of the danger which confronted him. Testimony and evidence was produced by appellees that Charles never braked, swerved, or took any evasive actions whatsoever. In addition, there is not substantial evidence that an emergency existed. As the Iowa Supreme Court stated in Manley v. Janssen, 213 N.W.2d 693 (Iowa 1973):

> Sudden emergency has been defined and discussed many times. These authorities, and many others like them, say that if there is substantial evidence an emergency existed, the matter should go to the jury. On the other hand, it is equally

> well settled that an issue without substantial evidentiary support should not.

Id. at 696 (citations omitted.) Under this record, the trial court did not abuse its discretion in denying appellant's request for a sudden emergency instruction.

B. Assured Clear Distance. Appellant claims the trial court erred in instructing on assured clear distance. Appellees produced substantial evidence that the Gaunt truck did not unexpectedly enter the freeway. As such, the trial court was correct in instructing on the assured clear distance doctrine. See Vanderheiden v. Clearfield Truck Rentals, Inc., 210 N.W.2d 527, 531 (Iowa 1973).

C. Instruction 23A. Appellant also objects to the trial court's giving of instruction 23A, which provides in pertinent part:

> A driver has a duty to stop, swerve, slacken speed or sound a warning when the driver knows or by the exercise of reasonable care should know that failure to take such action will likely result in a collision provided there is sufficient time for the driver to take such preventative measures.

We find no error in instructing the jury as to the duties detailed in instruction 23A.

IV.

Appellant next argues the jury's responses to the special verdict were inconsistent and the trial court failed to take appropriate action to correct the inconsistencies. The jury found Gaunt to be at fault in the accident, but that this fault was not a proximate cause

of damage to appellant. The jury, however, then went on to apportion fault, which was a proximate cause of the accident, between Charles and Gaunt, 90% and 10%, respectively.

It is clear that the jury's finding Charles 90% at fault and Gaunt 10% at fault and that this fault was a proximate cause of the damage to appellant was inconsistent with its determination that Gaunt's fault was not a proximate cause of the accident. See Westfall by Terwilliger v. Kottke, 328 N.W.2d 481, 485 (Wis. 1983). It is further clear that the trial court erred in not permitting the jury to correct its inconsistency. See Iowa Code § 668.3(6).

While such an inconsistency would normally require us to reverse and remand this case for a new trial, we do not find such action warranted here. The jury's determination that Gaunt's fault was not a proximate cause of the accident precludes appellant's recovery of damages. Likewise, the jury's decision that Charles was 90% at fault and Gaunt was 10% at fault for the accident still does not result in appellant's recovery of damages.

Iowa Code section 668.3(1) provides in relevant part:

> Contributory fault shall not bar recovery in an action by a claimant to recover damages for fault resulting in death or in injury to person or property unless the claimant bears a greater percentage of fault than the combined percentage of fault attributed to the defendants . . . .

The jury's finding that Charles was 90% at fault bars appellant from recovering damages from appellees for all but appellant's consortium claims. Even there, the jury's decision was to award zero damages for lack of consortium.[1]

V.

Finally, appellant argues that the trial court erred in permitting appellees to introduce the fact that Charles had been married previously and had a daughter from that marriage. Since the trial court has discretion in ruling upon whether to admit or exclude offered evidence, the issue here is whether the trial court abused its discretion. See Carter, 360 N.W.2d at 131. We find no such abuse of discretion.

VI.

A final subsidiary issue in this matter concerns appellant's contention that the appellees have designated unnecessary parts of the record to be included in the appendix. The Iowa Supreme Court has directed us to consider this issue with the appeal. Upon review of those

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1. Appellant's failure to raise in a timely posttrial motion the issue of the inadequacy of the consortium claim precludes us from considering the issue on appeal. See Dutcher v. Lewis, 221 N.W.2d 755, 758 (Iowa 1974). But even so, the Iowa Supreme Court held in Brunson v. Winter, 443 N.W.2d 717, 720 (Iowa 1989), where the jury awarded no damages for loss consortium, the trial court did not abuse its broad discretion in refusing to grant a new trial on this issue. As in Brunson, a reasonable jury could have determined that the consortium loss alleged here was insufficient to support a money award.

objected-to portions of the record, we conclude that overall they were pertinent to the issues on appeal.

AFFIRMED.