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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-612 / 89-1532

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MARY LANZ,

Plaintiff-Appellant,

vs.

CARVEL PEARSON and LESLIE RICHTER DAMON HICKMAN, IDA HICKMAN, AND AMERICAN MOTORIST INSURANCE COMPANY,

Defendants-Appellees,

THE ECONOMY COMPANIES,

Plaintiff-Appellant/Cross-Appellee,

vs.

CARVEL PEARSON, LESLIE RICHTER,

Defendants-Appellees/Cross-Appellants,

and

DAMON HICKMAN, and IDA HICKMAN,

Defendants-Appellees.

Appeal from the Iowa District Court for Buena Vista County, Phillip S. Dandos, Judge.

The plaintiffs have appealed an adverse judgment in a negligence suit arising from a highway collision. Two of the successful defendants have cross-appealed. **REVERSED AND REMANDED FOR A NEW TRIAL.**

Fredd J. Haas, of Humphrey & Haas, P.C., Des Moines, for appellants/cross-appellees.

Joseph L. Fitzgibbons, of Fitzgibbons Brothers, Estherville, for appellees/cross-appellants Pearson & Richter.

Fred L. Morris, of Peddicord, Wharton, Thune, Foxhoven & Spencer, P.C., Des Moines, for appellees Hickman.

Heard by Donielson, P.J., and Hayden and Habhab, JJ., but decided en banc.

HAYDEN, J.

Mary Lanz was injured in a three-car collision while driving a car owned by her employer, the Economy Companies. Lanz sued the owners and drivers of the other two cars for her personal injuries. Her employer also sued the same defendants for property damage to its vehicle. These two actions were consolidated for trial. The jury answered separate special verdict forms for each case.

At trial defendants presented an "act of God" defense, namely icy conditions on the road surface. Over plaintiffs' objections, the court instructed the jury on the "act of God" defense.

The jury returned verdicts in both cases in favor of defendants. Plaintiffs appealed. Two defendants cross-appealed.

Plaintiffs contend the district court erred by instructing the jury on the defense of "act of God." They argue the evidence about the road surface conditions did not support such a defense.

Plaintiffs also contend the district court should have allowed them to cross-examine one defendant concerning the existence of a prior statement he had allegedly made about the collision. They argue this cross-examination should have been permitted in order to impeach the witness or to refresh his memory.

In their cross-appeal, two defendants challenge an instruction stating any fault of Mary Lanz would not be

attributed to her employer in considering the employer's claim for property damage to its vehicle. Cross-appellants note the instruction was supported by a 1956 Iowa case holding the negligence of a consent driver was not imputable to the vehicle's owner. Stuart v. Pilgrim, 247 Iowa 709, 74 N.W.2d 212 (1956). However, cross-appellants argue Pilgrim has been abrogated by the adoption of the comparative fault act and should now be overruled.

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

I. Act of God

We first address plaintiffs' contention the "act of God" defense and jury instruction was improper under the circumstances of this case.

The Iowa Supreme Court has stated:

> "The rule of exemption from liability for loss, where the loss is the result of an 'act of God' is founded upon reason and justice that one should not be held responsible for that which he could not have reasonably anticipated, and could not have taken reasonable precautions to guard against. Accordingly, it is said that an act of God, as the term is known to the law, is such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been anticipated or expected. However, the occurrence need not be unprecedented. * * * If it could not have been anticipated or expected under normal conditions, that is sufficient."

Oakes v. Peter Pan Bakeries, Inc., 258 Iowa 447, 454, 138 N.W.2d 93, 98 (Iowa 1965) (quoting 1 Am. Jur. 2d Act of God § 3 (1962)).

That same chapter of Am. Jur. 2d continues:

> Extreme weather conditions, though inevitable in the locality involved, which operate to foil human obligations of duty are usually deemed in law to be acts of God. In this connection, the instances most often mentioned as coming within the legal comprehension of the expression "act of God" are lightning, tornadoes, storms or tempests, high waters, and sudden squalls of wind. However, every strong wind cannot be termed an act of God merely because it is unusual or more than average intensity.
> * * *
> Freezing weather, especially if coming in that season of the year when such weather may be expected, cannot be brought within the strict definitions of an act of God . . . "

1 Am. Jur. 2d Act of God § 5 (emphasis added).

It also appears from our review of the authorities, only the unexpected and overwhelming forces of nature acting without interference by human agency can constitute an "act of God." See, e.g., Lea Co. v. North Carolina Bd. of Trans., 308 N.C. 603, 304 S.E.2d 164, 173 (1983).

> Winter floods of near equal proportions, a common occurrence in the general area, cannot be viewed as an Act of God. An Act of God, excusing failure to perform a duty, excludes all circumstances produced by a human agency.

McClaskey v. United State, 261 F. Supp. 912, 914 (D. Or. 1966) (citations omitted).

In the present case, defendants rely on the adverse weather conditions present at the time of the accident as constituting an "act of God." However, despite the poor driving conditions, the circumstances were not such an "unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been anticipated or expected." 1 Am. Jur. 2d Act of God § 3.

Oakes is the leading Iowa case in this area, addressing a similar situation. However, the weather conditions in that case were much more severe. In Oakes several cars piled into each other due to sudden blinding blowing snow. Oakes, 258 Iowa at 455-56, 138 N.W.2d at 99. The sudden blinding snow was "just like driving into a snowdrift." Id. A highway patrolman arriving at the scene had trouble seeing the hood of his car. Id. The patrolman did not see another vehicle stopped at the scene until he collided with it, even though he was only traveling six miles per hour. Id. The supreme court held a winter storm of this intensity to be an "act of God." Id.

The situation in this case is not like that in Oakes. Unlike Oakes, the described conditions in the instant case appear to be fairly typical of a poor winter day in Iowa. It appears the accident happened around 6:30 a.m. on January 29, 1985. Snow was falling at an increasing rate at the time. The road surface was slick. Visibility was limited to twenty to thirty feet.

The parties all lived in the area. They were presumably familiar with winter driving conditions there. They had a duty to take those extra precautions reasonably necessary when driving in winter in Iowa. It does not appear this accident would have happened without a failure to exercise reasonable care by a human agency.

We hold there is insufficient evidence to support a jury instruction on an "act of God" theory of defense. We reverse the trial court on this issue.

II. Cross-examination on Prior Statement

The plaintiffs contend the trial court erred by not allowing plaintiffs' trial counsel to cross-examine Carvel Pearson, one of the defendants, concerning the existence of a prior statement about the accident. The statement involved had been given to the defendant's insurance carrier shortly after the accident.

Plaintiffs contend they should have been able to cross-examine the defendant concerning the existence of his statement for impeachment purposes or to refresh Pearson's memory. The defendants claim the statement is protected by Iowa R. Evid. 411. That rule prohibits the admission of evidence of insurance on the issue of whether the defendant acted negligently. The defendants also claim the statement was "prepared in anticipation of litigation" under Iowa R. Civ. P. 122(c). Defendants claim it therefore should be afforded the protection of that rule as well. Finally, the defendants claim the plaintiffs waived discovery of the document by their failure to file a motion to produce during discovery.

> "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has been traditionally allowed to impeach, i.e., discrediting, the witness." (Emphasis supplied.)

State v. Droste, 232 N.W.2d 483, 489 (Iowa 1975) (quoting

Davis v. Alaska, 415 U.S. 308, 315, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347, 353 (1974)).

The trial court's exclusion of the cross-examination was premature. The plaintiff is allowed to cross-examine the defendant about prior statements for impeachment purposes. It is possible the statement given to the insurance carrier by Pearson was materially different than the story he told at trial. In fact, Pearson's denial of the very existence of a prior statement could be of revealing impeachment value.

It is possible a review of the statement would have refreshed Pearson's memory of its existence. However, this may not have been necessary had the cross-examination been allowed to proceed further.

The trial court had other, less drastic measures available to limit the scope of the cross-examination. It could have reviewed the disputed document in camera. It could have allowed the plaintiffs to question Pearson about the statement, without allowing the statement itself into evidence. It could have specifically limited plaintiffs' line of questioning. The court could give limiting instructions to the jury or exercised a broader discretion in controlling the scope of the cross-examination. Or it could have simply allowed plaintiffs to further develop their cross-examination and considered the defendant's objections to each particular question as it arose.

We determine the trial court abused its discretion in foreclosing the plaintiffs from cross-examining Pearson about his prior statement to his insurance carrier. This issue does not revolve around discovery, but rather around impeachment. Impeachment is a permissible and often necessary form of cross-examination. Iowa R. Evid. 607. The trial court unnecessarily limited plaintiffs' cross-examination.

We reverse the trial court on this issue.

III. The Pilgrim Doctrine

We address this next issue for instructional purposes only on remand.

Mary Lanz's employer, Economy, was the owner of the car driven by Lanz. Economy sued the defendants to recover for damage to its vehicle. Economy did not sue its employee, Lanz, nor did the defendants implead her.

The defendants object to the trial court's jury instruction numbers 14 and 15. Number 14 is a restatement of Iowa comparative fault law. See Iowa Code ch. 668. Jury instruction number 15 reads:

> When you [the jury] consider The Economy Companies' claim for damages to their motor vehicle, you will not charge The Economy Companies with the fault of plaintiff Mary Lanz and I will not reduce the amount of damages awarded to them by the percentage of her fault.

The trial judge was acting under its interpretation of the Iowa Supreme Court's ruling in Stuart v. Pilgrim, 247

Iowa 709, 74 N.W.2d 212 (1956). The defendants urge us now to overrule Pilgrim in light of Iowa's adoption of comparative negligence law. See Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982); Iowa Code ch. 668.

a. **Purpose of Pilgrim.** *Pilgrim* was written to clarify the relationship between the owner's responsibility statute, Iowa Code section 321.493, and the doctrine of contributory negligence. The owner's responsibility statute provides the owner shall be liable for damage caused by his or her car when driven by a person operating the vehicle with the owner's consent. Id. Contributory negligence provides a party who was contributorily negligent is foreclosed from any recovery. The trial court in Pilgrim concluded these two doctrines combined to preclude recovery by the innocent non-driver owner for damage to her car.

Pilgrim mitigated this unnecessarily harsh result. Pilgrim, 247 Iowa at 718, 74 N.W.2d at 218. Pilgrim basically held the contributory negligence of a driver is not imputed to the non-driver by the Iowa owner's responsibility statute in an action to recover for damage to the owner's vehicle. Id., 247 Iowa at 719-20, 74 N.W.2d at 219; see Iowa Code § 321.493. Therefore, barring some exceptions, the non-driver owner may recover from a third party for damages to the owner's vehicle or person.

b. **Exceptions.** Some notable exceptions to the Pilgrim doctrine exist. The Pilgrim doctrine applies only where

the owner has no right of control over the immediate operation of the vehicle. Philips v. Foster, 252 Iowa 1075, 1080-85, 109 N.W.2d 604, 606-09 (1961). It also does not apply where there is a respondeat superior relationship, such as master-servant, employer-employee, principal-agent, partnership, or joint venture. Id., 252 Iowa at 1080, 109 N.W.2d at 606; Pilgrim, 247 Iowa at 715, 74 N.W.2d at 216. None of these exceptions have been argued in this case, so we need not consider them here.

c. **Viability of Pilgrim.** We have reviewed the supreme court's holding in Pilgrim. The case is well-reasoned. Nothing in Pilgrim conflicts with a comparative fault approach to a non-driver owner's claim for damages against a third party for damages to the owner's car or person. See Pilgrim, 247 Iowa at 717-18, 74 N.W.2d at 217-18. We determine under Pilgrim the comparative negligence of the consent driver shall not be imputed to the non-driver owner in an action for damages to the owner's vehicle or person. We restate our supreme court's interpretation of Iowa Code section 321.493:

> We think the legislature intended to protect third parties from the negligence of the bailee driver of another's car; we find nothing to indicate it also intended to relieve such third parties from the consequences of their own negligence.

Id. at 717-18, 74 N.W.2d at 218. We adhere to that interpretation. We turn now to the damages issue.

d. **Nonparties' Damages.** Damages may only be apportioned to those parties whose fault toward the claimant is at issue. Reese v. Wertz Corp., 379 N.W.2d 1, 6 (Iowa 1985). "Party," under section 668.2, means (1) a claimant, (2) a person named as defendant, (3) a party who has been released pursuant to section 668.7, and (4) a third-party defendant. Thus, fault of persons who are not "parties" to the action or whose fault toward the claimant has not been placed in issue cannot be considered. Damages may not be assessed against nonparty "phantom defendants." Payne Plumbing & Heating Co. v. Bob McKiness Excavating & Grading, Inc., 382 N.W.2d 156, 158-59 (Iowa 1986). Those against whom no relief is sought may not have damages apportioned to them. Peterson v. Pittman, 391 N.W.2d 235, 238 (Iowa 1986).

For tactical reasons perhaps, Economy did not name Lanz as a defendant, nor did the defendants implead her. But our comparative fault act does not require joinder of all potential defendants in one action. We have a permissive joinder rule. It reflects the common law principle that "ordinarily, where a party is not indispensable, a plaintiff should not be forced to sue anyone." Selchert v. State, 420 N.W.2d 816, 819 (Iowa 1988) (quoting Cowman v. Lavine, 234 N.W.2d 114, 123 (Iowa 1975)). As the court in Selchert further stated:

> We have repeatedly interpreted these statutory provisions to preclude allocation of fault to nonparties, whether they be identified [citations omitted]; known parties to an occurrence from whom

> no relief was sought [citations omitted]; or acts of God [citations omitted]. In each case, our decision turned on the strict definition of "party" adopted by the legislature in section 668.2 which clearly limits allocation of fault to a claimant, a person named as a defendant, a person released pursuant to settlement, or a third-party defendant.

Id.

Although involved in the same proceedings, Mary Lanz has not been brought into Economy's case on damage to its car. Therefore, no damages may be apportioned to her.

e. **Apportionment of Total Damages.** If there was but one defendant in this case and that defendant was liable, since Mary Lanz's negligence is not imputable to the non-driver owner, the owner would recover 100 percent of the damages allowed from the defendant. Under this hypothetical, there is no need to compare fault for there is only one defendant. Since as a matter of law Economy is free of fault, no fault is "attributable to the claimant."

But here there are multiple defendants. Thus, when this case is submitted to the jury, special interrogatories will be submitted. The jury will be asked (yes or no) to determine whether each individual defendant is at fault and whether such fault is a proximate cause of the property damage of Economy. Obviously, if the jury finds none of the defendants to be at fault (as was the case here) the plaintiff recovers nothing. The jury will then be directed not to assign any fault to a defendant nor is it to fix damages.

If, however, the jury finds one or more defendants to be at fault, the jury will then be asked to decide what percentage of the total fault is attributable to those defendants. In a separate interrogatory, the jury will place the percentage of fault alongside the name of the defendant. The percentages of fault attributed to all the defendants must equal 100 percent. This gives the claimant full recovery. That part of section 668.3(1) requiring diminishment of damages by the percentage of fault attributed to the claimant does not apply here, as Economy is free of fault as a matter of law.

f. **Application of Pilgrim.** The defendants did not implead Mary Lanz in this portion of the consolidated case. See Iowa R. Civ. P. 34. Nor did Economy include her as a defendant. Therefore, Mary Lanz is not a "party" before the court in Economy's action. See Iowa Code § 668.2. As such, the jury could not apportion fault to Lanz. See id. § 668.2 and .3. Thus, jury instruction number 15 was a correct statement of the law.

If Mary Lanz is not now a party to this case, it is too late to implead her now. The accident at issue took place on January 29, 1985. The statute of limitation on property damages is five years. Iowa Code § 614.1(4). The court may not apportion damages to a "phantom defendant." If she had been impleaded, the jury could have apportioned fault to her for damage to the owner's vehicle for her percentage of negligence. Regardless of the posture of the parties,

the negligence of the consent driver will not be imputed to the non-driver owner absent some exception.

In conclusion, we hold Stuart v. Pilgrim remains viable. See, e.g., Smedsrud v. Brown, 227 N.W.2d 572 (Minn. 1975) (Minnesota Supreme Court, in a case similar to the one at bar, upheld their long-standing rule the negligence of the bailee is not attributable to the bailor). Unless one of the listed exceptions applies, as a matter of law under comparative fault the negligence of the driver cannot be imputed to the owner. Where the exceptions of Stuart v. Pilgrim and subsequent case law apply, the nonimputation of negligence does not apply and fault can be attributed to the claimant.

We further hold where the Pilgrim doctrine applies, the claimant is entitled to recover 100 percent of his property damage from the defendant or defendants found to be at fault and whose fault was a proximate cause of the plaintiff's damages. Where there is more than one defendant, fault is to be allocated among the defendants. The percentage of fault must equal 100 percent. Their joint and several liability is governed by section 668.4. Persons not "parties" as defined by section 668.2 may not be allocated fault, as joinder in Iowa is not required.

We determine the trial court's jury instruction numbers 14 and 15 were correct statements of the law as applied to the facts and the postures of the parties before the court.

We affirm the trial court on this issue.

IV. Summary

We reverse the trial court on instruction of the jury on an "act of God" defense. We reverse the trial court on its exclusion of cross-examination of defendant Pearson on his prior statement to his insurance carrier. We affirm the trial court on its jury instructions 14 and 15 concerning apportionment of damage to the non-driver owner's car. We remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

Oxberger, C.J., and Donielson, Schlegel, and Habhab, JJ., concur; Sackett, J., dissents.

SACKETT, J. (dissenting)

I dissent. I would affirm. I agree with the trial court that the act of God instruction should have been given. I look to the following testimony about weather conditions at or near the time of the accident: (1) visibility was limited to 20 to 25 feet in front of the car, (2) the roads were slippery, (3) one driver could not see the yellow line or determine the location of the edge of the road, (4) it was snowing heavily, (5) it was not a normal morning, (6) the road was snow packed, (7) one defendant could not see the vehicles as he approached the accident scene and he testified the collision occurred all of a sudden, (8) snow would billow up, reducing visibility, (9) the accident scene was not readily visible, and (10) one person on the scene did not see the accident until it was right in front of him. I do not agree with the majority's characterization of these conditions as fairly typical of a poor winter day in Iowa.

The jury was instructed an act of God is an unusual and extraordinary display of nature that could not be expected under normal conditions. This accident happened in Buena Vista County. The Buena Vista County jury is best able to assess whether this is an unusual and extraordinary display of nature that could not be expected under normal conditions in their locale.

I also do not find the trial court abused its discretion on the issue of examination of Defendant Pearson with reference to a prior statement plaintiff may have given.

Prior to trial plaintiff filed an interrogatory seeking statements Pearson may have made concerning the accident. Pearson's response to the interrogatory was "any statements that the defendant has obtained would not be discoverable under rule 122(c) because they were secured in anticipation of litigation." The plaintiff made no other effort to obtain any statements during discovery.

In clarifying the ruling the trial court said:

> Well, I am not going to let you -- I mean, you can ask him whether he's made a statement, but that's as far as you've gone.
>
> I am not going to permit you to suggest that the insurance company or any other person has that statement. If you have it, and you want to use it to refresh your -- his recollection, fine.
>
> Otherwise, let's go on with it. The point I'm making, for the purpose of the record, is if that statement is important to this case and if it is discoverable, then it should be done during the pretrial proceedings.
>
> I am not going to allow that sort of procedure to be used during trial, because I don't feel that's what the rules call for.
>
> And as far as refreshing his recollection, as far as -- the way I recall the record, I don't know that there's any part of his testimony that needs refreshing.
>
> Apparently you also made some reference to impeachment. But since you don't have the statement, I don't know whether it's impeachment or not, so I guess that's the ruling.

I would affirm the trial court.