

IN THE COURT OF APPEALS OF IOWA

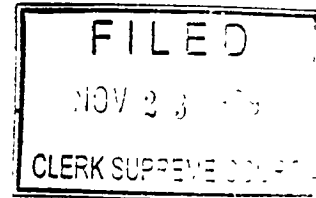
No. 1999-200(9-424) / 98-1825

Filed November 23, 1999

VANDE WEERD TRUCKING, INC.,
Plaintiff-Appellant,

vs.

STEVE NORMAN MILLER,
Defendant-Appellee.



STEVE NORMAN MILLER,
Counterclaimant-Appellee,

vs.

VANDE WEERD TRUCKING, INC.,
Counterclaim Defendant-Appellant.

Appeal from the Iowa District Court for Dickinson County, Frank B. Nelson,
Judge.

Plaintiff appeals from a judgment for defendant after a jury trial in tort action
arising out of a motor vehicle accident. **AFFIRMED.**

Ned A. Stockdale of the Fitzgibbons Law Firm, Estherville, for appellant.

Richard J. Barry of Montgomery, Barry & Bovee, Spencer, and Lonnie B.
Saudners of Chozen & Saunders, Spirit Lake, for appellee.

Considered by Huitink, P.J., Mahan, J., and Honsell, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

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HONSELL, S.J.

On October 24, 1995, Gerald Kramer was driving a semi-truck for plaintiff-appellant Vande Weerd Trucking, Inc. north bound on Highway 86 in Dickenson County, Iowa. A Jeep driven by Steve Miller entered the highway from a gravel side road in front of the truck. Mr. Kramer testified at trial that the Jeep rolled through a stop sign while entering the highway, and he was forced to brake hard to avoid hitting the Jeep. Mr. Miller testified he stopped at the stop sign.

Mr. Kramer followed the Jeep at a distance of two to three truck lengths for approximately one-half mile. When the Jeep slowed down at the Diamond Lake public access road, Mr. Kramer moved into the left lane to go around the Jeep. Mr. Miller turned left just as the semi-truck was passing, and the vehicles collided. The attempt to go around the Jeep occurred in a no-passing zone. The truck went off the left side of the highway and rolled over in the ditch.

Mr. Kramer testified that he did not see a turn signal when the Jeep slowed. Mr. Miller testified he signaled his intention to turn left. A test of the Jeep's turn signals immediately after the accident showed they were inoperable. A mechanic inspecting the Jeep at a later time discovered the turn signals were not working because the flasher was not in its receptacle, but on the floor of the Jeep. Mr. Miller offered "expert" testimony from an auto mechanic friend that the flasher was knocked out of its receptacle in the accident.

The instructions of the court included as specifications of negligence against Mr. Miller that: he failed to display a turn signal prior to turning from a direct course on a public highway; he slowed his vehicle on a public highway without displaying brake lights; and he failed to keep a proper lookout to the rear. The instructions also included as specifications of negligence against Mr. Kramer that: he followed too closely; he attempted to overtake and pass in a no-passing zone; he failed to have his vehicle under control; he failed to maintain a proper lookout; and he drove at a speed greater than would permit him to stop within the assured clear distance ahead. The court refused to instruct that Mr. Miller's entrance without stopping at a stop sign was negligence or to instruct on the doctrines of legal excuse and sudden emergency.

The case was submitted to the jury on the basis of comparative fault. The jury found Vande Weerd Trucking, Inc. ninety percent at fault and Mr. Miller ten percent at fault. The court summarily denied Vande Weerd's motion for a new trial and entered judgment accordingly. Vande Weerd appeals.

The plaintiff-appellant appeals the trial court's ruling on the motion for new trial and the judgment for defendant/counter-claimant-appellee contending that the trial court erred in (1) allowing an auto mechanic to testify as an expert witness, (2) failing to instruct the jury on the defendant's negligence in running a stop sign, and (3) failing to instruct the jury on the doctrines of legal excuse and sudden emergency.

I. Standard of review: We review a denial of a motion for new trial for abuse of discretion. *Shepherd Components, Inc. v. Brice Petrides-Donohue &*

Assocs., Inc., 473 N.W.2d 612, 618 (Iowa 1991). The reason for granting a new trial must fairly appear in the record. *Bredberg v. Pepsico, Inc.*, 551 N.W.2d 321, 326 (Iowa 1996).

II. Expert Testimony: Tony Caldwell testified as an expert that the turn signal flasher unit was dislodged from its socket by the accident. Mr. Caldwell is an auto mechanic and friend of Mr. Miller. He has no training in accident reconstruction. He did not know the dynamics of the accident. He did not testify concerning the amount of force needed to dislodge a flasher. He had never testified before as an expert. He testified he had seen more than 100 vehicles with collision damage in his work with the local rescue unit. Mr. Caldwell testified that he had seen other vehicles after accidents in which objects were laying around loose, such as flashers, relays, brake pedals, and foot pedals. Objection to the testimony was overruled. The court determined that Mr. Caldwell was an expert because of his experience. Mr. Caldwell answered the question about the flasher being under the seat:

Due to the point of impact of the Jeep is the location of where this flasher is and all the other fuse panels, and I found the flasher underneath the driver's seat, and I can see no other way of how it got there prior to the accident unless somebody physically unplugged it and threw it under the seat.

Expert testimony must aid the jury in resolving a disputed issue. "A witness's ability to testify as an expert is determined in reference to the topic under examination

The witness must be qualified to answer the particular question propounded."

Hylar v. Garner, 548 N.W.2d 864, 868 (Iowa 1996).

Iowa Rule of Evidence 702 states an expert may be qualified by "knowledge, skill, experience, training or education. . . ."

Iowa Civil Jury Instruction 100.12 Opinion Evidence, Expert Witness, in part instructs the jury to give an expert's testimony that weight which they determine it should be given.

Given these perimeters we find that the trial court was correct in allowing the expert to give his opinion.

III. Jury Instructions: "Parties to lawsuits are entitled to have their legal theories submitted to a jury if they are supported by the pleadings and substantial evidence in the record." *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994). When weighing the sufficiency of the evidence to support a requested instruction, the court views the evidence in the light most favorable to the party seeking the instruction.

Requested jury instructions are required to be given when they properly state the law and apply to the facts in the case. *Smith v. Air Feeds, Inc.*, 556 N.W.2d 160, 163 (Iowa App. 1996); *Sumpter v. City of Moulton*, 519 N.W.2d 427, 433 (Iowa App. 1994).

Error in giving or refusing to give an instruction does not require a reversal unless the error is prejudicial. *Stover v. Lakeland Square Owners Association*, 434 N.W.2d 866 (Iowa 1989).

In *Hayward v. P.D.A., Inc.*, 573 N.W.2d 29 (Iowa 1997) the supreme court set forth the two tests for proximate cause: the harm would not have occurred but for the negligence of the defendant, and the negligence was a substantial factor in bringing about the harm. *Id.* at 32.

We conclude that: under the circumstances set forth in the record, Mr. Miller's actions at the intersection one half mile before the accident did not, as a matter of law, proximately cause the accident.

Mr. Kramer admitted that he was following the Jeep at 55 mph down a hill at a distance of two to three truck lengths. The drivers' manual exhibit states a safe following distance is one second for each ten feet of vehicle length, plus an additional second if the speed is above 40 mph. By that formula, Mr. Kramer should have allowed a six-second gap between the Jeep and his truck. At 55 mph, that would be a distance of over 480 feet, or about eight truck lengths. The testimony is conflicting whether the Jeep displayed any turn signal or brake lights. Mr. Kramer claims he could have braked and avoided the Jeep if the decrease in speed had been signaled by brake lights or a turn signal. The trial court may have determined sudden emergency did not apply because Mr. Kramer's own conduct contributed to the emergency. In addition, the court could have concluded it was foreseeable that Mr. Miller planned to turn left into the park entrance because he was slowing down as if preparing to turn. The instruction on legal excuse is a companion to the sudden emergency

instruction. If it was improper to give the sudden emergency instruction, it would be improper to give the legal excuse instruction.

We conclude the instructions on sudden emergency and legal excuse do not apply to the facts of the present case.

The district court did not abuse its discretion in denying the motion for new trial. The objection to the offer of expert testimony was properly refused and the jury was appropriately instructed.

AFFIRMED