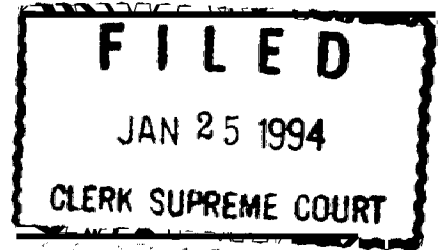


IN THE COURT OF APPEALS OF IOWA

No. 3-601 / 93-109



SAMIR SHAMS and LAILA SHAMS,

Appellants/Cross-Appellees,

vs.

JOHN JEROME CARNEY,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Polk County,
Gene L. Needles, Judge.

Plaintiffs appeal a judgment for defendant in this
personal injury suit. **REVERSED AND REMANDED ON THE APPEAL;
AFFIRMED ON THE CROSS-APPEAL.**

Frederick B. Anderson of Wiggins & Anderson, P.C.,
Des Moines, for appellants/cross-appellees.

Thomas L. Logan and Hugh J. Cain of Hopkins & Huebner,
P.C., Des Moines, for appellee/cross-appellant.

Heard by Oxberger, C.J., and Habhab, J., and McCartney,
S.J.*

*Senior judge from the 2nd Judicial District serving
on this court by order of the Iowa Supreme Court.

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MCCARTNEY, S.J.

Samir Shams and his wife, Laila Shams, brought this action seeking damages after Samir was struck by a vehicle driven by John Carney when he was walking across a street. The jury returned a verdict for Carney. Plaintiffs have appealed and Carney cross-appealed.

On December 17, 1990, Shams took the bus home from work. He got off the bus at about 5:15 p.m. It was then after sunset and the weather was misty. Samir exited the bus at a bus stop on Hickman Frontage Road in Urbandale. This frontage road runs east and west and is parallel to and north of Hickman Road. An access road, running north and south, connects Hickman Frontage Road to Hickman Road at 90th Street. The intersection of the access road and Frontage Road is a T intersection. The bus stop is at the intersection of the access road and Frontage Road and on the north side of the Frontage Road.

Samir lived on 90th Street south of Hickman Road. He planned to walk south and cross Frontage Road, then walk south down the access road, and then cross Hickman Road to 90th Street. He testified he looked both ways before crossing Frontage Road. When Shams had already traveled across the north half, or westbound, portion of Frontage Road and was entering the south, or eastbound, portion, he was struck by a vehicle driven by Carney. Carney testified he had been driving east on Frontage Road and did not see Samir until he was only a few feet in front of him. Carney

stated he had been watching a car which was on the access road to see if it would pull onto Frontage Road in front of him. The intersection was lit by a street lamp, and Carney, in driving east, noticed people walking north from the bus stop.

Shams was injured in the accident. He and his wife, Laila, filed this suit alleging that Carney negligently failed to yield the right of way to a pedestrian, failed to sound his horn, failed to keep a proper lookout, failed to stop in a safe assured distance, and failed to have his vehicle under control. As noted above, the jury returned a verdict for defendant. Plaintiffs filed a motion for new trial. The district court denied the motion.

Our scope of review in this case is for the correction of errors at law. Iowa R. App. P. 4.

I. Plaintiffs contend the district court erred in failing to give their proposed jury instruction No. 9. This instruction states:

A driver operating a vehicle must have it under control and shall reduce its speed to a reasonable and proper rate when approaching and traveling through a crossing or intersection of streets.

The language of this instruction is derived from Iowa Code section 321.288.

"Intersection" is defined in section 321.1(33) as follows:

"Intersection" means the area embraced within the prolongation or connection of the lateral curb lines, or, if none, then the lateral boundary

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 lines of the roadways of two highways which join one another at, or approximately at, right angles, or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict.

The definition of an intersection requires a junction of two roadways, both of which are open to use by the public as a matter of right, for the purpose of vehicular traffic. Kroblin Refrigerated X Press, Inc. v. Ledvina, 256 Iowa 229, 235, 127 N.W.2d 133 (1964). "Intersection" means all intersections, whether a T intersection or otherwise. Herman v. Muhs, 256 Iowa 38, 41, 126 N.W.2d 400, 402 (1964).

The statutory duty to reduce speed at intersections under section 321.288 is in addition to the general rule set forth in section 321.285 that all motorists must drive at a reasonable and proper rate under the circumstances then existing. Wilson v. Jefferson Transportation Co., 163 N.W.2d 367, 371 (Iowa 1968). The additional duty to slow down at intersections is ordinarily not applicable to motorists on through highways where intersecting traffic has the duty to stop and yield. Id. In connection with the duty to keep a proper lookout, it is a duty of a motorist to make reasonable observation of all surrounding circumstances, including intersections and other traffic which may be in fair view or intersecting roads, and to use such care as an ordinarily prudent person would do in the light of everything disclosed by such observations. Id.

Specifications of negligence limit a jury's consideration to acts or omissions upon which a particular claim is based and which the court has determined are supported by sufficient evidence to generate a jury question. Diehl v. Diehl, 421 N.W.2d 884, 887 (Iowa 1988). There is no duty to instruct upon an issue without substantial support in the evidence or with support resting only on speculation or conjecture. Nolte v. Case, 221 N.W.2d 741, 745 (Iowa 1974).

In this case, there is substantial evidence to show Shams was crossing Frontage Road at an intersection. Carney contends, however, that section 321.288 should not apply because he was on a through roadway and the traffic on the access road had a duty to yield. He argues that under Wilson, he therefore had no duty to slow down at the intersection.

We cannot interpret Wilson to mean that a motorist on a through roadway never has a duty to slow down at an intersection. Whether a motorist has a duty to slow down at an intersection depends upon his or her reasonable observation of all surrounding circumstances, including intersections and other traffic which may be in fair view or intersecting roads, and to use such care as an ordinarily prudent person would do in the light of everything disclosed by such observations. See Wilson, 163 N.W.2d at 371.

Carney testified he did not slow down as he approached the lighted intersection nor did he apply his brake. He had seen the oncoming moving bus and assumed it had let passengers off. He further saw other persons walking north away from the bus stop. Under these circumstances, we find there was sufficient evidence on this issue to require its submission to the jury.

Under Iowa law, a court should give a requested instruction when it states a correct rule of law having application to the facts of the case and the concept is not otherwise embodied in the other instructions. Smith v. Smithway Motor Xpress, 464 N.W.2d 682, 685 (Iowa 1990). The general instruction given by the trial court that Carney was required to drive at a reasonable and proper rate under the circumstances did not embody the concept stated in the requested instruction No. 9.

However, error in giving or refusing to give a particular instruction does not warrant reversal unless the error is prejudicial. Id. We determine plaintiffs were prejudiced by the refusal of the court to give this instruction because Carney admitted he did not slow down when approaching the intersection. We reverse the judgment for defendant and remand for a new trial. Upon the record made, instruction No. 9 should have been given.

II. Plaintiffs also contend the district court erred in refusing to give their proposed jury instruction No. 11:

No person shall drive any vehicle on a street at a speed greater than will permit them to stop within the assured clear distance ahead. The words "within the assured clear distance ahead" mean the distance from which noticeable objects, reasonably expected or anticipated to be upon the highway, may be seen.

This instruction is based on section 321.285.

In order to submit an instruction on assured clear distance, there must be sufficient evidence to show that plaintiff entered the path of defendant's vehicle at a point sufficiently far ahead to establish an assured clear distance. Wright v. Welter, 288 N.W.2d 553, 556 (Iowa 1980). The plaintiff has the initial burden of going forward with the evidence tending to show he or she was within defendant's directional line of travel at a point sufficiently in front of defendant to have made it possible for defendant, in the exercise of ordinary care, to avoid the collision. Nolte v. Case, 221 N.W.2d 741, 747 (Iowa 1974).

Section 321.285 does not apply when there is a sudden and unexpected entry of a person, motor vehicle, or other object into a motorist's directional line of travel. Id. at 745. A jury question on the issue exists where there is substantial evidence:

- (1) that the object with which the operator collided was located ahead of him in his lane of travel;
- (2) that such object was reasonably discernible;
- and
- (3) that the object was (a) static or stationary, (b) moving ahead of him in the same direction as such operator, or (c) came into his lane of travel within the assured clear distance ahead at

a point sufficiently distant ahead of him to have made it possible to bring his vehicle to a stop and avoid a collision.

Coppola v. Jameson, 200 N.W.2d 877, 880 (Iowa 1972).

Carney contends that Shams suddenly came into his lane of travel, and that it was not possible for him to bring his vehicle to a stop. However, we note that Shams had already crossed the westbound portion of Frontage Road and was into the eastbound portion when the accident occurred. Carney stated Samir was walking quickly but not running. No vehicles or other objects obstructed Carney's view of the road ahead of him.

We conclude a jury question exists on this issue and an instruction on assured clear distance ahead should also have been submitted to the jury.

III. Because we have reversed and remanded for a new trial, we do not address plaintiffs' contention that the jury verdict was not supported by the evidence.

IV. In his cross-appeal, defendant contends the district court should not have given the jury instruction No. 17. This instruction provides:

Where signals are not in place, the driver of a vehicle shall yield the right-of-way to a pedestrian crossing the road within a crosswalk.

Crosswalk means that portion of the roadway ordinarily included within the prolongation or connection of the lateral lines of the sidewalks at intersections, or, any portion of the roadway distinctly indicated for pedestrian crossing by lines or other markings on the surface.

The definition of "crosswalk" follows that found in section 321.1(16).

Defendant claims there is insufficient evidence there was a crosswalk at the intersection of the access road and Frontage Road. There is no evidence of a marked crosswalk. There was a sidewalk on 90th Street. We conclude that whether Shams crossed within that portion of the roadway ordinarily included within the prolongation or connection of the lateral lines of the sidewalks at intersections was a question for the jury.

We find no error in the submission of this instruction to the jury.

V. In summary, we have reversed and remanded for a new trial on the appeal. We affirm on the cross-appeal. Costs of this appeal are assessed to defendant.

REVERSED AND REMANDED ON THE APPEAL; AFFIRMED ON THE CROSS-APPEAL.