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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CHLORIS ANN HUBBY, As Executor of the ESTATE OF MERLIN LEE HUBBY, Deceased,	)	Filed October 28, 1982
Plaintiff-Appellant,	)	2-304 / 2-67572 238
vs.	)	
STATE OF IOWA,	)	
Defendant-Appellee.	)	

Appeal from Story District Court, Carl D. Baker, Judge.

Plaintiff appeals from a judgment for defendant based upon plaintiff's alleged contributory negligence following trial to the court in this wrongful death action arising out of a motorcycle-automobile accident. On appeal, plaintiff asserts that (1) the court applied the wrong test for proper lookout in finding contributory negligence; (2) an opinion offered by state's expert witness suggested that plaintiff's decedent's duty to avoid contributory negligence was greater than that imposed by Iowa law; (2) the court should not have admitted evidence of an experiment at the accident scene, as conditions were allegedly not sufficiently similar to those obtaining at the time of the accident; (4) the court failed to find that plaintiff's decedent's acts were proximate cause of the collision; (5) an expert witness was allowed to express an opinion as to the speed of the vehicle with which plaintiff's decedent collided, without an adequate foundation for the hypothetical question. REVERSED AND REMANDED.

L. W. Courter and Kirke C. Quinn of Doran, Doran, Courter & Quinn, Boone, for plaintiff-appellant.

Jon K. Swanson and John R. Scott, Assistant Attorneys General, for defendant-appellee.

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

On August 24, 1979, Merlin Hubby and Brian Carrel left Boone, Iowa, on their motorcycles. The sun was shining brightly in the east. Hubby and Carrel were traveling eastward on U.S. Highway 30, which is a four-lane highway divided by a median between Boone and Ames.

Two officers of the Iowa Highway Patrol had parked their vehicles on the south shoulder of U.S. 30 facing east, stopping traffic violators at the direction of an officer who was flying above in a patrol aircraft, timing vehicles as they passed through timing lines about three-quarters of a mile to the west of the parked patrol cars. A motorist traveling through the timing lines would not have been able to see the patrol cars, because there was a major curve in the road between the officers and the time lines. No beacon lights were in operation on the officers' cars to warn approaching motorists of the situation.

The officers on the ground were instructed to stop a white car and an orange cab semi truck. One of the officers (North) signaled the driver of the white car to pull over, and as he was conversing with the driver of that automobile, the semi approached the scene from the west. It was preceded by a blue and white Oldsmobile, both vehicles operating in the south lane of the east-bound traffic. As the two vehicles approached, the second Officer (Skahill) used hand signals to indicate to the driver of the truck that he should pull over. However, the drivers of both the Oldsmobile and the semi thought that he was signaling to them. The truck took the left lane, passing the Oldsmobile, and pulled onto the shoulder as the Oldsmobile proceeded to drive very slowly eastward, evidently partly on and partly off the highway. Officer Skahill got into his patrol car and drove up the shoulder, ignoring the Oldsmobile, intending to issue a citation to the driver of the truck. At about this time, he was informed by the officer in the patrol plane that

he was not to stop the Oldsmobile.

Another call from the patrol plane announced that a red car was to be stopped. As Officer North stepped onto the traveled portion of the roadway and positioned himself in the center of the two eastbound lanes to stop this vehicle, he saw the motorcycles of Hubby and Carrel proceeding toward him. Without attending to the circumstances existing to the east of him, he gave no signals to the operators of the motorcycles, but stopped the vehicle behind them and had it pulled to the shoulder behind the white automobile whose driver he was in the process of ticketing.

In the meantime, as Officer Skahill was walking to meet the truck driver, he heard a noise and saw the Hubby motorcycle go past him in an upright position with the Carrel motorcycle following it, sliding on its side. He then saw the collision of the Hubby motorcycle with the Oldsmobile. The Oldsmobile was on the highway at the time. Hubby died at the scene.

Mr. Carrel, driver of the second motorcycle, first saw the patrol cars when he was a half mile to the west. At the same time, he saw the semi. He was riding approximately twenty motorcycle lengths behind Hubby. He saw Officer North come onto the highway, and as he and Hubby proceeded past Officer North, Carrel was still unaware of the blue Oldsmobile. Only after he had driven past Officer North did he see the Oldsmobile near the front of the semi partly off the traveled portion of the roadway. He immediately applied his brakes and placed his cycle on its side. It was his opinion that Hubby had no time to apply his brakes due to the suddenness of the manner in which the Oldsmobile appeared in front of them. The collision occurred nearly abreast of the left front wheel of the truck.

The court found that the Iowa Highway Patrol officers were negligent, but concluded also that Hubby was contributorily negligent, and therefore denied plaintiff's recovery. Because of errors that were prejudicial to the plaintiff, we reverse and remand.

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I. Proper Lookout

The trial court's conclusion that Hubby was contributorily negligent was based in part upon the court's determination that Hubby failed to maintain a proper lookout. This was derived from the following logical operation:

1. The day was clear and the blue Olds was visible from a distance of 2000 feet.

2. A person driving a motor vehicle on a highway has a duty to keep a proper lookout for all objects that might conflict with his use of the highway.

3. Since the blue Olds was such an object, Hubby had a duty to see it.

4. Hubby did not see the blue Olds before colliding with it, since he did not apply his brakes.

5. Therefore, Hubby did not fulfill his duty to maintain a proper lookout, and was contributorily negligent.

Despite its appearance of validity, the argument is unsound because it omits a factor that is essential to the determination of the answer to the question whether Hubby maintained a proper lookout.

The doctrine imposes upon the driver the duty not only to look straight ahead, but also to maintain a vigilant watch upon all potential hazards in every direction. Paulsen v. Des Moines Union Ry. Co., 262 N.W.2d 592, 597 (Iowa 1978); Brandt v. Grell Construction Inc., 161 N.W.2d 336, 341 (Iowa 1968).

The issue as to whether Hubby fulfilled his duty of proper lookout does not begin and end when he rounded the curve and saw the scenario ahead of him. That is, the issue is not, as the trial court ruled, whether Hubby could see the blue Olds when he rounded the curve 2000 feet from the point of collision. The issue is whether a reasonable, prudent motorcycle rider in the circumstances in which Hubby found himself would have violated his duty of proper lookout by not seeing the blue Olds in time to avoid colliding with it.

When Hubby rounded the curve, he had a duty to observe all potential hazards behind and on both sides of him, as well as those in front of him. As he drove the 2000 feet from the end of the curve to the point of collision, he would have seen a number of hazards and potential hazards. First was the white Pressler vehicle, and then Officer North's patrol car. He would have seen Officer North walking across his lane of travel, turning to face him, and standing between the two lanes of eastbound traffic, obviously intending to direct some vehicle to pull off the road. He slowed down, and his attention would properly have been focused upon Officer North, at least until after he passed the officer. Just 200 feet beyond Officer North were Officer Skahill's patrol car, Officer Skahill and the truck driver standing on or near the pavement, the semi, and the blue Olds. In determining whether Hubby failed to keep a proper lookout, the trial court must determine whether Hubby kept a vigilant watch upon each and all of the potential hazards as they presented themselves to him. (emphasis added).

The inquiry as to whether Hubby maintained a proper lookout would have been at an end if the blue Olds had not been visible as Hubby approached the scene. But merely establishing that the Olds was visible does not end the inquiry, since visibility is merely a necessary condition, not a sufficient condition for Hubby's having a duty to see the hazard before the collision. Once visibility is established, the crucial inquiry begins: whether, in light of all of the circumstances, Hubby ought to have seen the vehicle with which he ultimately collided in time to avoid the collision. Hubby was obliged to concentrate upon the hazards and potential hazards that presented themselves to him as he proceeded along the road: the white Pressler vehicle, Officer North's patrol car, Officer North standing facing him in the middle of the highway, Officer Skahill's patrol

car, Officer Skahill and the truck driver standing in, on, or near the pavement, and the semi. If Hubby attended to each of these hazards as he came upon them, he was fulfilling his duty of proper lookout.

We therefore reverse and remand to the trial court with instructions that it reconsider this matter on its present record and apply the doctrine of proper lookout in its entirety, bearing in mind that the mere fact that an object is visible is not sufficient to impose upon a driver the duty to see it when there are other hazards that demand his immediate and continuing attention.

II. The Beno Deposition

At the trial, the plaintiff offered into evidence portions of the deposition of Dr. John A. Beno, an expert witness.

Following the introduction of those portions of the Beno deposition proffered by the plaintiff, the defendant moved that the remainder of the deposition be admitted into the record. Over objections raised by counsel for the plaintiff, the court admitted virtually the entire transcript of Dr. Beno's deposition. Among the passages that were admitted were some to which the plaintiff objected on the ground that the answers constituted opinions as to Hubby's duty which, if accepted by the court, would be greater than that created by the laws of the state of Iowa for the operation of his vehicle. These included testimony to the effect that even though there were no written rules or rules of the road on the matter, there is an "operational rule" for motorcyclists that required "placement of the vehicle from the hazard as far as you can get in the riding environment that you're in." Unless this is no more than the truism that a cyclist ought to avoid collision, it can only mean that a cyclist has a duty to interpose his motorcycle between himself and the object with which he is about to collide, as suggested by the context, in which Beno commented upon the fact that cycists do not have the benefit of steel surrounding them as do automobile drivers, "so you want every advantage that you

can make for yourself." This was, in fact, the manner in which Carrel slid his cycle into the collision with the blue Olds. There is no such rule in Iowa law.

Under Iowa Rule of Civil Procedure 145A, the State was entitled to offer portions of the deposition after the plaintiff had offered limited portions of it. However, a witness, regardless of his expertise, may not offer opinions on matters of domestic law. Schlichte v. Franklin Troy Trucks, 265 N.W.2d 725, 730 (Iowa 1978); Grismore v. Consolidated Products Co., 232 Iowa 328, 5 N.W.2d 646 (1942).

The rule is that an expert is permitted to testify as to facts, to the extent that he is able to do so based upon his special technical competence. But as to normative issues—what the law permits or requires, what standards are to be applied in judging the rightness or wrongness of a person's behavior, or whether a person's actions were negligent or not—any testimony by an expert witness is inadmissible.

> [O]pinions on matters of domestic law or involving the law of the case or on mixed questions of law or fact are also excluded. To avoid confusion, there can only be one law-giver in a trial. Only the trial judge is permitted to define the law for the jury, and the jury has a prerogative and responsibility to apply the law to the facts. McCormick, Opinion Evidence, 19 Drake L. Rev. 245, 259.

See also State v. Ogg, 243 N.W.2d 620, 621 (Iowa 1976); State v. Nimmo, 247 N.W.2d 228, 230 (Iowa 1976).

Dr. Beno's testimony as to standards of motorcycle operation was conclusory and constituted opinion on matters of law—opinion on matters concerning which he was not an expert. Such opinions should not have been admitted into evidence.

On remand, the court, in its reconsideration of the case, should give no weight to those portions of the Beno deposition which consist of testimony concerning matters of law.

III. Admissibility of Testimony Concerning the Experiment

The trial court based its finding of contributory negligence upon six factors, one of which was an experiment carried out by Officers Skahill and North. Officer Skahill was permitted to testify about the results over objection by the plaintiff.

Some time after the accident, Officers North and Skahill returned to the scene, asked the driver of a semi who was passing by to park on the shoulder in the exact postion where the semi had stopped on the day of the accident, and arranged for a General Motors automobile whose coloring was identical to that of the Oldsmobile that was involved in the accident to be positioned in the approximate location of the Oldsmobile. Officer Skahill placed Hubby's green-tinted faceshield on his own helmet, which Skahill says is similar to that of Mr. Hubby. Officer Skahill then drove his motorcycle back around the curve in the highway, turned his motorcycle eastward, and rounded the curve to see whether the bue and white car was lost in the shadow of the semi. He testified that the experiment was performed at approximately the same time of day as the accident under clear skies. He concluded that "the car was easily visible at all times."

The conditions under which the experiment was carried out were different in a number of significant respects from those prevailing at the time of the accident. In addition to the fact that not all of the vehicles and persons present at the time of the accident were present during the experiment, Skahill and North knew what to look for and were not in the same frame of mind as Hubby as he approached the scene.

In Wiedenfeld v. Chicago and N.W. Transp. Co., 252 N.W.2d 691 (Iowa 1977), the supreme court found that even though there were significant differences

between the conditions under which an experiment was carried out and those under which the accident occurred, admission of the evidence derived from the experiment was not reversible error, although the trial court would have been within its sound discretion in excluding it.

The court has broad discretion in admitting and according weight to such experimental evidence. However, the most that this experiment can establish is the fact that the blue Olds was visible as Hubby came upon the scene. The experiment does not establish that under the circumstances in which Hubby approached the scene, he could reasonably have been expected to see the blue Olds in time to avoid the collision. To the extent that the trial court relied upon the experiment to establish the truth of this latter proposition, it was in error. Upon reconsideration, the court is instructed to infer no more from the experiment than the bare fact that the Olds was visible.

IV. Proximate Cause

The plaintiff contends that the trial court "has seemingly overlooked the issue of proximate cause concerning the issue of contributory negligence."

Although the court did not explicitly spell out its findings on the matter of proximate cause, it is clear from the court's conclusions of law that the court was aware of the fact that the defendant's burden to prove contributory negligence included a burden to prove that such negligence was a proximate cause of the injury or damages. In view of this fact, we find that there was no error in this espect of the court's finding.

V. Challenges to the Testimony of the State's Expert Witness

Sergeant D. M. Jontz, an officer with the state patrol, was called by the State as an expert witness. He was asked to calculate the speed, direction of travel, location, and position of the various vehicles involved in this collision

based upon his observations, measurements, and calculations. Many of the questions directed to Officer Jontz were couched as hypotheticals, to which objections were raised by the plaintiff. These objections were based upon plaintiff's contention that the hypothetical questions contained matters not in the record which were hearsay and on plaintiff's further contention that the State failed properly to disclose during discovery that Officer Jontz would be asked to give his opinions as to these matters. Plaintiff did not challenge Jontz's expertise on the questions propounded.

Admission of the testimony of Officer Jontz in response to the hypothetical questions that were put to him rests in the discretion of the trial court and can be reversed only for an abuse of that discretion. White v. Citizens National Bank Of Boone, 262 N.W.2d 812, 816 (Iowa 1978). If substantially the same evidence is already in the record from other sources, the plaintiff cannot establish prejudice based on the admission of similar evidence. State v. Windsor, 316 N.W.2d 684, 688 (Iowa 1982). Such evidence was in the record from other sources. Therefore, admission of Jontz's testimony was not prejudicial to the plaintiff.

Because of the errors of law discussed in Divisions I, II, and III of this opinion, we reverse and remand with instructions.

REVERSED AND REMANDED.