

IN THE COURT OF APPEALS OF IOWA

FILED

OCT 18 1979

CLERK SUPREME COURT

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DEAN M. RIECK,

)

Plaintiff-Appellant,

)

Filed October 18, 1979

vs.

)

MARK ALAN SCHMUECKER and
SANDRA J. KAISER,

)

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2-62424

)

Defendants-Appellees.

Appeal from Benton District Court - Harold J. Swailes, Judge.

Plaintiff appeals trial court's judgment dismissing his petition in a negligence action arising out of a car-tractor collision and awarding contribution to defendants on defendants' counterclaim alleging trial court erred: 1) in finding plaintiff's negligence was a proximate cause of the accident; 2) in not finding the doctrine of last clear chance applicable; 3) in entering judgment based on findings unsupported by sufficient evidence; and 4) in overruling his motion to dismiss defendant's counterclaim for contribution when defendant was not the real party in interest. - Affirmed.

Morris L. Eckhart, of Milroy & Eckhart, Vinton, for plaintiff-appellant.

Mark Mossman of Mossman & Mossman, Vinton, for defendants-appellees.

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

PER CURIAM

Plaintiff, Dean M. Rieck, appeals trial court's judgment dismissing his petition in a negligence action for damages against defendants Mark Alan Schmuecker and Sandra J. Kaiser¹ and awarding \$6800 for contribution to defendants on their counterclaim against plaintiff.² On appeal, plaintiff alleges trial court erred; (1) in finding the lack of an amber flashing light on the plaintiff's tractor was a proximate cause of the accident; (2) in not finding the doctrine of last clear chance applicable; (3) in entering judgment based on findings of fact and conclusions of law not supported by sufficient evidence; and (4) in overruling his motion to dismiss defendant's counterclaim when defendant was not the real party in interest. We affirm.

The accident occurred on October 25, 1976, at approximately 7:00 p.m. on a Benton County road. Defendant was driving a 1966 Ford automobile owned by Sandra J. Kaiser in a northerly direction on the county road. As he crested a hill, defendant came upon plaintiff's tractor, also proceeding in a northerly direction at a speed of approximately 16 miles per hour. At the same time, Darlene Garling was southbound in her auto on the county road.

Defendant proceeded north without braking until he was quite close to plaintiff's farm tractor, at which point he saw the tractor immediately ahead. Although defendant began braking, he struck the left rear wheel of plaintiff's tractor, forcing it into the ditch along the east side of the road. Defendant then veered left into the path of the Garling vehicle, colliding nearly head-on with it, before proceeding into the west ditch where his vehicle came to a stop some 240 feet north of the point of initial impact.

Because it was after sunset, plaintiff was operating his tractor with headlights and a red rear light. The tractor also was equipped with a reflectorized "slow-moving vehicle" sign on the back of the seat. The tractor, however, was not operating or even outfitted with a flashing amber light as required by law when traveling on either a primary or secondary road after sunset at a speed of twenty-five miles per hour or less. Section 321.423(6), The Code 1975.

¹ For purposes of this opinion, the word "defendant" will be used and will refer to Defendant Rieck.

² Both actions arose out of the same auto-farm tractor collision.

As a result of this accident, plaintiff brought a negligence action against defendant seeking \$1356.56 for damages to his tractor. Defendant counterclaimed for contribution requesting one-half of \$13,600 in damages paid to Darlene Garling in satisfaction of her claim for injuries to her person and property. The case was tried to the court on May 23, 1978, and judgment was entered against plaintiff on defendant's counterclaim in the amount of \$6800, together with interest and court costs.

I. Proximate Cause. As his first assignment of error plaintiff contends trial court erred in finding the absence of an amber flashing light was a proximate cause of the collision. We do not agree.

Under Iowa law, "there may be more than one proximate cause of an injury, and concurring negligence, if each meets the proximate cause test, may render several tortfeasors jointly and severally liable." Davis v. Crook, 261 N.W.2d 500, 506 (Iowa 1978). See Hysell v. Iowa Public Service Co., 534 F.2d 775, 781 (8th Cir. 1976). To meet this test, an actor's negligent conduct must constitute a substantial factor in bringing about the harm. Oak Leaf Country Club, Inc. v. Wilson, 257 N.W.2d 739 (Iowa 1977); Piper, Jeffray & Hopwood, Inc. v. Ladin, 399 F. Supp. 292, 300 (S. D. Iowa 1975).

Examination of the record reveals absence of an amber flashing light was a substantial factor in bringing about the collision. It was after sunset. Plaintiff's tractor was operating with only a red light and a reflectorized sign to warn traffic approaching from the rear of its presence. Plaintiff was traveling only sixteen miles per hour between the crests of two hills. Because of these conditions, another vehicle approaching from the rear would have overtaken plaintiff very quickly and had little time to react to avoid an accident. We therefore conclude trial court's finding absence of an amber flashing light to be a proximate cause of the accident is supported by substantial evidence.

II. Last Clear Chance. Plaintiff next alleges the doctrine of last clear chance is applicable to the facts of this case.³ While the doctrine of last clear chance presupposes a plaintiff's negligent conduct placed him or her in a position of peril, the court stated in Ackerman v. James, 200 N.W.2d 818, (Iowa 1972), "[i]n our opinion,

³ The Iowa Supreme Court abolished last clear chance as a separate doctrine in Stewart v. Madison, 278 N.W.2d 284, 293 (Iowa 1979). Because application of that holding is prospective only, and plaintiff commenced this action prior to filing of the opinion in that case, Stewart is not dispositive.

liability under circumstances where the doctrine of last clear chance is now applied may properly be determined by a legitimate application of the modern concepts of proximate cause." Id. If the trier of facts finds plaintiff's negligence was a proximate cause of his or her injury, rather than defendant's negligence the sole proximate cause, recovery by plaintiff is precluded. Ackerman, 200 N.W.2d at 830. (emphasis supplied)

In this case, trial court found the negligence of plaintiff contributed to the original collision between the tractor and defendant's car and the negligence of plaintiff and defendant were concurrent proximate causes of the collision between defendant's car and the car driven by Darlene Garling. We concluded above that trial court did not err in finding plaintiff's failure to have an amber flashing light was a proximate cause of the accident. Trial court, therefore, properly found the doctrine of last clear chance inapplicable.⁴

III. Trial Court's Findings and Conclusions. In his third assignment of error, plaintiff urges trial court's findings of fact and conclusions of law were not supported by sufficient evidence. Findings of fact in a law action tried to the court will not be disturbed on appeal if supported by substantial evidence. Iowa R. App. P. 14(f)(1). A finding of fact is supported by substantial evidence if the finding reasonably can be inferred from the evidence. Briggs Transportation Co. v. Starr Sales Co., 262 N.W.2d 805, 808 (Iowa 1978). "Generally, questions of contributory negligence and proximate cause are for the trier of fact to determine." Iowa R. App. P. 14(f)(10); Iowa Power & Light Co. v. Board of Water Works Trustees of Des Moines, 281 N.W.2d 827, 831 (Iowa App. 1979); Grall v. Meyer, 173 N.W.2d 61, 63 (Iowa 1969). A reviewing court will overturn a trial court's determination of negligence and proximate cause only if the absence of either can be established as a matter of law. Iowa R. App. P. 14(f)(10); Iowa Power, 281 N.W.2d at 831; Stanley v. State, 197 N.W.2d 599, 604 (Iowa 1972). In light of our discussion in Division I of this opinion, we will not review this allegation further.

IV. Real Party in Interest. In his final assignment of error, plaintiff asserts trial court erred in overruling his motion to dismiss defendant's counterclaim because the action was not brought by defendant's insurer as the real party in interest. Prior to trial

⁴ In determining whether a defendant's negligence is the sole proximate cause, the trier of facts still should consider a defendant's ability to have avoided the accident through the exercise of reasonable care despite plaintiff's negligence.

the parties stipulated to defendant's negligence, defendant's demand of plaintiff for contribution, plaintiff's refusal to satisfy the demand, plaintiff's damages of \$1356 and defendant's payment of \$13,600 to Darlene Garling as a fair, reasonable and just settlement of all her claims against defendant. At trial, Darlene Garling testified she had received the \$13,600 from defendant's insurance company.⁵

Generally, every action must be prosecuted in the name of the real party in interest. Iowa R. Civ. P. 2; Leasing, Inc. v. Gage, 199 N.W.2d 43, 44 (Iowa 1972). An insurer who has paid a loss thereby is subrogated to the rights of its insured. United Security Insurance Co. v. Johnson, 278 N.W.2d 29, 30 (Iowa 1979), citing Fireman's Insurance Co. v. Bremner, 25 F.2d 75, 76 (8th Cir. 1928). Where the insurance payment covers the entire loss, the insurer becomes the real party in interest and may bring the action. Id. If the insurance covers only a portion of the loss, the right of action remains in the insured for the entire loss and the insured becomes a trustee for the insurer in the recovery secured by it. United Security, 278 N.W.2d at 31. The right of action for the entire loss is single and cannot be split and separately maintained by the owner and the various insurers who have paid parts of the loss. Id.

A defendant may question whether a plaintiff is the real party in interest when it is necessary to protect him or her from harassment, annoyance or vexation by other claimants to the same demand, "to protect him or her from multiple suits[,] ... [t]o permit a defendant to assert defenses or counterclaims available against the real party in interest ... [,] or in order that defendant's payments to plaintiff or plaintiff's recovery against him or her would protect defendant from third party claims or harassment." United Security, 278 N.W.2d at 31; Grings v. Great Plains Gas Co., 260 Iowa 1309, 1321, 152 N.W.2d 540, 546 (1967). However, "... if defendant is fully protected against further liability on the same cause of action, defendant may not object on the ground that plaintiff is not the real party in interest." Grings, 260 Iowa at 1321, 152 N.W.2d at 546; Conner v. Thompson Construction and Development Co., 166 N.W.2d 109, 115 (Iowa 1969).

⁵ While there is some question as to whether the stipulation precludes plaintiff from asserting defendant is not the real party in interest or whether plaintiff has properly preserved the record by failing to raise this issue until the close of all the evidence, we will decide the issue on the merits.

In this case, the only right to which defendant's insurer has been subrogated is defendant's entitlement to contribution from plaintiff as a joint tort-feasor. Garling's release of defendant as a tort-feasor is a release of plaintiff as well. Hawkeye-Security Insurance Co. v. Lowe Construction Co., 251 Iowa 27, 33, 99 N.W.2d 421, 425 (1959). As joint tort-feasors, defendant is entitled to one-half of the amount paid in settlement of Garling's damages. Schnebly v. Baker, 217 N.W.2d 708, 731 (Iowa 1974). Whether defendant or the insured is entitled to the recovery is a matter between them. Plaintiff in no way has been prejudiced by defendant's counterclaim. See Grings, 260 Iowa at 1320, 152 N.W.2d at 546. Trial court properly overruled plaintiff's motion to dismiss.

Judgment of trial court is affirmed.

AFFIRMED.