IN THE COURT OF APPEALS OF IOWA

No. 8-144 / 97-0498
Filed May 29, 1998

DWAYNE M. THAVENET, TERI THAVENET, ADAM THAVENET, KYLIE THAVENET, and JASON THAVENET, Minors, by Their Parent and Next Friend, TERRI THAVENET,
Appellants,
vs.

CHARLES DAVIS,
Appellee,
and

WILLIAM B. WILCOX and ROAD RUNNER DISTRIBUTING SERVICE, INC.,
Defendants.

Appeal from the Iowa District Court for Johnson County, L. Vern Robinson, Judge.

Plaintiffs appeal the judgment entered in favor of defendant in this negligence action arising out of a traffic collision. **AFFIRMED.**

Daniel D. Bernstein and William J. Bribriesco of William J. Bribrieso & Associates, Bettendorf, for appellants.

John W. Hayek and Joseph T. Moreland of Hayek, Hayek & Brown, L.L.P., Iowa City, for appellee.

Heard by Cady, C.J., and Sackett and Streit, JJ.

STREIT, J.

Plaintiffs appeal from the district court's submission of jury instructions on the legal excuse doctrine and several of the court's evidentiary rulings regarding witnesses. Because the jury instructions on legal excuse are an accurate statement of the law when read as a whole and the court did not abuse its discretion in its evidentiary rulings, we affirm.

I. Background Facts & Proceedings.

Thavenet was driving his car east on Interstate 80 in February 1995. Davis was driving a "bobtail," a semi-truck without a trailer attached, west on Interstate 80. Davis was traveling in the left-hand lane behind a row of three semi-trucks. The roads were ice covered. Davis was traveling at a rate of fifty to fifty-five miles per hour and was approximately twenty-five to thirty-five feet behind the semi-truck in front of him.

A semi-truck jackknifed in the right-hand lane and the semi-truck in front of Davis applied its brakes. Davis veered left to avoid hitting the semi-truck. He crossed the median, entered the eastbound traffic lane on Interstate 80, and collided with Thavenet.

The collision fractured Thavenet's clavicle and ankle. Thavenet and his family filed a negligence petition against Davis.

At trial, there were several evidentiary disputes the trial court resolved in the defendant's favor. At the close of the trial, the court instructed the jury on legal

excuse and sudden emergency. The jury returned a verdict in favor of defendant. The plaintiffs appeal arguing the jury instructions were not an accurate statement of the law and the court abused its discretion in making its evidentiary rulings.

II. Jury Instruction on Legal Excuse & Sudden Emergency.

The plaintiffs contend the trial court's jury instructions on legal excuse and sudden emergency did not accurately state the law and confused the jury. Specifically, plaintiffs argue the instruction did not clearly state the doctrine of legal excuse does not apply when a party contributes to the emergency situation. The plaintiff argues the jury was left to infer this.

Jury instructions are reviewed to decide if they are an accurate statement of the law and supported by substantial evidence. *Bride v. Heckart*, 556 N.W.2d 449, 452 (Iowa 1996). The court is required to instruct the jury on the law applicable to all material issues in the case. Iowa R. Civ. P. 196. Even if the court has erred in instructing the jury, the trial court will be reversed only when the instruction was prejudicial to the complaining party. *Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 148 (Iowa 1992). Jury instructions must be considered as a whole. *Clarey v. K-Products, Inc.* 514 N.W.2d 900, 904 (Iowa 1994). An instruction is not confusing if a full reading of all the instructions leads to the conclusion that the jury could not have miscomprehended the challenged instruction. *Moser v. Stallings*, 387 N.W.2d 599, 605 (Iowa 1986).

Instruction numbers nineteen and twenty stated:

Instruction No. 19

Charles Davis claims that if you find that he violated the law in the operation of his vehicle, he had a legal excuse for doing so because the jackknifing of the Wilcox/Roadrunner truck presented a sudden emergency and made control of his vehicle impossible. "Legal excuse" means that someone seeks to avoid the consequences of his or her conduct by justifying the acts which would otherwise be considered negligent. Charles Davis must prove the defense of legal excuse by proving he was confronted with a sudden emergency as defined in Instruction No. 20.

If you find that Charles Davis has violated the law as submitted to you in other instructions, and that he has established a legal excuse for doing so, then you should find that Charles Davis was not negligent for violating the particular law involved.

Instruction No. 20

A sudden emergency is a combination of circumstances that calls for immediate action or a sudden or unexpected occasion for action. *An emergency situation does not excuse lack of ordinary care.* A driver of a vehicle who, *through no fault of his or her own*, is placed in a sudden emergency, is not chargeable with negligence if the driver exercises that degree of care which a reasonably careful person would have exercised under the same or similar circumstances. (emphasis added).

Instruction nineteen explains that to prove the defense of legal excuse, the defendant had to prove he was faced with a sudden emergency. Sudden emergency is defined in instruction twenty. Plaintiffs contend the jury may have only read the first sentence of instruction twenty for the definition of "sudden emergency." It is improbable the jury did not read the rest of instruction twenty, which clearly tempers the doctrine. Instruction twenty also explains a party who contributed to the emergency situation cannot escape liability for his negligence. Although greater

emphasis could have been given to this aspect of the legal excuse doctrine,[1] instructions nineteen and twenty, when read together, accurately state the law. *See Clarey,* 514 N.W.2d at 904. The plaintiff argues important statements of law are left out of instruction nineteen. The gist of the law the plaintiff claimed was left out is adequately covered in instruction twenty. *See Johnson v. Interstate Power Co.*, 481 N.W.2d 310, 324 (Iowa 1992).

Instructions nineteen and twenty sufficiently explained the legal excuse doctrine. The trial did not err in submitting the instructions to the jury.

III. Evidentiary Rulings.

The plaintiffs argue the trial court erred in excluding the testimony of Richard Hanna, and Warren Beine, the plaintiffs' expert, and in admitting the testimony of Brad Swyers, the defendants' expert.

The district court has broad discretion in ruling on evidentiary matters. *Gerace v. 3-D Mfg. Co., Inc.*, 522 N.W.2d 312, 319 (Iowa App. 1994). The district court's ruling on evidentiary matters will be reversed only when the court abuses its discretion by basing its ruling on grounds clearly untenable or to an extent clearly unreasonable. *Id.*

A. Richard Hanna Testimony. The plaintiffs sought to introduce the opinion testimony of Richard Hanna on the primary cause of the accident and that the

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[1] Placing the information at the end of instruction nineteen or adding an instruction would have emphasized this aspect of the legal excuse doctrine.

defendant was driving too fast for the road conditions. The court excluded the testimony.

Lay witness testimony is admissible when it is rationally based on the witness' perception and helpful to a clear understanding of a fact in issue. *See Sonnek v. Warren*, 522 N.W.2d 45, 50 (Iowa 1994). A lay witness' opinion testimony is allowed if it aids the jury in determining the case and is based upon some special training, experience, or knowledge of the witness. *Ganrud v. Smith*, 206 N.W.2d 311, 314 (Iowa 1973). Lay opinion testimony is excluded if the factual foundation for the opinion is inadequate. *Sonnek*, 522 N.W.2d at 50.

Hanna was driving a truck in the right-hand lane on Interstate 80 when he saw Davis's bobtail pass him in the left-hand lane. He estimated Davis to be driving approximately fifty to fifty-five miles per hour at that time. Davis's bobtail was not slipping or swerving when Hanna observed it. Hanna next saw the bobtail after it crossed the median into the eastbound traffic of Interstate 80. Hanna did not see the semi-truck jackknife in front of Davis, Davis swerve to avoid hitting the semi truck, or Davis's trip through the median.

The trial court excluded Hanna's testimony regarding the cause of the collision. Because Hanna did not see the semi-truck jackknife, Davis's braking, or his cross into eastbound traffic, his opinion regarding the cause of the collision is not based on his perception. The testimony was properly excluded.

The trial court allowed Hanna to testify Davis was driving his bobtail approximately fifty to fifty-five miles per hour when he passed Hanna. This occurred immediately before the collision. The trial court reasoned Hanna was qualified to testify as to observed speed based on his motoring experience. The trial court excluded Hanna's testimony regarding whether this speed was too fast for the conditions existing immediately before the collision.[2] This testimony should not have been excluded. If Hanna was qualified to make an estimate of speed based on his motoring experience and observations, he would have been qualified to opine whether the speed he saw was appropriate for the road conditions he observed.

Even though Hannah's testimony on whether Davis's speed was appropriate for the road conditions should have been admitted, the trial court's exclusion of the testimony was not reversible error. The plaintiffs were not prejudiced by the exclusion. The jury heard Hanna's testimony regarding the weather conditions and Davis's speed. With this information, the jury could have determined whether Davis's speed was too fast for the road conditions.

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[2] Hanna testified he "assumed" Davis was traveling too fast for the road conditions. This ambiguous word choice appears to be Hanna's way of expressing opinions he has formed based on his direct observations.

B. Expert Witness Testimony. Plaintiff took the deposition of Brad Swyers, the defendants' expert. At the deposition, the parties made a "standard stipulation" that all objections except those relating to the form of the question and the responsiveness of the answer were reserved until trial.[3] In response to plaintiffs' questions, Swyers opined the primary cause of the collision was the jack-knifed truck and Davis was faced with a sudden emergency.

Plaintiff intended to offer portions of Swyers' deposition at trial. In response, defendants said they intended to offer Swyers' testimony of the primary cause of the accident and Davis was faced with a sudden emergency. The plaintiff objected to these portions of the deposition as inadmissable legal conclusions.[4] The trial court ruled all of Swyers' deposition would be allowed into evidence. Plaintiff chose not to offer Swyers' deposition testimony as evidence at trial. Admissibility of expert testimony is discretionary. *Wheeler v. Dental East, P.C.*, 494 N.W.2d 248, 250 (Iowa

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[3] The source of this standard stipulation is the Iowa Rules of Civil Procedure 158(d) and (e). Those rules state:

(d) Taking Deposition. Errors or irregularities occurring during an oral deposition as to any conduct or manner of taking it, or the oath, or the form of any question or answer; and any other errors which might thereupon have been cured, obviated or removed, are waived unless seasonably objected to when it is taken.

(e) Testimony. Except as above provided, testimony taken by deposition may be objected to at the trial on any ground which would require its exclusion if given by a witness in open court, and objections to testimony, or competency of a witness, need not be made prior to or during the deposition, unless the grounds thereof could then have been obviated or removed. Iowa R. Civ. P. 158(d) and (e).

[4] Generally, expert witnesses are not allowed to state legal conclusions. *Terrell v. Reinecker*, 482 N.W.2d 428, 430 (Iowa 1992).

App. 1992). The appellate court will not interfere unless a manifest abuse of discretion has resulted in prejudice to the complaining party. *Id.*

Iowa Rule of Civil Procedure145(b) states "(a) party does not make a deponent his own witness by taking his deposition . . . ." Thus, Swyers did not become the plaintiffs' witness because the plaintiff procured his deposition. *Osborn v. Massey-Ferguson, Inc.*, 290 N.W.2d 893, 897 (Iowa 1980).

Under the Rules of Civil Procedure if a party offers a deposition at trial pursuant to rule 144(a) or 144(b), the witness does not become the party's. *Osborn*, 290 N.W.2d at 898. In such a case, the party offering the deposition can object to other portions of the deposition offered by the opposing party, regardless of the fact that the party took the deposition or propounded the questions. *Id.* It cannot be inferred from a party's procuring a deposition that he is bound to admit the statements contained in it. *Id.*

In this case, however, Swyers' testimony was offered pursuant to Iowa Rule of Civil Procedure 144(d) as an expert witness. In such a circumstance, the expert witness becomes the witness of the offerer of the deposition. Iowa R. Civ. P. 145(b) (1997). An attorney cannot object to the questions he asks of his own witness, however. *Osborne,* 290 N.W.2d at 898. Because Swyers was the plaintiffs' witness, the trial court correctly denied the plaintiffs' objections to his testimony.

Further, whether or not the trial court erred in allowing Swyers to testify on legal conclusions is moot because the jury never heard the testimony. Plaintiffs chose not to read Swyers' deposition at trial. No prejudice resulted.

The plaintiffs also object to the court's exclusion of the testimony of Warren Beine, the plaintiffs' expert witness. As an expert witness, not a witness testifying as to personal observations, Beine was to testify the defendant was driving too fast for road conditions and too close to the vehicle in front of him. The trial court excluded the testimony.

An expert witness is not permitted to state a legal conclusion. *Terrell v. Reinecker*, 482 N.W.2d 428, 430 (Iowa 1992). Whether or not Davis was driving too fast for the road conditions or following too closely were questions for the jury in deciding the case. Beine's proposed testimony echoed the contents of a motor vehicle statute, violation of which is negligence per se, and was a conclusion of law in addition to the operative facts of the case. *See id.* The district court was correct in determining the testimony should have been excluded.

AFFIRMED.