

IN THE COURT OF APPEALS OF IOWA

No. 3-107 / 12-0837
Filed March 13, 2013

DEREK K. CROW,
Plaintiff-Appellee,

vs.

**EDWIN E. SIMPSON, Individually
and d/b/a SIMPSON TRUCKING
AND EXCAVATING,**
Defendant-Appellant.

Appeal from the Iowa District Court for Monroe County, Daniel P. Wilson,
Judge.

Defendant, Edwin Simpson (individually and doing business as Simpson
Trucking and Excavating), appeals from a district court order that granted a new
trial to the plaintiff, Derek Crow. **AFFIRMED.**

Paul Zingg of Deneffe, Gardner & Zingg, P.C., Ottumwa, for appellant.

Alfredo Parrish of Parrish Kruidenier Dunn Boles Gribble Parrish Gentry &
Fisher, L.L.P., Des Moines, for appellee.

Heard by Eisenhauer, C.J., and Danilson and Bower, JJ.

DANILSON, J.

Defendant Edwin Simpson (individually and doing business as Simpson Trucking and Excavating), appeals from a district court order that granted a new trial to the plaintiff Derek Crow. Because it is clear that the end loader was parked in the traveled portion of the roadway, the jury could not have followed the jury instructions given, and the district court did not abuse its discretion in granting a new trial. We affirm.

I. Background Facts and Proceedings.

Sometime around 2:30 a.m. on Saturday August 30, 2008, eighteen-year-old Derek Crow met fourteen-year-old Brianna Baylor at the Albia, Iowa, soccer fields. Crow and Baylor had had their first date that Friday night, going first to a football game and then to a post-game gathering. Baylor arrived at the soccer fields on her moped with her friend Brooke Sinnott. Baylor gave Crow permission to take the moped for a short ride. Crow had a cast on his left hand and the controls for the moped's rear brakes were on the left handle. The headlights of the moped came on automatically.

Crow left the area of the soccer fields. At about 3:15 a.m., Crow called or sent Baylor a text saying something like, "I wrecked on a gravel road," there were some scratches on the moped, and that he wasn't hurt at all. He told her he didn't know where he was. Baylor and Sinnott began walking and came upon the moped five or six blocks away near an end loader on North Ninth Street. It was dark, but the girls could see the end loader from about a block away. Crow was

not there. The moped “was on the kick stand.” The moped engine would not turn over, but the headlights came on.

Crow appeared and walked the moped back to Baylor’s house. Baylor and her friend walked on the opposite side of the street because Baylor was angry with Crow. Crow told Baylor “he hit the end loader and maybe the moped rolled under it.” When Baylor got back to the house she saw that the front fender was broken off and one of the turning signals was “busted. Then I sat on it and the wheel was crook[ed]. And there was something in the wheel and it had come out about two inches. And I think there were a couple scrapes on it and there was also blood on it.” They put the moped somewhere Baylor’s mother would not see it right away and then the three young people walked back to Ninth Street where Crow’s car was. Crow then gave the two girls a ride toward the house where Baylor had told her mother she was spending the night.

Crow’s mother, Debra Crow, called him at 1:09 a.m. on August 30. He told her he was at a friend’s house “hanging out in the garage” and would be home soon. This friend lived less than a quarter mile away on a gravel road. Crow did not return home until 3:25 a.m. He talked to his mother briefly then went upstairs. He came back downstairs twice: the first time was fifteen to twenty-five minutes later, at which point his mother did not notice anything in particular; he came down again about forty minutes later. Crow told his mother he had a headache. He lay down and threw his hand on the back of the sofa. His mother noticed band-aids “all up and down his arm and hand.” She took the band-aids off and noticed his hand was “wide open.” He told his mother he did

not know what happened to his hand. He said he had fallen down the steps at the football game. He then grabbed his head and shortly thereafter began vomiting. He was taken to the hospital in Albia, where he was diagnosed with head trauma. He became non-responsive and was air-lifted to a Des Moines hospital where he underwent surgery. Crow later was flown to the hospital in Iowa City. He recovered consciousness on September 5.

Crow brought an action for personal injuries against the city of Albia, the local electric cooperative,¹ and Edwin Simpson claiming their acts of negligence were the cause of injuries he received while allegedly riding a moped and striking an end loader owned by Simpson.

Crow testified he had been riding motorized bikes since he was six or seven and that prior to August 30, 2008, he had ridden a moped several times. He stated he met Baylor and Sinnott at the parking lot between the pool and soccer fields and borrowed the moped to take a short ride. Crow testified he rode past the high school, turned on to D Avenue, then turned left on to Ninth Street. The moped head light was on and he saw “something big and yellow.” He said he remembered grabbing for both brakes and the next thing he remembers is “kind of laying to the side.” He texted Baylor while still lying down. He then got himself up and began walking back to meet with Baylor and Sinnott, but decided to call some friends to come pick him up and take him back to his car. It was after 2:30 a.m. His friends picked him up and took him back to his

¹ Crow does not appeal the district court’s entry of judgment in favor of the city and the cooperative.

car. He then returned to Ninth Street where he found Baylor and Sinnott by the moped.

Following a six-day trial, the jury answered a question on the verdict form, finding Simpson was not at fault. In a motion for new trial, Crow argued that the finding was not supported by sufficient evidence, particularly in light of jury instructions that stated that violations of law constitute negligence. The court ruled that the jury's finding that Simpson was not at fault was "contrary to the uncontroverted evidence . . . in light of Instructions Nos. 21 and 17." It also concluded the jury's verdict did not effect substantial justice between the parties.

On appeal, Simpson contends (1) the district court erred in granting a new trial based on unasserted challenges to the jury instructions, and (2) the court abused its discretion in granting a new trial on grounds the verdict failed to affect substantial justice between the parties.

II. Analysis.

We begin with the observation that there were no objections to the jury instructions given. Thus, they provide the law of the case. See Iowa R. Civ. P. 1.924 (stating that objections to the jury instruction must be made and ruled on before arguments to the jury and that "[n]o other . . . objections shall be asserted thereafter, or considered on appeal"); see also *Olson v. Sumpter*, 728 N.W.2d 844, 850 (Iowa 2007) (finding the plaintiff was not entitled to a new trial for the reason articulated by the district court—failure to instruct the jury properly—where the plaintiff "failed in advance of closing arguments to object to jury

Instruction 17, the jury verdict form, and the sufficiency of the evidence of her unreasonable failure to mitigate her damages”).

Simpson argues Crow did not raise the issue that Simpson was negligent as a matter of law or move for a directed verdict on the issue of Simpson’s negligence and therefore waived any such claim. Crow responds that the issue is not whether he preserved a claim of error to the instructions given, but whether the jury *followed* those instructions. We agree. The district court’s conclusion that the verdict was “contrary to the law *as instructed*” is, in essence, a finding that the jury failed to follow the instructions. We thus set the instructions out in some detail.

The jury was instructed, in part:

Instruction No. 15.

Mr. Crow must prove all of the following propositions:

(1) Defendant Simpson was negligent in one or more of the following ways:

(a) leaving the front end loader parked in the traveled portion of a public roadway;

(b) failing to warn motorists the front end loader was parked in the traveled portion of a public roadway;

(c) failing to take reasonable precautions to insure the public roadway was kept in a reasonably safe condition for passing motorists; or

(d) failing to act as a reasonable person under the circumstances then and there existing.

(2) The negligence was a cause of damage to Mr. Crow.

(3) The amount of damage

If Mr. Crow has failed to prove any of these propositions, he is not entitled to damages. If Mr. Crow has proved all of these propositions, you will consider the defense of contributory negligence as explained in Instruction No. 18.

Instruction No. 17

You have received evidence that when excavation occurs in the City of Albia, Ordinance 175.10.3 requires the City of Albia to specify standards to place, provide and maintain adequate

barricades or warning lights, or requires the permit holder, Edwin Simpson to place, provide and maintain adequate barricades and warning lights meeting standards specified by the city to protect the public from hazard. Conformity with Ordinance 175.10.3 is evidence that the City of Albia and/or Edwin Simpson were not negligent and violations of its provision is evidence the City of Albia and/or Edwin Simpson were negligent. Such evidence is relevant and you should consider it, but it is not conclusive proof.

Instruction No. 21

A driver of a vehicle shall not park a vehicle alongside any street excavation when the parking would obstruct traffic. The end loader owned by Mr. Simpson is considered a motor vehicle under Iowa law.

A violation of this law is negligence.

Instruction No. 27

In these instructions I will be using the term "fault." Fault means one or more acts or omissions towards the person of the actor or of another which constitutes negligence.

Instruction No. 28

"Negligence" means failure to use ordinary care. Ordinary care is the care which a reasonably careful person would use under similar circumstances. "Negligence" is doing something a reasonably careful person would not do under similar circumstances, or failing to do something a reasonably careful person would do under similar circumstances.

Instruction No. 29

The conduct of a party is a cause of damage when the damage would not have happened except for the conduct.

Instruction No. 30

Damages may be the fault of more than one person. In comparing fault, you should consider all of the surrounding circumstances as shown by the evidence, together with the conduct of the plaintiff and the defendants, or persons who have been released, and the extent of the causal relation between their conduct and the damages claimed. You should then determine what percentage, if any, each person's fault contributed to the damages.

Instruction No. 31

After you have compared the conduct of all parties, if you find the plaintiff Derek K. Crow was at fault and the plaintiff's fault

was more than 50% or the total fault, plaintiff Derek K. Crow cannot recover damages.

However, if you find the plaintiff's fault was 50% or less of the total fault, then I will reduce the total damages by the percentage of plaintiff's fault.

In its post-trial ruling, the court wrote it was granting a new trial because:

“(1) . . . the jury's verdict does not effect substantial justice between the parties and (2) the verdict is not sustained by the evidence and is contrary to the law as instructed.”

A. Scope and Standard of Review.

Iowa has long recognized the trial court's inherent power to grant a new trial where the verdict fails to administer substantial justice. The trial court is not limited to the grounds for granting a new trial specified in Iowa Rule of Civil Procedure [1.1004]. Nevertheless, there must be a reason apparent from the record to justify the court's exercise of its power.

Lehigh Clay Products, Ltd. v. Iowa Dep't of Transp., 512 N.W.2d 541, 543-44 (Iowa 1994) (citations omitted).

“Our standard of review for rulings on a motion for new trial depends on the grounds for new trial asserted in the motion and ruled upon by the court. Where the motion and ruling are based on a discretionary ground, our review is for an abuse of discretion.” *WSH Props., L.L.C. v. Daniels*, 761 N.W.2d 45, 49 (Iowa 2008). To show an abuse of discretion, [the appellant] must demonstrate that the court exercised its discretion “on grounds clearly untenable or to an extent clearly unreasonable.” *Lehigh*, 512 N.W.2d at 54. We are slower to interfere with the grant of a new trial than with its denial. *Id.*

B. The district court did not abuse its discretion in granting a new trial.

In moving for a new trial, Crow asserted, “There is not sufficient evidence in the record to support the jury’s verdict that Defendant Simpson was *not* negligent.” Although the district court explained its ruling by noting Instructions No. 17 and 21, it is clear that had the jury followed the instructions given, they were required to find Simpson negligent and should have proceeded to the issue of proximate cause. See *King v. State*, 818 N.W.2d 1, 11 (Iowa 2012) (“[W]e will uphold a district court ruling on a ground other than the one upon which the district court relied provided the ground was urged in that court.”).

Instruction No. 15 provides that Crow was required to prove that Simpson was negligent in one or more of the following ways:

- (a) leaving the front end loader parked in the traveled portion of a public roadway;
- (b) failing to warn motorists the front end loader was parked in the traveled portion of a public roadway;
- (c) failing to take reasonable precautions to insure the public roadway was kept in a reasonably safe condition for passing motorists; or
- (d) failing to act as a reasonable person under the circumstances then and there existing.

A review of the evidence presented at trial clearly shows that Simpson left the end loader parked in the traveled portion of a public roadway and Crow collided with it while driving the moped and suffered injuries. Thus Crow proved him negligent in at least one of the ways listed in Instruction No. 15. Because Instruction No. 27 defines fault as “one or more acts or omissions towards the person . . . which constitutes negligence,” under the instructions given, the jury

should have affirmatively answered the question “Was Defendant Edwin E. Simpson at fault?”

Moreover, in Iowa violation of one of the statutory rules of the road amounts to negligence per se, absent a legal excuse. *Jones v. Blair*, 387 N.W.2d 349, 352 (Iowa 1986). Although Crow did not seek a negligence-per-se instruction, and the jury was not instructed on negligence per se, the district court also did not instruct on the legal-excuse defense. Thus, there was no basis upon which the jury could have exonerated Simpson from a finding of a general specification of negligence of leaving the end loader in the traveled portion of the roadway. Crow’s failure to object to the instructions for omission of negligence per se only waived his right to such an instruction and finding. He did not waive his right to a verdict of fault premised upon the general specification of negligence. On this basis alone, the district court could conclude that the jury had failed to follow the instructions given and a new trial was warranted. Obviously, the jury could still have concluded that Simpson’s negligence was not the proximate cause of Crow’s injuries or disagreed with the amount of damages he sought.

We find no abuse of discretion in the grant of a new trial and we therefore affirm.

AFFIRMED.