IN THE COURT OF APPEALS OF IOWA

No. 0-917 / 10-1012
Filed April 13, 2011

GEORGE MOGENSEN,
Plaintiff-Appellant,

vs.

DES MOINES REGIONAL TRANSIT AUTHORITY and GARY COZAD,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Don C. Nickerson, Judge.

Plaintiff appeals the judgment entered for defendants in his tort suit based on a motor vehicle-pedestrian accident. **AFFIRMED.**

John P. Dougherty of Lawyer, Dougherty, Palmer & Flansberg, P.L.C., West Des Moines, for appellant.

Kenneth R. Munro of Munro Law Office, P.C., Des Moines, for appellee DART.

Mark Schultheis of Nyemaster Goode, P.C., Des Moines, for appellee Cozad.

Considered by Danilson, P.J., Tabor, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MAHAN, S.J.

I. Background Facts & Proceedings

On the morning of July 17, 2007, Gary Cozad was driving a bus for the Des Moines Area Regional Transit Authority (DART). The bus was going west on Grand Avenue in Des Moines, when it stopped at a traffic light at the intersection with East Sixth Street. Cozad testified that when the light changed to a green turn arrow, he turned the bus left onto East Sixth Street. Another motorist, William Brown, agreed the bus moved forward after the light turned green. As the bus was making the turn, the bus struck George Mogensen, who allegedly was walking through the cross-walk on East Sixth Street, on the south side of the intersection.[1]

Mogensen filed a lawsuit alleging he was injured as a result of the negligence of DART and Cozad. The jury returned a verdict assigning fault ninety-two percent to Mogensen and eight percent to defendants. Because the plaintiff was more than fifty percent at fault, he was not awarded any damages. Mogensen appeals the judgment in favor of defendants, claiming (1) the court should have instructed the jury that the bus had a duty to sound its horn when it made a turn and (2) the court erred in excluding evidence of Cozad's prior criminal convictions.

[1] Officer Richard Glade of the Des Moines Police Department, who was an accident investigator, testified that when the left turn arrow was on for westbound traffic on Grand Avenue, the pedestrian crosswalk light on the south side of the intersection shows "do not walk."

II. Jury Instructions

Mogensen requested the district court to give the following Iowa Civil Jury Instructions:

> No. 600.32. A driver shall not turn a vehicle from a direct course on a highway unless the movement can be made with reasonable safety. And then only after sounding the horn if any pedestrian may be affected by the movement.
> A violation of this law is negligence.
>
> No. 600.52. The driver of a vehicle is required to exercise ordinary care to avoid hitting a pedestrian on a road and shall give warning by sounding the horn when necessary.
> A violation of this law is negligence.

The district court denied this request, stating that "when it considers the instructions as a whole, the instructions properly and fully instruct the jury as to the factual issues in this case."

On a claim that the district court erred by refusing to give a requested instruction, we review the court's decision for an abuse of discretion. *Summy v. City of Des Moines*, 708 N.W.2d 333, 340 (Iowa 2006). An instruction should be given if it contains a correct statement of the law, applies to the case, and the legal concept is not otherwise embodied in other instructions. *Banks v. Beckwith*, 762 N.W.2d 149, 151 (Iowa 2009). Error in refusing to give a requested instruction does not warrant reversal unless the error was prejudicial to a party. *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994). We will not reverse for marginal or technical omissions, but the instructions must thoroughly and fairly convey the law applicable to the issues presented. *Sanders v. Ghrist*, 421 N.W.2d 520, 522 (Iowa 1988). It is the trial court's duty to see that a jury has a clear and intelligent understanding of what it is to decide. *Id.*

Under the instructions, the jury could have found defendants negligent in one or more of the following particulars: (1) driving at a speed greater than reasonable and proper and without due regard for pedestrian traffic; (2) failing to exercise ordinary care to avoid hitting a pedestrian; (3) failing to yield to a pedestrian lawfully within a crosswalk; (4) driving at a speed greater than that which would have permitted him to stop within an assured clear distance ahead; (5) failing to have his vehicle under control; (6) failing to maintain a proper lookout; and (7) failing to stop and remain stopped until it was safe to proceed.

The requested jury instructions are based upon Iowa Code sections 321.314 and 321.329(1) (2007), respectively, and thus are correct statements of the law. Defendants claim these instructions are not applicable under the facts of this case because the intersection had traffic control signals and because the legal concept was embodied in other instructions. Defendants assert the duties of the parties in the intersection were regulated by the traffic control signals, and that the requested instructions are applicable only in situations that are not regulated by a traffic control signals. We agree as to requested jury instruction 600.52, which is based on Iowa Code section 321.329(1).

Section 321.325 provides, "Pedestrians shall be subject to traffic-control signals at intersections as heretofore declared in this chapter, but at all other places pedestrians shall be accorded the privileges and shall be subject to the restrictions stated in sections 321.327 to 321.331." Where the language of a statute is plain, there is no need for interpretation, and the language expresses the intent of the legislature. *See McGill v. Fish*, 790 N.W.2d 113, 118 (Iowa 2010). Under section 321.325, the provisions in sections 321.327 to 321.331 do

not apply at intersections regulated by traffic control signals. Section 321.329(1), which creates a requirement for motorists to "give warning [to pedestrians] by sounding the horn when necessary,"[2] comes within these provisions that do not apply where a traffic control signal is employed at an intersection. We conclude that uniform instruction No. 600.52, which relates to section 321.329(1), does not apply under the facts of this case.

We turn then to instruction 600.32, which is based on Iowa Code section 321.314. Section 321.314 provides as follows:

> No person shall turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by such movement or after giving an appropriate signal in the manner hereinafter provided in the event any other vehicle may be affected by such movement.

Section 321.314 applies in three possible factual scenarios:

> 1. It provides that no person shall turn a vehicle from a direct course upon a highway unless and until such movements can be made with reasonable safety.
> 2. It further provides that such turn shall be made when the movement from the direct course can be made with reasonable safety and only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by such movement.
> 3. A vehicle may be turned from a direct course upon a highway if another vehicle is involved only after a signal is made by the operator of the vehicle in the manner provided for in section 321.315.

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[2] Section 321.329(1) provides:

> Notwithstanding the provisions of section 321.328 every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary and shall exercise due care upon observing any child or any confused or incapacitated person upon a roadway.

Crow v. Weller, 197 N.W.2d 352, 353-54 (Iowa 1972). Mogensen is claiming section 321.314 applies based on the second scenario.

We determine uniform instruction 600.32, which is based on section 321.314, should have been given to the jury. This error, however, will result in reversal of the judgment entered by the district court only if Mogensen was prejudiced by the court's refusal to give the requested instruction. *See Koenig v. Koenig*, 766 N.W.2d 635, 637 (Iowa 2009) (noting an error in jury instructions does not warrant reversal unless the error results in prejudice to the complaining party). The defendants claim this legal concept is embodied in other instructions. Specifically, the defendants state the duty to sound a warning is subsumed in the specifications of negligence "failing to exercising ordinary care in order to avoid hitting a pedestrian."

We note that a motorist has a duty to sound a horn if the motorist sees a pedestrian, or in the exercise of reasonable care should have seen a pedestrian, in time to give a signal. *Ruby v. Easton*, 207 N.W.2d 10, 19 (Iowa 1973). "Whether such signal is essential in the exercise of ordinary care must be determined from the circumstances of each case." *Nichols v. Snyder*, 247 Iowa 1302, 1306, 78 N.W.2d 836, 839 (1956) (citation omitted). The underlying question is whether a motorist in the exercise of reasonable care should have seen the pedestrian. The jury was also instructed that Cozad could be found negligent for failing to keep a proper lookout. Thus, the jury has already addressed the issue of whether Cozad, in the exercise of reasonable care, should have seen Mogensen, and assigned fault accordingly. *See id.* at 1310, 78 N.W.2d at 841 ("While this duty is similar to the duty to keep a proper lookout,

it is not identical, and by failure to act one may breach both duties."). The instructions in this case thoroughly and fairly conveyed the law applicable to the issues presented. *See Sanders*, 421 N.W.2d at 522. The jury assigned fault ninety-two percent to plaintiff and eight percent to defendants. We conclude Mogensen was not prejudiced by the court's failure to include uniform instruction 600.32 in the jury instructions.

III. Criminal Convictions

Defendants filed a motion in limine seeking to prohibit Mogensen from presenting evidence of Cozad's prior criminal convictions. Cozad had been convicted of second-degree burglary in 1984; operating while intoxicated (OWI) in 1988 and 2001; drug-related offenses in 1996, 1997, 2001, and 2003; and convictions for domestic abuse in 2002 and 2003. Outside the presence of the jury, Mogensen offered two exhibits that were Cozad's criminal records. Defendants objected on the grounds that the evidence was irrelevant, or if relevant, was more prejudicial than probative. The defendants argued the issue was irrelevant to the issues properly before the jury. The district court granted the motion in limine.

Plaintiff also filed a motion in limine. This motion involved the plaintiff's past suicidal ideations and a statement made by the plaintiff four months prior to this accident. Said statement involved a possible threat to commit suicide by stepping in front of a bus. The district court also granted plaintiff's motion in limine.

We conclude the district court's rulings on both motions were correct. This was a civil matter involving a bus-pedestrian accident. The district court was

being fair and reasonable to both parties. The matter was submitted to the jury solely on the evidence surrounding the accident. Rule 5.403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." "Unfair prejudice arises when the evidence prompts the jury to make a decision on an improper basis, often an emotional one." *Waits v. United Fire & Cas. Co.*, 572 N.W.2d 565, 569 (Iowa 1997).

We conclude the district court did not abuse its discretion in determining the probative value of this evidence was substantially outweighed by the danger of unfair prejudice.

We affirm the decision of the district court.

AFFIRMED.

Danilson, P.J., concurs; Tabor, J., concurs specially.

TABOR, J. (concurring specially)

While I agree with the result reached by the majority decision, I take this opportunity to write separately on the issue of the admissibility of the defendant's prior criminal convictions under Iowa Rules of Evidence 5.609 and 5.403. The majority prefaces its analysis of the district court's ruling on the defendants' motion in limine seeking to exclude the driver's prior convictions with the explanation that the district court also granted a motion in limine filed by the plaintiff seeking to exclude evidence of his past suicidal ideations. Without being asked to review the district court's ruling on the plaintiff's limine motion, the majority expresses the opinion that the district court ruled correctly on both motions. While that is likely true, I am concerned that we may be perceived as applying a "tit-for-tat" theory to the court's evidentiary rulings. *See Commonwealth v. Malone*, 514 A.2d 612, 613 (Pa. Super. 1986) (noting that "what's good for the goose is good for the gander" approach to excluding testimony has "an immediate seductive appeal that is ultimately illusory"). Decisions concerning admissibility of evidence must be based on the independent merits of each issue raised.

Under rule 5.609(*a*)(1) the credibility of a witness—other than the accused in a criminal case—may be attacked by evidence that the witness has been convicted of a crime punishable by more than one year of incarceration. Many of Cozad's convictions fall into that category and were admissible for impeachment purposes, subject to a careful balancing under rule 5.403. Cozad's burglary conviction—which involved an element of dishonesty—would have been admissible under rule 5.609(*a*)(2), but for the fact that it was more than ten years

old. *See* Iowa R. Evid. 5.609(*b*). The age of the burglary conviction rendered it inadmissible unless the court determined, in the interests of justice, that its probative value substantially outweighed its prejudicial effect. *See State v. Parker*, 747 N.W.2d 196, 208 (Iowa 2008). Because Cozad's recollection of the accident was corroborated by other witnesses, I agree with the majority that the district court did not abuse its discretion in concluding that the probative value of Cozad's prior convictions for impeachment purposes was substantially outweighed by the danger of undue prejudice.