IN THE COURT OF APPEALS OF IOWA

No. 9-654 / 09-0190
Filed September 2, 2009

CHARLES HALTOM and LINDA HALTOM,
Plaintiffs-Appellees,

vs.

DES MOINES AREA REGIONAL TRANSIT AUTHORITY f/k/a DES MOINES METROPOLITAN TRANSIT AUTHORITY,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge.

Defendant appeals from an adverse jury verdict in a personal injury action.

AFFIRMED.

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

Mark E. Spellman, G. Michael Kealhofer, and Patrick J. Spellman of Spellman, Spellman, Spellman, Kealhofer & Spellman, Perry, for appellees.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

DOYLE, J.

Defendant Des Moines Area Regional Transit Authority (DART) appeals following an adverse jury verdict in a personal injury action brought by two passengers. DART contends the trial court erred in failing to give a "right of assumption" jury instruction. We affirm.

I. Background Facts and Proceedings.

On August 11, 2007, Charles and Linda Haltom, together with other family members, were visiting the Iowa State Fair. At the end of the day, the Haltoms and family boarded a DART state fair shuttle bus to return to the Center Street Park and Ride facility. Before the Haltoms could seat themselves, the bus suddenly moved forward and then came to an abrupt stop. At that time, a sport utility vehicle (SUV) traveling at thirty-five to forty miles per hour passed in front of the bus, causing the bus driver to stop to avoid a collision. As a result of the abrupt stop, the Haltoms fell to the floor of the bus and were injured.

The Haltoms sued DART alleging, among other things, it was negligent "[i]n suddenly and without warning causing the bus to accelerate from a stop before allowing Plaintiffs opportunity to be seated" and "[i]n suddenly and without warning bringing the bus to an abrupt and sudden stop before allowing Plaintiffs to be seated." The case proceeded to a jury trial in November 2008.

At the close of all the evidence, DART requested the trial court to instruct the jury on the right to assume that other drivers would obey the law, i.e., Iowa Civil Jury Instruction 600.71. The court did not give the instruction. The jury returned a verdict in favor of the Haltoms. DART filed a motion for new trial

asserting it was prejudiced by the court's failure to give the requested instruction. The court denied the motion and DART appeals.

II. Standard of Review.

We review the failure to give a requested jury instruction for the correction of errors at law. Iowa R. App. P. 6.907 (2009); *Stover v. Lakeland Square Owners Ass'n*, 434 N.W.2d 866, 867 (Iowa 1989). Parties are entitled to have their legal theories submitted to the jury when the instructions expressing those theories correctly state the law, have application to the case, and are not otherwise covered in other instructions. *Vasconez v. Mills*, 651 N.W.2d 48, 52 (Iowa 2002). Proposed instructions must be supported by the pleadings and substantial evidence in the record. *Id*. Evidence is substantial if a reasonable person would accept it as adequate to reach a conclusion. *Id*. Error in giving or refusing to give a requested instruction does not require reversal unless the error is prejudicial. *Stover*, 434 N.W.2d at 868.

III. Discussion.

After the parties had an opportunity to review the proposed instructions, the trial court asked DART's counsel if there were any objections or exceptions. Counsel replied: "We would ask for the insertion of 600.71, Right of Assumption." The court responded:

> The court discussed this with counsel off the record, and the court is going to decline to give that instruction. The court does not feel that it is particularly applicable to the facts in this case, and the instructions that are given, I believe, allows the defendant to make the argument the defendant needs to make with respect to that issue.

After the jury returned its verdict in favor of the Haltoms, DART filed a motion for new trial arguing failure to give the requested instruction was reversible error. The motion was denied.

On appeal, the Haltoms assert DART failed to preserve error with respect to the issue because DART's objection to the court's failure to give its proposed instruction "was, at most, a general objection that included no grounds or reasons of any kind to alert the trial court of the basis for the objection." *See* Iowa R. Civ. P. 1.924. However, regardless of whether or not error was preserved, DART's claim fails as the requested instruction was not applicable under the facts of this case. *See State v. Taylor*, 596 N.W.2d 55, 56 (Iowa 1999) (bypassing error preservation concerns and affirming on merits).

DART's proposed instruction stated:

> Both drivers had a right to use the road, but each had to respect the rights of the other. Each driver could assume the other would obey the law until they knew, or in the exercise of ordinary care, should have known the other driver was not going to obey the law.

The instruction is stock Iowa Civil Jury Instruction 600.71. The proposition has been deemed so well established that authorities need not be cited in support of it in appellate briefs. *See* Iowa R. App. P. 6.904(3)(*i*). The issue is whether or not the instruction, as written, is appropriate under the circumstances of this case. We conclude it is not.

After spending the day at the fair, the Haltom family boarded a DART shuttle bus parked near fairgrounds Gate 9. The bus was facing north on East 30th Court, just south of Logan Avenue. The Haltoms boarded through the front door of the bus. As Charles and Linda were making their way to the rear of the

bus, the bus suddenly made a "jackrabbit start," causing the Haltoms to lose their balance and then "almost instantaneously stopped," throwing the Haltoms to the floor. Linda landed on her shoulders at the bottom of the rear door stairwell.

The bus driver testified she had pulled the bus forward about five to eight feet to the stop sign, "enough to where the light pole was not blocking [her] view from the right." The bus driver stated:

> [I] looked to my left, to my right, to my left again and I wanted to make sure that the Southeast Polk bus wasn't moving to my right again, and I proceeded through the [Logan Avenue] intersection.

She stated that it was not possible that something obstructed her vision as she looked to the right. She said she did not see anything coming from the right. When she was not quite halfway through the intersection, she caught a blur out of the right corner of her eye. She took her foot off the accelerator and applied the brake slowly. When she realized the blur was an SUV going at "a high rate of speed," she fully applied the brakes. She testified the SUV was "[r]ight at the corner of my eye, right at my—like my headlight on my bus." The SUV was almost in front of the bus when she first saw it. The SUV, traveling westbound on Logan, was leaving the fairgrounds through Gate 9. It swerved to the right to avoid a collision with the bus, and kept on going. A witness estimated the SUV was traveling in excess of thirty-five miles per hour. The SUV had the right-of-way as traffic traveling on Logan was not controlled by a stop sign.

There is no dispute that DART is a "common carrier" as defined under Iowa law. *See Wright v. Midwest Old Settlers & Threshers Ass'n*, 556 N.W.2d 808, 810 (Iowa 1996) (defining common carrier as one who "holds itself out to the public as a carrier of all goods and persons for hire"). A common carrier must

exercise more than ordinary care to protect its passengers and has a duty to both anticipate any possible danger and to guard against it. *See id.* at 811; *Doser v. Interstate Power Co.*, 173 N.W.2d 556, 558 (Iowa 1970). This duty stops just short of ensuring passengers' safety. *Doser*, 173 N.W.2d at 558.

DART's proposed right to assume instruction, identical to the stock instruction, provides in part that "[e]ach driver could assume the other would obey the law until they knew, or in the exercise of *ordinary care*, should have known the other driver was not going to obey the law." (Emphasis added.) But DART, as a common carrier, is obligated to "generally exercise *more than ordinary diligence*" for its passengers. *Wright*, 556 N.W.2d at 811 (emphasis added). "A *high degree of care* must be exercised in foreseeing, as well as guarding against, danger." *Id*. (emphasis added). Although the proposed instruction is an accurate statement of the law applicable to non-common carrier motorists, it does not, with its reference to the exercise of ordinary care, accurately reflect DART's duty of heightened care.

A district court must give a requested instruction if the instruction (1) correctly states the law, (2) has application to the case, and (3) is not stated elsewhere in the instructions. *Weyerhaeuser v. Thermogas Co.*, 620 N.W.2d 819, 823 (Iowa 2000). Because Dart's requested instruction did not correctly state the law applicable to common carriers, the district court committed no error in refusing to give the instruction to the jury.

DART submits that under *Doser*, the right of assumption doctrine applies in common carrier cases. In *Doser*, the district court granted a new trial when it failed "to advise the jury that the operator of the vehicle is entitled to assume that

all others using the highway will obey the law." 173 N.W.2d at 559. It made no mention of any limitation to the rule. The district court went on to say, "Failure to include this portion of the law in the instruction . . . is, of course, clearly error even though defendant was a public service vehicle." *Id*. Our supreme court declined to interfere with the district court's broad discretion in granting the motion for new trial. *Id*. It noted the right to assume rule has "certain limits." *Id.* The court did not discuss those limits. Notably, the court did not carve out any exception to a common carrier's unqualified heightened duty of care, nor did the court suggest that application of the right to assume rule relieves in any way a common carrier's well established obligation to exercise more than just ordinary care.

We will not read *Doser* as relieving a common carrier from its obligation to exercise a high degree of care in foreseeing, as well as guarding against, danger. *See Wright*, 556 N.W.2d at 811. DART's instruction improperly injected the concept of ordinary care into the case. The trial court properly refused to give the instruction to the jury.

Because we have affirmed on the above grounds, we need not address the remaining arguments raised by the Haltoms in their brief.

IV. Conclusion.

We conclude the district court did not err in failing to give DART's requested instruction to the jury. The judgment of the district court is therefore affirmed.

AFFIRMED.