Court of Appeals of Nebraska.

Kathy OZENBAUGH, Appellant,
v.
Thomas GLIDDEN and Patrick C. Hatler, Appellees.

No. A-90-443.

Filed July 7, 1992.

Appeal from the District Court for Lancaster County; Earl J. Witthoff, Judge.

Terry R. Wittler, Cline, Williams, Wright, Johnson & Oldfather, for appellant.

Robert L. Anderson, Wolfe, Anderson, Hurd, Luers & Ahl, for appellee Glidden.

William L. Switzer, Jr., and Eric W. Kruger, Rickerson, Welch & Kruger, for appellee Hatler.

Before CONNOLLY, IRWIN and MILLER-LERMAN, JJ.

IRWIN, Judge.

***1** This is an appeal from an action for personal injury, as the result of an accident involving several cars. The case was tried to a jury on the issues of negligence, contributory negligence, assumption of risk, and damages. The jury returned a general verdict for both of the defendants. Plaintiff's motion for a new trial was overruled.

In her appeal, plaintiff, Kathy Ozenbaugh, maintains that the trial court erred (1) in submitting the defense of assumption of risk to the jury; (2) in refusing to instruct the jury on plaintiff's specifications of negligence against defendant Patrick C. Hatler; (3) in restricting plaintiff's counsel from arguing inferences to be drawn from defendant Hatler's failure to appear and testify; (4) in submitting the defense of contributory negligence, while failing to instruct the jury on the "rescue rule"; and (5) in failing to direct a verdict in favor of plaintiff and against defendants under the "range- of-vision rule." We affirm.

FACTS

On March 28, 1987, a multicar collision occurred during a snowstorm. Ozenbaugh was returning to her home in Denton, Nebraska, from a dental appointment in Lincoln. It was about 12 noon, and the road was snowpacked and slippery. As she came over the crest of a hill, a whiteout developed, and her car ended up in the ditch on the right-hand side of the road. The rear portion of her car protruded into the roadway. Several other vehicles, in succession, came over the crest of the same hill, while heading west toward Denton. The second and third cars to come over the crest of the hill were able to go around Ozenbaugh's car and then stop farther down the hill, along the road. The fourth car to come over the crest of the hill, that of defendant Hatler, hit the rear of Ozenbaugh's car and spun around several times while sliding down the hill. At the time of this collision, Ozenbaugh was in her car. She was not injured as a result of Hatler's car striking her car.

At some point, Ozenbaugh got out of her car. The record reflects that Hatler, after bringing his car to a stop, drove his car back up the hill to a point across the road from Ozenbaugh's car. Hatler and Ozenbaugh exchanged words.

The fifth car to come over the crest of the hill, a van driven by defendant Thomas Glidden, hit Ozenbaugh's car. Ozenbaugh's car was pushed into her and knocked her down. She was taken into Denton for medical assistance and was subsequently transported to Lincoln General Hospital for extensive medical treatment and surgery.

SCOPE OF REVIEW

A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is any competent evidence presented to the jury upon which it could find for the successful party. *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989).

> In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. [Citations omitted.]
> ***2** ....
> Regarding the claim of prejudice from an instruction given or a court's refusal to give a

> tendered instruction, the given instructions must be read conjunctively rather than separately in isolation. If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning instructions and necessitating a reversal. [Citations omitted.] "All instructions, read conjunctively, must correctly state the law, adequately state the issues, and not mislead the jury."

Rose v. City of Lincoln, 234 Neb. 67, 74-75, 449 N.W.2d 522, 528 (1989). Accord *Sikyta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991).

ASSUMPTION OF RISK

When a defendant pleads assumption of risk as an affirmative defense in a negligence action, he has the burden to establish the elements of assumption of risk before that defense, as a question of fact, may be submitted to the jury. *Trackwell v. Burlington Northern RR. Co.*, 235 Neb. 224, 454 N.W.2d 497 (1990); *Vanek v. Prohaska*, 233 Neb. 848, 448 N.W.2d 573 (1989); *Mandery v. Chronicle Broadcasting Co.*, 228 Neb. 391, 423 N.W.2d 115 (1988). "Before the defense of assumption of risk is submissible to a jury, evidence must show that the plaintiff (1) knew of the danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger which proximately caused the plaintiff's damage." *Mandery*, 228 Neb. at 398, 423 N.W.2d at 120. See, also, *Sikyta v. Arrow Stage Lines, supra; Jensen v. Hawkins Constr. Co.*, 193 Neb. 220, 226 N.W.2d 346 (1975).

The defense of assumption of risk presupposes that plaintiff had some actual knowledge of the danger, that she understood and appreciated the risk therefrom, and that she voluntarily exposed herself to such risk. *Vanek v. Prohaska, supra.*

Ozenbaugh argues that there was no evidence that she voluntarily assumed any risk but, rather, there was evidence that she had a statutory duty to render aid to anyone injured in the accident, and she was attempting to see if Hatler needed assistance. However, the record supports submission of this issue to the jury. Ozenbaugh was approximately 40 years old and was experienced enough to appreciate whiteouts, slippery pavement, and the risks inherent when people attempt to drive in such weather conditions, especially on hills. As Ozenbaugh stood by her car, the snow was blowing and cars were sliding. One car had just hit her car, spun, and slid down the hill.

The record supports the fact that Ozenbaugh knew of the danger, appreciated the danger, and voluntarily exposed herself to it. The jury instructions regarding the assumption of risk issue meet the standard set forth above, and their submission to the jury was not prejudicial error.

REQUESTED INSTRUCTION ON HATLER'S NEGLIGENCE

Defendant Hatler did not appear at the trial. Ozenbaugh argues that Hatler's testimony would have supported her theory that he was negligent in failing to maintain a proper lookout, in failing to maintain control of his car, and in driving with excessive speed. She contends that she is entitled to the benefit of Hatler's testimony and, finally, that those specific issues should then have been in the instruction submitted to the jury.

***3** However, even if Hatler had testified and even if his testimony had supported Ozenbaugh's theory, her requested jury instruction covering those specific points was not submissible because those actions were not the proximate cause of her injuries. In addition, the submitted jury instructions did follow her theory that defendant Hatler was negligent because he parked or stopped his vehicle on the roadway. When jury instructions adequately state the issues and the law, there is no prejudicial error.

ARGUMENT AS TO INFERENCES

We find no merit in Ozenbaugh's claim that the court improperly restricted counsel from arguing the favorable inferences that could be drawn from Hatler's failure to testify. The court sustained an objection to counsel's attempt to state why Hatler did not testify. No argument was ever made or attempted regarding reasonable inferences which could be drawn from Hatler's failure to testify.

RESCUE RULE INSTRUCTION

We also find no merit in Ozenbaugh's claim that the jury should have been instructed on the rescue rule. The issue of the rescue rule was not raised in the pleadings. Jury instructions should be confined to those issues raised in the pleadings and supported by the evidence. *Simon v. Christie*, 210 Neb. 600, 316 N.W.2d 303 (1982). Ordinarily, it is error to submit an issue to the jury which is not pleaded in the case.

Id.

In addition, the evidence does not support Ozenbaugh's contention that she was attempting to rescue Hatler. The rescue rule "contemplates a voluntary act by one who, in an emergency and prompted by spontaneous human motives to save human life, attempts a rescue which he had no duty to attempt by virtue of a legal obligation or duty.... " *Buchanan v. Prickett & Son, Inc.*, 203 Neb. 684, 688, 279 N.W.2d 855, 858 (1979). However, the less the danger to the third party, the less risk the volunteer is justified in taking. *Id.* The evidence shows that Ozenbaugh was going to inquire, after Hatler had driven back up the hill, as to whether he was injured, rather than that she was attempting to rescue him from any imminent danger.

DIRECTED VERDICT

A trial court should direct a verdict, as a matter of law, only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Baker v. St. Paul Fire & Marine Ins. Co.*, 240 Neb. 14, 480 N.W.2d 192 (1992). Ozenbaugh argues that under the range-of-vision rule, the court should have directed a verdict against each of the defendants. The range-of-vision rule states that it is negligence, as a matter of law, if one operates a motor vehicle on a public roadway and, because of the manner of operation, is unable to avoid colliding with an object or obstruction on the roadway within the operator's range of vision. *Prime Inc. v. Younglove Constr. Co.*, 227 Neb. 423, 418 N.W.2d 539 (1988). However, the facts regarding the issue of the manner of operation of defendants' vehicles were not conceded, undisputed, or such that only one conclusion could be drawn. It was not error for the trial court to refuse to direct a verdict in this instance.

***4** We find no prejudicial error in the submission of the above-mentioned jury instructions or in the refusal to submit to the jury the above-mentioned requested instructions.

AFFIRMED.

1992 WL 152940, 1 Neb.C.A. 790, 1992 WL 152940 (Neb.App.)

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