IN THE COURT OF APPEALS OF IOWA

No. 1-066 / 10-1402
Filed March 21, 2011

DAVID PHIPPS and LAURA PHIPPS,
Plaintiffs-Appellants/Cross-Appellees,

vs.

BOONE COUNTY and DENNIS CONSIER,
Defendants-Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Boone County, Michael J. Moon, Judge.

The plaintiffs appeal and the defendants cross appeal in a motor vehicle accident case. **AFFIRMED.**

Allison R. Abbott and W. Adam Buckley of Elverson, Vasey & Peterson, L.L.P., Des Moines, for appellants.

Mark W. Thomas and Allison J. Doherty of Grefe & Sidney, P.L.C., Des Moines, for appellees.

Considered by Vogel, P.J., and Doyle and Tabor, JJ. Mansfield, J., takes no part.

VOGEL, P.J.

This case arises from an accident on January 5, 2009, between Laura Phipps, who was driving a 2003 Honda Civic, and Dennis Consier, a Boone County employee who was operating a road maintainer. Laura and her husband David Phipps, filed suit against Boone County and Consier, seeking damages in the amount of $80.25 for towing, $611.23 for a rental vehicle, and $5098.89 for repair of the car. A trial was held to the court. On July 28, 2010, the district court entered its ruling, finding the defendants were at fault for the accident, but the Phippses failed to prove their entire claim for damages. It stated,

> It is well settled in Iowa that the measure of damages for repairs to property is the fair and reasonable cost of repair, not to exceed the value of the property immediately prior to the loss or damage. *State v. Urbanek*, 177 N.W.2d 14 (Iowa 1970). In order to recover damages, a complaining party must prove not only the reasonable costs of the repairs but also the value of the vehicle immediately prior to the accident. *Ag Partners v. Chicago Cent. & Pac. R. Co.*, 726 N.W.2d 711 (Iowa 2007). In the case, plaintiffs introduced repair estimates for the vehicle without objection. Plaintiffs failed, however, to introduce any evidence regarding the fair market value of the Honda immediately prior to the accident.

Therefore, the Phippses failed to prove the damages for repair. The Phippses did present evidence of the special items of damage, and the district court entered judgment in favor of the Phippses for the towing and rental vehicle costs totaling $691.48. The Phippses appeal and the defendants cross appeal. Our review is for correction of errors at law. Iowa R. App. P. 6.907.

The Phippses first assert the district court "erred in refusing to allow the Plaintiffs to reopen their case to present evidence regarding the value of [the] vehicle prior to the accident." The defendants respond that the Phippses did not

move to reopen the record and therefore did not preserve the issue for appeal.

During closing arguments to the court, this exchange occurred:

> THE COURT: What's your measure of damages?
> MR. BUCKLEY: $5790.
> THE COURT: That's the amount of damages. What's the measure of damages?
> MR. BUCKLEY: Measure of damages. I'm not sure what you mean.
> THE COURT: How do I measure the damages?
> MR. BUCKLEY: Oh, all the invoices. Oh, the amount that it takes to repair the vehicle?
> THE COURT: Now we're talking. What is the measure of the damages for the repair to the vehicle?
> MR. BUCKLEY: If it's not a total loss, then it's the measure of repairs.
> THE COURT: It would be the reasonable cost to repair not to exceed the value of the vehicle immediately before the accident. What's the value of the vehicle immediately before the accident? I've never heard it.
> MR. BUCKLEY: I don't know. Miss Phipps could maybe testify to that.
> THE COURT: That's my point. Go right ahead.
> MS. DOHERTY: [Gives closing argument regarding liability].
> . . . .
> THE COURT: I think the best argument was he failed to prove damages.
> MS. DOHERTY: Yeah, that argument, too. We'll make that argument, too.
> THE COURT: All right. Anything else for the good of the cause?
> MR. BUCKLEY: Just briefly with regard to damages. I don't know that there is any dispute that the value of the vehicle was more than the cost of repairs, but I see your point.
> THE COURT: I don't know what a 2003 Honda Civic is worth. I have no clue.
> MR. BUCKLEY: I understand. [Proceeds with argument on liability.]
> . . . .
> THE COURT: . . . So, I'm more concerned about the damages than anything else . . . Anything else?
> MR. THOMAS: No, Your Honor.
> MR. BUCKLEY: No, Your Honor.

Plaintiffs' counsel had several opportunities to request the record be reopened, but did not do so. In its order, the district court stated, "No motion was made to reopen the case." We find the Phipps did not make a motion to reopen the record and this argument is without merit.[1]

The Phippses next assert the district court was "well aware this matter involved a subrogation claim by an insurance company" and the district court should have assumed the insurance company paid for the repairs, demonstrating the vehicle was worth more than the repairs. They cite no *applicable* law in support of this assertion. We find this argument is without merit.

Finally, the Phippses essentially assert that because the defendants failed to raise the issue of the pre-accident value of the vehicle or make a motion for a directed verdict, the Phippses should be relieved of their burden to prove damages. In their answer, the defendants contested damages, denying the amount of repairs did not exceed the value of the vehicle immediately before the accident. The defendants respond that "[a]t no point was the district court ever notified" of this waiver argument and the Phippses have not preserved it for appeal. We agree, but also find this argument is without merit. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2006) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."); *see also Urbanek*, 177

[1] The Phippses did not request to reopen the record, yet on appeal the Phippses' attorney represents they did. The Phippses' brief states,

> When the Court questioned Plaintiffs' counsel regarding the value of Plaintiffs' vehicle prior to the accident, counsel for the Plaintiffs asked the Court to allow the Plaintiff, Laura Consier [sic], to testify to that amount. The Court refused and directed counsel for Defendants to proceed with her closing argument.

The Phippses' counsel on appeal has seriously mischaracterized the record.

N.W.2d at 18 (finding the plaintiff failed to establish the value of the property before the damage, "an essential element of proof to enable it to recover").

On cross-appeal, the defendants assert that substantial evidence does not support the finding the defendants were at fault. Both Laura Phipps and Consier testified to the details surrounding the accident, and disagreed as to how close Phipps was following behind Consier, when Consier backed up the maintainer. We have reviewed the testimony and find substantial evidence supports the district court's finding of fault. We affirm pursuant to Iowa Court Rule 21.29(1)(*a*), (*b*), (*c*), (*d*), and (*e*).

AFFIRMED.