

IN THE COURT OF APPEALS OF IOWA

No. 3-477 / 12-1769
Filed August 7, 2013

MARK PEAK,
Plaintiff-Appellant,

vs.

RACHEL ADAMS,
Defendant-Appellee.

Appeal from the Iowa District Court for Muscatine County, Mark J. Smith,
Judge.

Personal injury plaintiff appeals from the trial court's denial of his motion
for new trial. **AFFIRMED.**

Stephen T. Fieweger of Katz, Huntoon & Fieweger, P.C., Moline, Illinois,
for appellant.

Robert T. Park and Abigail C. Waeyaert of Califf & Harper, P.C., Moline,
Illinois, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

EISENHAUER, C.J.

Personal injury plaintiff Mark Peak appeals from the trial court's denial of his motion for new trial following a jury verdict. He argues the court erred in instructing the jury. We affirm.

I. Background Facts and Proceedings.

In February 2008 Mark Peak was seriously injured while helping Ellis and Rachel Adams move into their new home. Peak accompanied Ellis and Rachel to the U-Haul rental office and waited in the car while they went into the rental office together. Ellis drove the U-Haul truck during the moving process. After the U-Haul truck's final trip to the new home, the truck became stuck in the snow covering the gravel driveway. Ellis and Rachel wanted to return the truck that afternoon in order to avoid being charged a second day's rental. Peak put a piece of plywood under the rear wheels for traction. Peak, Rachel, and others pushed on the rear of the truck while Ellis drove. When Ellis accelerated, the plywood was propelled backward and it struck Peak's leg. Peak's subsequent medical expenses exceeded \$50,000.

Peak hired attorney Stephen Fieweger to represent him, and Fieweger contacted insurance companies on Peak's behalf. Republic Western Insurance Company's claims administrator wrote Fieweger and advised U-Haul was offering its policy limits of \$20,000. She enclosed a document entitled "RELEASE OF ALL CLAIMS" stating Peak releases Ellis Adams, [U-Haul, Republic Western] . . . and all . . . agents [or] principals . . . of those hereby released." On the advice of his attorney, Peak signed the release in October 2008. Republic Western's check was received and cashed.

Fieweger also asserted a claim under the Adams's automobile liability insurance policy with Country Mutual. Country Mutual denied coverage on the grounds Peak's release discharged the liability of Ellis and Rachel. In December 2008 Fieweger wrote to the Republic Western claims administrator: "Unbeknownst to us you put language in the Release of All Claims that released Ellis Adams from any and all claims." Fieweger included an amended release, but Republic Western refused to accept the amendment.

In January 2009 Peak filed a common law negligence action against Ellis and Rachel. Ellis and Rachel denied liability, raised Peak's release as an affirmative defense, and filed a motion for summary judgment. The district court granted summary judgment and dismissed the petition. The court ruled Ellis and Rachel jointly rented the truck, as alleged in Peak's petition, and Rachel was covered by the release.

Peak appealed and this court reversed, ruling questions of fact existed as to the parties' intent to release Ellis and Rachel. *See Peak v. Adams*, No. 09-1471, 2010 WL 2079692, at *4 (Iowa Ct. App. May 26, 2010). On further review, the Iowa Supreme Court reversed the trial court in part and affirmed in part and ruled the release "unambiguously discharges Peak's claims against Ellis Adams." *Peak v. Adams*, 799 N.W.2d 535, 543 (Iowa 2011) (stating Peak's failure to read the release does not avoid its effect). After noting "[a]gency is generally a question of fact, Rachel's marriage to Ellis is a factor to consider in determining if an agency relationship existed," and Rachel and Ellis "used the U-Haul truck together on their joint marital endeavor to move shared belongings from their old residence to their new home," the court concluded "there is a genuine issue of

material fact whether Ellis and Rachel were in an agency relationship within the meaning of the release.” *Id.* at 547. “[W]hether the release discharged [Rachel] as an agent or principal of Ellis” is for the trier of fact to resolve on remand. *Id.* at 548.

Peak filed a second amended petition alleging Rachel was negligent.¹ Rachel again asserted the release as a defense. She alleged “[a]t the time of the occurrence, defendant, Rachel Adams, and her husband, Ellis Adams, were co-agents, engaged in a joint enterprise with a common pecuniary motive.”

Trial commenced in June 2012. It is undisputed the U-Haul was rented for a period of twenty-four hours in order to move Rachel and her husband Ellis into their new home. Ellis signed the rental agreement as the prospective driver. Rachel paid the rental fee from the couple’s joint funds. Ellis always drove the truck, Rachel never drove the truck, and Rachel was never a passenger in the truck. Peak testified when the truck first became stuck, he, Rachel, and others unsuccessfully pushed the truck while Ellis drove. Peak explained Rachel then found and placed kitty litter under the tires in an attempt to get traction—they pushed again and failed again. Peak testified Rachel’s next effort was obtaining table salt and putting it under the tires. They pushed again without success. Peak obtained a board from the garage and put it under the tires. Peak stated

¹ The second amended petition alleged Ellis rented the moving truck, Rachel knew the board was under the truck’s wheels, and Rachel was negligent by (1) failing to prevent Ellis from operating the truck until Peak was standing away from the wheels, (2) failing to observe Peak “was in back of the truck behind its wheels before her agent Ellis Adams began accelerating the truck,” (3) failing to tell Peak to step away from the back of the truck before Ellis began accelerating, (4) failing to notify Ellis “of when Peak had cleared the back of the truck so that Ellis Adams could safely operate” the truck, and (5) failing to remove the accumulated snow from her driveway causing the truck to get stuck in the snow. We note some of the petition’s allegations support the jury’s finding an agency relationship existed between Ellis and Rachel.

Ellis returned to the driver's seat and Peak signaled for Ellis to hit the gas. Peak, Rachel, and the others again pushed from the rear of the truck. After Ellis accelerated, the board flew out and hit Peak on the leg.

At the close of evidence, both parties moved for a directed verdict on the issue of joint enterprise. Rachel argued she and her husband Ellis were involved in a joint enterprise in moving their property, they jointly rented the truck, she paid the truck rental fee out of marital funds, and they had a common purpose, pecuniary in nature, to "get this truck back to the rental agency to avoid payment of a fee." Peak argued the "operation that they were in the joint venture was moving. It wasn't the rental of the truck that ended up getting stuck." The court ruled "there is sufficient evidence to generate a jury question as to whether or not [there is] a joint enterprise or a mutual agency" and denied the motions.

During the jury instruction conference, Peak objected to Instructions No. 18 and 19 and Question No. 1. The court overruled his objections and instructed the jury:

Instruction No. 18

In these instructions I will use the term "mutual agency" to refer to a situation where two persons are engaged in a joint enterprise, meaning that they had an agreement to carry out a common purpose, that they each had the right to control what was being done to carry out their common purpose, and that they both had a common pecuniary, monetary, or financial interest in the joint enterprise.

Instruction No. 19

[Rachel] has raised the defense of the release. [Peak] signed a release of all claims that released Ellis Adams and the "agents [or] principals of those hereby released."

If [Rachel] has proven that she and Ellis Adams were in an agency relationship, [Peak] cannot recover damages.

. . . .

Question No. 1: Were Rachel Adams and Ellis Adams in a mutual agency relationship? Answer 'yes' or 'no.'"

The jury answered yes to Question No. 1, and the court entered judgment for Rachel. Peak filed a motion for a new trial, which was denied, and this appeal followed.

II. Scope of Review.

“The scope of review of a district court’s ruling on a motion for new trial depends on the grounds raised in the motion.” *Clinton Physical Therapy Serv., P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 609 (Iowa 2006). We review Peak’s claim the court gave an instruction that was not supported by the evidence for correction of errors of law. *See Smith v. Koslow*, 757 N.W.2d 677, 680 (Iowa 2008).² Error in giving an instruction will not warrant reversal unless Peak has been prejudiced by the instruction. *See Estate of Hagedorn v. Peterson*, 690 N.W.2d 84, 88 (Iowa 2004).

III. Mutual Agency Instruction.

Peak seeks a new trial based on error in giving Instruction No. 18/Question No. 1. Quoting the challenged instruction, Peak contends “there was a complete lack of evidence in the case that Rachel Adams ‘had the right to control what was being done.’” Citing to *Heick v. Bacon*, 561 N.W.2d 45, 49 (Iowa 1997), Peak asserts joint enterprise requires *both* engagement in a common enterprise *and* the mutual right to control the means of locomotion.” Peak argues there was no evidence Rachel Adams “had any right to exercise any right of control over the *operation* of this truck.” Peak asserts he was

² Our resolution of this issue makes it unnecessary for us to address Peak’s additional issue contending the court erred in denying his motion for a directed verdict.

prejudiced because this instruction placed an improper emphasis on a legal theory not supported by the evidence.

Rachel responds the authorities cited by Peak stand for the proposition “a vehicle passenger, even a spouse or a vehicle owner, is not responsible for the driver’s negligence that causes a collision where the passenger or owner does not have the right to control the vehicle.” These authorities “would be pertinent if this case involved a vehicle collision. However, the truck Ellis was driving did not collide with [Peak] or anything else,” making the cases irrelevant. Rachel also points out her answer relied on the *Heick* court’s outline of the requirements for a joint enterprise resulting in a mutual agency. See *Heick*, 561 N.W.2d at 49.

The *Heick* court explained a joint enterprise differs from a partnership by the fact “the joint enterprise is for a more limited time and purpose.” *Id.*

Those entering into a joint enterprise do so under circumstances in which all have an equal voice in directing the conduct of the enterprise. Under the law each is an agent for the others, and the act of any one within the scope of the enterprise is charged vicariously to the rest The nonbusiness application of joint enterprise has generally been confined to automobile law.

Id. Recognizing there is no exact definition for joint enterprise, the *Heick* court quoted a well-recognized definition:

“[A] joint enterprise arises out of, and must have its origin in, a contract, express or implied, in which the parties thereto agree to enter into an undertaking in the performance of which they have a common purpose and in the object or purposes of which they have a community of interest, and, further, a contract in which each of the parties has an equal right to a voice in the manner of its performance and an equal right of control over the agencies used in the performance. Thus, we note (1) a contract, (2) a common purpose, (3) a community of interest, [and] (4) equal right to a voice, accompanied by an equal right of control.”

Id. (quoting *Carboneau v. Peterson*, 95 P.2d 1043, 1054 (Wash. 1939)).

The *Heick* court discussed Iowa's joint enterprise law in the context of a driver and a passenger and concluded for a joint enterprise to exist, the passenger must have the right to control the operation of the vehicle employed to carry out the common purpose. *Heick*, 561 N.W.2d at 50. Further,

in determining whether a relationship gives the right of control there must be a common pecuniary interest by the passenger and the driver in the objective of the journey. Without the common pecuniary interest element, the mutual right of control does not exist and consequently a joint enterprise does not exist.

Id. at 50-51 (citing *Stam v. Cannon*, 176 N.W.2d 794, 798 (Iowa 1970) (ruling the driver wife and the passenger husband did not have a *common* pecuniary objective even though they were traveling to their respective jobs, coincidentally within the same quarry, because "they were not going to the same job").

The *Heick* court ruled no mutual agency existed:

We fail to see . . . how [the] evidence supports any kind of understanding between [the driver] and [the passenger] that [the passenger] had the right to have her wishes respected to the same extent as [the driver] in the *operation* of his pickup. As the owner of the pickup, [the driver] had the last word and was the only one, as between the passenger and him, who could have prevented the accident. It was his decision to drive, and it was his decision how to drive.

More importantly, this evidence generates no fact question that [the driver] and [the passenger] had a common pecuniary interest in the use of the pickup for the game run [to numerous bars]. They had no common monetary purpose to use the pickup that would give [the passenger] the right to share control with [the driver] in the operation of the pickup. Rather the evidence shows that the two were engaged in a pleasure trip. Their main purpose was to drink, play games, and generally have fun.

Heick, 561 N.W.2d at 51.

As distinguished from *Heick*, this case does not involve a mutual agency/joint enterprise issue within the factual context of a collision when Ellis

was driving and Rachel was a passenger. Also, neither Ellis nor Rachel was the owner of the vehicle. We believe a fact question³ on “right of control” is generated by the facts Rachel paid for the truck rental at the time of the rental using joint funds in order to enable their joint objective of moving their belongings into their new marital home. Further, Rachel attempted to help extricate the truck by putting cat litter and salt around the tires and then pushing while Ellis drove. The jury could consider the fact Rachel was personally involved in attempting to free the truck as it resolved Rachel’s “right of control” and potential agency under the release. The jury could also consider Rachel and Ellis’s common pecuniary interest of returning the rental truck on time to avoid late charges as relevant to whether Rachel had a “right of control” sufficient to constitute a mutual agency/joint enterprise. See *Stam*, 176 N.W.2d at 798 (stating in “determining whether a relationship gives the right of control, the later [cases] emphasize the presence or absence of a common pecuniary interest”).

The evidence at trial supports the challenged jury instruction and verdict question. The evidence generated a fact question regarding the existence of a mutual agency/joint enterprise and the jury, as fact finder, resolved the issue. Accordingly, we affirm.

AFFIRMED.

³ Peak does not contend Instruction No. 18 and Question No. 1 are inaccurate statements of the law of mutual agency. Rather, he argues the evidence presented does not support submitting the fact question to the jury.