IN THE COURT OF APPEALS OF IOWA

No. 8-094 / 07-1598
Filed April 9, 2008

BRADLEY TOMKINSON,
Plaintiff-Appellee,

vs.

KYLE TURNER,
Defendant,

AND SHARON TURNER,
Defendant-Appellant.

Appeal from the Iowa District Court for Page County, Timothy O'Grady, Judge.

A defendant appeals the district court's finding she should be liable under Iowa Code section 321.493(1)(a) (2005) for the intentional acts of the driver of the motor vehicle. **REVERSED AND REMANDED.**

Gregory G. Barntsen and Marvin O. Kieckhafer of Smith Peterson Law Firm, L.L.P., Council Bluffs, for appellant.

Richard D. Crotty, Council Bluffs, for appellee.

Kyle Turner, Clarinda, pro se.

Considered by Huitink, P.J., and Miller, J., and Beeghly, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

BEEGHLY, S.J.

I. Background Facts & Proceedings

On November 18, 2005, Bradley Tomkinson was a pedestrian when he was struck by a vehicle driven by Kyle Turner. The vehicle was owned by Kyle's mother, Sharon Turner. Tomkinson filed suit against Kyle and Sharon, claiming Kyle's negligent action caused him injury. Tomkinson's claims against Sharon were based on the vicarious liability provisions of Iowa Code section 321.493(1)(a) (2005), which provides, "in all cases where damage is done by any motor vehicle by reason of negligence of the driver, and driven with the consent of the owner, the owner of the motor vehicle shall be liable for such damage."

Sharon filed a motion for summary judgment which pointed out that Kyle had pled guilty to willful injury causing bodily injury, in violation of section 708.4(2).[1] She claimed that because Kyle had admitted his actions were willful, his conduct was intentional, and therefore not negligent. She asserted that under section 321.493(1)(a), she could only be liable for Kyle's actions if he had acted negligently.

The district court found, "a driver's intentional acts are not within the ambit of the statute." The court determined, however, that Tomkinson was not a party to the guilty plea proceedings, and did not have a full and fair opportunity to litigate the issue of Kyle's intent. The court also found there was a genuine issue of material fact concerning Kyle's intent, and denied the motion for summary judgment.

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[1] Police reports submitted with the motion for summary judgment showed Kyle and Tomkinson had been engaged in an altercation before Tomkinson was hit by the pick-up truck driven by Kyle.

The case proceeded to trial. The jury was instructed:

> In all cases where damage is done by any motor vehicle by reason of negligence of the driver and driven with the consent of the owner, the owner of the motor vehicle is liable for such damage.
>
> The owner is not liable for damages caused by the driver of the motor vehicle if the driver of the vehicle intended to run into someone with the vehicle. An intentional act is one that is done on purpose and willfully. A negligent act is merely failure to use ordinary care.
>
> It is possible that a tortfeasor, such as Kyle Turner, may commit both negligence and an intentional tort or act by the same actions or omissions.

The jury returned a verdict assessing fault seventy-five percent to Kyle and twenty-five percent to Tomkinson. The court awarded Tomkinson damages of $6587.63. The jury answered "yes" to the question, "Did Kyle Turner intentionally cause bodily injury to Bradley J. Tomkinson with his vehicle on November 18, 2005?" The court entered judgment against Kyle and Sharon.

Sharon filed a post-trial motion claiming that because the jury found Kyle had engaged in an intentional act, the court should find she was not liable under section 321.493(1)(a). Sharon asked the court to amend the judgment entry to eliminate the judgment against her. The court denied the motion, finding section 321.493(1)(a) applied in cases where vicarious liability was premised on an intentional act which carried criminal consequences. Sharon appealed.

II. Standard of Review

This case was tried at law, and our review is for the correction of errors at law. Iowa R. App. P. 6.4. We review the district court's interpretation and construction of a statute for the correction of errors at law. *Reilly v. Anderson*,

727 N.W.2d 102, 105 (Iowa 2006). Findings of fact in a law action are binding on appeal if they are supported by substantial evidence. Iowa R. App. P. 6.14(6)(*a*).

III. Timeliness of Appeal

We raise on our own motion the issue of the timeliness of the appeal. *See Doland v. Boone*, 376 N.W.2d 870, 876 (Iowa 1985) (noting "[i]t is our duty to refuse, on our own motion, to entertain an appeal" if it is untimely).

A notice of appeal must be filed within thirty days after a final order, judgment, or decree of the district court. Iowa R. App. P. 6.5(1); *State ex rel. Miller v. Santa Rosa Sales & Mktg., Inc.*, 475 N.W.2d 210, 213 (Iowa 1991). That period is extended, however, if a valid and timely motion for new trial, motion for judgment notwithstanding the verdict, or motion pursuant to Iowa Rule of Civil Procedure 1.904(2) is filed. *In re Marriage of Okland*, 699 N.W.2d 260, 263 (Iowa 2005). An improperly filed post-trial motion does not extend the time for filing a notice of appeal. *Boughton v. McAllister*, 576 N.W.2d 94, 96 (Iowa 1998).

After the court entered judgment on the jury's verdict, Sharon filed a motion with the caption "Motion to Reconsider and Amend Judgment Rule 1.904(2)." Generally, a motion pursuant to 1.904(2) lies only when addressed to a ruling made upon a trial without a jury. *Federal Am. Int'l, Inc. v. Om Namah Shiva, Inc.*, 657 N.W.2d 481, 483 (Iowa 2003). This is because ordinarily rule 1.904(2) applies only when rule 1.904(1) applies. *Id.* Thus, a rule 1.904(2) motion would not have been the proper motion to file in this case.

We consider a motion by its contents, however, not its caption. *Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2002). "[A] party may use any means to

request the court to make a ruling on an issue." *Id.* Sharon's post-trial motion claimed the judgment entered by the district court did not reflect the jury's verdict. Sharon asserted that because the jury made a factual finding that Kyle intentionally caused bodily injury to Tomkinson, the court should not have entered judgment against her.

The judgment entered by the district court should reflect the jury's intent. *See Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 614 (Iowa 2006) (noting verdicts are to be liberally construed to give effect to the intention of the jury). We determine Sharon properly raised in a post-trial motion her claim that the judgment was inconsistent with the intent of the jury. Although the motion may have improperly made reference to rule 1.904(2), we determine the motion extended the time for filing an appeal.[2] We determine Sharon's appeal was not untimely.

IV. Merits

Sharon contends the district court erred by finding the vicarious liability provisions of section 321.493(1)(a) applied when the driver of a motor vehicle committed an intentional tort. She asserts the statute applies only when the driver was negligent, and points to the statutory language, "in all cases where damage is done by any motor vehicle by reason of *negligence* of the driver . . . ." *See* Iowa Code § 321.493(1)(a) (emphasis added).

This presents an issue of statutory interpretation. Because section 321.493 creates a statutory cause of action, it should be strictly construed. *Van*

[2] We make no findings as to whether the motion should have been designated a motion for judgment notwithstanding the verdict or motion for new trial.

Zwol v. Branon, 440 N.W.2d 589, 591 (Iowa 1989). "In construing statutes, our goal is to determine and give effect to the legislature's intention." *Mewes v. State Farm Auto. Ins. Co., Inc.*, 530 N.W.2d 718, 722 (Iowa 1995). We look to what the legislature said, not what it might or should have said. *Wesley Retirement Servs., Inc. v. Hansen Lind Meyer, Inc.*, 594 N.W.2d 22, 25 (Iowa 1999). When the language of a statute is clear, we do not search for meaning beyond the express terms of the statute. *State v. Kamber*, 737 N.W.2d 297, 299 (Iowa 2007).

The term "negligence" is not defined in chapter 321. The ordinary meaning of the term "negligence" is:

> The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregardful of others' rights.

Black's Law Dictionary 1056 (7th ed. 1999); *see also John Rooff & Sons, Inc. v. Winterbottom*, 249 Iowa 122, 128, 86 N.W.2d 131, 135 (1957) ("Perhaps the most common definition of negligence is failure to exercise the care of an ordinary prudent person under the circumstances.").

The Iowa Supreme Court has previously stated the purpose of section 321.493 is "to protect an innocent third party from the careless operation of a motor vehicle and to make the owner responsible for the negligence of one to whom the owner entrusted its operation." *Wells v. Enterprise Rent-A-Car Midwest*, 690 N.W.2d 33, 37 (Iowa 2004) (citation omitted). The supreme court has also stated that one of the purposes of section 321.493 "is to make vehicle

owners responsible for the actions of others to whom they have entrusted their motor vehicles." *Veasley v. CRST Int'l, Inc.*, 553 N.W.2d 896, 899 (Iowa 1996).

In finding section 321.491(1)(a) applied when the driver of a motor vehicle was engaged in intentional, and not merely negligent, conduct, the district court relied upon *Dettmann v. Kruckenberg*, 613 N.W.2d 238 (Iowa 2000). In that case, the driver of a motor vehicle stole beer and drank some of it before getting into an accident. *Dettmann*, 613 N.W.2d at 241. The driver was convicted of vehicular homicide. *Id.* The jury instruction on vehicular homicide specifically required a finding that the defendant's acts unintentionally caused the death of Dettmann. *Id.* at 242 n.1. Therefore, unlike the present case, there was no finding that the plaintiff's damages were the result of the driver's intentional acts. We conclude *Dettmann* is not dispositive on the issue before us.

The Michigan Court of Appeals has addressed this issue in *Berry v. Kipf*, 407 N.W.2d 648, 649 (Mich. Ct. App. 1987). There, the driver of a motor vehicle intentionally rammed the plaintiff's automobile. *Berry*, 407 N.W.2d at 648. The plaintiff filed an action against the owner of the motor vehicle under a Michigan statute which provided in relevant part:

> The owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation of such motor vehicle whether such negligence consists of a violation of the provisions of the statutes of the state or in the failure to observe such ordinary care in such operation as the rules of the common law requires. The owner shall not be liable, however, unless said motor vehicle is being driven with his or her express or implied consent or knowledge.

Id. at 649 (quoting Mich. Comp. Laws § 257.401 (1985)). The court found the plain language of the statute meant the statute applied only in instances where

the driven had engaged in "negligent operation." *Id.* The court concluded, "We must presume that the Legislature is aware of the distinction between negligence and intentional torts and that it chose not to create ownership liability for injuries arising out of the intentional acts of a nonowner." *Id.*

Also, in *Beddingfield v. LaBarbera*, 714 N.Y.S.2d 312, 313 (N.Y. App. Div. 2000), the driver "intentionally drove onto the sidewalk where the plaintiffs stood." The New York Supreme Court, Appellate Division, determined that under the New York statute an owner of a vehicle was vicariously liable "only for the negligence of a permissive operator or user of the vehicle." *Beddingfield*, 714 N.Y.S.2d at 313. The court concluded the owner of the vehicle could not be vicariously liable for an intentional act. *Id.*

Section 321.493(1)(a) provides for the liability of the owner of a motor vehicle "in all cases where damage is done by any motor vehicle by reason of *negligence* of the driver, and driven with the consent of the owner . . . ." (Emphasis added.) Section 321.493 creates a statutory cause of action, and it should be strictly construed. *Van Zwol*, 440 N.W.2d at 591. We conclude the legislature intended to create vicarious liability for the owner of a motor vehicle, driven with the owner's consent, only when the driver engaged in negligent acts, and not when the driver has intentionally harmed another.

The jury specifically found Kyle intentionally caused bodily injury to Tomkinson with his vehicle. The parties do not challenge this finding on appeal. We conclude that under the facts of this case, the owner of the motor vehicle,

Sharon, is not liable under section 321.493(1)(a). We reverse the decision of the district court and remand for a new judgment entry.

Because we have found section 321.493(1)(a) does not apply under the facts of this case, we do not address an alternative argument concerning the application of that statute.

REVERSED AND REMANDED.

Huitink, P.J concurs; Miller J., dissents.

MILLER, J. (dissenting)

I believe that those portions of the record presented on appeal demonstrate we do not have subject matter jurisdiction to entertain the merits of this appeal and therefore respectfully dissent.

The majority correctly cites certain cases and rules concerning the timeliness of appeals, as well as a case holding that we consider a motion by its contents rather than its caption. Certain related holdings apply as well. Subject to certain exceptions having no application in this case, appeals to our supreme court must be taken within, and not after, thirty days from the entry of the order, judgment, or decree, unless a motion for new trial, for judgment notwithstanding the verdict, or a motion as provided in Iowa Rule of Civil Procedure 1.904(2) is filed, and then within thirty days after entry of the ruling on the motion. Iowa R. App. P. 6.5(1). The requirements of rule 6.5(1) are mandatory and jurisdictional, and failure to comply with the rule requires dismissal of the appeal. *See Hayes v. Kerns*, 387 N.W.2d 302, 305 (Iowa 1986) (discussing the predecessor of current 6.5(1)).

> Rule 6.5 articulates the only types of posttrial motions which are deemed to extend the time for filing a notice of appeal: motion for a new trial, motion for judgment notwithstanding the verdict, and motion to enlarge the district court's findings of fact and conclusions of law pursuant to Iowa Rule of Civil Procedure 1.904(2).

Federal Am. Int'l, Inc. v. Om Namah Shiva, Inc., 657 N.W.2d 481, 483 (Iowa 2003). As noted by the majority, an improper posttrial motion does not toll the time for appeal. *See Boughton v. McAllister*, 576 N.W.2d 94, 96-97 (Iowa 1998). In addition, "[a]n untimely posttrial motion is defective and does not toll the

running of the thirty-day period within which an appeal must be taken." *Lutz v. Iowa Swine Exports Corp.*, 300 N.W.2d 109, 110 (Iowa 1981).

The dates of certain events are important to the question of our subject matter jurisdiction in this case. Following a trial to a jury, the verdict was filed on June 13, 2007. The court's judgment on that verdict was filed on July 18, 2007. On July 27, 2007 the defendant Sharon Turner served her posttrial motion. The district court filed its order denying the motion on August 23, 2007. Sharon served her notice of appeal on September 17, 2007, and it was filed on September 18.

The posttrial motion in this case does not address a ruling made upon trial of an issue of fact without a jury. The majority therefore is correct that Sharon's posttrial motion was not a proper Iowa Rule of Civil Procedure 1.904(2) motion.[3] We are left with the question of whether Sharon's motion may be a proper and timely motion for a new trial, or a proper and timely motion for judgment notwithstanding the verdict.

"A new trial is the reexamination in the same court *of any issue of fact or part thereof*, after a verdict, or master's report, or a decision of the court." Iowa R. Civ. P. 1.1002 (emphasis added). Sharon's posttrial motion raised no issue concerning any factual determination made by the jury, and it did not either expressly or by reasonable implication request a new trial. Instead, the motion raised only a legal question of what judgment was appropriate given the jury's

[3] I believe that even if the motion did address such a ruling, for reasons discussed hereafter the motion was untimely and thus did not toll the time for appeal.

factual determinations. It does not seem that Sharon's posttrial motion may reasonably be seen as a proper motion for a new trial.

Our rules concerning judgment notwithstanding the verdict provide as follows:

> **Rule 1.1003. Judgment notwithstanding the verdict.** On motion, any party may have judgment in that party's favor despite an adverse verdict, or the jury's failure to return any verdict under any of the following circumstances:
>
> **1.1003(1)** If the pleadings of the adverse party fail to allege some material fact necessary to constitute a complete claim or defense and the motion clearly specifies such failure.
>
> **1.1003(2)** If the movant was entitled to a directed verdict at the close of all the evidence, and moved therefor, and the jury did not return such verdict, the court may then either grant a new trial or enter judgment as though it had directed a verdict for the movant.

Iowa R. Civ. P. 1.1003.

"A motion for judgment notwithstanding the verdict must stand or fall on the grounds raised in the movant's motion for directed verdict." *Lamb v. Manitowoc Co., Inc.*, 570 N.W.2d 65, 67 (Iowa 1997). The purpose of rule 1.1003(2) is to afford the trial court an opportunity to correct its error in failing to sustain a motion for directed verdict where the movant was entitled to a directed verdict at the close of all evidence. *See Bangs v. Maple Hills, Ltd.*, 585 N.W.2d 262, 268 (Iowa 1998) (discussing the substantively indistinguishable predecessor of current rule 1.1003(2)).

> In reviewing denial of a motion for judgment notwithstanding the verdict, we consider whether the evidence, when viewed in the light most favorable to the non-moving party, shows that the movant was entitled to a directed verdict at the close of all the evidence.

Lamb, 570 N.W.2d at 67-68.

From the contents of rule 1.1003 and the quoted and paraphrased holdings and language of the above-cited cases it readily appears that a motion for a judgment notwithstanding the verdict can succeed only if (1) as described in rule 1.1003(1) the pleadings of the adverse party are deficient and the motion clearly specifies the deficiency, or (2) under rule 1.1003(2), (a) a motion for directed verdict was made, and (b) the motion should have been sustained, was not sustained, and the jury returned an adverse verdict. Nothing in Sharon's posttrial motion specifies or suggests a pleading deficiency such as described in rule 1.1003(1). Further, and more importantly, nothing in the posttrial motion, and nothing in those other portions of the record presented on appeal, suggests that Sharon made a motion for a directed verdict. It therefore does not appear that Sharon's posttrial motion may reasonably be seen as a proper motion for judgment notwithstanding the verdict.

I would conclude that those portions of the record presented on appeal demonstrate that Sharon's posttrial motion is not a proper motion for a new trial, motion for judgment notwithstanding the verdict, or motion as provided in rule 1.904(2). If it is not, then because the notice of appeal was not served until some sixty-one days after the district court entered judgment the appeal was untimely and we are without subject matter jurisdiction and must dismiss this appeal. *See Hayes*, 398 N.W.2d at 305.

The record also suggests that for a second and separate reason the appeal was untimely and we are without subject matter jurisdiction. A motion as provided in rule 1.904(2), as well as a motion for a new trial and a motion for

judgment notwithstanding the verdict, must be filed within ten days after filing of the verdict, report, or decision with the clerk, unless the court grants additional time. Iowa Rs. Civ. P. 1.1007 and 1.904(2). The timeliness of such motions is to be judged by the date the jury renders its verdict or the date the master makes his report or the date the trial court files its findings of fact and conclusions of law. *See Qualley v. Chrysler Credit Corp.*, 261 N.W.2d 466, 467-71 (Iowa 1978) (discussing and applying the predecessors of present rules 1.1007 and 1.904(2)).

As previously noted, absent a proper and timely posttrial motion an appeal must be taken within thirty days from the entry of judgment. Iowa R. App. P. 6.5(1), and an untimely posttrial motion does not toll the running of the thirty-day period within which an appeal must be taken, *Lutz*, 300 N.W.2d at 110. Here, Sharon's posttrial motion was not served until July 27, 2007, some forty-four days after the verdict was filed. It thus appears that even if the motion was a proper posttrial motion it was untimely and did not extend the time for taking an appeal beyond thirty days from the district court's July 18, 2007 entry of judgment. For this additional reason I would conclude that those portions of the record presented on appeal demonstrate that we are without subject matter jurisdiction to entertain this appeal, taken some sixty-one days after entry of judgment.

From the foregoing it appears that the merits of the issue raised by this appeal are not properly before us, both because Sharon's posttrial motion was not a proper posttrial motion and because even if it were a proper posttrial motion it was untimely, in either event rendering her appeal untimely and leaving us

without subject matter jurisdiction of the appeal and requiring its dismissal. However, the parties have not addressed the question of our subject matter jurisdiction. Rather than dismissing the appeal I would order the parties to brief that question, with any supplementation of the appendix that might be necessary and appropriate, and then have that question submitted with the appeal.

In summary, I believe that those portions of the record as presented on appeal demonstrate we do not have subject matter jurisdiction of this appeal. However, in an abundance of caution I would order the parties to address that question and have it submitted with the appeal, rather than presently deciding that we do have subject matter jurisdiction, a decision that I believe is not supported by those portions of the record presented on appeal. I therefore respectfully dissent.