IN THE COURT OF APPEALS OF IOWA

FILED
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JAMES CHILDERS AND PATRICIA CHILDERS,

Plaintiff-Appellants,

vs.

RON McGEE AND MARY LOU McGEE,

Defendant-Appellees.

0-415
2-64807

Appeal from Black Hawk District Court - L. John Degnan, Judge.

Appeal in a personal injury damage action growing out of a fall sustained by plaintiff on defendants' premises. AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

C. A. Frerichs, Waterloo, Iowa, for plaintiff-appellants.

Stephen J. Powell of Swisher & Cohrt, Waterloo, Iowa, for defendant-appellees.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

This is an appeal in a personal injury damage action growing out of a fall sustained by plaintiff James Childers, on defendants' premises. Plaintiff Patricia Childers' claim is for loss of consortium occasioned by James' injury. The jury returned a verdict for defendants on the claims of both plaintiffs.

I. The issues on appeal all involve the trial court's jury instructions on the defense of contributory negligence. These instructions relate entirely to alleged acts or omissions of James. As such, they do not affect Patricia's claim and cannot serve as a basis of reversal as to her.[1] We therefore affirm the judgment as to Patricia.

II. As to James' claim, it is asserted on appeal that the trial court erred: (1) in submitting the issue of contributory negligence in any form, (2) in submitting two general specifications of negligence, and (3) in failing to define "improper lookout" as that term was used in the instructions on contributory negligence. We summarily reject the claims asserted as to grounds (1) and (3) above.

Given the conflicting evidence as to how James' fall occurred, a jury issue as to his contributory negligence was presented. Iowa R. App. P. 14(f)(10). Based on the evidence presented, the allegation of improper lookout was a proper specification of negligence to be submitted to the jury. The trial court's instruction on the duty of lookout sufficiently defined the concept involved to withstand plaintiff's claim of error.

In addition to the issue of maintaining a proper lookout, the trial court's instruction no. 15 submitted for the jury's consideration the following additional specifications of negligence on James' part:

> b. In failing to use ordinary care for the safety of his person when traversing stairs while carrying a heavy object.
>
> c. In failing to exercise ordinary care for the safety of his person when traversing the stairs after he had been warned of the surface of the carpet covering said stairs.

James contends these are improper general assignments of negligence. We believe that specification c above sufficiently conveys the notion of failure to heed a warning (a viable issue in the case). But we can find no basis to sustain the giving of

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[1] The trial court's instructions presaged the result in Fuller v. Buhrow, 292 N.W.2d 672 (Iowa 1980), and did not present James' negligence as a bar to Patricia's claim. More difficulty is presented in determining whether the jury's verdict on Patricia's claim renders any error with respect to James' negligence harmless. This would be true only if the verdict were based on a finding that the defendants were not negligent. We conclude from the record that it might have been based on a finding of no damage.

specification b. James made timely objection to the giving of this instruction on the ground that it is a general allegation of negligence.

The giving of instructions relating to general charges of negligence has been determined to be improper in the following cases: Teeling v. Heles, 195 N.W.2d 704, 708 (Iowa 1972) (instruction that defendant asserted that plaintiff was negligent by "not expressing due care for his own safety while working at night in the street"); Hartwig v. Olson, 261 Iowa 1265, 1275, 158 N.W.2d 81, 87 (1968) (instruction on plaintiff's claim that defendant "failed to exercise due care to avoid collision"); Sparks v. Long, 234 Iowa 21, 28, 11 N.W.2d 716, 720 (1943) (instruction that defendant "failed to exercise due care to avoid colliding with plaintiff"). We fail to discern how instruction 15b in this case can be distinguished from the instruction determined to be improper in Teeling, Hartwig, and Sparks. In addition, we conclude from the record that specification b in instruction 15 lacks evidentiary support.

For the reasons stated, the trial court erred in including specification b in instruction no. 15. This requires a new trial as to James' claim. The costs of appeal are taxed to appellees.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

All judges concur except Oxberger, C.J., who dissents in part.

OXBERGER, C.J. (concurring specially)

I concur in the reversal but would hold the instruction in 15c to be error as an improper general change of negligence. The warning factor is not sufficient to permit the overbroad nature of the standard given in the instruction.