FILED
MAR 29 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RECAROLYN INGERTSON, Appellant,	)	Filed March 29, 1978
v.	)	
JACK LELAND CARNES, Appellee.	)	409 2-60240

Appeal from Polk District Court - Harry Perkins, Jr., Judge.

Plaintiff appeals judgment entered on a jury verdict in favor of defendant, assigning as error trial court's refusal to admit a police officer's opinion as to the point of impact and the overruling of her exceptions to several instructions. Reversed.

William F. Fanter, of Bradshaw, Fowler, Proctor & Fairgrave, Des Moines, for appellant.

Henry A. Harmon, of Grefe & Sidney, Des Moines, for appellee.

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

PER CURIAM

Plaintiff, Recarolyn Ingertson, appeals from a judgment entered on a jury verdict in favor of defendant, Jack Leland Carnes, and the ensuing denial of her motion for a new trial.

The accident out of which this action arose occurred at approximately 12:20 A.M. on August 8, 1973, on S.W. 9th north of Wade in Des Moines. Defendant's car struck plaintiff as she was crossing the street from the east. The night was dark and windy and it was raining heavily. Plaintiff was returning across the street after retrieving the body of her pet Chihuahua from the east parking, the dog having been killed by a vehicle earlier that evening.

On appeal, plaintiff assigns as error trial court's refusal to admit a police officer's opinion testimony as to the point of impact and the overruling of her exceptions to several instructions. We consider the latter assignment first.

I. Plaintiff objected to instructions 13, 14, 16 and 17. We find that plaintiff's exceptions are minimally sufficient and that trial court erred in several respects. Plaintiff first asserts that instruction 13, commencing with paragraph 3, is defective. Numerous grounds were woven into the objection, including: the instruction is in part inappropriate because it describes duties normally associated with "slip and fall" cases; it places on plaintiff a general and undefined duty to exercise ordinary care under the circumstances for her own safety; it is ambiguous, permitting the jury to speculate as to plaintiff's responsibilities under the circumstances; it is confusing. We agree that the portion of the instruction pertaining to due care was not sufficiently specific; it failed to define plaintiff's duty for the jury. It left the question of what was due care to speculation and conjecture. See Teeling v. Heles, 195 N.W.2d 704, 708 (Iowa 1972). Moreover, it was not sufficient to constitute a specification of negligence. Teeling v. Heles, supra; Sparks v. Long, 234 Iowa 21, 28, 11 N.W.2d 716 (1943). Use of the once familiar "slip and fall" stock instruction language, i.e., "to see and observe open and obvious conditions," was inappropriate. Cf. Hanson v. Town and Country Etc. Center, 259 Iowa 542, 549, 144 N.W.2d 870 (1966). We perceive, as the purpose of instruction 13, an intention to inform the jury of defendant's affirmative defense, the particulars of that defense, and the burden of proof of such defense. Uniform Jury Instruction number 2.2B is an appropriate pattern for this purpose.

Next, plaintiff excepted to instruction 14, complaining that it was confusing and that it would result in jury speculation as to its application when coupled with instructions 13 and 15. The duties embodied in the instruction are not alleged by defendant as a specification of plaintiff's contributory negligence. This instruction is merely an abstract statement of law and as urged by plaintiff, begs conjecture by the jury. In addition, instruction 14 contains elements of pedestrian duties of both lookout (placed before the jury by instruction 15) and to yield the right of way, when not in a crosswalk, to vehicles (covered in instruction 18).

Instruction 16 informs the jury it was plaintiff's duty to be "watchful of her bodily movements," stated that this requires close observations and reasonable precautions prior to movement and that, in this connection, she must exercise reasonable care for her own safety. As plaintiff insists, this is essentially a repetition, though in different language, of plaintiff's duty of lookout, already defined in instruction 15.

Plaintiff attacks instruction 17 because it results in undue emphasis on her duty of lookout and repeats the language which requires plaintiff to exercise reasonable care for her own safety. The objection is well taken.

The instructions in question, when viewed in their entirety, unduly and prejudicially emphasize plaintiff's duties. Jury instructions should not give undue emphasis to any phase of the case. Rosenau v. City of Estherville, 199 N.W.2d 125, 133 (Iowa 1972). This constituted error, requiring reversal and remand for a new trial.

Finally, we note that on appeal plaintiff does not dispute that she had a duty, as a pedestrian, to keep a lookout. On retrial the court should consider including the factors recognized in Ackerman v. James, 200 N.W.2d 818, 825 (Iowa 1972) (quoting 4 Blashfield Automobile Law and Practice, (Third Ed.), section 142.51) within the pedestrian lookout instruction. Nor does she question that she was required to yield the right of way to all vehicles upon the roadway. Section 321.328, The Code; see, e.g., Uniform Jury Instruction number 4.28.

II. Because our holding in division I requires a new trial of this action, we should decide the other matter assigned as error. Plaintiff sought to establish the point of impact between defendant's car and plaintiff by the use of an expert, Officer Kenneth Moon. Officer Moon was the accident investigator who was called to the scene shortly

after the collision occurred. Trial court, while it acknowledged Moon's qualifications to testify as to the general subject, refused to allow him to relate his opinion as to the point of impact. The court determined that the facts which Moon had available to work with were not sufficient to form an opinion. Specifically, the trial judge pointed out that there was no showing of how defendant's car came to be in the position it was in when Moon took his measurements of the scene. Trial court also noted that the location of plaintiff's body after the accident was not sufficiently established.

It is well settled that the courts of this state are vested with broad discretion in determining whether to admit expert testimony. See, e.g., Ganrud v. Smith, 206 N.W.2d 311, 314 (Iowa 1973). For an expert to testify, a sufficient factual foundation must be established. Lessenhop v. Norton, 261 Iowa 44, 55, 153 N.W.2d 107 (1967). Trial court's explanation of the infirmity in the foundation for Moon's testimony was precise and compelling. Rejection of the proffered testimony was an exercise of trial court's sound discretion.

REVERSED.