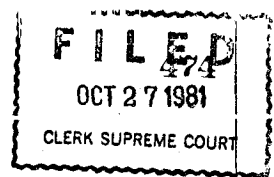


IN THE COURT OF APPEALS OF IOWA



SHIRLEY LEED and NORMAN LEED,)

Plaintiffs-Appellants,)

Filed October 27, 1981

vs.)

**THE UNITED METHODIST CHURCH OF)
HANCOCK, IOWA, and GENE OLSEN,**)

1-167
2-65888

Defendants-Appellees.

Appeal from Pottawattamie District Court - Leo Connolly, Judge.

Plaintiffs, Shirley and Norman Leed, seek to recover damages for injuries suffered by Shirley Leed when she fell down an interior set of stairs in a church building. Defendants are the church and a contractor who installed a metal strip upon which plaintiff allegedly tripped. **AFFIRMED.**

Scott H. Peters and Dennis Gray of Peters Law Firm, Council Bluffs, for plaintiffs-appellants.

Phillip Willson of Smith, Peterson, Beckman & Willson, Council Bluffs, for defendant-appellee Methodist Church.

James M. Richardson of Barron & Richardson, Audubon, for defendant-appellee Gene Olsen.

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

PER CURIAM

Plaintiffs, Shirley and Norman Leed, brought this negligence action seeking to recover damages for injuries suffered by Shirley when she fell down an interior set of stairs in a church building. The defendants are the church and a contractor who had installed a metal strip upon which plaintiff allegedly tripped.

Trial commenced on September 16, 1980. A verdict was subsequently returned by the jury in favor of the defendants, and a judgment on that verdict was entered on September 25, 1980. Plaintiffs then instituted this appeal alleging that the trial court erred by: (1) giving jury instructions that did not correctly inform the jury of Iowa law applicable to this case; (2) sustaining defendants' hearsay objection to the testimony of Reverend Cuddeback as to the spontaneous utterances of unidentified bystanders at the scene of plaintiff's fall; and (3) failing to strike and substitute, or allow voir dire of, an impaneled juror whose working relationship with a surprise defense witness was not discovered until after the jury was impaneled.

Our scope of review in this matter is limited to correction of errors at law. Iowa R. App. P. 4. We affirm.

I.

Plaintiffs allege three errors in the trial court's instructions to the jury. First, that in instruction No. 21, where the trial court instructed that the landowner may not have a duty to protect or warn where the danger is obvious, the trial court erred by failing to instruct that under certain circumstances the landowner may have a duty to protect or warn even where the danger is obvious. Second, that the trial court erred by giving instruction No. 10 which stated both parties could assume the other would obey the law when no violation of any statute or ordinance was pleaded or proved by either party. Third, that in a trip and fall case, it was improper to give a separate instruction regarding plaintiff's duty to keep a proper look-out.

Our review is guided by well-recognized principles. A trial court may choose its own language in drafting instructions and is not bound to use wording preferred by counsel so long as the instructions cover all legal principles involved. Turner v. Jones, 215 N.W.2d 289, 292 (Iowa 1974); Osterfoss v. Illinois Central Railroad, 215 N.W.2d 233, 235 (Iowa 1974). Instructions are to be read and considered as a whole, not piecemeal or in artificial isolation. Greninger v. City of Des Moines, 264 N.W.2d 615, 617 (Iowa 1978); Wiedenfeld v. Chicago & N.W. Transp. Co., 252 N.W.2d 691, 698 (Iowa 1977); Dickman v.

Truck Transport, Inc., 224 N.W.2d 455, 464 (Iowa 1974).

We are convinced that when the instructions are considered as a whole, they do cover all the legal principles involved and correctly apply Iowa law in a manner not prejudicial to the plaintiffs. The instructions were no more repetitious than required to give the jury a clear presentation of the issues. Eickeberg v. Deere & Co., 276 N.W.2d 442, 447 (Iowa 1979); Hoyt v. Chicago, R.I. & P.R. Co., 206 N.W.2d 115, 120 (Iowa 1973).

II.

Plaintiffs allege the testimony of Reverend Cuddeback should have been admitted under the res gestae exception to the hearsay rule. Admission of evidence as part of the res gestae is largely a matter of trial court discretion. In re Willeesen's Estate, 251 Iowa 1363, 1374, 105 N.W.2d 640, 647 (Iowa 1960). We find no abuse of that discretion in this case.

III.

Plaintiff's final allegation, that the trial court erred by failing to strike and substitute, or allow voir dire of, an impaneled juror whose working relationship with a surprise defense witness was not discovered until after the jury was impaneled, is also without merit. Plaintiffs were informed before voir dire that witness Koch worked with the Oakland Fire Department's ambulance service and that juror Cooper also worked with the Oakland Fire Department. Prior to swearing in the jury, plaintiffs had opportunity to voir dire the entire jury panel. All challenges, both those known and those which could have been ascertained by questioning, are waived if no challenge is made prior to when the jury is sworn. Turner v. Jones, 215 N.W.2d 289, 291 (Iowa 1974); State v. Cuevas, 288 N.W.2d 525, 534 (Iowa 1980). We find plaintiffs waived their objection by not challenging juror Cooper about his status with the fire department before the jury was sworn.

AFFIRMED.