FILED
NOV 19 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

156

ALAN JAY DOLE,

Plaintiff-Appellant,

vs.

DENNIS PAUL McFARLANE,

Defendant-Appellee,

and

MARK WILSON,

Plaintiff-Appellant,

vs.

DENNIS PAUL McFARLANE,

Defendant-Appellee.

Filed November 19, 1979

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2-61514

Appeal from Black Hawk District Court - William G. Klotzbach, Judge.

Plaintiffs appeal from a judgment entered against them following an adverse jury verdict in consolidated actions seeking damages for personal injury. REVERSED.

Jim R. Sween of the Sween Law Office, Eldora, for appellant Dole.

Dennis F. Chalupa of Brierly, McCall, Girdner & Chalupa, Newton, for appellant Wilson.

Eldon R. McCann and Stephen J. Powell of Swisher & Cohrt, Waterloo, for appellee McFarlane.

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

PER CURIAM

Plaintiffs appeal from a judgment entered against them following an adverse jury verdict in consolidated actions seeking damages for personal injury. The principal issues on appeal relate to the trial court's instructions setting forth the respective duties of the plaintiffs and defendant. We consider only those assignments of error which we deem to be significant. Our discussion does not follow the order in which the issues are argued by the parties.

The injuries upon which plaintiffs' claims are based occurred while they were standing off the traveled portion of the roadway assisting a friend in extricating his automobile from the ditch. While they were so engaged, an automobile operated by the defendant, slid off the roadway and struck them.

I. Plaintiffs assert as a ground for reversal and new trial that the trial court's instructions 21 and 24 incorporate an improper charge of general negligence. They urge these instructions permitted the jury to find them guilty of contributory negligence for simply standing in the ditch at a place well off the roadway with knowledge that traffic was moving along the highway. The instructions were objected to on these grounds in the trial court. Our reading of these instructions in light of the record evidence leads to the conclusion that this assertion of trial court error is well founded and requires the granting of a new trial.

The trial court instructed the jury in instruction 21:

> Defendant asserts that Plaintiff Alan Jay Dole and Plaintiff Mark Wilson were each negligent in the following particulars:
>
> . . .
>
> 3.. Placing themselves unreasonably in a position of danger.

Instruction 24 told the jury:

> Defendant contends that the Plaintiffs, Alan Jay Dole and Mark Wilson, were contributorily negligent in placing their persons in a dangerous position along the roadway.
>
> Under the law of Iowa, Plaintiffs were each required to exercise ordinary care for their own safety and if you find that either of the Plaintiffs placed himself in a dangerous position, and if you find that in the exercise of ordinary care such Plaintiff knew or should have known such position was dangerous, and that an ordinary, reasonably prudent person under the same or similar circumstances would not have assumed such position of danger, then such act would constitute negligence.

In determining whether this instruction presents a proper issue of contributory negligence for the jury's consideration, we are forced to ask: (1) in what manner is it claimed that plaintiffs placed themselves in a position of danger? and (2) to what point in time, with respect to plaintiffs' alleged knowledge of the danger, does the charge relate? We conclude the instructions are too general to convey to the jury the answer to either of these questions. As a result, the jury was free to find plaintiffs negligent for maintaining a position in the ditch without regard to their knowledge: (a) that a vehicle had lost control and was sliding off the highway; or (b) that because of road conditions, vehicular traffic was likely to slide off the highway.

While the cases are dissimilar in other respects, the issue in the present case is somewhat like that presented in Hendricks v. Broderick, ___ N.W.2d ___, ___ (filed October 17, 1979) wherein an instruction was held to be defective for permitting a finding of contributory negligence on too broad a basis. See also Teeling v. Heles, 195 N.W.2d 704, 708 (Iowa 1972); Hartwig v. Olson, 261 Iowa 1265, 1275, 158 N.W.2d 81, 87 (1968); Sparks v. Long, 234 Iowa 21, 28, 11 N.W.2d 716, 720 (1943).

Manley v. O'Brien County Rural Electric Cooperative, 267 N.W.2d 39 (Iowa 1978), relied upon by defendant, is not in point on the issue presented. The instruction in that case specifically related the charge of assuming a dangerous position to a location in dangerous proximity to a high voltage power line. For the reasons stated, the giving of instructions 21 and 24 necessitate the granting of a new trial.

II. Because a new trial is required, we consider certain other claims of the parties. Plaintiffs claim the trial court erred in instructing the jury that plaintiffs had a duty to take due care for their own safety by setting out flares or other warning devices.

While we are not at all certain that plaintiffs' objection at trial was sufficient to preserve the issue they now argue on appeal, we conclude that this instruction was improper. Plaintiffs were off the traveled portion of the roadway, assisting another motorist in extricating his car from the ditch when the accident occurred. Under such circumstances, we cannot conclude that the setting out of flares or other warning devices was required prior to the re-entry of the plaintiffs or the disabled vehicle onto the traveled portion of the roadway.

III. We consider and find without merit plaintiffs' contention that the trial court should have instructed the jury that because of limited visibility, defendant was required to stop his automobile on the roadway. Equally unavailing is plaintiffs' contention that the jury should have been instructed on defendant's failure to stop within the assured clear distance ahead.

IV. Finally, we consider and reject plaintiff Dole's contention that a separate instruction should have been given on defendant's duty to remain on the traveled portion of the roadway. On the facts presented, this was adequately covered by the trial court's instruction on defendant's duty to keep his vehicle under control.

For the reasons indicated, the case is

REVERSED.