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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA 130

ELIZABETH F. SCHNEE,

Plaintiff-Appellant,

vs.

CHARLES F. BUTLER,

Defendant-Appellee.

Filed August 25, 1981

1-113
2-65049

Appeal from Linn District Court - Clinton E. Shaeffer, Judge.

Plaintiff appeals from judgment on jury verdict for defendant in personal injury action arising from intersection collision. AFFIRMED.

Francis J. Pruss and Mitchell E. Turner, Cedar Rapids, Iowa, for plaintiff-appellant.

Gary D. Ordway of Patterson, Lorentzen, Duffield, Timmons, Irish & Becker, Des Moines, Iowa, for defendant-appellee.

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

Plaintiff appeals from the judgment on a jury verdict for the defendant in this personal injury action arising from an intersection collision. She assigns two errors on appeal for purposes of seeking reversal of the judgment below: (1) that the trial court erred in permitting an expert witness to testify over objection as to the color of the traffic lights at or about the time of the collision; and (2) that the jury should have been peremptorily instructed that defendant was negligent as a matter of law for failing to maintain a proper lookout. We reject both contentions and affirm the trial court.

On September 11, 1976, a car in which plaintiff was riding as a passenger was involved in a collision with a car driven by the defendant at an intersection controlled by synchronized traffic lights. As a result of the accident, plaintiff sustained injuries and hospitalization. The principal factual issue upon which this case turned at trial was the determination of which party had the green light at the intersection where the collision occurred. Facts of the case essential to proper resolution of the contentions of the parties on appeal can more appropriately be recited in our discussion of the legal issues presented.

I. Plaintiff's first contention concerns whether the trial court erred in permitting Ronald Johnsen, an expert witness called by defendant, to answer a hypothetical question. This question asked the witness to express an opinion as to the color of the traffic lights confronting each driver when approaching the intersection where the collision occurred.

At the time this question was asked, the synchronization of the traffic signals involved had been established by other evidence. In addition, the witness had testified that if he knew where a particular vehicle was at a particular time within the sequence of the traffic lights, the speed of the vehicle, the distances travelled, and the synchronization of the traffic control lights, he could predict the status of the traffic lights at the time the collision occurred within a reasonable degree of engineering certainty. At this point, a hypothetical question was asked in which the witness was to assume the following matters:

> (1) that the automobile being operated by defendant was driving west as it approached the intersection where the collision occurred, that while so proceeding, defendant, when more than one block but less than two blocks from that intersection observed the light at that intersection to be red and that it changed to green when he was approximately one-half block from that intersection;
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> (2) that the automobile in which plaintiff was riding was proceeding westbound on a street parallel to and one block

north of the street on which defendant was travelling. This automobile then turned south on a street leading to the intersection where the collision occurred;

(3) that the left turn described in the previous paragraph was made on a straight green light cycle rather than on a green arrow and was toward the end of this cycle as the result of having to yield to traffic approaching from the opposite direction;

(4) that the color of the light at the intersection where the collision occurred was red when observed by both plaintiff and the driver of the car in which plaintiff was riding shortly after that car turned south. These witnesses observed this light turn green as their car was about one-half block from that intersection;

(5) that observations were made by the driver of a van following the car in which plaintiff was riding which also turned south on the same street. Such observation corroborates the testimony of plaintiff's witnesses as to item (3) above, but contradicts plaintiff's evidence as to item (4) above; and

(6) the approximate speeds and movements of both cars involved in the collision during the times and courses immediately preceding the collision and the distances involved as shown by the evidence.

To this question plaintiff lodged the following objection:

MR. PRUSS: If the Court please, there's no proper foundation laid for this testimony. The facts that are laid, given as suppositions, are inconsistent, in that the statement of the Witness Gardner, contained in this assumption of facts, [item (5) of the hypothetical question] is contradictory to the other witnesses; and further, that the statements of facts of the first driver, the Martz vehicle, obviously is contradictory to the testimony of Mr. Butler, who was coming down Second Avenue, and it's an impossible situation from the synchronization, Exhibit 5 and Exhibit B, [exhibit establishing the synchronization of the traffic lights] which is attached to it; no proper foundation for this type of testimony, and it's an invasion of the province of the jury.

This objection was overruled by the trial court. The witness was permitted to testify based upon the facts assumed that it was his opinion that as the two motor vehicles involved in the collision entered the intersection, the plaintiff's vehicle faced a red light and defendant's vehicle faced a green light.

On appeal, plaintiff challenges this evidentiary ruling of the trial court on several grounds. With respect to the contention that the answer, if given by the witness, would invade the province of the jury, it is now well established that a qualified witness may opine on the ultimate issue to be rendered by the trier of fact. Schlichte v. Franklin Troy Trucks, 265 N.W.2d 725, 730 (Iowa 1978). Three other contentions now being advanced by plaintiff on appeal were not part of the objection voiced in the trial court. This omission results in failure to preserve any error relating to such matters for

consideration on appeal. A party who objects to hypothetical questions must advise the trial court in what respect the question is improper. Olson v. Katz, 201 N.W.2d 478, 482 (Iowa 1972); Pastour v. Colb Hardware, Inc., 173 N.W.2d 116, 124 (Iowa 1969); Van Aernam v. Nielsen, 261 Iowa 1115, 1123, 157 N.W.2d 138, 143 (1968). We believe this rule precludes consideration of plaintiff's arguments on appeal that (1) a hypothetical question must be based upon facts undisputed in the record;[1] (2) that the question asked the witness to assume existence of the very conditions which the question sought to establish by expert opinion; and (3) that the question failed to contain certain assumptions as to the rate of acceleration necessary to arrive at the conclusion made by the witness. The latter ground was subsequently raised by a belated motion to strike the testimony, but such motion on the present record does not cure the failure to make timely objection. See Fagen Elevator v. Pfiester, 244 Iowa 633, 638-39, 56 N.W.2d 577, 580 (1953). Moreover, to the extent that the original hypothetical question failed to state certain of these assumptions, such assumptions were otherwise fully revealed in subsequent questions asked the witness. We conclude that this circumstance cures the deficiency, if any, in the foundation laid in the hypothetical question itself.

Plaintiff's other argument relating to the admission of the expert's opinion involves the contention that item (4) in the hypothetical question is inconsistent with that which is assumed in item (5) and given other assumptions implicit in the question, is inconsistent with item (3). Plaintiff cites E. Clearly, McCormick's Handbook on the Law of Evidence § 14 at 32 (2d ed. 1972) for the proposition that the facts assumed in a hypothetical question used to elicit opinion testimony should not be conflicting. As a general proposition, we have no quarrel with this contention. We also conclude, as does plaintiff, that, given the present record, item (4) contradicts the controlling premises contained in the hypothetical question. More significantly, it contradicts the opinion sought to be elicited from the witness. But for reasons presently discussed, we cannot conceive how the inclusion of item (4) in the hypothetical question could in any way have confused the jury as to the basis upon which the expert opinion was formulated.

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[1] We also disagree with this contention on the merits. It is only necessary that the facts assumed are those which the jury might have found to exist. Nelson v. Langstrom, 252 Iowa 965, 969, 108 N.W.2d 58, 60 (1961); In re Estate of Telsrow, 237 Iowa 672, 682, 22 N.W.2d 792, 799 (1946).

There are two reasons why we conclude that the jury was not misled by the hypothetical question. First, the opinion expressed by the witness as to the color of the lights at the time of the collision, when considered with the rest of the record in this regard, is clearly inconsistent with any assumption by the witness that item (4) contained in the hypothetical question correctly portrays the lighting sequence at the time the observations therein referred to were purportedly made. We believe that this is a matter which would have been obvious to the jury given the other elements of the hypothetical question and the answer given to the question by the witness. Second, if there were any room for doubt on this matter, it was removed by the witness's answer to subsequent questions which followed. This is particularly true with respect to a question relating to the assumption contained in item (3) of the hypothetical question. That assumption is based upon plaintiff's own version of the movement of the motor vehicle in which she was riding. The inquiry made in this regard was as follows:

> Q. Excuse me, is that [the facts assumed in item (3)] consistent with the sequencing of the lights to get a green? A. Yes, that's--the next statement I was going to make is a person observing a circular green at First Avenue could do so, then proceed, as I've indicated, taking 17 seconds to cover the distance from First Avenue down to Second Avenue, and then at Second Avenue they would not get a green indication; they would get a red indication. Under each of the possibilities, whether they left at the beginning of the circular ball, or whether they left at the end of the circular ball, or any point in between up at First Avenue, if it takes them 17 seconds from this stopped position on First Avenue, given the speeds that I was given to work with, when they reach Second Avenue they will be facing a red.

After this question was asked, it became quite apparent to the jury that the expert, in giving his opinion as to the color of the lights at the intersection at the time and place of the collision, was in fact accepting the testimony of the plaintiff and the driver of the car in which she was riding as establishing the sequence of the traffic lights as that car turned south onto the street where the accident occurred. It is equally apparent from the testimony of the expert witness that, given this sequence of the lighting when the turn was negotiated, the witness believed that it was impossible for the observations recited in item (4) of the hypothetical question to have been correct. As a result of the clarification which flows from this question and answer, and the cross-examination which followed, we see no likelihood that the jury was confused as to the basis upon which the expert's opinion was formed. Also of significance is the fact that this testimony indicates that the accuracy of defendant's testimony is not really essential to the ultimate conclusion arrived at by the witness. For all the reasons

stated, we find no error in the admission of the challenged opinion testimony. While some of the assumptions upon which this opinion rests are contradicted by some of the evidence, there is also evidence to sustain such assumptions. The principal area where plaintiff disputes the assumptions from which the expert's opinion was derived concerns the rate of acceleration of the car in which she was riding after it negotiated the left hand turn. We believe the expert was entitled to make a conservative estimate as to such acceleration—an estimate which is somewhat corroborated by the testimony of plaintiff's own expert. All of these matters go to the weight of the expert testimony, rather than its admissibility.

II. Plaintiff also urges on appeal that the trial court erred in not peremptorily instructing the jury that defendant was negligent for failure to maintain a proper lookout. This contention is premised upon defendant's own testimony as to his movements and observations preceding the collision. This includes the following testimony:

> A. Well, I got up, as I approached the intersection, I observed that the light was still green to me. I saw no vehicles parked or moving in the immediate vicinity of the intersection. I looked on ahead up the street to determine, you know, where I was going to be going and drove into the intersection.
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> Q. Uh-huh. Well, tell us everything you saw and everything you did. A. Well, the next thing I saw was the car, a car approaching me from the right just a short distance away, within I would say a car length, probably, and that car then struck me broadside on the right.
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> Q. Did you apply your brakes? A. No, sir.
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> Q. Did you swerve? A. No, sir.
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> Q. Did you do anything evasive to avoid that collision at all? A. No, sir, I didn't have time.
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> Q. Now did you—how did your—how did you turn your head? Did you turn your head and look at that vehicle, or what did you do?
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> A. I caught a glance out of the side of my eye.
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> Q. So you didn't turn your head, actually?
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> A. Not clear around at that time, no. I had observed the intersection, I thought, adequately before I entered into it.

In considering rather similar evidence as to driver lookout on the part of a plaintiff, the court in Matuska v. Bryant, 260 Iowa 726, 736, 150 N.W.2d 716, 722 (1967), concluded that "it would have been improper to hold, as a matter of law, that plaintiff was

negligent in not seeing defendant until it was too late to take evasive action." We reach the same conclusion with respect to the lookout of the defendant in the present case.

We have considered all issues presented and find no basis for reversal.

AFFIRMED.