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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DENNIS J. SCHULLER and BECKY SCHULLER,

Plaintiffs-Appellants,

vs.

HY-VEE FOOD STORES, INC.,

Defendant-Appellee.

Filed September 6, 1984

232

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Appeal from the Iowa District Court for Linn County - Robert E. Ford, Judge.

Plaintiffs appeal from a judgment entered upon a jury verdict in a negligence action. REVERSED AND REMANDED.

James W. Affeldt, Benjamin W. Blackstock, and Lew Eells of Eells, Blackstock, Affeldt & Harms, Cedar Rapids, Iowa, for plaintiffs-appellants.

James F. Pickens and Matthew G. Novak of Pickens, Barnes & Abernathy, Cedar Rapids, Iowa, for defendant-appellee.

Heard by Oxberger, C.J., Donielson, and Schlegel, JJ.

Plaintiffs, Dennis J. and Becky Schuller, appeal from a judgment entered upon a jury verdict in a negligence action. They assert the trial court erred in making two evidentiary rulings and in giving certain jury instructions. We reverse and remand for a new trial.

Dennis Schuller was a dentist who injured his hand when he fell over a canister ashtray in defendant Hy-Vee's store. The injury forced him to abandon his practice of dentistry. Dennis sued to recover damages for his injury. Becky sued to recover damages for lost consortium. A trial was held and the jury returned a verdict for Hy-Vee. On appeal, the Iowa Supreme Court reversed and remanded because of errors in the instructions given to the jury. Schuller v. Hy-Vee Food Stores, Inc., 328 N.W.2d 328, 332-33 (Iowa 1982).

The jury in the second trial returned a verdict for Hy-Vee. The Schullers' Motion for New Trial was denied, and they now appeal. Our review of this law action is limited to correcting errors of law; findings of fact are binding on this court if supported by substantial evidence. Iowa R. App. P. 4, 14(f)(1).

I. Evidentiary Questions. The Schullers claim the trial court erred: (1) in admitting evidence concerning the lack of prior accidents at defendant's store; and (2) in not admitting evidence showing customary practices in similar stores. Neither claim has merit.

Hy-Vee employees James Edwards and Kevin Horman testified in the second trial that they did not know of anyone previously falling over an ashtray in the store in which Dr. Schuller was injured. Mr. Edwards' testimony was supplemented by a document showing a cash register count which established that over four million customers had been in the store since its opening in 1973 until the time of Dr. Schuller's fall. Further, Mr. Edwards testified that the ashtray canister was customarily kept near the place where it was when Dr. Schuller fell, that there had been no other incidents reported of anybody falling over the canister, and that

Hy-Vee had not received any prior complaints about the location of the canister. Plaintiffs contend that it was error to admit the customer count list because there was no evidence the other customers faced circumstances similar to the ones Dr. Schuller faced the day he fell.

This issue was ruled on in favor of Hy-Vee in Schuller v. Hy-Vee Food Stores, Inc., 328 N.W.2d 328, 330-31 (Iowa 1982). Apparently, the only difference between the evidence presented on this issue in the two trials is that in the second trial plaintiffs obtained a specific admission that the witnesses did not know of even one other person who faced circumstances similar to those facing Dr. Schuller. That admission cannot change the result. In Schuller the court stated:

> The rule, however, is that evidence of absence of prior accidents may be admitted without specific proof of the existence of the same set of circumstances "when the experience sought to be proved is so extensive as to justify the inference that it included an adequate number of situations like the one in suit." McCormick's Handbook of the Law of Evidence § 200 at 476 (Second ed. 1972). The evidence showed that the store customarily kept canister ashtrays at the end of merchandise counters in the same general area as the one involved in this case. Evidence that four million customers had previously been in the store was sufficient to permit the court to conclude that other persons had been exposed to substantially similar circumstances. We find no abuse of trial court discretion in admitting the evidence.

328 N.W.2d at 330-31 (emphasis added). The same reasoning applies to the evidence in the second trial. The trial court did not abuse its discretion.

Plaintiffs also contend the trial court erred in not admitting testimony of William Meeker pertaining to the customary practice of food stores regarding the placement of ashtrays. We find no error.

The custom in a particular trade may be shown by a witness who is qualified by knowledge or experience to testify to its existence. Englund v. Younker Brothers, Inc., 259 Iowa 48, 56, 142 N.W.2d 530, 534 (1966). The record shows, however, that Mr. Meeker was not such a qualified witness. Mr. Meeker has been employed at one food store for the last ten years. He also does his own grocery

shopping at that store. His knowledge is thus too limited to qualify him to testify whether or not a custom exists in the food store trade. The trial court correctly refused to admit Mr. Meeker's proposed testimony.

II. Jury Instructions. Plaintiffs contend the trial court erred in submitting instruction 13, which stated the duty of the defendant, instead of the plaintiffs' three proposed instructions. We must initially determine whether plaintiffs' objection at trial was sufficient to preserve error.

The proper method for objecting to the giving of instructions is set forth in detail in Iowa Rule of Civil Procedure 196. However, an objection need not be a model of clarity or specificity to be sufficient. Henkel v. R & S Bottling Co., 323 N.W.2d 185, 190-91 (Iowa 1982). The test is whether the exception taken alerted the trial court to the error. Goetzman v. Wichern, 327 N.W.2d 742, 745 (Iowa 1982); Henkel, 323 N.W.2d at 191.

Plaintiffs' objection to the court's instruction in this case was given as follows:

> MR. EELLS: Your Honor, for the record, we would object to Instruction No. 13, the duties of the store. I think the Court has made an attempt to combine our Proposed Instructions Nos. 22, 23 and 24. We feel that although the Court has made a good attempt to combine those into one instruction, it would be far clearer to have given the Proposed Instructions of the Plaintiff 22, 23 and 24, and would briefly cite for the Court cases supporting those instructions. Meader versus Paetz Grocery Company, 147 N.W.2d 211; Atherton versus Hoenig's Grocery, 249 Iowa 50; Schuller versus Hy-Vee, 328 N.W.2d 328. The principles you have combined in the one are in those cases.

This objection is by no stretch of the imagination a model of clarity. Nonetheless, we believe that, under all the circumstances of this case, it was sufficient to alert the trial court. The objection specifically refered to plaintiffs three proposed instructions and objected to the combining of the three. The objection indicated that instruction 13 was not clear, which means the jury could become confused. The objection also specifically refers to the cases plaintiffs relied on in drafting

their proposed instructions, including Schuller v. Hy-Vee Food Stores, Inc., 328 N.W.2d 328. Moreover, the objection was not made in a vacuum. The trial court not only knew that this case had already been tried once and been reversed on appeal, but also had the benefit of the Schuller decision on the instruction setting forth defendant's duty of care. See id. at 332-33. Cf. Geotzman, 327 N.W.2d at 745 (two recent cases decided by Iowa Supreme Court which left a question of law unsettled were considered as circumstances that could alert trial court to meaning of lawyer's objection). Under all of these circumstances, we believe the objection was sufficient to preserve error on all grounds plaintiffs assert on appeal.

Plaintiffs claim instruction 13 combined their three proposed instructions, which incorrectly led the jury to believe that both a failure to maintain safe premises and a failure to warn had to be proved before Hy-Vee could be liable. While the three separate proposed instructions are easier to understand than the trial court's instruction, there is no merit to plaintiff's claim. Instruction 13 states, "If you then find from the evidence . . . that the Defendant failed to exercise reasonable care to protect the Plaintiff in any of the particulars alleged by the Plaintiff, then the Defendant would be negligent." (Emphasis added). Instruction 16 states:

> The Plaintiffs assert that the Defendant was negligent in the following particulars:
>
> 1. In failing to maintain its store premises in a safe condition for its customers.
>
> 2. Failing to provide warning or notice to Dennis J. Schuller of the presence of the canister ash tray and where it was located in the aisle in the store.
>
> * * *
>
> To entitle the Plaintiff Dennis J. Schuller to recover, the burden is upon him to establish . . .
>
> A. That the Defendant was negligent in at least one or more particulars (paragraphs 1 and 2 above) as alleged by Plaintiffs. (Emphasis added).

These instructions clearly do not require proof of both specifications of negligence.

Plaintiffs claim that the trial court erred in not submitting their proposed instruction 23, which is concerned with a store owner's duty to "anticipate" dangerous conditions. Although plaintiffs argue that this duty is different from the two duties set forth in instruction thirteen--a general duty of care and the duty to warn customers of dangerous conditions--we do not believe their argument is correct. The only authority plaintiffs cite to support their position is Meader v. Paetz Grocery Co., 259 Iowa 1101, 147 N.W.2d 211 (1966). It appears, however, that plaintiffs misconstrue the language of that case. A careful reading of Meader shows that the word "anticipate" is used in the same sense as "should know." See id. at 1106, 147 N.W.2d at 215. Instruction 13 used the words "should realize" instead of either "anticipate" or "should know." We believe, however, that the words used adequately described the duty owed by Hy-Vee.

Plaintiffs also assert the trial court erred because instruction 13 did not inform the jury that it should take into account distracting displays of merchandise when considering defendant's duty. We agree. The Iowa Supreme Court specifically stated such a failure is error in Schuller v. Hy-Vee Food Stores, Inc., 328 N.W.2d at 333.

Hy-Vee contends there was no error because the "lookout" instruction given regarding Schuller's duty contained the instruction about distracting displays and because the jury was instructed to construe each instruction in light of, and in harmony with, every other instruction. However, "[t] he real issue is whether the instructions as given were likely to confuse and mislead the jury." Bauman v. City of Waverly, 164 N.W.2d 840, 846 (Iowa 1969). We find the instructions misleading regarding this issue.

Instruction 16 told the jury to consider Hy-Vee's negligence first and indirectly referred the jury to instruction 13, which stated Hy-Vee's duty. The

special interrogatory answered by the jury shows that the jurors found Hy-Vee not negligent. The special interrogatories also show the jurors considered no other issues in reaching a verdict. We must therefore assume that the jury correctly followed instruction 16 and did not consider the instruction regarding Dr. Schuller's duty in reaching its verdict. Since the jury did not consider the instruction regarding Dr. Schuller's duty, the instruction about distracting displays contained therein was not construed together with Hy-Vee's duty, and the jury was misled.

The jury should have been instructed that distracting displays should be considered in determining whether Hy-Vee breached its duty. Schuller v. Hy-Vee Food Stores, Inc., 328 N.W.2d at 333. The failure to do so is reversible error. See id. The trial court's ruling on plaintiff's motion for new trial is reversed and this cause is remanded for new trial.

REVERSED AND REMANDED.