IN THE COURT OF APPEALS OF IOWA

No. 0-474 / 99-1297
Filed October 25, 2000

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CLERK SUPREME COURT

RALPH J. FREEMAN,
Plaintiff-Appellant,

vs.

HY-VEE INC.,
Defendant-Appellee.

Appeal from the Iowa District Court for Johnson County, Thomas L. Koehler, Judge.

Plaintiff appeals from the judgment entered upon a jury verdict in favor of the defendant in his negligence action. **AFFIRMED.**

John T. Nolan, Iowa City, for appellant.

Terry J. Abernathy and Stephanie L. Hinz of Pickens, Barnes & Abernathy, Cedar Rapids, for appellee.

Heard by Sackett, C.J., and Huitink and Mahan, JJ.

MAHAN, J.

Plaintiff appeals from the judgment entered upon a jury verdict in favor of the defendant in his negligence action. He contends the district court (1) abused its discretion by unreasonably excluding relevant and material evidence, thereby denying him a jury trial based on the evidence, and (2) erred in giving undue prominence to issues not in evidence and improperly instructing the jury. We affirm.

I. Background Facts and Proceedings. Between 5:00 a.m. and 6:00 a.m. on October 19, 1995, Ralph "Jim" Freeman went to Hy-Vee to read the newspaper and drink coffee, as was his custom. He had difficulty seeing out of his glasses, so went to the restroom to clean them. He cleaned his glasses, and turned to leave the restroom. As he turned he slipped and fell. He felt tremendous pain in his right knee, and had to yell for help to get to his feet. He was carted to a vehicle and driven to the hospital. At the hospital, Freeman's wife noticed the front of his pants were wet in the crotch area. Freeman's pants apparently absorbed water while on the restroom floor. He required medical treatment, including medication and crutches. He saw a specialist, and eventually had to undergo knee surgery.

Freeman filed his petition on February 11, 1997, claiming Hy-Vee breached its duty to maintain the premises in a reasonably careful manner and in a safe condition for him. Specifically, Freeman claimed Hy-Vee was negligent in: (1) allowing water to accumulate on the floor of the restroom resulting in a slippery surface for use by the customers; (2) failing to observe the accumulated

water and slick surface and remedy the slippery condition; (3) failing to provide a traction surface with non-slip floor surface or commercial non-slip mats; and (4) failing to give any kind of warning or notice to Freeman of the slippery condition.

At trial, the court ruled inadmissible certain pieces of evidence Freeman attempted to introduce. The court also overruled several objections to jury instructions made by Freeman. Following the jury's verdict in favor of Hy-Vee, the trial court denied Freeman's motion for a new trial. Freeman appeals.

II. Evidentiary Rulings. We review the exclusion of evidence for correction of errors at law. Iowa R. App. P. 4. The decision whether to admit evidence is within the sound discretion of the trial court, and such decisions will not be disturbed on appeal unless the discretion has been abused and a substantial right of a party has been affected. *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 542 (Iowa 1996).

A. Industry Catalog and Safety Standards. Freeman attempted to introduce an industry catalog depicting various non-slip floor mats, and the American Society for Testing Material (ASTM) periodical entitled, "Standard Practice for Safe Walking Surfaces." Freeman argues both the catalog and ASTM periodical are relevant because they demonstrate a recognized industry standard of reasonable and prudent conduct, and the availability of safe measures to avoid a slick water hazard. Plaintiff offered the catalog and ASTM periodical at the start of plaintiff's counsel's second day of direct examination of plaintiff. Freeman testified as follows:

Q. Please identify Exhibit 3. A. These are commercial magazines and they're catalogs, and by the cover they show floor mats, and they look like they're done periodically.

MR. NOLAN: At this time we'll offer Plaintiff's Exhibit 3.

MR. ABERNATHY: Defendant objects to Exhibit 3 on the basis of hearsay and also it's in violation of the Rule of Evidence 902. It's not a self-authenticating document.

THE COURT: The objection is sustained.

Q. All right. I'll hand you Exhibit 4 and ask you to identify this, please. A. This is the American Testing Material that tells about walkway surfaces and different kinds of slip resistant material, by glancing at it, that's used in walkways and every area.

Q. All right. Is that a published periodical? A. Yes, it is.

Q. All right. Do you know if that's available at the University of Iowa library? A. Yes. It's available at top libraries, yes.

MR. NOLAN: All right. We offer Plaintiff's Exhibit 4.

MR. ABERNATHY: Defendant objects on the basis of hearsay and Rule 902. Rule of Evidence 902.

THE COURT: Sustained.

MR. NOLAN: And, your Honor, we – I'd offer those as a hearsay exception under Item 17.

THE COURT: 803(17)?

MR. NOLAN: Yes.

THE COURT: The Court understands that.

MR. NOLAN: Thank you.

An offer of proof serves both to give the trial court a more adequate basis for its evidentiary ruling and to make a record for appellate review. *Strong v. Rothamel*, 523 N.W.2d 597, 599 (Iowa App. 1994). The burden of making an offer of proof to preserve error is on the party that urges the evidence should have been admitted. *Id.* The rule is that when it is apparent upon the face of the question the content and materiality of the evidence sought to be introduced, this is sufficient. *Hartwig v. Olson*, 261 Iowa 1265, 1271-72, 158 N.W.2d 81, 85 (1968). But when this is not apparent, then the party seeking to introduce the evidence is required to state what he expects to prove, and thus make its materiality appear. *Id.*

We conclude Freeman failed to make an adequate offer of proof. The materiality of the evidence offered is not apparent on the face of plaintiff's counsel's questions. Freeman's counsel did not explain to the court what he expected to prove by introducing the exhibits. Therefore, Freeman failed to preserve error on this issue.

Even if Freeman did preserve error, the trial court correctly sustained Hy-Vee's objections because both pieces of evidence were offered as exhibits without being identified through the foundation testimony of any witness. *See Rinkleff v. Knox*, 375 N.W.2d 262, 269 (Iowa 1985). In addition, testimony regarding ASTM standards was properly excluded as being beyond the scope of discovery. *See Gerace v. 3-D Mfg. Co., Inc.*, 522 N.W.2d 312, 319-21 (Iowa App. 1994). The trial court did not abuse its discretion by excluding the industry catalogs and ASTM safety standards.

B. Photographs. Freeman attempted to introduce photographs of a different Hy-Vee store and a Cub Food store, both located in Iowa City. Freeman contends these depicted "other similarly situated facilities," and should have been admitted to demonstrate how other stores with similar situations handle water slick hazards. The court sustained defendant's objection on the basis of irrelevance and subsequent remedial measures.

The admission or exclusion of photographs rests largely in the discretion of the trial court since it has the opportunity to examine the photographs and hear the evidence. *Tewes v. Pine Lane Farms, Inc.*, 522 N.W.2d 801, 805 (Iowa 1994). A ruling on the admissibility of photographs will not be interfered with

upon appeal except upon a clear showing of abuse of discretion. *Id.* Whether photographs should be excluded is largely, if not entirely, a question left to the discretion of the trial court. *Id.*

The general rule is that for a photograph to be admissible in evidence it must be a correct and accurate representation of the relevant facts observed by the witness. *Twyford v. Weber*, 220 N.W.2d 919, 926 (Iowa 1974). Where the record establishes similarity of conditions between the time the photos were taken and the date of the happening of an accident, no abuse of discretion is shown. *Galbraith v. George*, 217 N.W.2d 598, 602 (Iowa 1974). A photograph taken long after the event may be admitted into evidence where the record establishes a substantial similarity of conditions between the time it was taken and the material date. *Harrison v. Ulicki*, 193 N.W.2d 533, 536 (Iowa 1972).

The photographs offered by Freeman were not a "correct and accurate" representation of the scene of the accident, because they did not depict the accident scene at all. Freeman could not have demonstrated "similarity of conditions," because the pictures depicted completely different stores than the one in which he fell. The photographs were irrelevant to the issue of measures taken by Hy-Vee at the time of the accident. In addition, Freeman offered no testimony to support his contention that the way in which other grocery stores maintained their restrooms was a standard Hy-Vee should have followed. The court did not abuse its discretion in refusing to admit the photographs.

C. Testimony. Freeman called Thomas Crowley, a former Hy-Vee employee, to testify the floor in the Hy-Vee restroom would frequently be covered

with water. Crowley worked for Hy-Vee until November 1993, nearly two years before Freeman's accident. Crowley testified during an offer of proof that he would clean water from the restroom floor often, tracing its source back to a plugged drain in the floor of an overflowing urinal. Grease and residue from rubber-wheeled carts and the meat department would exacerbate the hazardous condition. Crowley reported the condition to his supervisors, but nothing was done to remedy the slick restroom floor. He had not been in the restroom where Freeman fell since the last day of his employment, November 29, 1993. The trial court excluded Crowley's testimony on the basis of defendant's objections of irrelevance and remoteness in time.

Hy-Vee hired a new store manager, Terry Hockum, in December 1993. Mr. Hockom testified from December 1993 until September 1995, an independent contractor handled the general cleaning and maintenance of Hy-Vee's main floor area. The restroom was cleaned by employees. In September 1995, Mr. Hockum terminated the outside maintenance agreement, and hired two new Hy-Vee employees to clean and maintain the store. John Olson, an assistant manager, trained the employees and instructed them on how to clean the restrooms. A distributor of janitorial supplies provided additional training to the new employees.

A remoteness objection raises the issue of relevancy. *State v. Helm*, 504 N.W.2d 142, 146 (Iowa App. 1993). "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be

without the evidence. Iowa R. Evid. 401. Whether evidence which is otherwise relevant should nevertheless be excluded due to remoteness is a decision which rests in the sound discretion of the trial court. *Helm*, 504 N.W.2d at 147. The question is whether "the elapsed time is great enough to negative any logical connection between the evidence and the fact sought to be established by it." *Godbersen v. Miller*, 439 N.W.2d 206, 210 (Iowa 1989).

Crowley had not been in the Hy-Vee restroom since leaving his employment in 1993. After Crowley left his employment, a new store manager took over and changed the store's maintenance policies and procedures. The trial court did not abuse its discretion in determining Crowley's proposed testimony was too remote in time to have any relevancy to the issue of Hy-Vee's negligence in 1995.

III. Jury Instructions. We review objections to jury instructions on assigned error. Iowa R. App. P. 4; *Grefe & Sidney v. Watters*, 525 N.W.2d 821, 824 (Iowa 1994). We read the court's instructions as a whole when determining whether there has been error. *Grefe & Sidney*, 525 N.W.2d at 824. We review to decide if the jury instructions are correct statements of the law and are supported by substantial evidence. *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996); *Grefe & Sidney,* 525 N.W.2d at 824.. As long as a requested instruction correctly states the law, has application to the case, and is not stated elsewhere in the instructions, the court must give the requested instruction. *Foggia v. Des Moines Bowl-O-Mat, Inc.*, 543 N.W.2d 889, 892 (Iowa 1996). If the trial court errs in submitting or refusing to submit an instruction, we will reverse only if

the error has caused prejudice. *Kessler v. Wal-Mart Stores, Inc.*, 587 N.W.2d 804, 806 (Iowa App. 1998).

A. Negligence. Instruction No. 14 instructed the jury as follows:

> The plaintiff must prove all of the following propositions:
>
> 1. Hy-Vee, Inc. knew or in the exercise of reasonable care should have known of a condition on the premises and that it involved an unreasonable risk of injury to a person in Ralph J. Freeman's position.
>
> 2. The condition is one that a person in Hy-Vee, Inc.'s position should have expected would not have been discovered or realized by Ralph J. Freeman or one that Hy-Vee, Inc. should have expected Ralph J. Freeman would fail to protect himself from.
>
> 3. Hy-Vee, Inc. was negligent *in one of the following ways*:
> (a) in allowing *excessive water* to accumulate on its restroom floor.
> (b) in failing to warn the Plaintiff of a slippery floor condition.
> (c) in failing to barricade the Plaintiff from the restroom.
>
> 4. The negligence was a proximate cause of the plaintiff's damage.
>
> 5. The amount of damage.
>
> If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If the plaintiff has proved all of these propositions, you will consider the defense of comparative fault as explained in Instruction No. 15. (emphasis added).

Freeman argues the use of the word "excessive" unnecessarily and prejudicially misstated the law. Freeman contends the repeated use of the term "excessive" by Hy-Vee's counsel during closing arguments gave further "undue prominence" to the term, thereby exacerbating the prejudice to Freeman.

The possessor of land is under a duty to use ordinary care to keep the premises in a reasonably safe condition for business invitees. *Sheets v. Ritt, Ritt & Ritt, Inc.*, 581 N.W.2d 602, 604 (Iowa 1998). This duty requires the possessor

to use reasonable care to ascertain the actual condition of the premises. *Id.* The duty also requires the possessor to make the area reasonably safe or to give warning of the actual condition and risks involved. *Id.* "Excessive" is defined as "exceeding a normal, usual, reasonable, or proper limit." The American Heritage College Dictionary 477 (3rd ed. 1993).

The trial court did not err in including the term "excessive" in its instruction. While "excessive" may not have been the ideal choice, the trial court was free to choose its own language in submitting the issue of reasonable care. *Schuller v. Hy-Vee Food Stores, Inc.*, 328 N.W.2d 328, 332 (Iowa 1982). In addition, we conclude the trial court's choice of the term "excessive" did not prejudice plaintiff, as other evidence in the record refuted the existence of *any* "water slick" hazard in the restroom. Two Hy-Vee employees present the day of the incident testified they did not notice any water on the floor of the restroom immediately after plaintiff's fall. Finally, the jurors were provided with three possible ways in which they could find Hy-Vee negligent: (1) in allowing excessive water to accumulate on its restroom floor; *or* (2) in failing to warn the plaintiff of a slippery floor condition; *or* (3) in failing to barricade the plaintiff from the restroom. Jurors could have chosen any of the three as a basis for Hy-Vee's negligence.

B. Defendant's Knowledge of Hazard. Instruction 14(d) provided:

> The owners of premises are presumed to know all conditions on the premises that are caused or created by the owners or the owners' agents. *The owners of premises are not responsible for an injury suffered by a person on the premises which resulted from a condition of which the owners had no knowledge*, unless the condition existed for a long enough time that in the exercise of reasonable care the owners should have known about it. (Emphasis added.)

Freeman argues the instruction wrongfully includes the requirement the plaintiff prove, and the jury find, the defendant had knowledge of the hazard.

In order to impose liability for failure to warn the invitee of a dangerous condition, the possessor must know or be chargeable with knowledge of the condition and risk. *Schuller*, 328 N.W.2d at 332. Knowledge of a dangerous condition is imputed to a possessor of land who has created the condition that causes the plaintiff's injury. *Richardson v. Commodore, Inc.*, 599 N.W.2d 693, 697 (Iowa 1999). Therefore, where the breach of duty relied on by plaintiff is dependent on knowledge or notice:

> [I]t is incumbent on plaintiff to establish defendant's knowledge or notice of the dangerous or defective condition causing the injury, or to prove facts on the basis of which the law will charge him with, or raise a presumption of, knowledge or notice, as that he caused or created the defect or danger, or should, in the exercise of reasonable care, have discovered it, as that the danger or defect existed for a sufficient time to be discovered in the exercise of due care.

Schafer v. Hotel Martin Co., 249 Iowa 866, 871, 89 N.W.2d 373, 376, (1958) (quoting 65 C.J.S. *Negligence* § 208, page 968, 969 (19__)).

Freeman contends he presented uncontroverted evidence the hazard was created entirely by the defendant, thereby charging Hy-Vee with knowledge thereof. We disagree. The record does not clearly establish Hy-Vee created the alleged water slick hazard in the men's restroom. To the contrary, two Hy-Vee employees testified they did not see any water on the floor or Freeman's clothing immediately after the incident. Freeman testified he had no idea where the water came from, how it got on the restroom floor, how long it had been there, or that any Hy-Vee employee was aware of the water on the restroom floor. Freeman

testified when he entered the restroom there was no water running in the sink, and the toilets and urinals were not overflowing.

The trial court correctly informed the jury of the applicable law. We affirm the trial court on this issue.

C. Comparative Fault. The trial court instructed the jury on Freeman's comparative fault. Freeman contends the court prejudiced him by including comparative fault instructions, because there was no evidence to suggest Freeman failed to keep a proper lookout.

The jury answered a special interrogatory finding Hy-Vee not at fault, and did not reach the issue of plaintiff's comparative fault. Therefore, Freeman cannot show prejudice. *See Ladeburg v. Ray*, 508 N.W.2d 694, 696 (Iowa 1993) (no prejudice to plaintiff where case was submitted to the jury on special interrogatories, jury found defendants not at fault in response to the first question on the verdict form, and consequently did not answer the interrogatories concerning plaintiff's fault). We affirm the trial court on this issue.

AFFIRMED.