IN THE COURT OF APPEALS OF IOWA

No. 5-449 / 94-2046

ROBIN VAN LEUVEN, Individually and as Parent of **JACOB MICHAEL VAN LEUVEN**,

Plaintiff-Appellant,

vs.

DORIS JANE MOSHER,

Defendant-Appellee.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Calhoun County, Louie F. Beisser, Judge.

Robin Van Leuven appeals from a district court judgment entered upon a jury verdict in Doris Mosher's favor in Van Leuven's action for damages for injuries incurred by her minor son, Jacob, due to Mosher's alleged negligence. **AFFIRMED.**

Dan T. McGrevey, Fort Dodge, for appellant.

Kirke C. Quinn of Courter, Quinn, Doran & Anderson, Boone, for appellee.

Heard by Hayden, P.J., and Habhab and Huitink, JJ.

PER CURIAM.

On October 20, 1991, Robin Van Leuven, her husband and her two children went to visit Robin's mother, Doris Mosher, after church. They walked up the front sidewalk with Robin in the lead, followed by Jacob, age two, who was holding his sister's hand, then Robin's husband in the rear. At the base of the steps the sidewalk was damaged. Robin had walked up the sidewalk "hundreds of times" and cautioned her children about the sidewalk. Jacob tripped on the sidewalk and hurt his nose and face.

Robin, individually and as Jacob's mother, filed suit against Mosher for failing to properly maintain the premises and failing to warn invitees of the danger presented by the damaged sidewalk.

The jury entered a verdict in Mosher's favor. The district court entered judgment on the verdict and denied Robin's motion for judgment notwithstanding verdict or new trial.

Robin appeals.

I. ***Scope of Review.*** Our review of this appeal is for errors of law. Iowa R. App. P. 4.

II. ***Jury Instructions.*** On appeal, Robin contends the district court erred in giving a jury instruction. The instruction in question is jury instruction 14. This instruction, as given to the jury, stated:

> The Plaintiff must prove all of the following propositions:
> 1. The Defendant 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 the Plaintiff's position.
> 2. The condition was one *that a person in the Defendant's position should have expected would not have been discovered or realized by the Plaintiff or one* that the Defendant should have expected the Plaintiff would fail to protect himself from.
> 3. The Defendant was negligent in failing to maintain the sidewalk in a reasonable manner.
> 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, the Plaintiff is entitled to damages in some amount.

(Emphasis added). Robin objected to the underlined portion of the instructions and asked that the underlined portion be struck. The district court overruled Robin's objection.

Parties are entitled to have their legal theories submitted to a jury if they are supported by the pleadings and substantial evidence in the record. *Sanders v. Ghrist*, 421 N.W.2d 520, 522 (Iowa 1988). The district court is required to give a requested jury instruction if it correctly states the applicable law and is not embodied in other instructions. *Stover v. Lakeland Square Owners Ass'n*, 434 N.W.2d 866, 868 (Iowa 1989). Error in refusing to give a requested instruction does not warrant reversal unless it is prejudicial to the party. *Id.* The district court has much discretion in framing jury instructions. *Schuller v. Hy-Vee Food Stores, Inc.*, 407 N.W.2d 347, 351 (Iowa App. 1987). We look to the jury instructions as a whole in determining

whether or not they are proper. *Bossuyt v. Osage Farmers Nat'l Bank*, 360 N.W.2d 769, 774 (Iowa 1985).

Robin argues the jury instruction does not accurately reflect Iowa law. Robin contends the instruction "allows the jury to determine the Defendant's expectations in relation to Jacob's ability to discover or realize the danger or Jacob's ability to protect himself from that danger." Further, Robin argues "Jacob could not be at fault comparatively as a matter of law or at a minimum, a special instruction was needed to inform the jury that Jacob's conduct must be measured by individuals of his own age bracket."

Robin admits comparative fault was not pled in this case. Rather, she contends comparative fault was implicit in instruction 14. Instruction 14 is taken from the uniform civil instructions. We are reluctant to disapprove a uniform instruction. *State v. Monk*, 514 N.W.2d 448, 450 (Iowa 1994); *State v. Weaver*, 405 N.W.2d 852, 855 (Iowa 1987). If, however, the instruction is faulty, we must find so. *Monk*, 514 N.W.2d at 450; *State v. McMullin*, 421 N.W.2d 517, 518-19 (Iowa 1988).

We do not believe the issue of comparative fault is inferred in the disputed jury instruction. Rather, the focus of the instruction is the duty owed by a landowner to an invitee. The instruction defines defendant's duty in terms of defendant's expectations. Any negligence on the part of plaintiff is not used in the determination of defendant's duty. Robin's concerns regarding the jury instruction are without merit.

We find there was no error in submitting this instruction to the jury. We affirm the district court.

AFFIRMED.