

IN THE COURT OF APPEALS OF IOWA

FILED

MAR 26 1985

2413 SUPREME COURT

MERLE A. LEWIS,

)

Plaintiff-Appellee

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Filed March 26, 1985

vs.

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5-48

84-816

HY VEE FOOD STORES, INC.,

Defendant-Appellant.

)

Appeal from the Iowa District Court for Linn County - Paul J. Kilburg,
Judge.

The defendant appeals from adverse judgment in negligence action arising
out of the plaintiff's fall in defendant's grocery store. **AFFIRMED.**

Benjamin W. Blackstock, and James W. Affeldt, of Eels, Blackstock, Affeldt
and Harms, Cedar Rapids, for the Plaintiff-Appellee.

James F. Pickens and Mathew G. Novak, of Pickens, Barnes & Abernathy,
Cedar Rapids, for the Defendant-Appellant.

Heard by Oxberger, C.J., and Hayden and Sackett, JJ.

SACKETT, J.

On August 29, 1982, Plaintiff Merle Lewis, while shopping in one of defendant's Hy Vee food stores, slipped and fell. Mrs. Lewis filed suit, and after trial to a jury, a verdict was returned in her favor in the amount of \$21,000. No negligence was attributed to Mrs. Lewis.

At the time of the accident, the plaintiff was 76 years of age. She had accompanied her daughter to the Hy Vee store to do some grocery shopping. While walking in the produce aisle with her attention on the displays, Mrs. Lewis slipped on a piece of lettuce and fell, breaking her hip. The only testimony as to how the lettuce got on the floor was that pieces fell when the display was stocked earlier in the day. Immediately following the accident, a store employee cleaned up the floor and threw the lettuce away. Much testimony was heard concerning Mrs. Lewis' path through the aisle, cleaning times and procedures of the store, and the appearance of the lettuce.

Defendant on appeal asserts several errors. We address these in the order presented by defendant.

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Hy Vee initially contends that their motion for directed verdict should have been sustained because there was insufficient evidence that of Hy Vee's negligence was a proximate cause of Mrs. Lewis' injuries.

Evidence is considered in the light most favorable to the party against whom the directed verdict motion is made. Much of the evidence here is not disputed by either side. Mrs. Lewis slipped on a piece of lettuce and fell while in defendant's store. Various witnesses described the lettuce as "squashed" with a "horrible odor," "squishey," "mushy," "stepped on," "smashed," "carts had run over it," and that it didn't look fresh. There was testimony that the lettuce display had been stocked earlier in the day and that pieces were dropped then and could have been

kicked around. The floor had not been swept all day. An employee admitted he dropped pieces of lettuce which he picked up by hand. Mrs. Lewis fell a distance from the lettuce display and, in fact, had never approached the vegetable area. The lettuce that Mrs. Lewis tripped on had been thrown away by a store employee following the accident.

There was no direct evidence as to how the lettuce got on the floor, or who put it there; however, circumstantial evidence is equally probative.

The question of negligence is generally for the jury, and only in exceptional cases is it decided as a matter of law. Bartels v. Cair-Dem, Inc., 124 N.W.2d 514, 516 (Iowa 1963). Here there was sufficient evidence presented that a Hy Vee employee might have dropped the lettuce that caused the fall or that an employee failed to clean the floor to submit the question of negligence to the jury.

Whether the time the lettuce was on the floor was sufficient to allow defendant time to clean it up is also a jury question. "[T]he length of time sufficient to constitute constructive notice and a reasonable opportunity to remedy the defect depends upon the facts of each case and is generally a question for the fact finder." Houden v. City of Decorah, 261 Iowa 624, 626-27, 155 N.W.2d 534, 536 (1968).

The refusal to sustain the directed verdict was not error.

II.

The trial court's admission of the two prior accident reports was not error. Defendant opened the door to admit this evidence by questioning the store manager about store accident reports and their purpose. Hy Vee's objections were waived by the interrogation, and they cannot complain of error now.

III.

To determine whether the testimony concerning the cleanliness of the store prior to the day of the accident should have been admitted, we consider first whether Hy Vee's objection was sufficient to preserve the error.

Questions concerning the cleanliness of the store were asked several times in different ways. After each question, defendant objected that it was leading and suggestive, irrelevant, prejudicial, and vague and ambiguous. After the last time, defendant said "same objection."

We do not find, as plaintiff suggests, that this can be considered an attempt by defendant to make a standing objection. While a standing objection may not be adequate to preserve error, where Hy Vee had made its objection several times previously, "same objection" was adequate to inform opposing counsel, the trial court, and this court of the error asserted.

Since Mrs. Lewis slipped on food, it is obviously relevant that a witness had seen food on the floor. The fact that it was not the same kind of food does not destroy its probative value, but merely limits the weight to be given it. Regardless of what kind of food, its normal place is not on the floor. Mrs. Lewis had seen food on the floor on prior occasions, and her daughter saw food on the floor the day of the accident. Thus, evidence may be admitted under Iowa R. Evid. 405 to show what was becoming a routine practice - failing to clean the floors.

While any evidence which supports opponent's case is prejudicial, the rule speaks of "unfair prejudice" which may outweigh the probative value of the evidence. Iowa R. Evid. 403. We find that the prejudicial effect of the "unclean store" testimony does not rise to the level of "unfair prejudice" to warrant excluding this relevant testimony.

IV.

We disagree with Hy Vee's argument that the issue of a third party as sole proximate cause was squarely before the court and should have been before the jury in the instructions of the court. The defendant bears the burden of proof in

this defense, Adam v. T.I.P. Rural Elec. Coop., 271 N.W.2d 896, 902 (Iowa 1978); and Hy Vee has presented no evidence of a third party involvement.

Hy Vee argues that the lettuce could have been dropped by a customer. We find nothing in the record to support this claim - inferences and innuendos are not enough.

The cases on which Hy Vee relies define the rule to be applied, but do not support Hy Vee's position because they all had substantial and direct evidence of third party negligence. In Sponsler v. Clarke Electric Coop., Inc., 329 N.W.2d 663 (Iowa 1983), the plaintiff was injured when a co-worker raised a crane into a power line while plaintiff was under the crane. The suit was brought against the electric coop for negligent placement of lines and failure to warn of danger. Even though the crane operator was not a party to the suit, the instruction as to third party negligence was approved.

According to Sponsler, "a defendant is entitled to have the jury instructed on [the third party defense] when substantial evidence supports it." Id. at 665 (emphasis added). See also Porter v. Iowa Power and Light Co., 217 N.W.2d 221 (Iowa 1974). It would be error to instruct on an issue not supported by substantial evidence as resting on speculation. Clinton Land Co. v. M/S Associates, Inc., 340 N.W.2d 232, 234 (Iowa 1983).

We find defendant's "speculations" are not enough to warrant a specific instruction on a third party as sole proximate cause.

V.

We also give no credence to Hy Vee's claim that Instructions 16, 17, 17A, 17B, and 17C were unsupported by the evidence and were duplications. As discussed previously, both parties concede there was lettuce on the floor, and sufficient evidence was presented to create a jury question of how long it was on the floor.

Defendant claims that by submitting several instructions which are similar, the court unduly repeated and thus emphasized Mrs. Lewis' side of the case. While

we recognize that the court may not emphasize, by repetition, one theory of the case, Sickman v. Truck Transport, Inc., 224 N.W.2d 459, 464 (Iowa 1974), some repetition may be necessary to clarify points for the jury. Wagaman v. Ryan, 142 N.W.2d 413, 419 (Iowa 1966).

Within the instructions, we find no undue emphasis on plaintiff's side of the case to support reversible error.

VI.

Finally, we address the question of error in failure to give a requested jury instruction that any award would be exempt from federal and state income tax.

Generally, the amount of damages received as compensation for personal injuries is not taxable, but unknowledgeable jurors may assume the award is subject to taxation. Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490, 496, 100 S.Ct. 755, 759, 62 L.Ed.2d 689, 695 (1980). Thus the purpose of an instruction is to prevent inflated jury awards resulting from over-compensating plaintiff to provide for taxation. Burlington Northern, Inc. v. Boxberger, 529 F.2d 284, 297 (9th Cir. 1975).

In Norfolk, the United States Supreme Court held that failure to give such an instruction was reversible error. Norfolk at 100 S.Ct. at 759-60, 62 L.Ed.2d at 696. Hy Vee's reliance on Norfolk is misplaced, however, because the Norfolk ruling applies to actions brought under the Federal Employer's Liability Act (FELA) and is not applicable to federal diversity actions or questions arising under state law. See Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 69 L.Ed.2d 784, 101 S.Ct. 2870 (1981); Vasina v. Grumman Corp., 644 F.2d 112, 118 (2nd Cir. 1981).

The 8th Circuit recognized that state law would govern in diversity cases and required the nontaxability instruction to be given in the absence of state law. Grant v. City of Duluth, 672 F.2d 677, 682-83 (8th Cir. 1982).

We decline to require that the instruction be given in this situation. Hy Vee has made no showing or even an assertion that the damage award was excessive

and that the jury may have considered tax consequences in their award. While certain fact situations may require a nontaxability-of-award instruction to satisfy due process requirements, we do not consider those situations until they are presented. To fail to give the instruction here was not error.

AFFIRMED.