

IN THE COURT OF APPEALS OF IOWA

LETA BABB,

Plaintiff-Appellant,

vs.

JACK AND JILL, INC., d/b/a
CAL'S JACK AND JILL,

Defendant-Appellee.

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86-641

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Appeal from the Iowa District Court for Wapello County (No. CL 2409-0785), James P. Rielly, Judge.

Plaintiff appeals from judgment in favor of defendant in a personal injury action. **AFFIRMED.**

Alfredo G. Parrish and Elizabeth S. Kruidenier of Parish & Kruidenier, Des Moines, for plaintiff-appellant.

Timothy J. McKay of McKay & Moreland, P.C., Ottumwa, for defendant-appellee.

Considered by Oxberger, C.J., and Schlegel and Hayden, JJ.

OXBERGER, C.J.

In this appeal, plaintiff Leta Babb challenges the judgment entered in favor of the defendant, Jack and Jill, Inc., in the underlying personal injury action. The plaintiff's sole contention on appeal is that the trial court erred in submitting a certain instruction to the jury. We disagree with this assertion, and affirm.

A brief recitation of the facts will aid in understanding the plaintiff's assignment of error. The record discloses that on December 19, 1984, the plaintiff slipped and fell in front of the defendant's Ottumwa, Iowa, store. She subsequently commenced the underlying action alleging that the injuries she sustained as a result of the fall were proximately caused by the defendant's failure to maintain the premises in a reasonably safe condition.

At trial, a number of witnesses, including the plaintiff's mother, who was with the plaintiff at the store, and several store employees, testified that on the day of the accident, the weather had been unfavorable with intermittent sleet and freezing rain. Over the plaintiff's objection, the trial court submitted to the jury the following instruction concerning a business's duty to remove accumulations of ice or snow from its premises:

You are instructed that a business establishment, in the absence of unusual circumstances, is permitted to await the end of a storm and a reasonable time thereafter to remove ice or snow from an outdoor entrance walk or steps. The reason for this rule is that changing conditions due to the pending or continuing storm render it inexpedient and impracticable for the business establishment to take earlier effective action, and that ordinary care therefore does not require it.¹

The basis of the plaintiff's objection to this instruction was that the record did not contain evidence sufficient to establish that a storm had occurred

¹The plaintiff does not dispute that this instruction correctly states the applicable law. See Hovden v. City of Decorah, 261 Iowa 624, 630, 155 N.W.2d 534, 538 (1968).

on the day of her accident. The plaintiff reasserts this argument on appeal, contending that the instruction was improper because it assumed the existence of facts not in proof. We disagree.

The principles governing the submission of jury instructions are well established. It is a trial court's responsibility to present the issues and the law of the case to the jury in order that they may have an intelligent conception of the particular questions before them. State v. Gilroy, 313 N.W.2d 513, 520 (Iowa 1981); see also Edwards v. City of Des Moines, 349 N.W.2d 786, 788-89 (Iowa App. 1984). In fulfilling this function, the court should submit to the jury all pleaded issues supported by substantial evidence; conversely, error results if the court instructs the jury on an issue lacking substantial evidentiary support. Hoekstra v. Farm Bureau Mut. Ins. Co., 382 N.W.2d 100, 107 (Iowa 1986). The requisite "substantial evidence" is contrasted from "a mere scintilla of evidence," which was not sufficient to warrant an instruction on an issue. Franken v. City of Sioux Center, 272 N.W.2d 422, 428 (Iowa 1978). In determining whether an issue is supported by sufficient evidence, we give it "the most favorable construction possible in favor of the party urging submission" of an instruction. Hoekstra, 382 N.W.2d at 108. We have viewed the evidence in the present case in light of these principles, and conclude that the instruction in question was warranted.

We think that the record contains substantial evidence from which the jury could have found that a storm occurred on the day of the plaintiff's accident. Four of the defendant's employees testified that on December 19, 1984, sleet and freezing rain occurred intermittently throughout the day. In addition, the plaintiff's mother testified that December 19 was "an icy, cold and wintry day" and that some ice and freezing rain had accumulated prior to her daughter's fall. The plaintiff argues, however, that the record does not contain evidence

sufficient to establish that a "storm" as severe as that alluded to in the challenged instruction occurred. We disagree. Contrary to the plaintiff's assertion, a "storm" is not a term with legal significance, but rather is a word defined by the application of ordinary principles. 83 C.J.S. Storm, p. 106 (1953); see also Pearson v. Arrostook County Mut. Fire Ins. Co., 149 Me. 313, 315-316, 101 A.2d 183, 185 (1953) (a storm is an atmospheric disturbance attended by rain, snow, hail, sleet, or thunder and lightning). Similarly, we disagree with the plaintiff's contention that expert climatological testimony was necessary to establish that a storm had occurred on the day in question. We think that the supreme court's decision in Anderson v. City of Fort Dodge, 213 N.W.2d 527 (Iowa 1973), explicitly refutes this assertion. In Anderson, the court held that a laywitness was qualified to testify as to whether ice which had accumulated on a street was "old" ice; the basis for the court's holding was that such testimony was in essence "a conclusion drawn from facts of common observation." Anderson, 213 N.W.2d at 529. Similarly here, the determination of whether a "storm" had occurred is a conclusion drawn from the common knowledge of the witnesses and the jury. See 83 C.J.S. Storm, p. 106 (1953).

The plaintiff further argues that even if the challenged instruction is supported by substantial evidence, the trial court erred in failing to advise the jury that they must first determine whether a storm had occurred. Because this objection was not presented to the trial court, we are precluded from considering it as a basis for reversal upon appeal. See Iowa R. Civ. P. 196 (all objections to instructions must be specifically stated before the trial court and no additional grounds may be considered on appeal). The plaintiff's sole objection presented to the trial court was that the instruction was not supported by substantial evidence. We do not think that this objection alerted the trial court to the additional ground mentioned above, and accordingly, we conclude

that the latter basis of error has been waived. See Jensen v. Crabb, 380 N.W.2d 736, 737-78 (Iowa App. 1985).

We reiterate our finding that the challenged instruction was properly supported by the evidence, and consequently, we affirm the judgment in favor of the defendant.

AFFIRMED.