IN THE COURT OF APPEALS OF IOWA

No. 0-089 / 99-0339
Filed June 14, 2000

JILL C. JOHNSTON and DAVID K. JOHNSTON,
Plaintiffs-Appellants,

vs.

CHEESE ENTERPRISES, INC., d/b/a CHEESE'S SHURFINE FOOD CENTER,
Defendant-Appellee.

FILED
JUN 14 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Taylor County, David L. Christensen, Judge.

Plaintiffs appeal from the district court judgment entered following a jury verdict in defendant's favor on plaintiffs' negligence claim. Plaintiff contends the court erred (1) by submitting jury instructions employing the distinction between invitee and licensee; and (2) in submitting instructions which misapplied the doctrine of avoidable consequences. **AFFIRMED.**

David S. Wiggins of Wiggins & Anderson, P.C., West Des Moines, for appellant.

Michael F. Lacey, Jr., and Michael S. Jones of Patterson, Lorentzen, Duffield, Timmons, Irish, Becker, & Ordway, L.L.P., Des Moines, for appellee.

Heard by Huitink, P.J., and Streit and Miller, JJ.

MILLER, J.

Plaintiffs Jill and David Johnston appeal from a judgment entered on a jury verdict in favor of the defendant, Cheese Enterprises, Inc. (hereinafter "Cheese's"). In this premise liability case, the Johnstons claim trial court error in jury instructions. We affirm.

This case arises from a slip and fall that occurred at Cheese's Shurfine Food Center in Lenox, Iowa, in August 1995.[1] On June 30, 1997, the plaintiffs filed a petition at law, claiming Cheese's was liable for causing and leaving a puddle of water on the grocery store floor, which caused Jill's accident and was the proximate cause of her physical and mental pain and suffering, loss of wages and medical expenses. Jill's husband, David, claimed a loss of consortium as a result of the slip and fall. Cheese's answered, denying all material allegations and claiming Jill Johnston was at fault. After trial to a jury, the jury returned a verdict in favor of Cheese's. The Johnstons appeal, claiming the court erred in giving jury instructions.

Our review of trial court determinations concerning jury instructions is for correction of errors at law. Iowa R. App. P. 4; *Beyer v. Todd*, 601 N.W.2d 35, 38 (Iowa 1999). "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." *Id.* (quoting *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 539 (Iowa 1996)). Parties are entitled to have their legal theories submitted to a jury if they are supported by the pleadings and substantial

[1] The plaintiffs contended the slip and fall occurred on August 22, 1995, while the defendant presented evidence that the accident actually occurred on August 17, 1995, the same day plaintiff Jill Johnston had outpatient surgery on her right foot. The surgery resulted in her having to use crutches. For the purpose of this appeal, however, the date of the slip and fall is irrelevant.

evidence in the record. *Id.* Failure to give a requested jury instruction does not warrant reversal unless it results in prejudice to the party requesting the instruction. *Id.* A party's objections to the court's instructions must be "sufficiently specific to alert the trial court to the basis of the complaint so that if error does exist the court may correct it before placing the case in the hands of the jury." *Boham v. City of Sioux City, Iowa*, 567 N.W.2d 431, 437-38 (Iowa 1997) (quoting *Moser v. Stallings*, 387 N.W.2d 599, 604 (Iowa 1986).

At trial the plaintiffs objected to Instructions No. 15 through 20, and requested that instead the court give the instructions set forth on pages 16 through 19 of their proposed instructions. Their objection was that Instructions No. 15 through 20 improperly continued the distinction between invitees and licensees, contrary, they urged, to the opinion of four justices of an evenly divided court in *Sheets v. Ritt, Ritt & Ritt, Inc.*, 581 N.W.2d 602 (Iowa 1998). Their proposed instructions were based on that opinion in *Sheets*.

On appeal the plaintiffs continue to urge "the trial court erred in giving jury instructions that continue the distinction between invitee and licensee." However, much more specifically they complain this prejudiced them "because of element number 2 in the Uniform Jury Instruction." The instruction in question is Instruction No. 17, based on Iowa Civil Jury Instruction 900.1. We will pass the question of whether the plaintiffs' objection and request in the trial court was sufficiently specific to alert the trial court to the basis of this much more specific complaint now made on appeal and address it as well as the general objection raised in the trial court.

Element number 2 of Instruction No. 17, an "elements" or "marshalling" instruction, required the plaintiffs to prove:

> 2. The defendant knew or in the exercise of reasonable care should have known:
>
> a. The plaintiff would not discover the condition, or
> b. The plaintiff would not realize the condition presented an unreasonable risk of injury, or
> c. The plaintiff would not protect herself from the condition.

The plaintiffs argue this element is erroneous because based on the distinctions between invitees and licensees and prejudiced them because "[i]f the jury believes that Jill Johnston knew or should have known of the water on the floor, they would find no duty and answer the first question of the verdicts 'no.' That is what exactly was done in this case." They further contend "[i]n the Instructions requested by the Plaintiffs, the duty is not dependant upon what Plaintiff knew or didn't know, but rather on the conditions which existed at the time of the incident."

The plaintiffs' argument concerning element 2 fails because element 2 does not focus on what the plaintiff knew or didn't know, but instead focuses on what the *defendant* knew or should have known. Element 2 specifically focuses on what was or should have been foreseeable by the defendant. In other words, element 2 of the instruction focuses on whether the defendant knew or should have known Jill Johnston would not discover the water, would not realize the water presented an unreasonable risk of injury, or would not protect herself from the condition. The jury instruction objected to merely follows the plaintiff's theory of the case, as pled and supported by evidence, that customers such as Jill Johnston "habitually pay attention to goods displayed on shelves rather than walkway floors," and the defendant knew or should have known such displays

would cause Jill Johnston to be distracted and not watch the floor for otherwise obvious hazards.

The plaintiffs' objection to Instructions No. 15 through 20 and related objection to the trial court's failure to give their requested alternative instructions fail for two additional reasons. First, as noted in *Richardson v. Commodore, Inc.*, 599 N.W.2d 693, 698 n.3 (Iowa 1999), the position advanced by four justices in *Sheets* has not gained the approval of a majority of the Iowa Supreme Court. "Therefore, the status of the plaintiff continues to be a relevant consideration in premises liability law." *Richardson*, 599 N.W.2d at 698 n.3. Therefore, the law that prevailed before *Sheets*, distinguishing between invitees and licensees, still prevails. The trial court did not err in submitting instructions based on plaintiff Jill Johnston being a business invitee.

Second, the Johnstons' argument fails because they suffered no prejudice. "[T]he uniform instruction seems quite innocuous and, in [plaintiff's] situation, not misleading." *Sheets*, 581 N.W.2d at 606. The Johnstons are unable to show how the requested instruction would have improved their chances of recovery. There was no prejudice. *Sheets*, 581 N.W.2d at 607.

To summarize, element 2 of Instruction No. 17 does not suffer from the defect claimed by plaintiffs, the instructions given by the court were a correct and accurate statement of current law, and no prejudice occurred as a result of the trial court overruling plaintiffs' objection to Instructions No. 15 through 20 and request for alternative instructions.

Plaintiffs next contend the doctrine of avoidable consequences was misapplied in the instructions given to the jury. They focus on Instruction No. 13

and Instruction No. 21. Instruction No. 13 defines negligence and is taken verbatim from Iowa Civil Jury Instruction 700.2. Instruction No. 21 is an "elements" or "marshalling" instruction concerning what defendant had to prove on its claim of plaintiff Jill Johnston's comparative negligence, and closely tracks Iowa Civil Jury Instruction 400.6. Plaintiffs focus on one of the specifications of fault in Instruction No. 21, by which the trial court informed the jury that the defendant claimed plaintiff Jill Johnston was at fault in "[f]ailing to exercise ordinary care under the circumstances then and there existing." The plaintiffs argue that by giving Instructions No. 21 and 13 together, "the court allowed the jury to go beyond the duty of avoidable consequences. The court allowed the jury to speculate on what would be reasonable care under the circumstances due to the failure of the court to set out specific specifications on negligence."

If required to decide, we would no doubt find the specification of fault quoted above from Instruction No. 21 to be fatally defective for lacking required specificity. *See, e.g., Rinkleff v. Knox*, 375 N.W.2d 262, 266 (Iowa 1985). Further, nothing in Instructions No. 13 and 21 appears to present any issue involving the doctrine of avoidable consequences. However, for the following reason we need not address either of these matters.

In submitting the case to the jury, the court submitted special verdict forms on each plaintiff's claim. Each contained special interrogatories. Question one of each asked whether the defendant was at fault. The jury answered in the negative on each. It thus did not reach further questions, one of which dealt with whether the plaintiff Jill Johnston was at fault. Therefore any error in submitting the challenged instructions did not prejudice the plaintiffs. *See Ladeburg v. Ray*,

508 N.W.2d 694, 696 (Iowa 1993) (holding when a case is submitted to a jury on special interrogatories and the jury finds the defendant not at fault, any alleged error regarding a jury instruction that addresses comparative fault need not be addressed as there can be no resulting prejudice).

AFFIRMED.