FILED
AUG 2 3 1989
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

39

HAZEL BRANNING,

Plaintiff-Appellee,

vs.

JACK FLESKES, d/b/a JACK FLESKES CONSTRUCTION,

Defendant-Appellant.

JACK FLESKES d/b/a JACK FLESKES CONSTRUCTION,

Cross-Petitioner-Appellant,

vs.

GLENN BRANNING and GLENN BRANNING FARMS, INC.,

Cross-Petitioner-Defendants-Appellees.

9-106
88-576

Appeal from the Iowa District Court for Carroll County (28481), R.K. Richardson, Judge.

Defendant appeals a jury verdict in this personal injury case. **AFFIRMED.**

Kirke C. Quinn and Bruce L. Anderson of Doran, Courter, Quinn & Doran, Boone, for defendant-appellant.

Russell S. Wunschel, Carroll, for plaintiff-appellee.

Stephen D. Hardy and Ross H. Sidney of Grefe & Sidney, Des Moines, for cross-petitioner/defendants-appellees Branning Farms.

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

SCHLEGEL, J.

This appeal arises from a personal injury case in which the jury found defendant 65% at fault and plaintiff 35% at fault. Defendant contends the trial court erred by: sustaining a motion for a directed verdict made by the cross-petition defendants; permitting an expert witness to give an opinion on a subject not suitable for expert testimony; and excluding on hearsay grounds evidence that was admissible as an admission against interest. We affirm.

Hazel Branning and Glenn Branning are husband and wife. Glenn was the president of the family farm corporation, Glenn Branning Farms, Inc. (GBFI) and Hazel was an officer of GBFI. Jack Fleskes was an independent contractor hired to build a house on land owned by GBFI. Hazel brought this action against Fleskes after she was injured by falling into an open sump pit in the basement of the house. She alleged negligence on Fleskes' part for leaving the sump pit uncovered.

Fleskes filed a cross-petition against GBFI as the landowner, alleging negligence for failure to maintain a safe premises, and against Glenn, alleging that he knew of the uncovered sump pit but failed to warn Hazel.

This is an action at law. Therefore this court reviews for the correction of errors at law. Iowa R. App. P. 4.

Appellant first contends that it was error for the trial court to direct a verdict in favor of GBFI. In considering a motion for a directed verdict, this court views the evidence in the light most favorable to the nonmoving party. Iowa R. App. P. 14(f)(2). Appellant submits that there were three possible theories of recovery against GBFI under the Restatement (Second) of Torts: 1) as possessor of the land, section 414A; 2) as joint possessor, section 422; and 3) as being in control of the subcontractor, section 414. Under all three of these theories the crucial issue is control, whether it is control over the land, joint control with the subcontractor, or control over the subcontractor himself.

In Lunde v. Winnebago, 299 N.W.2d 473, 459 (Iowa 1981), the court discussed what constituted a possessor of land under section 422 of the Restatement (Second) of Torts. "Here, Winnebago was not a possessor of the land; it had relinquished occupation and control of it to Henningsen during the construction period." This is clearly not a case where GBFI possessed the land. GBFI had relinquished control of the premises to the contractor and even had to ask him for a key to get in the house. The joint possession theory recognizes that in certain circumstances complete control is not given to the independent contractor and so the owner should be liable for those aspects of the land over which he maintains control. There is no aspect

of this house over which GBFI retained control. Finally, appellant contends that even though GBFI may not have been actually on the premises it exerted substantial control over the actions of the subcontractor. In Lunde, the court imposed the condition of substantial control. Id. Substantial control was clearly not exercised by GBFI. The actions of the appellees in cleaning up or helping in small ways was merely an expression of the general concern that the job be done in a satisfactory manner, which every owner of land possesses. The joint possession theory is merely an extension of the possessor of land theory to an owner/independent contractor situation. The element of control must still exist, and in this case it does not.

We need not address appellant's contention that the directed verdict prevented the court from properly instructing the jury regarding the fault of GBFI as the granting of the motion for a directed verdict was correct.

Appellant next challenges the admission of the answer of plaintiff's expert witness to the question "Based upon your investigation, did you come to any conclusions as to whether Hazel exercised caution for her own safety?" The answer of the witness was as follows:

> A. Yes, I evaluated Mrs. Branning's action preceding the accident as I understood them, which were that she had a light at the stairway, she proceeded down the stairway, the lighted stairway. With a lighting fixture, carrying a lighting fixture. At the bottom of the stairs she set the lighting fixture down and proceeded empty-handed across the basement where there was some visibility into the far room to turn on the

> lights before doing anything further. My evaluation of those actions indicates normally its expected behavior. There was no contributory act.

The trial judge ordered that the last comment of the witness, as to the contributory act, be stricken and instructed the jury to disregard it. The receipt of opinion evidence is committed to the sound discretion of the trial court, and we will not interfere unless a manifest abuse of discretion has resulted in prejudice to the complaining party. Bornn v. Madagan, 414 N.W.2d 646, 647 (Iowa App. 1987).

The admissibility of expert testimony is governed by Article VII of the Iowa Rules of Evidence. The rules specifically state that testimony in the form of a opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. Iowa R. Evid. 704. Iowa follows the liberal rule that allows opinion testimony if it will aid the jury and is based on special training, experience, or knowledge with respect to the issue in question. Miller v. Bonar, 337 N.W.2d 523, 528 (Iowa 1983). In the Bornn case the court applied this liberal standard to an accident reconstruction expert and allowed him to testify as to what the party could have done to avoid the accident. This is essentially the same situation. The expert in this case was a safety engineer who in his testimony described a series of acts on the part of Hazel which, in his opinion,

was expected conduct. The only part of the evidence that could be considered a true legal conclusion was the last statement, and that statement was stricken by the trial judge. The witness in this instance was clearly qualified to testify as to safety and the mental processes it takes to perceive and physically react. It was not a clear abuse of discretion by the trial judge to allow the testimony.

Appellant's final contention is that a statement during a deposition of Hazel Branning that, "Glenn knew it but I did not know it," should not have been excluded by the trial court. The subject that Glenn supposedly knew about was whether the sump pit was left open. The answer to the question was clearly not within the personal knowledge of Hazel. The only possible way Hazel could know if Glenn knew it is if he or someone else told her or if she merely assumed it. Hazel did not testify that Glenn told her anything. Her statement "that Glenn knew it," purported to be from her own personal knowledge, which is not possible. The requirement of personal knowledge is imposed by Iowa Rule of Evidence 602 and is a prerequisite to the admissibility of testimony. Even if we assume the question was answered in a manner to suggest hearsay, it is still inadmissible. If a statement is hearsay then it must be subject to some exception to be admissible. The exception cited by the appellant is Iowa Rule of Evidence 801(d)(2),

admission by a party opponent. In order to be admissible against GBFI there must be proof that GBFI authorized the statement or that Hazel made the statement concerning a matter within the scope of her agency. There is no evidence of either of these. It was well within the discretion of the trial judge to exclude the statement.

AFFIRMED.

Oxberger, C.J., concurs; Sackett, J., concurs in part and dissents in part.

SACKETT, J. (concurring in part and dissenting in part)

I concur in part and dissent in part. I agree with the majority's decision to affirm the judgment of plaintiff-appellee Hazel Branning.

I do not agree with the majority's decision to affirm the directed verdict as to cross-petitioner/appellee Glenn Branning Farms, Inc. I find substantial evidence of negligence on the part of Glenn Branning Farms and would reverse and remand the cross-petition for a new trial.