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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-740 / 90-1235

ROBERT BROWN and BRENDA BROWN,

Appellants,

vs.

K-MART CORPORATION,

Appellee.

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Appeal from the Iowa District Court for Polk County, Jerrold Jordan, Judge.

Plaintiffs appeal judgment on jury verdict and contend the trial court erred in failing to submit specific allegations of negligence. **REVERSED AND REMANDED.**

Tom Drew and David D. Drake of Lawyer, Lawyer, Dutton & Drake, West Des Moines, for appellants.

Paul C. Thune of Peddicord, Wharton, Thune, Foxhoven & Spencer, Des Moines, for appellee.

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

SCHLEGEL, J.

Plaintiffs Robert Brown and Brenda Brown appeal a judgment on a jury verdict finding defendant K-Mart Corporation had not been negligent. Plaintiffs argue that the trial court erred in failing to submit specific allegations of negligence to the jury and in failing to grant a new trial based upon juror misconduct. We reverse and remand for a new trial.

I. On July 19, 1987, plaintiff Robert Brown slipped and fell at a K-Mart Store in Des Moines. Brown was walking through the toy department and looking at the displays when he slipped on a toy which was in the aisle. At the time, there were several toys on the floor. Brown injured his neck, requiring a cervical fusion.

Brown and his wife brought this suit alleging K-Mart had a known safety procedure of picking up their toys, but this safety procedure had not been followed on the day of the accident. K-Mart argued that Brown had not been keeping a proper lookout. The jury returned a verdict for K-Mart. The district court denied Brown's motion for a new trial. Brown appeals.

II. Brown contends that the jury instructions were inadequate because the court did not submit his specifications of negligence to the jury. He believes that the instructions did not adequately set forth his claims that K-Mart failed to provide a safe place to shop, that K-Mart failed to follow its own safety procedures, and that

K-Mart failed to warn him there may be dangerous toys on the floor.

Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. State v. Freeman, 267 N.W.2d 69, 71 (Iowa 1978). Submission to the jury of issues that have no support in the evidence is error. W. T. Rawleigh Medical Co. v. Bane, 181 Iowa 734, 739, 165 N.W. 42, 43-44 (1917). Conversely, failure to submit issues that are supported by substantial evidence is error. Borough v. Minneapolis & St. L. R. Co., 191 Iowa 1216, 1223, 184 N.W. 320, 323 (1921). The trial court has a duty to ensure that the jury understands the issues it must decide. Clinton Land Co. v. M/S Assocs., Inc., 340 N.W.2d 232, 234 (Iowa 1983). Thus, the court must "instruct with reasonable fullness on pleaded issues supported by substantial evidence." Id. The trial court also has a duty to ensure that the jury understands the law it must apply. Sanders v. Ghrist, 421 N.W.2d 520, 522 (Iowa 1988). In evaluating this, we read all of the instructions together, not piecemeal or in artificial isolation. Id.; Clinton Land Co., 340 N.W.2d at 234. We will reverse and order a new trial if the instructions as a whole are insufficient to convey the applicable law. Sanders, 421 N.W.2d at 522.

Plaintiffs complain that instructions 14 and 15 were merely abstract statements of law and are inadequate. Those instructions read as follows:

INSTRUCTION NO. 14

The Plaintiff claims that the Defendant was at fault because of Defendant's negligence. In order to establish this claim, the Plaintiff must prove all of the following:

1. The Defendant knew or in the exercise of reasonable care should have known, of a condition on the premises that involved an unreasonable risk of injury to a person in the Plaintiff's position. This particular claim of fault is further explained to you in Instruction No. 15.

2. The condition was one that the Defendant should have expected would not have been discovered or realized by the Plaintiff, or one that the Defendant should have expected that Plaintiff would fail to protect himself from.

3. The Defendant was negligent in failing to make the condition safe to protect the Plaintiff.

4. The fault of the Defendant was a proximate cause of the Plaintiff's damage.

5. The amount of damage.

If the Plaintiffs have failed to prove any of these propositions, then the Plaintiffs are not entitled to recover damages. If Plaintiffs have proved all of these propositions, then you will consider the Defendant's defense of Plaintiff's comparative fault as explained to you in Instruction No. 25 and 27.

INSTRUCTION 15

The law provides that a store owner is under a duty to use reasonable care to keep its premises safe for use by customers. This standard of care does not require the store to be free from all conditions that could possibly cause harm so as to guarantee or insure the safety of all customers, but a store owner is liable for physical harm to customers caused by certain conditions existing on the premises if the owner fails to use reasonable care to protect customers from harm in accordance with the following rules.

(1) The duty of a store owner to a customer by reason of a condition on the premises does not arise until the owner (a) knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk of harm to a customer, and (b) should expect that the customer, as a reasonable and prudent person, will not discover or realize the danger or will fail to protect himself against it.

When such a duty arises, the store owner must then exercise reasonable care to protect the customer from the danger.

However, as to a condition on the premises which the existence of and danger of is known or obvious to a customer, the owner is under no duty to a customer with respect to such condition unless the store owner, as a reasonable and prudent person or business, should anticipate harm to the customer despite such knowledge or the obviousness of the condition. In anticipating harm to a customer under such circumstances, the store owner has a right to assume a customer will act as a reasonable and prudent person.

The store owner is presumed to know all conditions on his premises caused or created by him, his agents or employees, and is charged with knowledge thereof without further proof.

In applying the above rules of law to this case, you are instructed that you must first determine from all of the facts and circumstances disclosed by the evidence the actual conditions existing on the defendant's premises at the time of the incident involved herein.

If you then find from the evidence (1) that K-Mart knew or by the existence of reasonable care would have discovered the toys in the aisle and should have realized that it involved an unreasonable risk of injury to a person in the position of the [sic] Rob Brown, and (2) that the condition was such that a person in the position of K-Mart should expect that the [sic] Rob Brown would not reasonably discover or realize the danger, or would fail to protect himself against it, and (3) that K-Mart failed to exercise reasonable care to protect the [sic] Rob Brown in any of the particulars by him, then K-Mart would be negligent.

Plaintiffs complain that specific allegations of negligence should have been included as set out in their proposed instruction 43:

1. That K Mart was negligent in one or more of the following ways:

A. By failing to provide a safe place for Rob Brown to shop.

B. By failing to follow K Mart's own safety procedures of picking up toys that were left on the floor in the aisle.

C. By failing to warn Rob Brown of the danger presented of toys being on the floor in the aisle.

We conclude that the trial court abused its discretion in submitting instructions 14 and 15 as they now read. With slight changes, instruction 14 appears to be drawn from Iowa Civil Jury Instruction 900.1. The first numbered paragraph of instruction 14 has an extra sentence that makes reference to further explanation and essentially incorporates instruction 15. Paragraph three of model instruction 900.1 states: "The defendant was negligent in [set forth the particulars of the claim of negligence in failing to protect the plaintiff]." Paragraph three of instruction 14 states: "The Defendant was negligent in failing to make the condition safe to protect the Plaintiff."

Instruction 15 is a hodgepodge of statements about store owner liability. The source of instruction 15 is not apparent, but part of the instruction is reminiscent of Restatement (Second) of Torts section 343 and model instruction 900.4 on notice of premise conditions. The last paragraph restates, almost verbatim, the first three numbered paragraphs of instruction 14.

We do not think this is sufficient. As is well stated in Wambsgans v. Price, 274 N.W.2d 362, 365-66 (Iowa 1979), and Hagenson v. United Tel. Co., 209 N.W.2d 76, 82-84 (Iowa 1973), abstract statements of law are not adequate instructions. While the trial court need not word jury

instructions in a particular way, Schuller v. Hy-Vee Food Stores, Inc., 407 N.W.2d 347, 351 (Iowa App. 1987), the court has a duty to ensure that the jury understands the issues it must decide, Clinton Land Co., 340 N.W.2d at 234. The supreme court held in Gibbs v. Wilmeth, that the plaintiff is entitled to have the instructions reasonably tailored to the case because "a mere abstract definition of a term, having no application to the particular controversy, is insufficient." 261 Iowa 1015, 1022, 157 N.W.2d 93, 97-98 (1968). There as here, the circumstances were important, but were not called to the attention of the jury. We cannot agree with defendant that merely rewording the model instruction's admonition to "set forth the particulars of the claim of negligence" to state "failing to make the condition safe" rises above an abstract definition. Clearly, "[t]he instruction was incomplete and could be nothing except confusing to the jury." Id. at 1022, 157 N.W.2d at 97.

Because we hold that the instructions given were inadequate, we must reverse the judgment of the district court and remand for a new trial. Because this issue is determinative, we need not address the remaining issues of jury misconduct.

REVERSED AND REMANDED.

Oxberger, C.J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I dissent. I would affirm the trial court.