IN THE COURT OF APPEALS OF IOWA

No. 6-768 / 95-1973

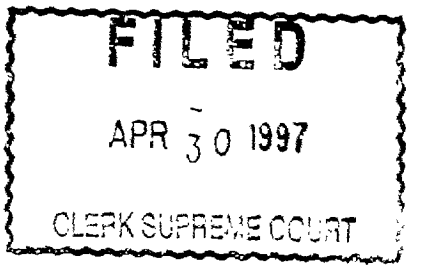
LORRAINE BANGS,

Appellee,

vs.

PIONEER JANITORIAL OF AMES, INC.,

Appellant.



Appeal from the Iowa District Court for Story County, Dale E. Ruigh, Judge.

Defendant appeals the judgment entered in this case as a result of a jury verdict. **AFFIRMED.**

John B. Grier and Merrill C. Swartz of Cartwright, Druker & Ryden, Marshalltown, for appellant.

Ed Skinner and Donald G. Beattie of Skinner & Beattie, P.C., Altoona, for appellee.

Heard by Cady, P.J., Huitink, J., and Schlegel, S.J.*

* Senior judge from the Iowa Court of Appeals serving on this court by order of the Iowa Supreme Court.

SCHLEGEL, S.J.

Plaintiff Lorraine Bangs (Bangs), an employee of the K-Mart store in Ames, Iowa, brought suit against defendant Pioneer Janitorial of Ames, Inc. (Pioneer) for injuries suffered by Bangs when she fell at her place of employment. She claimed the fall resulted from wet wax that was being applied on the floor of the store by employees of Pioneer. Pioneer operated under a contract with K-Mart for the cleaning and care of its floors. On a day when Pioneer employees were applying wet wax to the floor, Bangs, who was engaged in stocking shelves in the course of her employment, fell on a recently waxed portion of the floor. She suffered injuries for which she sought damages.

The case was tried to a jury, which returned a verdict in favor of Bangs for her injuries; past, present, and future pain; disability; and lost wages. The jury awarded no amount for medical expenses, although the uncontroverted evidence in the record showed that Bangs incurred $68,234.05 in medical expenses attributable to the injuries she received as a result of the fall. The jury found that Bangs and Pioneer were each fifty percent at fault.

On a motion by Bangs, the court, after hearing, ordered an additur of the amount of the past medical expenses, and ordered judgment in favor of plaintiff and against defendant of one-half the past medical expenses plus the other items allowed by the jury, resulting in a judgment in the amount of one-half of $309,834.05, or the

sum of $154,917.03, plus interest. The court ordered the parties to each pay one-half of the court costs.

Pioneer appeals. It claims the trial court erred in failing to properly instruct the jury and that it erred in granting plaintiff's motion for additur.

Additional facts will be set out as needed to clarify issues discussed later in this opinion.

I. INSTRUCTION ERRORS.

(A) Pioneer first claims the trial court erred in failing to give Pioneer's requested jury instruction on Bang's failure to provide for her own safety by utilizing other aisles instead of a newly waxed aisle. The court gave the following Instruction No. 9 on the issue of Bang's comparative negligence:

> Concerning the defense of comparative negligence referred to in instruction No. 8, damages may be caused by the negligence of more than one person. Pioneer Janitorial claims that if it was negligent in this case, Ms. Bangs was also negligent in causing her own fall and injuries. In order to prove this defense of comparative negligence, Pioneer Janitorial must prove all of the following propositions:
>
> 1. Ms. Bangs was negligent in one or more of the following ways:
>   (a) In failing to keep a proper lookout as she walked, as explained in Instruction No. 9-A.
>   (b) In failing to heed any warnings about the wet wax on the K-Mart floor, which warnings she was aware of or in the exercise of reasonable care should have been aware of.
> 2. Ms. Bangs' negligence was a proximate cause of her fall and injuries.
>
> If Pioneer Janitorial has failed to prove any one or more of these propositions, Pioneer Janitorial has not proved its defense of comparative negligence. If Pioneer Janitorial has proved all of these

propositions, then you will assign a percentage of negligence against Ms. Bangs and include Ms. Bangs' negligence in the total percentage of negligence found by you in answering questions on the Special Verdicts.

Instruction No. 9-A, referred to in Instruction No. 9, provided:

"Proper lookout" refers to the lookout a reasonable person using ordinary care would keep as she walks through an area under the same or similar circumstances. It means more than looking and seeing. It includes being aware of one's movements in relation to things seen or which could have been seen in the exercise of ordinary care.

Pioneer claims the court erred in failing to give its requested Instruction No. 3 on the issue of comparative negligence, as follows:

The Defendant has asserted the defense of comparative fault. In order to establish this defense the Defendant must prove each of the following propositions:

1. The Plaintiff, Lorraine Bangs, was negligent in one or more of the following propositions:
   a. in failing to maintain a proper lookout;
   b. in failing to exercise ordinary care for her own safety by avoiding walking on a recently waxed floor;
   c. in failing to exercise ordinary care for her own safety by utilizing other aisles available to her in the store so as not to encounter the recently waxed aisle.
2. That such negligence was a proximate cause of the Plaintiff's injuries and damages.

If the Defendant has established each of these propositions, then you shall assign a percentage of fault to the Plaintiff in accordance with Instruction No: ____.

The trial court considered the requested instruction and defendant's objection to the court's proposed Instruction No. 9, and held that paragraph 1(c) of defendant's requested Instruction No. 3 (set out above) was subsumed in the second specification

of negligence in Instruction No. 9. The second specification of negligence in Instruction No. 9 reads: "In failing to heed any warnings about the wet wax on the K-Mart floor, which warnings [plaintiff] was aware of or in the exercise of reasonable care should have been aware of." Requested Instruction No. 3(1)(c) read as follows: "In failing to exercise ordinary care for [plaintiff's] own safety by utilizing other aisles available to her in the store so as not to encounter the recently waxed aisle."

This court must view the evidence in the light most favorable to the party requesting the instruction. *Knauss v. City of Des Moines*, 357 N.W.2d 573, 576 (Iowa 1984); *Ort v. Klinger*, 496 N.W.2d 265, 268 (Iowa App. 1992). Instructions must be read and construed together, not piecemeal or in artificial isolation. *Sanders v. Ghrist*, 421 N.W.2d 520, 522 (Iowa 1988); *Ort*, 496 N.W.2d at 268. A court may refuse to give an instruction where the matter is adequately covered in another instruction. *Johnson v. Interstate Power Co.*, 481 N.W.2d 310, 324 (Iowa 1992); *Ort*, 496 N.W.2d at 268. The trial court is free to draft jury instructions in its own language as long as they fairly cover the issues. *Norton v. Adair County*, 441 N.W.2d 347, 358 (Iowa 1989); *Sanders*, 421 N.W.2d at 522; *Ort*, 496 N.W.2d at 268; *Schuller v. Hy Vee Food Stores*, 407 N.W.2d 347, 351 (Iowa App. 1987).

We agree with the trial court that the matter sought by defendant to be included is properly excluded. From the instructions given on lookout, both in Instruction No. 9 and in Instruction No. 9-A, the issue defendant sought to include by a separate specification was before the jury. Again, the instruction concerning plaintiff's failure

to heed warnings which she knew or in the exercise of reasonable care should have been aware of places the issue defendant urges within the instructions. Defendant was not prejudiced by the refusal of the court to give the specific instruction contained in defendant's requested Instruction No. 3.

> We will not grant a reversal on the basis of error in giving or refusing to give a particular jury instruction unless the action results in prejudice to the defendant.

Foggia v. Des Moines Bowl-O-Mat, Inc., 543 N.W.2d 889, 892 (Iowa 1996); *Rudolph v. Iowa Methodist Medical Ctr.*, 293 N.W.2d 550, 555 (Iowa 1980).

(B) Pioneer claims error by the court because it did not instruct on the duty of K-Mart to provide a safe place for plaintiff to work. It is claimed that in the absence of such an instruction defendant would be unable to argue to the jury that K-Mart had made no complaint of the adequacy of Pioneer's warnings.

The trial court's decision on instructions will not be disturbed absent an abuse of discretion. *State v. Cunningham*, 463 N.W.2d 887, 889 (Iowa App. 1990). To constitute an abuse of discretion, the court's discretion must have been exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.* The trial court did not abuse its discretion in refusing the requested instruction.

There is nothing in the record to indicate Pioneer was unable to make its argument to the jury. Nor do the pleadings in the case suggest any such claim with respect to K-Mart. In addition, the evidence does not suggest that K-Mart breached any duty it owed to plaintiff. The trial court acted within its discretion in not

instructing the jury on the duty of K-Mart to provide a safe place for plaintiff to work. Defendant was not prejudiced thereby. We find no merit in this claim.

(C) Pioneer further claims the court erred in failing to correctly instruct the jury on the duty to warn of an obvious condition or one known to plaintiff. Defendant complains the jury should have been instructed that it could not find Pioneer liable if the danger to plaintiff by the wax was open and obvious. Defendant's position seems to be related to its requested Instruction No. 1(4). In that instruction, Pioneer requested the court instruct the jury that Bangs must prove:

> Lorraine Bangs did not know and did not have any reasonable basis to know that wet wax was present in the K-Mart store and that it posed a risk to her.

Under Iowa law, and the decisions of this court, that proposition is not a correct statement of law. In *Coleman v. Monson*, 522 N.W.2d 91 (Iowa App. 1994), the court held that mere knowledge of the presence of water in the store, where the injured party did not know where it was, did not excuse the defendant.

> We believe plaintiff's evidence is sufficient to permit an inference the water in the aisle where she fell would not have been obvious to one exercising ordinary care. We also believe a jury could have found on the present record that defendant had superior knowledge of where the floor was wet and, in the exercise of reasonable care, should have warned the plaintiff of that fact. We find the district court correctly found that it could not say that as a matter of law defendant had fully discharged his duty to plaintiff.

Coleman, 522 N.W.2d at 94 (citation omitted). Likewise in this case we cannot say that the district court, as a matter of law, could say defendant had discharged its duty

to plaintiff so as to require the giving of the requested instruction. We affirm the trial court on this issue.

II. ADDITUR.

Finally, defendant claims the trial court was in error in ordering an additur representing fifty percent of the proven medical bills. In its special verdict, the jury allowed damages for the following items, in the following amounts:

Past medical expenses	$ 0.00
Past loss of wages	32,000.00
Future loss of earning capacity	46,800.00
Past loss of function of mind and body	12,800.00
Future loss of function of mind and body	50,000.00
Past pain and suffering	50,000.00
Future pain and suffering	50,000.00

The damages allowed by the jury totaled $241,600.00. The jury also found that plaintiff and defendant were each fifty percent at fault. The effect of that finding reduces the award to plaintiff to $120,800.00.

Defendant moved the court to grant its motion for directed verdict; to grant judgment notwithstanding the verdict; or in the alternative, to order a new trial. Plaintiff resisted defendant's motions and moved the court to enlarge or modify the judgement, asking that the jury verdict be modified to add the uncontested medical expenses in the amount of $68,234.05 to the jury's findings. She asked that the court enter an additur in that amount. The court overruled defendant's motions and ordered a further hearing on the issue of additur.

There is no dispute in the amount of medical expenses resulting from

plaintiff's injuries. Defendant suggests the treating doctor did not know the reason for the lack of healing (aseptic necrosis) of the fracture, resulting in extensive further medical treatment, but the record does not suggest any dispute concerning the need for medical treatment as a result of the injuries incurred in her fall or the reasonableness of the charges. We then have a situation where the jury has decided that defendant is liable for the injuries received by plaintiff, but has failed to allow medical expenses which were proven in the record without dispute.

The recent case of *Kerndt v. Rolling Hills National Bank*, ___ N.W.2d ___ (Iowa 1997), holds as follows:

> An inadequate award merits a new trial as much as an excessive one. Iowa R. Civ. P. 244(d); *Witte* [*v. Vogt*], 443 N.W.2d 715, 716 (Iowa 1989). Whether the damages awarded are inadequate in a particular case depends on the facts of that case. *Id.* "If uncontroverted facts show the amount of the verdict bears no reasonable relationship to the loss suffered, the verdict is inadequate." *McHose v. Physician & Clinic Servs., Inc.*, 548 N.W.2d 158, 162 (Iowa App. 1996). In such a case, refusal by the district court to grant either an additur or a new trial is an abuse of discretion. *Id.* In cases involving undisputed or liquidated damages or damages reasonably susceptible to precise calculation, additur is appropriate. 58 Am.Jur.2d *New Trial* § 585, at 512 (1989).

Kerndt, ___ N.W.2d at ___.

As stated in *Kerndt*, there is no reasonable relationship between the jury's award of no amount for medical expenses and the evidence of those expenses in the record. It is suggested the trial court made its ruling upon the belief that the jury had some erroneous thoughts about the payment of medical expenses by some other entity. What the jury had in mind in returning no amount for medical expenses is

immaterial. The undisputed evidence showed the medical expenses attributable to the injuries suffered by Bangs to be $68,234.05. By the jury verdict, Bangs is entitled to one-half that amount, unless she will receive it in addition to the medical bills already paid by her employer. The parties agreed K-Mart was entitled to subrogation of the amount paid by it. At the time of the court's ruling on the motions for new trial and for judgment notwithstanding the verdict, it was not known if K-Mart would claim its subrogation right. It had not perfected a lien against the award to Bangs at the time of the hearing. The trial court correctly ruled that its failure to file a lien did not deprive K-Mart of its right of subrogation or indemnification. *See Shirley v. Pothast*, 508 N.W.2d 712, 717 (Iowa 1993). It provided for a further hearing to determine if K-Mart intended to enforce its right of indemnity. At that hearing, it was apparent K-Mart intended to do so. The result will be that Bangs will not have an additional benefit from the inclusion of the medical expense reimbursement in the jury verdict. The trial court's action in this respect was in accordance with the procedure suggested by the supreme court in *Schonberger v. Roberts*, 456 N.W.2d 201, 203 (Iowa 1990), and prescribed by this court in *Loftsgard v. Dorrian*, 476 N.W.2d 730, 735 (Iowa App. 1991). This is a case in which additur is proper. We affirm the trial court's addition of the medical expenses to the verdict rendered by the jury, and affirm the judgment entered by the trial court.

All issues having been decided, we affirm the trial court in all respects.

AFFIRMED.

Huitink, J., concurs; Cady, P.J., dissents.

CADY, J. (dissenting)

I respectfully dissent. The majority concludes the district court did not err in failing to instruct the jury that Pioneer had no duty to Bangs if the wax was open and obvious. It finds the instruction was not necessary because the wax was not open and obvious as a matter of law.

I do not believe courts must find a dangerous condition open and obvious before the instruction is given. Instead, the jury should be instructed there is no duty if *it* finds the dangerous condition was open and obvious.