

IN THE COURT OF APPEALS OF IOWA

No. 9-102 / 98-0472

Filed April 30, 1999

JOE E. HUFFMAN,

Plaintiff-Appellee,

vs.

JOSH ROBERTS and PATTI ROBERTS,

Defendants/Third-Party Plaintiffs-Appellants,

vs.

**DOUGLAS PRICHARD, JOHN SMITH,
RICHARD VOGT, d/b/a CROSS IRON EXCAVATION,
JOHN DOE I and JOHN DOE II,**

Third-Party Defendants.

Appeal from the Iowa District Court for Jefferson County, Daniel P. Wilson,
Judge.

Defendants appeal the jury verdict in plaintiff's favor for injuries he suffered
after he stepped into a trench on defendants' property. **REVERSED AND
REMANDED FOR NEW TRIAL.**

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

Allan C. Orsborn of Orsborn, Bauerle & Milani, L.L.P., Ottumwa, for
appellees.

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

MAHAN, J.

Josh and Patti Roberts appeal the jury verdict in Joe Huffman's favor for injuries he suffered after he stepped into a trench on the Roberts' property. The Roberts contend the district court erred in overruling their motions for a directed verdict, a judgment notwithstanding the verdict, and in instructing the jury. We reverse and remand for a new trial.

In 1992, the Roberts purchased a four-acre lot for the site of a home they had designed by Cooper Norman of Prairie Architects in Fairfield. They had never built a home before and had no construction experience. Throughout the course of the three-year project, the Roberts had three general contractors: Dan Walker, who worked on the project until April 1993; John Smith, who worked on the project from September 1993 to July 1994; and Doug Prichard, who worked on the project from October 1994 until April 1995. Between contractors, little or no work was performed.

Huffman, an employee of GTE Telephone Company, was on the site to install telephone service. He was injured on October 26, 1994, when he stepped into a trench on the property near the utility transformers. The trench was approximately six inches wide, twelve to eighteen inches deep, and five feet long. The trench was partially settled in and weeds had grown up around it. The trench apparently was dug for an electrical line during the time John Smith was working on the project. It is dangerous to backfill near transformers and should be packed by hand. If not backfilled properly, the fill will settle over time and create a depression. The record does not disclose who backfilled the trench or when.

Huffman filed suit against the Roberts alleging they were at fault in allowing the open trench to exist on their property, failing to warn Huffman of the existence of the open trench, and failing to mark the open trench. The case was tried to a jury, which was instructed, in part, as follows:

INSTRUCTION NO. 17. The owner of premises is presumed to know all conditions on the premises that are caused or created by the owner or the owner's agent. The owner of premises is not responsible for an injury suffered by a person on the premises which resulted from a condition of which the owner had no knowledge, unless the condition existed for a long enough time that in the exercise of reasonable care the owner should have known about it.

(A) The term "agent" includes the owner's contractors or subcontractors and any agent, employee, or subcontractor of the owner's contractors or subcontractors.

(B) The right to control the manner and method of performing the work is the primary test for determining whether a person is an independent contractor or an employee. If the person doing the work answers to another only as the result of the work but selects the manner and method of doing the work, such person must be regarded as an independent contractor.

INSTRUCTION NO. 19. A possessor of land who entrusts to an independent contractor construction, repair or other work on the land, or on a building or other structure upon it, is subject to the same liability as though he had retained the work in his own hands to others on or outside of the land for physical harm caused to them by the unsafe condition of the structure.

(A) While the possessor has retained possession of the land during the progress of the work; or

(B) After he has resumed possession of the land upon its completion.

The jury returned a verdict in favor of Huffman and awarded him \$40,899 in damages. The Roberts appeal.

I. STANDARD OF REVIEW. We review rulings denying motions for directed verdict and judgment notwithstanding the verdict for correction of errors at law. Iowa R. App. P. 4. Our inquiry on review is whether there is sufficient evidence to justify submitting the case to the jury. *Tredrea v. Anesthesia & Analgesia, P.C.*, 584 N.W.2d 276, 280 (Iowa 1998); *Heick v. Bacon*, 561 N.W.2d 45, 47 (Iowa 1997). If the party against whom the motion was made has presented substantial evidence on each element of the claim, a directed verdict or judgment notwithstanding the verdict should be denied. *Tredrea*, 584 N.W.2d at 280; *Heick*, 561 N.W.2d at 47; *Frunzar v. Allied Property & Cas. Ins. Co.*, 548 N.W.2d 880, 884-85 (Iowa 1996). Evidence is substantial for purposes of sustaining a finding of fact if a reasonable person would accept the evidence as adequate to reach a conclusion. *Frunzar*, 548 N.W.2d at 884-85. We view the evidence in the light most favorable to the party against whom the motion was made and take into consideration every legitimate inference that may fairly and reasonably be made. Iowa R. App. P. 14(f)(2); *Frunzar*, 548 N.W.2d at 884-885; *Willey v. Riley*, 541 N.W.2d 521, 526 (Iowa 1995).

We review challenges to jury instructions for errors of law. Iowa R. App. P. 4; *Sheets v. Ritt, Ritt & Ritt, Inc.*, 581 N.W.2d 602, 604 (Iowa 1998); *Kragel v. Wal-Mart Stores, Inc.*, 537 N.W.2d 699, 702 (Iowa 1995).

II. JUDGMENT AS A MATTER OF LAW. The Roberts contend the district court erred in overruling their motions for a directed verdict and a judgment notwithstanding the verdict. Specifically, the Roberts assert they were not possessors

of the land as a matter of law. Without deciding whether or not the Roberts were possessors of the land, we agree the determination of whether the Roberts owed a duty to Huffman should have been made by the district court as a matter of law and not submitted to the jury.

The possessor of land is under a duty to use ordinary care to keep the premises in a reasonably safe condition for business invitees. *Konicek v. Loomis Bros., Inc.*, 457 N.W.2d 614, 618 (Iowa 1990). This duty requires the possessor to use reasonable care to ascertain the actual condition of the premises. *Id.* The duty also requires the possessor to make the area reasonably safe or to give warning of the actual condition and risk involved. *Id.* (citing Restatement § 343 comment d; accord *Greenwell v. Meredith Corp.*, 189 N.W.2d 901, 905 (Iowa 1971)).

The mere fact of ownership is not sufficient to impose liability for premises defect. While ownership includes the right of possession and control, "possessory rights may be 'loaned' to another, thereby conferring the duty to make the premises safe while simultaneously absolving oneself of responsibility." *Galloway v. Bankers Trust Co.*, 420 N.W.2d 437, 441 (Iowa 1988) (citing *Merritt v. Nickelson*, 407 Mich. 544, 553, 287 N.W.2d 178, 181 (1980)); cf. *Lunde v. Winnebago Indus., Inc.*, 299 N.W.2d 473, 479-80 (Iowa 1980) (owner of real estate who transferred possession to contractor not liable simply by reason of ownership of property); Restatement (Second) of Torts § 422 comment c (no liability of owner when possession surrendered to contractor).

Although the possessor-of-land exception is defined by control over the land, courts make this determination by looking at the degree of control exercised over the work. *Robinson v. Poured Walls of Iowa, Inc.*, 553 N.W.2d 873, 876 (Iowa 1996). A party's involvement may be insufficient as a matter of law to create liability as a possessor of land under our prior interpretations of section 343 of the Restatement. *Id.* (citing *Downs v. A & H Const., Ltd.*, 481 N.W.2d 520, 524-25 (Iowa 1992) (general contractor, who owned property developed for show home and regularly inspected progress of subcontractor's work, exercised insufficient control over premises to be held liable under Restatement sections 343 or 414 for injury sustained by carpenter)); *Lunde*, 299 N.W.2d at 479 (premises owner not liable as possessor of land where occupation and control of property relinquished to independent contractor during construction period); *Thrasher v. Gerken*, 309 N.W.2d 488, 489 (Iowa 1981) (no liability as possessor of land where employer's only involvement was to insure construction complied with contract specifications). Only where the record reveals substantial control over the premises has liability been imposed. *Id.* (citing *Stephens v. Crown Equip. Corp.*, 22 F.3d 832, 835-36 (8th Cir.1994) (applying Iowa law) (control retained where employer gave independent contractor's employees detailed instructions through use of "pick cards," had nearly exclusive control over equipment used, and contractually reserved right to control scope of work)); *Giarratano v. Weitz Co.*, 259 Iowa 1292, 1305, 147 N.W.2d 824, 830-31 (1967) (control retained where general contractor assumed responsibility for safety aspects of entire job); *Farris v.*

General Growth Dev. Corp., 354 N.W.2d 251, 254 (Iowa App.1984) (general contractor exercised control over job site through general supervision, inspection, and direction of work)).

The issue of retained control is inescapably part of the duty issue, which is necessarily and properly determined as a matter of law by the court. *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 814 (Iowa 1994) (citing *Davis v. Kwik-Shop, Inc.*, 504 N.W.2d 877, 879 (Iowa 1993) (court rejected plaintiffs' argument that a factual issue existed and determined defendant had no duty as a matter of law); *Downs*, 481 N.W.2d at 522 ("Whether a duty exists is a question of law." [quoting *Sankey v. Richenberger*, 456 N.W.2d 206, 207 (Iowa 1990)]); *Shaw v. Soo Line Railroad Co.*, 463 N.W.2d 51, 53 (Iowa 1990)). The question of whether the Roberts were possessors of the land should have been determined by the district court as a matter of law; it was error to submit the case to the jury without resolving this issue.

III. JURY INSTRUCTIONS. The Roberts contend the district court erred in instructing the jury. Specifically, the Roberts are challenging instructions seventeen and nineteen. We find the errors in instructing the jury are traceable to the district court's failure to determine whether the Roberts were possessors of the land and consequently owed a duty to Huffman. Since we are remanding this case for a new trial, we need not discuss this issue.

For these reasons, we reverse and remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

No. 98-0472. [9-102] HUFFMAN v. ROBERTS

Appeal from the Iowa District Court for Jefferson County, Daniel P. Wilson, Judge. **REVERSED AND REMANDED FOR NEW TRIAL.** Heard by Huitink, P.J., and Streit and Mahan, JJ. Opinion by Mahan, J. (7 pages \$2.80)

Josh and Patti Roberts appeal the jury verdict in Joe Huffman's favor for injuries he suffered after he stepped into a trench on the Roberts' property. **OPINION HOLDS: I. *Judgment as a Matter of Law.*** The Roberts contend the district court erred in overruling their motions for a directed verdict and a judgment notwithstanding the verdict because, the Roberts assert, they were not possessors of the land as a matter of law. Without deciding whether or not the Roberts were possessors of the land, we agree the determination of whether or not the Roberts owed a duty to Huffman should have been made by the court as a matter of law. **II. *Jury Instructions.*** The Roberts contend the district court erred in instructing the jury. We find the errors in instructing the jury are traceable to the district court's failure to determine whether the Roberts were possessors of the land and consequently owed a duty to Huffman. Since we are remanding this case for a new trial, we need not discuss this issue.