

IN THE COURT OF APPEALS OF IOWA

FILED

MAY 22 1984

CLERK SUPREME COURT

GARY DOLTER AND VICKIE DOLTER,)

Plaintiffs-Appellees,)

Filed May 22, 1984

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vs.)

DUBUQUE SUPPLY COMPANY, d/b/a)

THE LIGHTING CENTER AND THE)
FIREPLACE SHOPPE,)

4-109
83-1000

Defendant-Appellant.)

Appeal from the Iowa District Court for Dubuque County - Roger F. Peterson, Judge.

Defendant appeals from judgment for plaintiffs in a negligence action.
AFFIRMED.

David L. Hammer and Les V. Reddick of O'Connor, Thomas, Hammer, Bertsch & Norby, Dubuque, Iowa, for defendant-appellant.

William C. Fuerste of Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C., Dubuque, Iowa, for plaintiffs-appellees.

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

Defendant appeals from judgment for plaintiffs in a negligence action.

Plaintiff Vickie Dolter fell and injured her ankle as she passed through an interior doorway connecting two separate businesses operated by the defendant. She sued alleging that defendant was negligent in maintenance and design of the doorway and failure to warn of a three and one-half inch change in elevation between the two shops. Plaintiff Gary Dolter brought a claim for loss of consortium. Defendant asserted that the proximate cause of the injury was plaintiff's failure to keep a proper lookout. The jury returned a verdict for plaintiffs finding that Vickie was not negligent. Judgment was entered in the amount of \$77,784 for Vickie and \$1,000 for Gary.

On appeal defendant maintains: (1) the trial court's instructions erroneously stated the duty of care of a shopkeeper; (2) the trial court erred in allowing an architect to testify as to custom and usage regarding floor elevation changes in a public building; and (3) the trial court erred in allowing a medical expert to testify concerning future medical expenses without requiring his opinion to be based on a reasonable degree of medical certainty.

Our review of this action at law is on assigned error. Iowa R. App. P. 4.

I. Jury Instructions. In Schuller v. Hy-Vee Food Stores, Inc., 328 N.W.2d 328, 332 (Iowa 1982), the supreme court summarized the duty a storekeeper owes to business invitees as follows:

A storekeeper expects and intends that business visitors will look at the goods which are displayed to attract their attention. Ordinarily the customer has a right to assume the floor is free of obstructions and pitfalls. This does not mean a customer may ignore a hazard that is as apparent, foreseeable and known to the customer as to the storekeeper. For example, a customer who sees a stockperson stocking shelves may be charged with knowledge that a box may be on the floor in proximity to that activity. See Meador v. Paetz Grocery Co., 259 Iowa 1101, 147 N.W.2d 211 (1966). Generally, however, the storekeeper cannot complain if a customer looks at displayed goods instead of at the floor. The customer is

not bound to the same care to avoid obstacles as a pedestrian on the street, and the storekeeper's care must be correspondingly greater.

In the present case the trial court incorporated some of the language from Schuller into Instruction 12 which provides in part:

However, where a possessor of real property such as a storekeeper expects and intends that business visitors will look at the goods which are displayed to attract their attention and which the storekeeper hopes they will buy, the customer who is expected and intended to look at goods which are displayed to attract her attention has a right to assume the floor is free from obstructions and pitfalls, and in such situation of displayed goods, the care of the storekeepers to constitute ordinary and reasonable care must be correspondingly greater.

Defendant asserts that the instruction as given is a misstatement of the law because it omits the language in Schuller requiring an invitee to be aware of obvious or foreseeable hazards.

In determining whether there has been an error, jury instructions must be read as a whole. State v. Horn, 282 N.W.2d 717, 730 (Iowa 1979). As long as a subject is covered by the court's instructions, it is not error for the court to reject any specific language or form requested. See State v. Jones, 193 N.W.2d 509, 514 (Iowa 1972). In this case the trial court included the following sentence in Instruction 16 concerning plaintiff's duty: "You are instructed that at the times material hereto it was Plaintiff's duty to keep a proper lookout and to observe conditions and things which were obvious or reasonably apparent and to use reasonable care to avoid the dangers thereof, if any." We conclude that the language above from Instruction 16 is substantially similar to the omitted language of Schuller so that the jury was adequately instructed on the duty of plaintiff to observe obvious or foreseeable dangers. The instructions given, when read together, do not imply that defendant is strictly liable for accidents occurring on its premises.

II. Testimony Regarding Custom. Defendant submits that the trial court erred in allowing an architect to testify that it is customary to avoid slight

elevation changes in public buildings because of the risk of injury to the public. Defendant claims that since the witness was engaged in a different occupation than defendant, the testimony should not be admitted without a showing that defendant knew of the custom. Defendant cites authority that evidence of a custom cannot be introduced to bind a party to a contractual obligation unless that party has actual knowledge of the custom, has assented to it, or the custom is so prevalent that he will be presumed to have knowledge of it. 21A Am. Jur. 2d Customs and Usages §§ 18-20 (1981); Des Moines Blue Ribbon Distributors, Inc. v. Drewrys Ltd U.S.A., Inc., 256 Iowa 899, 913, 129 N.W.2d 731, 740 (1964); Wall v. Mutual Life Insurance Co., 217 Iowa 1106, 1111-12, 253 N.W. 46, 48 (1934). The present action is not based on a contract, however. In a negligence action, evidence of custom is admissible as relevant to what is reasonable care under the circumstances. Gibson v. Shelby County Fair Association, 246 Iowa 147, 151, 65 N.W.2d 433, 435-36 (1954). The custom may be shown, as a fact, by a witness who is qualified by knowledge and experience to testify to its existence. McCrary v. Sino, 254 Iowa 856, 861, 118 N.W.2d 592, 595 (1962). In McCrary a body shop foreman was allowed to testify as to the customary method used in locking truck doors in a negligence action against an experienced truck driver. In the present case an architect having knowledge and experience of how interior doorways are designed testified as to the customary method of handling elevation changes. We conclude that he was qualified to testify to this fact. Defendant's contention that he was not aware of the custom does not make the evidence less relevant to the issue of the proper standard of care of a reasonable person.

Defendant further claims that the substance of the architect's testimony was a matter of general knowledge, and was, therefore, not the proper subject for expert testimony. The witness was qualified as an expert to show his knowledge of the custom. However, he did not give an opinion as an expert. A custom must be established as a matter of fact and not of opinion. Gibson v. Shelby County

Fair Association, 246 Iowa at 153, 65 N.W.2d at 437. Any person who knows of the custom is a competent witness to testify regarding it. Id. There was no error in allowing this witness to testify.

III. Medical Testimony. At trial a deposition of plaintiff's treating physician was read into the record. Defendant objected to the line of questioning of future medical expenses on the ground that the doctor's opinion was not based on a reasonable degree of medical certainty. The following excerpts are from direct examination:

Question: Is there anything that you see as a matter of reasonable medical probability, Doctor, will have to be done because of this anticipated future degeneration?

Answer: Well, I believe that in a patient who is not yet thirty years of age and showing these changes that it's very probable she will go on to require fusion of her ankle, making the ankle stiff so it does not move at all.

* * *

Question: Could you give us an approximation of the medical and hospital costs that such a procedure entails, Doctor?

* * *

Answer: I can't give you any approximation of the hospital costs. I would think that the surgical costs would be in the range of a thousand dollars.

* * *

Question: Doctor, do you anticipate with or without this future fusion surgery that you have talked about that Mrs. Dolter will be incurring medical expenses in the future?

* * *

Answer: Well, I would feel that most everything that can be done has been done to this point and that she may have some expenditure for analgesics, aspirin, some of the other anti-inflammatory medications, and I will presume there will be some ongoing expense as the ankle deteriorates, but really it comes down to that she's going to have pain until it gets so bad she wants something done and then the other expenses will be incurred.

Defense counsel reopened the subject on cross-examination and elicited the following testimony:

Question: In other words, to tell a jury that this lady is going to have a fusion operation or going to be in a cast and it's going to cost a thousand dollars for just the medical part of it is not a certainty as to this patient?

Answer: Well, I think it was testified to as medically probable.

In Bostian v. Jewell, 254 Iowa 1289, 1298-99, 121 N.W.2d 141, 146 (1963), the supreme court stated:

The rule is clear that opinion testimony of a physician or medical expert as to the future consequences or effects of an existing injury or condition is admissible only as to those which are reasonably certain to occur, or which are medically probable. Consequences or effects which are a mere possibility are not admissible.

The physician in this case testified as a matter of reasonable medical probability that fusion surgery would be required. While his testimony on direct examination as to the cost of the surgery was only an "approximation," on cross-examination he testified that these expenses were "medically probable." Defense counsel is bound by the answer he received on cross-examination. It is clear that the doctor's opinion was not mere speculation.

AFFIRMED.