IN THE COURT OF APPEALS OF IOWA

No. 0-610 / 89-1177

FILED
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CLERK SUPREME COURT

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TAMARA SINDELAR,

Appellant,

vs.

GERALD L. WEINER, Individually and d/b/a **GLW INVESTMENTS,**

Appellee.

Appeal from the Iowa District Court for Woodbury County, Edwin L. Mitchell, Judge.

The plaintiff was raped in her apartment. She later sued the owner of the apartment building, alleging failure to provide a reasonably safe and secure apartment. A jury returned a verdict in favor of the defendant, and the plaintiff has appealed the resulting adverse judgment. **AFFIRMED.**

Roxanne Barton Conlin of Galligan & Conlin, P.C., Des Moines, for appellant.

James R. Villone and William Kevin Stoos of Klass, Hanks, Stoos, Carter & Villone, Sioux City, for appellee.

Considered by Donielson, P.J., and Schlegel and Hayden, JJ.

DONIELSON, P.J.

This case involves plaintiff's claims that her landlord failed to provide her with a reasonably safe and secure apartment. A jury trial resulted in a verdict for defendant. Plaintiff now appeals. We affirm.

Tamara Sindelar lived in Apartment 6 at 1523 Nebraska Street in Sioux City, Iowa. This apartment was on the second floor. She rented her apartment from Gerald L. Weiner, doing business as GLW Investments, in December 1984. There was a metal fire escape on the south side of the building. The metal fire escape was attached to a platform base approximately six feet above the ground. No fan or air conditioning was provided with the apartment.

Sindelar worked as a supervisor for other night-shift waitresses. On September 7, 1985, she returned to her apartment at about 3:00 a.m. after getting off work. Because it was hot outside Sindelar slept with the window open. Sometime during the night Lawrence Harvey cut through the window screen and entered the apartment by the fire escape. Harvey then raped Sindelar and stole $140.

Because of this experience, Sindelar quit working nights and would only work days. She gave up her position as supervisor until April 1987. She also gave up her part-time job. Sindelar attended group therapy for several months. In November 1987 Sindelar's long-time romantic relationship with Jeff Gray ended. She felt this was due in part to her feelings about the rape.

Sindelar later filed the present lawsuit against the owner of the apartment building, alleging failure to provide a reasonably safe and secure apartment. Her primary complaints about the apartment related to the nature and placement of the fire escape and the windows, which allegedly gave access to intruders too easily; she also complained about the absence of air conditioning, which required the window to be open on hot nights.

Sindelar's suit was tried to a jury, which returned a verdict in favor of the defendant. Sindelar appeals the resulting adverse judgment.

I.

Initially we consider the proper scope of review. The action below was tried at law. Our scope of review is on assigned error only. Iowa R. App. P. 4.

II.

Sindelar challenges the district court's instruction on the duty of care owed by a landlord to a tenant. Sindelar contends the district court erred by instructing the jury on the duty of care owed by a real estate owner to ordinary business invitees. She argues the district court should instead have instructed the jury that a landlord owed a tenant a "high degree of care" and a "positive duty".

Generally, a landlord owes a greater duty of care to his tenants than to a business invitee. Bostian v. Jewell, 121 N.W.2d 141, 144, 254 Iowa 1289, 1295 (1963). A landlord may be subject to liability for injuries resulting

from his failure to exercise reasonable care to keep common areas reasonably safe. Bostian, 121 N.W.2d at 145, 254 Iowa at 1297; Primus v. Bellevue Apartments, 44 N.W.2d 347, 351, 241 Iowa 1055, 1061 (1950).

However, a landlord is not an insurer against every conceivable act of a third party and his responsibility is limited to providing reasonable security against crimes under the circumstances shown in the record. Brichacek v. Hiskey, 401 N.W.2d 44, 47 (Iowa 1987). Whether conduct is reasonable is usually a fact question rather than a question of law. Id. The pertinent question is whether the criminal acts by a third party could have been reasonably anticipated so as to impose a duty upon the landlord to increase existing security measures. See Johnson v. Palmer College Foundation, 271 N.W.2d 768, 770 (Iowa App. 1978).

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). However, the trial court's ruling regarding this decision will not be disturbed absent an abuse of the trial court's discretion. State v. Christensen, 323 N.W.2d 219, 222 (Iowa 1982); State v. Lewis, 391 N.W.2d 796, 798 (Iowa App. 1986). We will not find an abuse of discretion unless "such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." Id.

The jury instructions in this case adequately set forth the duties of a landlord to keep leased premises reasonably safe. We affirm the jury verdict.

III.

Sindelar also appealed based on four evidentiary issues.

A. First, Sindelar contends the district court erred by admitting evidence of her private sexual conduct subsequent to the rape and evidence of her use of birth control measures. Sindelar contends this evidence was irrelevant and was a prejudicial attempt to portray her as a sexually-promiscuous person. She also appears to suggest that the use of this evidence impermissibly invaded her constitutional right to privacy. The defendant responds, among other things, that the evidence was relevant to damages because Sindelar was claiming damages for sexual dysfunction and for inability to form intimate relationships.

Determinations of relevance of evidence rest within the sound discretion of the trial court and will be reversed only upon a showing that such discretion has been abused. State v. Gordon, 354 N.W.2d 783, 784 (Iowa 1984). The point at which questioning into private sexual conduct becomes more prejudicial than probative is within the sound discretion of the trial court. See State v. Harmon, 238 N.W.2d 139, 145 (Iowa 1976).

We have repeatedly held that ordinarily, matters not raised in the trial court, including constitutional questions, cannot be effectively asserted for the first time on appeal. State v. Lyon, 223 N.W.2d 193, 194 (Iowa 1974). Sindelar did not raise her constitutional objections, based on right to privacy, to this area of questioning in the trial court.

We believe that the trial court did not abuse its discretion here. Because Sindelar claimed damages for sexual dysfunction and for inability to form intimate relationships, the district court did not err in concluding defendant was entitled to question her in these areas.

B. Second, Sindelar contends the district court erred by refusing to allow her building security expert to testify concerning his opinion on the foreseeability of crimes occurring on the premises.

The admissibility of expert testimony rests in the sound discretion of the trial court, and the trial court's determination will not be disturbed on appeal unless manifest abuse of that discretion causing prejudice to the complaining party is shown. State ex rel. Leas v. O'Neal, 303 N.W.2d 414, 420 (Iowa 1981).

Although the same expert, Anthony Potter, was allowed to testify about the foreseeability of criminal activity in a shopping mall, Galloway v. Bankers Trust Co., 420 N.W.2d 437, 440 (Iowa 1988), we believe the trial court acted within its discretion in this case. Potter was allowed to

testify that the building did not meet the standard of care for landlords and that this failure to meet the standard of care was a proximate cause of the rape. The fact that Potter was not able to give his opinion concerning foreseeability did not prejudice the plaintiff.

C. Third, Sindelar contends the district court erred by excluding her evidence regarding other crimes in the apartment building, both before and after her rape, her evidence regarding lax security in the building, and her evidence that persons were frequently on the building's fire escapes.

The determination of similarity of conditions and timeliness involves relevancy and is vested in trial court discretion. Madison v. Colby, 348 N.W.2d 202, 210 (Iowa 1984). Sindelar was allowed to introduce evidence of prior crimes in the neighborhood in order to show foreseeability. The general rule is that prior, non-violent incidents may provide a basis for a finding of foreseeability of personal confrontation crimes. Galloway v. Bankers Trust Co., 420 N.W.2d 437, 440 (Iowa 1988).

The trial court properly did not allow evidence of incidents that occurred after the rape. Evidence of subsequent acts ordinarily is inadmissible to show antecedent negligence. 65A C.J.S. Negligence §224 (1966).

D. Finally, Sindelar contends the district court erred by allowing the defendant to testify that a deceased former maintenance employee had reported that Sindelar hosted

"wild parties" and had "a lot of men coming and going all the time". Sindelar contends this testimony was inadmissible hearsay, was irrelevant, and was highly prejudicial to her.

While Sindelar now complains about this testimony, her counsel on cross-examination brought out Weiner's doubts about Sindelar's reputation based on statements of the maintenance worker. Under the doctrine of invited error, a party may not complain of an error which she has invited or to which she has assented. Knudsen v. Merle Hay Plaza, Inc., 160 N.W.2d 279, 285 (Iowa 1968).

Furthermore, the rule in Iowa is that when one party introduces inadmissible evidence, with or without objection, the trial court has discretion to allow the adversary to offer otherwise inadmissible evidence on the same subject when it is fairly responsive. State v. Padgett, 300 N.W.2d 145, 147 (Iowa 1981). Thus, defendant could introduce the evidence of the content of the maintenance worker's statements to Weiner.

IV.

After considering all of the issues in this case, we affirm the judgment for defendant entered in district court.

AFFIRMED.