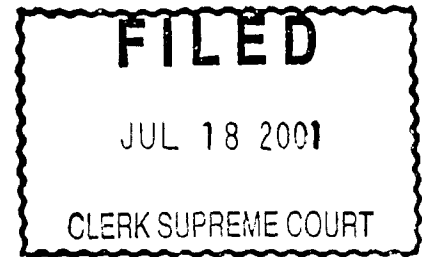


IN THE COURT OF APPEALS OF IOWA

No. 1-036 / 00-0817
Filed July 18, 2001



DOUGLAS R. BLOW,
Plaintiff-Appellant,

vs.

MARTIN BROTHERS COMPANY, FAYE DOROTHY ANDERSON,
and **HOPE MARTIN ANDERSON,**
Defendants-Appellees.

Appeal from the Iowa District Court for Black Hawk County, Stephen C.
Clarke, Judge.

Douglas Blow appeals following the entry of judgment for the defendants
on his personal injury action. **REVERSED AND REMANDED.**

Hugh G. Albrecht of the Tom Riley Law Firm, Cedar Rapids, for appellant.

David L. Riley of Yagla, McCoy & Riley, P.L.C., Waterloo, for appellees.

Considered by Streit, P.J., and Hecht and Vaitheswaran, JJ.

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STREIT, P.J.

Plaintiff appeals the district court's entry of judgment for defendants in his personal injury action. We find the court should have instructed the jury that defendants had a nondelegable duty to inspect and maintain the premises where his injuries occurred.

This case involves a duplex, originally a farmhouse, which was purchased by Martin Brothers Company in the 1940s.¹ The farmhouse was remodeled in the mid-1970s to create a duplex, with one unit on the main floor, and one unit upstairs. The sole access to the upstairs unit was an outside, wooden staircase. In 1983 Martin Brothers sold the duplex to Faye Anderson and Hope Anderson, mother and son.

B & C Property Management managed several rental properties owned by the Andersons, including the duplex. B & C Property Management was operated by Cindy Blow. Cindy periodically hired Doug Blow Construction, owned and operated by her brother, Douglas Blow (Blow), to do repair work on the rental properties.

In 1998 Cindy called Blow and told him the stove was not working in the upstairs unit of the duplex. Blow went to the duplex. As he was climbing the outside stairs, a step gave way, and he began to fall through the stairs. Blow was holding on to the handrail with his right hand, and he was able to catch himself, but in the process he claims he hurt his right shoulder and arm. Blow later had surgery on his wrist and shoulder.

¹ The sole shareholders of Martin Brothers Company were Faye Anderson and Hope Anderson.

Blow filed suit against Martin Brothers and the Andersons on a theory of premises liability. The district court granted a directed verdict for Martin Brothers because they did not own the property at the time of the incident. At the trial, Blow presented the expert testimony of David Brost, an architect. Brost testified the stairs had been constructed with nongalvanized nails, which were not proper for outdoor use because they became rusty. He stated the step gave way because the nails had rusted through. Brost also testified the stairs had not been properly maintained by replacing the rusty nails with galvanized nails.

Hope Anderson testified he went to the duplex about one time per year and glanced at the property to see if there was anything obviously noticeable that needed maintenance or repairs. He never noticed any problems with the stairs. Cindy would take care of routine repairs and maintenance of the property. On cross-examination Anderson testified:

Q. Is it your testimony, sir, that someone other than you as the owner of this premises and your mother, who because of her age, I would not expect that she would be out there doing repairs or arranging for repairs, but is it your testimony that someone other than you should be making repairs to that property? A. Yes.

Q. Okay. And that, I understand you to say, should have been Cindy Blow? A. Primarily she was the one responsible for getting someone out there.

Q. Okay. But she was acting for you, was she not, sir? A. Actually Doug Blow and Cindy Blow were the ears and eyes of the property maintenance at that time.

Q. And there were acting for you? A. Yes, they were.

In light of Anderson's testimony, Blow asked for a jury instruction on an owner's nondelegable duty to maintain the premises. The district court refused to give the instruction, stating it would not be helpful to the jury in this case. The

jury returned a verdict finding defendants were not at fault. The district court denied Blow's motion for a new trial. Blow appeals.

We review a trial court's formulation of jury instructions for errors of law. *Waits v. United Fire & Cas. Co.*, 572 N.W.2d 565, 575 (Iowa 1997). If the trial court errs in submitting or refusing to submit an instruction, we will reverse only if the error has caused prejudice. *Kessler v. Wal-Mart Stores, Inc.*, 587 N.W.2d 804, 806 (Iowa Ct. App. 1998).

Blow contends the district court erred by refusing to instruct the jury that the defendants had a nondelegable duty to maintain their premises in a reasonably safe condition. He asserts defendants attempted to show the duty to inspect, repair, and maintain the premises had been delegated to another, namely B & C Property Management, operated by Cindy.

Litigants are entitled to have their legal theories submitted to the jury if they are supported by the pleadings and substantial evidence. *Thompson v. City of Des Moines*, 564 N.W.2d 839, 846 (Iowa 1997). Evidence is substantial if reasonable minds could accept it as adequate to reach a conclusion. *Weems v. Hy-Vee Food Stores, Inc.*, 526 N.W.2d 571, 573 (Iowa Ct. App. 1994). If a requested instruction states a correct rule of law which applies to the facts of the case, and the concept is not already contained in the court's instructions, the requested instruction, or one substantially similar, should be submitted to the jury. *Lane v. Coe College*, 581 N.W.2d 214, 216 (Iowa Ct. App. 1998).

Blow relies on *Kragel v. Wal-Mart Stores, Inc.*, 537 N.W.2d 699 (Iowa 1995). In that case, Wal-Mart contracted with others to remove snow from its

parking lot. *Kragel*, 537 N.W.2d at 701. A customer brought suit against Wal-Mart after she slipped and fell on ice in the parking lot. *Id.* at 702. The district court refused plaintiff's request to instruct the jury that Wal-Mart had a nondelegable duty to maintain the parking lot in a reasonably safe condition. *Id.* In reversing the district court's decision, our supreme court pointed out, "the duty of a possessor of land to keep the possessor's premises in a reasonably safe condition for business invitees is a nondelegable duty." *Id.* at 703. The court held, "a possessor of land is subject to liability to its invitees if its premises are not in a reasonably safe condition whether the possessor maintained the premises itself or hired an independent contractor to do so." *Id.* at 704.² The court concluded the jury should have received an instruction which conveyed Wal-Mart's nondelegable duty to maintain the premises in a reasonably safe condition for business invitees. *Id.* at 705.

A party's nondelegable duty is also discussed in a well-reasoned case, *Lane*, 581 N.W.2d at 216, which involved a contract between Coe College and Marriott Corporation to provide food service for students. *Id.* at 216. A Marriott employee was injured in the college kitchen, and she brought suit, claiming the college had not properly maintained the food service equipment. *Id.* The college claimed Marriott should have inspected the equipment. *Id.* at 217. We held:

A party who assumes a duty under a contract for the safety of the public or certain individuals cannot delegate the duty to an

² The court's holding is based on Restatement of Torts (Second) § 425, which applies to a possessor who holds its property open to the public as a place of business. Comment a to § 425 provides that section is analogous to § 422, which applies when a possessor of land entrusts it to an independent contractor for construction, repair or other work. We determine § 422 is applicable to the present case.

independent contractor, even when it is the independent contractor who is doing the actual work.

Id. The college could not escape liability resulting from Marriott's failure to inspect the equipment, when this duty was included in the college's duty of maintenance. *Id.* The jury should have been instructed on the college's nondelegable duty to maintain the food service equipment. *Id.*

In the present case, we determine the jury should have been instructed on the defendants' nondelegable duty to maintain the premises. Defendants were attempting to shift to Cindy the duty to maintain the premises in a reasonably safe condition. Under *Kragel*, as the possessor of land, defendants had a nondelegable duty to keep the premises in a reasonably safe condition for business invitees. See *Kragel*, 537 N.W.2d at 703. Blow was a business invitee because he was on the property for business purposes. See *Konicek v. Loomis Bros., Inc.*, 457 N.W.2d 614, 618 (Iowa 1990) ("A business invitee is one 'who is invited to enter or remain on land for the purpose directly or indirectly connected with business dealings with the possessor of land.'"). The outside stairway was a common area of the leased premises, which would remain under the control of the owner. See *Van Essen v. McCormick Enter. Co.*, 599 N.W.2d 716, 720 (Iowa 1999) (citing *Stupka v. Scheidel*, 244 Iowa 442, 448, 56 N.W.2d 874, 878 (1953) (owners frequently retain control of halls, stairways, and the outside of the building)). The defendants were the possessors of the stairway. The requested instruction contained a correct rule of law and was not otherwise contained in the court's instructions.

Plaintiff was prejudiced by the court's failure to instruct the jury on this issue. As we noted in *Lane*, "The jury was not aware of the applicability of this legal theory to the case. Prejudice resulted." *Lane*, 581 N.W.2d at 217.

We reverse and remand for a new trial.

REVERSED AND REMANDED.

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