IN THE COURT OF APPEALS OF IOWA

No. 6-154 / 95-419

APRIL HOERCHLER, As Personal Representative of the Estate of Pearl Martin,

Plaintiff-Appellee,

vs.

WAL-MART STORES, INC., A Corporation,

Defendant-Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Webster County, Gary McMinimee, Judge.

In this slip and fall case, Wal-Mart challenges the judgment entry on the jury verdict in Hoerchler's favor. **AFFIRMED.**

Fred L. Morris and Joseph M. Barron of Peddicord, Wharton, Thune & Spencer, Des Moines, for appellant.

Brian L. Yung of Bennett, Crimmins & Yung, Fort Dodge, and John W. Gailey of the Gailey Law Office, Fort Dodge, for appellee.

Heard by Sackett, C.J., Cady and Streit, JJ.

CADY, J.

Wal-Mart Stores, Inc. appeals the jury verdict and judgment awarding damages to April Hoerchler, the personal representative of Pearl Martin's estate. On our review, we affirm.

On February 22, 1993, Pearl Martin slipped on a patch of ice and fell in the parking lot of a Fort Dodge Wal-Mart store. She sued Wal-Mart seeking damages for injuries sustained in the fall. During the trial, Martin passed away due to complications from leukemia, and the trial court substituted Hoerchler, Martin's legal representative.

At trial, Dr. John Beno was called as an expert witness. He earned a Ph.D. in health and safety and worked as an associate professor at Iowa State, dealing with accident causation and prevention. He was a certified safety specialist, a member of the Governor's Safety Advising Committee, and an author of several publications dealing with health and safety matters. Beno testified, over Wal-Mart's objection, he was concerned Wal-Mart did not have a written safety policy to deal with snow and ice removal on the day of Martin's fall. He also stated it would be best if a uniform corporate policy was implemented.

At the close of Hoerchler's case, and again at the close of all the evidence, Wal-Mart moved for a directed verdict on the issue of liability. It contended the evidence showed the slippery condition of the parking lot was a known and obvious danger. It further argued Martin, as a business invitee, could not recover for injuries

resulting from this danger. The trial court denied both motions and submitted the case to the jury.

Over Wal-Mart's objection, the trial court submitted Hoerchler's instruction fourteen, referring to Wal-Mart's duty to warn Martin about the slippery condition of the parking lot or to correct the condition. The trial court, however, refused to separately instruct the jury about open and obvious dangers through Wal-Mart's proposed jury instructions seventeen and eighteen.

The jury returned a verdict finding Wal-Mart to be at fault and awarded Hoerchler $247,405.28. The trial court denied Wal-Mart's motion for judgment notwithstanding the verdict and motion for a new trial.

Wal-Mart appeals. It contends the trial court erred in allowing Dr. Beno to testify regarding Wal-Mart's lack of a written or corporate snow removal policy. It argues the absence of such a policy is not evidence of negligence, and any testimony regarding these policies should have been excluded. Wal-Mart also contests the trial court's failure to grant its motion for directed verdict. It finally argues the trial court erred in submitting jury instruction fourteen and in failing to submit Wal-Mart's proposed instructions seventeen and eighteen to the jury.

I. Expert Testimony

We employ a liberal rule which allows expert testimony if it will aid the jury and is based on special training, experience, or knowledge with respect to the issue in question. *Miller v. Bonar*, 337 N.W.2d 523, 528 (Iowa 1983). The admissibility

of expert testimony is a matter committed to the sound discretion of the district court. *Poyzer v. McGraw*, 360 N.W.2d 748, 752 (Iowa 1985). We will not interfere with the district court's ruling unless a *manifest* abuse of discretion has resulted in prejudice to the complaining party. *Miller*, 337 N.W.2d at 528.

Dr. Beno has a strong educational and vocational background in accident causation, accident prevention, health, and safety. He works as an associate professor of occupational safety and industrial technology. His teaching duties include defining programs to control health and safety matters. He has studied the interrelationship between management and its commitment to safety. He is a certified specialist from the World Safety Organization and a member of the Governor's Safety Advisory Committee. We find Dr. Beno's educational background and work experience adequately qualify him to testify about the need for a written corporate policy to outline procedures to deal with a specific safety issue, specifically snow and ice removal. *See* Iowa R. Evid. 702; *Hunter v. Board of Trustees*, 481 N.W.2d 510, 520 (Iowa 1992) (expert witness need not be a specialist in the particular area of testimony so long as the testimony falls within his or her general area of expertise). Dr. Beno's lack of experience in dealing with snow and ice removal goes to the weight the jury should place on his opinion, rather than its admissibility.

In order for an expert's opinion to be competent, sufficient facts must be present upon which an expert judgment can be made. *Iowa Power and Light Co. v. Stortenbecker*, 334 N.W.2d 326, 330-31 (Iowa App. 1983). Such facts must be

sufficient for the witness to reach a conclusion which is more than mere conjecture or speculation. *Id.* at 31. Dr. Beno stated he studied Wal-Mart's safety handbook and found no snow and ice removal policy. He also stated, based upon the facts of the case, the depositions, and his educational and vocational background, he was concerned with Wal-Mart's lack of a policy. We find sufficient facts support Dr. Beno's testimony.[1]

Expert testimony must also assist the trier of fact to understand the evidence or determine a fact in issue. Iowa R. Evid. 702; *Hunter*, 481 N.W.2d at 519. Dr. Beno offered testimony suggesting Wal-Mart should have adopted a corporate policy for snow and ice removal, stemming from his observations of the facts of the case and his expertise in the area of accident prevention and safety. Moreover, he outlined details of what should be included in the plan, including alternative suggestions. We find Dr. Beno's specialized knowledge would assist the trier of fact in determining whether Wal-Mart used reasonable care to correct the dangerous condition or adequately warned Martin of the danger.

Moreover, we note Dr. Beno's testimony was brief, and did not specifically state the absence of a written corporate policy aided to or caused Martin's accident. He merely stated he was concerned Wal-Mart did not have a policy to deal with snow

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[1] Wal-Mart contends insufficient facts existed to permit supported Dr. Beno's opinion as to the effect and impact of a corporate snow removal policy. We note Dr. Beno never specifically stated what effect a corporate policy would have on the particular day in question. However, he stated he was concerned with the absence of such a policy.

and ice removal. We do not find this testimony misled or confused the jury. Furthermore, Wal-Mart was able to provide testimony concerning its procedures for dealing with snow and ice removal, and the reason no corporate policy existed. Under our standard of review, we find the trial court did not abuse its discretion in allowing Dr. Beno's testimony.

II. Evidence of Negligence

Our scope of review is for the correction of errors of law. Iowa R. App. P. 4. On this evidentiary issue, we review for an abuse of discretion. *State v. Halstead*, 362 N.W.2d 504, 506 (Iowa 1985). In order to show an abuse of discretion, it must generally be shown the court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *State v. Blackwell*, 238 N.W.2d 131, 138 (Iowa 1976) (quoting *Weeks v. Burnor*, 326 A.2d 138, 140 (Vt. 1974)).

The determination of relevant evidence rests with the sound discretion of the trial court. Evidence is relevant if it renders the existence of a fact more probable or less probable than without the evidence. *Carter v. MacMillan Oil Co., Inc.*, 355 N.W.2d 52, 55 (Iowa 1984).

We find the trial court did not abuse its discretion by allowing various persons to testify concerning the absence of a snow and ice removal plan at the Fort Dodge Wal-Mart store. The evidence was relevant to help determine the reasonableness of Wal-Mart's inspection and correction of dangers in the parking lot on the day of the

accident. The evidence presented indicated the Wal-Mart employees may not have been properly instructed on dealing with proper snow and ice removal.[2] As such, we cannot find the trial court unreasonably exercised its discretion or exercised it for untenable reasons.

III. Motion for Directed Verdict

A directed verdict is appropriate in cases where each element of the claim is not supported by substantial evidence. *Oberreuter v. Orion Indus., Inc.*, 398 N.W.2d 206, 209 (Iowa App. 1986). The trial court must view the evidence in the light most favorable to the nonmoving party when ruling on a motion for a directed verdict. *Beitz v. Horak*, 271 N.W.2d 755, 757 (Iowa 1978); Iowa R. App. P. 14(f)(2). If reasonable minds could differ, an issue is for the jury. *Harvey v. Palmer College of Chiropractic*, 363 N.W.2d 443, 444 (Iowa App. 1984). We give considerable discretion to the trial court to determine whether evidence is sufficient to create a jury question. *Hoover's Hatchery, Inc. v. Utgaard*, 447 N.W.2d 684, 687 (Iowa App. 1989).

With premise liability cases, a landowner possesses a duty of care to business invitees to keep its premises in a reasonable condition. *Konicek v. Loomis Brothers*, 457 N.W.2d 614, 618 (Iowa 1990); *Hanson v Town & Country Shopping Center,*

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[2] Don Peck testified he normally placed "ice-melt" on a designated area near the entrances of the store. He also testified, in the past and only at the direction of management, he placed "ice-melt" in other areas of the parking lot.

Inc., 144 N.W.2d 870, 874-75 (1966); Restatement (Second) of Torts § 343 (1965). This duty of care requires a landowner "to use reasonable care to ascertain the actual condition of the premises . . . [and make] the area reasonably safe or [give] warning of the actual condition or risk involved." *Baumler v. Hemesath*, 534 N.W.2d 650, 653 (Iowa 1995).

Generally, a landowner is not liable for injuries caused by a known or obvious danger. *Baumler*, 534 N.W.2d at 653. An obvious danger means the condition and risk are apparent to and would be recognized by a reasonably prudent person, in the position of the invitee, exercising ordinary perception, intelligence and judgment. *Id.; Konicek*, 457 N.W.2d at 618; Restatement (Second) of Torts § 343A cmt. b (1965). However, a possessor of land may still be liable for injuries caused by an open or obvious danger. *Baumler*, 534 N.W.2d at 653. If a landowner can and should anticipate the condition will cause physical harm to the business invitee, despite its known or obvious condition, it has a duty to warn the invitee of the danger or make the condition reasonably safe. *Id.*; *Konicek*, 457 N.W.2d at 618; Restatement (Second) of Torts § 343A (1965). Moreover, the duty arises when the possessor has reason to expect a reasonable person, in the position of the invitee, would not anticipate the harm or guard against such harm. *See* Restatement (Second) of Torts § 343A cmt. f (1965). To resolve the question of whether the landowner, in the exercise of reasonable care to make the premises reasonably safe for business invitees, should know an invitee would not anticipate or guard against open and

obvious dangers, the evidence must be viewed in light of all the evidence presented. *Frantz v. Knights of Columbus*, 205 N.W.2d 705, 711 (Iowa 1971).

Here, testimony indicated Wal-Mart management was aware of the slippery conditions in the parking lot, as various employees commented about it throughout the day. Wal-Mart made attempts to get an outside sanding company to sand their parking lot, but it was unavailable. A witness to the fall, Ray Rogers, testified he noticed a circular patch of ice underneath Martin's body. He stated he did not see this patch of ice prior to her fall or as he was approaching her, and the icy spot would have been difficult, if not impossible to see. He also stated Martin gave no indication she noticed the patch of ice. Testimony also indicated Wal-Mart employees had, on previous occasions, sanded or salted the parking lot with a spreader. Wal-Mart's maintenance man testified there was no reason he could not salt the area of the fall two or three times a day.

A reasonable jury could have found the patch of icy spot in the parking lot was of a nature that reasonable persons would not have anticipated or guarded themselves against. A reasonable jury could also have found Wal-Mart negligently failed to correct the dangerous icy parking lot conditions, or negligently failed to warn of the dangers.

We find the evidence was sufficient to generate a jury question concerning Wal-Mart's liability to Pearl Martin. We find no error in the district court denying the motion for a directed verdict.

IV. Jury Instructions

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). The trial court has a duty to ensure the jury understands the issues it must decide. *Clinton Land Co. v. M/S Assocs., Inc.*, 340 N.W.2d 232, 234 (Iowa 1983); *McDivitt v. Des Moines City Ry.*, 141 Iowa 697-98, 118 N.W. 459, 463 (1909). In fulfilling these duties, the trial court must "instruct with reasonable fullness on pleaded issues supported by substantial evidence." *Clinton Land Co.*, 340 N.W.2d at 234.

The trial court also has a duty to ensure the jury understands the law it must apply. *Sanders v. Ghrist*, 421 N.W.2d 520, 522 (Iowa 1988). In evaluating this, we must read all of the instructions together, not piecemeal or in artificial isolation. *Id.*; *Clinton Land Co.*, 340 N.W.2d at 234. We must reverse and order a new trial if the instructions as a whole are insufficient to convey the applicable law. *Sanders*, 421 N.W.2d at 522 (citing *Adam v. T.I.P. Rural Elec. Coop.*, 271 N.W.2d 896, 900-01 (Iowa 1978)).

We find no error in the trial court submitting instruction fourteen to the jury.[3] The instruction adequately set forth the premises liability standards under Restatement (Second) Torts § 343, and mirrors Iowa's Uniform Jury Instruction 900.1. *See State v. Monk*, 514 N.W.2d 448, 450 (Iowa 1994) (uniform jury instructions favored unless faulty).

Failure to submit issues supported by substantial evidence is also error. *Borough v. Minneapolis & St. L. R. Co.*, 191 Iowa 1216, 1223, 184 N.W. 320, 323 (1917). *See Miller v. International Harvester Co.*, 246 N.W.2d 298, 301 (Iowa 1976). Here the trial court refused to submit Wal-Mart's proposed instruction

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[3] Hoerchler's instruction fourteen stated:

To recover on her claims the plaintiff must prove all of the following propositions:

1. Wal-Mart Stores, Inc., knew or in the exercise of reasonable care should have known of a slippery condition on the premises that involved an unreasonable risk of injury to a person in the position of Pearl Martin.
2. The slippery condition was one that a person in the position of Wal-Mart Stores, Inc., should have expected would not have been discovered or realized by Pearl Martin or one that Wal-Mart Stores, Inc., should have expected Pearl Martin would fail to protect herself from.
3. Wal-Mart Stores, Inc., was negligent in any of the following ways:
   a. In failing to correct the slippery condition on its parking lot.
   b. In failing to warn Pearl Martin of the slippery condition on the parking lot.
4. The negligence was a proximate cause of Pearl Martin's damage.
5. The amount of damage.

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If the plaintiff has proved all these propositions, then you will consider the defense of Pearl Martin's negligence as explained in Instruction No. 16.

seventeen and eighteen, dealing primarily with open and obvious dangers.[4] Wal-Mart's instruction essentially states if the jury finds the dangerous conditions in the parking lot to be open and obvious, it is relieved of liability. The instruction, however, does not propose any liability for Wal-Mart if it should anticipate the harm despite such knowledge or obviousness. Restatement (Second) of Torts § 343A(1) (1965).

We find Wal-Mart's jury instructions do not adequately state the law applicable to premise liability cases dealing with open and obvious dangers. *See Baumler*, 534 N.W.2d at 653 (even if danger is open and obvious, landowner still

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[4] Wal-Mart's proposed jury instructions seventeen and eighteen read as follows:

A possessor of land is not liable when the injuries sustained by a business invitee were caused by a known or obvious danger. The word known denotes knowledge of the existence of the condition as well as an appreciation of the danger, the business invitee must recognize the condition as dangerous and understand the probability and gravity of the threatened harm. An obvious danger means that both the condition and the risk are apparent to and would be recognized by a reasonably prudent person.

If you find that the condition existing on the Wal-Mart parking lot was known or obvious , then Plaintiffs have failed in their burden of proof, and your verdict must be for Wal-Mart Stores, Inc.

An invitee who enters land is entitled to nothing more than knowledge of the conditions and dangers they will encounter if they come. If they know the actual conditions, and the activities carried on, and the dangers involved in either, they are free to make an intelligent choice as to whether the advantage to be gained is sufficient to justify them in incurring the risk by entering or remaining on the land. The possessor of the land may reasonably assume that they will protect themselves by the exercise of ordinary care, or that they will voluntarily assume the risk of harm if they do not succeed in doing so. Reasonable care on the part of the possessor therefore does not ordinarily require precautions, or even warning, against dangers which are known to the visitor, or so obvious to they [sic] that they may be expected to discover them.

possesses duty to warn invitee or make condition reasonably safe). *See also*, *Hanson v. Town & Country Shopping Center*, 114 N.W.2d 870 (Iowa 1966) (landowner possesses duty to warn of open and obvious dangers); *Knudsen v. Merle Hay Plaza, Inc.*, 160 N.W.2d 279 (Iowa 1968) (owner of snow and ice covered parking lot possesses duty to warn or use reasonable care to remove danger); *Frantz*, 205 N.W.2d 705 (Iowa 1973) (snow and ice on steps, while open and obvious, still requires duty to warn or use reasonable care); Restatement (Second) of Torts § 343A cmt. f (1965) (situations where possessor of land should expect harm to visitor despite open and obviousness of danger include when and invitee's attention is distracted and when advantages in encountering danger outweigh the apparent risk). *See cf. Schnoor v. Deitchler*, 482 N.W.2d 913 (Iowa 1992) (defendant could not have anticipated his employee would be distracted or walk sixty feet to the area of an open auger).

Moreover, instruction fourteen instructs the jury Hoerchler is not entitled to damages if she fails to prove the condition "involved an unreasonable risk of injury . . . and . . . was one that a person in the position of Wal-Mart Stores, Inc., should have expected would not have been discovered or realized by Pearl Martin or one that Wal-Mart Stores, Inc., should have expected Pearl Martin would fail to protect herself from." This language in instruction fourteen adequately reflects the potential liability

for a landowner concerning open and obvious dangers.[5] *See generally*, Iowa Uniform Jury Instruction 900.1; Restatement (Second) of Torts §§ 343 and 343A (1965).

We find the trial court did not err in failing to submit Wal-Mart's proposed jury instructions seventeen and eighteen.

AFFIRMED.

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[5] We note, however, the uniform instruction permits the jury to examine the dangerous condition as "one that a person in defendant's position should have expected would not have been discovered or realized *by the plaintiff* or one that the defendant should have expected *the plaintiff* would fail to protect herself from." Uniform Jury Instruction 900.1 (emphasis added). The viewpoint from which the jury is to examine the evidence may not properly reflect the law in landowner liability towards business invitees. *See Franz*, 205 N.W.2d at 711 (obviousness examined under reasonable person standard).' *See also* Restatement (Second) of Torts § 343A cmt. b, f (1965). Wal-Mart, however, does not raise this issue on appeal. Nonetheless, the uniform instruction would more clearly state the law applicable to landowner liability with the inclusion of a reasonable person standard.