

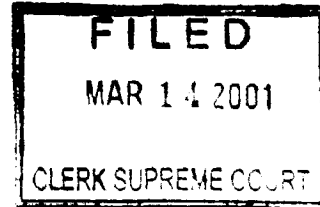
IN THE COURT OF APPEALS OF IOWA

No. 0-776 / 99-1685
Filed March 14, 2001

DIANNE TVRDIK and COLE TVRDIK,
Plaintiffs-Appellees,

vs.

CITY OF DES MOINES,
Defendant-Appellant,



Appeal from the Iowa District Court for Polk County, Linda Reade, Judge.

The City of Des Moines appeals from the district court's denial of its motion for a new trial. **AFFIRMED.**

Scott Beattie, Assistant City Attorney, Des Moines, for appellant.

Thomas S. Reavely of Whitfield and Eddy, P.L.C., Des Moines, for appellees.

Heard by Sackett, C.J., and Zimmer and Miller, JJ.

ZIMMER, J.

The City of Des Moines appeals from the district court's denial of its motion for new trial after a jury assessed the City sixty-five percent of the fault in the Tvrdiks' negligence action. It contends Iowa Code section 670.3 (1999) provides a complete defense to this tort claim and that the trial court should have given the City's proposed instruction regarding the elements of that code section. It also argues the court erred in holding section 670.3 only applied to public ways. We affirm.

I. Background Facts and Proceedings. In 1994, Diane Tvrdik was assigned a space in a parking lot as a benefit of her employment with the Public Employment Relations Board as an administrative law judge. The parking lot was owned by the City of Des Moines. Parking spaces 30 through 39 were leased to MPI Corporation, Inc. MPI in turn leased spaces 30 through 39 to the State of Iowa. The City retained maintenance responsibility of the lot. Shortly after Tvrdik began parking in the lot, she complained to her supervisor, David Knock, about its condition. Tvrdik was originally assigned to parking space 33, but was moved to the adjoining space 34 after a few months.

On April 24, 1996, Tvrdik left her office at noon to attend a mediation out of town. Her coworker, Charles Boldt, helped Tvrdik carry materials to her car. The receptionist who normally parked in space 33 had gone to lunch, leaving open the space adjoining the passenger side of Tvrdik's car. Tvrdik determined the boxes Boldt was carrying would not fit in the trunk of her car. Because spot 33 was open, Tvrdik decided to load the boxes on the passenger side of her car.

Tvrdik testified at trial she passed in front of her car and walked to the passenger door. As she opened the door, she backed up into a hole and fell breaking her foot.

Tvrdik and her husband filed suit alleging the City of Des Moines was negligent in failing to maintain and repair the parking lot, and in failing to warn her of holes that developed in the parking lot's surface. The City denied negligence and affirmatively pled protection under Iowa Code section 670.3 and comparative fault under chapter 668.

The case was tried to a jury in August of 1999. The City proposed a jury instruction providing for a complete defense to Tvrdik's tort claim under Iowa Code section 670.3 if the elements of that section were met. The district court refused to give that proposed instruction but did instruct the jury regarding comparative fault. A jury verdict assessed the City sixty-five percent of the fault and Tvrdik thirty-five percent of the fault and awarded damages. The City then filed a motion for new trial. The district court denied the motion, and the City appeals.

II. Scope of Review. We review failure to give requested jury instructions for errors at law. *Gamerdinger v. Schaefer*, 603 N.W.2d 590, 595 (Iowa 1999). A requested instruction must be given if it properly states the law and applies to the facts of the case. *Smith v. Air Feeds, Inc.*, 556 N.W.2d 160, 163 (Iowa Ct. App. 1996). When a complaining party has been prejudiced by the failure to give a jury instruction, reversal is warranted. *Iowa Compr. Petro. Underground Storage Tank Fund Bd. v. Shell Oil Co.*, 606 N.W.2d 376, 379 (Iowa 2000).

We review jury instructions to decide if they are a correct statement of the law and are substantially supported by the evidence. *Bride v. Heckart*, 556 N.W.2d 449, 452 (Iowa 1996). The evidence substantially supports a requested jury instruction when a reasonable mind would accept it as adequate to reach a conclusion. *Id.* "Requested instructions that are not related to the factual issues to be decided by the jury should not be submitted even though they may set out a correct statement of law." *Vachon v. Broadlawns Med. Found.*, 490 N.W.2d 820, 822 (Iowa 1992). In weighing the sufficiency of the evidence to submit a proposed instruction, we give the most favorable construction allowed in favor of the party seeking submission. *Bride*, 556 N.W.2d at 452.

III. Sufficiency of the Evidence for Proposed Instruction. The City contends the district court erred in failing to give the following proposed instruction:

The defendant claims the plaintiff was at fault by failing to take an alternate safe route.

The defendant must prove each of the following propositions:

1. Plaintiff knew of the dangerous condition.
2. Plaintiff knew [that] an alternate safe route was available.
3. Plaintiff failed to take an alternate safe route.
4. Plaintiff's fault was a proximate cause of the plaintiff's damage.

If the defendant has failed to prove any of these propositions, the defendant has not proved its defense. If the defendant has proved all these propositions, then the plaintiff cannot recover damages.

The instruction requested by the City is based on Iowa Code section 670.3. That section states:

In any action subject to the provisions of this chapter, an affirmative showing that the injured party had actual knowledge of the existence of the alleged obstruction, disrepair, defect, accumulation, or nuisance at the time of the occurrence of the

injury, and a further showing that an alternate safe route was available and known to the injured party, shall constitute a defense to the action.

Iowa Code § 670.3 (1999). The City contends that section 670.3 is intended to be a complete defense to actions brought under chapter 670. At trial, Tvrdik objected to the City's proposed instruction, contending it was both legally incorrect and factually unsupported in the evidence. In denying the requested instruction, the district court concluded that Iowa Code section 670.3 applied only to public ways as defined in Iowa Code section 364.12 and therefore was not applicable to this case because the property in question was held by the City in a proprietary function. The court also found that even if section 670.3 was applicable, the facts of this case did not support the proposed instruction. The court instructed the jury regarding the principles of comparative fault and gave a "proper lookout" instruction. The jury assessed thirty-five percent of the combined fault to Tvrdik.

Because we find the issue dispositive, we first examine whether there was sufficient evidence in the record to support the City's proposed instruction. The first requirement of section 670.3 is that the City affirmatively show Tvrdik had actual knowledge of the hole in which she fell. The City contends the record is adequate to support this element of section 670.3 and its proposed instruction. We disagree. Tvrdik testified she complained to Iowa Public Employment Relations Board member David Knock in 1994 about the general condition of the parking lot and of a depression on the driver's side of her vehicle. Tvrdik disavowed actual knowledge of the hole in which she fell some two years later. The City's contention Tvrdik had actual knowledge of the existence of the hole on

the passenger side of her car rests primarily on the testimony of David Knock. Knock was deposed in 1999 regarding the complaint Tvrdek made to him shortly after being assigned a parking space in 1994. His deposition was offered at trial.

Knock testified he does not park in the lot where Tvrdek fell and never personally observed the hole in which she fell. He could not recall the year in which he received Tvrdek's complaint. Knock received complaints from others in the office regarding the parking lot, but could not name the individuals who complained. Knock stated that Tvrdek complained about the general condition of the lot and mentioned the hole that was close to where she parked her vehicle. A fair reading of this deposition indicates that he was not sure exactly where the hole was located. Knock admitted he did not know if the hole Tvrdek complained about was the hole in which she fell in 1996. Assuming, without deciding, that the City's proposed instruction is a correct statement of the law, we conclude the instruction was not substantially supported by the evidence. The district court did not err in refusing to submit the City's proposed instruction.

Because we find the facts do not support the requested instruction, we need not consider whether the trial court was correct in its interpretation of sections 670.3 and 364.12 of the Code.

AFFIRMED.