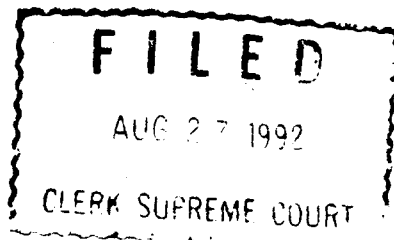


IN THE COURT OF APPEALS OF IOWA

No. 2-018 / 91-529



RYAN HOYT, A Minor by his Mother and Next Friend, **NANCY HOYT, NANCY HOYT** Individually and **MICHAEL HOYT** Individually,

Appellants,

vs.

KATHRYN DOSTAL,

Appellee.

Appeal from the Iowa District Court for Jackson County,
Jack Burns, Judge.

The plaintiffs appeal a district court judgment in favor of the defendant following a jury trial in a personal injury action. **AFFIRMED.**

Phillip D. Seidl of Eells & Peiffer, P.C., Cedar Rapids, for appellant.

Steven E. Mayer of Mayer, Mayer, Lonergan & Rolfes, Clinton, for appellee.

Considered en banc.

HAYDEN, J.

Nancy and Michael Hoyt, the plaintiffs, arranged for their five-year-old son, Ryan, to stay with Nancy's parents, Zelda and Burt Dostal, for one week. Because Zelda needed assistance with Ryan while she was on her delivery route, Zelda asked her daughter-in-law, Kathryn Dostal, if Ryan could spend the afternoon at Kathryn's home. Kathryn agreed to watch Ryan. While Ryan was playing in the yard with Kathryn's children, five-year-old Abe threw a stick against a tree which injured Ryan in the eye.

Hoyts filed the present action against Kathryn based on the theories of negligent supervision, premises liability, and res ipsa loquiter. The jury returned a verdict in favor of Kathryn.

Hoyts appeal, claiming the district court erroneously submitted and refused to submit certain jury instructions. Our review is for correction of errors of law. Iowa R. App. P. 4.

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). Submission of issues that have no support in the evidence to the jury is error. W. T. Rawleigh Medical Co. v. Bane, 181 Iowa 734, 739, 165 N.W. 42, 43-44 (1917); accord Borough v. Minneapolis & St. L. R. Co., 191 Iowa 1216, 1223, 184 N.W. 320, 323 (1921); see

Miller v. International Harvester Co., 246 N.W.2d 298, 301 (Iowa 1976). Conversely, failure to submit issues that are supported by substantial evidence also is error. See Borough, 191 Iowa at 1223, 184 N.W. at 323; see also Miller, 246 N.W.2d at 301. A corollary to these rules is that 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 R. Co., 141 Iowa 689, 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 sufficiency of the evidence to warrant submission of a pleaded issue to the jury is decided by giving the evidence the most favorable construction it will reasonably bear in favor of the party urging submission." Collegiate Mfg. Co. v. McDowell's Agency, Inc., 200 N.W.2d 854, 858 (Iowa 1972); Campbell v. Martin, 257 Iowa 1247, 1251, 136 N.W.2d 508, 511 (1965).

A second corollary is the trial court 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. Co-op, 271 N.W.2d 896, 900-01 (Iowa 1978)).

Hoyts first maintain the district court erred in submitting instruction eighteen. The instruction provided in part "a parent will be held liable: (1) where the child is acting as an agent for the parent, or (2) where the parent's own negligence is the proximate cause of the child's conduct." Plaintiffs argue the issues included in the instruction were not raised by the pleadings or the proof at trial. Plaintiffs argue the instruction failed to include a standard for parental liability for actions of the parent's child when the parent has an independent duty of care in favor of the injured party.

We hold the district court properly submitted instruction eighteen. The instruction, based on Smith v. Shaffer, 395 N.W.2d 853, 856 (Iowa 1986), is the applicable law on the issue of parental liability for damages caused by the parent's child. All instructions must be read together, not in piecemeal. Sanders, 421 N.W.2d at 522. Instructions fifteen and sixteen set forth the duty to exercise reasonable care when one voluntarily takes custody of a child and the resulting liability for failure to do so. We determine the instructions as a whole were sufficient to convey the applicable law.

Hoyts also contend the district court erred in submitting instruction twenty-two on the duty a landowner owes a licensee. Hoyts maintain the court should have

instead submitted an instruction concerning a landowner's duty to invitees. We disagree. Ryan's status on the Dostal property is more properly characterized as a licensee. See Restatement (Second) of Torts §§ 330, 332 (1965). The jury was instructed accordingly. See Devilbiss v. Brenton National Bank, 451 N.W.2d 198, 199-200 (Iowa App. 1989).

Hoyts next claim the district court erred in failing to submit the instruction that those who voluntarily accept children on the premises must take active, positive precautions dictated by ordinary care to protect the children from injury. We agree "a property owner may not close his eyes and refrain from affirmative action in the face of imminent danger to a child." Appling v. Struck, 164 N.W.2d 810, 814 (Iowa 1969). However,

there is virtually no condition upon any land with which a child may not possibly get himself into trouble Unless the possessor is to shoulder the impossible burden of making his land completely 'child-proof', which might mean razing it to the bare earth, something more is called for than the general possibility of somehow coming to some harm which follows the child everywhere throughout his daily existence.

Id. We find no evidence indicating Ryan was "in the face of imminent danger." Furthermore, Hoyts' proposed instruction is based on a standard of ordinary care when voluntarily accepting a child on the premises. Such care is addressed by instructions fifteen and sixteen. The district court properly rejected plaintiffs' proposed instruction.

Hoyts also contend the district court erred in failing to instruct the jury on parental negligence for permitting a child to possess a dangerous instrumentality and a landowner's duty to anticipate harm from a hazardous condition of the premises. We are unwilling to classify an ordinary stick found in the yard as a dangerous instrumentality. We are likewise unwilling to place our stamp of approval on a theory that a stick lying in the yard constitutes a hazardous condition. The district court properly rejected both of plaintiffs' proposed instructions.

We affirm the district court in all respects. Costs of this appeal are taxed to Hoyts.

AFFIRMED.

All judges concur except Sackett and Schlegel, JJ., who specially concur.

SACKETT, J. (specially concurring)

I concur specially. I would affirm the trial court.

Defendant Kathryn Dostal agreed to watch her five year old nephew, Ryan Hoyt, for the afternoon. Defendant's five year old son threw a stick and injured Ryan. Ryan and his parents sued Kathryn claiming she was negligent and her negligence caused Ryan's injury.

The case was submitted to a jury that returned a verdict in Kathryn's favor, and the trial court entered a judgment of dismissal. The majority has affirmed, and I agree with the dismissal because I do not find substantial evidence Kathryn was negligent in any particular.

I write separately because I cannot agree with that part of the majority opinion that infers Kathryn only had an affirmative duty to act if Ryan were in imminent danger. The duty owed to a young child one agrees to watch is a greater duty. Furthermore, if there had been evidence defendant was negligent, I feel the plaintiff's requested instruction "that one who voluntarily accepts a child on his or her premises has a duty to take active and positive precautions dictated by ordinary care to protect the child from injury," should have been given.

Schlegel, J., joins this special concurrence.