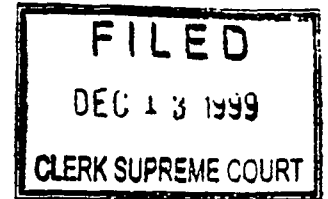


IN THE COURT OF APPEALS OF IOWA

No. 1999-193 (9-417) / 98-1703
Filed December 13, 1999



BARBARA ADAMS,

Plaintiff-Appellee,

vs.

WAL-MART STORES, INC.,

Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

The defendant appeals from a judgment entered after a jury trial for the plaintiff in her action seeking damages for injuries she suffered when she slipped and fell on the defendant's property. **AFFIRMED.**

Fred L. Morris and Danielle K. Dixon of Brown, Winick, Graves, Gross, Baskerville and Schoenebaum, P.L.C., Des Moines, or appellant.

Dwight W. James and Jennifer Gerrish-Lampe of The James Law Firm, P.C., Des Moines, for appellee.

Considered by Streit, P.J., and Mahan and Zimmer, JJ.

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MAHAN, J.

Defendant appeals a judgment entered for plaintiff after a jury trial in this slip and fall case. Defendant claims: (1) certain photographs were improperly admitted into evidence; (2) the trial court permitted improper expert testimony to be admitted into evidence; (3) the special verdict form was not proper; (4) there was insufficient evidence to instruct the jury on the failure to warn; (5) there was insufficient evidence to instruct the jury on the admission by a party opponent; (6) the jury's verdicts were inconsistent; and (7) the court should not have admitted evidence regarding subsequent remedial measures. We affirm on appeal.

On January 29, 1996, Barbara Adams went to a Wal-Mart Store in Des Moines, accompanied by her five or six year old grandson. The day was very cold and windy. It had snowed a few days previously, but was not snowing on that day. Adams purchased a picture frame and toy, then left the store. She slipped and fell on some ice on the sidewalk in front of the store. Wal-Mart employees came to Adams's assistance.

Adams was taken by ambulance to Mercy Hospital, where she was seen by Dr. Marshall Flapan. Dr. Flapan determined Adams had a broken bone in her left wrist and two broken fingers in her left hand. Adams was placed in a cast. She also suffered bruises on her right knee as a result of the fall. She was released to return to work on June 3, 1996. Dr. Flapan gave the opinion Adams had permanent discomfort caused by soft tissue injuries in her wrist and hand.

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On January 30, 1997, Adams filed a petition against Wal-Mart Stores, Inc., claiming its negligence caused her injuries. The case was tried to a jury. The jury awarded Adams \$4909.37 for past medical expenses and \$20,000 for future pain and suffering. The jury allocated fault twenty-five percent to Adams and seventy-five percent to Wal-Mart. The district court entered judgment on the verdict.

Defendant filed a combined motion for new trial and/or judgment notwithstanding the verdict. The district court adjusted the assessment of interest awarded in the case, but otherwise denied the combined motion. Defendant appealed.

I. *Scope of Review*

Our scope of review in this slip and fall case is for the correction of errors at law. Iowa R. App. P. 4.

II. *Photographs*

Plaintiff's expert, James Fafinski, a structural engineer, took several photographs of the Wal-Mart Store in December 1997. These photographs were admitted into evidence over defendant's objection. Fafinski testified concerning the photographs. On appeal, defendant claims the photographs should not have been admitted because there was insufficient evidence to show the conditions present at the time the photographs were taken were similar to the conditions at the time of the accident.

Under Iowa law, photographs are admissible if they are illustrative of the testimony of witnesses. *Maier v. Illinois Cent. R. Co.*, 234 N.W.2d 388, 394 (Iowa

1975). The admissibility of such evidence rests within the sound discretion of the trial court. *Galbraith v. George*, 217 N.W.2d 598, 602 (Iowa 1974). A court does not abuse its discretion in admitting photographs where there is a similarity of conditions between the time the photographs were taken and the date of the accident. *Id.* The burden of showing similarity in conditions is on the party offering the evidence. *Hubby v. State*, 331 N.W.2d 690, 698 (Iowa 1983).

We determine the district court did not abuse its discretion in admitting the photographs and Fafinski's testimony into evidence. The photographs showed the front of the Wal-Mart store in winter. There was no evidence of any substantial changes to the front of the store between the time of the accident and the time of the photographs.

III. Expert Testimony

Defendant contends Fafinski should not have been permitted to testify the Wal-Mart Store was defectively designed. Evidence of design defects are admissible in product liability actions. *Lovick v. Wil-Rich*, 588 N.W.2d 688, 697 (Iowa 1999). Defendant asserts evidence of design defects are irrelevant in premise liability cases.¹

Fafinski testified there was a leak in the metal flashing on the roof which allowed water to leak down to the sidewalk in front of the store, where it could freeze.

¹ Defendant relies on *Sheets v. Ritt, Ritt & Ritt, Inc.*, 581 N.W.2d 602 (Iowa 1998), where the supreme court abolished the distinctions between licensees and invitees. *Id.* at 605. Recently, however, the supreme court pointed out the holding in *Sheets* had not yet gained the approval of a majority of the court. *Richardson v. The Commodore, Inc.*, No. 97-1829 (Iowa Sept. 9, 1999), n.3. The court stated the status of a plaintiff continues to be a relevant consideration in premises liability law. *Id.*

We find this evidence was not admitted to show a design defect, but was admitted to show ~~whether~~ the leaking of water onto the sidewalk in front of the store was a regularly occurring incident such that defendant should have been aware of it. A landowner must use reasonable care to ascertain the actual condition of the premises. *Konicek v. Loomis Bros., Inc.*, 457 N.W.2d 614, 618 (Iowa 1990). The evidence in question was relevant and was properly admitted into evidence.

IV. Special Verdict Form

Defendant objected to the special verdict form, claiming it should have specifically informed the jury all damages for future loss of function of the mind and body and future pain and suffering should be limited to damages for injuries sustained in the accident. Plaintiff had other, unrelated medical problems.

Special verdict forms should be considered with the instructions. *Delaney v. Gansemer*, 567 N.W.2d 664, 665 (Iowa App. 1997). The jury was instructed to assess damages for the value of loss of function of the mind and body and the value of future physical and mental pain and suffering as it related to plaintiff's wrist and/or finger injuries only. Thus, while the special verdict form did not contain a limitation, the jury was properly instructed on permissible damages. Jury instructions are to be viewed as a whole. *Sanders v. Ghrist*, 421 N.W.2d 520, 522 (Iowa 1988).

The trial court has discretion regarding the form and content of instructions, including special verdict forms. *Beachel v. Long*, 420 N.W.2d 482, 487 (Iowa App.

1988). **We conclude the district court did not abuse its discretion by failing to include a limitation on damages in the special verdict form.**

V. Jury Instructions

A. Defendant contends there was insufficient evidence in the record to include the provision in the jury instructions allowing the jury to find defendant at fault for failing to warn plaintiff of the ice and snow on the ground. Defendant asserts the danger of ice and snow in Iowa in the winter is known and obvious and therefore it had no duty to warn.

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). A court may properly refuse to give an instruction when it is not supported by substantial evidence. *Bangs v. Pioneer Janitorial of Ames, Inc.*, 570 N.W.2d 630, 632 (Iowa 1997). Evidence is substantial if reasonable minds could accept it as adequate to reach a conclusion. *Weems v. Hy-Vee Food Stores, Inc.*, 562 N.W.2d 571, 573 (Iowa App. 1994). 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 App. 1998).

As to business invitees, a possessor of land has a duty of care to keep the premises in reasonable condition. *Baumler v. Hemesath*, 534 N.W.2d 650, 653 (Iowa 1995). An invitee is entitled to expect a possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make

it ~~reasonably safe~~ by repair or to give warning of the actual condition and risk involved. *Franz v. Knights of Columbus*, 205 N.W.2d 705, 711 (Iowa 1973) (citing Restatement (Second) of Torts § 343, comment d).

A possessor is not liable when the injuries sustained by an invitee were caused by a known and obvious danger. *Schnoor v. Deitchler*, 482 N.W.2d 913, 917 (Iowa 1992). However, if the possessor can and should anticipate the dangerous condition will cause physical harm to the invitee despite the known and obvious danger, the possessor still owes the invitee a duty. *Konicek v. Loomis Bros., Inc.*, 457 N.W.2d 614, 618 (Iowa 1990) (citing Restatement (Second) of Torts § 343A, comment b). In these circumstances, the possessor's duty is either to warn the invitee or to make the condition reasonably safe. *Id.*

In a similar situation, the supreme court determined the dangerous condition posed by frost on pavement was or should have been just as obvious and known to the defendant as it was to plaintiff. *Wieseler v. Sisters of Mercy Health Corp.*, 540 N.W.2d 445, 451 (Iowa 1995). The court concluded defendant should have realized plaintiff might fail to protect himself from the condition due to the fact there was only one common entrance and exit to the parking lot. *Id.* at 452.

In the present case, defendant should have realized customers would use the sidewalk in front of the store, even if the ice on the sidewalk was an open and obvious condition. Under these circumstances, Wal-Mart's duty was to either warn the customers or to make the condition reasonably safe. The jury instructions properly

allowed the jury to find defendant at fault for failing to warn plaintiff of the ice and snow on the ground.

B. Plaintiff presented as an exhibit a letter written by Karen Payne, an agent of Wal-Mart, which set forth the position of the claims representative for Wal-Mart. The letter provided:

The clmt [claimant] was coming out of the store and s/f [slipped/fell] on some ice suffering a fractured left wrist and left hand. The patch of ice that the clmt s/f on was due to the ice/snow melting off of the WAL-MART sign on the front of the building. The store does try to provide a safe area for there [sic] customer's [sic] to walk. When the ice/snow that dripped off the sign and sat there overnight, it refroze. So in order to take control of the situation and do the right thing, the store put salt on the patch of ice. The store did what they could and your client must also realize that at the time it was extremely cold and sometimes the right thing to do does not always make the situation better, it can only help. The store recognized the situation and did something about it.

The district court instructed the jury as follows regarding the admission by a party opponent:

You have heard evidence claiming an agent of Wal-Mart's, Karen Payne, made statements before this trial while not under oath.

If you find such a statement was made, you may regard the statement as evidence in this case the same as if Ms. Payne had made it under oath during trial.

Under Iowa Rule of Evidence 801(d), anything said by a party-opponent may be used against the party as an admission, provided it exhibits inconsistency with those facts presently asserted in pleadings and testimony. *Bailey v. Chicago, B. & Q. R.R. Co.*, 179 N.W.2d 560, 566 (Iowa 1970). Defendant claims Payne's letter was not

~~inconsistent with its position at trial, and thus, was not actually an admission.~~
 Defendant contends the jury instruction unduly emphasized the letter.

During the trial, Wal-Mart employees LaBet Cross and Beverly Morrison testified they never saw an accumulation of ice and snow on the ledge above the entrance to the store. Payne's letter is inconsistent with this position, and shows Wal-Mart was aware of the problem. The district court did not err in instructing the jury on admissions by a party-opponent.

VI. *Inconsistent Verdict*

Defendant asserts the jury's verdict was inconsistent because it awarded plaintiff \$0 for future loss of function of mind and body, but \$20,000 for future pain and suffering. The jury awarded \$0 for past loss of function of mind and body, but \$10,000 for past pain and suffering. Wal-Mart asks for a new trial.

An award of medical expenses or pain and suffering damages is not legally inconsistent with the jury's failure to award damages for loss of function of the body. *Blume v. Auer*, 576 N.W.2d 122, 126 (Iowa App. 1997). Loss of function of the body relates to functional impairment of a body part. *Brant v. Bockholt*, 532 N.W.2d 801, 805 (Iowa 1995). It does not include conditions of incapacity embraced within the definition of pain and suffering. *Id.* We determine defendant is not entitled to a new trial based on an inconsistent jury verdict.

VII. *Subsequent Remedial Measures*

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Under Iowa Rule of Evidence 407, evidence of subsequent remedial measures is not admissible to prove negligence. *Bingham v. Marshall & Huschart Mach. Co., Inc.*, 485 N.W.2d 78, 81 (Iowa 1992). Defendant claims the district court abused its discretion by admitting evidence it engaged in a subsequent remedial measure by placing a melting agent on the ice after the accident.

Rule 407 does not preclude evidence of subsequent remedial measure from being used to prove matters other than negligence. *McIntosh v. Best Western Steeplegate Inn*, 546 N.W.2d 595, 597 (Iowa 1996). Evidence of subsequent remedial measures may be admitted into evidence to explain the conditions existing at the time of an injury when photographs of the area were taken subsequent to the event. *Id.* (citing *E.V.R. II Associates Ltd. v. Brundige*, 813 S.W.2d 552, 556-57 (Tex. App. 1991)). We conclude the evidence was admissible to show the changed conditions between the time of the accident and the time the photographs were taken.

We affirm the judgment entered in district court. Costs of this appeal are assessed to appellant.

AFFIRMED.