**IN THE COURT OF APPEALS OF IOWA**

No. 1999-576 (9-837) / 99-315
Filed June 14, 2000

FILED
JUN 14 2000
CLERK SUPREME COURT

**JUDITH A. SORBER and RONALD SORBER,**
Plaintiffs-Appellees,

**vs.**

**WAL-MART STORES, INC.,**
Defendant-Appellant.

---

Appeal from the Iowa District Court for Boone County, Carl D. Baker, Judge.

The defendant appeals the district court order entering judgment, following a jury trial, in favor of the plaintiffs on their action against defendant for injuries sustained while a customer in defendant's store. **REVERSED AND REMANDED FOR NEW TRIAL.**

Fred L. Morris of Brown, Winnick, Graves, Gross, Baskerville & Schoenebaum, P.L.C., Des Moines, for appellant.

Alfredo Parrish and Maggi Moss of Parrish, Kruidenier, Moss, Dunn & Montgomery, L.L.P., Des Moines, for appellees.

Heard by Huitink, P.J., and Mahan and Miller, JJ.

000258

**HUITINK, P.J.**

***I. Background Facts and Proceedings.***

Judith and Ronald Sorber sued Wal-Mart for damages resulting from injuries Judith suffered when "a stack of jute rugs fell on top of her" while she was shopping at a Wal-Mart store in Boone. Sorbers' premises liability claim was based on allegations Wal-Mart "knew or in the exercise of reasonable care should have known that the rugs were not placed on shelving properly and that this condition involved an unreasonable risk of injury to a customer."

At trial Sorbers offered evidence of Wal-Mart's negligence, including excerpts from Wal-Mart's store manual, safety manual, and loss prevention manual. Sorbers also offered expert and other testimony concerning the Boone Wal-Mart store's noncompliance with policies and procedures specified in these publications.

Judith and Ronald Sorber testified concerning their postaccident experiences, including the effect of Judith's injuries on her employment and their relationship. Several physicians and chiropractors testified concerning Judith's medical history, the nature of her injuries, treatment, and resulting disability. Additional evidence of Sorbers' damages included chiropractic records admitted over Wal-Mart's foundation and other objections.

Wal-Mart denied their employees were negligent or that they caused any damages Sorbers claimed. Wal-Mart's timely objection to the qualifications of Sorbers' liability expert and motion for a mistrial following the experts' testimonial assertion that Wal-Mart was negligent were overruled.

Wal-Mart's request for a jury instruction concerning aggravation of Judith Sorber's preexisting medical condition was denied. At Sorbers' request, and over Wal-Mart's objection, the jury received the following instruction:

10.
NEGLIGENCE – ESSENTIALS FOR RECOVERY

Judith Sorber must prove the following propositions:

1. The defendant, Wal-Mart Stores, Inc., knew or in the exercise of reasonable care should have known of a condition on the premises and that it involved an unreasonable risk of injury to lawful visitors.

Among the factors to be considered in evaluating whether the defendant has exercised reasonable care for the protection of lawful visitors you shall consider:

A. The foreseeability or possibility of harm;

B. The purpose for which the entrant entered the premises;

C. The time, manner, and circumstances under which the entrant entered the premises;

D. The use to which the premises are put or are expected to be put;

E. The reasonableness of any inspection of the premises;

F. The opportunity and ease of correction of the condition of the premises.

G. The burden on the defendant in terms of inconvenience or cost in providing adequate protection.

2. The defendant was negligent in one or more of the following ways:

A. Stacking merchandise on a high shelf which could fall and cause injury to plaintiff; or

B. Failing to follow proper procedures, policies, or practices of Wal-Mart Stores, Inc.

3. The negligence of defendant was a proximate cause of damage to the plaintiff.

4. 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 of these propositions, the plaintiff is entitled to damages in some amount.

Although two specifications of negligence were submitted, the verdict forms only asked whether Wal-Mart was at fault and if so whether its fault was a proximate cause of the damages claimed. The jury responded affirmatively to both questions and found Sorbers sustained damages totaling $266,000.

Wal-Mart's posttrial motions challenged the sufficiency of the evidence supporting the jury's verdict. Wal-Mart's posttrial motions also included a request to question jurors about an unfavorable newspaper editorial describing Wal-Mart's profitability published while the jury was deliberating to determine if the editorial influenced their verdict. Wal-Mart made additional allegations of jury irregularities, citing inclusion of three rugs not admitted as evidence with other evidence taken into the jury room during deliberations.

On appeal Wal-Mart cites multiple trial court errors necessitating reversal of the judgment entered on the jury's special verdicts. Because we find Wal-Mart's challenge to instruction number ten dispositive, we limit our consideration to that issue.

***II. Standard of Review.***

Our review in this law action is for errors at law. Iowa R. App. 4.

We review jury instructions to determine if they correctly state the law and are supported by substantial evidence. *Johnson v. Interstate Power Co.*, 481 N.W.2d 310, 324 (Iowa 1992). We will not grant a reversal on the basis of error in giving or refusing to give a particular jury instruction unless the action results in prejudice to the defendant. *Foggia v. Des Moines Bowl-O-Mat, Inc.*, 543 N.W.2d 889, 892 (Iowa 1996).

***III. Instruction No. 10.***

Sorbers' claims against Wal-Mart were based on Wal-Mart's breach of its duty to exercise reasonable care in the maintenance of its premises for the protection of others. *See Sheets v. Ritt, Ritt, & Ritt, Inc.*, 581 N.W.2d 602, 606 (Iowa 1998) (analysis and restatement of owner's and occupant's duty of ordinary care in maintenance of premises). As noted earlier, Sorbers sought to prove Wal-Mart breached its duty of care by evidence of Wal-Mart's failure to follow its own policies, practices, and procedures for maintenance of the Boone store premises. The district court, based on its determination that substantial evidence supported this assertion, submitted Wal-Mart's failure to follow its own procedures, policies, or practices as a specification of negligence.

Wal-Mart's objection to Instruction No. 10 was stated as follows:

> Subparagraph A is not stated to a legal standard. Subparagraph B does not support evidence of negligence, even if the jury were to find that Wal-Mart failed to follow proper procedures or policies. The seven prongs of consideration to determine liability as set forth in the *Ritt* [*Sheets v. Ritt, Ritt, & Ritt*, 581 N.W.2d 602 (Iowa 1998)] are also in instruction No. 10. And subparagraph B, the specification regarding policies, has nothing to do with those considerations. And even if Wal-Mart were found to be in violation of their policies, and negligent under the *Ritt* standard, it would be error and not a negligence that was causally connected to any duty or responsibility of Wal-Mart under the law.

The gist of Wal-Mart's argument on appeal is that paragraph 2B of Instruction No. 10 incorporated an extraneous standard of care expressed in its internal company policies rather than a recognized legal duty of care to its customers.

Ordinarily, a legal duty, or standard of care, is established by legislative enactment or by judicial decision. *Engstrom v. State*, 461 N.W.2d 309, 315 (Iowa 1990). In the absence of judicial or legislative recognition, an industry standard

or custom "cannot be substituted for the legal standard of reasonable or ordinary care under the circumstances." *See LaSell v. Tri-States Theatre Corp.*, 223 Iowa 929, 943, 11 N.W.2d 36, 44 (1943). A party's compliance or noncompliance with an unrecognized industry standard of care is evidence of negligence and is not conclusive on the issue of ordinary care. *Jorgensen v. Horton*, 206 N.W.2d 100, 103 (Iowa 1973). Our supreme court has held that a specification of negligence based on noncompliance with an industry standard was fatally defective. *Rinkleff v. Knox*, 375 N.W.2d 262, 267 (Iowa 1985).

Although the specification of negligence at issue here concerns internal company policies rather than an industry standard, we believe the rationale supporting the decision in *Rinkleff v. Knox* is nevertheless controlling. There is no Iowa statute, rule, or judicial decision recognizing Wal-Mart's internal policies, practices, or procedures as defining the legal standard of care under these circumstances. Specification 2B's implicit incorporation of Wal-Mart's internal policies and procedures as the standard of care incorrectly states the law and is therefore fatally defective.[1] Because the special verdict forms do not disclose which of the two submitted theories of negligence the jury relied on or which was found to be the proximate cause of Judith Sorber's injuries, we are unable to say

---

[1] We also note that our decision is in conformity with the general rule that a failure to follow a company rule does not constitute negligence per se. 57A Am. Jur. 2d *Negligence* § 187 (1989). Other courts addressing this issue have also reached the same conclusion. *See, e.g., Mayo v. Publix Supermarkets, Inc.*, 686 So.2d 801, 802 (Fla. App. 1997); *Spearman v. Georgia Bldg. Auth.*, 482 S.E.2d 463, 465 (Ga. App. 1997); *Muller v. English*, 472 S.E.2d 448, 454 (Ga. App. 1996); *Van Duyn v. Cook-Teague Partnership*, 694 N.E.2d 779, 782 (Ind. App. 1998); *Morrison v. Mineral Palace, Ltd. Partnership*, 603 N.W.2d 193, 197 (S.D. 1999); *White v. Metropolitan Gov't of Nashville and Davidson County*, 860 S.W.2d 49, 52 (Tenn. Ct. App. 1993).

Wal-Mart was not prejudiced by the district court's instructional error. *See Erickson v. Wright Welding Supply, Inc.* 485 N.W.2d 82, 86 (Iowa 1992); *Gordon v. Noel*, 356 N.W.2d 559, 565 (Iowa 1984); *Stimmel v. Johnson*, 199 N.W.2d 356, 361 (Iowa 1972). In making this determination, we have not ignored those cases in which no prejudice resulted from submission of an improper theory of recovery. *See William C. Mitchell, Ltd. v. Brown*, 576 N.W.2d 342, 350-51 (Iowa 1998). Here, however, the jury's special verdict form failed to sufficiently insulate or separate the distinct theories of recovery submitted from each other.

As we have already said, the resolution of this issue is dispositive. The remaining issues are either moot or are better left to the discretion of the trial court should they reoccur on remand.

The judgment of the district court is reversed, and this case is remanded for a new trial.

**REVERSED AND REMANDED FOR NEW TRIAL.**