

IN THE COURT OF APPEALS OF IOWA

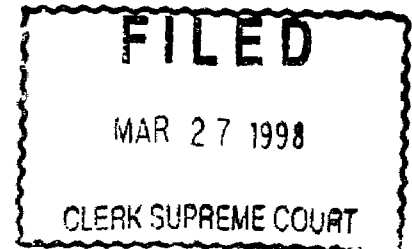
No. 7-542 / 96-1323

000189

MARLENE LEICHTY and MARION LEICHTY,
Appellees,

vs.

WAL-MART STORES, INC.,
Appellant.



Appeal from the Iowa District Court for Johnson County, August F. Honsell,
Judge.

Wal-Mart appeals a personal injury award in favor of the plaintiffs.

AFFIRMED.

Fred L. Morris of Peddicord, Wharton, Thune & Spencer, Des Moines, for
appellant.

Patrick M. Roby and Christopher L. Bruns of Elderkin & Pirnie, Cedar Rapids,
and Alanson K. Elgar of Elgar Law Office, Mount Pleasant, for appellees.

Considered by Sackett, P.J., and Vogel and Mahan, JJ.

VOGEL, J.

Wal-Mart appeals a personal injury award in favor of the plaintiffs, Marlene and Marion Leichty. Wal-Mart contends the trial court erred by applying the doctrine of *res ipsa loquitur* and by finding substantial evidence of specific negligence. As we find substantial evidence supports the district court's finding of specific negligence, we affirm its denial of Wal-Mart's motion for directed verdict.

Background facts. On January 26, 1994, plaintiff Marlene Leichty was shopping with a friend in a Wal-Mart store in Iowa City. According to Leichty, while she was reaching for a pillow in one of the aisles, something struck her head, injuring her and momentarily causing her to lose consciousness. When she awoke, she discovered a large, heavy bed rest pillow lying on the floor next to her of a kind stored on the top shelf. Immediately following the incident, Leichty's friend looked up at the top shelf and noticed two other bed rest pillows which appeared to be leaning over the edge of the shelf.

The matter was tried to the court on June 12, 1996. The court denied Wal-Mart's motion for directed verdict. The court found both *res ipsa loquitur* and the Restatement (Second) of Torts section 343 applied and inferred from the evidence that Wal-Mart was negligent. The court awarded Leichty \$39,839.29, representing her medical expenses, pain and suffering, loss of body function, and loss of earning capacity.

Scope of review. We review an order denying a motion for directed verdict for correction of errors at law and are limited to the grounds raised in the motion. *Podraza v. City of Carter Lake*, 524 N.W.2d 198, 202 (Iowa 1994). A motion for directed verdict must be rejected if substantial evidence supports the jury's verdict. *Id.*; Iowa R. Civ. P. 243. Conversely, a directed verdict is appropriate in cases in which 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). A court ruling on a motion for directed verdict must view evidence in the light most favorable to the nonmoving party. *Beitz v. Horak*, 271 N.W.2d 755, 757 (Iowa 1978); Iowa R. App. P. 14(f)(2). Movant is considered to have admitted the truth of all evidence offered by nonmovant and every favorable inference that may be deduced from it. *B & B Asphalt Co. v. T. S. McShane Co.*, 242 N.W.2d 279, 284 (Iowa 1976). To overrule the motion, the court must find substantial evidence in support of each element of nonmovant's claim. *Beitz*, 271 N.W.2d at 757. 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). The trial court is vested with considerable discretion in determining whether evidence is sufficient. *Hoover's Hatchery, Inc. v. Utgaard*, 447 N.W.2d 684, 687 (Iowa App. 1989).

Res ipsa loquitur and specific negligence. Wal-Mart first contends the district court erred by applying the doctrine of *res ipsa loquitur*. Wal-Mart argues the bed

rest pillow was not under its exclusive control, and the fall of the pillow is not the type of occurrence which would only happen in the absence of reasonable care, as required by the doctrine of *res ipsa loquitur*. Wal-Mart also contends the court could not have found it liable under *res ipsa loquitur* and at the same time find it was liable under the specific allegations of negligence. Wal-Mart further contends there was not substantial evidence in the record to support the court's finding of specific negligence under section 343 of the Restatement (Second) of Torts.

Although the trial court found for Leichty both on the *res ipsa loquitur* and specific negligence claims, our supreme court has held previously it is not error to submit both counts to the trier of fact. *Grings v. Great Plains Gas Co.*, 260 Iowa 1309, 1318, 152 N.W.2d 540, 544 (Iowa 1967). However, to find under both theories is inconsistent. *Id.* 260 Iowa at 1318, 152 N.W.2d at 545. ("Res ipsa has no application when there is proof of the precise cause of the injury.") Defendant is not prejudiced when both findings are made when there is sufficient evidence to support specific negligence. *See id.* We thus examine the sufficiency of the evidence to support a finding of specific negligence.

The scope of the duty of care which a possessor of land in Iowa owes to an entrant is based on the entrant's status as licensee, trespasser, or invitee. *Morgan v. Perlowski*, 508 N.W.2d 724, 727 (Iowa 1993). An invitee is a person who enters or remains on land open to the public by invitation or permission and is owed the highest

standard of care. Restatement (Second) of Torts § 330. Iowa courts recognize premises liability as incorporated in the Restatement (Second) of Torts section 343. *Wieseler v. Sisters of Mercy Health Corp.*, 540 N.W.2d 445, 449 (Iowa 1995); *Hanson v. Town & Country Shopping Center, Inc.*, 259 Iowa 542, 548, 144 N.W.2d 870, 874 (1966). Section 343 of Restatement of Torts (Second) provides:

Dangerous Conditions Known to or Discoverable by Possessor

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.

Id. The evidence revealed Wal-Mart failed 1) to comply with its own policy of stocking heavier items on the bottom shelves; 2) to prevent products from “leaning” from upper shelves of display racks; 3) to inspect to determine if the bed rest pillows were safely stored. We apply these uncontroverted facts to the foregoing Restatement analysis and conclude substantial evidence supports Leichty’s claim of specific negligence. We accordingly determine the district court appropriately denied Wal-Mart’s motion for directed verdict and found Wal-Mart negligent.

We note Leichty only had to prove *either* specific negligence or *res ipsa loquitur*. She proved her case under specific negligence. The fact the district court utilized *res ipsa loquitur* in addition to specific negligence did not bolster one weak theory with another as Wal-Mart claims, but was surplusage. Leichtys only needed to prove under one theory to prevail, as they did. *See Grings*, 260 Iowa at 1318, 152 N.W.2d at 545 (Iowa 1967). We need not consider whether the facts in this case required the application of *res ipsa loquitur*. We further conclude Wal-Mart was not prejudiced by the district court's discussion of both theories of recovery. *Id.*

Having considered all arguments properly before us, we affirm the district court's denial of Wal-Mart's motion for directed verdict.

AFFIRMED.