

IN THE COURT OF APPEALS OF IOWA

FILED

JUN 29 1988

CLERK SUPREME COURT

DAVID STEIN and DeLYNN STEIN)

Plaintiffs-Appellees,)

vs.)

Filed June 29, 1988

290

JEFFREY SHAWN ROSE,)

8-223
87-1134

Defendant,)

and)

HARDEE'S FOOD SYSTEMS, INC.,)

Defendant-Appellant.)

Appeal from the Iowa District Court for Webster County (No. 52766) -
R. K. Richardson, Judge.

Defendant appeals judgment upon a jury verdict for plaintiff in premises
liability action. **AFFIRMED.**

James L. Kramer and Neven J. Mulholland, of Johnson, Erb, Latham, Gibb
& Carlson, P.C., Fort Dodge, for the defendant-appellant.

Stephen G. Kersten, of Kersten, Opheim & Carlson, Fort Dodge, for the
plaintiffs-appellees.

Heard by Oxberger, C.J., and Schlegel and Sackett, JJ., Habhab, J., takes no
part.

SACKETT, J.

Defendant Hardee's Food Systems, Inc., appeals a judgment of \$48,750 entered against it after a jury trial of a premises liability suit. Hardee's raises several issues on appeal. We affirm.

Plaintiff David Stein was a customer at Hardee's restaurant in the early morning hours of September 8, 1985. A fight broke out in the parking lot. Plaintiff knew one of the combatants and went outside to stop the fight. The witnesses disagreed over what happened next. Jeffrey Rose was also trying to stop the fight. Rose testified plaintiff pushed him and swung at him as he was trying to leave the parking lot. Other witnesses testified Rose attacked plaintiff first. Rose and plaintiff fought briefly.

Plaintiff suffered fractured bones in his face and sued both Hardee's and Rose. Plaintiff dismissed his suit against Rose prior to trial. The jury found plaintiff suffered damages in the total amount of \$65,000 and attributed fault as follows: plaintiff - zero percent; Jeffrey Rose - twenty-five percent; and Hardee's - seventy-five percent.

I.

Hardee's contends the trial court erred in admitting into evidence a summary of calls made to the police department complaining about alleged fights or other disturbances at Hardee's. The origin of these calls is unknown and the summary was prepared from police logs by plaintiff's investigator.

An issue at trial was whether Hardee's could have foreseen the fight would occur. The summary of calls was offered to prove there actually were fights at Hardee's. Hardee's objected to admission of the evidence.

The erroneous admission of hearsay evidence is not prejudicial when a multiplicity of substantially the same evidence appears in the record without objection.

State v. Webb, 309 N.W.2d 404, 411 (Iowa 1981). Several witnesses, including security guards formerly employed by Hardee's, testified Hardee's had frequent problems with fights and other disturbances.

We hold Hardee's was not prejudiced by the admission of the summary of police logs.

II.

Hardee's contends the trial court erred in using the following language in Instruction 14:

Plaintiff David Stein asserts that the defendant was negligent in the following particulars:

1. In failing to prevent the assault upon David Stein.

* * *

Hardee's argues this language constitutes a misstatement of the law. We disagree.

According to the foreseeability test of Restatement (Second) of Torts, section 344 comment f, at 225-26 (1965), Hardee's "may be under a duty to take precautions against" criminal conduct on the part of third persons. We find the instruction as given adequately stated the law.

III.

Hardee's alleges jury misconduct based on the affidavit of one juror who stated she and at least one other juror had heard about fights at Hardee's although during voir dire they stated they had no personal knowledge of fights there.

The court has considerable discretion in determining whether to grant or refuse a new trial based on jury misconduct. Moore v. Vanderloo, 386 N.W.2d 108, 118 (Iowa 1986). Hardee's makes no showing the alleged misconduct was calculated to or, with reasonable probability, did influence the verdict. Id.

We find no abuse of discretion.

IV.

Hardee's contends the stock assumption of risk instruction, number 19, and Instruction 20 were conflicting and confusing. Instruction 20 included "unreasonable assumption of risk not constituting an enforceable express consent" as a factor in determining comparative fault.

In reviewing instructions for error all instructions given must be read together and in relation to each other. See Gremmel v. Junnie's Lounge, Ltd., 397 N.W.2d 717, 727 (Iowa 1986). Instruction 19 plainly told the jury a finding plaintiff assumed the risk of his injuries when he entered the fight would preclude any recovery from Hardee's. Read together, the instructions convey the correct legal standard. We conclude any error is harmless. See id.

Hardee's also contend the trial court erred in failing to give a special interrogatory on plaintiff's assumption of the risk. The requested interrogatory posed a question the jury had to decide in reaching its general verdict. There is no prejudicial error in refusing to submit interrogatories under such circumstances. See Six v. Freshour, 231 N.W.2d 588, 594 (Iowa 1975).

V.

Hardee's contention it was not allowed to read in the rest of a deposition when plaintiff read in portions thereof is without merit. The trial court's ruling was "I think [plaintiff has] got a right to read as much of it as he wants, and then you can go ahead and read the other portions" Hardee's read several pages of the deposition into the record later on in the trial.

VI.

Hardee's contends as a matter of law the evidence was not sufficient to submit a case based on premises liability to the jury. Applying the dictates of

Galloway v. Bankers Trust Co., 420 N.W.2d 437, 440 (Iowa 1988), we determine a genuine issue of fact regarding the foreseeability of plaintiff's injuries was raised.

In Galloway, the court held the district court erred in granting summary judgment where evidence of prior problems with vandalism and shoplifting at the defendant's mall was sufficient to raise a genuine issue of material fact whether a homosexual rape in the mall restroom was foreseeable. Id. In the present case, there was evidence Hardee's had prior problems with vandalism and fights.

We find the trial court did not err in overruling Hardee's motions for directed verdict and judgment notwithstanding the verdict.

VII.

Hardee's contends the trial court erred in not instructing the jury regarding plaintiff's settlement with Rose. We deem this issue to be waived because of Hardee's failure to argue or cite relevant authority in its brief. See Iowa R. App. P. 14(a)(3).

VIII.

Hardee's final brief points involve several evidentiary rulings made by the court during the course of the trial. The admission of evidence ordinarily lies within the sound discretion of the trial court. Blakely v. Bates, 394 N.W.2d 320, 324 (Iowa 1986). Having reviewed the record and considered all of Hardee's arguments regarding these rulings on the admissibility of evidence, we find no abuse of discretion on the part of the trial court.

Finding no basis for reversal, we affirm.

AFFIRMED.

Schlegel and Sackett, JJ., concur; Oxberger, C.J., dissents.

OXBERGER, C.J. (dissenting)

I dissent.