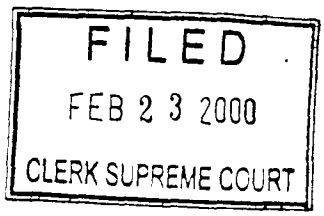
IN THE COURT OF APPEALS OF IOWA

No. 1999-370 (9-623) / 98-1985
Filed February 23, 2000



NIKKI HERBST,
Plaintiff-Appellant,

vs.

STATE OF IOWA,
Defendant-Appellee.

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

Nikki Herbst appeals from the district court's denial of a new trial. She claims the court erred by refusing to submit her proposed jury instructions concerning three specifications of negligence. She argues there was substantial evidence supporting the submission of one or more of the negligence specifications. **AFFIRMED.**

Martin A. Diaz of Martin Diaz Law Firm, Iowa City, for appellant.

Thomas J. Miller, Attorney General, and Joanne Moeller, Assistant Attorney General, for appellee.

Considered by Sackett, C.J., and Vogel and Hecht, J.J.

PER CURIAM.

Plaintiff-appellant, Nikki Herbst, appeals the district court's denial of her motion for a new trial. She claims she should be granted a new trial because the court erred by refusing to submit her proposed jury instructions concerning three specifications of negligence. She argues there was substantial evidence supporting the submission of each of the negligence specifications. We affirm.

On June 17, 1995, Plaintiff fell on what she termed a "makeshift" set of stairs while descending from the stage in the University of Iowa Opera Rehearsal Hall. On February 21, 1997, Plaintiff filed a petition at law bringing a premises liability claim against defendant-appellee the State of Iowa. Before submission to the jury, plaintiff asked the court to instruct the jury on three specifications of negligence:

> 1) permitting makeshift stairs to be used for access onto the stage at the Opera Rehearsal Hall;
> 2) failing to provide a safe and secure set of stairs for access onto the stage at the Opera Rehearsal Hall; and
> 3) failing to provide unimpeded access to the permanent stairs for access to the stage at the Opera Rehearsal Hall.

The court phrased the instruction, in relevant part: "failing to provide safe and secure access onto the stage at the Opera Rehearsal Hall." The jury returned a verdict in favor of the defendant. The district court denied plaintiff's motion for a new trial.

Herbst claims the district court erred in not giving her proposed jury instructions. She argues there is substantial evidence supporting submission to the jury of one or more of the specifications of negligence she requested. She asks us to reverse the district court and grant a new trial. The State contends the

jury was properly instructed and Herbst's proposed instructions are duplicative and two of the proposed instructions are not supported by the evidence.

The trial court has broad but not unlimited discretion in ruling on motions for a new trial. Iowa R. App. P. 14(f)(3). We will reverse only upon a finding of an abuse of that discretion. *Millis v. Hute*, 587 N.W.2d 625, 629 (Iowa App. 1998). Litigants are entitled to have their legal theories submitted to the jury if they are supported by substantial evidence in the record. *Thompson v. City of Des Moines*, 564 N.W.2d 839, 846 (Iowa 1997). If a requested instruction states a correct rule of law which applies to the facts of the case, and the concept is not contained in the court's instructions, the requested instruction, or the court's own instruction with the same legal substance, should be submitted to the jury. *Lane v. Coe College*, 581 N.W.2d 214, 216 (Iowa App. 1998); *Erickson v. Des Moines Water Works*, 421 N.W.2d 155, 157 (Iowa App.1988). If the trial court errs in refusing to submit an instruction, we will reverse only when the error has caused prejudice. *See Coker v. Abell-Howe, Co.*, 491 N.W.2d 143, 143 (Iowa 1992).

The circumstances of this case are analogous to those in *Schuller v. Hy-Vee Food Stores, Inc.*, 328 N.W.2d 328 (Iowa 1982). Plaintiff's proposed instructions were duplicative. *See Id.* at 332. Her proposed instructions were adequately incorporated in the court's instruction. The court is entitled to use it's own choice of words in instructing the jury. *Id.* The district court did not abuse its discretion in denying of plaintiff's motion for a new trial.

AFFIRMED.