IN THE COURT OF APPEALS OF IOWA

No. 8-540 / 97-1659

MONTIE GIBSON,

Plaintiff-Appellant,

vs.

LITTLE ALL-AMERICAN FOOTBALL LEAGUE, INC., (d/b/a "LITTLE ALL-AMERICAN FOOTBALL" and d/b/a "ACTION BINGO"), and DONALD WHITE,

Defendants-Appellees.

FILED
NOV 30 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Ray A. Fenton, Judge.

Plaintiff appeals from the jury verdict in the defendants' favor. **AFFIRMED.**

Fred L. Dorr and Matthew D. Kern of Wasker, Dorr, Wimmer & Marcouiller, P.C., Des Moines, for appellant.

David A. Tank of Davis, Brown, Koehn, Shors & Roberts, P.C., Des Moines, for appellee Little All-American Football League.

John E. Orrell, Jr. and Anne L. Clark of Hopkins & Huebner, P.C., Des Moines, for appellee Donald White.

Heard by Sackett, C.J., Huitink, J., and Peterson, S.J.*

* Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

SACKETT, C.J.

Plaintiff-appellant Montie Gibson appeals from a verdict for defendants-appellees Little All-American Football League, Inc. and Donald White. Plaintiff sued defendants contending defendants' negligence caused her fall on July 1, 1994, in the parking lot of a bingo hall operated by defendant Little All-American Football League, Inc. and owned by defendant Donald White. Plaintiff contends (1) she should have been granted a new trial because the district court did not properly instruct the jury, and (2) the jury improperly attributed fault of her daughter, a non-party. We affirm.

Plaintiff and her daughter had been playing bingo at the hall. They left the hall at about ten o'clock in the evening. Plaintiff, on leaving, fell in the parking lot area near the rear of the hall, hitting her head and breaking her knee cap. Plaintiff, in her late eighties at the time of the accident, incurred substantial medical bills and experienced a slow recovery.

Plaintiff's suit against defendants was premised on (1) a failure to inspect and maintain the property and keep the parking lot properly lit; (2) a failure to warn of the dangerous condition of the parking lot; (3) a failure to repair a dangerous condition, namely a raised condition in the parking lot; and (4) a failure to act as a reasonable person under similar conditions.

The case was tried to a jury. The jury returned a verdict on Monday, February 10, 1997, allocating percentages of fault for the accident. They allocated

ninety percent to plaintiff and ten percent to defendant Little All-American Football League, Inc. The jury did not find Donald White at fault.

On February 20, 1997, plaintiff filed a motion for a new trial contending the instructions given the jury by the district court were inconsistent and incorrect. On February 28, plaintiff filed a second motion for a new trial asserting jury misconduct. Both motions were overruled and this appeal follows.

Plaintiff first contends Instruction No. 14 given by the district court was not a correct statement of the law. The instruction given was as follows:

> An owner or occupant of land owes a duty of care to keep the premises in a reasonable and safe condition for its invitees. This duty requires an owner or tenant to use reasonable care to ascertain the actual condition of the premises. The duty also requires making the area reasonably safe or giving a warning of the actual conditions or risk involved.
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> A landowner or tenant, however, is not liable when the injury sustained by a business invitee is caused by a known or obvious danger. An obvious danger means that both the condition and the risk are apparent to, and would be recognized by, a reasonably prudent person. "Known" in the context of known or obvious danger to the invitee means knowledge of existence of a condition as well as appreciation of the danger involved.
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> The "obvious" in the context of a known or obvious danger to the invitee means both condition and risk are apparent to and would be recognized by a reasonable person in the position of the invitee exercising ordinary perception, intelligence, and judgment.

Plaintiff objected to the instruction at trial contending that at the end of the first sentence of paragraph two the court should have added the words "unless the landlord/tenant should have anticipated the harm despite such knowledge or

obviousness."[1] Plaintiff makes substantially the same argument on appeal she made in the district court.

We review the claim the trial court should have granted plaintiff's motion for new trial for an abuse of discretion. *Foggia v. Des Moines Bowl-O-Mat, Inc.*, 543 N.W.2d 889, 891 (Iowa 1996).

Plaintiff contends the instruction given misstates the law without the requested language. In *Wieseler v. Sisters of Mercy Health Corp.*, 540 N.W.2d 445 (Iowa 1995), the court said a possessor of land is not liable to his invitees for physical harm caused by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. *Id.* at 450.

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[1] The instruction would then have read:

An owner or occupant of land owes a duty of care to keep the premises in a reasonable and safe condition for its invitees. This duty requires an owner or tenant to use reasonable care to ascertain the actual condition of the premises. The duty also requires making the area reasonably safe or giving a warning of the actual conditions or risk involved.

A landowner or tenant, however, is not liable when the injury sustained by a business invitee is caused by a known or obvious danger ***unless the landlord/tenant should have anticipated the harm despite such knowledge or obviousness.*** An obvious danger means that both the condition and the risk are apparent to, and would be recognized by, a reasonably prudent person. "Known" in the context of known or obvious danger to the invitee means knowledge of existence of a condition as well as appreciation of the danger involved.

The "obvious" in the context of a known or obvious danger to the invitee means both condition and risk are apparent to and would be recognized by a reasonable person in the position of the invitee exercising ordinary perception, intelligence, and judgment.

Defendants contend the challenged instruction, when considered together with Instructions No. 15 and 17, correctly states the law. Instruction No. 15 provided:

> If the owner or occupant of real estate knows or in the exercise of reasonable care should know of a condition on the premises that creates an unreasonable risk of injury to a business invitee, and if the condition is one that the owner or occupant should expect that a customer exercising reasonable care would not know of or discover the condition, the owner or occupant has a duty to warn the customer of the condition and risk involved.
>
> If you find that either defendant failed to warn in such circumstances, such a failure would constitute negligence on said defendant's part.

Instruction No. 17 provided:

> In order for the plaintiff to recover against defendant Little All-American Football League, Inc., plaintiff must prove all of the following propositions:
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> 1. Said defendant 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 a person in the plaintiff's position.
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> 2. The condition was one that a person in the defendant's position should have expected would not have been discovered or realized by the plaintiff or one the defendant should have expected the plaintiff would fail to protect herself from.
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> 3. The defendant was negligent in:
>
> (A) failing to properly inspect, maintain, and keep properly lit the parking lot on the premises.
>
> (B) failing to warn or otherwise protect customers of a dangerous condition on the parking lot.
>
> (C) failure to repair an alleged dangerous condition on the parking lot.
>
> 4. The negligence of the defendant was a proximate cause of the plaintiff's damages.
>
> 5. The amount of plaintiff's damages.
>
> 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, then you will consider the defense of plaintiff's comparative fault as explained in Instruction No. 20.

Jury instructions are read and construed together and not considered piecemeal or in artificial isolation. *See Sunrise Developing Co. v. Iowa Dep't of Transp.*, 511 N.W.2d 641, 644 (Iowa App. 1993). A new trial need be ordered only if the instructions as a whole are insufficient to convey the applicable law. *See McIntire v. Muller*, 522 N.W.2d 329, 332 (Iowa App. 1994). The instructions, as a whole, are adequate. We affirm the trial court decision not to order a new trial on this issue.

Plaintiff next contends the trial court abused its discretion because of what plaintiff contends was jury misconduct in allocating fault of plaintiff's daughter to plaintiff. This issue was raised in the second motion for new trial filed eighteen days after the jury returned.[2] Plaintiff supported her motion with the affidavit of a juror deciding the cause. The juror, by way of affidavit, related in reaching its verdict, the jury discussed the role of plaintiff's daughter and it influenced the fault the jury ultimately attributed to plaintiff. Defendants contend the juror's affidavit was incompetent.

Iowa Rule of Evidence 606(b) provides:

> **Inquiry Into Validity of Verdict or Indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to

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[2] Defendants contend the motion was not timely. We find it unnecessary to address this challenge.

> bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Iowa R. Evid. 606(b).

Inquiry into a jury verdict is appropriate only (1) to show the verdict was not correctly recorded, or (2) to prove external matters were improperly brought into the deliberations. *See Weatherwax v. Koontz*, 545 N.W.2d 522, 524 (Iowa 1996). The juror's affidavit shows neither. We affirm on this issue.

AFFIRMED.