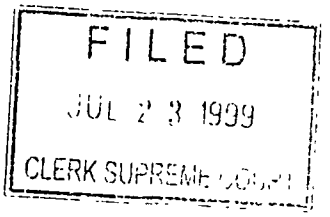
IN THE COURT OF APPEALS OF IOWA

No. 9-036 / 98-876
Filed July 23, 1999



EVANGLINE THOMPSON,
Appellant,

vs.

MONTGOMERY KONE, INC.,
Appellee.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

Plaintiff appeals a jury verdict for the defendant in a personal injury action involving an elevator maintained by the defendant. **AFFIRMED**

Robert A. Nading II of the Nading Law Firm, Ankeny, for appellant.

John Werner and Mark A. Schultheis of Grefe & Sidney, P.L.C., Des Moines, for appellee.

Considered by Sackett, C.J., and Huitink and Streit, JJ.

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STREIT, J.

Evangeline Thompson appeals several of the trial court's evidentiary rulings, the denial of her motion for directed verdict on the issue of exclusive control, and refusal to instruct the jury the defendant was in exclusive control of the elevator which caused her injury. Because we find the court did not abuse its discretion in making its evidentiary rulings, and a question of fact was generated as to whether the defendant was in exclusive control of the elevator, we affirm the trial court.

I. Background Facts & Proceedings.

Thompson injured her left ankle when she tripped and fell while leaving an elevator in the Hoover State Office Building in Des Moines. The elevator was maintained by Montgomery Kone, Inc. who contracts with the State of Iowa to maintain elevators in state office buildings in Des Moines. Thompson brought an action for damages against Montgomery alleging specific negligence and res ipsa loquitur.

Thompson grounds her appeal, in part, on three evidentiary rulings made at trial. The first is the court's exclusion of the American National Standards Institute standard governing elevator operations which states elevators should stop within one-half inch of the floor level. Thompson's elevator stopped approximately four to six inches above floor level. Thompson argued Montgomery was obligated to follow the standard under the provisions of its contract with the State. The second ground is the court's exclusion of Thompson's evidence the same elevator previously

malfunctioned after it was inspected by Montgomery the week prior to the incident. The third ground is the court's allowing testimony by a Montgomery employee that reasons other than poor maintenance could have caused the elevator to malfunction.

At the close of Thompson's case, the court directed a verdict for Montgomery. Thompson motioned for directed verdict in her favor which was denied. She also argued the court should instruct the jury that Montgomery had exclusive control of the elevator, but the court would not. Only the res ipsa loquitur general count was submitted to the jury. The jury returned a verdict for Montgomery. Thompson appeals.

II. Evidentiary Rulings.

We view evidentiary rulings of the trial court for abuse of discretion. *Williams v. Hedican*, 561 N.W.2d 817, 822 (Iowa 1997).

First, Thompson contends the trial court erred in excluding evidence of the ANSI standard. She argues the evidence was relevant to establish the first element of her res ipsa loquitur claim; that the occurrence, in the ordinary course of things, would not have happened if reasonable care had been used.

At trial, Thompson offered evidence of the ANSI standard to prove Montgomery was negligent per se rather than offering the standard as evidence of negligence. Only the City of Des Moines ordinance including the ANSI standard was offered at trial. No testimony was offered establishing a failure to meet the standard

was due to improper maintenance or that compliance with the ANSI standard equated with a failure to use ordinary care in maintaining the elevator.

A duty may be created by statutory or regulatory enactment when the victim is within the class of persons the statute was intended to protect, the harm suffered was the type the legislature was trying to prevent, and the statute or regulation is violated. *Timm v. Clement*, 574 N.W.2d 368, 372 (Iowa App. 1997); *Kessler v. Wal-Mart Stores, Inc.*, 587 N.W.2d 804, 807 (Iowa App. 1998). Violation of the ANSI standard, however, even when incorporated into a City of Des Moines ordinance, is not negligence per se. Rules of conduct establishing absolute standards of care, the violation of which is negligence per se, must be ordained by a state legislative body or an administrative agency regulating on a statewide basis under authority of the legislature. *Griglione v. Martin*, 525 N.W.2d 810, 812 (Iowa 1994). The ANSI standard is not such a rule of conduct and the court did not err in refusing to instruct the jury that violation of the standard was negligence per se.

Because Thompson presented the standard to prove negligence per se rather than specific acts of negligence, the district court did not err in excluding the evidence to prove her specific negligence claim. Further, we find the ANSI standard was not relevant to establish Thompson's claim of res ipsa loquitur.[1] Presented without other

[1] Res ipsa loquitur can be proven by establishing: (1) injury caused by an instrumentality under the exclusive control of the defendant, and (2) the occurrence is such that in the ordinary course of things it would not have happened had reasonable care been used.

testimony, the ANSI standard did not make either element of Thompson's res ipsa loquitor claim more probable.

Thompson secondly contends the trial court erred in excluding evidence the elevator previously malfunctioned after being inspected by Montgomery as evidence Montgomery did not use ordinary care in maintaining the elevator. Evidence of similar occurrences is not relevant to prove causation of the occurrence in question in the absence of proof of substantial similarity of all conditions that might enter into or affect causation. *Meeker v. City of Clinton*, 259 N.W.2d 822, 832 (Iowa 1977). The prior incidents where this elevator malfunctioned were dissimilar to this occurrence, involving entrapment problems rather than leveling problems. Those incidents were not notice to Montgomery of a leveling problem. Further, there was no evidence the previous malfunctions were caused by Montgomery's failure to maintain the elevators with ordinary care. For these reasons, the district court did not err in excluding this evidence.

Thompson contends the trial court erred in refusing to exclude, as a discovery sanction, testimony of Allen Coobs, a Montgomery employee, when his testimony had not been disclosed in response to her interrogatory requests. Coobs testified reasons other than poor maintenance could have caused the elevator to malfunction. Thompson argues Coobs was an expert witness who should have been disclosed under Iowa Rule of Civil Procedure 125.

The decision of a trial court to impose discovery sanctions is discretionary and will not be reversed unless there has been an abuse of discretion. *See Sullivan v. Chicago & N.W. Transp. Co.*, 326 N.W.2d 320, 324 (Iowa 1982). In order to show an abuse of discretion, one must show the court exercised its discretion " 'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.' " *Bindel v. Larrington*, 543 N.W.2d 912, 914 (Iowa App. 1995).

Before determining the appropriateness of sanctions in a personal injury action for nondisclosure of a witness under rule 125, it is necessary to examine whether the facts and opinions of the witness were formulated for purposes of the issues in pending or anticipated litigation. *See Carson v. Webb*, 486 N.W.2d 278, 281 (Iowa 1992). It would be an abuse of discretion to exclude or limit the testimony of a witness not retained for this under rule 125. *See Morris-Rosdail v. Schechinger*, 576 N.W.2d 609, 612 (Iowa App. 1998). In determining whether a witness must be disclosed under rule 125, generally, we look to whether the witness was retained for purposes of litigation. *See id.* However, application of the rule does not depend on the label given a witness, but rather, on the reason and time frame in which the underlying facts and opinions were acquired by the witness. *Id.*

Although Coobs could be considered an expert concerning the elevator, he was not retained for the purposes of litigation. He was an employee of Montgomery called to testify regarding the procedures used by the company in maintaining elevators and the maintenance of the specific elevator at issue in this case. His testimony elevators

may mislevel for reasons other than poor maintenance and that an elevator which mislevels would not correct itself was knowledge obtained through his on the job experience, not knowledge acquired and developed for use in anticipation of litigation. The trial court was correct in finding rule 125 inapplicable to Coobs' testimony.

Further, we do not find the trial court abused its discretion in failing to impose discovery sanctions for Montgomery's failure to disclose Coobs' testimony in response to Thompson's interrogatory number eight. The interrogatory did not inquire into the areas covered by Coobs' testimony. Interrogatory eight inquired:

> State each and every reason or cause known to defendant that would cause the elevator to fail to stop level with the floor at the time and place at issue.

Montgomery's response was:

> It is not possible to respond completely or accurately to this interrogatory; the answer would depend upon circumstances unknown to this defendant.

At trial, Coobs testified, generally, that elevators could mislevel for reasons other than poor maintenance. He did not state the other specific reasons elevators would mislevel and did not state other reasons why the elevator at issue misleveled. The trial court did not abuse its discretion in deciding not to impose the sanction of exclusion based on this inquiry, response, and testimony.

IV. Ruling on Motion for Directed Verdict & Jury Instructions.

Thompson contends the trial court erred in denying her motion for directed verdict on the issue of exclusive control for her res ipsa loquitur claim and her request the trial court instruct the jury Montgomery had exclusive control of the elevator, satisfying the first element of her res ipsa loquitur claim.

When reviewing the district court's decision on plaintiff's motion for directed verdict, we review the evidence in the same light as the district court and determine whether a fact or jury question was generated by the evidence. *Fiala v. Rains*, 519 N.W.2d 386, 387 (Iowa 1994). The court's findings of fact in this law action are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). Evidence is substantial for purposes of sustaining a finding of fact if a reasonable person would accept the evidence as adequate to reach a conclusion. *Falczynski v. Amoco Oil Co.*, 533 N.W.2d 226, 230 (Iowa 1995). When reviewing evidence for its substantiality, we view it in the light most favorable to upholding the district court's judgment. *Id.*

We review alleged error regarding refusal to submit jury instructions for correction of errors at law. Iowa R. App. P. 4; *State v. Simpson*, 528 N.W.2d 627, 630 (Iowa 1995). Litigants are entitled to have their legal theories submitted to the jury if they are supported by the pleadings and substantial evidence in the record. *Thompson v. City of Des Moines*, 564 N.W.2d 839, 846 (Iowa 1997). If the trial court errs in submitting or 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).

Thompson was not entitled to a directed verdict on the issue of control or an instruction informing the jury Montgomery was in exclusive control of the elevator at issue. Our reasoning is two-fold. First, a fact question as to whether Montgomery had exclusive control of the elevator was generated. Montgomery's evidence showed the owner of the building, the State of Iowa, was responsible for reporting problems with the elevators to Montgomery, including leveling problems. Between Montgomery's periodic maintenance visits the State of Iowa exercised significant aspects of control over the elevator. Employees of the state were not only responsible for reporting leveling problems between maintenance visits; but also assessed whether to report the problem to Montgomery Kone and whether to permit the elevator to remain operating after finding a problem. These facts raised a question for the jury on the issue of exclusive control.

Second, the res ipsa loquitur doctrine as a rule of evidence. *Mastland, Inc. v. Evans Furniture, Inc.*, 498 N.W.2d 682, 686 (Iowa 1993). If substantial evidence supports both elements, the happening of the injury permits, but does not compel, an inference of negligence. *Id.* Even if Thompson's evidence on each element was substantial, "[t]he inference of negligence to be drawn from the circumstances is left to the jury. They are permitted, but not compelled to find it." *Brewster v. U.S.*, 542 N.W.2d 524, 529 (Iowa 1996) (citation omitted). Thompson was not prejudiced by

the trial court's handling of this issue. The court submitted her res ipsa loquitor claim to the jury. We affirm the trial court's denial of Thompson's motion for directed verdict and request the jury be instructed Montgomery had exclusive control of the elevator at issue.

AFFIRMED.