

IN THE COURT OF APPEALS OF IOWA

No. 4-239 / 93-216

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NORMAN MICKEY,

Appellee,

vs.

IBP, INC., A Delaware Corporation,

Appellant.

FILED

DEC 14 1994

CLERK SUPREME COURT

Appeal from the Iowa District Court for Pottawattamie County, Leo F. Connolly, Judge.

Plaintiff brought suit claiming defendant's negligence in failing to maintain a safe work environment caused him to fall and injure his knee. After the jury returned a verdict for plaintiff, defendant appeals. **AFFIRMED.**

David F. McCann of Dippel & McCann, P.C., Council Bluffs, for appellant.

E. Terry Sibbernsen of E. Terry Sibbernsen, P.C., Omaha, Nebraska, and Thomas L. Root of Pogge, Root & Fleming, Council Bluffs, for appellee.

Heard by Donielson, C.J., Huitink, J., and Schlegel, S.J.*

*Senior judge from the Iowa Court of Appeals serving by order of the Iowa Supreme Court.

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SCHLEGEL, S.J.

Norman Mickey fell and injured his knee while cleaning the floor of an IBP plant's ham boning room. Mickey slipped on a piece of fat left on the floor while attempting to clear a partially clogged floor drain. At the time of the accident, Mickey worked for DCS, an independent contractor hired to provide additional maintenance for the plant.

Mickey brought suit against IBP claiming it negligently failed to maintain its premises in a safe condition and failed to give any warning of existing dangers. IBP claimed Mickey's negligence caused his injuries and that Mickey failed to mitigate his damages. The matter proceeded to a jury trial.

Mickey presented the testimony of Al Marchisio, an expert in the area of vocational rehabilitation. Marchisio testified concerning Mickey's loss of earning capacity. His opinions did not take into account the present value of future earnings. Marchisio opined Mickey suffered a loss of earning capacity in the amount of \$217,852. IBP objected to this opinion on the ground it violated an order granting its motion in limine limiting expert testimony to discovery responses. IBP alleged the expert's testimony should have been limited by an answer to an interrogatory indicating the loss of earning capacity amounted to only \$60,000.

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During closing arguments IBP's counsel showed the jury photographs of the ham boning room where the accident occurred. The photographs were taken by one of the plaintiff's experts. IBP's counsel allegedly showed the pictures in order to demonstrate what the plaintiff's expert relied upon in opining the floor contained an excess amount of fat. IBP claims that in rebuttal to the presentation of these photographs Mickey's counsel improperly suggested the plant had been "rigged" to benefit IBP's case.

A jury returned a verdict apportioning fault at ninety percent to IBP and ten percent to Mickey. It found Mickey's damages to be \$100,000. The court found that \$34,464 of this amount represented future damages. The court entered judgment against IBP for \$90,000. It denied IBP's motion for new trial. IBP appeals.

On appeal, IBP raises five distinct issues: (1) whether the trial court erred in permitting plaintiff's vocational rehabilitation expert to testify; (2) whether the trial court impermissibly allowed expert testimony which was not disclosed in pretrial discovery; (3) whether defendant should be granted a new trial by reason of allegedly prejudicial comments made by plaintiff's counsel; (4) whether the trial court erred in giving certain instructions to the jury; (5) whether the trial court erred in refusing to submit a special verdict form; and (6) whether the trial court abused its discretion in

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failing to sustain defendant's motion for judgment notwithstanding the verdict and for a new trial. We discuss each issue in turn.

I. Plaintiff's Vocational Rehabilitation Expert.

The first issue is whether the trial court committed reversible error in permitting plaintiff's vocational rehabilitation expert to express opinions concerning plaintiff's loss of earning capacity. IBP contends the expert should not have been allowed to translate his opinion into a dollar figure.

Mickey presented the testimony of Al Marchisio, an expert in the area of vocational rehabilitation. Marchisio testified concerning Mickey's loss of earning capacity. Marchisio opined Mickey suffered a loss of earning capacity in the amount of \$217,852.

Our scope of review is for correction of errors of law. Iowa R. App. P. 4. Admissibility of expert testimony is discretionary. Poyzer v. McGraw, 360 N.W.2d 748, 752 (Iowa 1985). Iowa courts are loath to interfere unless a manifest abuse of discretion has resulted in prejudice to the complaining party. Miller v. Bonar, 337 N.W.2d 523, 528 (Iowa 1983).

Iowa Rule of Evidence 702 allows a witness qualified as an expert by knowledge, skill, experience, training, or education to testify in the form of an opinion or otherwise if such testimony will assist the trier of fact. The trial court is granted considerable latitude in determining the

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expert qualifications of a witness preparatory to the rendering of an opinion. Ganrud v. Smith, 206 N.W.2d 311, 314 (Iowa 1973). The capacity to testify as an expert is relative to the topic under examination. In re O'Neal, 303 N.W.2d 414, 420 (Iowa 1981). Only in clear cases of abuse of discretion will the admission of expert testimony be found prejudicial. Haumersen v. Ford Motor Co., 257 N.W.2d 7, 11 (Iowa 1977). The discretion of the trial court ceases when the record shows as a matter of law the witness is not qualified or the facts upon which the opinion is based are not sufficiently stated by the witness. Ganrud, 206 N.W.2d at 314.

Admittedly, Marchisio is not an economist or financial expert. However, he testified at length regarding his qualifications. Marchisio testified he has a bachelor's degree in sociology and a master in guidance and counseling. He has twenty years of experience in his field. He is certified as a professional counselor and evaluates approximately 250-300 patients per year. The witness described his methods and factors involved in his determinations. The witness tested plaintiff on two different occasions. The witness obtained plaintiff's job history and determined his aptitude level. The witness testified he is often called on to project loss of income and loss of earning capacity. The witness testified as to the factors involved in determining loss of income.

Under these circumstances, there is no abuse of discretion. We affirm the trial court on this issue.

II. Testimony Not Disclosed in Pretrial Discovery.

IBP's second issue on appeal is based on Iowa Rule of Civil Procedure 125. Subsection (d) of that rule provides, in relevant part:

To the extent that the facts known, or mental impressions and opinions held, by an expert have been developed in discovery proceedings under . . . this rule, the expert's direct testimony at trial may not be inconsistent with or go beyond the fair scope of the expert's testimony in discovery proceedings

IBP also notes Mercy had a continuing obligation to supplement its answers to interrogatories concerning the substance of expert testimony to be offered at trial. See, e.g., Mercy Hosp. v. Hansen, Lind & Meyer, 456 N.W.2d 666, 670 (Iowa 1990); Iowa R. Civ. P. 125(c). The purpose of these rules is to avoid surprise to litigants and to permit issues to become both defined and refined before trial. See, e.g., Lambert v. Sisters of Mercy Health Corp., 369 N.W.2d 417, 422 (Iowa 1985); White v. Citizens Nat'l Bank of Boone, 262 N.W.2d 812, 816 (Iowa 1978).

At trial, Marchisio opined plaintiff suffered a loss of earning capacity in the amount of \$217,852. IBP objected to this opinion on the ground it violated an order granting its motion in limine limiting expert testimony to discovery responses. IBP alleged the expert's testimony should have been limited by an answer to an interrogatory indicating the loss of earning capacity amounted to only \$60,000. The trial court refused to exclude or limit Marchisio's testimony on this basis. We review this ruling for abuse

of discretion. See, e.g., Miller v. Bonar, 337 N.W.2d 523, 527 (Iowa 1983).

There is no showing here that discovery sanctions should have been imposed, that there was any surprise, or that plaintiff's counsel had pretrial knowledge there was a discrepancy between answers to interrogatories and trial testimony. Although the opposite ruling perhaps could have been made, we cannot say on this record the trial court abused its discretion in allowing Marchisio to testify as he did.

III. Prejudicial Comments.

Third, IBP claims that in rebuttal to the presentation of photographs plaintiff's counsel improperly suggested the plant had been "rigged" to benefit IBP's case. IBP claims the jury was "poisoned" by counsel's comment and thus IBP is entitled to a new trial.

We allow a trial court broad but not unlimited discretion in ruling upon motions for new trial and will reverse its determination upon a finding that it has abused its discretion. Iowa R. App. P. 14(f)(3); Thomas Truck & Caster Co. v. Buffalo Caster & Wheel Corp., 210 N.W.2d 532, 536 (Iowa 1973). When misconduct is asserted as a ground for a new trial, it must appear from the record that the misconduct caused prejudice to the moving party or that a different result would have been probable but for such misconduct. Laguna v. Prouty, 300 N.W.2d 98, 102 (Iowa 1981) (refusal of court to instruct jury not to consider

insurance coverage not a ground for mistrial); Yeager v. Durflinger, 280 N.W.2d 1, 8 (Iowa 1979) (statements of plaintiff's counsel during closing arguments allegedly ridiculing defense counsel not prejudicial).

We do not condone plaintiff counsel's comments. However, when we look at the entire record, we conclude there was no prejudice caused by the remarks, nor would a different result have been probable but for such misconduct. The issues of how photographs were taken, what procedure was used to allow inspection of the premises, and the condition of the floor on a day significantly after the accident in question are collateral issues. We do not believe the trial court abused its discretion.

IV. Jury Instructions.

IBP's assigns error to the trial court's jury instructions. We will not disturb a trial court's ruling on instructions absent an abuse of discretion. State v. Webb, 516 N.W.2d 824, 831 (Iowa 1994). Moreover, any "error in jury instructions must be prejudicial to warrant reversal." State v. Boley, 456 N.W.2d 674, 679 (Iowa 1990). IBP's three arguments relating to jury instructions will be discussed in turn.

A. Definition of "Unreasonable Risk of Injury".

IBP claims the trial court committed reversible error when it did not define "unreasonable risk of injury," a phrase which appeared in jury instruction No. 4. According to IBP, the jury was incapable of understanding this phrase without assistance from the trial court.

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We disagree. We hold that the phrase "unreasonable risk of injury" does not automatically require definition by the trial court. It is within the knowledge of the average venireman to understand its import.

B. Duty of Owner of Premises to Employees of Independent Contractor.

IBP also objects to instruction No. 9, which stated the duty of a premises owner to employees of an independent contractor. IBP claims instruction No. 9 was beyond the scope of the case.

We disagree. The trial court correctly instructed the jury under the facts of the instant case. Plaintiff was an employee of an independent contractor hired by defendant. As such, defendant was under a duty to provide a safe place of employment. See, e.g., Greenwell v. Meredith Corp., 189 N.W.2d 901, 905 (Iowa 1971) ("one who is having work done on his premises by an independent contractor is under the obligation to use ordinary care to keep the premises in a reasonably safe condition for the servants of the contractor"). The instructions, when taken as a whole, set forth plaintiff's theory of premises liability against defendant. The trial court committed no error here.

C. OSHA Standard.

Defendant argues the trial court committed reversible error in instructing the jury on the effect of an OSHA violation in jury instruction No. 21. Defendant has two theories. First, defendant argues there was insufficient

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evidence to show OSHA regulations apply in this case. Second, defendant argues instruction No. 21 itself misstates Iowa law.

In regard to the first argument, any error was waived. A review of the objection made to instruction No. 21 demonstrates defendant's argument was purely a legal one; that is, that the instruction misstated the law. The only grounds or objections that may be asserted or considered on appeal are those specified in the objections to the trial court. Iowa R. Civ. P. 196. A defendant cannot amplify or change the objection on appeal. Moser v. Stallings, 387 N.W.2d 599, 604 (Iowa 1986).

In regard to the second argument, instruction No. 21 does not misstate the law. Our supreme court has held that violation of an OSHA standard by an employer is negligence per se as to the employer's employee. Johnson v. Interstate Power Co., 481 N.W.2d 310 (Iowa 1992). However, such a violation is only evidence of negligence as to all other persons who are likely to be exposed to injury as a result of the violation. Id. at 315. Violation of OSHA in this case is evidence of negligence because plaintiff is one who could reasonably be expected to be harmed by such a violation. Thus, both the admission of the regulations into evidence and instruction No. 21 were proper.

Instruction No. 21 does not mislead the jury. Instruction No. 21 does not instruct the jury defendant has violated an OSHA regulation. Rather, it allows the jury to

determine whether or not an OSHA regulation has been violated by defendant. The instruction then allows the jury to use the violation to assess fault against defendant. Thus, the instruction was a correct embodiment of the law and was further a correct instruction on the facts of this case.

V. Special Verdict Form.

IBP next contends the trial court erred in refusing to give IBP's requested special verdict form. IBP claims the trial court's decision constitutes reversible error because its special verdict form required findings on the various elements essential for recovery, and because it was phrased only in terms of "negligence," rather than "fault."

Iowa Rule of Civil Procedure 205 states that "[t]he court may require that the verdict consist wholly of special written findings on each issue of fact." "This rule is permissive and not mandatory." Beachel v. Long, 420 N.W.2d 482, 487 (Iowa App. 1988). The trial court has discretion regarding the form and content of instructions. Carter v. Wiese, 360 N.W.2d 122, 131 (Iowa App. 1984). We find no abuse of the trial court discretion in its decision to not submit a special verdict form.

VI. Directed Verdict.

A directed verdict is appropriate in cases where 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 the 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).

IBP argues the trial court erred in refusing to direct a verdict in its favor. IBP claims a jury could not find plaintiff was unaware of the hazardous condition on the property. However, IBP does not correctly state the law on this matter.

In Konicek v. Loomis Bros., Inc., 457 N.W.2d 614 (Iowa 1990), our supreme court held that several exceptions exist to the requirement that, in order to impose liability on a landowner, the invitee must not be aware of the hazard. One exception is where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable person in their

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position the advantage of doing so would outweigh the apparent risk. 457 N.W.2d at 618. The court, when considering this exception, stated: "[A]n obvious example of the latter circumstance concerns an employee who encounters a known and obvious risk because to do otherwise would cost the employee his or her job" 457 N.W.2d at 618. In this case, exceptions to the general rule may apply.

We cannot say there was no substantial evidence supporting the jury's verdict. We therefore hold that the trial court did not commit reversible error in refusing to grant a directed verdict.

Judgment of the trial court affirmed.

AFFIRMED.