IN THE COURT OF APPEALS OF IOWA

No. 0-030 / 09-0601
Filed February 10, 2010

NICOLE VAN DYNE,
Plaintiff-Appellant,

vs.

DEBBIE TYSDAL and RANDY TYSDAL,
Defendant-Appellees.

Appeal from the Iowa District Court for Wayne County, Sherman W. Phipps, Judge.

Nicole Van Dyne appeals from a judgment entered in favor of Debbie and Randy Tysdal in a premises liability action. **AFFIRMED.**

Thomas Palmer of Lawyer, Dougherty, Palmer & Flansburg, P.L.C., West Des Moines, for appellant.

Loree Nelson of Gislason & Hunter, L.L.P., Des Moines, for appellees.

Considered by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

MANSFIELD, J.

This is an appeal from a judgment entered in favor of the defendants in a premises liability action. Nicole Van Dyne sued her former landlords, Debbie and Randy Tysdal, after allegedly falling on a staircase. A jury returned a verdict in the Tysdals' favor, and judgment was entered thereon. Van Dyne now contends the district court committed errors in its jury instructions and in certain evidentiary rulings. For the reasons set forth herein, we affirm.

I. Background Facts and Proceedings.

In October 2006, Van Dyne rented a second-floor apartment in a building owned by her sister and brother-in-law, the Tysdals. There were two ways to get to the second floor—a front stairway through an adjoining building and an interior staircase within the building itself. The interior staircase had been modified by Randy Tysdal making it, in the view of Van Dyne's expert, unsafe. After one ascended the staircase, there was a trap door at the top. After opening the trap door, the person would need to prop it open, step out onto a narrow landing, put the trap door back down, and then cross over the trap door to the hallway.

The front stairway did not present these issues, but was somewhat exposed to the elements and was also a longer and less convenient route of access. (The Tydals claimed, nonetheless, that Van Dyne had been told only to use the interior staircase in an emergency.) On the night of July 26, 2007, Van Dyne and her son were doing laundry in the laundromat located in the first floor of the building. After they were finished, and the son had carried up the laundry, Van Dyne walked up the interior staircase. As she reached the top, she tripped on a two-by-four that was propping up the trap door. As a result, the trap

door came down on her head, and she fell down the stairs. Van Dyne contends she suffered significant injuries from this accident, which necessitated her undergoing a cervical fusion on September 10, 2007.

However, Van Dyne did not seek medical treatment until August 15, 2007, and she did not complain about a fall until August 29, 2007. Van Dyne also had a history of back and neck pain, including two lower back surgeries. At the time of the fall, Van Dyne was already on Social Security disability due to her back condition.

In the fall of 2007, while Van Dyne was undergoing medical treatment, the Tysdals evicted her from the apartment, allegedly because of a one hundred dollar payment that was late.

On January 28, 2008, Van Dyne brought suit against the Tysdals for negligence. The case was tried to a jury from March 18 to March 25, 2009, under the premises liability law that preceded the supreme court's decision in *Koenig v. Koenig*, 766 N.W.2d 635 (Iowa 2009). A major point in dispute was whether the front stairway was an "alternate safe route" that was available to Van Dyne. She claimed it was not practical to use because it was full of puddles and debris due to rain.

To counter this claim, the Tysdals called Harry Hillaker, the Iowa State Climatologist, to testify by deposition. He testified that neither the federal government nor the State of Iowa gathers official data on precipitation in Corydon, but that the KCCI-TV "SchoolNet" service includes a rainfall collection device on a school in Corydon, which is connected to a central computer at Iowa State University. He testified that, according to SchoolNet, July 2007 in Corydon

was a dry month, that no measurable rain fell on July 24, 25, or 26, 2007, but that about one-half an inch of rain fell very early in the morning of July 27, 2007.

At the conclusion of trial, the jury was instructed under pre-*Koenig* law. No objection was made by Van Dyne to the jury instructions. The jury ultimately found Van Dyne fifty-one percent at fault, and the Tysdals forty-nine percent at fault, thus resulting in a defense verdict and a judgment for the Tysdals.

Van Dyne now appeals. She argues the district court erred: (1) in instructing the jury under pre-*Koenig* law, instead of the law as explicated by the supreme court in *Koenig*; (2) in admitting Hillaker's testimony and related SchoolNet data; and (3) in excluding evidence of the Tysdals' subsequent eviction of Van Dyne.

II. Standard of Review.

We review claims that the district court gave an improper jury instruction for correction of errors at law. *Anderson v. Webster City Cmty. Sch. Dist.*, 620 N.W.2d 263, 265 (Iowa 2000). "Although our review is on error, we will not reverse unless 'prejudicial error by the trial court has occurred.'" *Id*. (quoting *Thavenet v. Davis*, 589 N.W.2d 233, 236 (Iowa 1999)). We review evidentiary rulings for an abuse of discretion. *Dettmann v. Kruckenberg*, 613 N.W.2d 238, 249 (Iowa 2000).

III. Analysis.

Van Dyne's first claim of error relates to the jury instructions given by the district court. Van Dyne argues the district court should have instructed the jury based on the overall standard of "reasonable care" set forth in *Koenig*, 766 N.W.2d at 645-46. Understandably, since it did not have the benefit of *Koenig*,

the district court instructed the jury under the more compartmentalized traditional common law of premises liability.

We agree with the Tysdals that Van Dyne failed to preserve error, since she made no objection to the instructions at the time. Iowa Rule of Civil Procedure 1.924 prohibits raising an objection to a jury instruction on appeal unless a timely objection was made in the trial court. *See Spencer v. Spencer*, 479 N.W.2d 293, 297 (Iowa 1991) ("Failure to timely object to an instruction not only waives the right to assert error on appeal, but also the instruction, right or wrong, becomes the law of the case."). This case was tried by both sides, without objection, under the old categories and concepts of premises liability law. It would be unfair at this point to give Van Dyne a second bite at the apple.

Next, Van Dyne asserts the district court erred in admitting Hillaker's testimony and the Corydon SchoolNet data. Van Dyne challenges the reliability of the KCCI-TV SchoolNet site in Corydon, and points out there were gaps in its reports. While we agree that not everything on television is necessarily reliable, in this case Hillaker testified that he performed a quality control check on the SchoolNet data, they were "reasonably valid," and he routinely combs through these data in the course of his work. Van Dyne had the opportunity to point out the limitations of the SchoolNet site to the jury. We find no abuse of discretion in admitting the data or the testimony. "The admission of expert testimony rests in the discretion of the district court, and we will not reverse its decision absent manifest abuse of that discretion." *Gail v. Clark,* 410 N.W.2d 662, 673 (Iowa 1987).

Lastly, Van Dyne challenges the district court's pretrial ruling excluding evidence of her subsequent eviction by the Tysdals. Van Dyne claims here, as she claimed below, that this eviction was relevant to her damages in this action because they "added to her pain and suffering during her surgical recovery." We disagree. This was a suit for negligence, not wrongful eviction. It is difficult to see how Van Dyne's loss of her apartment would have affected her physical discomfort from her injuries. If the eviction caused Van Dyne to suffer damages, it did so because it was an independent wrong, over which she did not sue. Van Dyne does not allege the Tysdals' decision to evict her had anything to do with her accident. We see no abuse of discretion here.

IV. Conclusion

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.