IN THE COURT OF APPEALS OF IOWA

No. 2-227 / 11-0934
Filed July 11, 2012

RENELLA SUE CRAWFORD,
Plaintiff-Appellant,

vs.

STEVE YOTTY and
MYRON ROPP,
Defendants-Appellees.

Appeal from the Iowa District Court for Washington County, James Q. Blomgren, Judge.

RenElla Crawford appeals from judgment entered in favor of the landlords in this slip-and-fall case. **REVERSED AND REMANDED.**

Steven Gardner of Kiple, Denefe, Beaver, Garner & Zingg, L.L.P., Ottumwa, for appellant.

Craig A. Levien of Betty, Neuman & McMahon, P.L.C., Davenport, for appellees.

Heard by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

DANILSON, J.

The plaintiff, RenElla Sue Crawford, appeals from the judgment entered in favor of the landlords after a jury trial in this slip-and-fall case. She argues the district court erred in finding the landlords did not open the door to questions about other subsequent remedial measures by admitting into evidence manually cropped (edited) photographs that still contained other subsequent remedial measures. She also argues the district court erred in not giving her requested jury instructions regarding a landlord's obligations under the lease and the statute to maintain reasonably safe premises. We conclude the district court did not abuse its discretion in its evidentiary ruling. However, the jury instructions failed to explain the landlord's duty to keep the common areas under its control in a clean and safe condition to the prejudice of Crawford. We therefore reverse and remand for a new trial.

I. Background Facts and Proceedings.

On February 22, 2008, Crawford was injured after she slipped and fell on the unlighted icy steps of the building where her son rented an apartment. The building was owned by the defendants, Steve Yotty and Myron Ropp.

After Crawford fell, the landlords erected a handrail, installed a light fixture, and fixed a baseboard on and around the stairs where Crawford claimed to have fallen.

Crawford filed a suit on April 15, 2009, asserting the landlords were negligent in failing to maintain the premises in a clean and safe condition in

violation of Iowa Code section 562A.15 (2007)[1] and in violation of a rental agreement[2] entered into between the landlords and Crawford's son.

The landlords moved in limine to bar Crawford from submitting any evidence of subsequent remedial repairs. The court ruled, "Generally remedial repairs are not admissible and that general rule is considered, but here are certain exceptions to that rule which may arise during the course of the trial." So, the court overruled the motion in limine.

Trial was held May 17-20, 2011. Crawford introduced several photographs of the entry to her son's below-ground-level apartment at 705 F Avenue, Washington, Iowa, which were taken in March and April 2008. Six cement steps led down to the back door. There was no railing. At about the third step, there was a two-by-four board stretching between the upper deck support beams that ran parallel to the ground. There was no exterior light in the immediate vicinity.

Melissa McTee, a resident of the building, testified that she never saw the landlords shovel or spread de-icer in the two years she lived in the building.

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[1] Iowa Code section 562A.15(1)(a) through (c) require a landlord to:

> a. Comply with the requirements of applicable building and housing codes materially affecting health and safety.
>
> b. Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition.
>
> c. Keep all common areas of the premises in a clean and safe condition. The landlord shall not be liable for any injury caused by any objects or materials which belong to or which have been placed by a tenant in the common areas of the premises used by the tenant.

[2] Under the rental agreement, the landlord's duties are a verbatim repetition of section 562A.15(a) and (b). Subparagraph "c" varies the statutory punctuation and capitalization slightly. In the rental agreement, subparagraph "c" reads the landlord shall

> [k]eep all common areas of the premises in a clean and safe condition, but Landlord shall not be liable for any injury caused by any objects or materials which belong to, or which have been placed by, a tenant in the common areas of the premises used by the Tenant.

Crawford's son, Nathan Smith, testified his rental agreement stated the landlord would maintain the common areas of the premises in a fit and safe condition. He stated the landlords did not take care of snow or ice removal from the sidewalks or the steps of the apartment. Smith testified there was a deck above his apartment entrance and when snow melted, it dripped through that decking and into his entrance. Smith stated he arrived home on February 8, 2008, at 5:10 p.m. There was ice on his steps when he entered. He was able to safely negotiate the steps and was inside for about ten minutes. He was expecting his mother to arrive when he heard her scream. He ran to his door to find her at the bottom of the steps with her leg pinned under her. He and an upstairs neighbor were able to get Crawford to her car and transport her to a hospital.

Crawford testified that shortly after 5 p.m. on February 22, 2008, she was going down the steps to Smith's apartment. On the first or second step down, her left foot slipped out from under her and she fell to the bottom of the stairwell with her right foot trapped underneath her, breaking her ankle. She was transported to the hospital where, in the morning, she had surgery to insert a plate and nine screws. Crawford testified she did not see any ice or snow on the steps.

Myron Ropp and Steve Yotty were each called to testify by Crawford. Both acknowledged that on February 22, 2008, there were no handrails on the steps leading down to Smith's apartment and there was not an exterior light in his stairwell. Both also stated that someone was hired to take care of snow removal for the parking lot, but not for the rest of the apartment complex. Yotty

acknowledged the rental agreement required the landlord to keep the dwelling unit in a fit and habitable condition and to keep the common areas in a clean and safe condition.

The defendants called Jason Hartsock to testify. Hartsock lived in one of the upper apartments of 705 F Avenue. He testified that on more than one occasion he saw Yotty or Yotty's son shovel and apply a sand-and-ice-melt mixture to the stairs of the apartment building. Hartsock testified he, too, had shoveled the stairs of the building and had a bucket of ice melt at the bottom of his stairs. Hartsock also testified there was lighting in and around the area. On February 22, 2008, Hartsock learned Crawford had fallen when Smith came to Hartsock's apartment to ask for help. He did not hear her scream or see her fall. Hartsock and Smith carried Crawford up the back steps and to her vehicle, and they drove her to the hospital. Hartsock testified he believed Yotty "did the best he could" to keep the premises safe from snow and ice.

Yotty testified he owned Yotty's Incorporated and one of his businesses was to scoop walks and apply ice melt for several other downtown businesses after a snow. It was his practice that he would stop by the F Avenue apartments, of which he was a co-owner, and check on it. "So if it was done, I assumed that my partner had done it. And if it wasn't done, got out got my shovel, my ice melt, did it," including the back stairways. When he received a call from Smith on Friday night or Saturday morning that Smith's mother had fallen down the steps, Yotty went to the apartment building to check on the condition of the stairs and did not see a need for ice melt. Yotty testified that before February 22, 2008, he

did not recall any tenant complaining about snow or ice removal. Nor had he known of anyone falling and injuring themselves in the back stairways.

Ropp testified he was a co-owner of the 705 F Avenue apartments and it was his practice that when it snowed, "I'd get up early, because I have more than one property, I carry a shovel and ice melt in the back of my SUV, and I go to the properties. If the properties were not cleaned up, I did it."

A. Evidentiary Ruling. The defendants sought to introduce into evidence pictures taken on May 18, 2011, depicting the back stairwell leading to what had been Smith's apartment. In those pictures, a person is shown holding the decking support post and then the cross board as he descends the stairs. An additional brace or cross board between the decking supports and along the cement of the stairwell is visible in the picture, which did not exist at the time of Crawford's fall. Also visible in some of the photos was a handrail that had been installed after Crawford fell. Plaintiff objected and a discussion was held outside the presence of the jury. The court allowed the defendants to manually crop the handrail out of the photos and refused to allow Crawford's counsel to ask about the handrail, a subsequent remedial measure. The cropped photos, exhibits M and N, were introduced. Crawford's counsel cross-examined Ropp about the additional brace, and Ropp acknowledged it had not been there at the time of Crawford's fall.

B. Jury Instructions. The court proposed the following jury instructions:

> **Instruction No. 15**
>
> You must decide whether the claimed harm to the Plaintiff is within the scope of the Defendants' liability. The Plaintiff's claimed harm is within the scope of the Defendants' liability if that harm

arises from the same general types of danger that the Defendants should have taken reasonable steps to avoid.

Consider whether repetition of the Defendants' conduct makes it more likely harm of the type the Plaintiff claims to have suffered would happen to another. If not, the harm is not within the scope of liability.

. . . .

Instruction No. 17

The Plaintiff must prove all of the following propositions:

1. The Defendants knew, or in the exercise of reasonable care, should have known of a condition on their premises and that it involved an unreasonable risk of injury to a person in Plaintiff RenElla Crawford's position.

2. The Defendants knew, or in the exercise of reasonable care, should have known:

a. Plaintiff RenElla Crawford would not discover the condition, or

b. the Plaintiff would not realize the condition presented an unreasonable risk of injury, or

c. The Plaintiff would not protect herself from the condition.

3. The Defendants were negligent in:

a. Failing to maintain their premises in a reasonably safe condition, or

b. Failing to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors.

4. The negligence was a cause of the Plaintiff's damage.

5. The amount of damage.

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 comparative fault . . . .

. . . .

Instruction No. 19

Owners and landlords owe a duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors. You may consider the following factors in evaluating whether the Defendants exercised reasonable care for the protection of the lawful visitors:

1. The foreseeability or possibility of harm;

2. The purpose for which the visitor entered the premises;

3. The time, manner, and circumstances under which the visitor entered the premises;

4. The use to which the premises are put or are expected to be put;

5. The reasonableness of the inspections, repair or warning;

6. The opportunity and ease of repair or correction or giving of the warning; and

7. The burden on the land occupier and/or community in terms of inconvenience or cost in providing adequate protection.

8. Any other factor shown by the evidence bearing on this question.

Crawford objected to the court's proposed instructions, contending they did not adequately state the landlords' statutory and contractual duties to keep all common areas of the premises in a clean and safe condition. Crawford requested the following instructions be given:

Requested Instruction

Plaintiff may also recover against Defendants as a Landlord. To recover the Plaintiff must prove all of the following propositions:

1. The Defendants violated their obligations in one or more particulars set forth in Instruction No. __ and No. ___.

2. The violations were a proximate cause of plaintiff's damage.

3. The amount of damage.

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, the plaintiff is entitled to damages in some amount.

Requested Instruction

Defendants are a landlord under Iowa law. A landlord shall:

(a) Comply with requirements of applicable building and housing codes materially affecting health and safety

(b) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition.

(c) Keep all common areas of the premises in a clean and safe condition. The landlord shall not be liable for any injury caused by any objects or materials which belong to or which have been placed by a tenant in the common areas of the premises used by the tenant.

(d) Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air-condition, and other facilities and appliances, including elevators, supplied or required to be supplied by the landlord.

Authority: Iowa Code § 562A.15

Requested Instruction

Defendants are landlords in accordance with the Dwelling Unit Rental agreement, Plaintiff's exhibit 1. Defendants were contractually obligated as landlords to do the following:

> (a) Comply with requirements of applicable building and housing codes materially affecting health and safety.
>
> (b) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition.
>
> (c) Keep all common areas of the premises in a clean and safe condition. The landlord shall not be liable for any injury caused by any objects or materials which belong to or which have been placed by a tenant in the common areas of the premises used by the tenant.
>
> (d) Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air-condition, and other facilities and appliances, including elevators, supplied or required to be supplied by the landlord.
>
> Authority: Iowa Code § 562A.15

Crawford's counsel asked the district court for a "ruling with reference to the failure of the instructions in their entirety to provide that an owner or landlord . . . has a duty to keep all common areas of the premises in a clean and safe condition?" The court stated, "I'm going to overrule that on the basis that I think the instructions encompass that in terms of the description of lawful visitors as well as the descriptions of the bases of liability."

The jury found the defendants were not at fault, and the court entered judgment for the defendants.

Crawford now appeals. She argues the court committed reversible error by restricting her ability to ask questions about subsequent remedial measures and in failing to give her requested jury instructions.

II. Scope and Standard of Review.

A challenge to a district court's ruling on admissibility of evidence is reviewed for an abuse of discretion. *Hall v. Jennie Edmundson Mem'l Hosp.*, 812 N.W.2d 681, 685 (Iowa 2012).

We review the claim that the trial court should have given requested instructions for an abuse of discretion. *Summy v. City of Des Moines,* 708 N.W.2d 333, 340 (Iowa 2006).

III. Discussion.

A. Subsequent Remedial Measures. Crawford contends the district court erred in ruling the defendants' introduction of the cropped photos did *not* open the door to questions about subsequent remedial measure. She complains that photos "were allowed to be selectively edited, were admitted into evidence and that Plaintiff was prohibited from asking about what had obviously been cut out from the photographs or about other subsequent remedial measures that had been taken."

Iowa Rule of Evidence 5.407 provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, *evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event*. This rule does not require the exclusion of evidence of subsequent measures when offered in connection with a claim based on strict liability in tort or breach of warranty or for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

(Emphasis added.) As explained in *McIntosh v. Best Western Steeplegate Inn*, 546 N.W.2d 595, 597 (Iowa 1996),

> Rule [5.407] is not a general rule of exclusion. It is a rule precluding the evidentiary use of remedial measures to prove negligence. It does not preclude that type of evidence from being used to prove other legitimate matters. Care must be taken, of course, that the other matters sought to be proved are not pretextual.

Crawford was allowed to cross-examine Ropp in a manner that allowed her to inform the jury the conditions presented in the photos were not the same as at the time of the accident. *See McIntosh*, 546 N.W.2d at 597 ("The nature and condition of property may be shown by circumstantial evidence."). Crawford offers no other reason for wanting to ask questions about the cropped exhibits, and we thus presume she wished to use evidence of remedial measures to prove negligence—a purpose prohibited by rule 5.407. The court did not err in disallowing those types of questions.

B. Jury Instructions. "Parties to lawsuits are entitled to have their legal theories submitted to a jury if they are supported by the pleadings and substantial evidence in the record." *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994). "Under Iowa law, a court is required to give a requested instruction when it states a correct rule of law and when the concept is not otherwise embodied in other instructions." *Herbst v. State,* 616 N.W.2d 582, 585 (Iowa 2000). Error in giving a particular instruction does not warrant reversal unless the error was prejudicial to the party. *Thavenet v. Davis,* 589 N.W.2d 233, 236 (Iowa 1999).

Crawford contends the district court erred in failing to instruct the jury as she requested, contending the instructions as given did not encompass the landlords' contractual and statutory duty to "keep all common areas of the premises in a clean and safe condition." The defendants argue that despite the plaintiff's arguments to the contrary, the district court properly instructed the jury regarding the common-law standard, which includes a landlord's duty to "exercise reasonable care in the maintenance of the premises."

"The district court must give a requested jury instruction if the instruction (1) correctly states the law, (2) has application to the case, and (3) is not stated elsewhere in the instructions." *Weyerhaeuser Co. v. Thermogas Co.*, 620 N.W.2d 819, 823 (Iowa 2000). Only subparagraph "c" of the proposed instructions stated Crawford's theory of liability and was supported by the evidence. We find no error in the court's failure to include the remainder of those instructions, which had no application to the case. *See Duncan v. City of Cedar Rapids*, 560 N.W.2d 320, 327 (Iowa 1997) (finding no error in refusing to give instructions lacking evidentiary support).

We are left with the question of whether the duty to "keep all common areas of the premises in a clean and safe condition" is "stated elsewhere in the instructions," as the defendants assert. In Instruction No. 19, the jury was instructed that "[o]wners and landlords owe a duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors." And in the marshalling instruction, Instruction 17, the jury was instructed that the plaintiff must prove the landlords were negligent in "[f]ailing to maintain their premises in a reasonably safe condition, or [f]ailing to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors." But nowhere do the instructions explain the landlord's duty to keep the common areas in a clean or safe condition.

Our supreme court explained a landlord's liability over common areas in *Fouts ex rel. Jensen v. Mason*, 592 N.W.2d 33, 38 (Iowa 1999):

> Provided there is no agreement to repair, landlords are generally not liable for injuries arising from the unsafe condition of the premises arising after the landlord leases the property.

> However, the rule is subject to several exceptions. One exception includes circumstances in which the landlord retains control, or the landlord and tenant have joint control over the premises where the injury occurs. Generally, this exception applies where the injury is caused by the condition of common areas over which the landlord, alone or jointly with the tenant, has control. In these circumstances, the landlord is liable to one who has been so injured after coming onto the premises at the tenant's invitation. Thus, as to this exception, control determines liability.
>
> This court has applied Restatement of Torts, section 360 (1934) to this exception. This provision remains unchanged in Restatement (Second) of Torts, section 360 (1977):
>
> > A possessor of land who leases a part thereof and retains in his own control any other part which the lessee is entitled to use as appurtenant to the part leased to him, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sublessee for physical harm caused by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care could have discovered the condition and the unreasonable risk involved therein and could have made the condition safe.
>
> Restatement (Second) of Torts § 360, at 250 (1977).
>
> Unless there is evidence to the contrary, the law presumes that a landlord has retained control over premises used in common by different occupants of the landlord's property. These common areas may be inside or outside the building housing the tenant. Restatement (Second) of Torts § 360 cmt. e, at 252-53 (1977) (common area may include yard). The landlord's duty to keep the common areas reasonably safe does not arise from the usual implied covenant for quiet enjoyment incident to the leases of several portions of the premises. Rather, such obligation is similar to that of any other owner or possessor of real estate who invites others to use the real estate for a particular purpose: to keep the common areas reasonably safe for those using them within the scope of the invitation.

(Case citations omitted.) In addition to *Fouts*, the landlord's duty to keep the common areas clean and safe was established in the lease agreement and is statutorily required for most rental properties. *See* Iowa Code § 562A.15(c) ("The landlord shall [k]eep all common areas of the premises in a clean and safe condition.").

The instructions lack any explanation of common areas or the landlord's duty in respect to the common areas. The instructions also fail to explain this duty requires the landlord to use ordinary care measured by a reasonable and prudent person in defendant's position acting under like circumstances. Instruction 19 explains the legal principle relevant to the landlord's duty to exercise reasonable care in maintaining the premises. As applied to these facts, the jury might have applied Instruction 19 to aid them in considering the lack of lighting in the stairwell because there was a wire available for a light. However, Instruction 19 would give them little or no guidance in respect to the claim a handrail should have been installed on the stairwell as apparently there was never a handrail in the stairwell to maintain. The need, if any, for a handrail falls more squarely within the landlord's obligation to keep the common areas under his control in a safe condition. Moreover, a jury may consider the ice on the steps a matter of maintenance, but certainly the ice may be indicative of the landlord's failure to keep the common areas clean and safe.

Here, an explanation of the landlord's duty under Iowa law to keep the common areas under his control in a reasonably clean and safe condition is not embodied in the instructions. Instruction 17 does not explain the duty. Nevertheless, we will not reverse a verdict due to an erroneous instruction unless the error was prejudicial. *Waits v. United Fire & Cas. Co.,* 572 N.W.2d 565, 569 (Iowa 1997). Here, this duty was material to Crawford's claim, and the failure to inform the jury of the law prevented the jury from intelligently understanding what it was to decide. It is the district court's duty to "see that a jury has a clear and intelligent understanding of what it is to decide." *Sonnek*, 522 N.W.2d at 47.

Without an instruction explaining this duty under Iowa law, the jury was misled and Crawford was prejudiced. *Anderson v. Webster City Cmty. Sch. Dist.,* 620 N.W.2d 263, 268 (Iowa 2000) (noting prejudice results when the instruction "materially misstates the law, confuses or misleads the jury, or is unduly emphasized"). Because Crawford both objected and submitted a proposed instruction, we reverse and remand for a new trial.

On remand, the district court need not submit Crawford's proposed instruction but may embody the principle in its own words.

> As a rule, instructions offered by counsel are not so framed that the court is justified in giving them literally as asked, but, if the main thought sought to be expressed contains a pertinent legal principle which is not already fully covered by other instructions given, the court should embody it in proper words in its own charge.

Law v. Hemmingsen, 89 N.W.2d 386, 391 (Iowa 1958) (citation omitted).

REVERSED AND REMANDED.