IN THE COURT OF APPEALS OF IOWA

No. 6-428 / 05-1407
Filed September 21, 2006

**DAVID FELDERMAN, Executor of
the Estate of MARY BELLE WESTPHAL,
Deceased,**
Plaintiff-Appellant/Cross-Appellee,

vs.

CITY OF MAQUOKETA, IOWA,
Defendant-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Jackson County, Mark J. Smith, Judge.

David Felderman, the executor of the estate of Mary Belle Westphal, appeals from a directed verdict entered by the district court. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Robert F. Wilson of Wilson, Matias, Hauser & Speth, Cedar Rapids, for appellant/cross-appellee.

Michael C. Walker and Nathan Sondgeroth, Davenport, for appellee/cross-appellant.

Considered by Mahan, P.J., and Hecht and Eisenhauer, JJ.

HECHT, J.

David Felderman, the executor of the estate of Mary Belle Westphal, appeals from a directed verdict entered by the district court. We affirm in part, reverse in part, and remand.

I. Background Facts and Proceedings.

Mary Belle Westphal fell down several concrete steps as she attempted to enter the Maquoketa Community Center on July 8, 2003. Westphal, who was eighty-six years old at the time, sustained serious injuries as a result of the fall and later died.

David Felderman, the executor of Westphal's estate, filed suit against the City of Maquoketa on June 11, 2004. The petition alleged the City was negligent in "designing, building, and operating the [Center]," and that the "negligence of the City in the design, operation, and maintenance of the building was the proximate cause of the injuries to [Westphal]." The City's answer denied negligence was a proximate cause of Westphal's injuries and advanced several affirmative defenses. Among the affirmative defenses was the assertion that "[t]he [Center] was completed within the applicable standards at the time of construction."

The matter was tried to a jury. At the close of Felderman's evidence, the City moved for a directed verdict claiming statutory immunity from liability. The City's motion asserted (1) the Center is a public improvement designed and constructed consistent with standards prevailing at the time it was built, and (2) Felderman failed to generate a jury question as to either negligence or proximate cause. The district court granted the City's motion and directed a verdict in favor

of the City. In its ruling, the district court concluded that while there was some evidence the Center's entryway doors scraped the top of the cement landing in the location where Westphal attempted to enter the Center, there was no evidence tending to prove the door was either defectively designed or maintained. The district court also concluded the evidence was insufficient to generate a jury question on the plaintiff's claim that Westphal's fall was caused by either defectively maintained or designed stairs or doors. The district court did not address the City's immunity defense.

Felderman appeals, claiming the district court erred in granting the directed verdict. He also claims the district court improperly excluded evidence of relevant safety and design standards.

II. Scope and Standard of Review.

We review a ruling on a motion for directed verdict for correction of errors at law. Iowa R. App. P. 6.4; *Podraza v. City of Carter Lake*, 524 N.W.2d 198, 202 (Iowa 1994). In determining whether sufficient evidence existed to generate a jury question, we review the evidence in the light most favorable to Felderman. *Podraza*, 524 N.W.2d at 202. If reasonable minds could differ as to the issues in controversy, a directed verdict should not be granted. *Id.* We note that we may affirm the district court's ruling on any alternative ground raised below and urged on appeal. *Fencl v. City of Harpers Ferry*, 620 N.W.2d 808, 811 (Iowa 2000). The district court's evidentiary rulings are reviewed for abuse of discretion. *Horak v. Argosy Gaming Co.*, 648 N.W.2d 137, 149 (Iowa 2002). The court may abuse its discretion if it rejects relevant evidence based on an erroneous

application of the law. *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000).

III. Discussion.

a.) The City's Immunity Defense. We begin by addressing Felderman's claim that the district court erred in directing a verdict in favor of the City as to the claims of negligent design and construction of the steps and doors. It is undisputed that the Center is a facility operated by the City of Maquoketa. As we have noted, Felderman's petition alleged Westphal's fall was caused by the negligent design or construction of the Center's steps and doors at the front entrance. The City's answer alleged defensively that "[t]he [Center] was completed within the applicable standards at the time of construction." The City thus claimed entitlement to the protection offered by Iowa Code chapter 670 (2003). *See* Iowa Code §§ 670.1(2) (defining "municipality" as a "city, county, township, school district, and any other unit of local government"), 670.4(8) (granting municipalities immunity from liability for negligent design or construction of public improvements built consistent with standards prevailing at the time of construction).[1] Although the district court's ruling did not rely on statutory immunity to sustain the directed verdict in this case, we may nonetheless affirm

[1] Iowa Code section 670.4(8) states in relevant part:

> The liability imposed by section 670.2 shall have no application to . . . [a]ny claim based upon or arising out of a claim of negligent design or specification . . . or negligent construction or reconstruction of a public improvement or other public facility that was constructed or reconstructed in accordance with a generally recognized engineering or safety standard, criteria, or design theory in existence at the time of the construction or reconstruction.

the ruling on that ground if the defense was asserted in the district court and if it was meritorious. *DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002).

Felderman contends, however, that the city failed to adequately raise the immunity defense in the district court. We disagree. Iowa has long followed a liberal notice-pleading rule. No technical forms of pleadings are required so long as the pleadings contain a short and concise statement of the nature of the claim or defense and the legal theories that support it. Iowa R. Civ. P. 1.402. The pleadings must be sufficient to provide "fair notice" to the other party of the facts and law upon which the party intends to rely. *Schmidt v. Wilkinson*, 340 N.W.2d 282, 283 (Iowa 1983). Felderman was clearly aware that the Center was a public improvement operated by a municipality, and the City's answer specifically alleged the improvement "was completed within the applicable standards at the time of construction." This allegation closely tracks the language of Iowa Code section 670.4(8)[2] and was sufficient to alert Felderman of the City's intent to rely on a governmental immunity defense.

Felderman contends, however, that even if it was adequately raised, the immunity defense was waived by the City's purchase of insurance coverage for the risk. Although municipalities may waive their immunity by purchasing liability insurance, the extent of the resulting waiver is coterminous with the coverage. Iowa Code § 670.4; *Fettkether v. City of Readlyn*, 595 N.W.2d 807, 813 (Iowa Ct. App. 1999). If the municipality's insurance does not provide coverage for a tort, immunity is not waived. *Fettkether*, 595 N.W.2d at 813. We conclude Felderman

---

[2] *See* Iowa Code § 670.4(8), *supra*.

bore the burden of establishing a waiver of the City's immunity defense in this case. *See Continental Cas. Co. v. G. R. Kinney Co.*, 258 Iowa 658, 661, 140 N.W.2d 129, 130 (1966) (observing that the burden of establishing waiver is on the party asserting it). Felderman's waiver claim rests on evidence that an insurance agent took a statement from Westphal a few days after her injury. The record does not disclose the insurance company represented by the agent, the identity of the named insured(s) covered by the alleged insurance coverage, or the risks, if any, against which the City was insured by any such coverage. We are therefore unable to review Felderman's waiver claim because the record provides no evidence of the particulars of the alleged coverage.

Having concluded the City adequately raised the immunity issue, and having found no evidence in the record to support Felderman's contention that the defense was waived by the City's acquisition of insurance coverage, we next address the question of whether the immunity defense requires us to affirm the directed verdict ruling in favor of the City on the negligent design and construction theories. Our supreme court has established that under section 670.4(8),

> [i]t is the plaintiff's burden to establish the city did not construct or reconstruct the Center 'in accordance with a generally recognized engineering or safety standard, criteria, or design theory in existence at the time of the construction or reconstruction.'

Fischer v. City of Sioux City, 695 N.W.2d 31, 34 (Iowa 2005); *see also Connolly v. Dallas County*, 465 N.W.2d 875, 877, n. 3 (Iowa 1991) (concluding it was not

the defendant's burden to establish state-of-the-art construction, but rather that it "was the plaintiff's burden to establish the contrary").[3]

Felderman offered expert evidence in his case-in-chief tending to prove the Center's front doors, the landing in front of those doors, and the door-handle mechanisms were not in compliance with certain OSHA and ADA regulations. Although Felderman contends the district court erred in excluding some of this evidence, we find no reversible error in the district court's evidentiary rulings. Felderman offered expert testimony tending to prove that when measured against certain OSHA and ADA regulations, the landing in front of the doors was undersized, the front door-handle mechanism was undersized and otherwise inadequate, and one or both of the front doors were difficult to open because they scraped against the door sill and the surface of the landing. Felderman failed, however, to prove that the regulations evidenced or were consistent with the design and construction standards prevailing *at the time the Center was designed, constructed, or reconstructed*. Because Felderman failed to provide a temporal link between the regulations and the time of construction or reconstruction, he failed to establish the relevance of the evidence and failed to

[3] We cannot discern from the opinion in *Connolly* the degree of proof, if any, adduced by the county in an effort to demonstrate its compliance with applicable standards at the time of construction. *See Connolly*, 465 N.W.2d at 876-77. We note that in *Fischer*, the city and the plaintiff both had experts testify regarding the standard prevailing at the time the city's storm drains were constructed. *Fischer*, 695 N.W.2d at 34. While both cases appear to place the burden of proof on the plaintiff, neither case deals with the question of how much proof must be advanced by the government, if any, beyond the naked allegation of state-of-the-art construction contained in its answer. *See id.* at 34-36; *Connolly*, 465 N.W.2d at 876-77. We believe, however, that where the governmental defendant does assert immunity under section 670.4(8), these cases require the plaintiff to first disprove that assertion if he is to prevail on the merits. Where the plaintiff does nothing in its case-in-chief to rebut the city's answer, the burden of proof placed upon the plaintiff by both *Connolly* and *Fischer* remains unfulfilled, and we believe the case may be disposed of on directed verdict.

engender a jury question on the issue of whether the Center or any part of it was designed or constructed in a manner inconsistent with standards prevailing at the relevant time. Although the district court did not address the City's immunity defense, we nevertheless conclude the district court properly directed a verdict for the City on the negligent design and construction theories. *Fencl*, 620 N.W.2d at 811. We therefore find no reversible error in either the district court's evidentiary rulings or the directed verdict on this issue.

b.) Negligent Maintenance Theory. Felderman contends the district court erred in sustaining the City's directed verdict motion on the negligent maintenance theory. He correctly notes that although chapter 670 provides immunity for municipalities against negligent design and construction claims, it provides no defense for negligent maintenance. Thus, we next address Felderman's claim that he generated a jury question on the negligent maintenance theory of liability.

When the evidence is viewed in the light most favorable to Felderman, we believe a reasonable juror could find Westphal approached the front entrance of the Center, climbed the steps, placed her hand on the handle of the front door, and then fell backward down the steps.[4] Felderman offered expert and lay testimony which he claims proved the door was negligently maintained. James Meehan, a consulting mechanical engineer, testified that he observed scratch marks on the threshold and concrete sill under the door when he visited the Center after Westphal was injured. Meehan opined that the sagging door left the

[4] Although a witness approached Westphal and assisted her after she fell, no witness observed Felderman approach the door and fall backward down the steps.

scratch marks as it drug across the threshold and concrete sill as it was opened. Because the Center's doors were locked when he visited the Center, however, Meehan did not measure or opine as to (1) the amount of force needed to open the door, (2) whether the door was properly lubricated, or (3) whether the door was properly adjusted so as not to drag on the threshold or concrete sill if it had been opened on the occasion of his visit. No evidence was presented from which a reasonable juror could have made a finding as to the time when the scratch marks observed by Meehan were imprinted on the threshold and sill.[5]

Although we believe the testimony of Meehan was insufficient standing alone to generate a jury question on the plaintiff's negligent maintenance theory, other evidence combined with it in the record to engender a jury question. Vicki Felderman testified that she arrived at the Center shortly before Westphal did on July 8, 2003. Vicki Felderman approached the front door and attempted to open it while holding her child, but was unable to do so. She testified that she was unable to open the door until someone inside the building came to assist her. Felderman testified that the door appeared to be stuck and opened very hard. When taken together with the testimony of Meehan and viewed in the light most favorable to the plaintiff, Vicki Felderman's testimony generated a jury question as to whether the City negligently maintained the door in question. Consequently we must reverse and remand for a new trial on the negligent maintenance claim.

---

[5] On this record, the jury was left to speculate whether the scratches observed by Meehan were created before Westphal's injury or at some later date prior to Meehan's visit. Even if the jury were to have speculated that the scratches were created before Westphal's injury, the record is silent as to whether the door had been adjusted, lubricated, or otherwise maintained in such a fashion as to eliminate the drag after the scratches were created but prior to Westphal's injury.

Because they may recur on remand, we next address certain evidentiary issues raised by Felderman on appeal. First, he contends the district court erred in its legal conclusion that Occupational Safety and Health standards "are applicable only to employer-employee relationships" and therefore have no application in this case.[6] Although Westphal was not an employee of the City and any violations of OSHA regulations would not constitute negligence per se, such regulations may in certain instances be admissible as evidence of negligence when relied upon by non-employees. *Koll v. Manatt's Transp. Co.*, 253 N.W.2d 265, 270 (Iowa 1977). It is unclear to us following our review of Felderman's brief and the appendix what specific OSHA regulations he claims were relevant to the negligent maintenance claim. Nonetheless, it is undisputed that OSHA regulations were offered in evidence, and the district court broadly concluded they had no application in this case because Westphal was not an employee of the city. Because we conclude this legal conclusion is erroneous, the question of whether OSHA regulations are relevant to Felderman's negligent maintenance claim must be revisited by the district court on remand. We of course make no determination on appeal whether any particular OSHA regulation is relevant to that claim.

Felderman also challenges the district court's legal conclusion that "the Americans with Disabilities Act (ADA) does not apply retroactively and cannot be applied to the facts of this case [because] there has been no reconstruction or redesign of the entryway" to the building. *See* 28 C.F.R. § 36.402 (stating that

[6] This conclusion is expressed in the district court's ruling on the City's motion for directed verdict.

public facilities altered after January 26, 1992 must comply with the ADA and defining "alteration" to include "reconstruction"); 28 C.F.R. § 36.508 (indicating that the ADA became effective on January 26, 1992). Felderman contends this conclusion is erroneous because the City's answer to interrogatory six disclosed that (1) approximately twelve years earlier, the center's exterior doors were replaced, and (2) approximately five years earlier, new latches were placed on the doors. However, Felderman fails to direct us to the place in the record where that interrogatory answer or its substance was received in evidence. On this record, we therefore conclude the district court did not commit legal error in concluding that Felderman's negligent maintenance claim cannot be supported by evidence of an alleged violation of ADA provisions.[7]

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

[7] Felderman also fails to provide authority for the proposition that the ADA has relevance to this case in which the record is devoid of evidence tending to prove Westphal was disabled before the injury that is the subject of this case.