IN THE COURT OF APPEALS OF IOWA

No. 6-633 / 05-1995
Filed February 28, 2007

LUCY M. MCNEAL,
Plaintiff-Appellant,

vs.

HY-VEE, INC., d/b/a DRUGTOWN, INC.,
Defendant-Appellee.

Appeal from the Iowa District Court for Linn County, Mitchell E. Turner, Judge.

Lucy McNeal appeals following a jury verdict in favor of Hy-Vee, Inc. d/b/a DrugTown, Inc. in a negligence action. **AFFIRMED.**

David O'Brien of Willey, O'Brien, L.C., Cedar Rapids, for plaintiff-appellant.

Terry J. Abernathy and Thad J. Collins of Pickens, Barnes & Abernathy, Cedar Rapids, for defendant-appellee.

Considered by Sackett, C.J., and Vaitheswaran, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9208 (2007).

VAITHESWARAN, J.

Lucy McNeal sued DrugTown, Inc. after she slipped and fell on wet grass in the outdoor garden center. She alleged the store: (1) failed to warn patrons "of the foreseeable hazards created by the wet, slippery grass"; (2) created "the hazard by watering the plants in an unsafe manner and at an unsafe time"; and (3) failed "to act as a reasonable merchant under the conditions then and there existing." The case was tried to a jury, which determined DrugTown was not at fault. McNeal moved for a new trial. The district court denied the motion and this appeal followed.

On appeal, McNeal makes the following arguments: (1) the jury's verdict is not supported by sufficient evidence; (2) the district court erred in refusing to give certain proposed instructions; and (3) the district court abused its discretion in refusing to reopen the record to admit evidence of subsequent remedial measures.

I. Sufficiency of the Evidence

McNeal contends "no reasonable jury could have concluded that DrugTown was not even one percent negligent in causing [her] injury." McNeal first raised this argument in her motion for new trial. Citing Iowa Rule of Civil Procedure 1.1004(6), she asserted "the jury's verdict is not sustained by sufficient evidence and/or is contrary to law." We review the district court's denial of this part of the motion for errors of law. *Estate of Hagedorn ex. rel. Hagedorn v. Peterson*, 690 N.W.2d 84, 87 (Iowa 2004).

The jury was instructed that McNeal would have to prove several propositions, including the following:

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

2. The Defendant knew or in the exercise of reasonable care should have known:
   a. the Plaintiff 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 Defendant was negligent by:
   a. Creating an unsafe area in the garden center; or
   b. allow[ing] customers access to an unsafe area; or
   c. failing to warn customers of the unsafe area.

A jury reasonably could have found the following facts. McNeal went to DrugTown in search of purple petunias. She saw none along the gravel aisles of the outdoor garden center but spotted some in a sloped grassy area near the aisles. When she stepped from the gravel to the grass, her right foot "went out from under" her and she slipped and fell. McNeal sustained injuries to her arm and ankle.

At trial, McNeal acknowledged knowing from life experiences that wet grass could be slippery. She also acknowledged that "[i]t was nice and sunny" when she was searching for plants.

DrugTown employees testified to certain measures that were routinely taken to protect patrons from injury. First, employees laid gravel where patrons were expected to walk. Although DrugTown was aware that shoppers frequented the grassy knoll in search of fresh flowers, gravel was not placed there because that was "not an intended shopping area." Instead, this location was a temporary repository for new plants. Second, DrugTown placed twenty to

twenty-five signs throughout the garden center, warning patrons to watch their step. The signs were meant to remind customers they were in an outdoor garden center that could be wet. Again, no signs were placed on the grassy knoll, but a store employee testified the posted signs should have been fair warning for "the whole area."

We recognize there was evidence from which a jury could have surmised that the grassy knoll was wet. Specifically, a witness testified that there might have been a light rain early that morning. In addition, an employee acknowledged that, as a general matter, he watered the plants when they needed it and the water sometimes spilled into the grass. Notwithstanding this testimony, a jury could have credited McNeal's concession that moisture was to be expected in a garden area.

We conclude the district court did not err in denying McNeal's motion for new trial based on insufficiency of the evidence.

II. Jury Instructions

McNeal argues the district court erred in refusing to give two proposed instructions. *See Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 160 (Iowa 2004) (setting forth scope of review).

A. Independent Medical Examination

McNeal contends the jury should have been allowed to draw a negative inference from DrugTown's failure to request an independent medical examination of her, as authorized by Iowa Rule of Civil Procedure 1.515. At trial, she proposed the following jury instruction:

> Because the Plaintiff's physical condition has been placed in controversy, Defendant had the opportunity to have the Plaintiff examined by a doctor of their choice. In this case, Defendant chose not to have the Plaintiff examined by a doctor of its choice. You may give this omission as much weight as you think it deserves, considering all the other evidence in the case.

We discern no error in the district court's refusal to submit this jury instruction. Neither rule 1.515 nor cases citing the rule authorizes a fact finder to draw the requested negative inference. Additionally, we note that McNeal's medical condition was essentially undisputed, raising doubts as to whether an independent medical examination would have been ordered. *See* Iowa R. Civ. P. 1.515 (allowing court to order exam "[w]hen the mental or physical condition . . . of a party . . . is in controversy"). For these reasons, we conclude the court was not required to give the instruction. *See Weyerhaeuser Co. v. Thermogas Co.*, 620 N.W.2d 819, 823 (Iowa 2000) ("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.").

B. Standard of Care

McNeal requested a jury instruction stating a shop owner's standard of care remains the same whether the business is conducted indoors or outdoors. The district court declined to give this instruction. On appeal, McNeal argues "Drugtown was allowed to get away with arguing a different, lower, standard of care applied to outdoors shops." We disagree. The jury instruction quoted in Part I of this opinion accurately set forth the applicable law and McNeal points to no Iowa case law suggesting otherwise. McNeal's proposed instruction was

unnecessary. *Id.* Accordingly, the district court did not err in refusing to submit it to the jury.

III. Reopening of Record

Prior to trial, DrugTown filed a motion in limine, seeking to exclude evidence of subsequent remedial measures. *See* Iowa R. Civ. P. 5.407.[1] The district court granted the motion.

During closing arguments, defense counsel made an oblique reference to a remedial measure taken by DrugTown after McNeal fell. His comments were as follows:

> What about the evidence we heard from the DrugTown folks? Mr. Cole has been there . . . fifteen years; Mr. Chmelicek, five years. The garden center was there before either one of them came. They are not aware of anyone else ever falling in this area that the Plaintiff wants you to believe is a hazard, so hazardous, in fact, that we should build a wall across it or put up a fence or put up a barricade.

McNeal immediately brought these comments to the district court's attention, arguing that they opened the door to introduction of evidence concerning subsequent remedial measures. The district court ruled as follows:

> Counsel, I have gone back and read through the part of the closing that I believe Mr. O'Brien was objecting to. I find at this time after reviewing – And just for the record, I do want to clearly indicate that the Motion in Limine that was referred to by Mr. O'Brien prohibiting reference to subsequent remedial measures was, in fact, sustained.

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[1] The rule states:

> 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.

Iowa R. Evid. 5.407.

> However, as I read through the testimony, I do not find that the argument is opening the door to evidence of subsequent remedial measures. I believe that it is – it was responding to argument made by Plaintiff's counsel and there was clearly testimony at the time of trial that was not objected to regarding the fact that no one had slipped and fallen prior.

The court denied McNeal's request to reopen the record but admonished the jury that closing arguments were not evidence. Our review of this ruling is for an abuse of discretion. *Bangs v. Maple Hills, Ltd.,* 585 N.W.2d 262, 267 (Iowa 1998) (quoting 75 Am. Jur. 2d *Trial* § 390, at 587 (1991)).[2]

We discern no abuse. In addition to the testimony cited by the district court, McNeal's attorney attempted to elicit an admission from DrugTown employees that they should have erected a barrier to restrict customer access to the grassy area. The following exchange with a DrugTown employee is instructive:

> Q. And there is no barricade, warning tape, rope or anything that keeps people from coming into this area, this grassy, sloped area, is there?
>
> A. Not at that time.

Another employee testified there was nothing blocking customer access to the grassy area at the time McNeal fell. A third employee testified nothing was used to block off the area because "it didn't seem that it was a risk to us at that time." All this testimony came in without objection.

We believe defense counsel's comments during closing argument could have been appropriate allusions to this testimony about the absence of

[2] DrugTown argues we should not address the merits of this issue because error was not preserved. After reviewing the in-chambers argument of McNeal's counsel, we conclude error was adequately preserved.

barricades at the time of McNeal's fall. *See State v. Thornton*, 498 N.W.2d 670, 676 (Iowa 1993) ("Counsel may draw conclusions and argue permissible inferences which reasonably flow from the evidence presented."). We also are convinced that the district court's admonition not to construe closing arguments as evidence cured any misunderstanding about defense counsel's comments. For these reasons, we conclude the district court did not abuse its discretion in declining to reopen the record. *Cf. Bangs*, 585 N.W.2d at 267 (finding no abuse of discretion in district court's admission of subsequent remedial measures evidence where evidence went to controverted feasibility of remedial measure); *McIntosh v. Best Western Steeplegate Inn*, 546 N.W.2d 595, 597 (Iowa 1996) (concluding district court should not have excluded evidence of subsequent remedial measures that were "essential to showing the existence of a condition upon which the claim depends").

AFFIRMED.