STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0645

Jacky Larkin,
Respondent,

vs.

Ironwood Springs Christian Ranch, Inc.,
Appellant.

Filed February 3, 2009
Affirmed
Collins, Judge[*]

Olmsted County District Court
File No. 55-CV-06-3194

Wilbur W. Fluegel, Fluegal Law Office, 150 South Fifth Street, Suite 3475, Minneapolis, MN 55402; and

Thomas E. Gorman, Thomas E. Gorman Law Office, 1626 Old West Third Street, Red Wing, MN 55066 (for respondent)

Peter C. Sandberg, Sandberg & Sandberg, 4057 28th Street Northwest, Suite 300, Rochester, MN 55901 (for appellant)

Considered and decided by Hudson, Presiding Judge; Larkin, Judge; and Collins, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

COLLINS, Judge

Challenging the district court's denial of its posttrial motion, appellant argues that the district court abused its discretion by (1) failing to adopt appellant's proposed jury instructions and (2) excluding a contract and appellant's financial information. Because the district court's jury instructions expressed the applicable law fairly and accurately, and because the exclusion of the contract and the financial information was not an abuse of discretion, we affirm.

F A C T S

Appellant Ironwood Springs Christian Ranch, Inc. (Ironwood) is a nonprofit organization that owns and operates a retreat facility. Walk to Emmaus (Emmaus), an organization that conducts retreats, rented part of Ironwood's facility over the weekend of January 28, 2005 for a women's retreat. Respondent Jacky Larkin was a volunteer for Emmaus at this retreat.

The rental agreement permitted Emmaus to use Ironwood's main lodge, chapel, recreation hall, and some cabins. The contract contained the provision that "Ironwood does NOT provide any medical/liability insurance." Throughout the weekend, Emmaus volunteers and retreat participants walked between the various buildings using pathways, including a pedestrian path that had been cut through the layer of ice covering the parking lot, which was used for sleigh rides. On January 28, water from melting snow dripped from the overhang above the area of the main door to the dining hall, where it accumulated and froze. A light on a poll near the icy area periodically went off

throughout the weekend, leaving the area dark. The ice was reported by Jim Rottinger, the person in charge of the retreat for Emmaus, to Josh Christenson, the Ironwood host for the weekend. Rottinger testified that Christenson responded: "There's a bag of salt right there," and Rottinger applied the salt and chopped the ice four or five times during the weekend. Rottinger also stated that it was his understanding that when Emmaus personnel reported a problem to Ironwood staff it would "be taken care of," but he did not see anyone from Ironwood performing maintenance on the icy area that weekend. Conversely, Christenson testified that Rottinger offered to remove the ice, adding that he would be "glad to do it."

The retreat's closing ceremonies were held on the evening of January 30. As the retreat was ending, after dark, Larkin apparently left the dining hall, slipped, fell, and struck her head. She was discovered unconscious near the door to the dining hall.

At trial, Ironwood intended to offer in evidence the contract and financial records "to explain why the room rate was only $125.00 per person, why there was only one host and one chef for the [w]omen's retreat, and why Ironwood relied heavily upon volunteers." The district court granted Larkin's motion to exclude the contract and the financial records.

Ironwood proposed jury instructions on Ironwood's duty of care, assumption of risk, and negligence through failure to perform a promise.[1] The district court refused to

[1] Ironwood also requested a special-verdict interrogatory on primary assumption of risk. However, Ironwood abandoned its argument that it was entitled to judgment as a matter of law on the question of primary assumption of risk and did not challenge the special-verdict form on appeal.

give these proposed instructions. The jury found damages totaling $705,000 and apportioned fault for the accident, 42% to Larkin and 58% to Ironwood. The district court denied Ironwood's motion for judgment as a matter of law or, in the alternative, a new trial. Ironwood appeals.

D E C I S I O N

Ironwood challenges the denial of its posttrial motion. Because the district court has the discretion to grant a new trial, we will not disturb the decision absent a clear abuse of that discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990). Among other grounds, a new trial may be granted for an irregularity in the proceedings, errors of law objected to at the time, or a verdict not justified by the evidence or contrary to law. Minn. R. Civ. P. 59.01 (a), (f), (g).

Ironwood's posttrial motion states that it "move[s] the Court for a judgment notwithstanding the verdict or, in the alternative, a new trial under Rule 59.01(a), (f), and (g) of the Minnesota Rules of Civil Procedure." As an initial matter, Larkin challenges Ironwood's appeal, arguing that Ironwood's subsequent memorandum in support of its posttrial motion was not timely and that the failure to specifically allege errors in the motion precludes us from reaching those issues on appeal.

"[M]atters such as trial procedure, evidentiary rulings and jury instructions are subject to appellate review only if there has been a motion for a new trial in which such matters have been assigned as error." *Sauter v. Wasemiller*, 389 N.W.2d 200, 202 (Minn. 1986).

Ironwood appeals the district court's evidentiary rulings regarding admission of the contract and financial information and its failure to give the requested jury instructions. The Minnesota Supreme Court has held that *Sauter* applies to such rulings, which it classified as "issues arising during the course of trial." *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 310 (Minn. 2003). Ironwood made timely objections to the exclusion of the contract and financial information and to the district court's refusal of the requested jury instructions. In its posttrial motion, Ironwood did not specify the alleged errors, but subsequently it did so in the supporting memorandum.

This court addressed a similar attempt to invoke the *Sauter* rule in *GN Danavox, Inc. v. Starkey Labs.*, 476 N.W.2d 172, 176 (Minn. App. 1991), *review denied* (Minn. Dec. 13, 1991). There, the respondent argued that the appellant had failed to preserve the evidentiary issue because its motion for posttrial relief did not allege specific grounds under Minn. R. Civ. P. 59.01. The appellant had objected at trial to the admission of the evidence and had addressed the issue in the memorandum supporting its new-trial motion. *Id. B*ecause the respondent had the opportunity to respond and the district court had addressed the issue in its order denying the motion, we held that the issue was preserved for appeal. *Id.* We also rejected the respondent's argument that the appellant's supporting memorandum was untimely served because Minn. R. Civ. P. 59.03 merely requires *notice* of the new trial motion to be served within 15 days. *Id.*

As in *GN Danavox*, Ironwood disputed the exclusion of the evidence and raised the jury instruction issues at trial. In the memorandum in support of its posttrial motion,

Ironwood also specifically alleged error on the issues on appeal. Also as in *GN Danavox*, Larkin had the full opportunity to respond and the district court was able to address the issues in its order and memorandum denying the motion. Thus, we reject Larkin's challenge and go on to consider the merits of Ironwood's appeal.

I.

Appellate courts will not reverse a district court's decision regarding the choice of jury instructions unless the instructions constituted an abuse of discretion. *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986). "District courts are allowed considerable latitude in selecting the language used in the jury charge and determining the propriety of a specific instruction." *Morlock v. St. Paul Guardian Ins. Co.*, 650 N.W.2d 154, 159 (Minn. 2002). Where instructions fairly and correctly state the applicable law, an appellate court will not grant a new trial. *Alevizos v. Metro. Airports Comm'n*, 452 N.W.2d 492, 501 (Minn. App. 1990), *review denied* (Minn. May 11, 1990).

Instruction #1

Ironwood argues that its proposed jury instruction captured the controlling legal principles and that civil jury instruction 85.25, which was adopted by the district court and describes the duty of a possessor of property to an entrant, stated an erroneous standard and was "a fundamental error of controlling principle of law." *See* 4A *Minnesota Practice*, CIVJIG 85.25 (2006).

A possessor of property owes an entrant a duty of reasonable care. *Id.* A landlord, however, generally does not owe a duty of care to tenants regarding defective conditions. *See* 4A *Minnesota Practice*, CIVJIG 85.40 (2006) (stating limited conditions for duty).

A landlord owes a duty of reasonable care regarding areas on the property over which the landlord maintains control. 4A *Minnesota Practice*, CIVJIG 85.43 (2006).

Ironwood contends that its relationship with Emmaus was that of a landlord and tenant and that Ironwood owed the same duty to Larkin, Emmaus's invitee, as it did to Emmaus. Ironwood, therefore, maintains that the correct instruction on the duty owed by Ironwood to Larkin was described in its proposed jury instruction number one, which instructs that Larkin stands in the same shoes as Emmaus, a renter, and that Ironwood had no duty to use reasonable care regarding dangerous conditions unless (1) Ironwood concealed or failed to disclose them; (2) Larkin did not know of them; and (3) Ironwood knew or should have known that Larkin would not discover the condition.

The district court found that the relationship between Ironwood and Larkin was that of a possessor and entrant, and thus the duty of care was that of a reasonable person under the circumstances. *Peterson v. Balach*, 294 Minn. 161, 174, 199 N.W.2d 639, 647 (1972). The district court refused Ironwood's proposed jury instruction because it was based on the duty of care in a landlord-tenant relationship rather than a possessor-entrant relationship. The district court based its determination on caselaw and the fact that Ironwood had a contract with Emmaus that did not relieve Ironwood of liability and, had the parties so intended, Ironwood easily could have accomplished that by incorporating a hold-harmless agreement in the contract.

Ironwood contends that Minnesota caselaw illustrates a fundamental difference between the duties in a landlord-tenant relationship and those in a possessor-entrant relationship and that its proposed jury instruction applies the accurate standard for a

landlord-tenant relationship, as defined in *Breimhorst v. Beckman*, 227 Minn. 409, 417-18, 35 N.W.2d 719, 726 (1949). Ironwood relies on *Filipczak v. Int'l Bhd. of Elec. Workers, Local 110*, 292 Minn. 486, 195 N.W.2d 433 (1972), for the proposition that the relationship here is that of a landlord and tenant.

Ironwood's reliance on *Filipczak* is misplaced. *Filipczak* involved the injury of a guest at a wedding reception held at a rented hall and a landlord that had relinquished control of the property to the lessee. 292 Minn. at 487, 195 N.W.2d at 435. The Minnesota Supreme Court held that the landlord's duty to warn of known dangerous conditions existed when it turned over the premises for the reception, but the landlord had no control over the lessee's negligence once the premises were under the control of the lessee. *Id.* at 488, 195 N.W.2d at 435. Here, it is undisputed that Emmaus had the use of only some, not all, areas of Ironwood's premises and that Ironwood's staff members remained on the premises and performed ongoing general maintenance. Thus, Ironwood had not relinquished complete control of the property to Emmaus.

Breimhorst also significantly differs from this case. *Breimhorst* involved a spring gun that injured a waitress working at a restaurant operated on premises rented from the defendant landlord. 227 Minn. at 413, 35 N.W.2d at 724. As in *Filipczak*, the landlord in *Breimhorst* had given up possession and control of the premises to the lessee restaurant, although he did visit regularly and had performed some basic repairs on the premises. *Id.* at 419-20, 35 N.W.2d at 727.

Because Ironwood had not relinquished complete possession and control of the premises, the relationship between Ironwood and Larkin is dissimilar enough from that of

a typical landlord-tenant relationship that the district court's finding was not an abuse of discretion. Moreover, a landlord owes a duty of reasonable care regarding portions of property under the landlord's control, just as a possessor of property owes a duty of reasonable care to an entrant. And because Larkin fell in an area that remained under Ironwood's control, Ironwood was not prejudiced by the district court's choice, within its discretion, of a jury instruction addressing the duty owed to an entrant.

Instruction #5

Ironwood contends that, because there was sufficient evidence to demonstrate that Larkin chose the icy path and recognized the danger in doing so, and because primary assumption of risk is a fundamental and controlling principle of law, the district court should have instructed the jury on primary assumption of the risk.

> Assumption [of risk] may be broken into two forms, primary and secondary. Primary assumption of risk relates to the duty issue and is not an affirmative defense subject to comparison. Secondary assumption of risk is an aspect of contributory negligence and, as such, is subject to comparison under the Comparative Fault Act.

4 *Minnesota Practice*, CIVJIG 207-08 (2006) (introductory note to jury instructions). "Primary assumption of risk is a complete bar to recovery." *Id*. at 208. Primary assumption of the risk is applicable only if there is some manifestation of consent to relieve the defendant of the obligation to act reasonably. *Iepson v. Noren*, 308 N.W.2d 812, 815 (Minn. 1981). "The Committee recommends no instruction" on primary assumption of risk. 4 *Minnesota Practice*, CIVJIG 28.30 (2006).

In its order denying Ironwood's motion for a new trial or judgment notwithstanding the verdict, the district court found that primary assumption of the risk was not applicable, stating:

> In finding [Larkin] 42% at fault under the comparative fault and possessor/entrant instructions, the jury determined [Larkin]'s assumption of the risk. A primary assumption of the risk instruction was not necessary since there was no evidence [that Larkin] consented to relieve [Ironwood] of its duty of reasonable care.

The district court's refusal of Ironwood's proposed instruction on primary assumption of the risk was not an abuse of discretion. Such an instruction is rarely applicable and is generally discouraged. *See* CIVJIG 28.30 (stating that primary assumption of risk usually is better as subject of special-verdict questions); *cf. State v. Broulik*, 606 N.W.2d 64, 71 (Minn. 2000) (holding that district court did not abuse its discretion by following pattern jury instructions on established point of law). The district court correctly determined that there is no evidence that Larkin, or Emmaus for that matter, consented to relieve Ironwood of its liability as required for application of primary assumption of the risk. Although the contract provides for Emmaus's responsibility for any damages to the facility, there is no language relieving Ironwood of liability. Nor is there testimony that Larkin or Emmaus orally consented to such relief. There is testimony that Rottinger undertook to alleviate an icy-entryway condition earlier in the weekend. However, the jury had the opportunity to factor fault other than that of Ironwood in its findings, and did so in attributing 42% of the fault to Larkin.

Instruction #6

Based on the conversation between Rottinger and Christenson, Ironwood contends that its proposed jury instruction number six described the correct standard, instructing that one who should realize that his or her gratuitous promise or other conduct will cause another to refrain from performing a service is subject to a duty of care and that failure to perform that duty constitutes negligence. Larkin observes that this proposed instruction was apparently intended to permit the argument that Emmaus had contracted to have its members look after the property, but because the contract stated that it constituted the entire agreement between the parties, there is no contractual promise by Emmaus to care for the property other than to pay for any property damage caused by an Emmaus visitor.

The jury heard testimony relevant to this instruction from Rottinger, the Emmaus representative who had dealt with the icy-entryway condition. The jury was able to make a determination on the reasonableness of Ironwood's actions, as well as those of Larkin, based on that testimony and other evidence. Giving the proposed instruction rather than the more general instruction on duties of care would imply that Emmaus had agreed to maintain the property. *See Sandhofer v. Abbott-Nw. Hosp.*, 283 N.W.2d 362, 367 (Minn. 1979). In light of the "considerable latitude" given to district courts in choosing language for jury instructions, the district court did not abuse its discretion in declining to adopt the proposed jury instruction under these circumstances.

II.

Ironwood next argues that exclusion of the contract and of evidence of Ironwood's finances was prejudicial because the evidence was relevant to whether Ironwood used

reasonable care. Evidentiary rulings are committed to the sound discretion of the district court, and those rulings will be reversed only when there is a clear abuse of that discretion. *Pedersen v. United Servs. Auto. Ass'n*, 383 N.W.2d 427, 430 (Minn. App. 1986). Absent an erroneous interpretation of the law or an abuse of discretion, the district court's ruling on whether to admit evidence will not be disturbed. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997). "Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error." *Id.* at 46 (quotation omitted).

Ironwood contends that the contract and the financial evidence explained the staff size, the room rate, and Ironwood's heavy reliance on volunteers, and that this evidence was necessary to defend against Larkin's claims that Ironwood did not use reasonable care because its staff and services were inadequate. Ironwood argues that Emmaus negotiated a room rate for the use of its facilities with reduced staff and amenities, and that the exclusion of the proposed evidence was prejudicial because Larkin is now arguing that Ironwood should have provided increased staff and amenities that would have come with higher rates.

The district court excluded the financial records and the contract as irrelevant because the contract did not govern Ironwood's liability and because the financial records were unnecessary to the jury's determination of fault. This conclusion is not an abuse of discretion. Ironwood's duty of care is defined by its relationship with Larkin, and there is no language in the contract modifying that duty. This fundamental duty is not altered by

Ironwood's financial circumstances or the level of compensation it expected to receive from the event.

Affirmed.