2017 IL App (2d) 160805-U
No. 2-16-0805
Order filed July 14, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

LINDA SPINELLI	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 15-L-550
	)	
MENARD, INC.,	)	Honorable
	)	Dorothy French Mallen,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Birkett and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant has forfeited its claims that the trial court erred in giving three jury instructions by failing to file a postjudgment motion and, upon review, we are not convinced there was error, and any possible error was not so prejudicial that it deprived defendant of a fair trial and substantially impaired the integrity of the judicial process itself under the plain error doctrine. Affirmed.

¶ 2 In this negligence action, a jury rendered a verdict in favor of plaintiff, Linda Spinelli, and against defendant, Menard, Inc., for knee injuries plaintiff sustained when she tripped over a low bar that ran partially on the floor between a flatbed cart corral lane and a regular cart corral lane near the entrance to defendant's store in Glendale Heights, Illinois. Defendant argues on appeal that the trial court abused its discretion by giving three jury instructions. Plaintiff argues

that defendant has forfeited its claims by failing to file a postjudgment motion. Defendant concedes it did not file the required postjudgment motion (see, *e.g.*, 725 ILCS 5/2-1202(e) (West 2014); S. Ct. R. 366(b)(2)(iii) (eff. Feb. 1, 1994)), but maintains that the plain error doctrine permits our review of its claims. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On November 10, 2013, plaintiff went to defendant's store to purchase a vessel sink. She walked to the cart corral that housed the flatbed carts near the store's entrance but realized that the last flatbed cart had a broken wheel. So, plaintiff turned to her right to use a regular cart from the corral lane next to the flatbed cart lane. The regular cart lane was nearly empty of regular carts. While walking there, plaintiff tripped over a low bar that ran partially along the floor separating the flatbed carts from the regular cars, causing her to fall on her left knee and injuring it.

¶ 5 Plaintiff filed suit against defendant, alleging that defendant had a "duty to install, maintain, and inspect the cart corral in a reasonably safe and suitable manner" for those lawfully on the premises, and "[n]otwithstanding said duty," defendant was guilty of one or more of the following negligent acts or omissions:

> "a) Installed an unnecessary bar that was a trip hazard to patrons retrieving carts;
>
> b) Failed to use waist-high bars spread throughout the corral to separate the lanes, in lieu of the low bar that was a trip hazard;
>
> c) Failed to use bright colored safety paint to help alert a patron retrieving a cart;
>
> d) Failed to make reasonable inspection of said cart corral and recognize the danger to its patrons;
>
> e) Failed to warn Plaintiff and other patrons of the dangerous inconspicuous low bar that

ran partially along the floor;

f) Failed to allow a reasonably safe means of accessing carts when it knew or should have known that the subject rail/cart corral was a dangerous condition for Plaintiff and others similarly situated; [and]

g) Otherwise failed to construct, maintain, and monitor cart corral."

¶ 6 Plaintiff alleged that, as a direct and proximate result of one or more of the preceding careless and negligent acts and/or omissions by defendant, plaintiff was caused to trip and fall, resulting in injury that was personal, permanent, and pecuniary in nature.

¶ 7 At trial, plaintiff testified that she had arthritic knees prior to the incident. Plaintiff's own treating orthopedic surgeon, Dr. Daniel Kuesis, confirmed that plaintiff had pre-existing arthritis and that knee replacement surgery was inevitable, even without the fall at defendant's store. In February 2014, Dr. Kuesis informed plaintiff that she would need a knee replacement. She continued receiving injections to assist her with the pain to delay knee surgery, which she eventually had in June 2016.

¶ 8 Travis Edwards, a manager-trainee for defendant who was on duty the day of the incident, testified that there was a security camera focused on the entrance to the store and he believed there was one focused on the customer service desk, but he had minimal information about the operation of the cameras or where they were directed and that the Loss Prevention personnel viewed and operated the cameras. Edwards never saw any videos related to plaintiff's incident. He was unaware of the specifics of the accident reporting policy at the time of the incident, although he had been instructed on the job about how to handle injuries in the store. Edwards believed that there was no physical evidence to save or preserve. Because Edwards was neither a general manager nor an assistant manager, defendant's policies did not require him to

check or save any video footage. He was not aware if the incident had been recorded by a video camera or whether there was a video camera in the area that would have captured the incident.

¶ 9 Naima Hyatali, a head cashier for defendant at the time of the incident, also had no knowledge of whether the cart area had been videotaped.

¶ 10 Moe Jahangir, a Loss Prevention officer for defendant, testified that, at the time of the incident, defendant's video equipment could only keep recordings for two to four weeks. He stated that, in November 2013, defendant had stationary cameras fixed on the entrance, exit, service desk, and checkouts. The camera shows the entire entrance but cuts off along the chrome railing of the cart corral; there is no camera view that would show the cart corral. Jahangir explained that no cameras show the cart corrals because there are no thefts involving the carts. Although video cameras have been updated since the incident, the current cameras still do not show the cart corrals. Jahangir thought that a camera could have captured plaintiff being escorted to the electric scooter area. Jahangir stated that there are audio recordings of conversations at the customer service desk. If footage had been saved from the incident and plaintiff and Edwards had been close to the registers, he would have been able to hear a conversation between plaintiff and Edwards by the customer service desk.

¶ 11 Following deliberation, the jury returned a verdict in favor of plaintiff in the amount of $100,000. Judgment was entered on the verdict on August 31, 2016. Defendant did not file any posttrial motion, only a timely notice of appeal, arguing that the trial court erred in giving three jury instructions over its objection.

¶ 12 II. ANALYSIS

¶ 13 Although it did not file a posttrial motion, defendant contends that we may review its claims under the plain error doctrine. The plain error doctrine permits an appellate court to

review claims of error not properly preserved at trial, but the use of this doctrine in civil cases is " 'exceedingly rare.' " *Jones v. Rallos*, 373 Ill. App. 3d 439, 454 (2006) vacated & circuit court judgment affirmed upon reconsideration, *Jones v. Rallos*, 384 Ill. App. 3d 73 (2008) (quoting *Dowell v. Bitner*, 273 Ill. App. 3d 681, 693 (1995)). It is applied " 'only where the act complained of was a prejudicial error so egregious that it deprived the complaining party of a fair trial and substantially impaired the integrity of the judicial process itself.' " *Matthews v. Avalon Petroleum Co.*, 375 Ill. App. 3d 1, 8 (2007) (quoting *Lange v. Freund*, 367 Ill. App. 3d 641, 649 (2006)). Before an error can rise to the level of a plain error, there must first be a "threshold-level showing" of prejudice. *Lange v. Freund*, 367 Ill. App. 3d 641, 649 (2006).

¶ 14 "The decision to give or deny an instruction is within the trial court's discretion. The standard for determining an abuse of discretion is whether, taken as a whole, the instructions are sufficiently clear so as not to mislead and whether they fairly and correctly state the law." *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 505 (2002). Once a trial court determines an instruction is to be given, Illinois Supreme Court Rule 239(a) (eff. Jan. 1, 1999) creates a presumption that one of the pattern instructions will be used. *Luye v. Schopper*, 348 Ill. App. 3d 767, 773 (2004). The trial court does not abuse its discretion by refusing a nonpattern instruction if an appropriate pattern instruction exists. *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 285 (2002). The trial court may reject a pattern instruction that does not correctly state principles of law applicable to the submitted evidence. Ill. S. Ct. R. 239(a) (eff. Jan. 1, 1999). On review, we may look to whether the challenged instruction " 'fairly, fully, and comprehensively appraised the jury of the relevant legal principles.' " *Luye*, 348 Ill. App. 3d at 773 (quoting *Schultz*, 201 Ill. 2d at 273-74).

¶ 15 A. Premises Liability Instruction

¶ 16 Defendant's first claim is that the trial court abused its discretion by giving the jury the ordinary negligence instruction instead of the premises liability instruction it had submitted, depriving defendant of its opportunity to present its theory of the case.

¶ 17 Prior to trial, plaintiff filed a motion *in limine* to use a jury instruction on ordinary negligence instead of instructions on premises liability. She argued that she was permitted to proceed under whatever theory of liability she chose, citing *Reed v. Wal-mart Stores, Inc.*, 298 Ill. App. 3d 712 (1988), and that she chose to proceed under a theory of ordinary negligence only. Defendant maintained that premises liability instructions were more appropriate than ordinary negligence instructions because the present case dealt with issues related to the store design. Defendant argued that the cart corral bar was a fixture because it is made of cement and screwed to the floor. The trial court disagreed with defendant and granted plaintiff's motion.

¶ 18 Adequate jury instructions should fairly, fully, and comprehensively inform the jury of the applicable legal principles. *Ciampi v. Ogden Chrysler Plymouth, Inc.*, 262 Ill. App. 3d 94, 105 (1994). The trial court has the discretion to determine which issues have been raised by the evidence and which instructions should be read to the jury. A litigant is entitled to an instruction on his theory of the case if there is some evidence, even very slight evidence, to support that theory. *People v. Jones*, 175 Ill. 2d 126, 131-32 (1997).

¶ 19 We first observe that the trial court properly gave the negligence instruction because defendant's actual notice of the dangerous condition was never at issue in this case since they placed the bar there. See *Reed*, 298 Ill. App. 3d at 717-18; *Wind v. Hy-Vee Food Stroes, Inc.*, 272 Ill. App. 3d 149, 157 (1995) (holding that a negligence instruction *in lieu* of a premises liability instruction is appropriate where notice is not an issue). Plaintiff alleged that defendant acted negligently because it installed a bar that was a trip hazard; and/or failed to use waist high

bars to separate the lanes instead of the low bar that was a trip hazard; and/or failed to use yellow paint on the low bar to alert a patron retrieving a cart; and/or failed to allow a reasonably safe means of accessing carts when it knew or should have known that the cart corral was a dangerous condition for plaintiff and others similarly situated.

¶ 20 Regardless, defendant never explicitly states the differences between a premises liability instruction and an ordinary negligence instruction. Even if the instruction was improper, defendant never argues how it was prejudiced by the giving of one to the exclusion of the other. Without a showing of prejudice, this issue cannot rise to the level of plain error. Accordingly, as there is no plain error, defendant has forfeited the first claim.

¶ 21 B. Aggravation Instruction

¶ 22 Defendant next contends that the trial court erred by giving Illinois Pattern Jury Instructions, Civil, No. 30.21 (2011) (hereinafter, IPI Civil (2011) No. 30.21) because it did not accurately state the law and it offered a modified instruction based on *Schultz*, 201 Ill. 2d 260 (2002).

¶ 23 The supreme court in *Balestri v. Terminal Freight Cooperative Association*, 76 Ill. 2d 451, 455 (1979), held that it was reversible error to refuse an instruction that the plaintiff's right to recover damages for his or her injuries and disability is not barred or limited by the fact that they arose out of an aggravation of a pre-existing condition which made the plaintiff more susceptible to injury. The *Balestri* decision is the basis for what is now IPI Civil (2011) No. 30.21, which states:

> "If [you] decide for the plaintiff on the question of liability, [you] may not deny or limit the plaintiff's right to damages resulting from this occurrence because any injury resulted

> from an aggravation of a pre-existing condition or a pre-existing condition which rendered plaintiff more susceptible to injury."

¶ 24 Plaintiff offered this instruction at the jury conference based on the evidence presented at trial that plaintiff had severe, pre-existing arthritis in her knee prior to the fall. Defendant proposed to modify the instruction above with the following additional sentence: "However, defendant is not liable for injuries or damages which would have resulted from the pre-existing condition even if the accident had not occurred." The trial court refused defendant's proposed modification because it was concerned that the modified instruction did not accurately set forth the law.

¶ 25 The instructions tendered by defendant would have the effect of nullifyng the previously clear directive in IPI Civil (2011) No. 30.21 and the accurate charge to the jury when reading the instructions as a whole. See Supreme Court Rule 239(a) (eff. Jan. 1, 1999). The trial court correctly refused defendant's tendered instruction since it misstated the law and could be construed contrary to IPI Civil (2011) No. 30.21. Accordingly, the trial court's decision to use IPI Civil (2011) No. 30.21 was not arbitrary or unreasonable.

¶ 26 Additionally, as pointed out by plaintiff, defendant's reliance on *Schultz* is misleading. *Schultz* involved an aggravation of pre-existing injuries the plaintiff sustained while employed as a switch foreman for the defendant, doing business as Metra, pursuant to the Federal Employers' Liability Act (FELA). The supreme court in *Schultz* held that IPI Civil (2011) No. 30.21 does not accurately recite the federal law on the matter. *Schultz*, 201 Ill. 2d at 279. A FELA case requires a different jury instruction with respect to aggravation of pre-existing injuries. See Illinois Pattern Jury Instructions Civil, No. 160.27 (2011). Accordingly, because the trial court's

decision to use this jury instruction was not an abuse of discretion, it does not rise to the level of plain error, and this argument is forfeited.

¶ 27 C. Missing Evidence Instruction

¶ 28 Defendant last contends that the trial court abused its discretion by giving the missing evidence jury instruction regarding audio and video recordings that would have captured security footage of areas nearby the location where plaintiff fell. Illinois Pattern Jury Instruction Civil (2011) No. 5.01 (hereinafter IPI Civil (2011) No. 5.01).

¶ 29 Plaintiff filed a motion *in limine* prior to trial seeking a ruling to permit her to tender a missing evidence instruction. The motion arose from her contention that there was security footage of the area near the service desk where plaintiff was moved to after her fall. Defendant responded that there were no security cameras that captured the area of plaintiff's actual fall and that the footage, if any, of plaintiff *after* the fall by the service desk was undisputed and irrelevant. The trial court reserved ruling until it heard all of the evidence. After revisiting the issue and "very carefully exercising its discretion," the court ruled that the instruction would be given to the jury.

¶ 30 IPI Civil (2011) No. 5.01 allows a jury to draw an adverse inference from a party's failure to offer evidence or to produce a witness. The instruction should be given only when a foundation is presented which suggests that: (1) the witness or evidence was under the control of the party to be charged and could have been produced by reasonable diligence; (2) the witness or evidence was not equally available to the adverse party; (3) a reasonably prudent person under the same or similar circumstances would have offered the evidence or produced the witness if he believed the evidence or the witness's testimony would have been favorable to him; and (4) no

reasonable excuse for the failure to offer the evidence or to produce the witness has been shown. *Kersey v. Rush Trucking, Inc.*, 344 Ill. App. 3d 690, 696 (2003).

¶ 31 Defendant argues on appeal that the third and fourth elements were not met because "no reasonable person would have produced video footage from a camera that was *near* the incident in question because a reasonable person would not think that such footage would further their case or Plaintiff's case." Defendant asserts that the missing video evidence was excusable because "nearby footage would not be considered probative or relevant," and, any nearby footage "would have been merely cumulative because there was no dispute about what happened after the incident, which is what would have been depicted on the footage."

¶ 32 However, as pointed out by plaintiff, defendant did dispute plaintiff's version of the incident. Edwards stated that he found plaintiff sitting in an electronic cart near the customer service desk. Plaintiff told him that she was trying to separate two regular carts from each other, tripped, fell, and hit her knee and plaintiff never told him that she tripped over a bar on the floor and never mentioned a flatbed cart. Hyatali observed plaintiff pull two regular carts and then, when she looked again, she saw plaintiff on the ground in the regular cart corral. According to Hyatali, plaintiff was on the ground beyond the railing and plaintiff did not say anything to her about tripping over a bumper or a rail. Jahangir, the Loss Prevention officer on duty at the time of the incident, testified that he believed a camera could have captured plaintiff in the turnstile area being escorted to the electric scooter area and from there to the front desk, while she sat there waiting to speak with Edwards. Jahangir also testified that it was possible that the audio might have recorded the conversation between plaintiff and Edwards at the service desk after the incident. Thus, even if we were to accept defendant's assertion that a surveillance camera did not capture the actual area where plaintiff alleged she fell, the surveillance camera and the audio

arguably would have captured at least some of the evidence at issue. Accordingly, the four factors regarding the giving of this instruction have been met and we cannot say that the trial court abused its discretion by giving this instruction, which defeats defendant's plain error argument.

¶ 33 In sum, after reviewing defendant's claims of error, this is not one of the exceedingly rare civil cases that warrant application of the plain error doctrine. We are not convinced there was error, and any possible error was not so prejudicial as to substantially impair the integrity of the judicial process itself. Defendant's arguments on appeal are forfeited.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 36 Affirmed.