FOURTH DIVISION
June 9, 2016

No. 1-15-2736

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

KATHERINE BAKER,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	12 L 3306
	)	
COSTCO WHOLESALE CORPORATION,	)	Honorable
	)	Patrick F. Lustig,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the trial court's denial of defendant's motion for a judgment notwithstanding the verdict; the evidence at trial, when viewed in a light most favorable to plaintiff, did not so overwhelmingly favor defendant that a verdict for plaintiff could not ever stand. We also affirm the trial court's denial of defendant's motion for a new trial where the trial court properly instructed the jury with Illinois pattern jury instructions, and where any error in the admission of evidence that plaintiff's medical bills were not paid, in violation of a

motion *in limine*, did not prejudice defendant such that it impacted the outcome of the trial.

¶ 2 Katherine Baker, appellee, filed a lawsuit against Costco Wholesale Corporation (Costco), appellant, seeking damages for the injuries she sustained when she fell in a Costco store while shopping. Following a trial, a jury entered a verdict in favor of Baker. Costco filed a motion for judgment notwithstanding the verdict and a motion for new trial. The trial court denied both motions. Costco now appeals those rulings.

¶ 3 Background

¶ 4 Baker filed a complaint against Costco alleging that on May 24, 2010, she sustained an injury after she slipped and fell while shopping at Costco. Costco filed an answer denying all the material allegations in the complaint along with several affirmative defenses, and the matter proceeded to trial.

¶ 5 At the trial, Baker testified that she slipped and fell on the floor at Costco. At the time of her fall, she was shopping with her husband and her son, Rodney. Baker testified that she fell on the floor in the freezer section of the warehouse when she was several feet behind Rodney, who was pushing their cart. Rodney was looking for pizza and she was "window shopping." Immediately prior to falling, Baker was looking to her right. Baker testified that she was five feet tall and that the prices in the aisle were generally high, above her head.

¶ 6 Baker testified that she fell after stepping in a pink substance that appeared to be melted and was dry at the edges. The pink substance spanned about one foot by two feet on the floor. She thought the substance might be frozen yogurt. Baker commented that if the substance was ice cream, it had melted. She further testified that the substance was room temperature when she fell in it.

¶ 7 Baker testified that she did not see the substance on the floor prior to her fall and, accordingly, she did not look at the floor prior to her fall. Generally, when walking through the Costco aisles, she does not look at the floor because she is looking at the products. Baker testified that the floor at Costco was a brownish color, which was different than the color of the substance she slipped on. Baker testified that if there had been a hole in the floor where the substance had been, she would have walked into it. She could not testify as to how long the substance had been on the floor prior to her fall.

¶ 8 Shortly after her fall, Baker testified that she was approached by a sample distributor. The sample distributor was not handing out yogurt samples. The sample distributor had her back to Baker at the time of her fall, and Baker acknowledged that no one was facing her when she fell. Baker testified that the shopping carts at Costco did not have cup holders or a place to hold samples.

¶ 9 Rodney testified that on the date in question, he was with his mother at Costco. When his mother fell, he was walking down the frozen food aisle and was pushing a cart. His mother was approximately six feet behind him.

¶ 10 Rodney testified that he was pointing out items in the freezer section when he looked back and saw that his mother had fallen. When Rodney saw the substance on the ground, it was pink and a bit red at the outside. He explained that the substance looked like it was almost drying around the perimeter. There was also a streak through the substance where his mother's foot had smeared through it. Rodney was not behind his mother when she fell, so he could not testify as to what she could see.

¶ 11 Michael Lanthier, a Costco employee, testified that at the time of the incident in question, he was working as a membership manager. On the date in question, several vendors were

handing out samples of products throughout the warehouse. Lanthier testified that the individuals distributing samples in the warehouse are not Costco employees, but employees of a third-party vendor.

¶ 12 Lanthier testified about Costco's floor walk protocol, where certain warehouse employees are to conduct floor walks hourly to ensure that the property is hazard-free. Pursuant to Costco's procedure, if the floorwalker does spot a hazard, he or she is to remedy the problem. Lanthier testified that it is also Costco's policy to have an employee pick up anything he or her sees on the floor, even when not conducting a floor walk. The floorwalkers do not monitor any one zone more than any other.

¶ 13 Lanthier testified that the report made on the date of the incident indicated that Costco employee Terry Kubalanza was the last person to conduct a floor walk in the area where Baker fell. Kubalanza conducted that floor walk between 11:20 a.m. and 11:40 a.m. According to the incident report in this case, Lanthier testified that the floor walk had been performed about ten minutes prior to Baker's fall. The incident report indicated that Baker fell at approximately 11:50 a.m.

¶ 14 Lanthier testified that an individual who was not employed by Costco was distributing samples in the vicinity of where Baker fell. Baker, however, was behind the individual who was distributing samples when she fell. Lanthier further testified that Baker's fall did not occur in the area of the warehouse where yogurt samples were being distributed. Rather, she fell in a different area of the warehouse. Beside Baker and her family, Lanthier testified that he did not find any witnesses to Baker's fall.

¶ 15 Lanthier testified that the Costco floors were made of a polished concrete surface that would have been extremely hazardous for customers if something like melted frozen yogurt or

ice cream were to fall on the surface. On the date of the incident, Lanthier went to the scene of the incident and filled out an incident report. In his incident report, he indicated that Baker had fallen on an ice cream or yogurt demo and that she fell while looking into the freezer. He testified that he was not aware of anyone taking pictures of the substance after the incident, he did not interview or get a statement from the person assigned to doing floor walks just before the incident, and he did not check any surveillance cameras. Lanthier testified that the report he wrote and signed contains a statement that says: "do not admit responsibility and do not recommend medical treatment." On that particular day, there were approximately 14 vendors handing out products. When samples are handed out, customers are free to walk about with the samples, and there is no place in the carts to hold samples. Generally, samples are given near the area where that product is being sold. Products that are handed out by the vendors are Costco products and the vendors purchase those products from Costco. The vendors encourage customers to buy the product they are sampling from Costco.

¶ 16 Kubalanza testified that she was employed by Costco as a floorwalker on the date in question. In that capacity, she would walk the floor for 15-20 minutes every hour or two hours. When conducting floor walks, Kubalanza will start on the side of the store where the freezer aisles are, and after walking through the freezer aisles, she still has other areas of the warehouse to check. Kubalanza testified that even though she is a floorwalker, she is not continuously walking the floors and a vast majority of her time is spent doing other things, such as checking people at the door or clicking people in.

¶ 17 On the date of Baker's fall, Kubalanza had conducted a floor walk between 11:20 a.m. and 11:40 a.m. During the floor walk, Kubalanza walked through the store for about 20 minutes inspecting the floor of the warehouse and refrigeration temperatures. After her floor walk

between 11:20 a.m. and 11:40 a.m., Kubalanza noted in her floor walk report that the floor was "okay" in the area where Baker had fallen.

¶ 18 Kubalanza testified that if there was a problem with something on the floor, she would have called a manager or maintenance personnel or would have remedied the spill herself, depending on the size.

¶ 19 Robyn Lightle testified via evidence deposition that he was the general manager of the Costco where Baker fell at the time of the incident. Lightle was not working at the time of the incident, but she reviewed the paperwork associated with the incident in her capacity as general manager.

¶ 20 Lightle testified that product sampling in the warehouse is done though a company called CDS. Costco does not employ or supervise the individuals who demonstrate or sample products in the warehouse. If Costco has an issue with any of the individuals handing out samples in the warehouse, it would have to address that issue with a CDS supervisor.

¶ 21 Lightle testified that Costco's floorwalker employees push a cart that has cleaning supplies, so that if they see a spill they can clean it up immediately. Employees also carry radios so that they can call for help regarding spills, if needed. When they see a spill, employees are to close off that area.

¶ 22 At the close of plaintiff's case in chief, Costco made an oral motion for a directed verdict, which was denied. The jury later returned a verdict in favor of Baker in the amount of $148,591.70. Costco filed a motion for judgment notwithstanding the verdict and a motion for a new trial. After the motions were fully briefed, the trial court denied both motions. Costco timely filed this appeal, seeking reversal of the trial court's orders granting judgment in favor of Baker in the amount of $148,591.70, denying Costco's motion for judgment notwithstanding the

verdict and denying Costco's motion for a new trial. For the reasons that follow, we affirm the trial court's rulings.

¶ 23 Analysis

¶ 24 Judgment Notwithstanding the Verdict

¶ 25 Costco first argues that the trial court erred when it denied its motion for a judgment notwithstanding the verdict because: (1) there was no evidence that Costco knew or should have known there was substance on the floor, and (2) even if Costco had notice of the substance on the floor, the substance was an open and obvious hazard and Baker was not distracted. Baker in turn argues that there was evidence presented at trial showing that the substance was on the ground as a result of Costco's own negligence because Costco was aware that vendors were sampling products, and the items being sampled were purchased from Costco. In the event we disagree, Baker goes on to argue that Costco knew or at least should have known of the substance on the floor, and that it was not an open and obvious condition, but even if it were, the distraction exception applies where one could reasonably expect that a customer in the freezer aisle would be looking at the products and prices in the freezers rather than looking at the ground for hazards.

¶ 26 Whether the court improperly denied a judgment notwithstanding the verdict (JNOV) is a question of law that appellate courts review *de novo*. *Smith v. Joy Marvin, M.D.*, 377 Ill. App. 3d 562, 568 (2007). The standard for obtaining a JNOV is very difficult to meet. *Id*. A JNOV is properly entered only if all the evidence, when viewed in a light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand. *Id*. at 568-69. In ruling on a motion for JNOV, a court does not weigh the evidence or make credibility determinations. *Barth v. State Farm Fire and Casualty Co.*, 371 Ill. App. 3d

498, 507 (2007). A JNOV should not be granted if reasonable minds could differ as to inferences or conclusions to be drawn from the evidence presented. *Id.* at 508. "Most importantly, a judgment *n.o.v.* may not be granted merely because a verdict is against the manifest weight of the evidence." *Maple v. Gustafson*, 151 Ill. 2d 445, 453 (1992).

¶ 27 It is well-settled that a defendant owes a business invitee on the defendant's premises a duty to exercise ordinary care in maintaining the premises in a reasonably safe condition. *Ward v. K Mart Corp.*, 136 Ill. 2d 132 (1990). Where a business invitee is injured by slipping on the premises, liability may be imposed if the substance was placed there by the negligence of the proprietor or his servants, or, if the substance was on the premises through acts of third persons or there is no showing how it got there, liability may be imposed if it appears that the proprietor or his servant knew of its presence, or that the substance was there a sufficient length of time so that in the exercise of ordinary care its presence should have been discovered. *Thompson v. Economy Super Marts, Inc.*, 221 Ill. App. 3d 263, 265 (1991). Thus, where the foreign substance is on the premises due to the negligence of the proprietor or his servants, it is not necessary to establish their knowledge, actual or constructive; whereas, if the substance is on the premises through acts of third persons, the time element to establish knowledge or notice to the proprietor is a material factor. *Id.*

¶ 28 Here, Baker argues that the pink substance she slipped in was on the floor at Costco as a result of Costco's own negligence. In support of this argument, Baker states that there was evidence that Costco knew there were approximately 14 vendors distributing samples at the time of her fall; the samples being distributed were purchased from Costco; customers were encouraged to purchase the products they sampled from Costco; sampling was done close to the location of the product being sampled; there was a person sampling products who was

approximately 30 feet away from Baker when she fell; and, despite all these facts, Costco did not instruct their employees to check areas where products were being sampled more frequently. Lanthier testified floor walks were performed every hour while Kubalanza said she performed floor walks every hour or two. Baker argues that these facts "are sufficient to support an inference that Costco's business practice of distributing food caused the substance to be on the ground[.]"

¶ 29 While we do not know whether the pink substance that Baker slipped in was ice cream, yogurt or something else, there was evidence presented that it was a pink liquid substance that Baker believed to be frozen yogurt or ice cream. Lanthier indicated in his report that the substance Baker slipped in was an ice cream or yogurt demo, and yogurt was being sampled by one of the vendors working that day. Further, while we do not know how the pink substance made its way onto the floor, there was evidence that there were 14 vendors distributing food product samples, one of which was yogurt, and customers were allowed to walk around with the samples as they shopped. Viewing all the evidence in a light most favorable to Baker (*Smith*, 377 Ill. App. 3d at 568-69), including the evidence that the pink substance that caused Baker to fall had begun to dry on the edges, we find that reasonable minds could conclude that the pink substance was on the ground a significant amount of time as a result of Costco's negligence in failing to inspect the floor more frequently, particularly when Costco was aware that potentially slippery substances were being distributed by numerous vendors. *Barth*, 371 Ill. App. 3d at 508 (A JNOV should not be granted if reasonable minds could differ as to inferences or conclusions to be drawn from the evidence presented).

¶ 30 Further, reasonable minds could conclude that the pink substance was on the ground for a sufficient length of time so that in the exercise of ordinary care Costco should have discovered

its presence. *Thompson*, 221 Ill. App. 3d at 265; see *Tomczak v. Planetsphere, Inc.*, 315 Ill. App. 3d 1033, 1039 (2000); *Hayes v. Bailey*, 80 Ill. App. 3d 1027, 1030 (1980) ("The general rule is that liability will be imposed where a business invitee is injured by slipping on a foreign substance on the premises if (1) the substance was placed there by the negligence of the proprietor or (2) his servant knew of its presence, or (3) the substance was there a sufficient length of time so that, in the exercise of ordinary care, its presence should have been discovered, i. e. the proprietor had constructive notice of the substance.").

¶ 31 Where "the substance was on the floor through the act of a third person, or there is no showing of how it reached the floor, there must be evidence of sufficient notice to defendant of the presence of the substance so that defendant, in the exercise of ordinary care, would have discovered it." *Dunlap v. Marshall Field & Co.*, 27 Ill. App. 3d 628, 631 (1975). "Absent any evidence demonstrating the length of time that the substance was on the floor, a plaintiff cannot establish constructive notice." *Reid v. Kohl's Department Stores, Inc.*, 545 F.3d 479, 482 (7th Cir. 2008).

¶ 32 Here, Baker testified that she believed the substance she slipped in to be frozen yogurt or ice cream that had melted and had remained on the floor long enough to begin drying on the outer edges of the puddle. Thus, viewing the evidence in a light most favorable to Baker, the fact that the substance had melted and appeared to be drying at the edges would suggest that it had been there for some time. There was evidence in the record that Costco employee Kubalanza did a floor walk between 11:20 a.m. and 11:40 a.m., which would have covered the area where Baker fell; during that floor walk, Kubalanza did not indicate that she saw any pink substance on the floor; however, the freezer section where Baker fell is not the last area Kubalanza checks when conducting a floor walk; and Baker fell at 11:50 a.m. Thus, with respect

to showing how long the substance was on the ground before Baker slipped in it, the evidence shows that the substance appeared to be melted and drying around the edges by the time Baker slipped in it. Based on the time of the floor walk and the fall, the pink substance could have been on the ground for as long as 30 minutes before the fall, assuming the spill was not there during Kubalanza's prior floor walk or she simply failed to detect it.

¶ 33 We note that Costco argues that the condition of the pink substance—that it was melted, room temperature, and was drying at the edges—is inconclusive as to how long the dangerous condition existed based on *Dunlap,* wherein the appellate court stated that: "Ordinarily the wilted, torn or dirty condition of an object upon which the injured party slipped does not provide basis for an inference that it had remained on the floor for a length of time sufficient to charge defendant with constructive notice of its presence." *Dunlap,* 27 Ill. App. 3d at 632. However, the "wilted, torn or dirty" condition of the object is inconclusive as to how long it was there is because "[t]he object *** might have been dirty before it was dropped, become dirty after only a few moments on the floor, or been dirtied and flattened by the shoe of the individual who slipped on it." *Id*. As such, the condition of something as being "wilted, dirty or torn" does not necessarily imply a passage of time because the object could have been "wilted, torn or dirty" in its original state or before it made its way to the floor. Here, however, the fact that the pink liquid was drying at the edges could only be caused by the passage of time. As such, in this case, the condition of the substance upon which Baker slipped suggests that it could have been on the ground for a lengthy period of time.

¶ 34 A judgment notwithstanding the verdict ought to be directed "only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand."

Canales v. Dominick's Finer Foods, Inc., 92 Ill. App. 3d 773, 775 (1981) (citing *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). Under the circumstances of this case, and in viewing all the evidence in an aspect most favorable to Baker, we find that because there was evidence that the pink substance could have been on the ground for upwards of 30 minutes before an inspection was made by Kubalanza, evidence that the substance had been on the floor long enough to warm to room temperature and start to dry at the edges, and evidence that Costco was aware that there were at least 14 vendors distributing food samples to customers who would be consuming the samples as they carried them throughout the store, reasonable minds could conclude that Costco had constructive notice of the pink substance prior to Baker's fall. *Barth*, 371 Ill. App. 3d at 508. As such, we cannot find that the evidence "so overwhelmingly favored [Costco] that no contrary verdict based on that evidence could ever stand." *Canales*, 92 Ill. App. 3d at 775.

¶ 35 Next, Costco argues that even if it did have constructive notice of the pink substance, the substance was open and obvious and, therefore, Costco could not be liable for any injuries Baker sustained as a result of her fall. Under the open and obvious rule, "a party who owns or controls land is not required to foresee and protect against an injury if the potentially dangerous condition is open and obvious." *Rexroad v. City of Springfield*, 207 Ill. 2d 33, 44 (2003). "Obvious" means that "both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment." Restatement (Second) of Torts § 343A cmt. b, at 219 (1965).

¶ 36 Where no dispute exists as to the physical nature of the condition, whether the dangerous condition is open and obvious is a question of law. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 18. Here, the nature of the pink substance on the ground in Costco is not in dispute. The

record indicates that it was a spill that was approximately one foot by two feet in circumference, it was pink in color, which contrasted with the floor that was brown in color, and it was a liquid, room temperature substance.

¶ 37 The existence of an open and obvious danger is not an automatic or *per se* bar to the finding of a legal duty on the part of a defendant. *Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 418, 425 (1998). With open and obvious conditions, our duty analysis must also consider whether an exception to the open and obvious rule applies. *Bruns*, 2014 IL 116998, ¶ 20. Exceptions to the rule exist where "the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger." Restatement (Second) of Torts § 343A cmt. f, at 220 (1965). Illinois law recognizes two such exceptions: the "distraction exception," and the "deliberate encounter exception." *Sollami v. Eaton*, 201 Ill. 2d 1, 15 (2002); *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 391 (1998). The distraction exception applies " 'where the possessor [of land] has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it.'" *Sollami*, 201 Ill. 2d at 15 (quoting Restatement (Second) of Torts § 343A cmt. f, at 220 (1965)). "[O]ur courts have applied the distraction exception to impose a duty upon a landowner where it is clear that the landowner created, contributed to, or was responsible in some way for the distraction which diverted the plaintiff's attention from the open and obvious condition and, thus, was charged with reasonable foreseeability that an injury might occur." *Sandoval v. City of Chicago*, 357 Ill. App. 3d 1023, 1030 (2005); see *American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14, 29 (1992) (reasonably foreseeable to defendant-billboard lessees that painter would be distracted from billboard power lines while watching where he walked on

billboard railing and, thus, that he could be injured); *Ward*, 136 Ill. 2d at 156 (injury reasonably foreseeable where defendant-store placed a post right outside doors to be accessed by customers focused on carrying large and bulky items).

¶ 38 Even if we assume that the pink substance was an open and obvious danger, we find that the distraction exception applies in this case. Baker slipped and fell while she was walking down a frozen food aisle at Costco. Given that Costco placed its products in the freezers that lined both sides of the aisle, and placed price tags for the items in the freezers, we find that Costco should have anticipated that a customer walking down the frozen food aisle would be distracted looking at the frozen food items and prices such that he or she might not appreciate an open and obvious hazard on the ground. Accordingly, we find that, assuming the pink substance is an open and obvious hazard, the distraction exception applies in this case and, therefore, does not relieve Costco of potential liability.

¶ 39 We recognize Costco's argument that, based on *Bruns*, "Illinois case law makes clear that 'the fact of looking elsewhere does not constitute a distraction." However, this was not a case where Baker was merely looking elsewhere. In *Bruns*, the plaintiff brought a lawsuit against the city alleging that a defect in the sidewalk caused her to fall and injure herself. *Bruns*, 2014 IL 116998, ¶ 1. While walking, the plaintiff admitted that she was not looking at the sidewalk, but rather was looking at the door and steps of a clinic along the sidewalk. *Id*. ¶ 22. The court found that these facts did not satisfy the distraction exception to the open and obvious rule. The court noted that such a "distraction" was not reasonably foreseeable to the defendant city, and that the issue is not whether plaintiff was looking elsewhere, but *why* she was looking elsewhere. *Id*. ¶¶ 29-30. As such, the court ruled that "[a]lthough the record supports that plaintiff was, in fact, looking in that direction, rather than at the defective sidewalk, we conclude that the mere

fact of looking elsewhere does not constitute a distraction." *Id*. ¶ 22. Here, Baker was not merely looking elsewhere from the floor when she slipped and fell, she was looking to her right at items in the freezer, where Costco had placed frozen food items and price tags for those items. As such, Costco could have reasonably foreseen that someone walking down the freezer aisle, like Baker, could be distracted by the items and price tags it placed in those freezers. Accordingly, we affirm the trial court's denial of a motion for judgment notwithstanding the verdict.

¶ 40 Jury Instructions

¶ 41 Costco argues that the trial court erred in instructing the jury with both a modified Illinois Pattern Jury Instruction 20.01, which informed the jury on the legal standard for negligence, and Illinois Pattern Jury Instruction 120.08, which informed the jury on the legal standard for premises liability. Costco argues that the "only instruction supported by the evidence in the case was one of premises liability, which requires actual or constructive notice." Costco argues that the negligence instruction was improper because Baker failed to present any evidence that the negligent conduct of Costco or its employees caused the pink substance to be on the ground where Baker fell, and that the non Illinois Pattern Instruction it proposed on premises liability better suited the facts of this case. Therefore, Costco argues that the trial court abused its discretion when it: (1) instructed the jury with an Illinois pattern jury instruction regarding Costco's negligence because there was no evidence of the same, and (2) denied Costco's request to give a non-pattern jury instruction further explaining the law of premises liability regarding foreign substances.

¶ 42 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. *Reed v. Wal-Mart Stores, Inc.*, 298 Ill. App. 3d 712, 715 (1998). 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. *Id*. We will not grant a new trial based on a trial court's decision to give or not give a particular instruction unless that decision was an abuse of discretion and caused serious prejudice to the complaining party. *Id.*; *Surestaff, Inc. v. Azteca Foods, Inc.*, 374 Ill. App. 3d 625, 627 (2007) ("The determination of proper jury instructions rests with the sound discretion of the trial court and will not be disturbed absent a clear abuse of discretion."). "Even if the plaintiff was prejudiced by the use of [an improper jury instruction], there must be a reasonable basis supporting the conclusion that, but for the error, the verdict might have been different." *Doe v. University of Chicago Medical Center*, 2014 IL App (1st) 121593, ¶ 87.

¶ 43 We find that the evidence submitted supports giving both Illinois Pattern Instruction 20.01 (negligence) and 120.08 (premises liability) to the jury. Illinois Pattern Instruction 20.01, as modified for this case, read:

> "The plaintiff claims that she was injured and sustained damage, and that the defendant was negligent in one or more of the following respects:
>
> a. failed to adequately inspect and/or maintain the area where open food samples were handed out and/or transported; and/or
>
> b. caused a foreign substance to develop and exist on the premises; and/or

c. Allowed an unsafe condition to develop and exist on the premises when they knew or should have known that it caused a risk to patrons; and/or

d. failed to warn the Plaintiff of a dangerous condition on its premises which it knew of or, in the exercise of due care, should have known of."

¶ 44 We find that there was some evidence to support the negligence instructions contained in both jury instructions, Illinois Pattern Instruction 20.01 and Illinois Pattern Instruction 120.08. The first subsection in the negligence instruction states that Costco "failed to adequately inspect and/or maintain the area where open food samples were handed out and/or transported." This was supported by evidence showing that there were 14 vendors distributing food samples on the date and time in question, including yogurt samples that would be slippery if dropped on the ground. Lanthier testified that floor walks were performed every hour while Kubalanza said she performed floor walks every hour or two. Despite the knowledge that 14 vendors were distributing food samples to customers, Costco did not perform any additional floor walks or take additional precautions near the vendors handing out samples.

¶ 45 At trial there was also evidence submitted which if believed by the jury showed that Costco "allowed an unsafe condition to develop and/or exist on the premises when [Costco] knew or should have known that it caused a risk to patrons" because Costco was aware there were 14 vendors distributing food samples at the date and time in question; Costco was aware one of the products being sampled was yogurt, which would be slippery if spilled on the ground; and Costco allowed customers to walk freely throughout the store with these samples.

¶ 46 Based on the above, we find that there was sufficient evidence to support the negligence instructions given by the trial court judge. *Reed*, 298 Ill. App. 3d at 715 (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). Even if the trial court had erred in giving the negligence instruction to the jury, we would find that such an error did not cause "serious prejudice" to Costco such that the verdict might have been different, especially where Costco concedes that the premises liability instruction was proper and, as discussed earlier, there was evidence in the record to support a finding of constructive notice. See *Doe*, 2014 IL App (1st) 121593, ¶ 87.

¶ 47 Further, while Costco appears to concede that the premises liability instruction was properly given, which would require evidence of actual or constructive notice, we emphasize that there was sufficient evidence to support the premises liability instruction that the trial court gave as well. With respect to the first requirement in the premises liability instruction, "there was a condition on the property which presented an unreasonable risk of harm to people on the property," the evidence in the record shows that Costco's employee conceded that if yogurt were to fall on the warehouse floors, it would be slippery and dangerous to customers.

¶ 48 With respect to the second requirement, that "the Defendant knew or in the exercise of ordinary care should have known of both the condition and the risk or that the condition and the risk arose from the Defendant's acts or part of its business[,]" this is supported by the fact that Costco employees are responsible for cleaning up any spills in the warehouse; Costco was aware that there were 14 vendors sampling foods on the date and time in question and that customers would be walking about the store with those samples; despite this knowledge, Costco did not have any additional floor walks; and, when Baker slipped in the pink substance, there was evidence that it had melted, was room temperature, and had begun to dry at the edges. Although

Costco argues that the condition of the pink substance—that it was melted, room temperature, and was drying at the edges—is inconclusive as to how long the dangerous condition exited based on *Dunlap*. However, as we stated earlier, this case is distinguishable from *Dunlap*, which involved an injury allegedly caused by a dirty lollipop stick, because here the fact that the pink substance was drying at the edges could only be caused by the passage of time.

¶ 49 And, with respect to the last requirement, that "the Defendant could reasonably expect that people on the property would not discover or realize the danger or would fail to protect themselves against such danger[,]" there was evidence that Costco had a policy in place to clean up spills in order to prevent customers from getting injured, and there was further evidence that Costco placed its items in shelves with price tags so that customers could view the products while shopping. Thus, while Costco appears to have conceded that the premises liability instruction was properly given, we nonetheless find that there was sufficient evidence presented at trial to support giving this instruction. *Reed*, 298 Ill. App. 3d at 715 (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).

¶ 50 Next, Costco argues that the trial court erred in refusing to instruct the jury with certain non-pattern instructions submitted by Costco regarding constructive notice and foreign substances. Where Illinois Pattern Instructions correctly and adequately charge the jury, the use of additional instructions is improper. *Kent v. Knox Motor Services, Inc.*, 95 Ill. App. 3d 223, 226 (1981). Further, a trial court is required to use an Illinois Pattern Instruction when it is applicable in a civil case after giving due consideration to the facts and the prevailing law, unless the court determines that the instruction does not accurately state the law. *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 273 (2002); Ill. S. Ct. R. 239(a) (eff. Jan.

1, 2011) ("Whenever Illinois Pattern Jury Instructions (I.P.I.) contains an instruction applicable to a civil case, giving due consideration to the facts and the prevailing law, and the court determines that the jury should be instructed on the subject, the I.P.I. instruction shall be used, unless the court determines that it does not accurately state the law."). The refusal to give an instruction will result in a new trial only when the refusal amounts to a serious prejudice to a party's right to a fair trial. *Smith v. Joy Marvin, M.D.*, 377 Ill. App. 3d 562, 567 (2007).

¶ 51 The instruction for premises liability given in this case was Illinois Pattern Instruction 120.08, and, as modified for this case, it read:

> "First, there was a condition on the property which presented an unreasonable risk of harm to people on the property.
>
> Second, the Defendant knew or in the exercise of ordinary care should have known of both the condition and the risk or that the condition and the risk arose from the Defendant's acts or part of its business.
>
> Third, the Defendant could reasonably expect that people on the property would not discover or realize the danger or would fail to protect themselves against such danger.
>
> Fourth, the defendant was negligent in one or more of the following ways:
>
> a. failed to adequately inspect and/or maintain the area where open food samples were handed out and/or transported; and/or

b. caused a foreign substance to develop and exist on the premises; and/or

c. Allowed an unsafe condition to develop and/or exist on the premises when they knew or should have known that it caused a risk to patrons; and/or

d. failed to warn the Plaintiff of a dangerous condition on its premises which it knew of or, in the exercise of due care, should have known of."

¶ 52 Costco does not argue that the instructions given to the jury were incorrect. Instead, Costco appears to argue that the Illinois Pattern Instructions were inadequate and the instructions it offered were necessary to "articulate established Illinois law regarding constructive notice in cases where a customer invitee slips on a foreign substance." The jury instruction that Costco argued the trial court improperly refused to give to the jury is a non-IPI instruction titled "Foreign Substance on Floor—Duty of Care" and it states:

"A store is subject to liability to a customer who slips on a foreign [substance/object] and falls if

[CHOOSE FROM THE FOLLOWING SEE Use of Instruction:]

The store's [proprietor/employees] [created the condition or actually knew of the condition] that led to the customer's slip and fall and the condition had existed for a sufficient amount of time so that, in the exercise of reasonable care, the proprietor or an employee should have corrected the condition before the customer

> slipped and fell, or should have given adequate warning to the customer to enable him or her to avoid harm.
>
> [OR.]
>
> The [proprietor/employees] did not actually know of the substance on the floor at the time of the customer's slip and fall, but the condition had existed for sufficient length of time so that, in the exercise of ordinary care, [the proprietor/an employee] should have discovered and corrected the condition, or should have given adequate warning of the condition, regardless of who originally created it."

¶ 53 The trial court denied Costco's request to read the above instruction, stating: "I felt that the IPIs had appropriately instructed the jury on the issues and the non-IPIs could be somewhat confusing in conjunction with the approved IPIs." We agree with the trial court, and also find the Illinois pattern jury instructions that were given to the jury were correct and sufficient in this case. This was a typical premises liability case and the Illinois pattern instructions regarding premises liability, which Costco does not argue are incorrect in any way, was sufficient to instruct the jury on the law in this case. Ill. S. Ct. R. 239(a) (eff. Jan. 1, 2011) ("Whenever Illinois Pattern Jury Instructions (I.P.I.) contains an instruction applicable to a civil case, giving due consideration to the facts and the prevailing law, and the court determines that the jury should be instructed on the subject, the I.P.I. instruction shall be used, unless the court determines that it does not accurately state the law."). Therefore, we cannot say that the trial court abused its discretion by not reading Costco's suggested instructions since the Illinois

pattern instructions fairly and correctly stated the law. See *Sharbono v. Hilborn*, 2014 IL App (3d) 120597, ¶ 40.

¶ 54 Motion for a Mistrial

¶ 55 Next, Costco argues that the trial court erred in denying its motion for a mistrial after counsel elicited testimony from Baker that her medical bills were unpaid in violation of a motion *in limine*. At trial, the following exchange took place:

Q: Now, I am showing you what's been marked Exhibit No. 9. For the record, this is stipulated medical bills, your Honor Exhibit, No. 9.

Q: Is this a list of the medical treatment you incurred?

A: Looks like all of it.

Q: Does it appear to be the approximate amount of what you owe in medical?

A: Yes.

Q: How much is that?

A: 108,000 and change.

Q: Can you read –

A: 591.70.

Q: 108,591.70; is that right?

A: Yes.

Q: Are those bills paid?

A: No.

Following Costco's objection, Costco requested a motion for a mistrial. The trial court judge denied that motion and asked Costco's attorney if he wanted the jury to be instructed on the objection, and counsel stated he did not. The trial court judge then sustained the objection and the trial continued.

¶ 56 Costco argues that this line of questioning violated its motion *in limine* seeking to bar Baker from discussing her financial situation or her inability to pay for her medical care, which the trial court granted. In personal injury actions where the only damages recoverable are compensatory in nature, the financial standing of the parties is irrelevant and prejudicial. *Lorenz v. Siano*, 248 Ill. App. 3d 946, 953 (1993). This is because "appeals to the passion or sympathy of the jury are improper and are sufficient cause for reversing a judgment unless it can be said that the prejudice suffered was so minimal that it did not impact upon the outcome of trial." *Id.*

¶ 57 Here, we find that the mere statement that the bills were unpaid did not go into Baker's financial situation or her ability or inability to pay the bills and, accordingly, was not an attempt to appeal to the sympathy of the jury. The bills were not paid; there was no explanation as to why. As such, even if this line of questioning did cause prejudice, which we believe it did not, any prejudice was so minimal that it did not impact the outcome of the case. *Id.*

¶ 58 Motion for a New Trial

¶ 59 Last, Costco argues that the trial court erred in denying its motion for a new trial where there were several errors made during the trial—the trial court's refusal to instruct the jury with additional non-pattern jury instructions and the admission of Baker's testimony that her bills were not paid—and where the jury's verdict was against the manifest weight of the evidence. A request for a new trial will be granted only if the jury's verdict is against the manifest weight of the evidence. *Smith*, 377 Ill. App. 3d at 569. A verdict is against the manifest weight of the

evidence only if it is unreasonable, arbitrary and not based on evidence, or when the opposite conclusion is clearly apparent. *Id*. It is the province of the jury to resolve conflicts in the evidence, to pass on the credibility of witnesses, and to decide what weight to give to the witnesses' testimony. *Maple v. Gustafson*, 151 Ill. 2d 445, 452 (1992).

¶ 60 First, we have already found that the errors alleged by Costco did not prejudice Costco such that a new trial was warranted. Further, the evidence offered at trial showed that Baker slipped and fell in a pink liquid substance that could have been frozen yogurt or ice cream, and, at the time of the fall, the pink substance was melted and drying at the edges and could have been on the floor for thirty minutes. Baker's fall also occurred at a time when Costco was aware that 14 or more vendors were sampling Costco products to customers, who could carry the samples throughout the store. There was also evidence that Costco's floor walk procedure was the same (one floor walk every hour or two) throughout the store regardless of the section of the store and regardless of the number of vendors handing out samples in the store at any given time. Based on this evidence, we cannot say that the jury's verdict was "unreasonable, arbitrary and not based on evidence, or [that an] opposite conclusion is clearly apparent." See *Smith*, 377 Ill. App. 3d at 569.

¶ 61 Conclusion

¶ 62 For all the reasons above, we affirm the trial court's rulings.

¶ 63 Affirmed.