

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
EASTERN DIVISION

KIMBERLY ANN SMITH,)	
)	
Plaintiff,)	CASE NO. 3:21-cv-12
)	
vs.)	TRANSCRIPT OF
)	JURY TRIAL PROCEEDINGS
MENARD, INC.,)	
)	VOLUME I
Defendant.)	

COURTROOM, SECOND FLOOR
U.S. COURTHOUSE
131 East Fourth Street
Davenport, Iowa 50281
Tuesday, June 13, 2023
8:33 a.m.

BEFORE: THE HONORABLE STEPHEN B. JACKSON, JR., MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: KIMBERLY SMITH, PRO SE

For the Defendant: VERONICA KIRK
MWH Law Group LLP
Regency West Office Park, Building 8
4350 Westown Parkway, Suite 120
West Des Moines, IA 50266

Chelsey Wheeler, CSR, RPR, FCRR
United States Courthouse
123 East Walnut Street
Des Moines, IA 50309

1 to a rock further down the lane?

2 A. Not that I recall.

3 MS. SMITH: Could Plaintiff request to meet with the
4 judge, or do we need to wait on that?

5 THE COURT: To have a conference --

6 MS. SMITH: Yeah.

7 THE COURT: -- outside the presence of the jury? Is
8 that what you're asking for?

9 MS. SMITH: Yes.

10 THE COURT: We'll take about a ten-minute break right
11 now.

12 And so I am going to ask the jury -- the jury can
13 leave and go back to the jury room for about ten minutes.
14 We'll take a brief recess.

15 Jurors, you remain under the admonition I gave you.
16 Don't talk about this case with anyone or amongst yourselves.
17 We'll be in recess for ten minutes.

18 (Jury out at 4:00 p.m.)

19 THE COURT: You can have a seat.

20 Can Ms. Meeks step down, Ms. Smith?

21 MS. SMITH: No. I'm not done.

22 THE COURT: I'm sorry?

23 MS. SMITH: I'm not done with questioning her. I'm
24 sorry. But I needed to talk to her.

25 THE COURT: What is it you need at this time?

1 MS. SMITH: If you would please clear up something,
2 because she keeps objecting to a prior ruling. Can you tell me
3 what my boundaries are on those questions that she's referring
4 to?

5 THE COURT: I have told you my rulings. I have given
6 you an idea about the boundaries or the lanes of my rulings to
7 those objections.

8 One thing you're doing is referring to cases and
9 asking the witness if she's surprised a case says this or says
10 that. Don't know what case you're talking about, don't know if
11 it's true or not, and so it's not for the witness to opine what
12 the law is. So ask the witness questions about what happened,
13 what they did or didn't do, why they did or didn't do
14 something, like I've said before.

15 Does that answer your question?

16 MS. SMITH: Yes, Your Honor, but I think you know what
17 I'm trying to --

18 THE COURT: Tell me.

19 MS. SMITH: She's admitted that she didn't provide the
20 whole videotape, and she did that by saying that she did not
21 provide one that she walked back into -- that I walked back
22 into the store. So that means if she didn't provide that part,
23 there's parts she may also not have provided.

24 THE COURT: I can't give you advisory opinions,
25 Ms. Smith. You have to go forward in a manner that you think

1 is fit, and if Ms. Kirk makes objections, I'll rule on those
2 objections.

3 So I don't know if you're asking me to take any action
4 at this time, but you haven't.

5 MS. SMITH: Okay. I may.

6 THE COURT: I'm sorry?

7 MS. SMITH: I may by the time that we're done with
8 this witness, just...

9 THE COURT: What do you have in mind?

10 MS. SMITH: Okay. I know of at least two court cases
11 of -- I can't think of the first name. It starts with an "S."
12 It was in one of my motions. One versus Target and one versus
13 Walmart. Iowa 1.500 states that all videotape is supposed to
14 be provided as it is produced for a workday. She admitted it
15 was produced for a workday. She admitted she didn't provide
16 all of the videotape. So at that point, I believe that that
17 goes a long way to proving my motion for sanctions.

18 THE COURT: Well, that's not an issue that you take up
19 in front of the jury and with this witness during the course of
20 questioning.

21 MS. SMITH: Okay.

22 THE COURT: That's something that you take up at a
23 later time or a time you feel is appropriate, but you don't do
24 it in the middle of questioning this witness.

25 MS. SMITH: Okay. I'm sorry, Your Honor.

1 THE COURT: So that's a different matter.

2 Ms. Kirk, do you have anything you want to say about
3 this?

4 MS. KIRK: No, Your Honor.

5 THE COURT: You certainly can weigh in as you want to,
6 but the purpose of questioning witnesses, Ms. Smith, is to
7 elicit facts and information.

8 MS. SMITH: Okay.

9 THE COURT: So that's where the objections are well
10 taken when you're asking this witness if she knows about
11 lawsuits or other cases or rulings or laws.

12 MS. SMITH: Okay.

13 THE COURT: That's not related to what she knows about
14 factual information.

15 Does that make sense?

16 MS. SMITH: It does, Your Honor.

17 THE COURT: Anything further, Ms. Smith?

18 MS. SMITH: No, Your Honor.

19 THE COURT: Ms. Kirk?

20 MS. KIRK: No, Your Honor.

21 THE COURT: All right. We're going to call the jury
22 back in.

23 (Jury in at 4:06 p.m.)

24 THE COURT: All right. Please have a seat, everyone.

25 We're back on the record in the presence of the jury

1 after a brief recess. Ms. Meeks remains on the witness stand.

2 And, Ms. Meeks, you remain under the oath you were
3 given previously.

4 And, Ms. Smith, you may resume your questioning.

5 DIRECT EXAMINATION RESUMED

6 BY MS. SMITH:

7 Q. Okay. So why does the store have videotape at the entrance
8 and exit of its store?

9 A. Why do we have videotape?

10 Q. Yeah.

11 A. I guess, what do you mean?

12 Q. What is the purpose and the reason of that videotape for
13 being recorded?

14 A. There's lots of reasons.

15 Q. Could you list some of those off, please?

16 A. Sure. For training purposes, for theft purposes, for
17 accidents.

18 Q. So you do record for accident purposes?

19 A. Correct.

20 Q. Okay. Why do you -- why does the defendant have
21 surveillance video on the outside of its store?

22 A. For the same reasons.

23 Q. Okay. So that's for accidents, for thefts, things like
24 that? Okay.

25 Do the surveillance video cameras outside the store have

1 last I heard is that he would be here at 2:30 tomorrow.

2 MS. KIRK: No. He'll be here at 9:00.

3 THE COURT: Ms. Kirk indicated 9:00, I thought. But
4 we'll finish up with Ms. Meeks and then Mr. Brackett, okay,
5 Ms. Smith?

6 MS. SMITH: That's fine.

7 THE COURT: Okay. And then after Mr. Brackett, you
8 plan to testify; is that right?

9 MS. SMITH: No. Mr. Meier.

10 THE COURT: That's right. That's right. And then
11 you'll testify after that.

12 Let me ask you, Ms. Kirk: Do you plan on calling any
13 witnesses in your case in chief? I assume you're covering your
14 case at this time?

15 MS. KIRK: Correct, Your Honor.

16 THE COURT: And through Mr. Brackett tomorrow as well?

17 MS. KIRK: Correct, Your Honor.

18 THE COURT: Can you identify for me what's on the CD
19 that was produced?

20 MS. KIRK: It's Defendant's Exhibits A through I and
21 then now what we have labeled Plaintiff's Exhibit 10107.

22 THE COURT: Okay. I want to be clear about that
23 because all of those have been admitted by every one of the
24 parties.

25 Okay. Ms. Smith, anything for the record before the

1 close of business today?

2 MS. SMITH: Yes, Your Honor. I believe she's --
3 again, *Walmart v. Ballard* and the case against Target, there's
4 several cases where the federal court has ruled in sanctions.
5 There's also Iowa 1.500. Again, it says it's supposed to be
6 provided as it's produced for the workday.

7 She admitted to all this. I think those sanctions
8 need to be looked at.

9 THE COURT: Well, we're not done with -- well, what
10 kind of sanctions are you talking about? Because there's a
11 spoliation instruction. Is that what you're talking about?

12 MS. SMITH: Yeah. And whether it was negligent or
13 not, she's admitted she didn't provide all the videotape.

14 THE COURT: So you're asking for a spoliation
15 instruction; is that correct?

16 MS. SMITH: If that's what it's called, yes.

17 THE COURT: Well, you're asking the jury to be
18 instructed as to the purported lack of videos; is that correct?

19 MS. SMITH: Yes.

20 THE COURT: So that's an instruction to the jury that
21 evidence was spoiled. That's a spoliation instruction. Is
22 that what you're talking about?

23 MS. SMITH: Yes.

24 THE COURT: Okay. All of the evidence isn't in, as
25 Ms. Meeks is still testifying, and there's certain things that

1 you or Menards needs to show, and the appropriate time to take
2 up this request is when we talk about jury instructions. Okay?
3 Because it's an instruction to give to the jurors as to how to
4 treat this information or lack of information. That's what
5 that is.

6 MS. SMITH: Okay. So there will be more instructions
7 at the end, then?

8 THE COURT: Yes. There will be.

9 So that's a good segue unless you have anything
10 further.

11 MS. SMITH: I believe she just had Ms. Meeks enter
12 into hearsay. And, yes, I know I missed the objection, but I
13 think that should be stricken, but I'm not sure if I can do
14 that without making a big deal out of it.

15 Ms. Meeks does not remember measuring, but she
16 remembers supposedly something that I didn't say to begin with.

17 That would be hearsay, wouldn't it?

18 THE COURT: I'm not going to answer any questions for
19 you.

20 MS. SMITH: I would move to have that stricken from
21 the record.

22 THE COURT: About what she heard you say?

23 MS. SMITH: Yes.

24 THE COURT: And you're objecting that that's hearsay?

25 MS. SMITH: Yes.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
EASTERN DIVISION

KIMBERLY ANN SMITH,)	
)	
Plaintiff,)	CASE NO. 3:21-cv-12
)	
vs.)	TRANSCRIPT OF
)	JURY TRIAL PROCEEDINGS
MENARD, INC.,)	
)	VOLUME II
Defendant.)	

COURTROOM, SECOND FLOOR
U.S. COURTHOUSE
131 East Fourth Street
Davenport, Iowa 50281
Wednesday, June 14, 2023
8:43 a.m.

BEFORE: THE HONORABLE STEPHEN B. JACKSON, JR., MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: KIMBERLY SMITH, PRO SE

For the Defendant: VERONICA KIRK
MWH Law Group LLP
Regency West Office Park, Building 8
4350 Westown Parkway, Suite 120
West Des Moines, IA 50266

Chelsey Wheeler, CSR, RPR, FCRR
United States Courthouse
123 East Walnut Street
Des Moines, IA 50309

1 MS. KIRK: That's correct, Your Honor.

2 THE COURT: Okay. All right. So we meet to touch
3 base to make sure we understand what the schedule is going to
4 be, if there's any questions or any other matters that need to
5 be brought to my attention.

6 Ms. Smith, you had some.

7 MS. SMITH: Yes. I have a few things, actually,
8 but --

9 THE COURT: Hold on. Hold on one second.

10 Okay. Ms. Smith, proceed.

11 MS. SMITH: Yes, Your Honor. I have a few questions,
12 but one that you just kind of triggered now. After Ms. Kirk is
13 done examining, asking the questions, I will be able to re-ask
14 questions on Ms. Meeks; is that correct?

15 THE COURT: Yes.

16 MS. SMITH: Do you want to know about the other two
17 right now?

18 THE COURT: You've got the floor.

19 MS. SMITH: So I just want to make sure that I'm -- so
20 yesterday I requested to add the sanctions due to not all the
21 videotape being there.

22 Have those been added?

23 THE COURT: What do you mean "added"?

24 MS. SMITH: Well, our last conversation was about
25 sanctions as far as that she hadn't provided all the videotape.

1 THE COURT: Okay.

2 MS. SMITH: And so I was wondering: Will that go to
3 jury instructions?

4 THE COURT: We're not to that point yet.

5 MS. SMITH: Okay.

6 THE COURT: So you're jumping ahead a little bit,
7 Ms. Smith. Those are matters you can take up, but Ms. Meeks is
8 still testifying, we still have other witnesses, so until the
9 evidence is in about that, just hold on to that. Okay?

10 MS. SMITH: Okay. And the question is I noticed in
11 the jury instructions it has to be unanimous. I'm wondering --
12 well, actually, two more questions. I'm wondering, first of
13 all, if -- what happens if it's not unanimous? Do they
14 continue to deliberate until they come up with a unanimous?

15 THE COURT: It depends. So we'll see and cross that
16 bridge when we come to it, but there are certain measures that
17 we take. If they come back and say, We can't come to a verdict
18 and all agree, we may send them back for a little bit and say,
19 Keep working and think on this and keep thinking and make sure
20 that you cross your t's and dot your i's in that regard.

21 So we're jumping ahead a little bit, and we'll cross
22 that bridge if we have to come to it.

23 MS. SMITH: Okay. And then the other question is: At
24 the end when it's all said and done after my testimony, am I
25 able to recall any witnesses that I have already called?

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
EASTERN DIVISION

KIMBERLY ANN SMITH,)	
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Plaintiff,)	CASE NO. 3:21-cv-12
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vs.)	TRANSCRIPT OF
)	JURY TRIAL PROCEEDINGS
MENARD, INC.,)	
)	VOLUME III
Defendant.)	

COURTROOM, SECOND FLOOR
U.S. COURTHOUSE
131 East Fourth Street
Davenport, Iowa 50281
Thursday, June 15, 2023
8:24 a.m.

BEFORE: THE HONORABLE STEPHEN B. JACKSON, JR., MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: KIMBERLY SMITH, PRO SE

For the Defendant: VERONICA KIRK
MWH Law Group LLP
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4350 Westown Parkway, Suite 120
West Des Moines, IA 50266

Chelsey Wheeler, CSR, RPR, FCRR
United States Courthouse
123 East Walnut Street
Des Moines, IA 50309

1 one-sided such that Defendant Menard has shown that they are
2 entitled to judgment as a matter of law on either a legal or
3 factual basis as to damages. So the case will be submitted to
4 the jury.

5 Anything further on that matter, Ms. Kirk?

6 MS. KIRK: No, Your Honor.

7 THE COURT: Ms. Smith?

8 MS. SMITH: No, Your Honor, but thank you.

9 THE COURT: Please, you need to refrain from saying
10 thank you to witnesses or other people. Ms. Kirk shouldn't be
11 doing that either. I know that's something that maybe you
12 commonly do, but there is no favor granted by this Court. I am
13 doing what I believe is following the law and correct.

14 We now have the matter to take up of jury
15 instructions.

16 Ms. Smith, are you prepared to take that up?

17 MS. SMITH: I am, Your Honor.

18 THE COURT: Ms. Kirk?

19 MS. KIRK: Yes, Your Honor.

20 THE COURT: Ms. Smith, any objections to the proposed
21 final jury instructions submitted to you yesterday and the
22 final verdict form?

23 MS. SMITH: I have objections to it, but because I
24 believe there should be some things that should be added.

25 THE COURT: Please tell. This is the time to discuss

1 this.

2 MS. SMITH: Okay. The law as it pertains to
3 surveillance video states that it should be brought forward in
4 discovery totally intact as it is produced in the workday.

5 The plaintiff should have received the video from the
6 part that would cover the 85 percent of the parking lot.

7 Mr. Bartholomew and Plaintiff Smith both stated where they
8 walked, and it is within reason to believe they would have
9 walked there, as the parking lot lines up.

10 The plaintiff should have been given access to this.
11 During the discovery process, there was a request made.
12 Exhibit A demonstrates this. And that "and" does not mean
13 "only." As I might speak as an English language arts person
14 who had to do quite a bit of literature and --

15 THE COURT: Ms. Smith, just make your arguments.

16 MS. SMITH: Sorry.

17 THE COURT: I'm trying to move us forward.

18 MS. SMITH: I know. I understand.

19 THE COURT: There have been a lot of words that take
20 up a lot of time.

21 MS. SMITH: I'm sorry, Your Honor.

22 THE COURT: So what is it that you're requesting?

23 MS. SMITH: So according to my motion, according to
24 the law and the cases that should be in front of you, I am
25 requesting that that 85 percent of the parking lot as well as

1 the inside of the store cameras that have been mentioned, the
2 fact that Amanda -- that Ms. --

3 THE COURT: What are you requesting?

4 MS. SMITH: Okay. I am requesting sanctions against
5 the defendant. I would ask that the Court instruct, as
6 Mr. Brackett had stated yesterday, that the camera would likely
7 affect how the jury felt.

8 I would ask the judge to state that Dan Brackett
9 stated that as well as -- and if that's not possible, state
10 that the video should have been provided to the plaintiff and
11 it is most likely to support her side of the argument. And
12 that has been found in federal cases.

13 THE COURT: Okay. So you're requesting something that
14 is called a spoliation instruction; is that correct?

15 MS. SMITH: Yes. And negligence is enough.

16 THE COURT: You're saying negligence is enough to
17 require that instruction?

18 MS. SMITH: To require sanctions and --

19 THE COURT: But, to be clear, the sanction you are
20 requesting is the instruction to the jury that the video should
21 have been produced and, since it wasn't, it would most likely
22 support your position in that regard?

23 MS. SMITH: Yes, Your Honor.

24 THE COURT: Okay. Did I read that back to you
25 correctly?

1 MS. SMITH: Yes, Your Honor.

2 THE COURT: Other than that, anything else that you
3 have in terms of objections to -- suggestions or additions to
4 the jury instructions or the verdict form?

5 MS. SMITH: Yes, Your Honor.

6 Okay. So jury instructions, the jury should be
7 instructed that businesses do have a duty that includes
8 providing adequate lighting.

9 I'm going to take a picture of this because it's hard
10 to see on here from this, and then I am going to enlarge that.

11 Okay. The jury should -- bear with me, Your Honor. I
12 am so sorry. My screen is such that this light gives glare.

13 There. The jury should be instructed that a
14 business's duty to provide surveillance video as it has -- and
15 we talked about that -- but that they had a duty to provide
16 that.

17 Should instruct when asked for the -- okay. We've
18 talked about that.

19 And I believe that's it, Your Honor.

20 THE COURT: Okay. I want to make sure I'm clear. You
21 want sanctions in the form of an instruction to the jury about
22 failing to provide the video and that they should take the
23 facts in your favor concerning that video, number one.

24 Number two, you want the jury to be instructed that a
25 business has a duty to provide adequate lighting. And I think,

1 third, you said the business has the duty to provide
2 surveillance; is that correct?

3 MS. SMITH: Yes. I think I also said about the
4 probability.

5 THE COURT: You didn't say anything about the
6 probability; is that correct?

7 MS. SMITH: That's correct.

8 THE COURT: And you want an instruction about
9 probability?

10 MS. SMITH: Yes, because most people think it's beyond
11 a reasonable doubt. I know there's something in there, so I'm
12 thinking a more thorough instruction in there about
13 probability --

14 THE COURT: So here's what we have in here. First of
15 all, these are based on model jury instructions from the Eighth
16 Circuit and Iowa state court, and Final Instruction No. 4
17 addresses when a party must prove something, they must do so by
18 a preponderance of the evidence. Preponderance is evidence
19 that is more convincing than opposing.

20 I further have proposed to instruct the jury, "You
21 have probably heard the phrase 'proof beyond a reasonable
22 doubt.' That is a stricter standard than more likely true than
23 not true. It applies in criminal cases but not in civil cases,
24 so put it out of your mind."

25 Is that adequate?

1 MS. SMITH: Actually, I withdraw what I said. That's
2 perfect.

3 THE COURT: All right. So those three things,
4 spoliation instruction, duty to provide adequate lighting, and
5 duty to provide surveillance videos; is that right?

6 MS. SMITH: Yes, Your Honor.

7 THE COURT: Ms. Kirk, do you have any objections to or
8 comments on the jury instructions from your perspective, not
9 addressing Ms. Smith's at this point?

10 MS. KIRK: Yes. I would like to address Final
11 Instruction No. 13, which is the category of damages.

12 I don't believe that Ms. Smith has provided sufficient
13 evidence to support No. 1, past medical expenses; No. 2, future
14 medical expenses; No. 3, past lost of time and earnings; No. 4,
15 future loss of earning capacity; No. 5, physical and mental
16 pain and suffering; No. 6, future physical and mental pain and
17 suffering; No. 7, past loss of fully body; No. 8, future loss
18 of full body.

19 For past medical expenses we have only her information
20 regarding the amount of her bills, which, as stated, was more
21 than was previously disclosed in her interrogatory amounts.

22 Her future medical expenses, there was no supporting
23 information from an expert witness, and in Iowa there is case
24 law stating that questions of causation which are beyond the
25 understanding of a layperson require expert testimony. This

1 includes information regarding future damages and the need for
2 future medical treatment, including future medical expenses.

3 For past physical and mental pain and suffering, we
4 have Ms. Smith's testimony and her -- and the testimony of her
5 witnesses.

6 For future physical and mental pain and suffering,
7 that must be supported by expert testimony in most cases.
8 Expert testimony is often necessary to establish future
9 physical pain and suffering. It's known that a showing of
10 reasonable medical certainty is a predicate for recovery of
11 future physical consequences. Generally, Plaintiff can't
12 demonstrate the future physical pain and suffering without
13 reasonably medically certain expert testimony.

14 For past loss of full body, we have Ms. Smith's
15 testimony.

16 For future loss of full body, that also must be
17 supported by expert testimony according to the Iowa courts, and
18 Ms. Smith has no experts here to support her claim.

19 For past loss of time and past loss of earnings, we
20 have only some vague and inconsistent wage statements.

21 For future loss of earning capacity, we have no
22 information at all, only Ms. Smith's indication that she left
23 her job. There's no testimony or experts at all about --
24 relating her loss of employment to the injury at Menards and
25 nothing stating the amount of future loss of income.

1 Generally, future loss of income is something that must be
2 supported by expert testimony.

3 THE COURT: Is that it on 13?

4 MS. KIRK: That's it on 13.

5 THE COURT: Do you have any case citations?

6 MS. KIRK: I do.

7 THE COURT: Any other objections?

8 MS. KIRK: No.

9 THE COURT: Do the rest of the instructions look fine
10 and the verdict form, Ms. Kirk?

11 MS. KIRK: Yes, Your Honor.

12 THE COURT: Okay. I assume you object to the portions
13 of the verdict form that correspond with the damages in 13 you
14 just objected to?

15 MS. KIRK: Yes, Your Honor.

16 THE COURT: Okay.

17 MS. KIRK: Would you like the citations?

18 THE COURT: Yes.

19 MS. KIRK: Okay. So for future damage and causation
20 for future damages generally, we have *Vaughn v. Ag Processers*
21 *Inc.*, 459 N.W.2d 627, 637, Iowa 1990.

22 Additionally, *Bradshaw v. Iowa Methodist*, 101 N.W.2d
23 167, 177 [sic] through 172, Iowa 1960.

24 Additionally, *Wilber v. Owens-Corning Fiberglass*
25 *Corp.*, 476 N.W.2d 74, 77, Iowa 1991.

1 For future medical expenses, we have *Nesbit v. Myers*,
2 576 N.W.2d 613, 614, Iowa Court of Appeals 1998.

3 THE COURT: We don't need string citations.

4 MS. KIRK: Oh, you don't. I'm sorry.

5 THE COURT: I don't want string citations.

6 MS. KIRK: And, additionally, future loss of bodily
7 function, *Wilber v. Owens-Corning Fiberglass*, 476 N.W.2d 74,
8 77, Iowa 1991.

9 For future pain and suffering, you can also refer to
10 *Wilber v. Owens-Corning Fiberglass*, 476 N.W.2d 74, 77, Iowa
11 1991.

12 THE COURT: Any response to the requests or objections
13 by Ms. Smith?

14 MS. KIRK: Yes. Bear with me one second.

15 I would note that the Eighth Circuit has ruled on
16 spoliation and stated that in *Morris v. Union Pacific Railroad*,
17 373 F.3d 896 -- this was a 2004 decision -- there must be a
18 finding of intentional destruction indicating a desire to
19 suppress the truth before an adverse inference instruction is
20 justified.

21 In this situation, there is no evidence of intentional
22 destruction of evidence. What we have heard is the employees
23 of Menards followed policy and preserved as much evidence as
24 they could. There was no request from Ms. Smith or anyone
25 acting on her behalf to preserve additional video within their

1 policy time frame.

2 And, in fact, as far as I could tell, there was never
3 any request from anyone to preserve additional video until
4 Ms. Smith began advocating almost five years later for
5 additional video, at which time it was gone.

6 They did everything reasonable that they could and
7 that they needed to do and preserved a great deal of evidence
8 in this case. There was no ill intent of which Ms. Smith has
9 been implying.

10 For the information about businesses having a duty to
11 provide adequate lighting, I believe the instruction that the
12 Court has already given about the negligence and ordinary care,
13 Instruction No. 7, is sufficient and covers the duty that the
14 defendant had.

15 There's been no testimony from an expert requiring any
16 additional standard of care or any additional duty that the
17 defendant has which would require an additional instruction or
18 any extraordinary instruction in this matter. I think
19 Instruction No. 7 is sufficient.

20 And the duty to provide -- I forgot the last one she
21 said. Duty to provide --

22 THE COURT: Surveillance video.

23 MS. KIRK: -- surveillance video. I believe that's
24 covered under the spoliation -- I'm not entirely certain what
25 instruction she wanted by that. I don't think -- I don't think

1 there is any support for any sort of instruction under the law
2 for that.

3 THE COURT: Okay. Ms. Smith?

4 MS. SMITH: Yes, Your Honor.

5 THE COURT: Do you want to respond to anything
6 Ms. Kirk said?

7 MS. SMITH: I do. Actually, I was just trying to
8 figure out, because my computer wasn't working, like, case
9 laws.

10 Iowa Code 1.500, one of the bottom ones -- and I don't
11 really remember, but I do have it quoted in my motion --

12 THE COURT: Slow down, please.

13 MS. SMITH: Sorry. I do have it quoted in my motion.

14 THE COURT: I heard you. You don't need to repeat
15 either.

16 So please provide your response to Ms. Kirk.

17 MS. SMITH: I do believe there is sufficient evidence
18 that with the workday production, it was not -- that there
19 should have been -- both Ms. Meeks and Mr. Brackett testified
20 to there being cameras throughout the store. We have a
21 surveillance video of me walking in the store and out of the
22 store but never back into the store before you see the cash
23 register. Those would be spots that would have definitely
24 advocated where -- they should have been able to easily grab
25 video.

1 THE COURT: So, Ms. Smith, I heard the facts. I have
2 sat through all two and a half days of testimony. You're
3 rehashing --

4 MS. SMITH: I'm sorry.

5 THE COURT: You don't need to do that. You have to
6 show an intentional destruction of evidence or prejudice.
7 Address that briefly.

8 MS. SMITH: The prejudice is that Dan Brackett sat on
9 that stand and said that it would have likely persuaded the
10 jury if they would have provided the video. Negligence, as I
11 said, is -- as I pointed out, is enough to warrant sanctions.

12 The fact that Ms. Meeks changed her answer several
13 times and then said absolutely not there's not another camera
14 on there does demonstrate that the defendant wanted to hide
15 information.

16 As far as the money goes, I am sure that there are
17 people who have had slip and falls who did not work at all and
18 were compensated, let alone the fact that I have worked and
19 have shown a loss of income and have shown that I was hurt.

20 I am a teacher. We have my life expectancy. If
21 nothing else, there is, well, like, work comp laws that say how
22 much injury each thing is worth -- or how much each injury is
23 worth. There are laws that exist to be able to help find --
24 the jury, you know, to help find the answer.

25 And as far as what was originally listed only my

1 interrogatories and everything, by the time they were done
2 being gathered and that initial process, I have actually
3 reduced the amount because I knew that the second surgery had
4 occurred, and I was trying to balance it out and be fair.

5 I'm fine with going back to the million and something
6 that was exact -- that was listed, but now it's down to
7 900-and-some thousand.

8 So this was an attempt -- and even in my pretrial form
9 I stated -- and since we're not in front of the jury, I'm going
10 to bring this up -- I stated that even if it doesn't come
11 directly to me, I feel that she, during negotiations -- the
12 defendant during negotiations had said that there was a way for
13 her to be able to work with the insurance company so that she
14 wouldn't have to pay as much.

15 THE COURT: Ms. Smith, I have given you a lot of
16 latitude. How does anything you're talking about right now
17 have anything to do with Ms. Kirk's objection on the damage
18 instruction?

19 MS. SMITH: Because there's ways for that jury --
20 that's what's listed. The jury needs to find out how --

21 THE COURT: You're talking about settlement
22 discussions on some form that you filled out before this trial.
23 How does that relate to the objection that Ms. Kirk just made?
24 Please stick to that.

25 MS. SMITH: Your Honor, I think that I have been fair

1 with what I have requested. The jury, upon finding me -- if
2 they do find for me, that was an amount that was listed there
3 after a discussion with my ex-attorney.

4 I understand that the bills have not been entered in,
5 but Ms. Kirk has received a copy of those bills. As a pro se,
6 I am limited in my knowledge. I don't have the training. I
7 didn't foresee this coming, but I am hoping that there are
8 remedies to this.

9 THE COURT: Okay. So just to recap, request for
10 spoliation instruction by Ms. Smith; duty to provide adequate
11 lighting, No. 2; duty to provide surveillance video, No. 3.
12 And then Ms. Kirk has objected to pretty much -- well, all of
13 the damage instructions in what is now numbered as Instruction
14 No. 13.

15 Is that correct, Ms. Smith?

16 MS. SMITH: Yes, Your Honor.

17 THE COURT: Ms. Kirk?

18 MS. KIRK: Yes, Your Honor.

19 THE COURT: Okay. So I am going -- my plan is that
20 when we resume with the jury, before your closing arguments, I
21 am going to give them all -- I am going to read to them all of
22 the instructions except for the very last one. And then when
23 your closing arguments are done, that last instruction I will
24 read to them and then discharge -- or then have them go
25 deliberate.

1 Does that make sense, Ms. Smith?

2 MS. SMITH: Yes, Your Honor.

3 THE COURT: Ms. Kirk, is that fine?

4 MS. KIRK: Yes, Your Honor.

5 THE COURT: Okay. We're going to take a break. I'll
6 come back and make my ruling on the instructions. While we are
7 on a brief break, I am going to direct both of you to be
8 prepared to give your closing arguments.

9 Is that something you can do, Ms. Smith?

10 MS. SMITH: Yes, Your Honor.

11 THE COURT: Ms. Kirk?

12 MS. KIRK: Yes, Your Honor.

13 THE COURT: And each of you have agreed to limit your
14 closings to 30 minutes or less; is that right, Ms. Smith?

15 MS. SMITH: Yes, Your Honor.

16 THE COURT: And, Ms. Kirk?

17 MS. KIRK: Yes, Your Honor.

18 THE COURT: So, Ms. Smith, you have the burden of
19 proof, as I think you know and have acknowledged, so that means
20 you get the final word. So if you want to reserve some time to
21 talk after Ms. Kirk talks with her closing, you need to let me
22 know that.

23 So if you say, Your Honor, I want to reserve
24 five minutes, I will keep the first part of your closing to
25 25 minutes, and I will let you know when you get close.

1 Does that make sense?

2 MS. SMITH: It does. Can I wait to answer you until
3 after I read through this and time myself?

4 THE COURT: Yes. But we're not taking that long of a
5 break.

6 MS. SMITH: Okay.

7 THE COURT: We're going to take a five- or ten-minute
8 break.

9 MS. SMITH: Okay.

10 THE COURT: We'll be in recess.

11 (Recess taken at 10:48 a.m. until 11:11 a.m.)

12 (In open court, with the parties present, outside the
13 presence of the jury.)

14 THE COURT: Okay. We are back on the record with
15 Ms. Smith, Ms. Kirk, and Ms. Meeks outside the presence of the
16 jury.

17 Ms. Smith and Ms. Kirk, my law clerk, Mr. Brokaw, is
18 handing you a copy of the final jury instructions. We're also
19 giving a copy of all of the final jury instructions to the
20 jurors as well, and I will give them one verdict form once we
21 submit the case to the jury so there won't be eight verdict
22 forms floating around out there.

23 And if you want to highlight a jury instruction, the
24 ELMO is there, and that's why you have a copy of them as well
25 if you want to use that.

1 As it relates to the objections, first, those by
2 Ms. Smith, the instruction that a business has a duty to
3 provide adequate lighting, that's covered by Instruction No. 7
4 and other instructions in there in terms of what is ordinary
5 care. The allegation that Menard failed to provide adequate
6 lighting by Ms. Smith is set forth, so that's covered, and
7 that's not necessary to instruct any further because it's
8 already been provided for.

9 The duty to provide surveillance video, I think that's
10 tied into this motion for sanctions. Regardless, it would not
11 be a proper instruction.

12 As to the motion for sanctions, I find -- first of
13 all, there's been no discovery violation by Menard in this
14 case. There was no discovery propounded by Plaintiff, and so
15 in terms of Rule 37, it kind of takes it out of the discovery
16 context.

17 But the Eighth Circuit is clear that for an adverse
18 inference instruction, which has also been described as a
19 spoliation instruction, the district court is required to make
20 two findings: First, there must be a finding of intentional
21 destruction indicating a desire to suppress the truth; and,
22 second, there must be a finding of prejudice to the opposing
23 party.

24 I find that there's no grounds in law or fact for any
25 sanction in this case. I don't find there's prejudice because

1 Ms. Smith and her witnesses have been sufficiently able to talk
2 about what they believe the video would show. Secondly, even
3 if there was prejudice, I cannot find intentional destruction.
4 There's been credible testimony as to the processes and
5 procedures followed in this case, and so that instruction is
6 not warranted.

7 Concerning the objections by Menards about essentially
8 not allowing any damage instruction whatsoever, as I indicated
9 in my ruling on the motion for judgment under Rule 50(a),
10 there's been evidence provided as to every request for damages.
11 Whether it's significant evidence or less significant evidence
12 is up to the jury to consider, but there's been evidence
13 presented.

14 This is the type of case where causation does not
15 necessarily require expert testimony. Most of the cases, if
16 not all the cases, cited by the defendant refer to a different
17 case and a general principle that doesn't apply here, as is
18 consistent with my ruling in the motion for summary judgment
19 and 50(a) motion.

20 Okay. So the instructions have not been changed based
21 on the parties' objections or requests from the prior
22 instructions, so I want you to know what you have is what you
23 were presented before except we had a placeholder in case there
24 was an additional instruction that needed to be placed in here
25 at No. 6, so everything after No. 5 has been moved up one.

1 Does that make sense, Ms. Smith?

2 MS. SMITH: Yes, Your Honor.

3 THE COURT: Ms. Kirk?

4 MS. KIRK: Yes, Your Honor.

5 THE COURT: Okay. So I am ready to call the jury back
6 in. I will read them all the instructions except for the last
7 one, and then I am going to let them know that you are each
8 going to go for a half an hour, but I'll explain that Ms. Smith
9 might reserve some time.

10 Are you going to reserve some time?

11 MS. SMITH: I am, Your Honor. I think that five
12 minutes hopefully will be adequate.

13 THE COURT: Five minutes. And I will give you each a
14 heads-up when you have five minutes left, so I'll give you some
15 warning so you have an idea about that.

16 So I'll give you a warning at 20 minutes, Ms. Smith,
17 so you have 25 minutes to begin, Ms. Kirk will have up to 30,
18 and you will have five at the end.

19 MS. SMITH: Thank you, Your Honor.

20 THE COURT: Anything before we call the jury back?

21 MS. SMITH: No, Your Honor.

22 MS. KIRK: No, Your Honor.

23 THE COURT: All right. Bring the jury in.

24 (Jury in at 11:17 a.m.)

25 THE COURT: Welcome back. Everybody please have a

CERTIFICATE

I, Chelsey Wheeler, a Certified Shorthand Reporter of the State of Iowa and Federal Official Realtime Court Reporter in and for the United States District Court for the Southern District of Iowa, do hereby certify, pursuant to Title 28, United States Code, Section 753, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-titled matter and that the transcript page format is in conformance with the regulation of the Judicial Conference of the United States.

DATED this 27th day of September 2023.

/s/ Chelsey Wheeler

Chelsey Wheeler
Certified Shorthand Reporter