

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

VERA LOUISE BARNES and R.C. BARNES,)

Plaintiffs-Appellants,)

vs.)

Filed April 27, 1982-

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ROBERT LAWSON,)

Defendant-Appellee.)

2-92
2-66602

Appeal from Page District Court - Leo F. Connolly, Judge.

Plaintiffs appeal from a jury verdict rendered for defendant in a case where the wife was injured in a fall on steps of a house owned by defendant and the husband allegedly suffered loss of consortium. AFFIRMED.

Richard G. Davidson, Clarinda, Iowa, for plaintiffs-appellants.

Sanford A. Turner of Turner, Jones & Bitting, Clarinda, Iowa, for defendant-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Plaintiffs husband and wife appeal from a jury verdict rendered for defendant in a case where the wife was injured in a fall on steps of a house owned by defendant, and the husband allegedly suffered loss of consortium. The plaintiffs argue that the trial court committed error in not admitting a city building code and city ordinance adopting that code, in failing to give requested instructions on the statutory duties of a landlord under the local ordinances and chapter 562A, The Code, and in instructing the jury on contributory negligence. We affirm the trial court.

Plaintiff Vera Barnes was injured when she caught her foot and fell on the top step of a porch of a house owned by defendant Robert Lawson. Defendant was the landlord of the house; neither he nor plaintiffs resided there, although plaintiff was familiar with the house because she provided babysitting services for the tenants' children. Defendant had purchased the house in January of 1978 and rented it to the tenants in June 1978. Between those dates defendant did some repair work to the house, including work on the bathroom, kitchen, and porch. Entry to the porch was gained by ascending two steps, the second of which was also the porch itself.

Evidence at trial showed that, on the day of the accident, plaintiff stepped on the first step, raised her foot to the second step or porch level, caught that foot on the porch level, and fell, causing extensive injuries to herself. Evidence also showed that the rise of the two steps was not equal; the bottom or stone step had a rise of six inches, while the second step to the porch level had a rise of eight inches. The second level step also had an overhang of one inch. Evidence indicated also that plaintiff was familiar with the steps and had often safely used them prior to the accident. The plaintiffs sued defendant on a theory of negligence, alleging that the tilting of the lower step and the two-inch difference in rise were the proximate cause of plaintiff-wife's injuries and plaintiff-husband's

loss of consortium. The defendant denied negligence and asserted plaintiff-wife's contributory negligence as an affirmative defense; the jury returned a verdict for defendant.

On appeal, plaintiffs raise issues concerning admission of evidence and jury instructions. Our review is for correction of errors at law. Iowa R. App. P. 4.

I. Evidence Excluded. At trial plaintiffs sought to introduce the building code adopted by the City of Clarinda, the town in which defendant's house was located, and the city ordinance which adopted that code. Clarinda city manager Robert Bailey was called by the plaintiffs to identify both the code and the ordinance. During voir dire of Mr. Bailey, preparatory to making his objection to the admission of both documents, defendant elicited the following information:

Defendant: And can you tell us basically in your own words what that ordinance does?

Bailey: That ordinance adopts a set of rules governing construction within the city. This was adopted in conjunction with the city adopting planning and zoning rules. (emphasis added).

At the completion of voir dire, defendant objected to the admission of both the code and the ordinance on relevancy grounds, maintaining that there was no showing that the code or ordinance, adopted in 1977, had any applicability to defendant's house built long before that date. The court reserved ruling on the admission and allowed plaintiffs to continue examination of Mr. Bailey. During this period Mr. Bailey was allowed to read a portion of the code which provided that the difference in the height of risers of steps could be no more than one-quarter inch. Plaintiffs again moved for admission of the evidence, defendant objected, and the court again reserved ruling. During cross-examination defendant then asked:

Defendant: ... In your capacity as city manager, what application, if any, does the Uniform Building Code have to this particular house that we're talking about right here?

Bailey: In my application to this, none whatsoever.

Defendant then renewed his objection that the exhibits were incompetent, irrelevant, and immaterial, and the objection was sustained.

The evidence seems to leave no doubt that, if the ordinance and building code apply, then the rise of the two steps on defendant's house would be out of compliance since their height differs more than one-quarter inch. When violation of a statute or ordinance is involved, there is negligence per se. Otherwise, negligence and contributory negligence are matters for jury determination after proper instructions. Duke v. Clark, 267 N.W.2d 63, 67 (Iowa 1978); Jorgenson v. Horton, 206 N.W.2d 100, 102, 104 (Iowa 1973). We must conclude, however, that in no event were plaintiffs entitled to have these ordinances admitted as evidence in the case. Their rights, if any, under the ordinances, were a matter to be considered only by the court in giving proper instructions to the jury. The effect of the ordinances upon the jury instructions is hereafter considered. It is manifest, however, that there is no legal error presented in excluding the ordinances from evidence.

II. Jury Instructions. Plaintiffs contend that the trial court was in error in not giving plaintiffs' requested instructions 5 and 6 and in giving instructions 12 and 13, and in not giving an instruction they orally requested in chambers.

Plaintiffs' requested instructions 5 and 6, taken together, essentially spell out a negligence per se standard for violations of the local building and housing ordinances and chapter 562A, The Code. Section 562A.15(1)(a), the section relied upon by plaintiffs to sustain the giving of such instructions, provides:

1. The landlord shall:

- a. Comply with the requirements of applicable building and housing codes materially affecting health and safety. (emphasis added).

We hold that there was no error in failing to give requested instructions 5 and 6 based on either chapter 562A or the local ordinances. Our conclusion in this regard is based on the following grounds: (1) chapter 562A establishes no duty

owed to members of the public at large, such as plaintiffs; (2) even if a duty were owed to persons such as plaintiffs under chapter 562A, that duty relates only to applicable building and housing codes; and (3) the building and housing code upon which plaintiffs rely to sustain the offered instructions was not shown to be applicable to the premises where plaintiff's injuries occurred. In reaching these conclusions, we necessarily reject plaintiffs' contention that the local building code, even if initially inapplicable to the steps on which her fall occurred, subsequently became applicable as a result of repairs or alterations which had been made by defendant to these steps. We find no support in the record for such claim.

Plaintiffs also contend that the trial court should not have given instructions 12 and 13. Instruction 12 generally defines contributory negligence and the burden of proof required, while instruction 13 more specifically relates the manner in which defendant alleges that plaintiff was negligent, to wit, in failing to keep a proper lookout and in failing to exercise reasonable care in her surroundings. Apparently plaintiffs' argument is that failing to maintain a proper lookout is available as an instruction only in automobile cases, and that there is no factual basis in the record to support the giving of any contributory negligence instruction.

The defendant argues that plaintiffs failed to preserve error as to instruction 13 in that they objected, the court reserved its ruling, and then the plaintiffs never requested a final ruling on the instruction, and it was therefore given. It is true that the failure to take timely exceptions to instructions waives the right to assert error in them later. Porter v. Iowa Power and Light Co., 217 N.W.2d 221, 237 (Iowa 1974). However, even if the objection here was preserved, we find no error in the court's having instructed on failure to maintain a proper lookout and failure to exercise reasonable care. Instruction 13 appears to be no more than a general statement as to the degree of care a reasonable person would

be expected to exercise in the same or similar circumstances. Use of the word "lookout" in the instruction does not imply that such instruction as to reasonable care can be given only in cases concerning duties of automobile drivers. See generally, Childers v. McGee, 306 N.W.2d 778, 780-81 (Iowa 1981).

Likewise, we see no error in instruction 12. It was a general instruction on the doctrine of contributory negligence which defined it and set out the proper burdens of proof. Clearly there was a factual basis for the giving of the instruction, and contributory negligence is ordinarily a matter for jury determination under a proper instruction such as this. Duke v. Clark, 267 N.W.2d at 67.

Lastly, plaintiffs contend that an instruction requested orally in chambers by them should have been given. This proposed instruction once again dealt with the building code and specifically stated that, if the jury found that the height of the rise of the steps did not comply with the height delineated in the building code, then the defendant would be negligent. The court found that the proposed instruction went too far and commented on the evidence. Defendant objected to any instruction relating to the building code; nevertheless, the court gave instruction 14 which told the jury that proof of compliance or noncompliance with the information read to them from the building code [during Mr. Bailey's testimony] was not conclusive on the question of due care, but was relevant on the issue of what ordinary care under the circumstances should be. They were also instructed that the building code did not necessarily define the standard of conduct of a reasonable person. Because of the determination which we have made concerning the applicability of the building code, we hold this instruction gave plaintiffs as much, if not more, than they were entitled to.

We have considered all of plaintiffs' arguments and find no basis for reversal. The trial court is affirmed.

AFFIRMED.