FILED
NOV 20 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RONALD JOSEPH ANDERSON,	)	1
Plaintiff-Appellant,	)	Filed November 20, 1984
vs	)	
STATE OF IOWA,	)	4-367 83-1523
Defendant-Appellee	)	

Appeal from the Iowa District Court for Polk County - Arthur E. Gamble, Judge

Plaintiff appeals from the judgment entered in favor of the defendant in his action under the Iowa Tort Claims Act REVERSED AND REMANDED.

Virgil Moore, Des Moines, Iowa, for plaintiff-appellant

Thomas J Miller, Attorney General, and Iris J Post, Assistant Attorney General, for defendant-appellee

Heard by Donielson, P J , Schlegel, and Hayden, JJ

Plaintiff, Ronald Joseph Anderson, appeals from the judgment entered in favor of the defendant, State of Iowa, in his action under the Iowa Tort Claims Act. The trial court ruled, as fact finder, that Anderson failed to carry his burden to establish defendant's negligence by a preponderance of the evidence.

In this law action our review is upon errors at law. Iowa R. App. P. 4. The trial court's findings have the effect of a special verdict which, if supported by substantial evidence, are binding upon this court. State v. Hall, 287 N.W.2d 564, 565 (Iowa 1980). This standard of review applies to actions brought under the Iowa Tort Claims Act. Davis v. Jenness, 253 N.W.2d 610, 614 (Iowa 1977). This court is not bound by the trial court's determinations of law, nor is it precluded from inquiry into whether the trial court applied erroneous rules of law which materially affected its decision. Blunt, Ellis & Loewi, Inc. v. Ingram, 319 N.W.2d 189, 192 (Iowa 1982); Miller v. Berkoski, 297 N.W.2d 334, 337-38 (Iowa 1980).

I. Findings of Fact. The trial court found that Anderson, along with several others, went to the University of Iowa Fieldhouse/Armory to play basketball. The trial court found that Anderson was in the Armory as a business invitee. While playing basketball on one of the courts in the Armory, Anderson slipped on a wet spot on the basketball floor and was injured. The court found that the wet spot was approximately three to four feet in diameter "with small puddles of a clear liquid substance beaded up on the yellow surface of the synthetic floor."

The trial court further found that: (1) the armory dome (roof) leaked during periods of visibly heavy rain of one-half hour to one hour in duration, but that the roof does not leak during light to medium rainfall; (2) university officials are aware of the leakage problem and maintenance personnel or recreation supervisors usually put out containers to catch the water when the roof leaks; and (3) the

director of recreation of the university was aware of the danger of water on a basketball court, and that the problem existed all over the Armory, including the south portion of the south two basketball courts. These findings of fact are supported by substantial evidence, and are therefore binding upon us in this appeal.

The trial court also found that defendant did not have knowledge of the condition of moisture on the basketball court; that defendant did not realize that such a condition involves an unreasonable risk of harm to basketball players using its recreational facility; defendant should have expected that plaintiff would not discover the situation; and plaintiff did not know or appreciate the danger of the condition, nor was it obvious to him.

The court concluded that the defendant, in the exercise of reasonable care, would not have discovered the wet spot. Since defendant did not have knowledge of the condition, and could not discover it in the exercise of reasonable care, the trial court found the defendant did exercise reasonable care in making its premises safe for plaintiff.

Upon the basis of its findings, the trial court found that Anderson had failed to prove, by a preponderance of the evidence, that defendant was negligent.

II. Applicable Law. Anderson contends it was error for the court to find that defendant was not negligent. Anderson agrees with the trial court that section 343 of the Restatement (Second) of Torts applies in this situation. That section has been cited with approval by the Iowa Court in the case of Hanson v. Town & Country Shopping Center, Inc., 259 Iowa 542, 144 N.W.2d 870 (1966). That section provides:

> Dangerous condition known to or discoverable by possessor.
> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only

> if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts § 343 (1965). The trial court, in applying this section to the facts of this case, determined that the question of liability of the defendant turned upon whether the Armory roof did, in fact, leak on the floor on the day of the accident as alleged by plaintiff. The court reasoned that if the roof leaked on the floor, defendant would have discovered the water in the exercise of reasonable care, since the recreation department was aware the roof had leaked on prior occasions. On this issue, the trial court correctly concluded that plaintiff offered only circumstantial evidence of the leaking of the roof.

The trial court then analyzed the circumstantial evidence, using an incorrect legal principle regarding circumstantial evidence. Because the trial court relied on that erroneous legal standard in reaching its decision, its finding that Anderson's evidence failed to satisfy his burden to show that the spot of water came from a leaky roof cannot stand.

III. Circumstantial Evidence. Until State v. O'Connell, 275 N.W.2d 197 (Iowa 1979), Iowa followed the rule that where circumstantial evidence was relied upon, it must be sufficient to make the theory asserted reasonably probable, not merely possible, and more probable than any other theory based on such evidence. See Soreide v. Vilas & Co., 247 Iowa 1139, 1143, 78 N.W.2d 41, 43 (1956). In O'Connell, Iowa adopted the rule that direct and circumstantial evidence are equally probative. 275 N.W.2d at 205. The current state of the Iowa law concerning circumstantial evidence is set forth as follows:

> Direct and circumstantial evidence are equally probative.

Iowa R. App. P. 14(f)(16).

> [C] ircumstantial evidence is just as compelling and just as convincing as direct evidence.

State v. Moses, 320 N.W.2d 581, 586 (Iowa 1982).

> Circumstantial and direct evidence are equally probative, . . . but the substantial evidence rule requires that the circumstances have "sufficient probative force to constitute the basis for a legal inference, and not for mere speculation . . . ." 32A C.J.S. Evidence § 1039, pp. 753-54 (1964); see also 30 Am. Jur.2d Evidence § 1091, at 251 (1967) ("Circumstantial evidence must do more than raise a suspicion; it must amount to proof. It is necessary that there be some reasonable connection between the facts proved and the fact at issue."). Circumstances are not sufficient when the conclusion in question is based on surmise, speculation, or conjecture.

Harsha v. State Savings Bank, 346 N.W.2d 791, 800 (1984) (citations omitted). The trial court stated:

> The Court concludes the evidence is not sufficiently clear to make Plaintiff's theory of a leaking roof more probable than any other theory based on the same evidence. Given the rainfall and snowfall evidence presented by the Defendant, it is just as likely the wet spot on the floor resulted from player perspiration or expectoration or from spilled water or pop. (Emphasis added).

This shows the trial court's fact finding as to defendant's knowledge of the dangerous condition was based upon the former rule concerning the probative value of circumstantial evidence, not upon the current rule. Therefore, the trial court was in error.

In order to form the basis for a finding under the present rule, circumstantial evidence must do more than raise a suspicion. It is not sufficient when the conclusion in question is based on surmise, speculation, or conjecture. Harsha, 346 N.W.2d at 800. Anderson's evidence raises more than a suspicion, surmise, speculation, or conjecture. His evidence showed that: it was raining the day of his injury, albeit perhaps not a heavy rain; defendant knew the roof leaked in the area involved; and defendant knew water on the basketball court would be

dangerous to those using the court That evidence raised a question for the trier of fact to be considered under the correct rules of law with respect to circumstantial evidence In other words, such evidence constitutes substantail evidence to support plaintiff's theory See id

Because the trial court applied erroneous principles of law, Anderson is entitled to have a new trial with the issues raised by his pleadings decided according to correct rules concerning circumstantial evidence.

REVERSED AND REMANDED