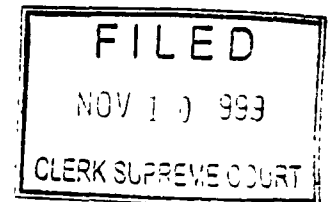


IN THE COURT OF APPEALS OF IOWA

No. 1999-285 (9-515) / 98-2121
Filed November 10, 1999



WILLIAM LOCKE and MARILYN LOCKE,
Plaintiffs-Appellees,

vs.

HAPPY CHEF OF MINNESOTA and HAPPY CHEF OF FORT DODGE, INC.,
Defendants-Appellants.

Appeal from the Iowa District Court for Webster County, Joel E. Swanson,
Judge.

Happy Chef appeals from the court's denial of their motions for directed
verdict and judgment notwithstanding the verdict in a slip and fall case. **REVERSED**
AND DISMISSED.

Mark R. Crimmins and Brian L. Yung of Bennett, Crimmins, Ostrander, &
Yung, Fort Dodge, for appellant.

Stephen G. Kersten of Kersten, Brownlee, & Hendricks L.L.P., Fort Dodge,
for appellee.

Heard by Sackett, C.J., and Zimmer and Miller, J.J.

000193

SACKETT, C.J.

Defendants-Appellants Happy Chef of Minnesota, Inc. & Happy Chef of Fort Dodge, Inc. appeal following a jury verdict finding them liable in part for injuries sustained after a customer, plaintiff William Locke and his wife, Marilyn, sued following William's fall in defendants' icy parking lot. Defendants contend they should not be held liable for the slippery condition of their parking lot during an ongoing sleet storm. We agree and reverse the district court and dismiss plaintiffs' action. Reversed and dismissed.

The facts of this case are basically undisputed. Plaintiff William Locke slipped and fell in defendants' parking lot in Fort Dodge, Iowa, at about seven o'clock on the morning of November 15, 1996. An ice storm hit the Fort Dodge area the preceding evening and continued into the next morning of November 15 until some time after William's fall. That morning William drove his wife to work. The streets were slick and had been sanded. On his way home he decided to stop at Happy Chef for a cup of coffee. He arrived at the restaurant just after six and parked his four-wheel drive truck in the space nearest the door in the front parking lot. He noticed that the parking lot was a little slick. When he entered the restaurant, William informed Sandy Ewing, the dining room supervisor, that the parking lot was slick and needed to be salted or sanded.

William stayed at Happy Chef for about forty-five minutes. As he left the restaurant, Sandy told him that they had called the sander and to be careful. William made two or three steps onto the parking lot from the raised sidewalk in front of the

restaurant before both of his feet went out from under him. He fell backwards and slid to his truck. He couldn't get up, but did manage to open the door of the truck and honk the horn for help. He honked his horn for ten to fifteen minutes before a person walking nearby heard the horn and went over to him. This person then called 911.

The climatological reports for November 15 showed temperatures between 29 and 30 degrees and almost continuous rain. William remembered a slight mist in the air as he arrived at Happy Chef and that it was raining when he fell in the parking lot. William could not remember if it was both raining and freezing at that time. It was still raining after he went to the hospital. Plaintiff's wife Marilyn testified that it was raining when she learned of her husband's fall.

Chris Crawford, an employee of the Hickory House Restaurant next door to Happy Chef, said as he went to work at about 4:00 a.m. that day it was raining lightly and the roads were slick, but the storm then got worse between 4:00 and 7:00 a.m. He related the wind picked up and it was cold enough so that the rain froze before it hit the ground or as it made contact with it. Chris was told by one of his customers of William's fall and he went outside to check. He found everything covered with solid ice and the cable lines had icicles dangling from them. Crawford fell on the Hickory House parking lot while going over to the Happy Chef lot. By the time the emergency personnel arrived, approximately forty-five minutes later, the ice storm had gotten worse. The police officer fell as soon as he got out of his car as did an E.M.T. A human chain was formed from the ambulance to William's pickup so those helping him could stay on their feet.

Derek Vohs, a night supervisor at Happy Chef, said from 12:00 to 3:00 a.m. it was raining and sleeting and there was slush on the ground and the entire parking lot was icy. He said at three in the morning he salted the lot, including the area where plaintiff fell. He said the salt helped and he salted the lot again at 5:45 a.m. He believed the best way to make the entire lot safe was to call a sanding truck. While salt was for use by employees and was available at the restaurant, the employees did not have the capability or supplies to sand the large parking lot.

Vohs testified the place where plaintiff fell was the most slippery spot on the parking lot, because cars would create slush in pulling up to the curb to drop passengers off and then the slush would quickly freeze. For this reason, he said he always threw salt around this area. He had previously received complaints about this spot.

Sandy Ewing testified she went to work at about 5:50 a.m. and the parking lot was slippery and did not look as if anyone had salted the lot five minutes earlier. At around 6:00 she tried to call the sander but was unable to talk with anyone. She said at the time William left the restaurant there was freezing rain.

Pam Schack, the assistant manager at Happy Chef, testified she called the sander at ~~6:15~~ 6:15 a.m. and was told that it would take a while for them to get there. She verified that there was an ice storm on that day and that everything was a sheet of ice. She stated the parking lot is too big of an area to salt, so that it is their practice to contact the sanding company for the parking lot.

Thomas Bethke, the manager at Happy Chef, testified there was no benefit in salting the area where plaintiff fell between 6:15 and 7:00 a.m., because the weather conditions were such that it would simply refreeze.

The jury, after hearing the evidence, returned a verdict finding William and defendants each fifty percent at fault. Defendants, who had made a motion for directed verdict at the close of plaintiff's evidence, made a motion for judgment notwithstanding the verdict. Defendants now contend the district court erred in overruling its motion for directed verdict and motion for judgment notwithstanding the verdict.

Generally, questions of negligence are for the jury and it is only in exceptional cases that they may be decided as a matter of law. Iowa R. App. P. 14(f)(10). Review of a court's denial of a motion for a directed verdict or judgment notwithstanding the verdict is for correction for errors at law. Iowa R. App. 4, *Crookham v. Riley*, 584 N.W.2d 258, 265 (Iowa 1998). ^A judgment notwithstanding the verdict must stand or fall on the grounds stated in the motion for directed verdict. *Johnson v. Dodgen*, 451 N.W.2d 168, 171 (Iowa 1990). On appeal, our review is limited to those grounds. *Id.*

~~When~~ considering a motion for judgment notwithstanding the verdict, the district court must view the evidence in the light most favorable to the party against whom the motion is directed. In reviewing the propriety of the district court's ruling on such a motion, the evidence is also reviewed in such a manner. These are the same

principles that the district court is bound to follow on a motion for a directed verdict. *Johnson*, 451 N.W.2d at 171.

Litigants are entitled to have their legal theories submitted to the jury if they are supported by the pleadings and substantial evidence in the record. *Kessler v. Wal-mart Stores, Inc.*, 587 N.W.2d 804, 806 (Iowa App. 1998), *Thompson v. City of Des Moines*, 564 N.W.2d 839, 846 (Iowa 1997). Evidence is substantial when reasonable minds would accept it as adequate to reach the conclusion. *Kessler v. Wal-mart Stores, Inc.*, 587 N.W.2d at 806.

Under this view of the evidence, if there is substantial evidence to support the claim or defense, the motion for a directed verdict or for judgment notwithstanding the verdict should be denied. Conversely, without such evidence, a directed verdict or judgment notwithstanding the verdict is appropriate. *Johnson*, 451 N.W.2d at 171.

Defendants argue that its motion for directed verdict should have been granted because as a matter of law, ordinary care does not require a business establishment to remove ice and snow from its premises during a storm. Citing *Hovden v. City of Decorah*, 155 N.W.2d 534 (Iowa 1968) defendants contend that even accepting the evidence in the light most favorable to the plaintiffs, there is no question that the storm **had not** subsided and freezing rain continued to fall at the time of William's injury. Defendants advance that according to *Hovden*, it had no duty to remove the ice until after the storm was over.

Hovden involved a slip and fall accident on a public sidewalk. Snow had been falling during the late afternoon of the previous day. City records showed the only

work done on the day of plaintiff's fall was two hours of sanding intersections at stop signs. The sidewalk where plaintiff fell was slushy immediately before her fall and the snow was melting at the time of the accident. It had been snowing off and on all morning, and it was still snowing when plaintiff was taken to the hospital immediately after her fall. Plaintiff claimed that the cause of her fall was rough and uneven ice which had covered the sidewalk along with the slush. She contended that when the snowy slush became rough and rigid ice, the city had a duty to take affirmative action for the safety of pedestrians.

The court in *Hovden* held that the trial court erred in not sustaining defendant's motion for judgment notwithstanding the verdict as the evidence was insufficient to raise a jury question as to defendant's negligence. The court reasoned that there was no showing of how long the dangerous condition of rough, uneven ice had existed and the city would not have had a reasonable opportunity to remedy the condition even if it had existed from the prior evening. *Hovden*, 144 N.W.2d at 538.

In support of its decision, the court stated the general rule that:

"... a business establishment ... in the absence of unusual circumstances, is permitted to await the end of the storm and a reasonable time thereafter to remove ice and snow from an outdoor entrance, walk, platform, or steps. The general controlling principle is that changing conditions due to the pending storm render it inexpedient and impracticable to take earlier effective action, and that ordinary care does not require it." *Id.*, citing *Walker v. Memorial Hosp.*, 187 Va. 5, 45 S.E.2d 898, 902.

The jury here in accordance with *Hovden*, was instructed that:

"A business establishment, in the absence of unusual circumstances, is permitted to await the end of the storm and a

reasonable time thereafter to remove ice and snow from its premises.” (Emphasis added.)

The pivotal issue is whether there was substantial evidence that unusual circumstances existed so that the district court was correct in submitting the question of whether such unusual circumstances existed so that defendant was required to take action to remedy the situation before the ice storm ended. Plaintiffs contend there is such evidence the district court was correct in allowing the jury to decide the question. The defendants contend there was no such evidence and the district court should have dismissed plaintiff’s case.

Plaintiff contends the following unusual circumstances existed: (1) the Happy Chef was open twenty-four hours a day, (2) defendants had two employees who could have taken care of the slipperiness of the portion of the parking lot where William fell, and (3) the area where William fell was an especially dangerous spot and defendants had received several complaints about the spot in the past.

We do not consider these circumstances to meet the definition of unusual circumstances as defined in *Hovden*. Many businesses are open twenty-four hours a day and there is nothing about this fact that creates a special duty under this circumstance. While there are no Iowa cases with comparable facts, other states have applied the rule that landowners have a reasonable time after a storm to remove ice and snow from outdoor areas to hospitals, which are also open for twenty four hours. *See: Mattson v. St. Luke’s Hosp. of St. Paul*, 89 N.W.2d 743 (Minn. 1958), *Walker*, 45 S.E.2d at 898.

The reasoning in these cases is certainly applicable here. In *Mattson*, the court stated that in the situation where

“The source and sole cause of the hazardous condition resulting in plaintiff’s injury was the unusual but natural result of extraordinary weather over which the hospital had no control, ... reasonable care for the safety of the invitee does not require an inviter to engage in an unending and impractical, if not useless, contest with the uncontrollable forces of nature while a storm is in progress.” *Mattson v. St. Luke’s Hosp. of St. Paul*, 89 N.W.2d at 746.

The hours a business is open does not put a special duty on a landowner to correct a weather related problem over which the owner has no control.

Nor does the fact defendants had two employees on site imply that this should be a basis for a higher standard of care for a condition that could not be controlled. See: *Parsons v. H.L. Green Co.*, 23 Iowa 648, 10 N.W.2d 40 (Iowa 1943), in which there had been a slip and fall on accumulated ice and snow which had been brought in by business invitees to an inside stairway. The court stated in reference to the slush on the steps that:

“Such condition is temporary and not a permanent dangerous structural defect as in most of the cases where recovery has been held. We cannot say that a failure to follow and remove immediately every deposit of snow that is brought into a building can reasonably be held to be a breach of duty ... and so constitutes negligence. ... To do so require would demand an exercise of such extraordinary care as to be unreasonable.” *Parsons*, 10 N.W.2d at 42.

Plaintiffs do not contend there were any defects in the parking lot other than the accumulation of ice. Thus, in accordance with *Parsons*, it would be unreasonable to expect defendants’ employees to remove a temporary condition, only to have it

reoccur within minutes. In this regard, even though efforts were made earlier that morning to melt the ice, the only evidence is that continued efforts at the time of William's fall would not be effective.

Nor is the plaintiffs' argument that the spot where Williams fell was more dangerous than other parts of the parking lot persuasive. Although it is true that in the past that portion of the lot had been more slippery than other parts of the lot, there is no evidence that it was more slippery at this spot than anywhere else on the morning of November 15, where every outside surface exposed to the storm was completely ice covered.

Accordingly, we hold that there was not sufficient evidence to generate a jury question of whether there were unusual circumstances. Therefore, the trial court erred in submitting this issue to the jury.

Plaintiffs argue, though, that the district court properly denied defendants' motions because defendants had the duty to warn him of the hidden danger of the extra slippery area. A jury instruction was given by the district court regarding evaluating whether defendant exercised reasonable care for the protection of lawful visitors.¹

¹The jury instruction used regarding this issue was taken from *Sheets v. Ritt, Ritt & Ritt, Inc.*, 581 N.W.2d 602, 606 (Iowa 1998), in which the term "lawful visitor" was substituted for "licensee or invitee" so as to abrogate the distinction in premises liability cases between invitees and licensees. However, it was pointed out in *Richardson v. The Commodore, Inc.*, No. 97-1829, slip op. at 8 (Iowa September 9, 1999), that the status of the plaintiff continues to be a relevant consideration in premises liability law since, although a plurality of the court would abrogate any distinction based on the status of the plaintiff, that position has not gained the approval of a majority of the court.

In considering this issue on appeal, we apply the standard of care owed to business invitees.

The duty to warn is dependent upon superior knowledge and arises when one may reasonably foresee danger of injury or damage to one less knowledgeable unless forewarned of the danger. *Baumler v. Hemesath*, 534 N.W.2d 650, 653-654 (Iowa 1995).

The concept of superior knowledge is set forth in 38 Am. Jur., Negligence, 757 section 97. The general rule is that the liability of an owner to an invitee for negligence in the failure to make the premises reasonably safe for the invitee is predicated upon a superior knowledge concerning the dangers of the premises to persons going thereon. The owner is liable, if such condition was known to him and not to them and was negligently suffered to exist.

Plaintiff asserts that since defendant had previously received complaints about the spot where he fell as being especially slippery defendant had "superior knowledge" of this danger. He argues further that it is for the jury to decide whether a warning is required of a landowner, citing *Christenson v. Kramer*, 122 N.W.2d 283 (Iowa 1963).

In *Christenson*, a person fell on steps where ice had formed from water that had dripped from the roof above. The court held that the issue of superior knowledge was appropriate because it was one about which reasonable minds could differ.

However, there is an exception to the superior knowledge rule. A landowner is not liable when the injuries sustained by a business invitee are caused by a known

or obvious danger. *Baumler*, 534 N.W.2d at 653. An obvious danger means that both the condition and the risk are apparent to, and would be recognized by, a reasonably prudent person. *Id.* Restatement (Second) of Torts section 343A.

Nevertheless, this exception is not automatic. Premises liability is reimposed on a possessor of land that, despite the openness and obviousness of the danger that was the cause of harm to the invitee, should have anticipated the harm and taken steps to prevent the harm from occurring but did not. Restatement (Second) of Torts section 343A(1). The possessor's duty in these circumstances is to either warn the invitee or make the condition reasonably safe. Restatement (Second) of Torts section 343A Cmt. f.

The present case differs significantly from those cited above in that here, plaintiff actually knew that the parking lot was slippery. He also told defendant's employee, Sandy Ewing, about the slickness of the parking lot when he arrived at the restaurant. Obviously, actual knowledge of defects and dangers is equivalent to, perhaps better than, a warning. *Hanson v. Town & Country Shopping Ctr., Inc.*, 144 N.W.2d 870, 873 (Iowa 1966).

Thus we hold that in the absence of evidence showing that the spot where plaintiff fell was actually more slippery or dangerous than any other place on the ice covered parking lot, defendant did not have a duty to warn defendant about the hazards of stepping onto the lot. Consequently, the court erred in submitting this issue to the jury.

In conclusion, we hold that under the circumstances defendants had no duty to clear the ice off of its parking lot until a reasonable time after the storm had ceased. It also had no duty to warn plaintiff of the icy condition of the parking lot in the absence of any evidence that any part of the lot was more slippery than any other at that time, since plaintiff knew about the icy conditions and conveyed his knowledge to defendant. Accordingly, the trial court erred in denying defendants' Motion for Directed Verdict and for Judgment Notwithstanding the Verdict.

REVERSED AND DISMISSED.