IN THE COURT OF APPEALS OF IOWA

No. 4-410 / 93-845

FILED
MAR 30 1995
CLERK SUPREME COURT

MICHELLE FARR,

Appellant,

vs.

GUNDERSEN CLINIC, LTD.,

Appellee.

Appeal from the Iowa District Court for Fayette County, John Bauercamper, Judge.

Plaintiff appeals from the denial of her claim for damages in this slip and fall case. **AFFIRMED.**

Larry F. Woods, Oelwein, for appellant.

Timothy C. Boller of Gallagher, Langlas & Gallagher, P.C., Waterloo, for appellee.

Considered by Hayden, P.J., and Cady and Huitink, JJ.

CADY, J.

This is an appeal by the plaintiff in a slip and fall case following a bench trial verdict for the defendant. We affirm.

On December 20, 1988, Michelle Farr took her daughter, Trista, to a scheduled appointment at the Gunderson Clinic, Ltd., in Fayette, Iowa. On their way into the clinic, Michelle noticed a puddle of water on the sidewalk leading to the steps and door of the building, and steered Trista around it. Michelle and Trista went into the clinic and learned the doctor had been called away to an emergency. They then left with Trista slightly ahead of Michelle. As Trista went down the steps, she started to fall. Michelle stepped forward in an attempt to catch her. Michelle slipped and fell, landing on the clinic's sidewalk. She was injured. Trista was not.

Lona Albert and Nancy O'Donnell, employees of the clinic, came outside after Trista reported her mother had fallen. They helped Michelle to her feet and walked her to her car. Albert and O'Donnell noticed a patch of ice, about the size of a basketball, on the southeast corner of the clinic step. There was also a small amount of water dripping from the roof onto that spot.

The employees who worked at the clinic that day testified they had not noticed the patch of ice, and therefore, no one had taken any action to remedy the situation. The clinic regularly hired someone to plow snow

from the parking lot and to shovel the sidewalks in the morning. No precipitation had fallen on the day in question.

Michelle filed the present tort suit, alleging Gunderson Clinic was negligent in failing to maintain the sidewalk in a safe condition, in failing to remove and clear any accumulation of ice and snow from the sidewalk, in allowing ice and snow to accumulate on the sidewalk, and in failing to keep the roof in proper repair so that the melting water would not drip onto the sidewalk and freeze. After the discovery deadline, Michelle filed an application to amend her petition to allege the clinic failed to have an appropriate gutter installed on its building. The court reserved ruling on her application.

The case was tried to the court. At the close of the evidence, the court denied Michelle's application for leave to amend, but allowed the application as an amendment to conform to the proof.

The district court denied Michelle's petition. The court concluded she failed to prove the clinic knew or should have known in the exercise of reasonable care of the icy patch, and that it involved unreasonable risk of injury to those entering or exiting the clinic. It also concluded the ice was not a condition which the clinic should have expected would not be discovered by Michelle or was such that the clinic should have expected Michelle would fail to protect herself from. The court observed there were no

severe weather conditions on the day in question. It also noted Michelle had seen a puddle on the sidewalk as she went into the clinic and she was familiar with Iowa winters. The court denied Michelle's petition. She appealed.

I. Appellate review of a cases tried to the court at law is for correction of errors. Power Engineering & Manufacturing, Ltd. v. Krug International, 501 N.W.2d 490, 493 (Iowa 1993). The findings of fact in jury-waived cases have the effect of a special verdict. Id. They are binding on appeal if supported by substantial evidence. Id. We are not bound by the trial court's application of legal principles or conclusions of law. Id.

When a trial court finds that the party with the burden of proof has failed to carry his or her burden, we will not interfere on appeal unless we find that the burden was carried as a matter of law. K.Carr v. Hovick, 451 N.W.2d 815, 817 (Iowa 1990). On review, we examine the evidence in the light most favorable to the judgment. Id.

II. Michelle first contends the district court erred in failing to apply the doctrines of sudden emergency and good Samaritan to the case. She believes the doctrines should be available to explain why she did not notice the patch of ice. Michelle claims the doctrine of sudden emergency should apply because when Trista started to fall she was confronted with an emergency, and she reacted to that emergency. She states the doctrine of good Samaritan should apply because she was acting to help Trista.

The district court applied Restatement (Second) of Torts section 343, and 343A in defining the duty of care the clinic owed Michelle. These sections are incorporated into Iowa Civil jury instructions 900.1, which sets forth the elements of recovering in a premise liability case, as follows:

> The plaintiff must prove all of the following propositions:
>
> 1. The defendant knew or in the exercise of reasonable care should have known of a condition on the premises and that it involved an unreasonable risk of injury to a person in the plaintiff's position.
>
> 2. The condition was one that a person in the defendant's position should have expected would not have been discovered or realized by the plaintiff or one that the defendant should have expected the plaintiff would fail to protect himself [herself] from.
>
> 3. The defendant was negligent in (set forth the particulars of the claim of negligence in failing to protect the plaintiff).
>
> 4. The negligence was a proximate cause of the plaintiff's damage.
>
> 5. The amount of damage.

The district court found Michelle failed to meet her duty to prove the first two elements. Under the first element, all a defendant need know is that the condition of the premises may result in some injury to some person and the duty to exercise reasonable care is imposed. Martin v. Nash Finch Co., 426 N.W.2d 666, 668 (Iowa App. 1988). A possessor's duty to remedy a defective condition does not arise until the possessor knows of it or in the exercise of

reasonable care would have discovered the condition. Franz v. Knights of Columbus, 205 N.W.2d 705, 711 (Iowa 1973).

We determine the district court's decision on this issue is supported by substantial evidence. The clinic presented evidence to show an employee had been in and out of the side entrance where Michelle fell. This employee did not see the patch of ice on the step. Defendant also presented the testimony of several witnesses to the effect the clinic did not regularly have a problem with water dripping from the roof. We conclude Michelle has not met her burden as a matter of law that defendant knew or should have known of the icy patch on the step.

Because Michelle has not met her burden to prove the first element, the district court's finding that Michelle had not met her burden to prove the second element is unnecessary. Furthermore, it is unnecessary to consider Michelle's conduct as it relates to the doctrines of sudden emergency and good samaritan. The doctrine of sudden emergency is a legal excuse. Jones v. Blair, 387 N.W.2d 349, 352 (Iowa 1986). It comes into play to allow a plaintiff to avoid the consequences of his or her comparative negligence. Id. Similarly, the good samaritan doctrine exists to allow a person to avoid liability which would otherwise result from his or her negligent conduct. See Iowa Code, 613.17 (1987). When it is not shown that a defendant breached the threshold duty of care, the actions of the plaintiff have no impact in the case.

III. Michelle claims the district court erred by not applying the doctrine of attractive nuisance. She believes the doctrine of attractive nuisance is applicable to the case because the clinic knew or should have known a puddle was present on the sidewalk, and puddles are attractive to children. She states this attractive nuisance caused Trista to speed over to the puddle, and start to fall, which caused Michelle to attempt to assist Trista and fall herself.

The district court decision did not specifically address plaintiff's attractive nuisance argument. Michelle, however, did not file a motion pursuant to Iowa Rule of Civil Procedure 179(b). We find she has not preserved error on this issue. A rule 179(b) motion is essential to preservation of error in a ruling when a trial court fails to resolve an issue, claim, defense, or legal theory properly submitted to it for adjudication. Farmers State Bank v. United Central Bank, 463 N.W.2d 69, 72-73 (Iowa 1990).

IV. Michelle next contends the district court should have admitted two Fayette City zoning ordinances into evidence. The district court ruled the ordinances were irrelevant and immaterial. Ordinance 8-2.06 related to the removal of snow and ice from sidewalks. Ordinance 8-2.17 provided eaves and gutters should be constructed so as not to allow water to run from roofs onto a sidewalk.

The district court found these ordinances only applied to city sidewalks. Michelle fell on a private sidewalk. We agree with the district court the ordinances apply only to ice and snow on city sidewalks and the runoff of water onto city sidewalks. Ordinance 8-2.06 implements Iowa Code section 364.12 (1987), which imposes a duty upon a city to keep all city sidewalks in repair and free from nuisance. We believe ordinance 8-2.17 has the same purpose, to keep city sidewalks free from nuisance.

A trial court has a broad range of discretion in determining whether to admit evidence. Bingham v. Marshall & Huschart Machinery, Inc., 485 N.W.2d 78, 80 (Iowa 1992). We find no abuse of discretion in the district court's decision.

V. Plaintiff also contends the district court erred by considering only the incidents on the day in question in arriving at its conclusion the clinic was not negligent. She believes the court should have considered the clinic's long-term passive acts, such as its failure to install adequate safety measures such as gutters and eaves. Michelle states the clinic knew or should have known its failure to install gutters and eaves presented an unreasonable risk of harm to a person in her position, because the clinic knew or should have known the failure to install such gutters and eaves would permit water to drip off the roof and freeze on the sidewalk or step, where invitees would walk.

In this argument, Michelle claims the district court should have considered different evidence in reaching its conclusion that she failed to meet her burden to prove the first element of recovery. We have already found the district court's decision was supported by substantial evidence, and Michelle has not shown she has met her burden as a matter of law.

VI. Michelle's final claim is that the district court erred in denying her application for leave to amend her petition. She claims she was prejudiced by the court's failure to consider the specification of negligence relating to the clinic's failure to install a gutter system.

The record shows the district court denied the application for leave to amend the petition because the application was untimely. The court, however, ruled it would be appropriate to allow the application as an amendment to conform to the proof. We determine that if the district court erred by not allowing the application for leave to amend, this error was harmless because the court allowed the application as an amendment to conform to the proof.

VII. In conclusion, we have examined each assignment of error raised in this appeal, and affirm the decision of the district court. Costs of this appeal are assessed to plaintiff.

AFFIRMED.