FILED
JUN 24 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

208

EDWIN G. BATES,

Plaintiff-Appellee,

vs.

TROWBRIDGE REALTY, INC.,

Defendant-Appellant.

Filed June 24, 1980

0-154
63598

Appeal from Floyd District Court - Ray E. Clough, Judge.

Defendant appeals from the judgment entered on a jury verdict against it in plaintiff's action to recover for personal injuries caused by a slip and fall on an icy walkway located on defendant's premises. AFFIRMED.

Warren L. DeVries of Mason City, Iowa, for defendant-appellant.

Allan C. Somers of Brierly, McCall, Girdner, Chalupa & Somers, Newton, Iowa, for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant Trowbridge Realty, Inc (defendant), appeals from the judgment entered on a jury verdict against it in plaintiff's action to recover for personal injuries caused by a slip and fall on an icy walkway located on defendant's premises. On appeal, defendant contends that its motion for directed verdict should have been granted because there was no substantial evidence that it should have known defendant would not guard against the danger; and that there was no substantial evidence that it breached a duty to plaintiff; and that plaintiff was contributorily negligent as a matter of law. We reject all of these contentions and affirm the judgment.

The evidence shows plaintiff departed from Cedar Rapids by bus on March 2, 1976, en route to Osage, Iowa. The bus stopped in Charles City about 4:50 p.m. The bus driver announced at this time that if anyone wanted to eat or to go to the restroom, they would be stopped for about 20 minutes. Plaintiff then asked the driver where he might get something to eat and was directed to a walkway to a nearby restaurant. The bus depot was located in a relatively small shopping center on defendant's property which consisted of a building leased to several tenants, including a restaurant. The bus depot and the restaurant are not connected internally and access from one to the other is by way of walking through a vehicular parking lot. Plaintiff proceeded to the restaurant as directed and upon returning to the bus, he slipped and fell on the walkway located on defendant's premises. The portion of the walkway where plaintiff slipped was covered by ice.

The evidence indicated that the cumulation of ice had been present for about 22 hours. Neither defendant nor anyone else had placed sand, salt or any abrasive substance on the icy walkway, although there was testimony that it was probable that such action would have made the walkway safer. Plaintiff testified that he was proceeding carefully at the time of the fall and was not in a hurry.

I. Defendant's first contention that it was entitled to a directed verdict is premised on the theory that the evidence shows conclusively that plaintiff appreciated the extent of the danger presented from the icy condition of the walkway. Such claim is based upon the following testimony of the plaintiff:

> Q. No, what conversation did you have with the bus driver? A. Oh, pardon me. I asked the bus driver where I could get something to eat and he directed me right, he said right up the walkway, there is a restaurant

> up there and I started to get off and here was clear ice and I remarked to the bus driver, I said, why don't you put something on here, someone is going to get hurt. There was no evidence of sand or anything else, just the clear ice.

The parties agree that this case concerns the proper application of that provision of section 343, of Restatement (Second) of Torts (1965), which was approved in Hanson v. Town and Country Shopping Center, 259 Iowa 542, 548, 144 N.W.2d 870, 874 (1966). The parties disagree as to whether plaintiff's evidence satisfies the conditions for liability under that portion of section 343 which states that, in order to be liable for a premises condition, a possessor of land (in addition to other requirements) should, in the exercise of reasonable care "expect that they [invitees] will not discover or realize the danger, or will fail to protect themselves against it." (emphasis added.) Defendant urges that the trial court erroneously read the word "or" to mean "and" and thus misapplied this rule.

The use of the disjunctive does not aid defendant in the application of this provision of the restatement. It is clear from a reading of section 343 in its entirety that if a possessor of land, in the exercise of reasonable care, should expect either (1) a failure to discover or appreciate the danger, or (2) a failure to protect against it, the conditions for liability are satisified, assuming that the possessor also knows or should know of the danger and fails to guard against it. See and compare, Hanson, 259 Iowa at 548, 144 N.W.2d at 874. As to the matter of whether defendant should have anticipated that bus passengers would not guard against the icy condition, it must be noted that the alternative to crossing this area was to remain on the bus and not avail themselves of the opportunity afforded to eat and go to the restroom. Faced with this choice, we submit, departure from the bus by some of the passengers was reasonably to be expected.

Defendant's argument on this point is misplaced to the extent it assumes that its primary duty is determined by the knowledge of the plaintiff. This is not so. Rather, such duty depends upon what is to be expected of the ordinary person without regard to the actual knowledge which any particular person may have of the hazardous condition. We find that a jury issue was presented as to all of the elements of liability under section 343 and that the motion for directed verdict was properly denied.

II. We also consider and reject defendant's contention that, given the knowledge of the icy condition to which plaintiff testified, he was guilty of contributory negligence

as a matter of law. We find this contention contrary to the holding in Smith v. J. C. Penney Co., 260 Iowa 573, 586, 149 N.W.2d 794, 802 (1967), that mere knowledge of the danger from an icy condition before attempting to pass over it is not conclusive evidence of contributory negligence. The test is whether the plaintiff, knowing thereof, believed that by the exercise of ordinary care, the danger might be passed in safety. Smith, 260 Iowa at 586, 149 N.W.2d at 802. See also Iowa R. App. P. 14(f)(10), (17).

We have considered all issues presented and find no basis for reversal.

AFFIRMED.