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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

EVELYN H. DOW, Conservator)
of the Property of)
JEFFREY DOW, a minor,)

November 10, 1977

Plaintiff-Appellant,)

vs.)

227
2-59077

THE CITY OF DUBUQUE, IOWA,)
a municipal corporation, and)
R. H. MUELLICH,)

Defendants-Appellees.)

Appeal from Dubuque District Court - T. H. Nelson, Judge.

Appeal by plaintiff of jury verdict for defendant where plaintiff sustained injuries in a fall on icy sidewalk. - Reversed and remanded for new trial.

Michael D. Stapleton, of Klauer, Stapleton, Ernst & Sprengelmeyer, of Dubuque, for Plaintiff-Appellant.

Gary K. Norby, of O'Connor, Thomas, Wright, Hammer, Bertsch & Norby, of Dubuque, for Defendants-Appellees.

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

PER CURIAM

Plaintiff Jeffrey Dow appeals a jury verdict holding defendant service station owner, R. H. Muellich, not liable for injuries sustained by plaintiff in a fall on West Locust Street, Dubuque, Iowa, where snow removed from defendant's place of business had been tracked by cars and pedestrians. Plaintiff's motion for new trial was overruled.

During the week prior to plaintiff's fall on December 19, 1970, there had been considerable snowfall in the city of Dubuque. On December 16th, defendant plowed the snow out of his gas station and off the street next to the station (West 17th) so people would be able to get into his place of business. Snow was placed on West 17th Street in a pile five or six feet high, about 20 feet long and extending into the street no more than three or four feet. It was not disputed that there was snow and ice on the crosswalk where plaintiff fell. However, there is contradictory testimony as to where that snow and ice came from.

Plaintiff frames the issue on appeal whether defendant is liable when snow is tracked from a pile made by defendant in the street to a crosswalk where plaintiff fell and sustained injury. Plaintiff testified cars, children and pedestrians tracked the snow onto the crosswalk from the pile made by defendant. Defendant testified he saw no tracking onto that crosswalk and that it would be difficult for a car to go over his snow pile on West 17th Street and through the intersection tracking snow onto West Locust Street. Plaintiff acknowledged there would have been snow and ice on the street even if defendant had not created his pile of snow.

At the close of all the evidence plaintiff moved to amend his pleadings to allege that defendant was negligent in permitting snow, ice and slush deposited by him to be cast about and dragged onto West Locust Street and on the crosswalk by vehicular and pedestrian traffic. The amendment also eliminated the allegation the snow, ice and slush were deposited upon the crosswalk by defendant.

The trial court initially sustained the motion, then later denied it. The apparent basis for the denial was that the original pleading more clearly alleged a case based on defendant's putting snow in the crosswalk and if he didn't, he wasn't liable. The instructions were thereupon framed to conform to this view.

Regarding the question of liability, the general rule is that an abutting owner is not liable for injuries resulting from snow or ice on the public sidewalk coming thereon from natural causes. *Lattimer v. Frese*, 246 N.W.2d 255, 258 (Iowa 1976); *Disbrowe v. Tucker*, 211 N.W.2d 318, 320 (Iowa 1973). However, he may be liable if his own affirmative negligence created the dangerous condition. *Lattimer*, supra. That liability is based upon the negligence in creating and maintaining the dangerous condition or nuisance causing the damage. *Franzen v. Dimock Gould & Co.*, 251 Iowa 742, 746, 101 N.W.2d 4, 7 (1960).

In 52 C.J.S. Landlord & Tenant, § 440(c) at 221-22, the rule is stated thusly:

Although at common law a tenant in possession owes no duty to remove the natural fall of snow, or the natural formation of ice, so as to be liable to strangers for injuries resulting therefrom, . . . he is liable for injuries resulting from any accumulation of snow or ice arising through his own negligence.

And in 63 C.J.S. Municipal Corporations §862(b) at 231:

Where an abutting owner piles up snow on the sidewalk in such an accumulated mass as to interfere with travel, or by means of the operation of natural causes which he ought to foresee will create danger by its melting and freezing, he is liable for injuries resulting therefrom to a pedestrian.

In *Case v. City of Sioux City*, 246 Iowa 654, 69 N.W. 27 (1955), the supreme court held a cause of action was stated based on the negligent repair by defendant property owner of a sidewalk.

It is true *Siegel* would not be liable for injury caused by a defective sidewalk which he failed to repair. But it does not follow that if he undertakes to repair he would not be liable for injuries caused by his negligently repairing. *Case*, supra at 660.

It has also been held if the abutting owner owes a duty to a pedestrian there is no distinction between the public alley and a public street or sidewalk. *Smith v. J.C. Penny Co.*, 260 Iowa 573, 149 N.W.2d 794, 800 (Iowa 1967).

Plaintiff's theory of the case was that defendant was liable for plaintiff's injury if he created a snowpile and it was reasonably foreseeable that injury could result from snow being tracked therefrom to the crosswalk. His petition prior to the proposed amendment to conform to proof was sufficient to permit instructions on this theory. From a review of the record we find a jury issue was engendered. The court's instructions 7, 8 and 9 did not permit recovery on this theory which plaintiff was entitled to have submitted. Plaintiff's motion for new trial should have been sustained on this ground.

Reversed and remanded for new trial.