

IN THE COURT OF APPEALS OF IOWA

FILED

JUN 28 1983

HELEN HARVEY,

)

Filed June 28, 1983 SUPREME COURT

Plaintiff-Appellant,

)

vs.

)

3-54
2-68852**FIRST NATIONAL BANK OF LeMARS,**

)

Defendant-Appellee.

)

Appeal from Plymouth District Court, Lawrence W. McCormick, Judge.

Plaintiff appeals from judgment entered on a jury verdict for defendants in this personal injury action arising from a fall in defendant bank's lobby.
REVERSED AND REMANDED FOR A NEW TRIAL.

James W. Redmond and John D. Ackerman of Gleysteen, Harper, Eidsmoe, Heidman & Redmond, Sioux City, for plaintiff-appellant.

G. Daniel Gildenmeister and N. Richard Willia of Margolin, Ryan, Gildemeister & Willia, Sioux City, for defendant-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, and Schlegel, JJ. Hayden, J., takes no part.

PER CURIAM

Plaintiff appeals from judgment entered on a jury verdict for defendants in this personal injury action arising from a fall in defendant bank's lobby. We reverse and remand for a new trial.

Plaintiff Helen Harvey was severely injured when she fell while walking away from a teller window in the defendant bank. Plaintiff asserted that the fall was caused by her tripping over a black free-standing ashtray which was placed next to the teller window and up against the teller partition. The bank's defense was centered upon a claim that plaintiff, who was 79 years old when she had the accident and extremely obese, was contributorily negligent by not obtaining help in walking when leaving the teller window or that she was already falling due to her own infirmities when she came into contact with the ashtray.

At trial, the court refused to admit evidence of a number of similar accidents in which customers had tripped over the ashtrays. The court stated that the evidence was inadmissible because the circumstances were not shown to be the same. The court gave the uniform jury instruction on the obligations of possessors or premises to business invitees, but added the following final paragraph: "The bank, as the possessor of premises, does not have a duty to anticipate that the plaintiff would not look to see objects plainly visible to one who looked." The court also submitted to the jury a special interrogatory in which the jury was asked to answer the question: "Do you find the plaintiff began her fall before coming in contact with the ashstand?" The jury returned a verdict for defendant bank, and answered the special interrogatory "yes."

Plaintiff then instituted this appeal, in which she asserts that: (1) the jury instruction that the defendant bank had no duty to anticipate plaintiff would not see obstructions that were plainly visible was contrary to provisions adopted by

this court of the Restatement (Second) of Torts, which provide that negligence may be imposed for injuries caused by an obvious defect if the possessor of the property should anticipate a harm despite the obviousness of the danger; (2) the circumstances of several prior accidents also involving bank patrons tripping over an ashtray occurred in circumstances sufficiently similar to the plaintiff's accident that evidence of the prior accidents should have been admitted; (3) there was not substantial evidence to support giving an instruction on contributory negligence; (4) there was not substantial evidence that plaintiff had begun to fall before she came into contact with the ashstand, so the court should not have submitted to the jury a special interrogatory asking them if they found that she was falling before she hit the ashtray; and (5) this court should abandon the rule that contributory negligence is a complete defense to a negligence claim and adopt the doctrine of comparative negligence.

Subsequent to the filing of this appeal, the Iowa Supreme Court decided Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982), adopting the doctrine of comparative negligence and holding it applicable to all pending cases, including appeals, in which the issue had been preserved. Id. at 754. Pursuant to this decision, the instant case must be reversed and remanded for a new trial. We address the following issues for guidance of the court on retrial.

Plaintiff argues that the trial court erred in submitting to the jury defendant's requested jury instruction on the obligations of property possessors to business invitees. The jury was instructed that:

If you then find from the evidence (1) that the defendant bank knew or by the exercise of reasonable care would have discovered the particular condition and should have realized that it involved an unreasonable risk of injury to a person in the position of the plaintiff, and (2) that the condition was such that a person in the position of the defendant bank should expect that the plaintiff would not reasonably discover or realize the danger, or would fail to protect herself against it, and (3) that the defendant bank failed to exercise reasonable care to protect the plaintiff in any of the particulars alleged by the plaintiff, then the defendant bank would be negligent.

The care required of the defendant bank is to be determined and measured by the care exercised by a reasonable and prudent person acting under like circumstances.

This portion of the instruction comports with the Restatement of Torts and Iowa law. Restatement (Second) of Torts §§ 343, 343 A (1965); Hanson v. Town & Country Shopping Center, Inc., 259 Iowa 542, 548-49, 144 N.W.2d 870, 874-75 (Iowa 1966). However, the court then added the following statement, as requested by defendant: "The bank, as the possessor of premises, does not have a duty to anticipate that plaintiff would not look to see objects plainly visible to one who looked." This portion of the instruction is inconsistent with the Restatement (Second) of Torts § 343 A, as adopted in Hanson, which makes a possessor liable for physical harm caused to his invitees even by known or obvious dangers, if the possessor should anticipate harm to the invitee despite the knowledge or obviousness. Under these circumstances a jury question may be generated as to whether the premises are "reasonably safe." Hanson, 259 Iowa at 549, 144 N.W.2d at 875.

Plaintiff has pointed out that the ashstand blended in with the decor of the teller windows and that there were numerous signs and photographs surrounding the teller window to distract a patron's attention from the floor where the ashstand was located. These are material facts which the jury should have been permitted to consider in determining whether "defendant had reason to believe that [the ashstand], though open and obvious, would not be discovered or become obvious to the invitee or that the risk involved would not be anticipated or appreciated by her." Id. at 550, 144 N.W.2d at 875. By instructing that defendant did not have a duty to anticipate that plaintiff would not look to see objects "plainly visible," the trial court essentially decided several issues which should have been left for the jury's consideration i.e., whether the ashstand was plainly visible, whether the plaintiff acted reasonably and prudently, and whether

defendant should have anticipated the harm despite any obviousness. We conclude that the court erred in submitting the debated portion of the instruction to the jury.

Plaintiff also contends that the court erred in submitting a special interrogatory, "Do you find the plaintiff began her fall before coming in contact with the ashstand?", to the jury at the request of defendant. Plaintiff claims that the submission of this interrogatory was erroneous because it was not supported by any evidence; it was leading and suggestive; and it failed to clarify any issues.

Iowa Rule of Civil Procedure 206 provides, in pertinent part: "The jury in any case in which it renders a general verdict may be required by the court, and must be so required on the request of any party to the action, to find specially upon any particular questions of fact. . . ." Notwithstanding the apparently mandatory language of this rule, the Iowa courts have long held that a trial court has considerable discretion regarding the submission of interrogatories, although that discretion is not unlimited. Six v. Freshour, 231 N.W.2d 588, 594 (Iowa 1975); Berghammer v. Smith, 185 N.W.2d 226, 236 (Iowa 1971). Sufficient evidence must exist to support the interrogatory. Burns v. Oliphant, 78 Iowa 456, 459, 43 N.W. 289, 290 (1889). In the instant case, plaintiff's treating physician stated, in his report, "She gives a history of falling when she turned. . . ." While we do not agree with defendant's argument that the jury's response to the special interrogatory was determinative on the issue of defendant's liability and hence find that the interrogatory submitted herein was inappropriately phrased, we conclude that, on retrial, sufficient evidence may be presented to justify the submission of a special interrogatory regarding whether defendant's negligence contributed to plaintiff's injury.

The final issue with which we are concerned on this appeal is whether the trial court erred by excluding plaintiff's proffered evidence of similar falls and accidents next to the teller windows. Such evidence is admissible in negligence

cases upon a showing that conditions were substantially similar and the occurrences were not too remote in time. Eickelberg v. Deere & Co., 276 N.W.2d 442, 445 (Iowa 1979). It is for the trial court to determine, in the exercise of sound judicial discretion, whether an adequate showing of similarity has been made. Davis v. L & W Construction Co., 176 N.W.2d 223, 227 (Iowa 1970). Some guidance has been given for making that determination:

[E]vidence of other instances of similar result from a common cause are only logically relevant when the essential circumstances are sufficiently similar to exclude a reasonable likelihood of the same result being produced by a different cause in the two instances.

Id. (quoting Poston v. Clarkson Construction Co., 401 S.W.2d 522, 526 (Mo. App. 1966)).

The case is hereby ordered reversed and remanded for a new trial.

REVERSED AND REMANDED