IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT
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No. 6-337 / 95-1518

CAROLYN J. TOLER and BOBBY TOLER,

Plaintiffs-Appellees,

vs.

EAGLE FOOD CENTERS, INC.,

Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Max A. Werling, Judge.

In this slip and fall case, Eagle Food Centers challenges the order denying its motion for judgment notwithstanding the verdict and new trial. **REVERSED.**

Craig A. Levien and Jean Dickson Feeney of Betty, Neuman & McMahon, L.L.P., Davenport, for appellant.

A. Fred Berger and Steven A. Berger of Wehr, Berger, Lane & Stevens, Davenport, for appellees.

Heard by Cady, P.J., and Huitink and Streit, JJ.

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HUITINK, J.

This case arises out of a slip and fall accident in which plaintiff Carolyn Toler was injured in defendant Eagle Food Center's ("Eagle") store. Eagle appeals the district court's denial of its motion for judgment notwithstanding the verdict and motion for new trial. Eagle also appeals the admission of the testimony of Toler's expert, Gerald Burko.

On January 12, 1993, Toler stopped at an Eagle Food Store in Davenport on her way home from work. Toler left work early that day because of the inclement weather and resulting icy and slick conditions. Toler entered the store through two sets of doors, an outer and an inner door. Eagle had placed absorbent mats in this entry area. One mat was between the two doors and another was immediately inside the second set of doors. The second mat measured three feet by eight feet. It was placed horizontally and covered the area three feet directly in front of both the enter and exit doors. Warning cones were also in place near the walkway to alert customers of the wet conditions. Toler testified she did not recall noticing the warning cones. The entryway of the store was periodically dry-mopped in order to keep the floor as dry as possible. Testimony at trial by the store manager, James Jepsen, indicated that after dry-mopping, a film of moisture remained on the tile floor.

After taking "three or so" steps off the second mat, Toler's feet slipped out from under her and she fell down hitting her head on the hard surface. She sustained

a cerebral concussion and has been treated for chronic migraine headaches as a result of her injury.

The Tolers filed a petition in February 1994 seeking damages for Carolyn Toler's injuries. They alleged Eagle was negligent in failing to place the mats vertically eight feet into the store instead of horizontally, and also in failing to position the warning cones according to its own safety manual. Eagle defended the action by claiming damages, if any, were partially or completely caused by fault on the part of Toler. The jury returned a verdict in favor of Toler finding Eagle seventy percent at fault and Toler thirty percent at fault. The court entered judgment for Toler in the amount of $109,162.99 and $4000 for Bobby.

Eagle filed a motion for directed verdict at the close of Toler's case claiming Toler had not presented substantial evidence in support of their claims. *See* Iowa R. Civ. P. 216. The motion was overruled. The motion was renewed at the end of the trial and was again denied. After the verdict, Eagle filed a combined motion for judgment notwithstanding the verdict, *see* Iowa R. Civ. P. 243, and a motion for new trial. The district court denied both motions. Eagle appeals the denial of the motions and also challenges the admission of expert testimony offered by Toler.

I. Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict.

Eagle argues Toler did not present substantial evidence to support each element of her claim, to-wit, [1] that the water on the floor created an unreasonable risk of injury; [2] that the water on the floor was not a known and obvious risk; [3] that Eagle failed to exercise reasonable care to protect Toler against the dangerous condition, if any; and [4] that a breach of duty on the part of Eagle was the proximate cause of Toler's injuries.

To determine whether the district court erred in overruling defendant's motion for judgment notwithstanding the verdict in favor of plaintiffs, we review the evidence in accordance with the same principles required for review by the district court. *Smith v. Smithway Motor Xpress,* 464 N.W.2d 682, 684 (Iowa 1990) (citations omitted). We view the evidence in the light most favorable to the party against whom the motion was made, taking into consideration every legitimate inference that may fairly and reasonably be made. *See* Iowa R. App. P. 14(f)(2)*; Smithway,* 464 N.W.2d at 684; *Konicek v. Loomis Bros., Inc.,* 457 N.W.2d 614, 617 (Iowa 1990). A motion for judgment notwithstanding the verdict must stand on the grounds raised in the motion for directed verdict. *Valadez v. City of Des Moines,* 324 N.W.2d 475, 477 (Iowa 1982).

Our only inquiry in assessing a motion for judgment notwithstanding the verdict here is whether there is sufficient evidence to justify submitting the case to the jury. *Smithway,* 464 N.W.2d at 684. A motion for judgment notwithstanding the verdict should be denied if there is substantial evidence to support each element of plaintiffs' claims. *Slocum v. Hammond,* 346 N.W.2d 485, 494 (Iowa 1984).

Negligence questions are typically for the jury and in only exceptional situations may negligence cases be decided by the court as a matter of law. Iowa R. App. P. 14(f)(10); *Capener v. Duin,* 173 N.W.2d 80, 81 (Iowa 1969); *Perkins v. Wal-Mart Stores, Inc.,* 525 N.W.2d 817, 820-21 (Iowa 1994) (court held summary judgment evidence presented jury question in negligence case on the issue of whether debris on defendant store's floor caused plaintiff to slip and fall); *Randol v. Roe Enters, Inc.,* 524 N.W.2d 414, 417 (Iowa 1994) (court held summary judgment evidence presented jury question in negligence case on the issue of whether an alleged drop-off between gravel and paved portions of defendant's parking lot was a proximate cause of plaintiff's slip and fall).

The issue in this case can be summarized as follows: whether substantial evidence demonstrated Eagle should have anticipated harm to Toler even though she was aware of the wet and slippery conditions and whether Eagle exercised reasonable care to protect Toler from the anticipated harm. *See Wieseler v. Sisters of Mercy Health Corp.,* 540 N.W.2d 445, 449 (Iowa 1995).

The contested element of Toler's slip-and-fall claim derives from the Restatement (Second) of Torts section 343 and 343A as originally adopted by the Iowa Supreme Court. *See Wieseler,* 540 N.W.2d at 449 (citations omitted). Under Iowa premises liability law, the scope of the duty of care that a possessor of land owes to the entrant is based on the entrant's legal status as either a trespasser, licensee, or invitee. *Id.*; *Morgan v. Perlowski,* 508 N.W.2d 724, 727 (Iowa 1993).[1] The Restatement sets forth the duty owed by a possessor of land to business visitors or invitees:

> [An invitee] is entitled to expect [the possessor] to exercise reasonable care to make the land safe for his or her entry not only in the original construction of the premises and any activities of the possessor or his employees which may affect their condition, but also in inspection to discover their actual condition and any latent defects, followed by such repair, safeguards, or warning as may be reasonably necessary for his protection under the circumstances.

Restatement (Second) of Torts § 343 cmt. b.

Premises liability in this case arises, if at all, under section 343 of the Restatement that provides:

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[1] Invitees are defined by the Restatement:

> (1) An invitee is either a public invitee or a business visitor.
>
> . . . .
>
> (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

Restatement (Second) of Torts § 332 (1965); *see Konicek v. Loomis Bros., Inc.,* 457 N.W.2d 614, 618 (Iowa 1990).

> **Dangerous Conditions Known to or Discoverable by Possessor**
>
> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Wieseler, 540 N.W.2d at 450.

Once enough evidence is presented by plaintiffs to generate a jury question on their Restatement section 343 premises liability claim, plaintiffs still must present enough evidence to overcome the test in Restatement section 343A:

> **Known or Obvious Dangers**
>
> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness.*
>
> (2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

See Wieseler, 540 N.W.2d at 450 (emphasis added); *see also Capener,* 173 N.W.2d at 83. Section 343A creates an exception to general premises liability under Restatement section 343. *Wieseler,* 540 N.W.2d at 450.

There are two Iowa supreme court slip-and-fall cases that provide the framework for evaluating Toler's claim and its supporting evidence. *See Weidenhaft*

v. Shoppers Fair of Des Moines, Inc., 165 N.W.2d 756 (Iowa 1969); *see also Wieseler,* 540 N.W.2d at 445.

In *Weidenhaft,* the plaintiff sought damages for injuries sustained after she slipped and fell on the defendant store's asphalt tile floor. *Weidenhaft*, 165 N.W.2d at 756. The parking lot of the defendant's store was covered with packed snow. *Id.* at 757. The plaintiff observed dirty water tracked in by patrons as she entered the premises. *Id.* at 758. She fell after stepping off the corrugated rubber mats placed in the entryway of the store. *Id.* at 757.

The *Weidenhaft* court held that considering the wet, dirty floor normally encountered in winter conditions, the plaintiff should have been aware of the risk and conducted herself accordingly. *Id.* at 761. The court did not believe the possessor, as a reasonable prudent person, would anticipate the condition would present an unreasonable risk of harm to a person using due care. *Id.* The court found the precautions taken, that is the mats placed at the entrance and the store's practice of mopping every hour or two, were sufficient to discharge its duty to exercise due care for the plaintiff's safety. *Id.*

Eagle argues that *Weidenhaft* is nearly identical to the circumstances of Toler's slip and fall. Furthermore, Eagle contends it took far more precautionary measures than the defendant store in *Weidenhaft,* thereby discharging its duty in full to Toler.

In *Wieseler,* the plaintiff was injured when he slipped and fell in the frost-covered parking lot upon leaving the defendant hospital. *Wieseler,* 540 N.W.2d at 446. The evidence demonstrated the plaintiff was aware of the slippery conditions as he entered the hospital. *Id.* at 447. However, the evidence also showed that the common entrance/exit was the sole means of accessing the hospital parking lot. *Id.* Furthermore, there was expert testimony indicating the parking lot could have been designed in a safer fashion and that without a handrail to grasp onto in slick conditions, the walkway was less than safe. *Id.*

The *Wieseler* court distinguished *Weidenhaft* by emphasizing that *Weidenhaft* involved an *indoor* slip and fall in a puddle of water whereas *Wieseler* involved an *outdoor* slip and fall on *frost*. *Id.* at 451 (emphasis added). The court held the dangerous condition posed by frosty pavement was or should have been just as obvious and known to the hospital as it was to the plaintiff. *Id.* Also, the fact that the danger was known or obvious to the plaintiff was not conclusive in determining whether the hospital acted reasonably in not taking precautions to prevent the type of accident that occurred. *Id.* Accordingly, the court held that even though the plaintiff knew of the potential danger, the hospital should have realized he might fail to protect himself from the condition due to the fact there was only one common entrance/exit to the parking lot. *Id.* at 452.

Toler, citing *Wieseler,* argues the fact that Toler knew of the slippery conditions is not conclusive in determining Eagle's duty or in determining whether Eagle acted reasonably by not taking more precautions to prevent the accident that occurred. These added precautions include placing the mats perpendicular to the door eight feet into the store and placing the warning cones in a more conspicuous manner.

We believe the circumstances of Toler's accident, an *indoor* slip and fall, are more factually similar to the *Weidenhaft* case. Like the plaintiff in *Weidenhaft*, we have here a plaintiff who was aware of the wet and slippery conditions. Toler admitted at trial that "common sense" told her before she entered the store that the floor could be slippery. Toler indicated in her testimony that she did not wipe her feet other than to dry them as she walked across the mat. The record confirms that Toler simply encountered the danger that is normally expected under icy or wet weather conditions. *See Weidenhaft,* 165 N.W.2d at 761.

Eagle had a mat placed horizontally to cover the entry and exit to the store. Warning cones were also placed in the vicinity of the in and out doors. Toler argues that like the defendant hospital in *Wieseler*, Eagle acting as a reasonable prudent person, should have anticipated the hidden danger resulting from dry-mopping the floor, despite Toler's general awareness of the danger. *See Wieseler,* 540 N.W.2d at 452. Because of the hidden danger, Toler contends, Eagle should have taken extra steps to protect Toler from the injury that took place. However, we find under this

factual scenario, Eagle satisfactorily discharged its duty under sections 343 and 343A of the Restatement (Second) of Torts by placing mats in the entryway, periodically dry-mopping the floor, and by placing warning cones in the area. We now hold the precautions taken in this case were sufficient to discharge Eagle's duty to its business invitees. Accordingly, the district court erred in overruling Eagle's motions for directed verdict and also its motion for judgment notwithstanding the verdict.

II. Expert Testimony.

Eagle has also appealed the admission of testimony by Toler's expert, Gerald Burko. As we are reversing the judgment of the district court, it is unnecessary to consider this issue.

The judgment of the district court is reversed.

REVERSED.