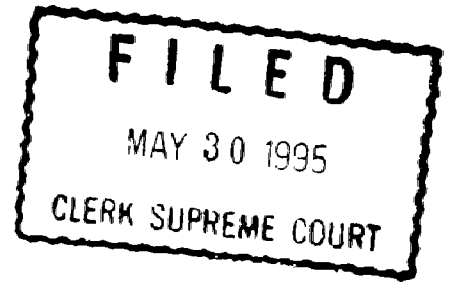


IN THE COURT OF APPEALS OF IOWA

No. 5-038 / 94-337



ALVIN WIESELER and GLENDORA WIESELER,

Appellants,

vs.

SISTERS OF MERCY HEALTH CORPORATION,

Appellee.

Appeal from the Iowa District Court for Woodbury County, Dewie J. Gaul,
Judge.

The plaintiffs appeal a ruling of the district court granting the defendant's motion for judgment notwithstanding the verdict, following the jury's verdict in favor of plaintiffs for damages sustained as a result of a fall in defendant's parking lot.

AFFIRMED.

Robert B. Deck, Sioux City, for appellants.

Paul D. Lundberg of Shull, Cosgrove, Hellige, Du Bray & Lundberg, Sioux
City, for appellee.

Considered by Donielson, C.J., and Habhab and Huitink, JJ.

DONIELSON, C.J.

On December 30, 1989, at about 8:00 a.m., Alvin Wieseler arrived at the Marian Health Center in Sioux City, which is operated by the Sisters of Mercy Health Corporation. Alvin went to the Health Center in order to pick up his wife, Glendora, who had stayed at the hospital overnight. Alvin parked his car in a visitor's parking lot across the street from the hospital. As he walked to the hospital, he noticed there was frost on the parking lot. Alvin did not inform any hospital employees of the frost.

After a period of time, Alvin walked from the hospital to the parking lot to get the car. He intended to drive his car to the hospital door to pick up Glendora. Alvin had both hands full carrying some items Glendora was taking home and some balloons. There was a slight decline from the street into the parking lot. As Alvin went down this decline, he slipped on the frost and fell backwards, injuring his right shoulder.

The Wieselers subsequently filed the present negligence action against the Sisters of Mercy Health Corporation for damages Alvin allegedly sustained as a result of the fall. Glendora also filed a claim for loss of consortium. Defendants claimed as an affirmative defense that Alvin's injuries were caused by his own negligence.

At trial, Alvin testified he knew there was frost on the parking lot when he went back out to his car. He stated there was only one route into the parking lot, and so he went ahead and walked down the frost-covered slope. Dale McKinney, an architect, testified on the Wieselers' behalf. He stated that the parking lot could have

been made safer by installing stairs and a hand-rail for pedestrian use. At the close of plaintiffs' case, defendant filed a motion for directed verdict which was denied by the district court.

Randy Jorgensen, a security guard at the Health Center, testified the Health Center offered valet service and he had been in the parking lot between ten to fifteen times on the morning of the accident to park cars. He stated he had not observed any condition that would have required salting, sanding or other precautionary measures. He testified no one complained to him that morning about any icy patches. Joseph Conlon, the security coordinator at the Health Center, testified he had not had any previous complaints about anyone slipping or falling in the parking lot.

The jury found that both Alvin and the Health Center were fifty percent at fault. The jury found Alvin had damages of \$43,333. Fifty percent of this amount is \$21,666. Glendora was awarded \$4,000 for her claim of lost consortium.

The defendant filed a motion for judgment notwithstanding the verdict. The district court granted the motion. The court determined plaintiffs had failed to present substantial evidence to show an element of their cause of action, which was:

The condition was one that a person in the defendant's position should have expected would not be discovered or realized by plaintiff or one that the defendant should have expected the plaintiff would fail to protect himself from.

The court found there was no evidence to show Alvin would not have discovered the condition of the parking lot, and in fact, Alvin knew of the slippery condition of the

lot. The court also found there was no evidence to show the Health Center should have anticipated the condition presented an unreasonable hazard to persons using due care. The court concluded there was no basis in the record for the jury to find defendant was negligent. The court set aside the jury verdict and dismissed the case. Plaintiffs appealed.

The Wieselers contend the district court should not have granted defendant's motion for judgment notwithstanding the verdict. They claim there is substantial evidence in the record to show defendant should have anticipated harm to Alvin despite his knowledge of the condition of the premises. Plaintiffs point out there was only one route into the parking lot, and in order to get his car to take his wife home Alvin had to walk down the slippery slope into the parking lot. Plaintiffs ask to have the jury verdict reinstated.

In ruling on a motion for directed verdict, the court should first determine whether the plaintiff has presented substantial evidence on each element of the claim. *Dudley v. Ellis*, 486 N.W.2d 281, 283 (Iowa 1992). If there is not substantial evidence in support of each element of the claim, judgment notwithstanding the verdict should be granted. *Id.* When considering such a motion,, the district court must view the evidence in the light most favorable to the party against whom the motion is directed. *Federal Land Bank v. Woods*, 480 N.W.2d 61, 65 (Iowa 1992). In addition, such party is entitled to every reasonable inference from the evidence.

Id. Finally, if reasonable minds could differ on the issue, it is proper to submit it to the jury. *Id.*

Iowa has adopted Restatement (Second) of Torts section 343, which provides:

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.

Hanson v. Town & Country Shopping Center, Inc., 259 Iowa 542, 548, 144 N.W.2d 870, 874 (1966).

A possessor of land is generally not liable for injuries to an invitee caused by a known or obvious danger from conditions or activities on the land. *Morgan v. Perlowski*, 508 N.W.2d 724, 729 (Iowa 1993). An obvious danger means that both the condition and the risk are apparent to and would be recognized by a reasonably prudent person. *Schnoor v. Deitchler*, 482 N.W.2d 913, 917 (Iowa 1992).

Here, the condition of frost on the parking lot was a known and obvious danger. Alvin testified he knew there was frost on the parking lot. He also testified he knew the frost was slippery because he has slipped slightly when he walked into the hospital. Thus, the condition and the risk had been recognized by Alvin before the accident.

In some cases, a possessor of land will not be relieved of liability for injuries caused by a known and obvious danger. *Hanson*, 259 Iowa at 548-549, 144 N.W.2d at 874. If the possessor can and should anticipate that the dangerous condition will cause physical harm to the business invitee despite its known and obvious danger, the possessor still owes the invitee a duty. *Mundy v. Warren*, 268 N.W.2d 213, 217 (Iowa 1978). Under these circumstances, the possessor has a duty to make the condition reasonably safe or warn of the danger. *Id.* at 218.

Several circumstances may exist that trigger the possessor's duty where there is a known and obvious danger. *Konicek v. Loomis Brothers, Inc.*, 457 N.W.2d 614, 618 (Iowa 1990). The possessor may have reason to expect that the invitee's attention may be distracted, so that the invitee will not discover what is obvious, or will forget what has been discovered, or fail to protect against the danger. *Id.* Additionally, the possessor may expect that the invitee will proceed to encounter the known and obvious danger because to a reasonable person in the invitee's position, the advantage of doing so would outweigh the apparent risk. *Id.* The possessor is entitled to assume the invitee will exercise the care of an ordinary reasonable prudent person. *Weidenhaft v. Shoppers Fair of Des Moines, Inc.*, 165 N.W.2d 756, 759 (Iowa 1969).

Plaintiffs claim Alvin might have been distracted by his wife's hospital stay or by the items he was carrying to the car so that he had forgotten the condition of the parking lot from the time he walked into the hospital to the time he walked back out. We first note plaintiffs presented no evidence to show Alvin was distracted. To the

contrary, Alvin testified he was aware there was frost on the surface of the parking lot at the time he was walking to his car. Secondly, even if Alvin had been distracted, plaintiffs presented no evidence to show the Health Center should have expected Alvin, as a reasonable person, would be distracted.

Plaintiffs also claim the defendant should have expected that he would proceed to enter the parking lot, even though it was slippery, because the advantage of doing so would outweigh the apparent risk. They argue Alvin was compelled to enter the parking lot in order to get his car. Again, we first note there is no evidence to show Alvin was compelled to enter the parking lot while it was in a dangerous condition. Alvin saw several hospital employees, but told no one about the slippery condition of the parking lot. Also, he could have taken advantage of the hospital's valet service by having the security guard retrieve the car. Additionally, even if Alvin had been compelled to enter the parking lot, there was no evidence to show defendant should have expected Alvin, as a reasonable person, would have done so.

We find no error in the district court's decision to grant defendant's motion for judgment notwithstanding the verdict under the facts of this case. Plaintiffs failed to present substantial evidence to show defendant should have expected plaintiff would fail to protect himself from a known and obvious danger. We affirm the decision of the district court.

While this case was pending on appeal, plaintiffs filed a motion for leave to cite additional authority. We determine the motion should be granted. We have considered the additional authority in reviewing this case on appeal.

We affirm the district court on all issues presented in this appeal. Costs of this appeal are assessed to plaintiffs.

AFFIRMED.