

IN THE COURT OF APPEALS OF IOWA

FILED

JUN 25 1985

CLERK SUPREME COURT

ERNEST GUTIERREZ, SR., and
JAMES GUTIERREZ,

Plaintiffs-Appellants,

vs.

LEO M. DIX and DELORES M. DIX,

Defendants-Appellees.

)
)
)
)
)
)

Filed June 25, 1985

164

5-173
84-1170

Appeal from the Iowa District Court for Dubuque County, R. J. Curan,
Judge.

The plaintiffs appeal from directed verdict granted in favor of the
defendants in an action for negligence arising out of the plaintiff's fall on an icy
sidewalk. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

David W. Leifker of David W. Leifker Law Offices, Dubuque, for plaintiffs-
appellants.

William C. Fuerste of Fuerste, Carew, Coyle, Juergens & Sudmeier,
Dubuque, for defendants-appellees.

OXBERGER, C.J.

A directed verdict in favor of defendants was granted below in plaintiff's action for negligence. We affirm in part, reverse in part, and remand.

The plaintiff is the son of a couple who rent a building from the defendants. The defendant landlords, Leo and Delores Dix, live next door to the rented house. Between the houses is a sidewalk set on what the plaintiffs describe as a steep slope. It is the only sidewalk leading away from the house. Dix maintained a flower garden on the property rented by the Gutierrez family and had erected a "handrail" with chicken wire attached to it to protect the garden from chickens. Under the terms of the lease agreement the leasee was responsible for shoveling snow off the sidewalk. The defendants also occasionally used the sidewalk to tend the flower garden and visit rental property.

The Gutierrez family used salt to remove ice which would build up on the sidewalk, until Leo Dix told the plaintiffs not to use salt because he believed it was harmful to the concrete. The family continued to use small amounts of salt on the sidewalk and testified they had no other means of removing the ice, since sand was not available in the store. On March 13, 1980, the plaintiff James Gutierrez, who was fifteen at the time, was on his way to school when he fell on the ice. The plaintiff's sister had shoveled the top half but not the bottom half of the sidewalk that morning. This suit was brought by James and his father, alleging negligence on the part of defendants.

At the close of plaintiff's presentation of evidence, the court directed verdict for defendants, indicating there was a lack of proof regarding negligence and proximate cause. The court elaborated by saying there was no way it could be known there was ice under the snow which covered the bottom half of the sidewalk.

In reviewing a ruling on a directed verdict, this court is to look at the evidence in the light most favorable to the plaintiff. Iowa R. App. P. 14(f)(2). We will determine whether sufficient evidence has been presented from which the jury could reasonably infer negligence and proximate cause. Pieper v. Harmeyer,

235 N.W.2d 122, 126 (Iowa 1975). Generally, questions of negligence and proximate cause are questions to be settled by the jury and are decided by law only in exceptional cases. Iowa R. App. P. 14(f)(10). If reasonable minds could draw different conclusions from the evidence presented then the issue is to be settled by the jury and not the court. Iowa R. App. P. 14(f)(17).

In discussing the duty of a landlord, the courts have stated:

As a general rule an owner who has leased a building to another without any agreement to repair is not liable to the tenant, or to one who has entered the premises on the tenant's invitation, for personal injuries sustained by reason of their unsafe condition. However, this rule does not apply where the owner retains control, or the owner and tenant have joint control, over the premises or the part thereof where the injury occurs.

Montgomery v. Engel, 179 N.W.2d 478, 780 (Iowa 1970)(citation omitted). This is reiterated in the Restatement of Torts which states the rule applies even when the injured person has knowledge of the existence of the dangerous condition. Restatement (Second) Torts § 360 (1965). The following illustration is also provided:

2. A leases an apartment in an apartment house to B. A step upon the common stairway by which the apartment of B as well as that of other tenants is reached, is to the knowledge of B and his family in bad condition but not in such a dangerous condition that a reasonable man would regard it as foolhardy to use the stairway. C, the wife of B, while ascending the stairway and exercising reasonable care to avoid harm from the defective step, slips upon it and is hurt. A is subject to liability to C.

Id. at Comment b.

The defendant here admitted that he provided a shovel to the family to remove snow, told them not to use salt, and after the accident gave them a tool for removing ice. He also checked regularly on their maintenance of the sidewalk because "it was never cleaned the way it should have been, and that is why I kept a pretty close eye on it." A jury could infer from these facts that the defendant at least controlled the manner in which ice and snow were removed. This, along with his occasional use of the sidewalk, generates a jury question as to the duty owed by the defendant. As our case law and the restatement cited above indicate,

where joint control is exercised, there follows a duty to use reasonable care.

While the court felt the evidence was not strong concerning knowledge of the presence of ice by the defendant, we believe a jury question was generated. Defendant states he kept an eye on the sidewalk conditions, and admitted in interrogatories and at trial he knew there was a problem with ice forming on that part of the sidewalk.

The defendant argues, inter alia, it is not logical to conclude a directive not to use salt on the sidewalk shows control by the landlord and that the defendant could not have taken steps to alleviate the situation. We believe a jury question on such issues is generated and the defendant's arguments should be presented to the jury.

We also find a jury question generated as to whether there was negligence in not placing a handrail along the sidewalk. The plaintiffs claim the chicken wire was not meant as a handrail, while defendant indicated that was the purpose of the rail and chicken wire. A juror could reasonably infer either was the case; and if a juror concluded it was not a handrail, could further decide it was negligent not to place a handrail along the sidewalk.

We agree, however, that even in viewing the evidence in the light most favorable to plaintiffs, a jury question has not been generated as to whether construction of the sidewalk was negligent because it allowed improper drainage and was too steep. The only evidence presented are pictures plaintiffs say reflect the steep incline of the sidewalk, and the fact they observed that because it was steep snow would melt and then freeze. No evidence was presented that the construction was improper or the walk might have been built in a different manner. We do not believe a juror could infer negligence from these facts.

Accordingly, we affirm the court's directed verdict for defendants regarding the claim of negligent construction of the sidewalk in paragraph 5d and 5e of plaintiff's petition and reverse the directed verdict ruling on the other claims. We remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.