IN THE COURT OF APPEALS OF IOWA

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MAY 26 1981
CLERK SUPREME COURT

Filed May 26, 1981

TERRANCE P. FRATELLA and JEANNE KAY FRATELLA,

Plaintiffs-Appellees,

vs.

THE BOSTON HOUSE APARTMENTS, a Limited Partnership, EUGENE A. KNEPPER, General Partner, d/b/a REAL ESTATE INVESTMENT PLANNING ASSOCIATES,

Defendants-Appellants.

1-10
2-64371

Appeal from Linn District Court - John L. Hyland, Judge.

Defendant appeals from a jury verdict for plaintiffs in a negligence action arising from plaintiff's fall on an icy sidewalk owned by defendant challenging 1) sufficiency of the evidence of defendant's negligence to submit the claims to the jury, 2) rulings on evidence, 3) errors in instructions, and 4) whether the verdicts effectuated substantial justice among the parties. REVERSED AND REMANDED FOR NEW TRIAL.

James F. Pickens of Pickens, Barnes & Abernathy, Cedar Rapids, Iowa, for defendants-appellants.

Lowell H. Forte and John M. Maher of Chipokas, Platt, Maher & Forte, Cedar Rapids, Iowa, for plaintiffs-appellees.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant, The Boston House Apartments, appeals from a jury verdict for plaintiffs, Terrance F. and Jeanne Kay Fratella, in a negligence action arising from Terrance Fratella's fall on an icy sidewalk owned by defendant.[1] Defendant asserts that trial court erred: 1) in submitting the case to the jury because the evidence established as a matter of law that plaintiff knew of the impending hazard and thus defendant owed no duty of care to him; 2) in refusing to allow defendant's general partner to testify whether he had notice of prior falls or accidents on the sidewalk; 3) in refusing to instruct the jury on defendant's requested specification alleging that plaintiff was negligent in failing to wear overshoes; 4) in instructing the jury on plaintiffs' three requested specifications of negligence because such instructions were prejudicial in that they were repetitive and amounted to overemphasis; 5) in permitting plaintiffs to present a rebuttal witness on the issue of weather conditions when plaintiffs failed to disclose the identity of this witness in response to defendant's interrogatory requesting the names of all persons having knowledge of the condition of the sidewalk; and 6) in failing to grant a new trial on the basis that the verdict failed to effectuate substantial justice and the jury had not responded truly to the real merits of the case. We reverse and remand this case for a new trial.

On January 3, 1975, plaintiff Terrance Fratella slipped and fell while crossing a private sidewalk located on real estate owned by defendant. An apartment house was located on the property, however, plaintiff neither lived there nor had any business to transact there. He was enroute to a nearby grocery store and cut across the front yard of the apartment building because there were no public sidewalks on either side of the street. The private sidewalk, which ran perpendicular to the public street, had accumulations of snow and ice which plaintiff noticed before he attempted to cross. As a result of the fall, he received a severe injury to his right arm and elbow. His recovery was complicated because his arm was in constant motion during his waking hours as a result of cerebral palsy, which he has had since birth.

During trial the court refused to allow defendant's general partner to testify as to whether he had notice of any prior falls or accidents on the sidewalk. At the close of

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[1] The Boston House Apartments is a limited partnership in which defendant Eugene A. Knepper is the general partner. Plaintiff Jeanne Fratella's action is for loss of consortium only. Use of "plaintiff" refers to Terrance Fratella.

defendant's evidence, over defendant's objection, trial court granted a half day continuance and permitted plaintiffs to present a rebuttal witness to testify about weather conditions on January 3, 1975.

At the close of plaintiff's case, and at the close of all the evidence, defendant made motions for directed verdicts on the ground that the evidence established as a matter of law plaintiff Terrance Fratella knew of the impending hazard and thus defendant owed no duty of care to him. Trial court overruled these motions and submitted the case to the jury, which rendered verdicts in favor of plaintiffs. This appeal followed.

I. Scope of Review. Since this appeal is at law, our review is on assigned error only. Iowa R. App. P. 4.

II. Submission of the Case to the Jury. Defendant asserts trial court was compelled to find, as a matter of law, that plaintiff knew of the condition of the sidewalk, appreciated the hazard which the condition presented, and, that as a consequence of this fact, defendant owed no duty of care to plaintiff. We disagree.

In ruling on a motion for directed verdict, we view the evidence in the light most favorable to the person against whom the motion is made. Iowa R. App. P. 14(f)(2). Ordinarily, questions of negligence are for jury determination; it is only in the exceptional case that they may be decided as a matter of law. Iowa R. App. P. 14(f)(10). Only rarely may a verdict be directed in favor of one who has the burden of proof. McCaull v. Universal Mfg., 218 N.W.2d 592, 593 (Iowa 1974). If reasonable minds might draw difference inferences from the evidence, a jury question is engendered. Iowa R. App. P. 14(f)(17).

Plaintiff testified on direct examination that he saw ice on the sidewalk at various places, that he looked up and down the sidewalk trying to find a place which had no ice on it, that he saw a place which appeared to be packed-down snow and proceeded to cross there. On cross-examination he testified that he saw snow and ice, knew it was slippery and hazardous, tried to avoid the ice, and slipped where the snow might have been hard on top. He confirmed that he had answered "yes" in an earlier deposition when asked whether he had seen the ice upon which he fell. On redirect examination he testified that he could not see that there was ice under the snow and that he did not know the packed snow was slippery or hazardous.

We believe from this evidence that trial court properly submitted the case to the jury and that the jury could find that plaintiff did not appreciate the hazard presented by the snow and ice.

III. Testimony on Prior Accidents. Defendant also claims that trial court erred in refusing to allow its general partner to answer the following questions:

> Q. Had you ever had any notification from him [the resident apartment manager] of any prior falls on the premises whatsoever?
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> * * *
>
> Q. To your knowledge, have there ever been any previous falls on that front walk due to any claim of ice or snow before Mr. Fratella fell?
>
> * * *
>
> Q. Mr. Knepper, before January 3, 1975, had there ever been brought to your attention, any fall on that front walk due to snow or ice or any combination of the same?

Trial court sustained plaintiffs' objection that the questions were irrelevant and immaterial, and that defendant failed to provide a foundational showing that similar circumstances existed on the prior occasions. Defendant made its offer of proof in which the witness answered "no" to each question. Defendant argues that the issue in this case is whether the sidewalk was unreasonably dangerous and that excluding evidence of no prior falls is contrary to Iowa law which provides such evidence is admissible when substantially similar circumstances exist, to show absence of danger or lack of knowledge by the defendant. Defendant further argues that since the question referred to "any" falls, the need for substantially similar conditions was obviated. We disagree.

Evidence of prior accidents at the same place under substantially similar circumstances is admissible, not to show independent acts of negligence, but as tending to show a dangerous and unsafe condition and knowledge thereof by the offending party. Jackson v. Chicago M., St. P. & P. R. Co., 238 Iowa 1253, 1264, 30 N.W.2d 97, 103 (1947). See also Wiedenfeld v. Chicago & N.W. Transportation Co., 252 N.W.2d 691, 700 (Iowa 1977). A corollary to this rule permits introduction of evidence that no accidents occurred at the same place under substantially similar circumstances to prove absence of danger and lack of knowledge thereof by a party claimed to be at fault. Id.

We believe it is clear that this rule requires proof of substantially similar circumstances. There is no merit to defendant's claim that asking whether "any" falls had come to the witness's attention obviates the need for substantially similar circumstances. Since defendant offered no evidence to show past conditions of the sidewalk, the testimony was without proper foundation and inadmissible.

IV. Specifications of Negligence. In instruction no. 15, trial court submitted to the jury the following specifications of defendant's negligence:

> 1. In carelessly and negligently permitting and allowing snow and ice to collect and remain on the sidewalk on which the plaintiff was walking, all of which rendered the sidewalk slippery and unsafe for persons walking over the same.
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> 2. In carelessly and negligently failing to remove the snow and ice which was allowed to accumulate.
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> 3. In failing to take reasonable preautions to remedy the dangerous condition resulting from the accumulations of ice and snow.

Defendant argues that these specifications are repetitive to the point of overemphasis and thereby prejudicial. We agree. This instruction is repetitive of the single claim that the defendant was negligent in allowing the snow and ice accumulations to remain on the sidewalk. See Dickman v. Truck Transport, Inc., 224 N.W.2d 459, 464 (Iowa 1974). The instruction does not amplify the negligence specification relating to defendant's duty to remedy the alleged hazard nor does it inform the jury of the different ways in which defendant may have avoided injury to the plaintiff. See Porter v. Iowa Power and Light Co., 217 N.W.2d 221 (Iowa 1974). While we would not find this error sufficient in itself to warrant reversal for new trial, in light of our discussion in Division V, infra, we find that this instruction should not be given upon retrial.

V. Defendant's Specification of Contributory Negligence. Defendant further asserts that trial court erred in refusing to submit to the jury the following specification of plaintiff's negligence:

> C. In failing to wear rubbers, overshoes or other protective footwear, to assist in his ability to walk and to maintain his balance in inclement weather when wintry conditions made walking at said time and place hazardous and dangerous.

We agree. We have considered plaintiff's contention that defendant has waived its right to raise this issue on appeal by accepting instruction no. 19A with "no objection" but are not persuaded that there was a waiver. From our review of the record we believe defendant's acceptance of instruction 19A without objection was because it stated the substance of defendant's requested instruction no. 23 relating to the duty of a person suffering from a physical disability which trial court had previously refused to give.

We initially note that, absent a motion for more specific statement, "[a] pleading of general negligence will permit consideration of any specification of negligence which has support in the record." Ruby v. Easton, 207 N.W.2d 10, 19 (Iowa 1973); Schmitt v.

Jenkins Truck Lines, Inc., 170 N.W.2d 632, 641 (Iowa 1969); Cavanaugh v. Jepson, 167 N.W.2d 616, 621 (Iowa 1969). Further, " '[t]he rule is well established that where there is sufficient evidence to warrant submission of pleaded specifications of negligence, it is error for the court not to do so.' " Karr v. Samuelson, Inc., 176 N.W.2d 204, 212 (Iowa 1970), quoting Kuehn v. Jenkins, 251 Iowa 557, 562, 100 N.W.2d 604, 607 (1960). Although instruction no. 19 and no. 19A focused on plaintiff's duty to exercise ordinary care under the circumstances, we conclude from the evidence that trial court should have submitted defendant's requested instruction. The court's refusal to give the requested instruction caused defendants to lose the benefit of the jury's specific consideration of all the competent evidence to establish contributory negligence.

VI. Plaintiff's Rebuttal Evidence. At the close of defendant's case plaintiff's requested permission to call one rebuttal witness, a meteorologist, Conrad Johnson, to testify as to weather conditions on January 3, 1975. Since Mr. Johnson was not immediately available, they also requested, and were given, a continuance until the next morning. Defendant objected asserting that this was not proper rebuttal evidence and should have been covered in plaintiff's case-in-chief. Defendant also objected on the grounds that plaintiffs had been aware for some time that defendant would offer evidence as to weather conditions and thus trial court should not grant a continuance.

Trial court has considerable discretion in determining what is proper rebuttal evidence and whether or not to grant a continuance. Karr, 176 N.W.2d at 211; Madison Silos v. Wassom, 215 N.W.2d 494, 498 (Iowa 1974). Defendant asserted in his objection to the trial court that it would be within the trial court's discretion to disallow these requests. However, it is not the exercise of discretion that is reviewable by this court, it is only the abuse thereof that is reviewable. State v. Noonan, 246 N.W.2d 236, 237 (Iowa 1976). We find no abuse of discretion in trial court's ruling.

When trial commenced the morning following the continuance, plaintiffs called Roger Clark, another meteorologist, to testify in Conrad Johnson's place. Defendant made no objection until, after considerable testimony, plaintiffs introduced Mr. Clark's business records. We agree with trial court that defendant waived his objection to the substitution of witnesses by failing to make a timely objection.

Defendant also argued that the witness was incompetent to testify because his name was not produced in answer to defendant's interrogatory requesting the names of all persons having knowledge of the condition of the sidewalk upon which plaintiff fell.

We conclude trial court correctly ruled that the witness could not testify as to weather conditions at the location of the sidewalk and that any testimony as to weather conditions at the airport were subject to attack as to credibility, but not as to admissibility.

VII. Motion for New Trial. Due to trial court's submission of instruction no. 15, which overemphasized plaintiff's theory of negligence, and failure to submit defendant's requested instruction on contributory negligence, we conclude defendant is entitled to a new trial. Although plaintiff Jeanne Kay Fratella's claim for loss of consortium is independent of her husband's claim and not affected by his contributory negligence, Fuller v. Buhrow, 292 N.W.2d 672, 676 (Iowa 1980), error in submitting instruction no. 15 relates to the defendant's negligence and thus affects upon her claim.

REVERSED AND REMANDED.

All judges concur except Oxberger, C.J., who dissents.

OXBERGER, C. J.

I dissent.

The majority establishes a new standard of care for pedestrians in inclement weather—they must wear overshoes. This duty is neither required by statute nor common law. In addition, the record is void of evidence showing the friction superiority of overshoes over regular shoes in eliminating falls on ice that would necessitate imposition of that duty. Finding no basis on which a jury could consider this element, I would affirm the trial court.