FILED
JAN 29 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

130

JULIE HOWARD,

Plaintiff-Appellant,

vs.

CITY OF SIOUX CITY, A Municipal Corporation,

Defendant,

HEELAN CATHOLIC HIGH SCHOOL,

Defendant-Appellee.

Filed January 29, 1986

5-550
85-332

Appeal from the Iowa District Court for Woodbury County - Phillip S. Dandos, Judge.

Plaintiff appeals a jury verdict for defendant-abutting landowner in a slip and fall case by contending the jury instructions were erroneous. **AFFIRMED.**

Stanley E. Munger of Kindig, Beebe, Rawlings, Nieland, Probasco & Killinger, Sioux City, for plaintiff-appellant.

Charles T. Patterson and John C. Gray of Eidsmoe, Heidman, Redmond, Fredregill, Patterson & Schatz, Sioux City, for defendant-appellee Heelan.

Considered by Donielson, P.J., and Snell and Schlegel, JJ.

The plaintiff, Julie Howard, was injured when she slipped and fell on a snow-covered public sidewalk in Sioux City. The sidewalk was adjacent to property owned by Heelan Catholic High School.

Howard sued both the city of Sioux City and the abutting property owner, Heelan Catholic High School. She alleged that Heelan's snow removal equipment had left a residue of snow on the sidewalk and had packed that residue, creating a slippery condition which caused her to fall.

A jury returned a verdict in favor of both defendants. Howard has appealed from the resulting judgment in favor of Heelan Catholic High School; she has not appealed from the judgment in favor of the city of Sioux City.

Howard contends the trial court erred in instructing the jury about the duty of care owed by Heelan as the owner of land adjoining a public sidewalk. Howard maintains the court should have instructed that Heelan could be held liable if it "caused an artificial condition on the sidewalk abutting [Heelan's] property . . . which would not have been present but for [Heelan's] action or inaction." The trial court rejected the plaintiff's request for such an instruction. Instead, the trial court instructed the jury that Heelan could be found liable only if it had "caused an artificial condition on the sidewalk abutting [Heelan's] property which caused the walk to be more hazardous than before to persons using it." (emphasis added)

Howard's contention on appeal is that the trial court's instruction regarding the abutting landowner's duty was erroneous. We disagree.

Although Iowa Code § 364.12(2) was amended[1] effective July 1, 1984, the parties agreed that the 1983 version of this section applies.

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[1]Iowa Code section 364.12(2) (1985), provides:

> 2. A city shall keep all public grounds, streets, sidewalks, alleys, bridges, culverts, overpasses, underpasses, grade crossing separations and approaches, public ways, squares, and commons open, in repair, and free from nuisance, with the following exceptions:
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> b. The abutting property owner is responsible for the removal of the natural accumulations of snow and ice from the sidewalks within a reasonable amount of time and may be liable for damages caused by the failure of the abutting property owner to use reasonable care in the removal of the snow or ice. If damages are to be awarded under this section against the abutting property owner, the claimant has the burden of proving the amount of the damages. To authorize recovery of more than a nominal amount, facts must exist and be shown by the evidence which afford a reasonable basis for measuring the amount of the claimant's actual damages, and the amount of actual damages shall not be determined by speculation, conjecture, or surmise. All legal or equitable defenses are available to the abutting property owner in an action brought pursuant to this paragraph. The city's general duty under this subsection does not include a duty to remove natural accumulation of snow or ice from the sidewalks. However, when the city is the abutting property owner it has the specific duty of the abutting property owner set forth in this paragraph.
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> e. If the abutting property owner does not perform an action required under this subsection within a reasonable time, a city may perform the required action and assess the costs against the abutting property for collection in the same manner as a property tax. This power does not relieve the abutting property owner of liability imposed under paragraph "b".

Iowa Code § 364.12(2) (1983) provides:

> A city is responsible for the care, supervision, and control of public grounds, streets, sidewalks, alleys, bridges, culverts, overpasses, underpasses, grade crossing separations and approaches, except those lawfully required to be maintained by a railway company, and the city shall keep all public ways, squares, and commons open, in repair, and free from nuisance, with the following exceptions:
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> b. The abutting property owner is responsible for the prompt removal of snow, ice, and accumulations from the sidewalks.
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> e. If the abutting property owner does not perform an action required under this subsection within a reasonable time, a city may perform the required action and assess the costs against the abutting property for collection in the same manner as a property tax.

A review of Iowa authority on this topic is necessary before we reach our result because this case ultimately turns on the distinctions between artificial and natural conditions and the consequences which flow from such conditions. The only case interpreting section 364.12(2) is Peffers v. City of Des Moines, 299 N W 2d 675 (Iowa 1980), and Howard claims that case stands for the proposition that abutting landowners can be held liable to pedestrians when they have caused any artificial condition on a sidewalk. The court in Peffers stated:

> Although prior statutes have imposed a duty to remove snow and ice from sidewalks on the abutting property owner, the owner's obligation runs to the city not to the traveling public. Case v. City of Sioux City, 246 Iowa at 659, 69 N.W.2d at 30. The abutting owner does not own the sidewalk; nor do the statutes give such owner control of or an exclusive possessory right to the sidewalk. The prescribed duty of removal is enforced by a monetary penalty assessed by taxation when the city is forced to perform the abutting owner's duty.
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> Thus, under the law existing at the time section 364.12(2) was enacted, an abutting property owner had no legal

> responsibility to pedestrians for failing to remove snow and ice from a sidewalk. "[L]iability of an abutting owner or occupant for injuries to a traveler ordinarily will not grow out of statutes or ordinances requiring him to repair sidewalks or remove snow and ice therefrom unless such liability is expressly imposed . . . ." 63 C.J.S. Municipal Corporations § 868, at 245 (1950). See also Restatement (Second) of Torts § 288(c) & Comment (1965). We must therefore determine whether section 364.12(2) expressly imposes liability on abutting property owners for injury to pedestrians caused by negligent failure to remove snow and ice.
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> In examining section 364.12(2) we find no language which can reasonably be interpreted as expressly imposing such liability on an abutting property owner.

Id at 677.

Howard contends Peffers does not indicate that abutting property owners are liable only if the artificial hazard is more hazardous so that the jury instruction in this case was erroneous. Howard encourages us to interpret Peffers more broadly than we are willing to do. Peffers simply provides that § 364.12(2) (1979) creates a duty on an abutting property owner to clear sidewalks of snow, but that duty runs to the city. See Johnson & Juhl, A Survey of Iowa Tort Law: From Mercer to Goetzman, 33 Drake L. Rev. 473, 528-29 (1984) ("The [Peffers] court did, however, distinguish between hazards created by the landowner and natural hazards. Ultimately, the court's decision involved the interpretation of Iowa Code section 364.12(2) (1979). The court concluded that the obligation imposed by section 364.12(2) runs from the abutting landowner to the city and not to the pedestrian. Accordingly, the abutting landowner owed no duty to the pedestrian to remove snow and ice from the sidewalk.") Howard cannot recover under this statutory provision.

The remaining Iowa authority Howard directs us to is distinguishable because each of those cases involved a situation where the abutting property owner, through an affirmative act, created an artificial hazard such as discharging

water or snow onto the sidewalk which eventually caused an injury to a pedestrian. See Smith v. J. C. Penney Co., 260 Iowa 573, 579-80, 149 N.W.2d 794, 798 (1967) (water discharged into alley from downspout); Beyer v. City of Dubuque, 258 Iowa 476, 139 N.W.2d 428 (Iowa 1966) (water discharged from defective downspout onto sidewalk); Franzen v. Dimock Gould & Co., 251 Iowa 742, 747, 101 N.W.2d 4, 7-8 (1960) (ice formed when vehicles under defendant's control dropped snow and ice on sidewalk); Updegraff v. City of Ottumwa, 210 Iowa 382, 383-84, 226 N.W. 928, 929 (1929) (downspout emptied onto sidewalk forming ice).

Thus, Iowa common law makes abutting property owners liable to injured pedestrians for creating artificial hazards (e.g., allowing runoff water to freeze), however, our situation involves a natural hazard (i.e., fallen snow) which became an artificial hazard when the abutting landowner cleared the sidewalk. Our survey of authorities on this topic indicates that Iowa law is compatible with authority from other jurisdictions which provide that when a natural hazard (e.g., fallen snow) exists, liability is imposed on the abutting property owner only if the resulting artificial hazard is more dangerous than the natural hazard.

Clarke v. Hubbell, 249 Iowa 306, 86 N.W.2d 905 (1957), which was before the enactment of § 364.12(2), involved a situation where an abutting property owner had partially repaired a low spot in the sidewalk. At this spot, standing water formed which turned into an artificial accumulation of ice. A pedestrian slipped and fell on this ice. The pedestrian's claim was unsuccessful because the court was unable to conclude that the abutting property owner's repairs "caused the walk, at the place where plaintiff fell, to be more hazardous than before." Id. at 310, 86 N.W.2d at 908. As to natural accumulations, Rockafellow v. Rockwell City, 217 N.W.2d 246, 248 (Iowa 1974), provides: "The owner of adjacent property owes no duty to a pedestrian to clear, or make safe for walking, ice and snow which had naturally accumulated on the sidewalk in front of it

ıless a statute validly imposes that duty." As mentioned, § 364.12(2) does ot ımpose such a duty.

In a case not governed by Code § 364.12(2) (1985), Iowa common law does ot clearly ındicate what liability an abutting property owner incurs when under- aking to remove natural accumulations of snow and ice which results in injury o a pedestrıan. Restatement (Second) of Torts § 323 (1965) addresses this ıtuatıon by ındicating:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
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> (a) his failure to exercise such care increases the risk of such harm, or
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> (b) the harm is suffered because of the other's reliance upon the undertaking.

Comment c of this same section provides:

> The fact that the actor gratuitously starts in to aid another does not necessarily require him to continue his services. He is not required to continue them indefinitely, or even until he has done everything in his power to aid and protect the other. The actor may normally abandon his efforts at any time unless, by giving the aid, he has put the other in a worse position than he was in before the actor attempted to aid him. His motives in discontinuing the services are immaterial.
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> Where, however, the actor's assistance has put the other in a worse position than he was in before, either because the actual danger of harm to the other has been increased by the partial performance, or because the other, in reliance upon the undertaking, has been induced to forego other opportunities of obtaining assistance, the actor is not free to discontinue his services where a reasonable man would not do so. He will then be required to exercise reasonable care to terminate his services in such a manner that there is no unreasonable risk of harm to the other, or to continue them until they can be so terminated. (emphasis added).

These principles expressed by the Restatement have been embodied in the decisions of several jurisdictions. See, e.g., Chisolm v. Stephens, 47 Ill. App. 3d 19, 7 Ill. Dec. 795, 365 N.E.2d 80 (1977). In Elam v. Marine, 116 Mich. App. 40, 321 N.W.2d 870, 871 (1982), the court stated the rule regarding a property owner's duty to remove natural accumulations of snow and ice "is that liability attaches only where the property owner has taken some affirmative step to alter the natural accumulation of the ice and snow, thereby increasing the hazard of travel for the public."

Heelan directs us to Boss-Harrison Hotel Company v. Barnard, 148 Ind. App. 406, 266 N.E.2d 810 (1971), a case where a pedestrian was injured when she fell on a public sidewalk. The court acknowledged that: "The sole question presented here is whether the [abutting property owner], in attempting to partially clear the public sidewalk of ice and snow, created a more hazardous condition than had previously existed because of the inclement weather." Id. at 811 (emphasis added).

Thus, we hold that the jury instruction requiring the jury to hold the abutting property owner liable only if the condition was made more hazardous was consistent with Iowa law and in accord with the authority from other jurisdictions. Public policy favors encouraging property owners, as opposed to the city, to remove natural accumulations of snow and ice. See § 364.12(2). It would seem an anomalous rule of law to hold the property owners who did not remove any natural accumulations of snow and ice not liable for resulting injuries of pedestrians, but hold property owners who undertake to remove such natural elements liable for resulting injuries to pedestrians for allegedly creating an artificial hazard by removing snow and ice. The better view is that property owners who create an artificial hazard by removing natural accumulations of snow

and ice can only be held liable if they created a more dangerous condition than previously existed.

For the above-mentioned reasons, we find no error in the trial court's instructions.

AFFIRMED.