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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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VICKY COLLIER,)

Plaintiff-Appellant,) Filed March 31, 1987

vs)

GENERAL INNS CORP., A Subsidiary of General Growth Properties; FARR, INC, d/b/a Holiday Inn,) 7-23 86-620

Defendants-Appellees.)

Appeal from the Iowa District Court for Lee County (CL48(S)0684) - D.B. Hendrickson, Judge.

Plaintiffs appeal the district court's award to defendant of a judgment notwithstanding the verdict. **REVERSED AND REMANDED.**

James P. Hoffman, Keokuk, Iowa, for plaintiff-appellant.

Ralph D. Sauer and Mark A. Woollums of Betty, Neuman & McMahon, Davenport, Iowa, for defendants-appellees.

Considered by Oxberger, C.J., Schlegel, and Hayden, JJ.

SCHLEGEL, J. 62

Plaintiff appeals the district court's award to defendant of a judgment notwithstanding the verdict. We reverse the judgment and reinstate the jury's verdict. The cause is remanded for ruling on the motion for a new trial, and in the event such motion is overruled, for judgment on the verdict.

The plaintiff was involved in an altercation in a lobby area of a Holiday Inn. The other combatant pushed the plaintiff through a plate glass door, breaking the glass. The plaintiff suffered injuries from the broken glass.

The plaintiff later filed this lawsuit against the owner of the Holiday Inn. She alleged the hotel owner was negligent in failing to use safety glass in the door, and in failing to monitor the area where the altercation took place.

The suit was tried to a jury, which returned a verdict apportioning 85% of the fault to the plaintiff and 15% to the hotel owner. However, the district court then awarded the hotel owner a judgment notwithstanding the verdict. The district court concluded the plaintiff's evidence was not sufficient to raise a jury question on her allegations of negligence.

The plaintiff has appealed the grant of judgment notwithstanding the verdict. The plaintiff contends her evidence was sufficient to generate jury questions on each of her allegations of negligence.

In its appellee's brief, the defendant asserts that in the event the judgment is reversed on appeal, the case should be remanded for consideration of a motion for new trial filed by the defendant but never adjudicated.

Our scope of review is limited to correction of errors at law. Iowa R. App. P. 4. In reviewing the grant of a judgment notwithstanding the verdict, we view the evidence in the light most favorable to the plaintiff and consider only evidence favorable to the plaintiff whether or not it is contradicted. Hardy v. Britt-Tech Corp., 378 N.W.2d 307, 318 (Iowa Ct. App. 1985). If there is sub-

stantial evidence in support of each element of the plaintiff's claim, the motion for judgment notwithstanding the verdict should be denied. Valadez v. City of Des Moines, 324 N.W.2d 475, 477-78 (Iowa 1982). If reasonable minds could differ concerning the issue, it is proper to send it to the jury and its verdict will be upheld. Dennett v. City of Des Moines, 347 N.W.2d 691, 692 (Iowa Ct. App. 1984).

In order to prevail in a negligence action, the plaintiff must prove four elements:

> 1) Existence of a duty of care, requiring the actor to conform to a certain standard of conduct for the protection of others against unreasonable risks;
>
> 2) A failure to observe the duty owed;
>
> 3) Proximate causation between the conduct and the resulting injury;
>
> 4) Actual loss or damage.

Meeker v. City of Clinton, 259 N.W.2d 822, 828 (Iowa 1977). The grant of a judgment notwithstanding the verdict is proper only when there is a lack of substantial evidence concerning one of these elements which plaintiff had to prove. Hardy v. Britt-Tech Corp., 378 N.W.2d at 308.

An owner of real estate who retains control of the premises owes the duty of due care to an invitee. Poyzer v. McGraw, 360 N.W.2d 748, 751 (Iowa 1985). The duty of care owed to an invitee by a possessor of land was set forth in Mundy v. Warren, 268 N.W.2d 213, 217 (Iowa 1978):

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition of 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.

We think plaintiff offered substantial evidence that defendant knew or by the exercise of reasonable care would have discovered that ordinary plate glass in the area in question involved an unreasonable risk of harm to invitees. Evidence was introduced by plaintiffs that fighting had previously taken place in the hotel bar, one of the fights spilling out into the area in question. Another fight had taken place near the same area. A different pane of glass in a door in the same general area had been broken previously and replaced with safety glass. The glass broken in the instant case had not been replaced with safety glass. The manager of the hotel testified that he was aware of the use and importance of safety glass. Reasonable minds may differ on whether the defendant knew or should have known that the plate glass in the door involved an unreasonable risk of harm to invitees. The jury had all the evidence before it, including the number of fights in the hotel, the replacement of another pane of nonsafety glass with safety glass, the awareness of the manager of the use and importance of the glass, the amount of traffic in the hotel passing the glass in question, and the placement of the glass door in relation to the swimming pool and the bar. We find there was substantial evidence from which the jury could properly find that defendant knew or should have known of the condition and should have realized that there was an unreasonable risk of harm to invitees. Accordingly, by not replacing the glass, the jury could have found defendant did not exercise reasonable care to protect invitees against danger.

Furthermore, the jury could have inferred from the testimony of the manager and the Gate City Glass Company representative that the plaintiff

would not have discovered or realized the danger of the glass door since regular glass and safety glass are virtually indistinguishable.

Plaintiff also sought to show that the defendant, as part of its duty of care, should have had security in the lobby and therefore negligently failed to protect her from assault. Restatement (Second) of Torts, Section 344 (1965), provides

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Comment f to section 344 provides:

> Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford reasonable protection.

The trial court appears to have concluded that defendant, to be subject to liability, was required to know that the two specific individuals involved were about to engage in a fight. The court said, "There is no evidence that agents or employees of the Holiday Inn knew or should have known that these two individuals were about to engage in a fight." We note that comment f to section 344 provides that the possessor is under a duty to exercise care when the possessor

knows or is likely to know from past experience that there is a likelihood of conduct of third persons in general which is likely to endanger the safety of the visitor even though the possessor has no reason to expect it on the part of a particular individual. The nub of section 344 is foreseeability. Martinko v H-N-W Associates, 393 N.W.2d 320, 321 (Iowa 1986). In Martinko, the supreme court said when there was no evidence that any crimes had been committed in the parking lot of a shopping mall, no past experience required the defendants to foresee the isolated act. Id. This is clearly not the circumstance of the present case. There were often fights in the bar of the hotel. On at least one occasion the fighting had spilled out into the lobby. There had been problems concerning pushing and shoving at banquets in the hotel. Though these were held on a different floor, attendance at them required invitees to pass through the area in question in this case. Security guards had been hired at times when heavy traffic of "kids" necessitated such a step. The general manager of the hotel testified:

> Question: Did you ever have any fights that took place in any other place other than inside the tavern itself during the tenure that you were there?
>
> Answer: Sure, we had one in front of the elevator one night.
>
> Question: Do you recall when that was?
>
> Answer: It was usually--It was usually with the younger set. That one, the two individuals that were involved were not staying there or drinking there. They had come in to use the bathrooms.
>
> Question: Okay.
>
> Answer: Or one did and was chased in by another one.
>
> * * *
>
> Question: Okay. On May 30th, 1984, what measures were taken for the security of people within that lobby area for their safety from being injured or touched without

their consent? What security measures were taken, if any?

Answer: No security measures. We do not have any full-time security guard on duty.

Question: Do you have a part-time security guard on duty?

Answer: On weekends when the kids are running in and out of the building, become a problem, yes, we put in off-duty policemen at times.

Question: Is that done on a consistent basis? In other words, you say "on weekends." Is that done every weekend?

Answer: No.

Question: How do you judge when you're going to do it?

Answer: We were running cycles. As the kids become a problem, we put an off-duty policeman on a weekend and that would slow things down for a couple weeks, three weeks; and we would not return a policeman to that status until the problem started becoming severe again.

Question: In other words, after a problem already had taken place, then you would call in a security guard?

Answer: No, not necessarily after the problem, but when the traffic started building up again.

Question: Isn't it true that after it became—appeared to be a problem, then you would call in a policeman or off-duty policeman so that you could avoid future problems?

Answer: Correct.

From the evidence presented, a jury could reasonably conclude that the defendant had failed to take reasonable security measures. It was not necessary that the actions of specific persons be foreseeable; it is enough that similar conduct be generally foreseeable. The jury could conclude that lack of security violated defendant's duty of care.

We must also address the issue of proximate cause as this was the other element of the negligence action on which the trial court found there was not substantial evidence presented to sustain the jury's verdict. The question of proximate causation is for the jury and may be decided as a matter of law only in exceptional cases. Wirtanen v. Provin, 293 N.W.2d 252, 257 (Iowa 1980); Iowa R. App. P. 14(f)(10). The trial court thought the present case was one of these exceptional cases. We cannot agree.

A determination of whether another person's conduct constitutes a superseding cause is a factual question, and it is a question of law only in extreme circumstances where it is manifestly clear that the intervening conduct was a superseding event. Haumersen v. Ford Motor Co., 257 N.W.2d 7, 15 (Iowa 1977). Moreover, an intervening act or force will not relieve a negligent defendant of liability if that act or force was a normal consequence of the defendant's conduct or was reasonably foreseeable by that defendant. Iowa Electric Light & Power v. General Electric Co., 352 N.W.2d 231, 235 (Iowa 1984). Our courts have adopted the factors set out in section 442 and 447 of the Restatement (Second) of Torts in determining whether an intervening act constitutes a superseding cause. Section 442 provides:

> The following considerations are of importance in determining whether an intervening force is a superseding cause of harm to another.
>
> a. The fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
>
> b. The fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;
>
> c. The fact that the intervening force is operating independently of any situation created by actor's negligence, or, on the other hand, is or is not a normal result of such a situation;

> d. The fact that the operation of the intervening force is due to a third person's act or his failure to act;
>
> e. The fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;
>
> f. The degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

Defendants contend that the above factors are favorable to its superseding cause defense; the trial court also concluded that the factors of 442 as applied to this case, required the finding that the intervening force of the fight relieved the hotel of liability, even assuming the failure to have safety glass in the door, constituted negligence. However, the supreme court also has approved section 447 of the Restatement (Second) in determining whether an intervening act constitutes a superseding cause. Section 447 provides:

> The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if
>
> (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or
>
> (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or
>
> (c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.

Id. We have already reviewed the evidence presented at trial. That evidence could support a finding that the defendant should have realized, at the time of its negligence, that a third person might engage in or cause a fight in the area in question and that someone could be hurt by its failure to install safety glass or that a reasonable person would not regard it as extraordinary that a

fight might occur and that someone might be injured by the plate glass as a result Since we believe that there was a submissible jury question on the issue of proximate causation as well as negligence, we believe the trial court erred in granting defendant's motion for judgment notwithstanding the verdict.

The trial court was presented with two posttrial motions: for a judgment notwithstanding the verdict and for a new trial. The court did not rule on the motion for a new trial as required by Iowa Rule of Civil Procedure 248(a). As the supreme court said in Smith v. Darling & Co., 244 Iowa 133, 144-45, 56 N W 2d 47, 53-54 (1952), is is unfortunate that the motion for a new trial cannot also be adjudicated with the appeal. However, that motion is for the trial court to rule upon. Hardy v. Britt-Tech Corp., 378 N.W.2d at 310. The judgment for defendants is reversed, the jury's verdict is reinstated, the cause is remanded for ruling on the motion for new trial and, in the event such motion is overruled, for judgment on the verdict.

REVERSED AND REMANDED.