FILED
FEB 28 1973
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

LLOYD A. MUNDY,

Appellant,

v.

FRANK and JOANNE WARREN, Appellants, and HOAK CONSTRUCTION COMPANY,

Appellee.

Filed February 28, 1973

361
2-59726

Appeal from Polk District Court - John N. Hughes, Judge.

Plaintiff and Warren defendants appeal from trial court's grant of a new trial as to all defendants in a personal injury action brought by a construction worker injured on the job site. Reversed on both appeals.

Robin L. Hermann, of Patterson, Lorentzen, Duffield, Timmons, Irish & Beeker, of Des Moines, for appellant Lloyd A. Mundy.

Henry A. Harmon, of Grefe & Sidney, of Des Moines, for appellants Frank and Joanne Warren.

David P. Ellingson, of Hansen, Wheatcraft & McClintock, of Des Moines, for appellee Hoak Construction Company.

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

CARTER, J. 194

This appeal arises out of a personal injury action brought by a construction worker who fell into an open storm sewer manhole on a job site. The jury returned a verdict for plaintiff Lloyd A. Mundy against defendant Hoak Construction Company, the subcontractor who had installed the sewer. The jury found in favor of the co-defendant owners of the land on which the accident occurred, Frank and Joanne Warren. Pursuant to Hoak Construction's motion, trial court granted a new trial as to both defendants. From that decision plaintiff and the Warren defendants appeal.

I. The sole reason articulated in the trial court's order for granting a new trial was its conclusion that it had erred in the giving of certain jury instructions. An appellate court must review an order sustaining a motion for new trial as a result of an alleged erroneous instruction as it would any other claim of legal error and reverse if the legal conclusion of the trial court is erroneous. Harris v. Clark, 251 Iowa 807, 809, 103 N.W.2d 215, 216 (1960). Such cases do not involve the exercise of trial court discretion but rather present the legal question involved. In re Estate of Murray, 238 Iowa 112, 114, 26 N.W.2d 58, 60 (1947). See, in addition, Wilkes v. Iowa State Highway Commission, 172 N.W.2d 790, 797 (Iowa 1969).

II. The trial court, in granting the motion for new trial, as to Hoak, accepted its contention that it had erred in the instructions given on the separate allegations of (a) failing to cover the manhole, and (b) failing to warn of the dangerous condition created by an uncovered manhole. Hoak, in its motion for new trial and on this appeal contends that these instructions (nos. 10 and 11) were erroneous in that they fail to tell the jury (a) that if a warning were given this would preclude a finding of negligence for failing to cover the hole (ground 12 of the motion for new trial), and (b) that even if the hole were left uncovered another form of guarding or protection could have satisfied Hoak's duty of reasonable care (ground 9 of the motion for new trial). We reject both contentions -- Hoak was not correct in asserting in its exceptions to the trial court's instructions and motion for new trial that either of two alternatives [covering the hole or warning] would have satisfied Hoak's duty of reasonable care as a matter of law. On the facts presented it was a jury question as to whether the actions of Hoak failed to satisfy the standard of reasonable care in the manner charged by plaintiff. Instructions 10 and 11 properly presented these issues to the jury in view of the allegations of the petition and the evidence.

The point is well made in Prosser, Law of Torts § 61 at 394 (4th ed. 1971):

> Against such [obvious and apparent] conditions it may normally be expected that the visitor will protect himself. It is for this reason that it is so frequently held that reasonable care requires nothing more than a warning of the danger. But this is certainly not a fixed rule, and all of the circumstances must be taken into account. In any case where the occupier, as a reasonable man, should anticipate an unreasonable risk of harm to the invitee notwithstanding his knowledge, warning, or the obvious nature of the condition, something more in the way of precautions may be required.

Similar language is contained in Hanson v. Town and Country Shopping Center, 259 Iowa 542, 547-48, 144 N.W.2d 870 (1966) where the court states:

> The extent of the invitation and care required to lawfully perform the duty imposed on the possessor of the real estate clearly is not satisfied by a showing the invitee knew or should have known of the defect at the time of her injury. Bostian v. Jewell, 254 Iowa 1289, 1296, 121 N.W.2d 141, 145.
>
> The fact the invitee comes upon the premises after warning of a dangerous condition or knowledge thereof does not qualify the duty of the possessor to exercise reasonable care for the invitee's safety. (Emphasis added.)

We believe the foregoing principles apply in possessor-invitee cases, generally. But they are even more applicable in the present controversy where we are considering the standard of care owed by a subcontractor on a construction project to an employee of another subcontractor on the same project. These instances in which a warning of the danger is sufficient to satisfy the possessor's duty involve situations where, after being warned, the invitee is free to reject the invitation. Because of the relationships between the parties in the present case the jury could well have concluded that plaintiff, even if given a warning, was in no position to reject the invitation to work in the face of the danger. Accordingly the jury might have determined that covering the hole was required.

The trial court submitted the issues to the jury in accordance with the manner in which plaintiff's claims were presented, viz. the specific acts of negligence alleged. Such separate submission of the issues was not error as the jury was clearly instructed that each alleged act of negligence was to be considered in accordance with Hoak's duty to exercise reasonable care (see subparagraph (2) of instructions 10 and 11). Under the instructions Hoak was free to urge upon the jury that reasonable care did not require the covering of the hole and that a warning would suffice but on the evidence the jury

was free to reject this contention and find Hoak negligent on either or both grounds.

We also reject Hoak's contention (in ground 9 of its motion) that it was error for the trial court not to tell the jury that other preventive measures might have satisfied Hoak's duty of reasonable care. The trial court is not obliged to instruct on all possible fact situations that would not constitute negligence. It need only give the jury the correct standards for determining whether a defendant is negligent in the particulars alleged. The instructions did this quite adequately. It was error to grant a new trial as to Hoak.

III. We also conclude that the trial court erred in granting a new trial as to the Warren defendants. The plaintiff has not challenged the verdict and judgment in their favor. Hoak challenges the verdict based only on alleged deficiencies in instructions relating to Warrens' duties to plaintiff. Under the holding in Hagenson v. United Telephone Company, 209 N.W.2d 76, 81 (Iowa 1973) we do not believe that issues concerning the duties of non-adversary third parties give Hoak any standing to assert the grounds upon which the new trial was granted. In any event we find no prejudice to Hoak on the present record in the trial court's failure to give additional instructions as to Warrens' duties. It was also error to grant a new trial as to the Warren defendants.

We reverse the order for new trial on both appeals and remand for judgment of dismissal as to Warrens and reinstatement of plaintiff's judgment on the jury's verdict with interest from the date the verdict was returned. Costs on appeal are assessed to Hoak.

DONIELSON, SNELL, and OXBERGER, JJ., concur; ALLBEE, C.J., concurs in part and dissents in part.

ALLBEE, C.J. (concurring in part and dissenting in part)

I concur in the court's conclusion that a new trial should not have been granted against the Warren defendants. I must, however, dissent from the portion of the decision which reverses trial court's grant of a new trial against Hoak Construction.

The new trial as to Hoak Construction was granted because instruction 10 in effect imposed the duty upon that defendant to place a protective cover over the manhole without informing the jury that defendant might properly discharge its duty to invitees by warning of the open manhole. Both plaintiff and Hoak Construction seem to agree, as they must, that the duty owed by defendant should have been stated in the alternative. See Hanson v. Town and Country Shopping Center, Inc., 259 Iowa 542, 546, 144 N.W.2d 870 (1966); Restatement (Second) of Torts § 343, Comment (b) (1965). That is, in order to find Hoak Construction negligent, the jury should have to find that defendant had failed both to cover the manhole, and to warn. If defendant took either of these actions, it met the appropriate standard of care, and could not be found negligent.

Instruction 10, however, dealt with only one part of this two faceted standard. That instruction told the jury that failure to cover the manhole would be negligence, without consideration of whether defendant had provided adequate warning. A proper instruction would have told the jury that plaintiff had the burden to show two things: (1) that Hoak Construction had not covered the manhole, and (2) that the defendant had not warned of the open manhole.[1] See, e.g., Uniform Jury Instruction 22.3. Trial court recognized its previous error in the order for new trial. The grant of a new trial as to Hoak Construction should be sustained.

[1] Instruction 11 standing alone might have been sufficient, since it required the jury to find both that the manhole was open, and that Hoak Construction had failed to warn. However, the fact that this instruction might have been adequate is not sufficient in light of instruction 10, which permitted a finding of liability upon a consideration of only one of the two questions involved.