**IN THE COURT OF APPEALS OF IOWA**

No. 5-087 / 94-250

FILED
APR 28 1995
CLERK SUPREME COURT

**PENNY K. JENN,**

Appellant,

vs.

**WARDWAY PLAZA PARTNERS, INC., An Iowa General Partnership; MEREDITH NATIONWIDE JOINT VENTURES, a Michigan Partnership; LAWRENCE E. FIELDLER,; BALCOR REAL ESTATE HOLDINGS, INC., a Delaware Corporation; and B.A. HORNER, Receiver of Wardway Plaza Receivership,**

Appellees.

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Appeal from the Iowa District Court for Johnson County, L. Vern Robinson and Kristin L. Hibbs, Judges.

Plaintiff appeals rulings of trial court not allowing her to amend pleadings and granting summary judgment in slip-and-fall case. **AFFIRMED.**

Davis L. Foster of Barker, Cruise, Kennedy, Houghton & Foster, Iowa City, for appellant.

William L. Chaplin and Patricia L. Vogel of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellees Wardway, Meredith and Fiedler.

Connie Alt and Diane Kutzko of Shuttleworth & Ingersoll, P.C., Cedar Rapids, for appellee Balcor.

James F. Kalkhoff of Dutton, Braun, Staack, Hellman & Iversen, P.L.C., Waterloo, for appellee Horner.

Heard by Donielson, C.J., and Hayden and Cady, JJ.

**HAYDEN, J.**

Penny Jenn fell in the parking lot in front of her business in the Wardway Plaza. The parking lot was icy and slippery. She originally filed suit against Wardway Plaza Partners, Inc., Meredith Nationwide Joint Ventures, and Lawrence E. Fiedler (collectively "Wardway"), alleging Wardway had breached a duty to maintain the premises in a safe condition and a duty to warn of dangerous conditions. Jenn claimed this breach of duty was the proximate cause of her alleged injuries. Jenn amended her petition to add the mortgage holder of the property, Balcor Real Estate Holdings, Inc. (Balcor).

Wardway and Balcor were granted motions for summary judgment. The trial court found a receiver had been appointed to the property known as Wardway Plaza to "take charge of and control of the property." The court thus held that although Wardway and Balcor were interested parties in the property, they did not control it and could not be liable for any negligence.

Jenn was allowed to amend her petition to add the receiver, B.A. Horner. Horner filed a motion to dismiss stating the statute of limitations had run on Jenn's claim against him. Horner's motion was granted.

Jenn now appeals all the adverse rulings. First, she claims the trial court erred in finding her amended petition adding Horner did not relate back to the filing date of the original petition under Iowa Rule of Civil Procedure 89. Jenn also argues the

court erred in ruling there was no fact question regarding control over the property or contractual liability for claims arising out of the maintenance of the property

**I. Relation Back.**

Plaintiff's claim against Horner would normally be barred by the statute of limitations. Iowa Rule of Civil Procedure provides authority for an amendment to a suit to "relate back" in time to the filing. However, certain criteria must be met. Rule 89 states in pertinent part:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Rule 89 contains language identical to Federal Rule of Civil Procedure 15(c). Federal Rule 15(c) has been interpreted to impose a four-part test. Under this test:

> Relation back is dependent upon four factors, all of which must be satisfied: (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

*Schiavone v. Fortune*, 477 U.S. 21, 29, 106 S. Ct. 2379, 2384, 91 L. Ed 2d 18, 27 (1986). The United States Supreme Court further provided:

> The linchpin is notice, and notice within the limitations period Of course, there is an element of arbitrariness here, but that is a characteristic of any limitations period And it is an arbitrariness imposed by the legislature and not by the judicial process.

*Id.* at 31, 106 S. Ct. at 2385, 91 L Ed. 2d at 29 (citation omitted). The Iowa Supreme Court has stated the *Schiavone* holding expresses the proper interpretation of the language in our rule 89. *Porter v. Good Eavespouting*, 505 N.W.2d 178, 181 (Iowa 1993) (citing *Grant v. Cedar Falls Oil Co.*, 480 N.W.2d 863, 866 (Iowa 1992)).

Without question, plaintiff's amended petition satisfies the first criterion of rule 89 for relation back of amended pleading. There is no dispute the basic claim arose out of the same conduct set forth in the original pleading. However, plaintiff has failed to meet the second requirement of rule 89. To meet this requirement, plaintiff must have, within the two-year limitations period, given notice of the institution of the lawsuit such that the opposing party will not be prejudiced in his defense. Horner had no notice of this suit within the statute of limitations. The earliest Horner could have possibly received notice of the institution of the present action is on September 9, 1993, when the trial court granted plaintiff leave to amend and designate Horner as an additional defendant. September 9, 1993, was over seven months past the expiration of the statute of limitations.

Plaintiff asserts since she had been negotiating with Horner's insurance company Horner did have notice of the claim. This argument has already been rejected by our supreme court. *See Jacobson v. Union Story Trust & Sav. Bank*, 338 N.W.2d 161, 164 (Iowa 1983) ("Notice to the insurance company concerning the possibility of suit is not tantamount to notice to the [defendant] that a suit has been filed.")

Even if we impute notice of the lawsuit to Horner based on his activities with the insurer and others, Jenn has failed to establish Horner knew or should have known, but for a mistake in identity, the lawsuit would have been brought against him. Jenn clearly knew Horner was the receiver and maintained some control over the property. There was no mistake in identity which prevented her from bringing Horner into the lawsuit within the period of limitations, and nothing to suggest Horner should have known he would have been sued except for a mistake in identity.

We affirm the trial court on this issue.

**II. Summary Judgment.**

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 237(c); *see Farm Bureau Mut. Ins. Co. v. Milne*, 424 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of a material fact, *Milne*, 424 N.W.2d at 423, and the evidence must

be viewed in the light most favorable to the resisting party, *Thorp Credit, Inc. v. Gott*, 387 N.W.2d 342, 343 (Iowa 1986) The procedure is functionally akin to a directed verdict, and every legitimate inference that reasonably can be deduced from the evidence should be afforded the resisting party. *Id.*; *Sherwood v. Nissen*, 179 N.W 2d 336, 339 (Iowa 1970). A fact issue is generated if reasonable minds can differ on how the issue should be resolved, but if the conflict in the record consists only of the legal consequences flowing from undisputed facts, entry of summary judgment is proper *Milne*, 424 N.W.2d at 423; *Gott*, 387 N.W.2d at 343. If the motion is properly supported, however, the resisting party "must set forth specific facts showing that there is a genuine issue for trial." Iowa R. Civ. P. 237(e).

This is a premises liability case. The Restatement (Second) of Torts provides that, given certain conditions, possessors of land are liable for injuries related to a condition on the land. A possessor is defined as:

> (a) a person who is in occupation of the land with intent to control it or;
> (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or;
> (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

Restatement (Second) of Torts § 328E (1965).

Our supreme court has repeatedly applied the Restatement (Second) of Torts in premise liability cases. *See, e.g., Downs v. A & H Constr., Ltd.*, 481 N.W.2d 520, 524 (Iowa 1992) (interpreting § 328E to find owner/general contractor was not possessor

and thus owed no duty to employee of subcontractor); *Galloway v. Bankers Trust Co.*, 420 N.W.2d 437, 441 (Iowa 1988) (interpreting § 328E in action against owners and managers of mall, finding bank acting as trustee was not possessor under Restatement definition).

Our review of the record shows there was no genuine issue of fact regarding possession and control over the property at issue. Wardway had no control or possession of the property because of its default, the foreclosure proceedings, and the court-ordered default judgment. Balcor's only relationship to Wardway Plaza at the relative period of time was as a mortgage holder. In the presence of a court-appointed receiver, namely, Horner, neither Balcor nor Wardway had any control or right to possess Wardway Plaza. Therefore, neither party owed Jenn a legal duty. Under these circumstances, the trial court was correct in granting the motion for summary judgment.

The trial court is also affirmed on this issue. We determine any other issues the parties may have raised are either covered by this opinion or are without merit. Costs on appeal are taxed to Jenn.

**AFFIRMED.**