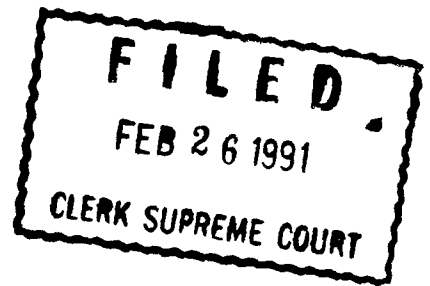


IN THE COURT OF APPEALS OF IOWA

No. 0-390 / 89-1609



JOAN I. PERDUE,

Appellee,

vs.

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MARJORIE E. CRANE, f/k/a MARJORIE PERRIN,

Appellant.

Appeal from the Iowa District Court for Cass County,
Keith E. Burgett, Judge.

Defendant appeals plaintiff's favorable verdict in this
premises liability action. **AFFIRMED.**

John M. French of Stuart, Tinley, Peters, Thorn, Smits,
French & Hughes, Council Bluffs, for appellant.

Scott H. Peters and Jacob J. Peters, Council Bluffs,
for appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

In January 1985, the plaintiff, Joan Perdue, slipped and fell on an icy area located outside a building where she worked for Farmer's Home Administration (FHA). FHA sublet the space from the Cass County ASCS Committee, who leased the building from its owner, the defendant, Marjorie Crane.

Perdue sued Crane based on premises liability. Crane moved for summary judgment contending that she was not liable for Perdue's damages because the tenants of her property were responsible for removing ice and snow on the sidewalks. The district court denied Crane's motion.

The case proceeded to trial. The jury returned a sealed verdict finding that Perdue was 60% at fault and Crane was 40% at fault. The jury also filled in the damage awards even though it had found plaintiff was primarily at fault. After the verdict was returned, the clerk of court notified counsel for both parties.

The parties dispute the occurrences that followed. It is clear the judge was contacted and that Perdue's counsel called the jury foreperson to ask whether the jury intended to award Perdue damages and, if so, whether it intended to find Perdue 60% at fault. The next morning the court and counsel discussed the inconsistent verdict, and the jury was reassembled. Each juror had signed affidavits stating the inconsistency was because of a clerical error by the foreperson. The court then asked each juror, out of the

presence of the other jurors, whether it was the juror's intent that Perdue was 60% at fault and Crane 40% at fault. All the jurors answered that that was not their intent. The court concluded that the percentages of fault on the original verdict were interchanged. The court then entered judgment in favor of Perdue for \$240,000, 60% of \$400,000. Crane appeals.

I.

Crane first contends the trial court erred in overruling the defendant's motion for summary judgment because the property upon which Ms. Perdue fell was allegedly under the control and responsibility of the tenant. The position of the Iowa Supreme Court with regard to summary judgments is well documented:

Summary judgment is proper when there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. The burden of showing the non-existence of a material fact is upon the moving party. While an adverse party generally cannot rest upon his pleadings when the moving party has supported his motion, summary judgment is still not proper if reasonable minds could draw different inferences and conclusions from the undisputed facts. In this respect summary judgment is functionally akin to a directed verdict, every legitimate inference that reasonably can be adduced from the evidence should be afforded the non-moving party and a fact question is generated if reasonable minds could differ on how the issue should be resolved

Knapp v. Simmons, 345 N.W.2d 118, 121 (Iowa 1984). See also, Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457, 464 (Iowa 1984).

The supreme court has also directed the manner in which a summary judgment appeal should be reviewed stating:

In reviewing the grant or denial of summary judgment motions, we view the underlying facts contained in the pleadings and the inferences to be drawn therefrom in the light most favorable to the party opposing the motion, and give to such party the benefit of any doubt as to the propriety of granting summary judgment. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied, and to reverse the grant of summary judgment if it appears from the record that there is an unresolved issue of material fact.

Frohwein v. Haesemeyer, 264 N.W.2d 792, 795-796 (Iowa 1978).

Logically our question is whether a genuine issue of material fact existed at the time the defendant made her motion for summary judgment. After a thorough review of the record, we determine there was a sufficient question of material fact which supports the trial court's overruling the summary judgment motion. We also believe the court was correct in overruling the motions for directed verdict.

II.

It is clear the landlord's agreement placed the responsibility of snow removal of the parking area and drives with the ASCS and that each sublessee had the responsibility for removal of snow from their sidewalk and entrance to the building. It is this part of the agreement that the defendant relies on in claiming she is released from liability.

However, it is equally clear the defendant had the responsibility for all the maintenance on the building

including the repair of the eaves (gutters) and the exterior lights. When this matter was submitted to the jury, it was not on the grounds that the plaintiff slipped and fell on snow and ice that the ASCS and the sublessees' had the responsibility to remove; rather, it was submitted on theories of negligence that the defendant failed to maintain or repair the leaky gutters which allowed water to drip on the sidewalk and in failing to inspect and change the burned-out light bulb near the site of the fall. The defendant admitted that these two responsibilities were hers.

We do not dispute the defendant's contentions as they relate to the extent of the general duties and obligations of the owner of leased premises. In this respect, the defendant cites us to Stupka v. Scheidel, 244 Iowa 442, 447-48, 56 N.W.2d 874, 877 (1952), and to the following statement taken therefrom:

It is true generally that the owner or occupant of realty is under no duty to look out for the safety of a bare licensee who comes on the premises without invitation express or implied. However, the one who has control of realty owes a duty to those who come upon it by express or implied invitation to exercise ordinary care to keep it in condition which will not imperil their safety. [citations omitted]

As a general rule, an owner who has leased a building to another without an agreement to repair it is not liable to the tenant, or to one who has entered the premises on the tenant's invitation, for personal injury sustained by reason of their unsafe condition. However, this rule does not apply where the owner retains control, or the owner and tenant have joint control, over the premises or the part thereof where the injury occurs.

The exception to the rule is frequently invoked where an injury is caused by the condition of a hall, passageway, stairway or elevator over which the owner, alone or jointly with a tenant, has control. Such an owner is liable to one who has been so injured after coming upon the premises by invitation from the tenant. There are other exceptions to the general rule which need not be considered. [citations omitted]

We are unable to find that the Stupka case is of any help to the defendant. The first paragraph of the quoted provision relates to the extent of the duty owed by the owner or occupant of realty to bare licensees and invitees. The second and third paragraphs concern the various exceptions to those general rules of liability of an owner to a tenant or to one who has entered the premises on the tenant's invitation.

We need not reach the question as to whether any of the exceptions apply for as we pointed out earlier the plaintiff's claim rests on elements of negligence that concern the defendant's duty to maintain and repair. We find that a genuine issue of material fact exists on the question at hand and thus affirm the trial court's ruling with regard to defendant's motion for summary judgment and its rulings on defendant's motions for directed verdict.

III.

Defendant's second assignment challenges the trial court's refusal to instruct on certain affirmative defenses. First, the defendant contends an instruction outlining the duties owed to a licensee should have been

given. The trial court submitted an instruction which was more "invitee" oriented. The plaintiff directs us to case law which indicates an employee of a tenant will assume the same status and rights of his employer vis-a-vis landlord. Casey v. Valley Savings Bank, 231 Iowa 19, 24, 300 N.W. 733, 736, (1941). The defendant fails to provide any instructive authority which convinces us the plaintiff should be viewed as a licensee. We find under the circumstances here that the plaintiff is an invitee.

The defendant also objects to the court's instruction on sole proximate cause. However, the defendant fails to cite any authority supporting the alleged error. We have reviewed the sole proximate cause instruction and when it is considered in the context of this case, we find it to be proper.

In addition, the defendant objects to the court's instruction regarding the responsibility of the owner of the premises. The court utilized Iowa Civil Jury Instruction 900.4 and defendant contends the instruction should have been tailored more toward the facts and circumstances of this case. More specifically, the defendant contends the instruction should have drawn a greater distinction between the owner and tenant.

While we agree the instruction might have been improved, we think the submission was not reversible error. The defendant further contends the instruction failed to instruct the jury on the theories, duties,

obligations and evidence in the case. The only responsibility of the tenant with regard to the upkeep was snow removal. We find the instruction was sufficient because the owner was responsible for upkeep on the property, including the lights and the gutters which were tangential to plaintiff's fall. We therefore affirm the instructions given by the trial court.

IV.

The defendant's third assignment of error asserts the trial court improperly reassembled the jury and reformed the verdict after the jury returned an inconsistent verdict containing a clerical error.

As stated earlier, the jury initially returned a verdict finding the defendant to be 40% at fault and assigned 60% fault to the plaintiff. Despite the jury finding plaintiff to be over 50% at fault, it continued on to the next question and determined the plaintiff had suffered \$400,000 in damages. Recognizing an inconsistency in the sealed verdict, the trial judge recalled the jury the following morning and subsequently reformed the verdict.

There is no question the supreme court has recognized the power of the trial court to recall a jury and reform a verdict when an inconsistency is present in the final verdict form.

It is we think, a common and proper practice, where informal or defective verdicts have been returned, to recall the jury for their correction, where the same can be done promptly or within

reasonable time, and verdicts thus corrected are permitted to stand, in the absence of any showing from which prejudice to the losing party may be inferred.

Cohen v. Sioux City Traction Co., 141 Iowa 469, 476, 119 N.W. 964, 966 (Iowa 1909).

One of the most recent cases that touches on the issue before us is Rutledge v. Johnson, 282 N.W.2d 111 (Iowa 1979). In that case, the jury returned a sealed verdict. When the clerk opened the verdict the morning following deliberation, it was discovered that the foreman had failed to sign two of the verdict forms. The court reassembled the jury, it retired to deliberate, and it returned with a completed verdict. Plaintiffs appealed and the Iowa Supreme Court affirmed, stating:

"In order for this power to recall a jury for the purpose of correcting a ministerial error to be properly exercised, certain circumstances must be present. First, the form of the sealed verdict should have been the result of inadvertence or clerical error. Secondly, proof of the ministerial nature of the mistake should be clear and indisputable." Id. at 114.

Further, in its holding, the supreme court stated:

"In summary, we confirm the long-recognized power of trial courts to recall a separated or discharged jury for the purpose of correcting a ministerial error in a sealed verdict. This power is excluded from the provisions of rule 203(c) as long as (1) the court neither requires nor permits further deliberations by the jury, (2) proof of the ministerial nature of the error is indisputable, and (3) the losing party fails to show prejudice resulting from the reassembly of the separated or discharged jury." Id. at 117.

And, perhaps most important to the instant case:

"Either method of inquiry, questioning the jury in open court or submitting written questions for it

to consider upon retiring, is appropriate, providing the jury engages in no further deliberations and the appellant is not prejudiced." Id. at 116, 117.

A more recent case also discussed this same issue. Prendergast v. Smith Laboratories, 440 N.W.2d 880 (Iowa 1989). In that case, the supreme court remanded the case for a new trial rather than accept the reformed verdict because the jury had not reached a decision as to the total damages sustained by the plaintiff. However, the court recognized that had the jury reached a total damage amount, juror testimony would have been permissible for the purpose of reforming the verdict.

The court discussed prior cases regarding verdict reformation and stated:

We have recognized in these decisions that the common law rule rendering juror testimony incompetent to impeach a verdict does not apply to exclude evidence that the jury made an error in recording an otherwise unanimous verdict.

Id. at 883, see Rutledge v. Johnson, 282 N.W.2d at 114-15.

The court stated further:

We have allowed reformation of a jury verdict based on juror testimony that it was inaccurately rendered even where the verdict form returned was facially consistent and logical.

Prendergast v. Smith Laboratories, Inc., 440 N.W.2d at 883; see P. M. Lattner Mfg. Co. v. Higgins, 196 Iowa 920, 195 N.W. 746 (1923).

In the case at bar, the verdict rendered by the jury was clearly illogical. The jury found the plaintiff to be 60% at fault and still awarded her a substantial amount of

damages. When the court, with counsel present and with the consent of counsel, polled the jurors, each stated it was not their intent to find plaintiff 60% at fault and defendant 40% at fault. The trial court had before it the affidavits of each of the jurors stating under oath that their vote was that Joan Perdue was 40% at fault and Marjorie Crane was 60% at fault and that the jury foreman mistakenly put the 60% figure after Joan Perdue's name and the 40% figure after Marjorie Crane's name. Each juror stated that it was an inadvertent clerical error and it was his/her intent to have Crane found 60% at fault and Perdue 40% at fault. Under the circumstances here, we agree with the trial court that it was a clerical error and concur that it was proper for the trial judge to reform the verdict.

AFFIRMED.

Schlegel, P.J., concurs; Sackett, J., concurs and dissents.

SACKETT, J. (concurring in part and dissenting in part)

I agree with the majority in all respects except for their decision to affirm the trial court in changing the jury verdict.

A sealed verdict was returned, signed by all jurors, fixing plaintiff's fault at sixty percent and defendant's fault at forty percent, and then assessing damages.. After the jury dispersed and the clerk advised counsel of the verdict, plaintiff's attorney had a conversation with the jury foreman. On the basis of this conversation, plaintiff sought to have the verdict changed. While I have no problem with the plaintiff's attorney talking to a juror after discharge, I cannot agree with a trial court changing a verdict after a jury has been discharged and after an attorney for one side has had a conversation about the verdict with a juror outside the presence of the court and adverse counsel.

Even if the verdict was inconsistent, the procedure used by the trial court was not in accordance with the procedures the comparative fault statute directs be used before discharge if there is an inconsistent verdict. The correct procedure is dictated by Iowa Code section 668.3(6), which provides:

In an action brought under this chapter and tried to a jury, the court shall not discharge the jury until the court has determined that the verdict or verdicts are consistent with the total damages and

percentages of fault, and if inconsistencies exist the court shall do all of the following:

- a. Inform the jury of the inconsistencies.
- b. Order the jury to resume deliberations to correct the inconsistencies.
- c. Instruct the jury that it is at liberty to change any portion or portions of the verdict to correct the inconsistencies.

Iowa Code section 668.3(6) was not followed. No determination of inconsistency was made before the jury was discharged. The jurors were asked, "Was it your intent that Joan Perdue be found sixty percent at fault and the defendant Marjorie Crane forty percent at fault?" After the jurors responded in the negative, the court, without further inquiry, although further inquiry was requested by counsel, stated it was of the opinion the figures were interchanged and, as a consequence, judgment entry would be made on that basis. Accordingly, the court entered a judgment finding Marjorie Crane sixty percent at fault.

The jurors were not informed of the inconsistencies, they were not ordered to resume deliberations, they were not advised they were at liberty to change the verdict. The trial court just did it for them. The result was to change judgment for plaintiff from zero to \$240,000. A new trial may be proper, but I cannot agree with the manner in which the verdict was amended.

This case illustrates the problems of sealed verdicts, particularly with the more complex verdicts in comparative negligence cases. It is advisable for court and attorney to be available until the jury returns, so problems such as this can be corrected before the jury is discharged.