

82-LW-1424 (10th)

John H. Jackson, Jr., et al., Plaintiffs-Appellants

v.

Holiday Inns, Inc., Defendant-Appellee.

No. 80AP-914.
10th District Court of Appeals of Ohio, Franklin County.
Decided on February 9, 1982.

GINGHER & CHRISTENSEN, MR. JOHN M. MAHOTA, MR. MALCOLM MILLER and MR. DANIEL G. HALE, of Counsel, 311 East Broad Street, Columbus, Ohio 43215, For Plaintiffs-Appellants.

FROST, KING, FREYTAG & CARPENTER, MR. ROBERT E. FROST and MR. DANIEL R. FREYTAG, 370 South Fifth Street, Columbus, Ohio 43215, For Defendant-Appellee.

DECISION

WHITESIDE, J.

Plaintiffs appeal from a judgment of the Franklin County Court of Common Pleas and raise four assignments of error as follows:

"1. In directing a verdict for the defendant, the trial court erred by holding that a motel assumes no duty to its patrons when it undertakes to clear away a natural accumulation of ice and snow from its common passageways.

"2. The trial court erred by not permitting the jury to determine both whether the motel breached its standard of care, and whether the motel knew or should have known that the condition it had created was substantially dangerous.

"3. The trial court erred when it invaded the province of the jury and precluded plaintiff from recovering on the basis that plaintiff either knew or should have known that the condition the defendant created was substantially dangerous.

"4. The trial court erred by excluding photographs taken after the accident but which proffered testimony demonstrated would have depicted conditions at the accident time."

Plaintiffs brought this action to recover for injuries sustained by plaintiff John Jackson while they were guests at defendant motel from a fall on an icy sidewalk.

The incident occurred following severe weather conditions in the Winter of 1978, including snow and prolonged freezing temperatures. The case was tried to a jury, but the trial court sustained defendant's motion for a directed verdict, stating, pursuant to Civ. R. 50(E), as reasons therefor, the following (Tr. 453-455):

"* * * This case reveals from the evidence, that the Jacksons arrived at the Holiday Inn North on or about February 9th, 1978, when the weather conditions in central Ohio were cold and the weather, temperature had not been above freezing for several days.

"On January 26, central Ohio had a severe blizzard unparalleled for several years. On the following day, February 10th, 1978, the weather was approximately five degrees above zero. After Mr. Jackson attended some functions to which he and Mrs. Jackson went to dinner and they returned to the Holiday Inn and parked their vehicle two or three parking spaces west of the entrance we have been referring to

in this case as number three.

"The parking lot, at the time was covered with ice and snow with no efforts to remove it by the Holiday Inn. After one trip to his room, Mr. Jackson returned to his car for a package or packages. Upon attempting to return to his room, he took a route in front of his car, one he had not chosen before. He slipped on a protruding piece of ice on the entrance ramp, slipped and fell, breaking his left ankle.

"The sidewalk and entrance ramp of the entrance number three was level and the lighting, though shadowy, was designed to flood the-light the entrance way.

"It is clear that the cause of the plaintiff's fall was the natural accumulation of ice and snow as a result of the severe winter blizzard.

"Plaintiff himself claims that he did not see and had no actual knowledge of the protruding ice on the ramp.

"Now, the law in Ohio is very clear, that the failure to remove ice and snow from a parking lot, adjacent walks, does not constitute negligence. This rule rests upon the principle that owners owe no duty to protect business invitees against dangers which are known to them or should be known, or which are so obvious and apparent to them that they may reasonably be expected to discover it.

"The danger of ice and snow is obvious, and a hotel owner may reasonably expect that an invitee in this premises will discover and realize the danger and protect himself against it. The evidence in this case seems uncontradicted that the plaintiff travelled by icy paths no less than six times before he fell.

"The Court finds that reasonable minds could come to but one conclusion: the Plaintiff should have discovered and realized the danger of the slivers or protruding ice and protected himself against it, especially in a severe blizzard and cold weather during 1978.

"There is no evidence in this case that the Plaintiff (sic) created a condition substantially or more dangerous and by the reason of their knowledge of weather conditions, prevailing generally in the area of central Ohio at that time and there is no such proof that Defendant, Holiday Inn, knew of a more dangerous condition or conditions, then, there is no proof of actual negligence. There is no evidence that the icy protrusion had existed for such a length of time as the Holiday Inn would reasonably have been expected to correct it or put up a warning sign.

"In fact, there is no evidence that the Defendant ever knew of protruding ice prior to the Plaintiff's fall. * * *"

Although defendant in this court argues that plaintiff assumed the risk of injury under the circumstances, the foregoing findings of the trial court indicate no such finding but is limited to a finding that plaintiff John Jackson's injuries were a direct result of his own negligence.

Assumption of risk is predicated upon venturesomeness, but one cannot be found as a matter of law to have assumed the risk of injury where he is confronted with the choice of utilizing two dangerous paths merely because the one he chose resulted in injury. The evidence in this case is uncontroverted that plaintiff John Jackson had to transverse an icy, slippery path in order to travel from his automobile to his motel room. While there was more than one hazardous path he could select, we find no basis for finding assumption of risk in choosing the one that he transversed at the time of his injury, even though he had safely crossed over another path on several occasions.

The issues, therefore, are whether plaintiff John Jackson's fall on the ice was the result of some negligence on the part of defendant or some negligence on his own part. The trial court found that, construing the evidence most strongly in favor of plaintiffs, reasonable minds could only conclude that defendant was not negligent but that plaintiff John Jackson was. If the trial court be correct upon either of these issues, we must affirm.

The basic rules of law with respect to natural accumulations of snow and ice are set forth in the first three

paragraphs of the syllabus of Sidle v. Humphrey (1968), 13 Ohio St. 2d 45, as follows:

"1. An occupier of premises is under no duty to protect a business invitee against dangers which are known to such invitee or are so obvious and apparent to such invitee that he may reasonably be expected to discover them and protect himself against them.

"2. The dangers from natural accumulations of ice and snow are ordinarily so obvious and apparent that an occupier of premises may reasonably expect that a business invitee on his premises will discover those dangers and protect himself against them. (Debie v. Cochran Pharmacy-Berwick, Inc., 11 Ohio St. 2d 38, approved and followed.)

"3. Ordinarily, an owner and occupier has no duty to his business invitee to remove natural accumulations of snow and ice from private walks and steps on his premises. (Paragraph two of the syllabus in Debie v. Cochran Pharmacy-Berwick, Inc., 11 Ohio St. 2d 38, approved and followed.)"

More directly applicable to the circumstances in this case is Jeswald v. Hutt (1968), 15 Ohio St. 2d 224, paragraphs one, three and four of the syllabus of which read as follows:

"1. One who maintains a private motor vehicle parking area, for the accommodation of those he serves in a professional or business way, is generally under no legal obligation to illuminate the same at night or to remove a natural accumulation of snow and ice therefrom.

"* * *

"3. 'Darkness' is always a warning of danger, and for one's own protection it may not be disregarded.

"4. An invitee who, in darkness and with knowledge that a private motor vehicle parking area is covered with a natural accumulation of ice and snow, ventures onto such area and slips or trips and falls, either assumes the risk of such misfortune, or, if the one maintaining such area may be charged with any negligence in its maintenance, the one who falls, in the circumstances described, is also chargeable with negligence which is a direct contributing cause of the fall."

Plaintiffs, on the other hand, contend that the applicable rule of law is that set forth in the first paragraph of the syllabus of Oswald v. Jeraj (1946), 146 Ohio St. 676, which reads as follows:

"The owner of an apartment building who reserves possession and control of the common approaches which provide ingress to and egress from such building to and from the public sidewalk and who assumes the duty of keeping such approaches clean and free from ice and snow is required to exercise ordinary care to render such common approaches reasonably safe for use by the tenants."

Plaintiffs also rely upon the Court of Appeals decision in Mizenis v. Sands Motel (1975), 50 Ohio App. 2d 226, the headnote of which reads as follows:

"Where an innkeeper fails to remedy a known hazard on his premises and a guest is left with no reasonable alternative but to subject himself to the condition in order to carry out his normal activities, his acceptance of the risk cannot be regarded as voluntary."

Mizenis is distinguishable for two reasons. First, as we have previously noted, assumption of risk cannot be found as a matter of law, and the trial court did not predicate its decision thereon. Secondly, there is no evidence of a known hazard herein involved, there being no evidence such as that in Mizenis, that a dangerous condition had existed for three days consisting of slippery and dangerous exterior stairways. Rather, there was testimony that defendant's employees were unaware of the condition of the sidewalk in question, and plaintiff John Jackson admitted that he did not know how the ice on which he slipped got on the sidewalk or how long it had been there. (Tr. 298.)

On the other hand, there was some evidence that defendant had taken some steps to clear the walk in question, consisting of plaintiff John Jackson's testimony that it appeared to have been cleared of snow and ice at one time.

Therefrom, a reasonable inference may be drawn that only defendant or its employees would undertake to clear one of its sidewalks of snow. As to the outcropping of ice upon which he fell, plaintiff John Jackson testified (Tr. 239):

"I think we all know what ice looks like. It was part of the general accumulation of snow where I fell by the, from the force of the nature was stacked there or by man, it was part of that mass at that corner."

He indicated that the stack was two to three feet high and described it as follows (Tr. 239):

"That pile was not a single column. It was stacked crevices, snow all along this area and from the large pile at the intersection, this large chunk of ice was jutting out onto the walk. I hit that chunk."

Plaintiff further testified that on this occasion he used the walk rather than walking across the parking lot because he felt it was closer. He also testified that the walkway appeared to have been "virtually cleared compared to the parking lot." (Tr. 328.) He also testified that it was dark and shadowy, stating (Tr. 328):

"The lights and the building designed, I assume, to illuminate the exterior, were causing shadows on the sidewalk because of the high piles of ice or snow and ice.

"Obviously, somebody had looked like a hand shovel because of the erratic pattern and stacked snow adjacent to the walk." (Sic.)

He also testified that he walked very carefully, further stating (Tr. 329):

"I, unfortunately, I took the most direct route. I stepped up over the curb because there was snow piled over the curb, I stepped over that on to the walk and because of the cars parked very narrow walkway and I was watching where I was going, carrying the packages. Then got close to the entrance and walked up and that was it.

"* * *

"It appeared clear but it was difficult to see and because of the shadows that existed and the cars parked so close and whatever lights anywhere in the lot did not meet to form a lighted surface on which to walk."

While we do have some difficulty with the conclusion of the trial court, this does not indicate prejudicial error under the circumstances of this case. We are unable to find any evidence which would at the same time support a finding that defendant was negligent but plaintiff John Jackson was not, which would be necessary in order to reverse the judgment of the trial court. In other words, construing the evidence most strongly in favor of plaintiffs, there is no evidence of direct, active negligence on the part of defendant. However, assuming that, contrary to Jeswald, supra, from the mere existence of the icy patch, reasonable minds could conclude that defendant had constructive notice thereof and was negligent in permitting it to remain in an area that appeared to have been cleared, reasonable minds can only conclude under such circumstances that plaintiff John Jackson was also negligent in walking along the walk in an area which he described as being obscured from clear vision by shadows, even though he knew of the general condition of the area. By his own admission, the sidewalk had not been completely cleared of any ice and snow but had only been "virtually cleared." See the fourth paragraph of the syllabus of Jeswald, supra.

Even though there might be some merit both to defendant's contention that there is no evidence of negligence on the part of defendant, and plaintiffs' contention that there is no evidence of negligence on John Jackson's part, coupling these together would necessarily result in an affirmance since there could be no liability under such circumstances. Under the circumstances of this case, even assuming that reasonable minds could differ upon the negligence issue, we find no basis upon which the trier of the facts could reasonably make different findings with respect to plaintiffs than with respect to defendant upon the negligence issue. If a trier of the facts were to find defendant negligent under the circumstances of this case, necessarily, plaintiff John Jackson must also be found to be negligent. This is the necessary conclusion we must draw from Jeswald, supra, especially the fourth paragraph of the syllabus. Were Jeswald not the rule of law in Ohio, and a different rule of law were applicable, the conclusions reached by the dissent might be appropriate.

The majority does feel that there is merit to the position taken by the dissent. A motel-keeper arguably should have some duty to keep the premises safe for guests, including a duty to keep walkways reasonably free of ice and snow. However, Sidle and Jeswald preclude the imposition of such a duty, specifically the third paragraph of the syllabus of Sidle. The opinion in Sidle indicates that application of Oswald, supra, is limited. The only basis for liability under present law would be that stated in the first paragraph of the syllabus of Debie v. Cochran Pharmacy-Berwick, Inc. (1967), 11 Ohio St. 2d 38, which would require a showing that defendant had notice that the condition was substantially more dangerous than an invitee would reasonably anticipate. There is no such evidence in this case, and plaintiffs have made no such contention.

Turning more specifically to the assignments of error, the first assignment of error is not well taken. The trial court did not expressly find that a motel assumes no duty when it undertakes to clear a natural accumulation of snow and ice from common passageways. While such a finding would be erroneous, there is no prejudicial error in this case for the reason stated above.

Likewise, we find no prejudicial error as to the second assignment of error. As stated earlier, there is no evidence that the defendant created the dangerous condition which caused plaintiff John Jackson's fall. While it might be possible to draw an inference that defendant had cleared the walk in question, it would be impermissible to draw an inference from that inference that defendant had created the dangerous condition, especially in light of plaintiffs' own evidence set forth above. There is no evidence permitting a finding that defendant created the condition in the process of clearing the walk. Such a conclusion can at best be based only on speculation. In any event, for the additional reasons set forth above, there is no prejudicial error. The second assignment of error is not well taken.

The third assignment of error improperly presupposes a finding that defendant created a dangerous condition. While we recognize that plaintiffs to some extent are contending that the virtually cleared walkway constituted a "trap," we find no basis for such a conclusion from the evidence. Plaintiff John Jackson's testimony clearly indicates that he knew that the walk was not a completely safe place to walk and, accordingly, walked very carefully. In addition, he was aware that it was dark, with shadows on the walkway, and that he fell upon an unexpected chunk of ice. However, there was no evidence as to how the ice got there, but plaintiff John Jackson did testify that cars had parked in such a fashion as to restrict the walkway area. In short, there is no evidence that defendant either created or had any special knowledge of this particular condition over and above that available to plaintiffs. In addition, if the condition were so obviously dangerous, it would be of such a nature as one would ordinarily expect those using the sidewalk to be able to see and to protect themselves from. Accordingly, the third assignment of error is not well taken.

The fourth assignment of error relates to the exclusion of certain photographs from evidence. We find no abuse of discretion on the part of the trial court in excluding the photographs, even though it may have been proper for the trial court to have admitted them. Admission of such evidence lies largely within the sound discretion of the trial court. The fourth assignment of error is not well taken.

For the foregoing reasons, all four assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

REILLY, J., concurs.

McCORMAC, J., dissents.

McCORMAC, J., dissenting.

The jury could have found that defendant was negligent; hence, a directed verdict for defendant on that issue was improper. There was evidence from which it could reasonably be inferred that defendant attempted to remove the natural accumulations of snow from the sidewalk where plaintiff fell, and did so negligently, leaving chunks of ice and snow projecting into the dimly lit walk area proximately causing plaintiff's fall.

I disagree with the majority in their conclusion that the trier of the fact could not reasonably make different findings with respect to plaintiff's contributory negligence than it made with respect to defendant's negligence. Those determinations are not so intertwined that necessarily the findings must be the same. The trier of the fact could find that

defendant did not act reasonably when it partially cleared the sidewalks, leaving them in a hazardous condition. The determination of whether plaintiff acted as a reasonable man under the circumstances with which he was confronted is a different question with the possibility of a different answer. Even though plaintiff knew that the sidewalks were icy and hazardous in places, he was a guest at the motel and had to use one of defendant's sidewalks to reach his room. It is reasonable that plaintiff would proceed as cautiously as possible, as he testified that he did, albeit, under conditions which he would prefer were otherwise, rather than sit in his car all night. It is not contributory negligence as a matter of law to proceed as cautiously as possible when confronted with those circumstances. Plaintiff was required to act as a reasonable person would under similar circumstances. That issue was a question of fact for the jury.

The judgment of the trial court should be reversed.