2000

Ernestina Martin v. Safeway Stores Incorporated : Brief of Appellant

Utah Supreme Court

Mark S Miner; Attorney for Appellant.
Merlin R Lybbert; Attorney for Respondent.

STATE OF UTAH

ERNESTINA MARTIN,

Plaintiff and Appellant,

VS. Case No. 14492

SAFEWAY STORES INCORPORTED,

Defendant and Respondant.

BRIEF OF APPELLANT

Appeal from Directed Verdict of
Honorable Hal G. Taylor, District Court
of Salt Lake County, State of Utah

MARK S. MINER
219 Felt Building
341 Main Street
Salt Lake City, Utah 84111
Attorney for Plaintiff and
Appellant

MERLIN R. LYBBERT
7th Floor Continental Bank Building
Salt Lake City, Utah 84101
Attorney for Defendant
and Respondent

TABLE OF CONTENTS

CASES CITED

RULES CITED

UTAH CONSTITUTION

IN THE SUPREME COURT OF THE STATE OF UTAH

ERNESTINA MARTIN,

Plaintiff and Appellant,

VS. Case No. 14492

SAFEWAY STORES INCORPORTED,

Defendant and Respondant.

BRIEF OF APPELLANT

Appeal from Directed Verdict of
Honorable Hal G. Taylor, District Court
of Salt Lake County, State of Utah

NATURE OF THE CASE

Appellant received a disabling and grievous compound fracture of the left leg in a fall on ice concealed by a defective approach and by defective lighting at the store entrance at Midvale, Utah, and recovery is sought therefore.

DISPOSITION OF THE CASE IN LOWER COURT

Honorable Hal G. Taylor granted motion for directed verdict.

REMEDY SOUGHT ON APPEAL

Appellant seeks reversal of order granting motion for directed verdict; an order granting a right to new trial; and, a right to have said cause submitted to a jury.

ISSUES PRESENTED FOR REVIEW

1. Is notice necessary when Safeway created the dangerous condition?

2. Is notice necessary When Safeway permitted faulty construction; permitted total deterioration of neon lights [Tr.-166] [TR-45] [TR-50], permitted flaking, chipping and dishing out of approach so that water would pool and ice would form on the store entrance; [TR-29] [TR-55[

3. Is notice necessary where manager and clerk, Hudson, had a duty to watch for dangerous conditions and walked by hazard several times but failed to discover it? [TR-185] [TR-168]

4. Is a defective entrance which allows water to collect and to form ice a transitory foreign object.

5. Was the ice area a dangerous and hazardous condition that existed over a long period of time, and a strong duty to keep the store entrance reasonably safe; sufficient to impute notice to the store owner? Should Safeway have known of the hazard and taken action to remedy it?

6. Is the meteorological weather report by the United States Weather Department at the Salt Lake City Airport admissible to show what the weather was at Midvale, Utah? Exhibit (4-P) [TR-143]

APPELLANT'S STATEMENT OF FACTS

On January 13, 1976, Ernestina Martin went to the Safeway Store at 723 Center Street, Midvale, Utah with her husband, Abe Martin, to purchase some groceries. They arrived at the store between 9:30 p.m. and 10:00 p.m. Abe Martin parked his car on the east side of the store approximately eighteen feet (18') to twenty feet (20') from the east wall of the store. Ernestina Martin left the automobile via the right passenger side. She took three or four steps on the paking lot, stepped up onto the approach and entrance to the store, proceeded east three to five steps, and slipped on a concealed area of ice. She fell to the ground and suffered a compound fracture of her left leg. Mrs. Martin sceamed and her husband, Abe Martin, who was locking the car, rushed to her aid. It was not until after Ernestina Martin fell that she and her husband were able to ascertain that the ice patch on

which she fell existed; and this was only determined by feeling the ice with their hands. [TR-6]. The approach to the store was very dark by reason of the fact that Safeway had permitted their approach lights to become in complete disrepair and the entrance at the point where Mrs. Martin fell was completely and totally dark. [TR-45]. There was further concealment as well, since the ice had formed in a defective "dished" out portion of the approach; said defect existed over a long period of time. [TR-65 to 68]

Abe Martin placed Ernestina Martin in his automobile. He then ran into the store and reported the fall to Rueben C. Martinez, the Assistant Store Manager. After hearing Mr. Martin's report, Rueben Martinez obtained a flashlight and went directly to the iced area and carefully examined same. Abe Martin, Rueben C. Gomez, and Mrs. Jillen Gomez all agreed that the icy area where Mrs. Martin fell was not visible without the use of a flashlight. [TR-46]

The ice patch which caused the fall of Mrs. Martin was carefully examined by Abe Martin, Rueben Martinez and Jillen Gomez. Rueben Martinez decided not to salt this area and left it in its original state so that the defective area could be shown to the store manager, Neil Johnson, on the following morning. That morning, after Mr. Martinez showed store manager, Neil Johnson, the icy area on which Mrs. Martin fell, the area was salted. During the morning of January 14, 1975, Abe Martin went to the Midvale Camera Shop and employed Elden Halladay, a professional photographer; together they proceeded to the Safeway Store and photographed the area where Mrs. Martin fell. The photographs are in evidence as Exhibits 1 and 3.

The accident area where Mrs. Martin fell consists of flaked and chipped cement which has been "dished" out so that approximately one quarter inch (¼") of water was permitted to accumulate in a pool and freeze solid. This area is distinctly shown in Exhibits 1 and 3 [also TR-93]. The photographs illustrate that a hazardous area of ice existed and had previously been approximately one foot larger in diameter than that actually shown in the photographs. The ice and water had been permitted to stand for considerable time and water marks showed that the area had decreased approximately one foot all the way around through evaporation. All of which indicated that the patch of ice had been permitted to exist for a substantial period of time. The premises were defective in that the accident area

was pitted, flaked, and chipped. Broken neon lights left the area totally dark and concealed a large, heavily iced area which obviously had existed over a long period of time. Such conditions had existed over such a long period of time that Safeway could not avoid knowledge of its presence or their duty to remove or repair such conditions. Safeway failed to keep their premises in good state of repair. The store owners failed to remove a dangerous condition, existing for a long period of time, that in the exercise of ordinary care, they should have known of its existence, realized its potential danger and taken action to remedy same.

STATEMENT OF POINTS

POINT I

The Trial Court erred in directing a verdict against the Plaintiff since there was overwhelming evidence that Safeway created the dangerous conditions which existed at their store in Midvale, in that:

A. The Defendant permitted and tolerated defective lights. Safeway failed to inspect their lights for a long period of time when a casual daytime glance would have revealed that the defective lighting condition would be hazardous and dangerous at night.

B The sidewalk in the area of the fall was of faulty construction and faulty upkeep. Safeway permitted the area to become so dished out, flaked and pitted that it would hold one-quarter inch (¼") or more of water which would freeze and become a solid patch of ice. This patch of ice was permitted to stand and remain frozen for exceeding long periods of time. That the ice area had existed over a considerable period of time was overwhelmingly proven by the photographs and testimony.

C. Safeway had a continuing duty to use ordinary care to keep the store entrance in a good state of repair; and the store owner is obligated to exercise ordinary care to keep the premises reasonably safe for the protection of those partronizing the store. Safeway had a duty to exercise ordinary care to see that the particular portion of the premises used by the Plaintiff was reasonably safe.

POINT II

The Safeway Store had either actual and/or constructive notice of the dangerous

condition or that the dangerous condition had existed for such period of time that in the exercise of ordinary care, the store owners should have been aware that such hazardous conditions existed and taken action to remedy it. Actual notice is only required for transitory foreign objects.

POINT III

The Court erred in not allowing the weather report, Exhibit P-4, in evidence to show the weather conditions from January 10 to January 13, 1975.

POINT I

THE COURT ERRED IN DIRECTING A VERDICT AGAINST THE PLAINTIFF. [TR-299]

Directed verdicts are carefully reviewed by the appellate courts and the plaintiff Martin, is given the benefit of her entitlement to favorable aspects of the evidence and the reasonable inferences therefrom. On this type of a verdict, the evidence is reviewed and studied in the light most favorable to the plaintiff. If the evidence is such that reasonable men could differ after presuming that plaintiff's evidence is true, the matter should be submitted to the jury. See Section 10, Article 1, Constitution of Utah; *Finlayson v. Brady,* 121 Utah 204; Rules 38 and 39 U.R.C.P.; *Hindmaster v. O. P. Skaggs Foodliner,* 21 Utah 2d. 413; 446 P.2d 410; ***Holland v. Brown,*** 15 Utah 2d. 422; 394 P.2d 77.

POINT II

SAFEWAY HAD ACTUAL AND/OR CONSTRUCTIVE NOTICE OF DANGEROUS CONDITION. WHERE SAFEWAY CREATED THE HAZARDOUS CONDITION AND/OR PERMITTED THE SAME TO EXIST, THERE IS NO NECESSITY TO PROVE ACTUAL NOTICE.

It should be borne in mind that this accident happened in a dark walkway where a shopper was required to go. Safeway had permitted the neon lighting to so deteriorate that the tubes hung broken from the canopy (see Exhibits, TR-43). Johnson, The manager of the store, had never seen the lights working. [TR-49, TR-50]. Customer Gomez testified that the lights were broken. [TR-50].

There were defects in the store approach itself. It was improperly constructed and had become so deteriorated that one-quarter inch (¼") of water was permitted to accumulate

and freeze over a large area. The sidewalk was flaked, chipped and "dished out" permitting ice to form. Such conditions give rise to a jury question as to whether or not Safeway exercised reasonable care to find and correct known defects and hazardous conditions. See *DeeWeese v J. C. Penney Company,* 5 Utah 2d. 116, 297 P.2d 898. See also, Exhibits 1 and 3, [TR-64], [TR65], [TR-70], Exhibits 25-28, inclusive; *Erickson v. Walgreen Drug Co.,* 120 Utah 31; 232 P.2d 210. Plaintiff's evidence conclusively shows that the dangerous and hazardous condition had existed over a long period of time, even though Safeway had a strong duty to keep the premises reasonably safe and should have remedied same.

With regard to the length of time the ice area existed, the Court's attention is directed to the testimony of the store manager, Johnson, who swore under oath:

> "The walk was cleared Friday, January 10, 1975; snow fell intermittently, the walk was cleared several times that day. It was also salted. The parking lot was plowed by Lindon Olson on the morning of Januay 11, 1975. The walkway was dry on January 11, 12, and 13."

The evidence is clear that there had been no snow fall for three (3) days. The ice area, of necessity, must have existed over a *three day period*! This shows conclusively, a failure to inspect; and, that Safeway not only created the condition then and there existing, but also, permitted the same to exist for three (3) days. Under these facts as proven, the basic rules impose liability for this grevious injury since there was reasonable evidence that Safeway knew or should have known of the defect and remedied it. Plaintiff also proved by a preponderance of the evidence that the condition or defect was created by Safeway, its agents and its employees; therefore, proof of actual notice was not required.

Hudson, Safeway's employee, testified that he walked by the hazard twenty or thirty times on the night Mrs. Martin fell and, at no time, did he see the ice area. [TR-185-187] Since the iced area existed during the twenty or thirty inspections, he *should have seen* the dangerous condition. Safeway owed their business guests a high degree of care to see that the store entrance was reasonably safe. This includes a duty to inspect; a duty to watch and discover dangerous conditions; and, a duty not to create dangerous conditions or to permit such conditions to continue to exist. There is a continuing duty to keep premises in good repair. Actual notice is only necessary when transitory objects are involved; even then, when

the dangerous condition exists for a period of time, the Court concludes that constructive notice has been given and that the store owner should have known of it and remiedied same.

Notice of defective lights must be conceded. [TR-43] Notice of dishing out'', flaking, and chipping of the cement at the entrance to the store cannot be denied [TR-66]. Certainly, permitting water to form a pool and to freeze over a three day period so that it became a part of the entrance itself, completely distinguishes this case from the transitory foreign object cases. See, *Owen v. Kroger Company,* 238 Ark. 413; 382 SW.2d 192 (1964); *Surface v. Safeway Stores, Inc.,* 166 Fed. 2d 927; *DeeWeese v. J. C. Penney,* (supra); *Erickson v. Walgreen,* (supra); *Hindmark v. O. P. Skaggs,* 21 Utah 2d 413; 466 P.2d 410. Frequent salting of this area both before and after the plaintiff fell, showed a knowledge and a notice that the dangerous condition existed. This is not a ''grape'' case, nor is it a ''pebble'' or a ''spilt water'' case. This is a care of known neglect, i.e., faulty lights, eroded cement, pooling and freezing of water; all caused by the failure to keep the premises in good state of repair. This Court has always held that if the store owner created the hazardous condition or permitted it to exist over a period of time, there is no necessity to prove notice. See *Campbell v. Safeway Stores, Inc.,* 15 Utah 2d 113; 388 P.2d 409: *DeeWeese v. J. C. Penney,* (supra.).

When an employee fails to propely clean an entrance or does a poor job of removing the snow and ice from the sidewalk approach to a store or business, actual notice is presumed in that the store owner actually created the hazard and/or permitted it to exist, solid ice is not a loose object. Safeway knew that water would accumulate and freeze in eroded, ''dished out'', defective cement. Mrs. Martin's fall occurred at a defective, permanent part of the entrance to this store where the pooling and freezing of water was tolerated over a long period of time. Snow was removed three (3) days prior to Mrs. Martin's fall [TR-254]. Certainly Safeway knew or, in the exercise of reasonable care, should have known of the hazardous condition and had reasonable opportunity and a duty to remedy the condition but failed to do so. This matter being amply proved, should be submitted to a jury. See *Rhodes v. El Rancho Markets,* 4 Arizona App. 183; 418 P.2d 613; El Grande Market No. 2; 13 Arizona 302; 475 P.2d. 961; *Mahoney v. J. C. Penney,* 71 N.M. 244; 377 P.2d 663.

POINT III

THE COURT ERRED IN NOT ADMITTING INTO EVIDENCE "EXHIBIT 4-P", THE UNITED STATES WEATHER BUREAU REPORT COMPILED AT THE SALT LAKE CITY AIRPORT. IT ACCURATELY SHOWED THE WEATHER FOR SALT LAKE COUNTY AREA FOR THE MONTH OF JANUARY, 1975, AND MORE PARTICULARLY, FOR THE DAYS IN QUESTION.

This weather report was extremely material to the Plaintiff's case in proving that the store manager, Johnson, told the truth in his interrogatories [TR-254], to-wit:

> Snow fell Friday, January 10, 1975; walk was cleared several times that day. It was also salted. The last time being approximately 3:00 to 4:00 p.m. on that day. The parking lot was plowed by Lindon Olson on the morning of January 11, 1975. The walkway was clean and dry on January 11, 12 , and 13."

The weather report would show "no snow" on January 11, 12, and 13, 1975. This weather report would have also revealed that Martinez was not truthful when he testified that he cleaned snow off of the walkway on January 13, 1975 [TR-168]. The weather report would show that the store manager, Johnson, varied the truth (on page 28 of the transcript when he testified that it snowed on January 13, 1975, all counter to his sworn interrogatories [TR-254] and, the weather report would have substantiated the Plaintiff's allegation that the ice was permitted to remain at the entrance to the store for approximately three (3) days. The Plaintiff should have been given the right and the privilege to prove these important facts.

A United States Weather Report is a public record and, as such, is admissable to show weather conditions. See *United States v. Meyer,* 113 F.2d, 387; 311 U.S. 706; 61 Sup. Ct. 174; 85 L.Ed. 459. Weather reports are prepared by public officials pursuant to a duty imposed by law and, as such, are admissible to show weather conditions. See *Ballhorst v. Hahner-Forman Cale, Inc.* (1972) 207 Kansas 89; 484 P.2d 38, (43-44), where a United States Weather Bureau Report was admitted to show evidence of wind direction and velocity in a personal injury case. See also, *DeeWeese v J. C. Penney,* (supra), 5 Utah 2d. 116 (at page 122) where this Court said, "The official weather report admitted into evidence. . .**" The Court not only admitted said report into evidence, but also relied upon same in arriving at its decision. Our own Utah codified Rules of Evidence give express recognition to the rule

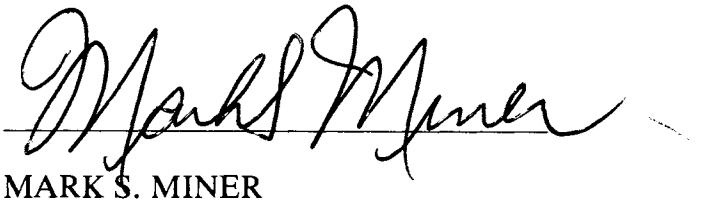
that weather reports compiled by United State Weather Bureau are admissible.

Appellant submits that the weather report should have been admitted as part of her case.

CONCLUSION

Plaintiff, Ernestina Martin, received a compound fracture (her leg was rotated at a 90° angle) [TR-112]; her fibula was fractured an inch and a half below the head of the fibula; second fracture was a long, oblique fracture, three inches below the head of the fibula; large fracture containing three separate parts - comminuted fracture - displaced from each other [TR-112]. See also x-rays, Exhibits 17, 18, 19, 20, and 21. All of which required bone grafts and the placing of screws and internal fixation devices in her leg which resulted in a fifteen percent (15%) permanent partial disability. The foregong injuries were caused by Safeway's negligence in failing to repair and remedy hazardous and dangerous defects and conditions which existed in the nature of a hidden trap at the entrance way and premises of the Safeway Store. Plaintiff, as a customer had a right to expect that Safeway would obey the law and keep their premises safe. Under the law, Plaintiff is entitled to a fair jury trial. It is respectfully requested that the Directed Verdict be reversed and held for naught and that the matter be returned to the District Court for trial by Jury.

RESPECTFULLY SUBMITTED,



MARK S. MINER
Attorney for Plaintiff and
Appellant
219 Felt Building
341 Main Street
Salt Lake City, Utah