2000

Ernestina Martin v. Safeway Stores Incorporated : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

PREME COURT

OF THE STATE OF UTAH

ERNESTINA MARTIN,

Plaintiff and
Appellant,

vs.

Case No. 14492

SAFEWAY STORES
INCORPORATED,

Defendant and
Respondent.

BRIEF OF RESPONDENT

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

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IN THE SUPREME COURT OF THE

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ERESTINA MARTIN,

Plaintiff/Appellant,

vs. Case No. 14492

SAFEWAY STORES, INCORPORATED,

Defendant/Respondent.

- -

BRIEF OF DEFENDANT/RESPONDENT

NATURE OF THE CASE

This is a suit for personal injury sustained as a result of a slip and fall on a spot of ice on a sidewalk outside a Safeway grocery store.

DISPOSITION IN LOWER COURT

This case was tried before the Honorable G. Hal Taylor, District Court Judge of the Third Judicial District. At the conclusion of all the evidence the trial court directed a verdict of no cause of action.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the trial court's decision.

STATEMENT OF FACTS

Plaintiff/Appellant's statement of facts is inaccurate in several respects.

It is uncontroverted that on January 13, 1975 plaintiff fell and was injured outside a grocery store owned by Safeway Stores, Incorporated (hereinafter "Safeway").

It had been snowing intermittently throughout the day. (R. 27-28; 81; 186). Safeway employees had cleaned and salted the sidewalk at 2;00 P.M. and again at 5;00 P.M. (R. 82; 85; 168). The Safeway employees kept the sidewalk as clean as possible so as to avoid water being tracked in that would later have to be mopped. (R. 168-169).

Between 5:00 P.M. and the time that plaintiff fell, Bruce Hudson, a Safeway courtesy clerk carrying groceries out of the store for customers, walked over the area where the plaintiff fell some twenty to thirty times. He did not observe it to be slippery or icy, although it was wet. (R. 185).

The evidence at trial was conflicting as to exactly where the plaintiff fell, but the evidence taken in the light most favorable to the plaintiff indicates that the ice formed on a spot in the sidewalk where there was slight "spalling" or flaking of the concrete. There had been no

previous problem of ice or water collecting at this particular spot. (R. 155).

The Safeway manager did testify that he has occasionally seen water or snow dropped onto the sidewalk by cars which were parked with their hoods protruding slightly over the edge of the walkway. (R. 157).

At one time neon lights were installed in connection with the canopy which extended across the store front and the Safeway sign. (R. 153). These lights had been inoperable for several years prior to the accident. (R. 43). There is no evidence that these lights were needed for adequate lighting, however. There were two parking lights in the immediate area of the accident which were working the night of the accident. (R. 151; 185).

After plaintiff fell the area was examined by the plaintiff's husband; Mr. Ruben C. Martinez, a Safeway employee; and Mrs. Julaine Gomez, a customer. They found a thin transparent spot of ice about twelve inches by fourteen inches. (R. 61, 172).

Either the next morning or the following morning the plaintiff's husband returned with a photographer who took photographs of the spot where the "spalling" was. (Ex. 1 and 3). However, the condition was not the same as when

plaintiff fell because no ice was present. In fact, the place where plaintiff fell could not be located with certainty. (R. 91). Although plaintiff's expert testified that in his opinion the photograph showed salt marks which indicated a "high water line", he admitted that he had no way of knowing whether the line was left there as a result of the ice which caused plaintiff's fall, or on some prior occasion. (R. 75).

ARGUMENT

POINT ONE

PLAINTIFF PRESENTED NO EVIDENCE TO SHOW HOW LONG THE ICE HAD EXISTED.

Contrary to the assertions in plaintiff's brief, absolutely no evidence was presented to the trial court tending to prove when the transparent ice formed on the walkway. All of the evidence admitted at the trial indicated that the day of the accident, January 13, 1975, was a stormy day.

Mr. Johnson, the manager of the Safeway store testified:

> Q. (by Mr. Miner) And now the -- do you recall what the weather was on the 13th day of January 1975?
>
> A. To my recollection it was a stormy day. (R. 27-28).

Mr. Martinez, Safeway's Inventory Control Clerk, testified:

Q. (by Mr. Miner) Now, what was the weather when you went to work? Was it clear or snowy or what was the weather?

A. It was snowy, slushy. (R. 81).

Mr. Bruce Hudson, Safeway's courtesy clerk, said that when he went to work at 5:00 P.M. the walk was being cleaned. He testified as follows:

Q. (by Mr. Miner) Did I understand that when you went to work that somebody was shoveling snow?

A. Yes.

Q. Out in front of the store?

A. Yes. (R. 186).

This testimony is uncontroverted. The evidence at trial established that the employees of defendant shoveled the walkway twice during the afternoon; once at 2:00 P.M. and again at 5:00 P.M. The walk was salted on each occasion. (R. 89). Thereafter the walkway was wet but not icy. One of the Safeway employees took special precautions to see that the walk was properly cleaned because he wished to prevent customers from tracking snow or slush into the store, since he had the responsibility of mopping the store after closing, the evening of the accident. (R. 169).

Plaintiff's husband testified that the ice was clear and was the same color as the sidewalk and could not be seen. (R. 61). Bruce Hudson testified that he had walked

past the area of the accident some twenty to thirty times that evening and had not observed the presence of any ice. (R. 185). Nor had any customers complained of the ice. (R. 186).

Plaintiff presented no evidence to show the temperature, or when freezing could have occurred. Further, the walkway had been twice salted a few hours earlier, and undoubtedly the presence of salt would have prevented freezing at the usual freezing temperature. There was no evidence that weather conditions were such that the precautions taken by the defendant's employees were not reasonable under the circumstances.

No evidence was presented to account for the presence of ice on the sidewalk. It may be that water from melting snow from the hood of a car dropped onto the sidewalk and froze minutes before the accident. In fact, plaintiff's husband testified that plaintiff fell directly in front of his car, which protruded slightly over the walkway. (R. 581). Mr. Johnson, the store manager, testified that he has occasionally seen cars drip water on the sidewalk when the warmth of the engine caused snow on the hood of the car to melt. (R. 156-157). It is significant to note that the icy spot was only twelve inches by fourteen inches in area. The entire surface of the walkway was not icy as would have been the case had the condition causing the formation of the ice been

general in nature. Further, the area of the walkway where the spalling occurred is much larger than the isolated spot of ice described by witnesses.

A thorough examination of the record will show that there is absolutely no credible evidence as to how long the ice had existed prior to the accident, or to account for the presence of the ice.

POINT TWO

A LANDOWNER IS NOT LIABLE FOR A FALL ON ICE OR SNOW UNLESS HE FAILS TO MAKE IT REASONABLY SAFE WITHIN A REASONABLE TIME AFTER THE STORM CEASES.

This Court expressed itself clearly on this issue in Schofield v. Kinzell, 29 Utah2d 427, 511 P.2d 149 (1973). In that case the plaintiff was injured as she walked across a snowy parking lot. This court held:

> The landlord is not a guarantor for the safety of his tenants as they proceed along the common ways. An accumulation of ice or snow upon those portions of the premises reserved for the common use of his tenants may make the landlord liable for injuries sustained by his tenant which are due to such an accumulation, provided the landlord knows, or should have known of the condition and failed to act within a reasonable time thereafter to protect against injuries caused thereby. The mere accumulation of snow or ice does not ipso facto make the landlord liable, he must be given a reasonable time after the storm has ceased to remove the accumulations or to take such measures as will make

> the common areas reasonably safe from those conditions which pose an unreasonable risk of harm to the user. (Emphasis added).

29 Utah 2d at 431, 511 P.2d at 151.

Plaintiff relies upon DeWeese v. J.C. Penny Co., 5 Utah 2d 116, 297 P.2d 898 (1956) as authority for the proposition that the issue of negligence should have gone to the jury. The situation in DeWeese, however, differs from this case in one crucial respect: in DeWeese there was evidence that the storm and dangerous condition had existed for some time and no remedial effort was undertaken, whereas here, there is no evidence as to how long the ice had been on the sidewalk, and reasonable efforts, through cleaning and salting had been previously and timely undertaken.

In DeWeese, plaintiff slipped and fell on a wet terrazzo floor. The evidence showed that terrazzo was slippery when wet and it is customary for store owners with terrazzo entrances to use rubber mats during storms. The evidence taken in the light most favorable to the plaintiff also indicated that the storm began 25 to 30 minutes before the accident.

Like DeWeese, this case involves a permanent condition on the walk: spalling in the concrete. Indeed, there is scarcely a walkway in the state of Utah that does not have some spalling present. No reasonable mind could conclude

that the spalling, standing alone constitutes negligence. There was no evidence that this area became icy during previous storms. In fact, the only evidence was that water and ice had not accumulated at this spot previously. (R. 155).

Unlike DeWeese, in this case there is no evidence as to how long the ice had been present on the sidewalk. In DeWeese, the plaintiff testified that it had snowed from 25 to 30 minutes prior to the accident. In this case, none of the witnesses testified as to how long the ice was present. Nor was evidence presented to account for its presence. In fact, the testimony of defendant's witnesses was uncontroverted in establishing that the walkway had been twice cleared of slush and snow during the afternoon and salted on each occasion. Although it remained wet, a condition which could not be prevented, defendant's employees did take such measures as necessary to make the walkway reasonably safe.

POINT THREE

THE UNDISPUTED EVIDENCE SHOWS THAT SAFEWAY EXERCISED REASONABLE CARE IN SNOW REMOVAL.

The undisputed evidence indicates that the snow was removed from in front of the Safeway store on two occasions during the afternoon of January 13, 1975. Mr. Martinez came to work at

2:00 P.M. on that day. The first thing he did upon arriving was clean the sidewalk. (R. 82). The sidewalk was also salted at that time. (R. 168).

At 5:00 P.M., he again reswept the snow and salted the sidewalk. (R. 85, 168).

Bruce Hudson, the courtesy clerk, passed the spot where the small patch of ice was later found on twenty to thirty occasions between 5:00 P.M. and the time when the plaintiff fell. (R. 185). He did not see the ice on any of those occasions.

Plaintiff's claim that this is evidence of negligence in that he should have seen the ice, ignores the fact that there is absolutely no evidence that the ice was on the sidewalk for any length of time before the plaintiff fell. Further, plaintiff's husband testified that the patch of ice was clear and blended in with the color of the cement. (R. 61); all the other witnesses concurred in this observation. (R. 137; 171; 100).

POINT FOUR

THERE IS NO EVIDENCE THAT THE BROKEN NEON LIGHTS CONTRIBUTED TO THE ACCIDENT.

It is undisputed that near the walkway there were some broken neon lights. These lights had been inoperable for several years. (R. 43). There is no evidence, however,

that the absence of these lights contributed in any way to the accident.

The evidence is undisputed that there were other lights in the parking lot, (R. 151) and that they were on the night of the accident. (R. 185).

There is no evidence that the broken neon lights were for any purpose other than decorative.

POINT FIVE

PLAINTIFF'S "EXHIBIT 4-P" WAS PROPERLY REJECTED BY THE TRIAL COURT.

Plaintiff submitted a weather report, showing weather conditions at the Salt Lake City Airport in January of 1975.

The trial court rejected the exhibit, not because weather reports are per se inadmissible, but because the weather at the Salt Lake City Airport is immaterial to prove the weather in Midvale, Utah, some 20 miles away.

This court held in DeWeese v. J.C. Penny Co., 5 Utah2d 116, 297 P.2d 898 (1956):

> It is recognized that in this mountain valley storms are sometimes spotty and irregular as to time and place of starting, duration and amount of precipitation.

5 Utah2d at 122, 297 P.2d at 902.

The law is clear that in matters of determining materiality the trial court should be accorded a large measure

of discretion and should only be reversed if this discretion is abused. Throop v. F.E. Young & Co., 94 Ariz. 146, 382 P.2d 560 (1963); Tucker v. Lower, 200 Kan. 1, 434 P.2d 320 (1967); Gunderson v. Brewster, 154 Mont. 405, 466 P.2d 589 (1970); Carter v. Moberly, 263 Or. 193, 501 P.2d 1276 (1972).

The Utah Rules of Evidence provide:

> Rule 45. [T]he judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will . . .
>
> (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury.

The weather report offered as Exhibit "4-P" had very little, if any probative value; it created a substantial risk of confusing the issues. The judge did not abuse his discretion in excluding it.

If plaintiff's attorney felt that it was necessary to prove what the weather was on January 13, 1973, he should have done so by the most direct means: by questioning the persons who were present on the day of the accident.

CONCLUSION

The mountain valleys of the state of Utah contain hundreds of miles of concrete sidewalks in varying states of repair. Each winter these sidewalks are subjected to a

constantly recurring cycle of snow, melting, freezing, thawing and refreezing. It is virtually impossible to construct a sidewalk where ice cannot accumulate.

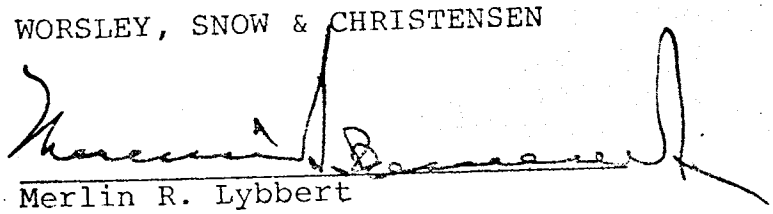
This court has wisely determined that property owners cannot be insurers of the safety of those who come on their property. They should only be held liable for injuries caused by ice or snow where it has existed for a long enough time that the property owners should have known about it and corrected it.

Here the plaintiff failed to produce any evidence to show that the danger had existed for any substantial time before the accident. Had the trial court permitted these issues to go to the jury, any verdict for plaintiff would have been required to be based upon speculation and not upon the evidence. The trial court exercised its proper supervisory powers in determining as a matter of law that reasonable minds could not differ in finding that the defendant's employees met their duty under the circumstances in making the walkway reasonably safe for those risks which could have been observed or anticipated. The trial

court rightly directed a verdict of no cause of action.

Respectfully submitted,

WORSLEY, SNOW & CHRISTENSEN



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STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Kathryn S. Vass, being duly sworn, says that she is employed in the offices of Worsley, Snow and Christense, Attorneys for Respondent herein, that she served the Brief of Respondent upon Appellant by placing a true and correct copy thereof in an envelope addressed to Mark S. Miner, 219 Felt Building, 341 Main Street, Salt Lake City, Utah 84111, and depositing same, sealed, with first class postage prepaid thereon, in the United States mail at Salt Lake City, Utah, on the 3rd day of June, 1976.

Kathryn S. Vass

Subscribed and sworn to before me this 3rd day of June, 1976.

Notary Public, Residing
At Salt Lake City, Utah