STATE OF MICHIGAN

COURT OF APPEALS

JUSTINE HICKMAN and JOHN D. HICKMAN

Plaintiffs-Appellees,

v

COMFORT INN - ANN ARBOR, INC.,

Defendant-Appellant.

UNPUBLISHED
February 11, 1997

No. 188420
Washtenaw Circuit Court
LC No. 94-909-NI

Before: Doctoroff, P.J., and Hood and P.J. Sullivan,* JJ.

PER CURIAM.

Defendant appeals by leave granted from an order issued by the lower court granting plaintiffs' motion for a new trial. We reverse.

This case involved a slip and fall accident which occurred outside the entrance of defendant's motel in January 1992. At trial, plaintiff Justine Hickman (plaintiff) testified that she fell on a patch of ice located on a sloped walkway directly beneath a flat roof overhang that had been constructed without eaves troughs. Plaintiffs also presented an expert witness who opined that the design of the roof where plaintiff sustained her fall allowed water runoff to drop to the pavement below and freeze, thereby posing a hazardous and dangerous condition.

In response, defendant denied the presence of ice where plaintiff fell. Defendant further argued that the roof was designed in accordance with building safety codes, and never posed a problem in the past. Defendant also claimed that it took reasonable precautions to make certain that the walkways were clear and safe.

Before the case went to the jury, plaintiffs requested that the court give the following supplemental instruction:

> Ordinarily, the plaintiff must show that the defendant knew or should have known of the dangerous condition. However, if the defendant or its agents created the

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* Circuit judge, sitting on the Court of Appeals by assignment.

dangerous condition, the plaintiff need not show that the defendant had actual or constructive notice of its existence.

The court refused, opining that the standard jury instruction on premises liability was sufficient considering the facts presented at trial. The court then instructed the jury in pertinent part as follows:

> Now, a possessor of a place of business, as the Defendant was here, has a duty to maintain the place of business in a reasonably safe condition. A possessor has a duty to exercise ordinary care to protect an invitee from unreasonable risks of injury that were known to the possessor or that should have been known in the exercise of ordinary care. A possessor has a duty to inspect a place of business, to discover possible dangerous conditions of which the possessor does not know if a reasonable person would have inspected under those circumstances.
>
> It was the duty of the Comfort Inn in this case to take reasonable measures within a reasonable period of time after an accumulation of snow or ice to diminish the hazard of injury to Mrs. Hickman or other guests.

The jury found that defendant was not negligent. Plaintiffs then moved for a new trial, arguing that the trial court erred in refusing to give the requested instruction. The lower court determined that, without the requested instruction, plaintiffs were improperly required to prove that defendant was aware of the icy condition, even though the case law held that notice is presumed where the defendant is responsible for actually creating the hazard. A new trial was granted.

On appeal, defendant argues that the lower court abused its discretion in ordering a new trial because the requested supplemental instruction involved an issue not directly in dispute at trial, and the alleged error, if any, was harmless. We agree. Whether to grant a new trial is within the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *Beasley v Washington*, 169 Mich App 650, 655; 427 NW2d 177 (1988).

In this case, the supplemental instruction was not necessary for a just resolution of the issues presented at trial. Defendant did not dispute its knowledge or notice of the accumulation of ice on the motel sidewalk. Instead, defendant argued that there was no ice. Defendant never theorized or argued that if ice caused plaintiff's fall, it was not aware of the ice and, therefore, not liable for plaintiff's injuries. The principal issues were whether ice existed where plaintiff fell, and whether defendant had taken reasonable precautions to protect against such hazards. Plaintiffs' requested instruction would not have answered either question for the jury, and, therefore, was unnecessary to the resolution of the case. *Mull v Equitable Life Assurance Society*, 196 Mich App 411, 422-423; 493 NW2d 447 (1992).

Moreover, even if the absence of the instruction constituted error, it was harmless. See MCR 2.613(A). As defendant notes, even if the instruction been given, plaintiffs were still required to establish that plaintiff actually slipped on ice. Nothing in plaintiffs' requested instruction would have permitted the jury to bypass the critical issue of the existence of ice and decide whether defendant actually had notice of the ice. Because notice was not at issue in the case, a failure to give such an

instruction cannot warrant reversal. Accordingly, the lower court abused its discretion in granting plaintiffs' motion for a new trial. [1]

Reversed.

/s/ Martin M. Doctoroff
/s/ Harold Hood
/s/ Paul J. Sullivan

[1] We note that plaintiffs cite numerous cases in which a similar supplemental instruction was given even though the presence of the hazardous condition was not at issue. The present case, however, is distinguishable because the actual existence of the hazardous condition (the ice) was hotly disputed.