4-16-2008

Chapman v. Chapman Respondent's Brief Dckt. 34614

IN THE SUPREME COURT OF THE STATE OF IDAHO

KAY CHAPMAN, an individual,

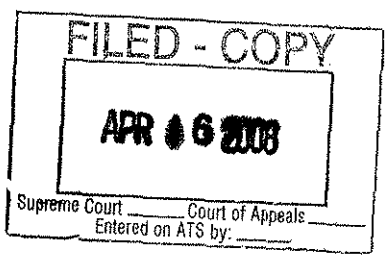
Plaintiff/Appellant,

v.

VONDEL and BECKY CHAPMAN, husband and wife,

Defendants/Respondents.

Supreme Court No. 34614



RESPONDENTS BRIEF

Appealed from the District Court of the Seventh Judicial

District of the Seventh Judicial District, in and for the County of Bingham,

Honorable Darren B. Simpson, District Judge, presiding.

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I. STATEMENT OF THE CASE

The plaintiff, Kay Chapman, was invited to a surprise birthday party for one of her old boyfriends at the home of the defendants, VonDel and Becky Chapman, husband and wife. (Tr., p. 168, Ll. 5-25). While at defendants' home, plaintiff fell while using the bathroom and injured her shoulder. Plaintiff had been to the defendants' home once before, but it was not certain whether she had visited the bathroom on that occasion. (Tr. p. 166, Ll. 3-25, p. 167, Ll. 1-25, p. 168, Ll. 1-4).

The surprise birthday party was organized by Shawna Williams, a mutual friend of the both the plaintiff and defendant, Becky Chapman. Shawna is the one who sent out the invitations and made the arrangements. (Tr. P. 256, Ll. 6-12). The plaintiff brought alcohol with her to the party. There was some dispute at trial as to whether she had alcohol to drink before she arrived, but the plaintiff's story was that she only had a little to drink after arriving at defendants' home and she was not under the influence of alcohol when she went into defendants' bathroom. (Tr. p. 121, Ll. 12-25, p.122, Ll. 1-7, p.170, Ll. 12-25, p.171, Ll. 1-19, p. 174, Ll. 8-25, p. 175, Ll. 1-9). There was testimony from and independent witness, Audra Burgener, that within 15 or 20 minutes of plaintiff's arrival at the party, and before plaintiff went into the bathroom, plaintiff was talking in a loud voice, and using inappropriate language. (Tr. p. 323, Ll. 10-25, p. 324, Ll. 1-2, 15-25, p. 235, Ll. 9-14). However, neither of the defendants were aware of how much plaintiff drank because defendant, Becky Chapman, as the hostess, was busy preparing food and working in the kitchen, and the defendant, Vondel Chapman, spent much of the time in his garage retreat watching television. (Tr. p. 262, Ll. 2-16, p. 286, Ll. 10-25, p. 287, Ll. 1-11).

Defendant, Becky Chapman, bought a new bathroom rug for the party and placed it in the bathroom. It was a typical rug like many other rugs that she had used in her bathroom over the years. (Tr. p. 240, Ll. 7-10, p. 200, Ll. 1-8, p. 215, Ll. 17-25, p. 216, Ll. 1-5).

When the plaintiff walked into the bathroom she could see the toilet, the step down shower, the tile floor and the rug. She claims that her heal caught either in her pant leg or slipped on the rug, and she fell into the sunken tub/shower area. She asserted that she would have been more careful had the defendants told her that other people had fallen in that bathroom. (Tr. p. 126, Ll. 15-21, p. 176, Ll. 9-25, p. 177, Ll. 1-18, p. 178, p. 179, p. 180, p. 181, Ll. 1-18, p. 186, Ll. 12-25, p. 188, p. 189, Ll. 18-21, p.191, Ll. 15-25, p. 192, Ll. 1-12).

After it was discovered that the plaintiff was hurt, defendant, Becky Chapman, drove plaintiff to the hospital in Idaho Falls in the plaintiff's car. The hospital emergency room record said that the plaintiff was intoxicated. (Exhibit I, Tr. P. 172, Ll. 21-25, p. 173, p. 174, Ll. 1-10). The plaintiff injured her shoulder when she fell and had substantial medical expense as a result of her fall in defendants' bathroom.

Defendant, Becky Chapman, had grown up in the subject home, it having been built by her parents in approximately 1963, when she was in the fifth grade. Even when her parents were quite old they used the toilet and shower in the subject bathroom. (Tr. p. 239, Ll. 19-25, p. 240, Ll. 1-10). After her parents passed away and Becky was married, she and her husband moved into her parents home and have been there every since. (Tr. p. 197, Ll. 8-17). The bathroom in question has not been changed since the home was built by Becky's parents. It was built for the

convenience of her parents so that they could have a step down tub/shower, all in one. (Tr. p. 234, Ll. 3-25, p. 235, Ll. 1-10).

Over the years the defendants had enjoyed entertaining and had many social events and many people of various ages at their home and to their knowledge no one had ever been injured in their bathroom, except for the plaintiff. (Tr. p. 256, Ll. 2-5, p. 249, Ll. 13-25, p. 250, Ll.1-25, p. 251, Ll. 1-25, p. 252, Ll. 1-25, p. 253, Ll. 1-25, p. 254, Ll. 1-25, p. 255, Ll. 1-18). However, about twenty (20) years ago one of defendants' social guests came out of the bathroom laughing and announced that he had fallen in the bathroom. He said nothing about why he fell and there was no injury. (Tr. p. 210, Ll. 6-25, p. 216, Ll. 14-25, p. 217, Ll. 1-16).

There was no dispute at trial over the plaintiff's storey that she fell into the step down shower. Also, all her medical bills and records were admitted by stipulation. (R. pgs. 34-35). The only dispute at trial was whether or not the defendants were legally responsible for plaintiff's fall and resulting injury.

II. THE COURT DID NOT ERR IN EXCLUDING SOME OF THE TESTIMONY OFFERED THROUGH MATTHEW MEACHAM.

The standard for reviewing a trial court's rulings regarding admissibility of expert testimony is the same as that used in reviewing challenges to a trial court's evidentiary rulings, the abuse of discretion standard. In *Perry v. Magic Valley Reg. Med. Ctr.*, 134 Idaho 46, 51, 995 P. 2d 816, 821 (2000), this court defined its role as follows:

> This Court reviews challenges to a trial court's evidentiary rulings under the abuse of discretion standard. (Citation omitted). These include trial court decisions admitting or excluding expert witness testimony, (Citation omitted); and excluding evidence on the basis that it is more prejudicial than probative, (citation omitted). Error is disregarded unless the ruling is a manifest abuse of the trial

> court's discretion and affects a substantial right of the party. (Citations omitted). To determine whether a trial court has abused its discretion, this court considers whether it correctly perceived the issue as discretionary, whether it acted within the boundaries of its discretion and consistently with applicable legal standards, and whether it reached its decision by an exercise of reason. (Citation omitted).

In the case at bar, the trial court issued a memorandum decision before trial on this very issue. (R. p. 20-27). It is impossible to read the trial court's memorandum decision and not readily see that the court understood that it was a matter of discretion it was considering, that it must act within the bounds of discretion consistent with legal standards and reach its decision by an exercise of reason. (R. p. 23). The trial court met that standard when it wrote its memorandum decision and again during trial when this issue was revisited. (R. p. 20-27). The trial court even took a recess to consider the issue before ruling on the question. (Tr. p. 74, Ll. 16-21; p. 76, Ll. 14-25; p. 77, Ll. 1-25; p. 78, Ll. 1-7).

It is not even arguable that the slight limitation the court placed on the testimony of plaintiff's expert, was a "manifest abuse of the trial court's discretion." Further, that limitation did not affect a substantial right of the plaintiff. The trial court granted the plaintiff wide discretion in presenting evidence in support of her case.

During discovery, the defendants had allowed plaintiff and her expert, Matthew Meacham, to visit their home and examine the bathroom. The defendant even supplied the very rug that was in place in the bathroom at the time the plaintiff fell so that it was there when Mr. Meacham visited. Mr. Meacham was allowed to take photographs and all of those photographs were allowed into evidence by stipulation. (R. p. 35, Exhibit Q). The photographs taken by Mr. Meacham showed what a person would observe entering the bathroom looking toward the toilet

and looking at the shower in front of the toilet. There was no evidence introduced at trial that the design of the bathroom violated any code, but the plaintiff's expert testified extensively about his observations of the bathroom, about the photographs he took, about how tile floors and rugs can be slick and about how if you were to fall into the sunken tile tub/shower and hit your shoulder it could cause physical injury, just like the injury plaintiff suffered.

Specifically, Mr. Meacham testified there were twenty-four (24) inches from the lip or edge of the toilet to the edge of the first step into the shower area, (Tr. p. 44, ll. 1-3) that from a safety standpoint he would have wanted edge protection between the toilet and the tub/shower, (Tr. p. 45, ll 16-25, p. 46, ll 1-12) that the rug did not have a good backing on it which could allow it to bunch up thus causing a potential risk or likelihood of a slip, trip or a fall, (Tr. p. 49, ll. 1-25) that the rug in question contributed to plaintiff's fall, (Tr. p. 49, ll. 1-25; p. 50, ll 1-18; p. 51, ll. 5-10) and that the sudden "drop off", as he described the steps down into the shower, was a significant contributing factor to the cause of plaintiff's fall. He further testified that all those matters were contributing factors to the accident, (Tr. p. 53, ll. 2-19) that plaintiff's injuries were consistent with the fall plaintiff had, (Tr. P. 57, ll. 23-25; p. 58, ll. 1-7) and that her injuries were worse because of the configuration of the bathroom. (Tr. P. 60, ll. 12-24).

However, there was no testimony from Mr. Meacham that he had special expertise about alcohol and the effect, if any, the consumption of alcohol may have on a person and how that person might react to a tile floor, a rug, steps down into a shower, or anything similar. He also denied experience with women's high heel shoes, like the plaintiff wore. (Tr. p. 95, Ll. 9-21).

Therefore, what more could have been achieved by Mr. Meacham also opining that he believed the bathroom posed a "danger" and a "hazard"? While he didn't use those exact words, he had already said as much. It became clear from the argument of plaintiff's counsel on that issue that plaintiff wanted those additional words to overcome what counsel perceived to be some kind of jury bias. However, the trial court quickly pointed out that there was no evidence of bias. (Tr. p. 69, ll. 3-11).

Respondents take issue with a repeated assertion made in plaintiff's brief at pages 12, 13 and 15. She makes the assertion that defendants' counsel was allowed to argue that plaintiff's expert did not conclude that the bathroom was dangerous or hazardous. None of the arguments of counsel to the jury have been made a part of the record on appeal. It is therefor, inappropriate to make an observation or statement of fact regarding argument of counsel, when no record of that has been provided. However, counsel for defendants remembers arguing to the jury that the testimony of plaintiff's expert showed how obvious any danger or hazard that existed in the bathroom was and would have been to the plaintiff herself had she used reasonable care for her own safety. That is substantially different than plaintiff's assertion, and was consistent with the evidence.

Frankly, there is a real question whether the testimony of Mr. Meacham was even expert testimony that should have been allowed at all. Any lay person can take measurements and photographs as he did; any lay person that is old enough to be on the jury will have had experiences with tile floors in bathrooms and rugs on tile floors and will also have had experience with tile steps. In fact, the Bingham County Court House steps were tile. There is

really nothing that Mr. Meacham testified to that required any expertise or specialized knowledge. His measurements didn't require any expertise; his photographs didn't require any expertise; his observations of the rug required no expertise; his observations of the tile floor required no expertise and his repeating what the plaintiff told him required no expertise. In reality he gave the jury nothing that they couldn't have received through a lay witness.

Therefore under IRE 702, the real question was whether Mr. Meacham had any scientific, technical or other specialized knowledge, that assisted the trier of fact to understand the evidence or to determine the fact at issue. Since Mr. Meacham's testimony was not scientific, technical or specialized, it should not have been admitted al all, let alone his opinions on the ultimate issue. If anyone was prejudiced by what Mr. Meacham was allowed to say, it was the defendants because he dressed lay testimony up in an "expert" package to give it more weight.

III. THE COURT DID NOT ERR IN REFUSING THE PLAINTIFF'S REQUESTED INSTRUCTIONS NUMBERED 18, 20 AND 24.

The standard for review of jury instructions given by a trial court is, as follows:

> Whether jury instructions fairly and adequately present the issue and state the applicable law is a question of law over which this Court exercises free review. *Perry v. Magic Valley Reg. Med. Ctr., 134 Idaho 46,51; 995 P. 2d 816, 821 (2000).* When reviewing jury instructions on appeal, this Court asks whether the instructions, as a whole, fairly and adequately present the issues and state the law. *Leslie, 138 Idaho at 305, 62 P. 3d at 1103.* If the Court finds the instructions adequately present the issues and state the applicable law, this Court will not reverse the trial court. *Leazer v. Kiefer, 120 Idaho 902, 902, 824 P. 2d 957, 959 (1951).* However, if this court does find the instructions are not factually or legally accurate, it will not reverse the trial court unless the instructions would mislead the jury or prejudice the complaining party. *Id.; see also Perry, 134 Idaho at 51, 995 P. 2d at 821.*

Sun Valley Potato Growers, Inc. v. Texas Refinery Corporation, 139 Idaho 761, 765, 86 P. 3d 475, 479 (Idaho 2004).

The question then is whether or not the trial court gave jury instructions that taken as a whole fairly and adequately presented the issues and the law of the case.

When one considers the instructions given by the trial court, Instruction 20, defining negligence, Instruction 21, defining proximate cause and Instructions 22, 23, 24, 25 and 26, on duties of land owners, it is clear that the court instructed the jury properly. The jury was instructed that the defendants, had a duty to exercise ordinary care towards the plaintiff, and that they had a duty to warn the plaintiff of any dangerous or defective condition that they knew about that plaintiff wouldn't have discovered using ordinary care. That is what the case was about and that is how the jury was instructed.

There was no evidence introduced at trial that the defendants had knowledge that something "probably would result in harm because of a dangerous condition of the premises" in fact the opposite was true. The evidence was that over the course of forty (40) years the bathroom had been used by an active family who had many social guests over those years but no one had ever been hurt in the bathroom. There was much ado made by the plaintiff about an event approximately twenty (20) years before when a visitor who had been drinking went into the bathroom and came out laughing saying that he had fallen. However, there was no evidence that he had fallen in the shower or that he had fallen in front of the toilet, slipped on a rug, or that he was injured. There was no evidence of any forewarning to the defendants that there was a danger that would not be known or observable to anyone entering the bathroom.

The thing that did come out loud and clear through the photographs taken by Mr. Meacham, was that anyone entering the bathroom would see the toilet, the tile floor, the rug and the step down shower. There was no evidence that because the rug was new that it created some new danger that would not have existed for the proceeding forty (40) years with the old rugs.

It would have been totally inappropriate for the trial court to have given plaintiff's requested instruction 18 as it had nothing to do with the evidence and it would have misled or at least confused the jury. Plaintiff's requested instruction 20 is clearly covered by Instruction 23 given by the court. Plaintiff's requested instruction 24 would have been senseless since there was no evidence of intentional or reckless conduct on behalf of the defendants. The instructions given by the trial court were completely fair to the plaintiff.

IV. THE COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY PURSUANT TO PLAINTIFF'S PURPOSED JURY INSTRUCTIONS NUMBERS 14 AND 15.

The plaintiff argues that there is some magic with her requested instructions 14 and 15 that just didn't happen with the trial court's instruction 21. However, the trial court's instruction 21 directly follows the language of this Court in *Garcia v. Winley, 144 Idaho 539, 164 P. 3d 819 (Idaho 2007).* This Court in *Garcia* ruled that the defect in IDJI 2.30.2 is the last sentence of the first paragraph, stating that it would have to be omitted in order for the instruction to be consistent with the removal of the "but for" language included in IDJI 2.30.1. That is exactly what the trial court did here. It gave IDJI 2.30.2 leaving out the last sentence of the first paragraph, the only sentence in that instruction that is inconsistent with the "substantial factor" test.

As the court stated in *Garcia,* the only time the "substantial factor" instruction is given rather than the "but for" instruction is when there is evidence of multiple causes of an injury. However, in this case there was only one cause of the injury. The defense in this case never argued that the plaintiff's medical bills, or shoulder injury, were caused by anything other than her fall in the defendants' bathroom. There was never any argument that plaintiff's shoulder surgery resulted from a preexisting condition or congenital matters. Therefore, the "but for" instruction should have been given rather than the "substantial factor" instruction. However, the fact that the "substantial factor" instruction was given prejudiced only the defendants, and since they are not appealing, reversal is not appropriate. *Id. at 164 P.3d 825.*

V. THE JURY VERDICT WAS CONSISTENT WITH APPLICABLE LAW AND SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE

The cases, cited by plaintiff, clearly show that the trial court instructed the jury properly in this case and the jury made a very reasonable decision based on the facts. The Court of Appeals in *Keller v. Holiday Inn's, Inc.*, 105 Idaho 649, 671 P. 2d 1112 (Ct. App. 1983) had ruled that when there is an open and obvious danger a plaintiff could not sue the land owner when the plaintiff was injured by proceeding in light of that open and obvious danger. That case was overruled by this Court in a limited way in *Keller v. Holiday Inn's, Inc.*, 107 Idaho 593, 596, 691 P. 2d 1208 (Idaho 1984). Therein this Court stated:

> As noted previously, the trial court held even if a duty did exist on the part of Holiday Inn, Holiday Inn could not be held liable because plaintiffs had assumed the risk of injury. However, defenses of this sort generally present a question of fact which should be left to the jury, unless the facts are undisputed and only one reasonable conclusion can be drawn therefrom. (Citations omitted. Therefore, we reverse the summary judgment and remand for further proceedings.

Decisions that have followed after the *Holiday Inn's* case have continued to limit the duty owed to social guests or invitees. That restriction on duty is set out clearly in *Holzeheimer v. Johannesen*, 125 Idaho 397, 400, 871 P. 2d 814, 817 (1994), as follows:

> A licensee is a visitor who goes upon the premises of another with the consent of the landowner in pursuit of the visitor's purpose. (Citations omitted). Likewise, a social guest is also a licensee. (Citations omitted). The duty owed to a licensee is narrow. A landowner is only required to share with a licensee knowledge of dangerous conditions or activities on the land. (Citations omitted). Additionally, this Court has held that "the fact that a guest may be rendering a minor incidental service to the host does not change the relationship [between them as a landowner and licensee]. (Citations omitted).

A heightened duty is owed to a business invitee, someone who is there for business purpose. The *Holzeheimer* court defined that duty as follows:

> An invitee is one who enters upon the premises for a purpose connected with the business conducted on the land, or where it can reasonably be said that the visit may confer a business, commercial, monetary or other tangible benefit to the land owner. (Citation omitted). A landowner owes the invitee the duty to keep the premises in a reasonably safe condition, or to warn of hidden or concealed dangers.

125 Idaho at 400.

In this case, plaintiff never contended that she was a business invitee, but freely admitted she was a social guest or licensee. However, she now seems to argue that the jury should have been instructed as if she were a business invitee contrary to her admission and the facts.

Plaintiff's contention on appeal is exactly what she contended at trial. Plaintiff contends that she should have been a warning before she entered the bathroom. (Tr. p.186, Ll. 12-18). The question though is what could the defendants have warned the plaintiff about that the plaintiff herself could not have readily seen. Forty years of living in a house without anyone ever slipping and falling on a rug in front of a toilet and into the shower would hardly seem to be fore

knowledge on behalf of the defendant homeowners that would somehow be superior to the plaintiff's own experience with bathrooms, toilets, tile floors, rugs, steps, etc. All of those matters were clearly visible to the plaintiff. (Tr. p. 181, Ll. 9-18, p. 191, Ll. 15-25). Thus, for the jury to find that the defendants were not negligent is not only reasonable, it is the only conclusion that reasonable minds could have made. The plaintiff is really asserting that a homeowner must guarantee that no one visiting his or her home will slip, trip, or fall. That is not, and should never be, the law of Idaho.

VI. CONCLUSION

Based upon the foregoing, the defendants, VonDel and Becky Chapman, respectfully request that this Court deny the appellants petition on appeal and allow the jury verdict to stand.

RESPECTFULLY SUBMITTED this 15th day of April, 2008.

THOMSEN STEPHENS LAW OFFICES, PLLC

By: _____
Alan C. Stephens, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing document to be served upon the following persons on April 15, 2008 at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering the same, as indicated below:

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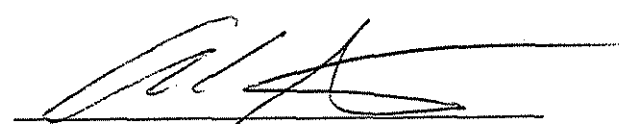
By: 
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