



The law of the state in which the allegedly negligent acts or omissions occurred governs the determination of negligence under the FTCA. See LeFond v. United States, 781 F.2d 153 (8th Cir. 1986). Under Nebraska law, a claim of negligence by a business invitee requires proof of the following five elements: (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to a business invitee; (3) the defendant should have expected that a business invitee such as the plaintiff either (a) would not discover or realize the danger, or (b) would fail to protect himself against the danger; (4) the defendant failed to use reasonable care to protect the plaintiff invitee against the danger; and (5) the condition was a proximate cause of damage to the plaintiff. Cloonan v. Food-4-Less of 30th & Weber, Inc., 529 N.W.2d 759, 762-63 (Neb. 1995); Richardson v. Ames Ave. Corp., 525 N.W.2d 212, 215-16 (Neb. 1995); Burns v. VFW, 438 N.W.2d 485, 493 (Neb. 1989).

The court held that Heller met his burden of proof only with respect to the first element. The court concluded that the ice patch was too small to present an unreasonable risk of harm, that it was reasonable for the defendant to expect a postal customer to see the ice and protect himself by avoiding it, and that the proximate cause of Heller's injury was his own failure to see and avoid the danger, not any negligence on the defendant's part. Based on our review of the record we find no error in the court's determinations. Accordingly, we affirm the court's judgment in favor of the defendant.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.