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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-588 / 88-1886

SANDRA JOYCE PALMER, GEORGE PALMER, and **BARBARA PALMER,**

Appellants,

vs.

CITY OF INDIANOLA, IOWA,

Appellee.

Appeal from the Iowa District Court for Warren County, Dale B. Hagen, Judge.

In this negligence suit the jury returned a verdict for the defendant. The plaintiffs have appealed challenging several instructions and several evidentiary rulings. **AFFIRMED.**

Stephen A. Hall, of Hall & Schlenker, Indianola, for the appellants.

Roland D. Peddicord and Fred L. Morris, of Peddicord, Wharton, Thune, Foxhoven & Spencer, P.C., for the appellee.

Considered by Oxberger, C.J., and Donielson and Sackett, JJ. Hayden, J. takes no part.

OXBERGER, C.J. 291

This is an appeal from a jury verdict for the defendant in a negligence suit. The plaintiffs-appellants challenge several jury instructions and several evidentiary rulings. Our scope of review is for correction of errors at law. Iowa R. App. P. 4. We affirm.

Employees of the city of Indianola cut into the concrete pavement of a city street in order to repair a sewer. While the repair was in progress, city employees barricaded the affected portion of the street. When the repair work was finished, the hole in the pavement was filled with gravel; the gravel was not packed by any mechanical means because the sewer line was so close to the surface. The city then removed the barricades and opened the street to traffic, allegedly with the intent that traffic would cause the gravel in the hole to settle and pack.

After traffic resumed on the affected portion of the street, the traffic allegedly threw some of the gravel out of the hole and onto the surrounding street surface.

While the street was in this condition, teen-ager Sandra Palmer attempted to traverse the street on her moped. She lost control of the moped in the loose gravel, and she then struck the hole where the pavement had been cut and where the subsequently inserted gravel had settled and sunk. She was thrown off the moped and suffered injuries.

Sandra Palmer and her parents later filed the present negligence suit against the city of Indianola. A jury returned a verdict in favor of the defendant city, and the Palmers have appealed from the resulting judgment.

The Palmers contend the district court erred by excluding any evidence that the city had barricaded the repair site before the accident but had removed those barricades by the time the accident occurred. The city filed a motion in limine designed to exclude any evidence or argument referring to this subject pursuant to Iowa Code section 668.10(1) (1989).

The Palmers' personal injury claim against the city of Indianola calls for an interpretation of Iowa Code section 668.10(1). Section 668.10 states in part:

> In any action brought pursuant to this chapter, the state or a municipality shall not be assigned a percentage of fault for any of the following:
>
> 1. The failure to place, erect, or install a stop sign, traffic control device, or other regulatory sign as defined in the uniform manual for traffic control devices adopted pursuant to section 321.252. However, once a regulatory device has been placed, created or installed, the state or municipality may be assigned a percentage of fault for its failure to maintain the device.

After a hearing out of the presence of the jury, the district court granted the city's motion in limine excluding any evidence or argument concerning any alleged duty on the part of the city of Indianola to place any warning device, barricades of any sort on the approach to

the place in the street where the accident occurred. The district court said:

> THE COURT: Well, the Court finds that Chapter -- or Section 668.10(1) one of the Code is applicable in this situation; that when barricades were placed around the hole at the beginning or at the time when there was an open hole, that the City certainly at that point did put up a traffic control device and had the hole remained open, that they would have had the duty to maintain that device.
>
> However, the Court also finds that the hole was subsequently filled up and it was opened to traffic. That once this hole was filled, then the hazard for which they were warning at that time was eliminated. That if in fact there was a subsequent pothole or hole that developed which created a hazard, that that would be a new hazard and that the City under Chapter 668 would not have had the obligation to erect a traffic control device inasmuch as this would be a new hazard created. It doesn't seem reasonable that the Code would expect that the City would keep this roadway closed even after the hole had been closed -- had been filled in and until such time as the repaving had taken place because settling needs to occur and it could be a matter of several weeks before that repaving could take place.
>
> So for those reasons, your motion in limine is sustained.

The Palmers' position is that the city of Indianola's decision to remove the barricades is a "failure to maintain" the barricades, such that the immunity otherwise provided by section 668.10(1) should be eradicated. The city cites Saunders v. Dallas County, 420 N.W.2d 468 (Iowa 1988), in support of its contention the decision to remove the barricades in question was a decision "not to place" a barricade at the accident site and not a matter of maintenance.

In Saunders a passenger on a motorcycle brought action against Dallas County for injuries sustained when the motorcycle went off a secondary county road due to the incorrect positioning of a reverse curve sign warning of curves on the road. One of the passenger's arguments was that the sign was placed at a time the road was gravel and, in order to be "functionally" maintained, had to be re-evaluated when the road was resurfaced. Id. at 472. The supreme court held that the county was entitled to immunity pursuant to section 668.10(1). Id. The court concluded:

> But we do not agree that the specifications [of negligence] here amount to the sort of maintenance which section 668.10(1) designates as appropriate for liability. No matter how the challenged county activity is defined or labeled, it comes down to a choice of whether or where to place signs. A decision whether to replace this sign, to move it, or to supplant it with one or more other signs, is not a matter of maintenance under the statute. On the contrary such an action is a matter of deciding to place signs, for which the county cannot be held liable.

Id.

We believe the allegations made by the Palmers in this case come down to decisions about whether to place traffic devices or signs at the scene of this accident. "Negligent decisions of this kind are precisely the ones which section 668.10(1) immunizes from liability." Id.

We note here that the legislative intent behind section 668.10(1) can "only be viewed as a continuation of a discernible current trend to make individual citizens bear

the sole burden of the negligence of state employees." Metier v. Cooper Transport Co., Inc., 378 N.W.2d 907, 913 (Iowa 1985).

We agree with the district court's conclusion that any subsequent hole that developed after the original hole was filled was "a new hazard and that the City under Chapter 668 would not have had the obligation to erect a traffic control device . . . ." We find that the city of Indianola's decision "not to place" a barricade at the accident site not to be a matter of maintenance under section 668.10(1). Consequently, we find no error by the district court in granting the city's motion in limine.

The Palmers also contend the district court erred in failing to submit their proposed instruction no. 21. This instruction stated, "No person shall throw or deposit on any street any substance likely to injure any person, . . . using the street. A violation of this law is negligence." The Palmers maintain that in order for the jury to be properly instructed, requested instruction no. 21 should have been allowed to inform the jury that it was negligent to permit the loose gravel on the street. We disagree.

Jury instructions must be read together and related to each other in order to determine the rights of the parties. Miller v. International Harvester Co., 246 N.W.2d 298, 306 (Iowa 1976). Instruction no. 12 provides as follows:

You are instructed that the Defendant, City of Indianola, at the time of the accident in question was required to use ordinary care to maintain its streets in a reasonably safe condition for travel, and it has the duty, in the event of a hazardous condition of which it had actual or constructive notice, to remedy said condition within a reasonable time after receiving notice of the hazardous condition.

The City is not required to maintain its streets in a state of perfection, but it assumes a duty to all who travel on those streets to use reasonable care to see that such streets are reasonably safe for such travel. This duty should be determined and measured by the care exercised by reasonable, careful and prudent persons acting under like circumstances or conditions, and it is the duty of the Defendant to exercise such care as a reasonably careful and prudent person would have exercised in an endeavor to maintain the street in question in a reasonably safe condition.

So if you find that the street at the scene of the accident was in a hazardous condition and that the Defendant, City of Indianola, knew or in the exercise of ordinary care should have known of such fact, then it was the duty of the Defendant to take reasonable precaution to render it safe for travel by those using it in an ordinary way and a failure to do so would be negligence on the part of the Defendant.

Instruction no. 13 provides in part:

The Plaintiff must prove all of the following propositions:

1. The Defendant was negligent in one or more of the following ways:

a. That the City of Indianola permitted holes to exist in the traveled portion of the street.

b. That the City of Indianola allowed debris in the form of loose gravel to lie upon the street.

2. That the negligence was the proximate cause of the Plaintiff's damage.

3. The amount of damage.

When instruction no. 12 and no. 13 are read together with the other instructions, they correctly put forth the applicable law. We find the requested instruction dealt with matters adequately covered in the instructions given by the court. Therefore, we find no error on the part of the trial court in refusing to submit the requested instruction.

In addition, the Palmers contend the district court should have given their requested instruction concerning situations in which the city would be charged with constructive notice of street defects. The Palmers contend the instruction actually given by the court did not clearly state the city's duty to anticipate defects or its duty to inspect when it knows of a condition which may become hazardous.

Upon our examination of instruction no. 12 as submitted by the trial court we find no merit in appellant's assertions. We believe this instruction adequately informs the jury about the city's duty and adequately defines instructive notice to the jury. The requested instruction dealt with matters adequately covered in the instructions given by the court. There was no error in the instruction issued to the jury. See Miller v. International Harvester, 246 N.W.2d 298, 307 (Iowa 1976); Greninger v. City of Des Moines, 264 N.W.2d 615, 617 (Iowa 1978).

Finally, the Palmers contend the district court erred by allowing the city to engage in cross-examination which went beyond the scope of direct examination.

Iowa Rule of Evidence 611(b) provides as follows:

> Scope of cross-examination. Cross-examination should be limited to the subject of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

The extent and scope of permissible cross-examination lies within the sound discretion of the trial court. State v. Ruble, 372 N.W.2d 216, 219 (Iowa 1985); State v. Jackson, 259 N.W.2d 796, 800 (Iowa 1979). The trial court's discretion will be disturbed only when such discretion has been obviously abused and prejudice results. State v. Holmes, 325 N.W.2d 114, 117 (Iowa 1982).

Upon our review of the record we conclude that the trial court did not abuse its discretion in allowing the city to cross-examine the city employee on the subject of conformity to a custom or practice in regards to a standard of care. Consequently, we find no merit in the Palmers' contention. The decision of the trial court is affirmed in all respects.

AFFIRMED.