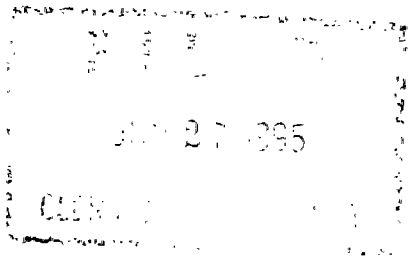
IN THE COURT OF APPEALS OF IOWA

No. 5-096 / 94-561



MARJORIE MARSHALL and EDGAR MARSHALL,

Plaintiffs-Appellees

vs.

CITY OF BURLINGTON,

Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, Harlan W. Bainter, Judge.

Defendant City of Burlington appeals the judgment of the district court, following a jury trial, awarding plaintiff damages for injuries received resulting from a trip and fall on a sidewalk owned by the city. **REVERSED AND DISMISSED.**

Patrick L. Woodward of Aspelmeier, Fisch, Power, Warner & Engberg, Burlington, for appellant.

Gerald D. Goddard of Cray, Goddard & Miller, Burlington, for appellee.

Considered by Hayden, P.J., and Sackett and Cady, JJ.

SACKETT, J.

Defendant-appellant City of Burlington, Iowa, appeals following the entry of a judgment based on a jury verdict entered against the City and in behalf of plaintiffs-appellees Marjorie Marshall and Edgar Marshall. The City contends the trial court erred in instructing the jury. We agree and reverse and dismiss.

The facts are basically without dispute. Marjorie was injured when she fell over legs of a bench on a city sidewalk. The legs remained after the bench was vandalized. The bench was last seen anchored in place between 7:00 p.m. and 8:00 p.m. on Friday, June 12, 1991. Marjorie fell just before twelve o'clock noon on Monday, June 15, 1991. The bench was located near her office. Marjorie arrived at her office, parked her car, walked by the broken bench, went in her office and returned outside and tripped and fell. Through the years, benches in this area have been vandalized.

Marjorie sued the City alleging it was negligent in not removing the bolts, in not inspecting and maintaining the sidewalk, and in not warning that the bolts protruded and created a danger. The case was tried to a jury. The jury found Marjorie's damages to be $32,438.95. The jury found Marjorie fifty percent at fault and judgment was entered in Marshall's favor for $16,219.48. The City filed motions for new trial and for judgment notwithstanding the verdict which the trial court denied.

The City contends the trial court erroneously instructed the jury in a number of particulars.

The City specifically objects to Instruction No. 12 which provided:

> The plaintiff claims the defendant was at fault in all [sic] or more of the following particulars:
>
> 1. In failing to remove the bolts from the sidewalk.
> 2. In failing to properly inspect and maintain the sidewalk area.
> 3. In failing to warn of the existence, location, and danger of remaining protruding bolts.
>
> These particulars or specifications of negligence have been explained to you in other instructions.
>
> To entitle the plaintiff, Marjorie Marshall, to recover, the burden is upon her to establish by a preponderance of the evidence all of the following propositions:
>
> a. The defendant, City of Burlington, was negligent in some particular, as charged by the plaintiff;
>
> b. That such negligence was a proximate cause of her injury or damage; and
>
> c. That the plaintiff has sustained damage and the extent thereof.
>
> If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If the plaintiff has proved all of these propositions, then you will consider the defense of comparative fault as . . .

The City contends the effect of Instruction No. 12, in this case, was to impose strict liability on the City and overemphasized Marjorie's theory of the case. In making this argument, the City points out it was undisputed the City did not know the bench had been vandalized some time between Friday evening and Monday noon when Marjorie fell. Marjorie urges the City preserved error on the issue of the instruction overemphasizing their case but did not preserve error that the instruction subjected the City to a standard of strict liability.

The focal question is whether there was substantial evidence to support a finding the City had a duty in the given time frame to inspect the sidewalk and discover the problem.

Iowa Code section 364.12, in applicable part, provides:

> 2. A city shall keep all public grounds, streets, sidewalks, alleys, bridges, culverts, overpasses, underpasses, grade crossing separations and approaches, public ways, squares, and commons open, in repair, and free from nuisance, . . .

Iowa Code § 364.12(2) (1991). The city has a duty under this section to use reasonable care in the supervision and control of its sidewalks. *Beach v. City of Des Moines*, 238 Iowa 312, 336, 26 N.W.2d 81, 94 (1947).

The issue of a city's duty to inspect sidewalks was addressed by the court in *Spechtenhauser v. City of Dubuque*, 391 N.W.2d 213 (Iowa 1986). There the court said:

> Municipalities are under *some* measure of active duty in the matter of inspection and of taking care to know that the streets, the care of which is imposed upon them by statute do not become sources of danger to the traveling public. The question is whether ordinary care, under the circumstances of the particular case, requires the municipality to inspect, and if so how extensive must the inspection be? As to this matter, the courts are not entirely in harmony and it is difficult, if not impossible, to say to what extent and when it is the duty of a municipality to look for defects. Conditions are likely to be so different in relation to different walks, or different portions of the same walk, and so many contingencies are likely to arise, that it can be determined only from the situation and circumstances of each case whether reasonable care has been exercised in the premises. (Emphasis supplied).

> There may be some instances in sidewalk fall down cases where negligence claims involving failure to maintain sidewalks in a safe condition, failure to repair defective sidewalks, and failure to inspect sidewalks may all be subsumed within a single specification of negligence. In such instances, the act of instructing on each as a separate ground of recovery may tend to overly emphasize the plaintiff's theory of the case. In other contexts, we have disapproved of jury instructions which do this. *See, eg., Childers v. McGee*, 306 N.W.2d 778, 780-81 (Iowa 1981); *Mundy v. Warren*, 268 N.W.2d 213, 217 (Iowa 1978). In the present case, however, the city did not object to the trial court's instructions on this ground and therefore has not preserved a claim under this theory.

Id. at 215-16.

In this case, the undisputed testimony was the bench had been in place on Friday, June 12, 1991, between seven and eight o'clock. There was no proof when the bench was vandalized except it was gone Monday morning when Marjorie fell. There was evidence the area was inspected on a daily basis, Monday through Friday, by a contract employee of the City who cleaned and maintained the sidewalk and would report vandalism for repair. The employee was working on Monday but had not yet reached the area where Marjorie fell.

There was not substantial evidence to support a finding the City had failed to inspect. The statute does not set the perimeters for inspections; rather, the measure of inspection must be weighed under the circumstances. *See Spechtenhauser*, 391 N.W.2d at 215. While in *Spechtenhauser* the court said the duty of the city to inspect is commensurate with reasonable circumstances, we do not find the facts here provide substantial evidence to support a finding the City breached its duty of inspection.

We reverse and dismiss.

REVERSED AND DISMISSED.

Cady, J., concurs; Hayden, J., dissents.

HAYDEN, P.J. (dissenting)

I respectfully dissent. I would affirm the trial court in all respects.