FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MARY SHIVELY,
Appellee,
vs.
CITY OF DUBUQUE, IOWA,
Appellant.

Filed April 28, 1978

487
2-60856

Appeal from Dubuque District Court - Karl Kenline, Judge.

Defendant city appeals judgment for plaintiff for injuries sustained when plaintiff tripped and fell over a defect in a public sidewalk challenging sufficiency of evidence to support trial court's finding that defendant city had or should have had notice of the defect. - Affirmed.

Barry A. Lindahl, Dubuque, for Appellant.

Victor V. Sprengelmeyer, of Sprengelmeyer & Henkels, Dubuque, for Appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant city of Dubuque appeals an adverse judgment in favor of plaintiff Mary Shively in the amount of $6400 on plaintiff's claim of negligence. Plaintiff sustained injuries when she tripped and fell over a defect in a public sidewalk in the city of Dubuque. In her petition she alleged the city, through its officers, employees and agents, had or should have had notice and knowledge of the defective condition of the sidewalk. In its findings of fact, the trial court found the city had or should have had notice and knowledge of the defective condition of the sidewalk prior to the date of the accident. On appeal, the city challenges the sufficiency of the evidence to support that finding.

Findings of fact in a law action tried to the court have the effect of a special verdict and are binding upon the appellate court if supported by substantial evidence. Rule 14(f)(1), Rules of Appellate Procedure. If the finding of the trial court that the city of Dubuque had or should have had notice or knowledge of the defective condition of the sidewalk is supported by substantial evidence, the verdict of the trial court must be upheld.

A city is responsible for the care, supervision and control of its public sidewalks and is charged with the responsibility of keeping its sidewalks " open, in repair, and free from nuisance." Section 389.12, The Code (1973). The question of whether a city was negligent in allowing a defective condition in a sidewalk to exist, is ordinarily a question for a jury. Beach v. City of Des Moines, 238 Iowa 312, 336-42, 26 N.W.2d 81 (1947). However, a city is not liable to all pedestrians who are injured through defects in sidewalks, but only where the city has had notice of the defect, either actual or constructive. Alber v. City of Dubuque, 251 Iowa 354, 361, 101 N.W.2d 185 (1960).

The length of time sufficient to constitute constructive notice of the condition and a reasonable opportunity to remedy it depends upon the facts and circumstances of each case and is generally a question for the finder of fact. Hovden v. City of Decorah, 261 Iowa 624, 627, 155 N.W.2d 534 (1968). See also Anderson v. City of Fort Dodge, 213 N.W.2d 527, 528 (Iowa 1973). The defect must be of such a character as, in view of its location and the use made of the walk, to

attract the attention of the officers of the city and cause them, in the exercise of that degree of caution an ordinary prudent person would exercise under like circumstances, to anticipate danger therefrom to pedestrians passing along the walk. Johnson v. City of Ames, 181 Iowa 65, 76, 162 N.W. 858 (1917).

The testimony showed plaintiff suffered a broken wrist when she tripped over a raised edge of a concrete section of a public sidewalk within the city of Dubuque. The evidence established the raised section was approximately two inches above the adjacent section of the sidewalk. However, the section was not raised proportionately along the entire width of the sidewalk, but increased in elevation as it neared the curb.

Photographs of the raised portion of the walk were admitted into evidence and plaintiff testified the photographs were an accurate representation of the scene, except that she thought there was more vegetation covering the raised edge of the sidewalk at the time of the accident, than shown in the pictures. Of two other witnesses who testified, one stated the vegetation depicted in the photographs accurately portrayed the area at the time of plaintiff's fall while the other agreed with plaintiff's version.

Detective Frederick Parr of the city of Dubuque police department testified that in his opinion, based upon his examination of the sidewalk and the color of the concrete, the difference in the elevation of the portion of the sidewalk had existed for at least six months to a year. Finally, plaintiff testified she had lived in the area thirty-one years, had walked over the area many times and never had any prior problems or falls. She also stated she had not remembered ever noticing the raise in the sidewalk but that it was noticable if one was looking specifically for it.

Plaintiff may show through evidence of physical condition, coloration and growth of vegetation that the city officers charged with the duty of keeping its sidewalks in good condition, by the exercise of ordinary diligence, would have known of the defect in question. Lorig v. City of Davenport, 99 Iowa 479, 482, 68 N.W. 717 (1896). It is also clear that an obstruction extending above the surface of a sidewalk, as here, is more likely to interfere with travel than a slight depression below the surface. Johnson v. City of Ames, 181 Iowa at 74.

A review of the record does not disclose the trial court erred in finding that the defendant city of Dubuque knew or should have had notice and knowledge of the defective condition of the sidewalk.

AFFIRMED.