FILED
JUN 28 1979
CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

LEROY MATT, Plaintiff-Appellee,	)	Filed June 28, 1979
vs.	)	
THE INCORPORATED CITY OF CRESCO, IOWA, Defendant-Appellant.	)	150 2-61929

Appeal from Howard District Court - Hon. L. John Degnan, Judge.

Defendant city appeals from trial court's overruling of certain post-trial motions. AFFIRMED.

Strand, Anderson, Raduenz & Larson of Decorah, Iowa, for appellant.

Frederick G. White of Waterloo, Iowa; and Anderson, Story & Anderson of Cresco, Iowa, for appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant city appeals from trial court's overruling of certain post-trial motions following judgment for plaintiff in an action seeking equitable and legal remedies for damages occasioned by changes made in the grade of the street in front of plaintiff's house. We affirm.

In 1974, plaintiff's sanitary sewer line was damaged and had to be replaced when defendant installed a new storm sewer system. Defendant was to some extent involved in the placement of plaintiff's new line but it is undisputed that the line flowed freely during the winters of 1974-75 and 1975-76. In 1976, the street in front of plaintiff's house was paved and its grade was significantly lowered. During the winter of 1976-77 plaintiff's sanitary sewer line froze solid for approximately two months. Expert testimony presented by plaintiff indicated the damage done to the sanitary sewer line may have resulted from the manner in which the city performed the various excavations on the street project.

One of defendant's assertions on appeal is that trial court should not have submitted the issue of damages to the jury on a nuisance theory because section 364.15 provides the exclusive remedy for a city's nonnegligent alteration in the grade of its streets. This issue was never raised below and consequently may not be considered for the first time on appeal. Quad County Grain, Inc. v. Poe, 202 N.W.2d 118, 119 (Iowa 1972).

Next, defendant complains that trial court incorrectly instructed the jury on the issue of plaintiff's duty to mitigate his damages. Once again, however, defendant failed to present this objection to the court below, and we will not entertain it on appeal. Miller v. International Harvester Co., 246 N.W.2d 298, 304 (Iowa 1976). Issues numbered four, five, and six in defendant's brief suffer the same infirmity already noted. The city's failure to make a proper record at trial precludes us from considering these points of error.

Defendant also maintains there was insufficient evidence of negligence or nuisance to permit presentation of these issues to the jury. In considering this claim, we view the evidence in a light most favorable to plaintiff. Iowa R. App. P. 14(f). Since the jury found in favor of plaintiff specifically on the nuisance theory, it could be

argued that the negligence instruction constituted harmless error. Nevertheless, we have reviewed the record and find the evidence of the city's negligence and the evidence of nuisance were both sufficient to create jury questions.

Defendant, citing several alleged "irregularities" which occurred at trial, argues that its motion for new trial should have been granted. We will interfere with trial court's ruling on a motion for new trial only when an abuse of discretion is clearly shown by the evidence. Thomas Truck and Caster Co. v. Buffalo Caster and Wheel Corp., 210 N.W.2d 532, 536 (Iowa 1973). The instant record reveals no such abuse.

We have considered all of defendant's contentions, whether mentioned herein or not, and conclude that no reversible error has been established.

AFFIRMED.