FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

SALLY L. SPECHTENHAUSER and **JOHN G. SPECHTENHAUSER,** Plaintiffs-Appellees,	)	254 Filed January 29, 1986
vs.	)	
CITY OF DUBUQUE, IOWA, Defendant-Appellant.	)	5-542 / 85-273

Appeal from the Iowa District Court for Dubuque County - James L. Beeghly, Judge.

Defendant city appeals judgment in favor of plaintiff asserting that the trial court erred by instructing the jury that a failure of the city to inspect its sidewalks constituted negligence. **AFFIRMED BY OPERATION OF LAW.**

Barry A. Lindahl, City of Dubuque Corporation Counsel, Dubuque, for defendant-appellant.

Stephen W. Scott of Kintzinger, Kintzinger, Van Etten, Setter & Scott, Dubuque, for plaintiffs-appellees.

Heard by Oxberger, C.J., and Snell and Schlegel, JJ., but considered en banc.

On this appeal the judges of this court have evenly divided on the result they would reach. Chief Judge Oxberger, and Judges Schlegel and Hayden would affirm; Judges Donielson, Snell, and Sackett would reverse. Accordingly, the decision of the trial court is affirmed by operation of law.

Judge Snell voted to reverse for the following reasons:

On June 15, 1983, plaintiff Sally Spechtenhauser purchased a stamp at Grandview Drug Store in the city of Dubuque. She exited the drug store and headed toward the mailboxes right outside. While she was looking at the mailboxes, trying to decide which one she would mail the letter in, she tripped and fell on an elevation in the sidewalk of one to one and one quarter inches. Spechtenhauser sued the city of Dubuque, alleging that the city was negligent "in failing to care for, supervise, inspect and control the public sidewalk in a safe condition and in failing to repair said sidewalk and keep said sidewalk free from nuisance as required by 364.12 of the Code of Iowa."

At trial the City Engineer testified that there are some 350 miles of sidewalks in the city of Dubuque. He stated that he and the Sidewalk Inspector were the two people in the city government responsible for the city's sidewalks. The evidence was undisputed that the city had no regular inspection program for the city's sidewalks. The sidewalks are inspected solely upon construction or reconstruction. Therefore, the last time the sidewalk in question was inspected was after its construction in 1973. Both the City Engineer and the Sidewalk Inspector testified that information about problems with the city's sidewalks comes from citizen complaints, accident reports, and observations made by city personnel using the public sidewalks while out on other city business.

There was no evidence presented at trial that the City had actual knowledge of the alleged defective condition of the sidewalk. However, a pharmacist at the Grandview Drug Store testified that from December of 1979 through

April of 1984 he had walked by the sidewalk in question four times daily. During that time, the sidewalk had always had a difference in elevation between the concrete slabs.

A jury found that the city was 95% negligent and Sally Spechtenhauser was 5% negligent. The jury found Spechtenhauser's total damages to be $40,320. The jury declined to award Sally's husband any damages for loss of consortium.

The city has appealed the resulting judgment of $38,304 against it. The city contends that the trial court erred by instructing the jury that the city had an affirmative duty to inspect its sidewalks and if the jury found that the city failed to so inspect, then the city was to be found negligent. The final instructions complained of read as follows:

> No. 15
>
> The law of Iowa provides that a city is responsible for the care, supervision and control of public grounds, streets and sidewalks; and shall keep all public ways, squares and commons in repair.
>
> The City of Dubuque is responsible for the inspection, repair and maintenance of its sidewalks, including the area where plaintiff claims to have fallen. This imposes upon the city the duty to exercise reasonable and ordinary care to keep its sidewalks in a reasonably safe condition for the use of pedestrians, free from such defects as it should anticipate are likely to result in injury to pedestrians.
>
> In determining whether a condition of the sidewalk has such a defect, the character and location of the condition as well as the use made of the sidewalk at that location, should be considered.
>
> This duty does not make the city the insurer of safety against all accidents that occur on its public sidewalks. The city is responsible when it fails to use ordinary care, as stated above. It must have actual notice of the defect or the defective condition must have existed for a sufficient time to enable the city to discover and repair the defect in the exercise of reasonable and ordinary care.

Regarding the city's duty to inspect, you are instructed that it is the duty of a municipality to exercise reasonable care to know whether the areas it is responsible for are in a safe condition. No ironclad rule can be laid down with respect to when the municipality has satisfied its duty under this requirement. (emphasis added)

No. 16

Plaintiff Sally L. Spechtenhauser asserts that the Defendant was negligent in the following particulars:

(1) In failing to inspect the sidewalk near the business known as Grandview Drug, at 486 North Grandview in Dubuque, Iowa;

(2) In failing to maintain the sidewalk in a safe condition;

(3) In failing to repair the sidewalk to a safe condition.

These particulars or specifications of negligence have been explained to you in other instructions.

To entitle the plaintiff Sally L. Spechtenhauser to recover, the burden is upon her to establish by a preponderance of the evidence all of the following propositions:

(a) That the Defendant was negligent in some particular, as charged by the Plaintiff;

(b) That such negligence was a proximate cause of her injury or damage;

(c) That the Plaintiff has sustained damage and the extent thereof.

The city argues that Iowa statutes and cases impose no affirmative duty to inspect sidewalks. The city also argues that the decision whether to inspect sidewalks would be a "discretionary function," for which a city may not be held liable under Iowa Code section 613A.4(3).

Spechtenhauser counters that Iowa law does impose on cities a duty to inspect their sidewalks. In addition, she argues that the challenged instruction was not essential to the verdict, and that any error was consequently harmless. She asserts that the evidence would support a finding of the city's negligence

on a theory of failure to repair after having constructive notice of the defect, as well as on a theory of failure to inspect.

A trial court has a duty to instruct with reasonable fullness on pleaded issues which have supportive evidence. Wiedenfield v. Chicago & N.W. Transp. Co., 252 N.W.2d 691, 695 (Iowa 1971). "A trial court may choose its own language in drafting instructions and is not bound to adopt wording preferred by counsel so long as instructions chosen cover all legal principles involved. Greninger v. City of Des Moines, 264 N.W.2d 615, 617 (Iowa 1978). "Instructions are to be read and considered together and related to each other, not piecemeal or in artificial isolation." Id. Because the trial court is obligated to correctly state the law in its instructions to the jury, a misstatement of the law in an instruction is reversible error. Heldenbrand v. Executive Council of Iowa, State, 218 N.W.2d 628, 637 (Iowa 1974).

Chapter 364 of the Iowa Code sets forth the powers and duties of cities in Iowa. Iowa Code section 364.12(2) (1983) provides:

> A city is responsible for the care, supervision, and control of public grounds, streets, sidewalks, alleys, bridges, culverts, overpasses, underpasses, grade crossing separations and approaches, except those lawfully required to be maintained by a railway company, and the city shall keep all public ways, squares, and commons open, in repair, and free from nuisance, ...

This section which is the source of the city's obligations regarding its sidewalks makes no specific mention of inspection. Rather, Spechtenhauser relies on case law to establish the proposition that a city has an active duty of inspection.

In Platts v. City of Ottumwa, 148 Iowa 636, 639, 127 N.W. 990, 991 (1910), the Iowa Supreme Court stated:

> It certainly is not true that the city is charged with no greater duty or obligation to observe the condition of its walks, or to know of the existence of dangerous defects

> therein, than the ordinary citizen or traveler who has occasion to use them. On the contrary, these 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. (emphasis added)

In Geer v. City of Des Moines, 183 Iowa 837, 841-42, 167 N.W. 635, 637 (1918), the court also discussed a city's obligation with regard to maintenance of its sidewalks as follows: ". . . The cited opinion does not negative the duty of the City to exercise reasonable care in the inspection and oversight of its walks or its duty to remove an obstruction which is manifestly a danger to pedestrians . . . ." (emphasis added). Another case upon which Spechtenhauser relies is Beach v. City of Des Moines, 238 Iowa 312, 26 N.W.2d 81 (1947). There the court stated that the sidewalk defects in question "were so obvious that the slightest inspection and supervision must have made them known to the city officers." Id. at 341, 26 N.W.2d at 96.

Although these authorities establish a responsibility on a city to inspect, none imposes an absolute duty upon municipalities to perform periodic, routine inspections of sidewalks. All of the language regarding inspection in those opinions is correlative to the law that a city must have notice of the particular sidewalk defects in issue. The liability of the city in each cited case did not rest upon a finding that the city had a duty to inspect. Rather, whether or not the city inspected was one factor for the jury to consider in determining if the city exercised reasonable care in the maintenance of its sidewalks. See Geer at 843, 167 N.W. at 636-37 (whether city is liable for sidewalk defect is question of fact to be determined by the jury); Beach at 342, 26 N.W.2d at 96 (measure of ordinary care is so variable in each case that question of city's negligence is function for jury); Krska v. Incorporated Town of Pocahontas, 200 Iowa 594, 596-97, 203 N.W. 39, 41 (1925) (fact question for jury as to whether

city exercised reasonable diligence to keep walks in safe condition). In none of these cases did the city's failure to inspect mandate a finding of negligence.

The law on notice and repair is succinctly stated in Krska as follows:

> The mere existence of a defect in a sidewalk that causes an injury is not alone sufficient to establish the liability of the municipality; but it must, in addition, either be shown that the city, through its officers, had actual knowledge of the defect, or that it had existed for such a length of time before the accident that, in the exercise of reasonable diligence, they ought to have known of it, a sufficient time before the accident to have permitted its repair, by the exercise of reasonable diligence.

Id. at 596, 203 N.W. at 40.

The trial court instructed the jury in Instruction No. 16 that for plaintiff to recover, it must find the defendant negligent in some particular, that the negligence was the proximate cause of plaintiff's damage and that plaintiff had been damaged. The particular negligence listed in Instruction No. 16(1) was that defendant city failed to inspect the sidewalk near the business known as Grandview Drug. Nowhere in the instruction is the failure to inspect allegation specifically tied to or referenced to the city's having notice of the defect and failure to repair. Thus a finding by the jury that the city failed to inspect is sufficient under this instruction to constitute negligence whether or not the city had constructive notice of the defect and failed to repair it. A city's failure to perform its duty to inspect sidewalks is not an actional ground of negligence. The framing of this issue by Instruction No. 16 as though it were constituted error.

The jury was instructed that the negligence must be the proximate cause of plaintiff's damage. However, this does not cure the error since liability could still be found by the jury without considering the question of the city's being on notice of the defect.

Our rule that instructions are to be read and considered together and related to each other, not piecemeal or in an artificial isolation, does not cure this error. Instruction No. 15 instructs the jury regarding the city's responsibility for the care, supervision, and control of public sidewalks including the responsibility for their inspection. Included therein is the requirement that the city must have notice of the defect. No other instruction on constructive notice is given. These general statements do not sufficiently instruct the jury to avert the error arising from Instruction No. 16, which specifically charges the jury that failure to inspect is negligence with no mention therein of the requirement of notice of defect and opportunity to repair.

The level of inspection necessary to meet the city's responsibility is a question for the jury to decide. Although the city had no established program of inspection on a daily, weekly, or monthly basis, that alone does not mandate the conclusion that the city failed to inspect. The jury must determine if the city's other methods of informing itself of defective sidewalks were enough to fulfill its duty of inspection. Whether that duty was met or not, the jury must still decide if the city had constructive notice of the elevated sidewalk, and if failure to repair it constituted negligence.

I would reverse and remand the case for a new trial.

Judge Schlegel voted to affirm for the following reasons:

Reading the instructions as a whole shows that the court was correct in instructing the jury on the issues of the city's duty to inspect and the requirements of notice. The authorities support a duty of inspection by the city. The instructions appropriately advised the jury of the claim of the city's failure to inspect, while giving adequate direction to the jury in its consideration of that duty.

I would affirm the trial court.