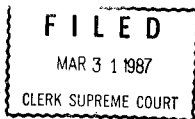


IN THE COURT OF APPEALS OF IOWA



RICHARD ALLEN GAUL; RICHARD)
WORDEN; and RICHARD ALLEN GAUL,)
EXECUTOR OF THE ESTATE OF)
PETER L. GAUL, Deceased,)

Plaintiffs-Appellants,)

vs.)

THE CITY OF SIOUX CITY, A)
Municipal Corporation,)

Defendant-Appellee.)

Filed March 31, 1987

7-37
86-863

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Appeal from the Iowa District Court for Woodbury County (9390BC) - Phillip
S. Dandos, Judge.

The district court granted the city a summary judgment, and the plaintiff
has appealed. **REVERSED AND REMANDED FOR REHEARING.**

J. Allen Orr, Sioux City, Iowa, for plaintiffs-appellants.

James L. Abshier, City Attorney of Sioux City, and Ann K. Jansen, Assistant
City Attorney, Sioux City, Iowa, for defendant-appellee.

Considered by Oxberger, C.J., Schlegel, and Hayden, JJ.

HAYDEN, J.**108**

On February 18, 1986, the plaintiffs filed a petition in three divisions: in division I plaintiff, Richard Allen Gaul, alleged defendant's negligent maintenance of the street known as Frances Place resulted in his severe emotional distress; in division II plaintiff, Richard Worden, also alleged defendant's negligent maintenance of the street resulted in his emotional distress; and in division III plaintiff, the estate of Peter L. Gaul, alleged defendant's negligent and intentional wrongs in maintaining the street resulted in general damages to the estate. All three divisions sought punitive damages. On May 7, 1986, defendant, City of Sioux City, filed a motion for summary judgment. The plaintiffs withdrew division III of the petition on June 9, 1986. On the same day, after a hearing, the trial court granted defendant's summary judgment and dismissed plaintiff's petition. Plaintiff, Richard Allen Gaul, has appealed; therefore we are concerned only with the allegations contained within division I.

We view the facts in a light most favorable to plaintiff, since defendant filed the motion for summary judgment. Swets Motor Sales, Inc. v. Pruissner, 236 N.W.2d 299, 304 (Iowa 1975). We also consider the entire record before the trial court, including the pleadings, admissions, depositions, answers to interrogatories and affidavits. Drainage District No. 119 v. Inc. City of Spencer, 268 N.W.2d 493, 499 (Iowa 1978). With these principles in mind we accept the following facts as established for purposes of this appeal.

Prior to January 28, 1986, plaintiff, Richard Gaul, lived with his grandfather, Peter Gaul, at 1715 Frances Place in Sioux City. On the morning of January 28, 1986, Peter Gaul passed away in his home at approximately 8:45 a.m. The funeral home, Myer Brothers Colonial Chapel, received a phone call from the Gaul household at approximately 9:30 a.m. The funeral home sent a hearse which came down Frances Place and parked in front of plaintiff's house

at approximately 10:00 a.m. While the funeral home's employees were in the house, the hearse slipped approximately twenty feet down the hill and struck a Mr. Worden's automobile. The funeral home personnel and plaintiff were able to carry the body out of the house and into the hearse. Both the employees and plaintiff slipped on the street. Once the body was in the hearse, some dirt was placed behind the back wheels of the vehicle, and it left under its own power. At 10:20 a.m., on January 28, 1986, Cheryl Hughes called defendant and requested assistance to remove ice and snow from the street. The city salted and sanded the street the same day.

Plaintiff contends the trial court erred in holding the petition failed to raise a genuine issue of material fact sufficient to defeat defendant's motion for summary judgment. Plaintiff also contends defendant is not entitled to the summary judgment as a matter of law. Finally, he contends the trial court erred by limiting consideration of the petition to events occurring six months prior to the date the petition was filed.

In reviewing the grant of summary judgment under Iowa Rule of Civil Procedure 237(c), the question is whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. Suss v. Schammel, 375 N.W.2d 252, 254 (Iowa 1985); Brown v. Monticello State Bank of Monticello, 360 N.W.2d 81, 83-84 (Iowa 1984). The purpose of summary judgment is to allow a judgment to be obtained promptly and without the expense of trial when there is no genuine and material fact issue present. Nedco, Inc. v. Christenson, 312 N.W.2d 559, 560 (Iowa 1981). The moving party has the burden of demonstrating both the absence of any genuine and material issue and that it is entitled to judgment as a matter of law. Drainage District No. 119 v. Inc. City of Spencer, 268 N.W.2d at 499. Our task on appeal is to determine only whether a genuine issue of

material fact exists and whether the law was correctly applied. D.R.R. v. English Enterprises, CATV, 356 N.W.2d 580, 582 (Iowa Ct. App. 1984).

On this appeal we need to consider only the plaintiff's contention regarding Iowa Code 613A.5 (1985). He argues the trial court erred in prohibiting evidence of defendant's negligence which occurred six months prior to the filing of plaintiff's petition. We agree.

In paragraph three of the trial court's conclusions of law, the following was set forth:

3. Iowa Code section 613A.5 provides:

Every person who claims damages from any municipality for or on account of any wrongful death, loss or injury within the scope of section 613A.2 or section 613A.8 or under common law shall commence an action therefore within six months, unless said person shall cause to be presented to the governing body of the municipality within sixty days after the alleged wrongful death, loss or injury a written notice stating the time, place, and circumstances thereof and the amount of compensation or other relief demanded. . . .

Plaintiffs make no allegation that any notice was served on the City for past injuries or damages. As such, the statute limits their claim to acts which occurred within six months prior to the time the petition was filed on February 18, 1986. Summary judgment should be granted as to any claim for damages or injuries for any conduct prior to August 18, 1985, and Plaintiffs claims should be so limited.

We do not agree with the court's interpretation of section 613A.5, Iowa Code (1985). The purpose of this section is to provide a method for prompt communication of the time, place, and circumstances of injury in order to accord the prospective defendant the opportunity to investigate while the facts are fresh. Lunday v. Vogelmann, 213 N.W.2d 904, 907 (Iowa 1973). Section 613A.5 is a section setting forth the time limitations for filing an action and giving notice of the claim against a municipality. This section does not limit the scope

of relevant and material evidence. In its ruling the trial court impermissibly limited the amount of evidence and thereby committed reversible error. Furthermore, we note section 613A.5 has been held to violate equal protection and is unconstitutional. Miller v. Boone County Hospital, 394 N.W.2d 776, 781 (Iowa 1986).

Since the trial court impermissibly limited consideration of plaintiff's evidence, we reverse and remand for rehearing on motion for summary judgment. At the rehearing the trial court shall consider all relevant and material evidence.

REVERSED AND REMANDED FOR REHEARING.