

4-11119

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107

IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT

NETTIE WHITE,

Appellee,

Filed January 25, 1979

VS.

CITY OF SIOUX CITY, IOWA,

A Municipal Corporation,

Appellant.

688

2-61448

Appeal from the Woodbury District Court - Donald M. Pendleton, Judge.

Defendant city appeals judgment for plaintiff following jury verdict awarding her damages for injuries sustained when she fell on a defective public sidewalk. Affirmed.

James L. Abshier and Michael S. Walsh of Sioux City, for appellant.

F. L. Goodwin and Richard L. McCoy of Sioux City, for appellee.

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

PER CURIAM

Defendant, City of Sioux City, appeals a judgment for plaintiff, Nettie White, following a jury verdict awarding her damages for injuries sustained when she fell on a public sidewalk which was found to be defective due to defendant's negligence in failure to repair. Defendant contends trial court erred: 1) in overruling its motion to dismiss (in effect a motion for directed verdict) and judgment N.O.V. due to plaintiff's failure to prove a) that the sidewalk was defective, or b) that defendant had constructive notice thereof; and 2) in admitting certain photographs into evidence without proper foundation. We affirm.

I. In considering whether trial court abused its discretion in overruling defendant's motion for directed verdict due to lack of any substantial evidence to warrant submitting the case to the jury, we must view the evidence in the light most favorable to the plaintiff as the party against whom the motion was made. *Ehrhardt v. Ruan Transport Corp.*, 245 Iowa 193, 196, 61 N.W.2d 696, 698 (1953); Rule 14(f)(2), Rules of Appellate Procedure. Further, "the movant [defendant] must be considered as admitting the truth of all evidence offered by the adverse party [plaintiff] and every favorable inference which may be fairly and reasonably deduced therefrom." *Schneberger v. Glenn*, 176 N.W.2d 782, 784 (Iowa 1970).

Defendant alleges that there is no substantial evidence that a defective sidewalk caused plaintiff's injuries because plaintiff failed to show the exact location of her fall or to give an accurate description of the physical dimensions of the alleged defect. However, applying the principles stated above, we believe trial court acted properly in overruling defendant's motion on this ground. Viewing the record as a whole, the evidence and the reasonable inferences to be deduced therefrom establish substantial evidence which would allow the jury to find that the accident occurred as plaintiff was walking northbound on the inside (east) portion of the sidewalk in front of 1500 Morningside Avenue and that she fell as a result of her toe catching on a raised portion of the sidewalk which was between a tree and a (stop) light pole. There is also sufficient competent evidence from which the jury could conclude that the inside portion of the sidewalk at that location was elevated as much as one and one-half inches.

Since Iowa has no law which requires a sidewalk defect to be of a minimum elevation before a municipality can be held liable for damages resulting from an accident caused by such elevation, the matter is appropriately submitted to the jury for its determination as

to whether defendant failed to exercise reasonable care under the circumstances in allowing the elevation to exist. See *Geer v. City of Des Moines*, 183 Iowa 837, 842-43, 167 N.W. 635, 637 (1918).

II. As its second assignment of error, defendant argues that trial court should have granted its motion to dismiss, even if the sidewalk was defective, due to lack of any substantial evidence that defendant had notice of the defect. Defendant asserts that the defect was of a trivial nature, that there was no competent testimony to establish the exact location of the defect, and no testimony as to the condition of the sidewalk on the date of plaintiff's accident.

Plaintiff has the burden of proving that defendant had either actual or constructive notice of the defect and, in this case, relies on constructive notice. She, therefore, must show that defendant, in the exercise of reasonable care, should have known of the defect and that defendant had a reasonable opportunity to remedy it.

Whether the city is liable depends on all the facts and circumstances, however, "[i]t 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." *Platts v. City of Ottumwa*, 148 Iowa 636, 639, 127 N.W. 990, 990-91 (1910).

Mere existence of a defect that causes an injury is not sufficient to establish liability, but it is not necessary that the defect be so obvious or notorious as to be observed by all. *Krska v. Incorporated Town of Pocahontas*, 200 Iowa 594, 596, 203 N.W. 39, 40 (1925). Size alone is not determinative, but can be significant, as can location of the defect. *Baxter v. City of Cedar Rapids*, 103 Iowa 599, 606, 72 N.W. 790, 792 (1897). There is no fixed or definite rule as to what length of time a defect must have existed. This, too, depends on the facts and circumstances of each case. *Hovden v. City of Decorah*, 261 Iowa 624, 627, 155 N.W.2d 534, 536 (1968), citing *Parks v. City of Des Moines*, 195 Iowa 972, 979, 191 N.W. 728, 731 (1928).

The evidence must be viewed in the light most favorable to plaintiff to determine if it is sufficient to generate a jury question on the issue of notice. *Ehrhardt v. Ruan Transport Corp.*, supra. Without setting forth the evidence in detail, we conclude that there was testimony from which the jury might have found that the defect was located at 1500 Morningside Avenue and that the portion of sidewalk between the elm tree and (stop) light pole had been elevated since 1964. One witness, who testified to the existence of the defective condition as early as 1964, also testified that he had had an opportunity to observe that portion of the sidewalk nearly every day since 1964 and that a photograph taken in 1977 showed no substantial change from the defective condition he observed in 1964. From this the jury could draw the reasonable inference that the sidewalk was substantially the same on April 28, 1973, as it was in 1964 and 1977. We, therefore, find that trial court did not err in overruling defendant's motion to dismiss due to plaintiff's failure to prove that defendant had notice of the defective sidewalk.

III. The trial court has broad discretion in ruling on the admissibility of photographs and its ruling will be upheld on appeal unless there is a clear showing of abuse of that discretion. *Coonley v. Lowden*, 234 Iowa 731, 743, 12 N.W.2d 870, 878 (1944). Where the record establishes similarity of condition between the time the photograph was taken and the date the accident occurred, no abuse of discretion is shown. *Galbraith v. George*, 217 N.W.2d 598, 602 (Iowa 1974). The credibility of such evidence is for the jury and it is necessary only that there is competent testimony to the effect that the photograph is a fair representation of the location at the time of the accident and that any changes be explained. *Coonley v. Lowden*, 234 Iowa at 743, 12 N.W.2d at 878.

Defendant argues that there is no evidence in the record to establish that the photographs are fair representations of the sidewalk on the day of plaintiff's accident. It further contends plaintiff never viewed the sidewalk from the angle shown in the photographs and that they were taken from that angle solely for the purpose of exaggerating the height of the defect.

The record establishes that plaintiff looked at the photographs and said they showed "where [she] fell." (App. p. 10). She further testified that after she fell she looked to see what caused her fall and knew that she fell over "the gap", although she did not measure it

at that time. However, she testified later regarding the height of the elevation and said the photographs accurately represented what the sidewalk looked like on April 28, 1973. This testimony establishes a sufficient foundation for the photographs. Trial court, therefore, did not abuse its discretion in ruling they were admissible.

Finding no reversible error, the judgment of trial court is affirmed.

AFFIRMED.