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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

EDITH M. GROVE and OREN A. GROVE,)

Plaintiffs-Appellants,)

vs.)

Filed June 24, 1980

THE CITY OF BOONE, IOWA,)

a Municipal Corporation,)

Defendant-Appellee.)

0-158

2-63721

Appeal from Boone District Court - Edward J. Flattery, Judge.

Plaintiffs appeal trial court judgment denying them recovery of damages against defendant in consolidated negligence and loss of consortium actions arising out of a fall into a hole on city property. AFFIRMED.

Jerry L. Jones of Ames, Iowa, for plaintiff-appellant.

Michael J. Moon of Cartwright, Druker & Ryden, Marshalltown, Iowa, for defendant-appellee.

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

Plaintiffs, Edith M. and Oren A. Grove, appeal trial court's judgment denying them recovery of damages against defendant, City of Boone, in consolidated negligence and loss of consortium actions arising out of Edith's fall into a hole on city property. They allege trial court erred in (1) concluding the City did not have constructive notice of the hole, (2) failing to find the City negligent for inadequately inspecting for the hole, and (3) granting defendant's motion for directed verdict. We affirm.

In the late afternoon or early evening of October 15, 1975, plaintiff Edith M. Grove alighted from her car and began traversing the city-owned parking located in front of 1128 Carrol Street, Boone, Iowa. After only two or three steps, the ground on which she was walking gave way under her and she fell into an approximately three feet deep subterranean hole, injuring her right leg.

The hole was located near a city stop box used for terminating water supply to individuals delinquent in payment of their bill. Apparently, the hole developed due to a leak in either the stop box or water line which caused an erosion of the subterranean soil over a long period of time. The City had installed the stop box in 1914, had not inspected it since that time, and consequently had no actual knowledge of the hole's existence.

In order to recover damages sustained as a result of the fall, plaintiffs brought consolidated negligence and loss of consortium actions against defendant on August 24, 1977. Defendant answered on September 14, 1977, generally denying plaintiffs' allegations and contending plaintiff, Edith M. Grove, was contributorily negligent.

Trial to the court was held on March 29, 1979. On April 12, 1979, trial court ruled plaintiffs had failed to prove by a preponderance of evidence the city had constructive knowledge of the hole's existence, or unreasonably failed to inspect for the hole's existence. In the concluding sentence of its ruling, trial court granted defendant's motion for a directed verdict.

I. Scope of Review. Although plaintiffs predicate this appeal on trial court's statement in its order "[d]efendant's Motion for Directed Verdict made at the close of the evidence is sustained," review of the entire ruling reveals trial court's determination actually was based on an examination of all the evidence presented. We consequently characterize this appeal as arising from a judgment on the merits in favor of defendant and review it from that posture.

Trial court's findings of fact therefore will have the effect of a special verdict. Warder and Lee Elevator, Inc. v. Britten, 274 N.W.2d 339, 340 (Iowa 1979). Our review, however, is not limited to trial court's determination of law. Id.

II. Constructive Notice. Plaintiffs argue trial court erred in failing to conclude defendant had constructive notice of the hole's existence. In order to recover under that theory, plaintiffs have the burden to prove by a preponderance of evidence the City failed to exercise reasonable care to keep its property in a safe condition. See e.g., Greninger v. City of Des Moines, 264 N.W.2d 615, 618 (Iowa 1978); Disbrowe v. Tucker, 211 N.W.2d 318, 320 (Iowa 1973). The condition must have existed long enough for the City to discover and repair it in the exercise of reasonable and ordinary diligence. Abraham v. City of Sioux City, 218 Iowa 1068, 1070, 250 N.W. 461, 462 (1933). Mere existence of a defect on public property which causes injury is not alone sufficient to establish liability. Krska v. Incorporated Town of Pocahontas, 200 Iowa 594, 596, 203 N.W. 39, 40 (1925). Constructive notice will not be presumed merely because of existence of a defective condition for a long period of time if it is not possible to discover the condition through the exercise of ordinary care. Broburg v. City of Des Moines, 63 Iowa 523, 525, 19 N.W. 340, 340 (1884). The presumption is of no force and effect if the condition was not discoverable, regardless of the duration of its existence. Cook v. City of Anamosa, 66 Iowa 427, 430, 23 N.W. 907, 909 (1885). Rather, the existence of constructive notice depends on the facts and circumstances of each case and is generally a question for the trier of fact. Anderson v. City of Des Moines, 213 N.W.2d 527, 528 (Iowa 1973).

Applying these principles to the facts, we agree with trial court's finding plaintiff failed to establish defendant had constructive notice of the hole's existence. No evidence was presented indicating the city should have known of the hole's existence. Testimony revealed the parking had been mowed a few days prior to the accident by the abutting property owner. Existence of the hole was not ascertained at that time. Indeed, it was not until plaintiff stepped on the ground above the hole that anyone had knowledge of the hole's existence. Defendant cannot be held liable for every hole which may exist out of sight beneath city property. As plaintiff stated herself, the ground above the hole appeared to be a nice grassy lawn. While it is unfortunate plaintiff fell in the hole and was injured, we cannot hold defendant liable for existence of a hole no

one would reasonably expect existed. Defendant is not required to foresee and protect against every possible accident.

III. Duty to Inspect. Plaintiffs also allege in brief point trial court erred in not finding defendant negligently failed to inspect for the hole's existence. Although plaintiffs may be correct in their assertions,¹ we will not review their contentions where no cases, statutes or other authorities have been cited in the argument covering that issue. Iowa R. App. P. 14(a)(3). The issue is deemed waived. Id.

Due to the foregoing reasons, judgment of trial court is affirmed.

AFFIRMED.

¹ See Wilson v. Nepstad, 282 N.W.2d 665, 672-74 (Iowa 1979).