IN THE COURT OF APPEALS OF IOWA

No. 7-414 / 06-1950
Filed October 24, 2007

MONICA BROWN-KIRKWOOD and
ELTON KIRKWOOD, JR.,
Plaintiffs-Appellees,

vs.

THE CITY OF CEDAR RAPIDS, IOWA,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Robert E. Sosalla, Judge.

The city of Cedar Rapids appeals arguing the issue of municipal immunity should have been submitted to the jury because a sidewalk is a "road or street" under Iowa Code section 668.10. **REVERSED AND REMANDED.**

Mohammad Sheronick, Cedar Rapids, for appellant.

John C. Wagner, of John C. Wagner Law Offices, Amana, for appellees.

Heard by Zimmer, P.J., and Eisenhauer, J., and Schechtman, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

EISENHAUER, J.

In this slip-and-fall case, a jury awarded damages to the plaintiffs based on injuries sustained in a fall on an icy sidewalk. We conclude the trial court correctly submitted the issue of the city's actual or constructive notice of the sidewalk's condition to the jury. We reverse and remand, however, because we conclude the trial court should also have submitted the issue of municipal immunity to the jury.

I. BACKGROUND FACTS AND PROCEEDINGS.

On the morning of December 17, 1999, Ms. Monica Brown-Kirkwood fell on an ice and snow covered brick sidewalk. Brown-Kirkwood was leaving the Crowne Plaza hotel and walking with three co-workers to her job. Because she fractured her ankle, an ambulance took her to the hospital. The injuries resulted in three surgeries and significant mobility limitations during her recovery and some indefinite physical limitations.

Brown-Kirkwood and her husband sued the city of Cedar Rapids and a jury verdict was returned in their favor. The city's motion for judgment notwithstanding the verdict was denied. The city appeals, claiming it was prejudicial error for the court not to direct a verdict based on Iowa's statutory immunity provisions. *See* Iowa Code § 668.10 (2001). Alternatively, the city seeks a new trial. Further, the city argues it was entitled to a directed verdict because the plaintiffs failed to prove the city had "actual or constructive notice" of the sidewalk's condition.

II. SCOPE AND STANDARDS OF REVIEW.

Our review of the district court's denial of a motion for judgment notwithstanding the verdict is for correction of errors at law. Iowa R. App. P. 6.4; *Lynch v. Saddler*, 656 N.W.2d 104, 107 (Iowa 2003). We examine the record to determine whether substantial evidence exists to support each element of the plaintiff's claim, justifying submission of the case to the jury. *Lynch,* 656 N.W.2d at 107. In making this analysis, we review the evidence in the light most favorable to the non-moving party. Iowa R. App. P. 6.14(*f*)(2); *Lynch,* 656 N.W.2d at 107. Our review of the trial court's exclusion of a requested jury instruction is for correction of errors at law. Iowa R. App. P. 6.4; *Lynch,* 656 N.W.2d at 107.

III. MERITS.

A. IMMUNITY.

Defendant contends it was entitled to a directed verdict under the immunity provisions of Iowa Code section 668.10:

> In any action . . . a municipality shall not be assigned a percentage of fault for any of the following:
>
> (2) The failure to remove natural or unnatural accumulations of snow or ice, or to place sand, salt, or other abrasive material on a *highway, road, or street* if the . . . municipality establishes that it has complied with its policy or level of service for snow and ice removal or placing sand, salt or other abrasive material on its *highways, roads, or streets*.

Iowa Code § 668.10(2) (emphasis added).

Defendant does not dispute that Kirkwood-Brown fell on the brick sidewalk in front of the hotel; but claims the statutory language, "highway, road, or street," includes sidewalks, thereby granting it immunity in this case.

The Iowa Supreme Court discussed a related issue concerning a walkway through a park in *Hoskinson v. City of Iowa City*, 621 N.W.2d 425 (Iowa 2001). The trial court relied on *Hoskinson* in overruling the city's motion for directed verdict. In *Hoskinson* the court first considered whether the walkway was a sidewalk under Iowa Code section 364.12(2), which imposes a duty to remove snow and ice from sidewalks. *Id*. at 427; *see* Iowa Code 364.12(2) (Supp. 1995) ("removal of the natural accumulations of snow and ice from the sidewalks"). If the walkway was a sidewalk, then the city had a duty under section 364.12(2) to remove snow and ice. *Hoskinson*, 621 N.W.2d at 427.

Because chapter 364 does not define sidewalk, the court relied on two early Iowa cases in concluding the walkway was not a sidewalk. *See id.* In 1870, the *Henly* court ruled,

> A sidewalk, so called, is part of the street. The fact that it is exclusively reserved for foot passengers, and is usually paved and constructed in a manner different from other parts of the street used for horses and vehicles, does not require it to be regarded as no part of the street.

Warren v. Henly, 31 Iowa 31, 37 (1870). Later, in 1919, the *Central Life* court concluded,

> A sidewalk is a part of the street, exclusively reserved for pedestrians, and constructed somewhat differently than other portions of the street, made use of by animals and vehicles, generally. Whatever may be the difference, it constitutes a part of the street.

Central Life Assurance Soc'y v. City of Des Moines, 185 Iowa 573, 576-7, 171 N.W. 31, 32 (Iowa 1919).

In *Hoskinson*, the park walkway was determined not to be a sidewalk because it did not have one of the two specific characteristics identified in the

early cases: "One, a sidewalk is a part of the street, constructed at or alongside of the street. And two, it is exclusively reserved for pedestrian use." *Hoskinson*, 621 N.W.2d at 428-9. The park walkway was not a sidewalk because it "was not located at or along the side of a road, street, or highway." *Id.* at 429.

Here, there is no controversy that Brown-Kirkwood's fall occurred on a sidewalk running parallel to First Avenue in downtown Cedar Rapids and the sidewalk clearly meets the *Hoskinson* court's definition of sidewalk. The controversy is whether this sidewalk is a "highway, road, or street," under Iowa's immunity statute. This issue was also addressed in *Hoskinson,* where the court divided its immunity discussion into two parts: (a) was the walkway a highway? and (b) was the walkway a road or street? *Id.* at 430-31.

Because the *Hoskinson* court decided the walkway was not a highway and neither party here argues the sidewalk is a highway, we turn to a discussion of the meaning of immunity statute terms, "road or street."

The *Hoskinson* court determined the statutory definition in Iowa Code section 306.3 provides the definition of "road or street" because section 306.3 specifically applies to "any chapter of the Code relating to highways." *Id*. at 430-431 (quoting Iowa Code § 306.3 (1995)). Therefore, "road or street" in the immunity statute means "every way or place of whatever nature when any part of such way or place is open to the use of the public, as a matter or right, for purposes of vehicular traffic." *Hoskinson*, 621 N.W.2d at 430-431 (quoting Iowa Code § 306.3(10)). Because the walkway in the park was not intended to be open to the public for vehicular traffic, the court determined the walkway was not

within the immunity statute's definition of "road or street." *Hoskinson*, 621 N.W.2d at 431.

However, because our case involves a sidewalk, not a walkway, and because the *Hoskinson* court first determined the walkway was not a sidewalk, the *Hoskinson* holding that a walkway is not a "road or street" under the immunity statute does not control our issue of whether a sidewalk is a "road or street" under that statute.

First, we note, "the word 'street' should be interpreted broadly so as to foster the legislative intent favoring immunity." *Humphries v. Methodist Episcopal Church*, 566 N.W.2d 869, 872 (Iowa 1997) (holding "street" includes a raised curb on public property at the edge of a roadway and includes as well a narrow concrete extension of the curb).

Second, we believe the plain meaning of section 306.3 shows "street" means the *entire way* dedicated to public use, *any* portion of which is dedicated to vehicular use. *See* Iowa Code § 306.3(8) (2001). It does not exclude the sidewalk. If it meant to exclude the sidewalk, the legislature could have defined "street" to be a public way open to vehicular traffic. Instead, the statute includes the entire publicly-owned tract if *any* part of that tract is open for vehicles. *See id*. "In the interpretation of a statute, the legislature will be presumed to have inserted every part thereof for a purpose, and to have intended that every part of the statute should be carried into effect." *Georgen v. State Tax Commission*, 165 N.W.2d 782, 785 (Iowa 1969). Therefore, "any part of such way or place" was intended for the purpose of including more area than just the vehicular way, but

also the public land directly adjacent, including the sidewalk. *See* Iowa Code § 306.3(8).

We conclude the immunity statute term "street" includes the sidewalk at issue here. On remand, it will be up to the jury in a new trial to consider the facts in light of the immunity statute and determine whether the city had a policy or level of service to remove snow and ice, and, whether it complied with its policy. *See Humphries*, 566 N.W.2d at 872.

B. ACTUAL OR CONSTRUCTIVE NOTICE.

Defendant next argues the district court erred in overruling its motion for directed verdict due to the plaintiff's failure to prove actual or constructive notice. The trial court stated:

> Principally my concern was as to the notice requirements. And after my review of the evidence, I think that that's a matter for the jury to determine. Based on all of the evidence, I think there is a sufficient factual issue as to whether the City had notice or whether reasonable amount of time had lapsed that the City should have been on notice. And that will be an issue that the jury should decide.

In Iowa, the requirements of notice and an opportunity to remove the hazard are limitations to liability in situations involving the natural accumulations of ice and snow. *Hopping v. College Block Partners*, 599 N.W.2d 703, 705 (Iowa 1999). Because each case is factually unique, for many years Iowa courts have recognized the issue of actual or constructive notice of snow and ice accumulation is a question for the jury. "The length of time sufficient to constitute constructive notice of the conditions and a reasonable opportunity to remedy it depends on the facts and circumstances of each case and is generally a question for the jury." *Hovden v. City of Decorah*, 261 Iowa 624, 627, 155

N.W.2d 534, 536 (1968), *overruled on other grounds by Hopping*, 599 N.W.2d at 705; *see also Gates v. City of Des Moines*, 240 Iowa 775, 781, 38 N.W.2d 96, 100 (1949); *Tollackson v. City of Eagle Grove*, 203 Iowa 696, 698, 213 N.W. 222, 224 (1927); *Parks v. City of Des Moines*, 195 Iowa 972, 977-78, 191 N.W. 728, 730-31 (1923). Constructive notice of the actual condition of the premises has been found to exist where a plaintiff fell on slippery cement on a cold day following several days of snow. *See Frantz v. Knights of Columbus*, 205 N.W.2d 705, 712 (Iowa 1973).

It snowed intermittently for several days prior to the morning Kirkwood-Brown fell. The most recent snow was a one inch snowfall, not an ice event, and it stopped in the early hours of the morning of her fall. The city had sent out its snowplow and work crews. Kirkwood-Brown testified the sidewalk where she fell had not been shoveled or salted. We agree with the trial court's conclusion the record contains sufficient evidence to create a factual issue for the jury concerning the city's notice of the sidewalk's conditions.

REVERSED AND REMANDED.