IN THE SUPREME COURT OF IOWA

SUPREME COURT No. 19-0221

POLK COUNTY No. LACL142505

LAURA H. FULPS AND CHARLES B. FULPS,

Plaintiffs/Appellants,

vs.

CITY OF URBANDALE

Defendant/Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE SARAH CRANE, JUDGE

APPELLANTS' AMENDED FINAL BRIEF

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ROUTING STATEMENT

The Appellants state that this case should retained by the Iowa Supreme Court under Iowa R. of App. Procedure 6.1101(2) because it presents substantial issues of first impression and it presents substantial questions of enunciating or changing legal principles, specifically the application of the public duty doctrine.

STATEMENT OF THE CASE

A. Course of the Proceedings & Disposition of the Case

On October 8, 2018, Plaintiffs/Appellants Laura H. Fulps and Charles B. Fulps filed a Petition at Law in Polk County District Court, against the City of Urbandale for negligence and a consortium claim for injuries resulting from a trip and fall on the sidewalk along 86th Street at the Cobblestone Shopping Center in Urbandale, Iowa. (App. 4-7). Defendant/Appellee City of Urbandale filed a Pre-Answer Motion to Dismiss on October 29, 2018. (App. 8-16). A hearing was held on Defendant's motion on December 7, 2018 and an Order Granting Motion to Dismiss was entered was entered on January 25, 2019 wherein the trial court dismissed the Fulps' action. (App. 63-69). The Fulps filed a Notice of Appeal on February 6, 2019. (App. 70-71).

B. Nature of the Case

This is a personal injury action for damages sustained by the Fulps. Laura was volunteering at an event held at the Cobblestone Shopping Center parking lot located at 8501 Hickman Road, Urbandale, Iowa 50322, located at the intersection of 86th Street and Hickman Road. (App. 4). Laura was walking on the sidewalk along 86th Street when she fell on the uneven, damaged, and improperly maintained sidewalk and suffered injuries in the fall, including a broken wrist and arm, requiring surgery. (App. 5). The Fulps filed action with two counts against the City of Urbandale. The first count of negligence asserts Urbandale was negligent in:

a. failing to properly maintain the sidewalk;

b. failing to properly repair and/or replace the uneven portion of sidewalk;

c. failing to fix the damaged and defective portion of the sidewalk;

d. failing to warn for a known danger;

e. failing to exercise ordinary care under the circumstances. (App. 5-6).

The second count is a consortium claim on behalf of Laura's husband, Charles Fulps. (App. 6).

Urbandale filed a pre-answer motion to dismiss arguing that the public duty doctrine precludes any liability on behalf of Urbandale because it does not owe a legal duty to Laura Fulps specifically, but only to the public in general to maintain the sidewalks. (App. 8-16). Fulps resisted the motion and showed ways that the public duty doctrine is not applicable to this situation. (App. 17-24, 34-38). The trial court sided with Urbandale and found the public duty doctrine applied to negligence claims on sidewalks and dismissed the Fulps' action, resulting in this appeal. (App. 63-69).

ARGUMENT

A. Preservation of Error.

The issues presented in this appeal were preserved by presentation of evidence at hearing through motions, resistances, briefs, and oral argument.

B. Scope and Standard of Review

The grant or denial of a motion to dismiss is reviewed for errors at law. *Geisler v. City Council of Cedar Falls*, 769 N.W.2d 162, 165 (Iowa 2009). We accept as true the facts alleged in the petition and typically do not consider facts contained in either the motion to dismiss or any of its accompanying attachments. *Id.*; *McGill v. Fish*, 790 N.W.2d 113, 116 (Iowa 2010).

C. Argument

I. THE COURT ERRED IN DISMISSING THIS ACTION AT SUCH AN EARLY STAGE

On a motion to dismiss, the petition should be construed in the light most favorable to plaintiff, with all doubt resolved in the plaintiff's favor. *Raas v. State*, 729 N.W.2d 444 (Iowa 2007). A dauntingly high hurdle must be cleared in order for the dismissal to be granted on this ground. Even in one of the relatively rare cases in which the Iowa Supreme Court actually affirmed a rule 1.421(1)(f) dismissal motion, the court admonished practitioners not to submit such motions and, if such motions nonetheless are submitted, that the district courts deny them:

> "[W]e mention the special risks and problems which attend premature attacks on litigation by motions to dismiss. Although we conclude the trial court should be affirmed, we certainly do not recommend the filing of motions to dismiss in litigation, the viability of which is in any way debatable. Neither do we endorse sustaining such motions, even where the ruling is eventually affirmed. Both the filing and the sustaining are poor ideas."

Cutler v. Klass, Whicher & Mishne, 473 N.W.2d 178, 181 (Iowa 1991).

> "We recognize the temptation is strong for a defendant to strike a vulnerable petition at the earliest opportunity. Experience has however taught us that vast judicial resources could be saved with the exercise of more professional patience. Under the foregoing rules dismissals of many of the weakest cases must be reversed on appeal. Two appeals often result where one would have sufficed had the defense moved by way of

> summary judgment, or even by way of defense at trial. From a defendant's standpoint, moreover, it is far from unknown for the flimsiest of cases to gain strength when its dismissal is reversed on appeal. We emphasize that our determination of this appeal is no commendation for filing or sustaining the motion to dismiss." *Id.*

Because Iowa is a notice pleading state, for a district court to sustain a motion to dismiss on the ground that the plaintiff has failed to state a claim upon which relief can be granted, the court "must conclude that no state of facts is conceivable under which the plaintiff might show a right of recovery." *Lakota Consol. Indep. Sch. v. Buffalo Ctr./Rake Cmty. Sch.*, 334 N.W.2d 704, 708 (Iowa 1983). The Iowa Supreme Court has emphasized that "[t]he impact of this philosophy of pleading [that is, notice pleading] has virtually emasculated the motion to dismiss for failure to state a claim." *Unertl v. Bezanson*, 414 N.W.2d 321, 324 (Iowa 1987). In that regard, "[n]early every case will survive a motion to dismiss under notice pleading." *U.S. Bank v. Barbour*, 770 N.W.2d 350, 353 (Iowa 2009).

While the Iowa Supreme Court has recently found the public duty doctrine applied in certain specific situations, it has not yet found it applicable to an action for injuries on a public sidewalk. Given the high bar the Court has set on motions to dismiss in Iowa, the District Court erred in dismissing this action at the outset, deciding that public duty doctrine applied to this specific action without a previous decision directly on point.

II. THE COURT ERRED IN FINDING THE PUBLIC DUTY DOCTRINE APPLIES TO SIDEWALK INJURIES CASES

The public duty doctrine provides that if a duty is owed to the public generally, there is no liability to an individual member of that group." *Kolbe v. State*, 625 N.W.2d 721, 729 (Iowa 2001). "[A] breach of duty owed to the public at large is not actionable unless the plaintiff can establish, based on the unique or particular facts of the case, a **special relationship** between the [governmental entity] and the injured plaintiff..." *Id* (emphasis added). Here, Urbandale has a duty to maintain its sidewalks pursuant to Iowa Code Section 364.12(2)(a), but Urbandale argues that since this duty is owed to the public in general, the public duty doctrine applies and it should not be held liable. To the contrary, there are two special relationships which circumvent the public duty doctrine in this case: one created by the Restatement (Third) of Torts and one created by Urbandale's own local ordinances.

A. RESTATEMENT (THIRD) CREATES A SPECIAL RELATIONSHIP BETWEEN POSSESSORS OF LAND AND THOSE LAWFULLY ON THE PREMISES.

The special relationship created by the Restatement (Third) of Torts was mentioned by Justice Wiggins in his dissent in *Johnson v. Humboldt*

County, the latest Iowa public duty doctrine case, decided on a 4-3 vote. *See* 913 N.W.2d 256, 270 (Iowa 2018). Section 40 of the Restatement (Third) is titled "Duty Based on Special Relationship with Another" and Section 40(b)(3) of the Restatement (Third) states "a business or **other possessor of land that holds its premises open to the public with those who are lawfully on the premises owes a duty of reasonable care**." Restatement (Third) § 40(b)(3), at 39 (emphasis added). *See Johnson v. Humboldt County*, 913 N.W.2d 256, 270 (Iowa 2018). Here, the City of Urbandale is an "other possessor of land that holds its premises open to the public with those who are lawfully on the premises" and therefore "owes a duty of reasonable care" pursuant to this special relationship. *See id.*

Urbandale owns its public sidewalks, including the sidewalk in question along 86th Street. "The abutting owner does not own the sidewalk; nor do the statutes give such owner control of or an exclusive possessory right to the sidewalk." *Peffers v. City of Des Moines*, 299 N.W.2d 675, 677 (Iowa 1980). Urbandale is therefore the owner and possessor of its sidewalks, it holds its sidewalks open to the public, and owes a duty of reasonable care to those who are lawfully on the sidewalks. This special relationship pursuant to the Restatement (Third) renders the public duty doctrine inapplicable here.

B. ONLY MUNICIPALITIES, NOT PEDESTRIANS, CAN HOLD ABUTTING LANDOWNERS LIABLE IN SIDEWALK CASES, THEREFORE A SPECIAL RELATIONSHIP EXISTS.

Urbandale argued in its motion to dismiss that it was not liable to the public on sidewalks pursuant to the public duty doctrine, and that Laura Fulps should have sued the abutting landowner instead of Urbandale for her injuries on its sidewalk. (App. 29). This argument is wholly without merit. This exact issue of abutting landowner liability was decided in 2014 in *Madden v. City of Iowa City*, where a bicyclist was injured on a sidewalk in Iowa City. "One question raised by the State is whether Iowa Code Section 364.12(2)(c) gives rise to a private cause of action against an abutting property owner for injuries sustained as a result of a sidewalk defect. We think the answer to this question is clear, and it is no." *Madden v. City of Iowa City*, 848 N.W.2d 40, 48 (Iowa 2014). The only exception to this in the Iowa Code is that an abutting landowner can be held liable in relation to snow and ice removal on the sidewalk, but that is not applicable to this case. *See* Iowa Code Section 364.12(2)(b). Pursuant to *Madden*, Laura does not have a private cause of action against the abutting landowner, only Urbandale, for her injuries on the sidewalk. *See Madden*, 848 N.W.2d at 48.

However, pursuant to Urbandale's own local ordinances, and just like in *Madden* case, Urbandale could seek indemnification from the abutting landowner for Laura's injuries by bringing in the abutting landowner as a third party defendant. *See Madden* 848 N.W.2d 40 at 50. "We therefore conclude that when an ordinance or statute validly imposes a maintenance obligation and also imposes liability on the abutting landowner, the City is entitled to indemnification from the abutting landowner for any damages arising out of its failure to maintain the sidewalk." *Id.*

Urbandale's own Municipal Code contemplates this exact scenario and allows the City to seek indemnification from the abutting landowner. Section § 99.079 FAILURE TO MAINTAIN SIDEWALKS states:

> "If the abutting property owner does not maintain sidewalks as required and action is brought against the city for personal injuries alleged to have caused by its negligence, the city may notify in writing any person by whose negligence it claims the injury was caused. The notice shall state the pendency of the action, the name of the plaintiff, the name and location of the court where the action in pending, a brief statement of the alleged facts from which the cause arose, that the city believes the person notified is liable to it for any judgment rendered against the city and asking the person to appear and defend. A judgment obtained in the suit is conclusive in any action by the city against any person so notified as to the existence of the defect or other cause of the injury or damage as to the liability of the city to the plaintiff in the first named action, and as to the amount of the damage or injury. The city may obtain an action against the person notified to recover the amount of the judgment together with all the expenses incurred by the city in the suit."

Urbandale Municipal Code Section 99.079.

Because of the wording of this ordinance, and pursuant to the *Madden* decision, only Urbandale has the power to bring in and hold the abutting landowner liable in this case, not the Fulps. If the public duty doctrine were also deemed to apply to these public sidewalk injuries, the result would be no one could sue for injuries on public sidewalks in Iowa because the plaintiff could not sue the city or the abutting landowner. Urbandale could have drafted its ordinance to include direct liability from the abutting landowner for these types of damages, but it did not do so. Urbandale instead put itself in the middle between the abutting landowner and a plaintiff's claim, and Urbandale alone now has the special power to hold the abutting landowner liable, if it chooses to do so. This ordinance has created a special relationship between Urbandale and the Fulps, for indemnification from the abutting landowner, and therefore the public duty doctrine does not apply.

CONCLUSION

As shown, there are two special relationships between Urbandale and the Fulps which makes the public duty doctrine inapplicable here. The end result of eliminating liability for all public sidewalk injury cases is not what Urbandale's own municipal code contemplates, and not what the Court in

Madden intended. As such, Appellants respectfully request that the order to dismiss in this matter be overturned and the case be remanded.

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CERTIFICATE OF FILING

The undersigned hereby certifies that a copy of the final brief of Plaintiffs-Appellants was filed via EDMS on the 11th day of October, 2019.

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CERTIFICATE OF SERVICE

It is hereby certified that on the 11th day of October, 2019, the undersigned party, or person acting on his behalf, did file via EDMS the within final brief of Plaintiffs-Appellants, which gives notice thereof to counsel for the other party at the following address:

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COST CERTIFICATE

I hereby certify that the true and actual cost of printing the foregoing final brief of Plaintiffs-Appellants was $0 N/A.

/s/ David J. Hellstern

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 2,328 words, excluding the parties of the brief exempted by Iowa R. App. Pr. 6.903(1)(g)(l).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(3) and the type-style requirements of the Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

/s/ David J. Hellstern — 10/11/2019
Signature — Date