

IN THE SUPREME COURT OF IOWA

BANKERS TRUST COMPANY

Appellant,

v.

THE CITY OF DES MOINES, IOWA

Appellee.

SUPREME COURT NO. 22-2085

(POLK COUNTY DISTRICT
COURT NO. LAACL148874)

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK
COUNTY CASE NO. LAACL148874

THE HONORABLE JOSEPH SEIDLIN

APPELLANT'S FINAL BRIEF

ANDERSEN & ASSOCIATES

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. DID THE CITY OF DES MOINES HAVE THE LEGAL ABILITY TO FULLY DELEGATE THEIR DUTY re: SIDEWALKS, TO THE PROPERTY OWNERS ABUTTING THOSE SIDEWALKS?

Authorities

Bd. Of Water Works Trs. Of City of Des Moines v. Sac Cnty. Bd. of Supervisors, 890 N.W.2d 50 (Iowa 2017) 12

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II. IF THE CITY OF DES MOINES WAS LEGALLY ENTITLED TO DELEGATE THEIR DUTY, DID THEY IN FACT LEGALLY DO SO VIA THEIR ORDINANCE §102-2.

Authorities

Madden v. City of Iowa City, 848 N.W.2d 40 (Iowa 2014)6, 10-16, 18

Slaughter v. Des Moines Univ. Col of Osteopathic Med., 925 N.W.2d 793, 800 (Iowa 2019) 10, 13, 16

City of Des Moines Municipal Code §102-2(d)..... 11, 15

III. WHAT ABOUT COMPARATIVE FAULT UNDER 668.5?

Authorities

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2019) 10, 13, 16

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ROUTING STATEMENT

Appellant Bankers Trust is asking the Iowa Supreme Court to (arguably) overrule itself and determine that the *Madden*¹ case was decided incorrectly. Bankers Trust argues that *Madden* broke from prior Iowa Supreme Court precedent and should rightfully be overruled.² Bankers Trust argues that the dissenting opinion in *Madden* was correct and should be found to be controlling. The facts of this particular case show the holding from *Madden* is unworkable and highlights why the Court should reverse. As such, this case should be retained by the Supreme Court pursuant to Iowa R. App. P. 6.1101(2)(b). Delegation to the Court of Appeals would be a waste of the Court's time given the reasonable expectation that the Court of Appeals would rule in the same way the District Court ruled by holding they do not have the authority to find the *Madden* decision is not controlling.

STATEMENT OF THE CASE

NATURE OF THE CASE: In this case, Appellant, Bankers Trust Company, (hereinafter, "Bankers Trust") appeals from the District Court's Ruling on Motions for Summary Judgment filed on December 13, 2022 (Order on Motions for Summary

¹ *Madden v. City of Iowa City*, 848 N.W.2d 40 (Iowa 2014).

² See *Peppers v. City of Des Moines*, 299 N.W.2d 675 (Iowa 1980) (*Madden* goes against the Court's interpretation of Iowa Code Section 364.12(2) from *Peppers*).

Judgment, App. p. 106-112).

COURSE OF PROCEEDINGS: On October 9, 2020, a personal injury petition was filed by Sally and Howard Splittgerber against Bankers Trust and The Richard G. Hansen Revocable Trust - Richard G. Hansen Trustee, (hereinafter “The Trust”). The Petition asked for damages related to injuries Ms. Splittgerber sustained when she tripped and fell on a sidewalk on August 22, 2019. (Petition at Law, App. p. 23-27).

On November 19, 2020, Bankers Trust and The Trust filed an Answer and Jury Demand. (Answer and Jury Demand App. p. 28-30).

The Splittgerbers then filed an Amended Petition which added the City of Des Moines as a Defendant. (First Amended Petition at Law, App. p. 31-35).

The City of Des Moines filed their Answer and made a cross-claim against the original Defendants. (Answer, Affirmative Defenses, and Cross-Claim, App. p. 39-43).

Bankers Trust and The Trust responded to this the same day filing their Answer to Cross-Claim Petition (Answer to Cross Claim Petition, App. p. 44-45).

Bankers Trust later filed an Amended Answer and brought their own cross-claim against the City of Des Moines. (Motion for Leave to Amend Answer and File Cross Claim, App. p. 46-47).

On August 30, 2022, the City of Des Moines filed a Motion for Partial Summary Judgment on Cross-Claim Against The Richard G. Hansen Revocable Trust, Richard G.

Hansen Trustee (Motion for Partial Summary Judgment on Cross-Claim, App. p. 48-78).

On September 21, 2022, Sally and Howard Splittgerber filed a Dismissal with Prejudice concerning all Defendants. (Voluntary Dismissal with Prejudice, App. p. 79). This left the case with only active claims by Bankers Trust and the City of Des Moines against each other.

Bankers Trust filed a Resistance to the City of Des Moines' Motion for Summary Judgment on September 28, 2022 (Resistance to City of Des Moines' Motion for Summary Judgment/Cross Motion for Summary Judgment, App. p. 80-103). Within that Resistance, Bankers Trust filed their own Motion for Summary Judgment against the City of Des Moines concerning their contribution claim. *Id.*

Hearing on both summary judgment motions was held on October 28, 2022, and the Court issued an Order on Motions for Summary Judgment on December 13, 2022 (Order on Motions for Summary Judgment, App. p. 106-112). Bankers Trust filed a Notice of Appeal on December 21, 2022 (Notice of Appeal, App. p. 113).

STATEMENT OF FACTS

The facts are not in dispute and the issues are purely legal.

The sidewalk on which Ms. Splittgerber fell was owned by the City of Des

Moines. The fall occurred on August 22, 2019³. Said sidewalk was adjacent to property owned by the Richard G. Hansen Revocable Trust (“Hansen Trust”).⁴ The Hansen Trust leased the property to Bankers Trust to operate a bank location for its’ business.⁵

Ms. Splittgerber alleged her fall was caused by the sidewalk in question being uneven and inadequately maintained.⁶

The City of Des Moines only inspects the sidewalks within its city limits if a complaint is made.⁷ No complaint was made about the sidewalk in question prior to the fall of Ms. Splittgerber.⁸ As such, the City of Des Moines has no record of inspecting the sidewalk in question prior to the subject fall. ⁹ If a complaint had been made about the sidewalk in question prior to Ms. Splittgerber’s fall, the City of Des Moines would have sent a city inspector out to examine the sidewalk and see if it met the criteria in the City of Des Moines’ municipal ordinance for condemnation.¹⁰

On August 19, 2022, Plaintiffs Splittgerber released their claims against both the Bankers Trust and the City of Des Moines.¹¹

³ City of Des Moines Statement of Undisputed Facts, App. p. 104-105

⁴ Motion for Partial Summary Judgment on Cross Claim, App. p. 48-78

⁵ Answer to Amended Petition, App. p. 36-38

⁶ First Amended Petition at Law, App. p. 31-35

⁷ City of Des Moines Statement of Undisputed Facts, App. p. 104-105

⁸ Deposition of Rob Silvers – pages 6-7, App. p. 89

⁹ *Id.*

¹⁰ Referring to Section 102-43 of the City of Des Moines Municipal Code, *citing* to testimony of Mr. Rob Silvers at pgs. 18-19 and 36-37 for factual cite.

¹¹ Resistance to City of Des Moines Motion for Summary Judgment/Cross Motion

The Hansen Trust assigned their claim for contribution against the City of Des Moines to Bankers Trust.¹²

ARGUMENT

I. DID THE CITY OF DES MOINES HAVE THE LEGAL ABILITY TO FULLY DELEGATE THEIR DUTY re: SIDEWALKS, TO THE PROPERTY OWNERS ABUTTING THOSE SIDEWALKS?

Preservation of Error: Error on this issue was preserved by way of the summary judgment proceedings in front of the District Court. Specifically, see the issues raised in Bankers Trust’s Motion for Summary Judgment. (App. p. 82).

Standard of Review: Summary judgment rulings are reviewed for correction of errors at law.¹³

Argument:

The City of Des Moines’ ordinance being discussed in this case (§102-2) is for all material purposes identical to the Iowa City ordinance discussed in *Madden*. The same language cited in *Madden* from the Iowa City ordinance is also contained within the City of Des Moines ordinance:

for Summary Judgment, App. p. 80-103

¹² Transcript of Summary Judgment Hearing – pages 8-9, App. p. 5-22

¹³ *Slaughter v. Des Moines Univ. Col. Of Osteopathic Med.*, 925 N.W.2d 793, 800 (Iowa 2019).

“The abutting property owner shall maintain the border area in a well-kept and safe condition free from defects...except as permitted in section 98-54 or 98-58 of this Code; provided, however the property owner shall not be required to removed diseased trees or dead or fallen tree limbs.”¹⁴

“The abutting property owner may be liable for damages caused by failure to maintain the border area.”¹⁵

As such, given the same applicable municipal law, the arguments made by the *Madden* Dissent apply just as much to this case as they did to *Madden*. Therefore, Appellant hereby incorporates the Dissenting Opinion¹⁶ issued in the *Madden* case as its argument on this issue. That opinion states with far greater persuasion anything new that can be argued on the foremost issue.

Specifically, Bankers Trust argues that Iowa Code §364.12(2) “contains an express legislative determination that [The City of Des Moines] should be responsible for sidewalk maintenance subject only to a particularized right to shift costs of repair to the adjoining property owner in certain circumstances.”¹⁷.

¹⁴ City of Des Moines Municipal Code §102-2(a).

¹⁵ City of Des Moines Municipal Code §102-2(d).

¹⁶ *Madden*, 848 N.W.2d 40, 54-58.

¹⁷ *Madden*, 848 N.W.2d at 58. (Dissent).

Undoubtedly there will be a discussion of Stare Decisis when reviewing this case. “In close cases, the determination of whether to apply stare decisis is a matter of judgment, not inexorable command.”¹⁸ “Within a system of justice, courts cannot blindly follow the past. Instead, we are obligated to depart from past cases when they were erroneously decided.”¹⁹ The Court is obligated to revisit prior decisions if the prior decision was incorrect.²⁰

In this case, the *Madden* decision is from only eight years ago and certainly not ‘long-standing’. Upon inspection, *Madden* departs from precedent established in *Peppers*.

The bigger issue however, is the unworkability of the *Madden* decision on cases such as this one and others that will arise.

After finding the Iowa City ordinance was not conflicting with the Iowa Code, the *Madden* Court jumps then to a under analyzed conclusion that the abutting property owner owes Iowa City **full** indemnification for any damages caused by the sidewalk defect.²¹

¹⁸ *Id.*, quoting *Bd. Of Water Works Trs. Of City of Des Moines v. Sac Cnty. Bd. of Supervisors*, 890 N.W.2d 50, 86 (Iowa 2017) (“In close cases, the determination of whether to apply stare decisis is a matter of judgment, not inexorable command.” – quoting Appel, J. concurring/dissenting opinion).

¹⁹ *Id.*, quoting *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845, 849 (Iowa 2014).

²⁰ *Id.*, citing to *Doe v. New London Comm. Sch. Dist.*, 848 N.W.2d 347, 360 (Iowa 2014).

²¹ *Madden*, 848 N.W.2d at 50; (“We therefore conclude that when an ordinance or

The *Madden* decision was decided incorrectly and should be overturned via this case. However, as noted in section two of this brief, there are other reasons why *Madden* should be overturned, beyond just what the Dissent addressed.

II. IF THE CITY OF DES MOINES WAS LEGALLY ENTITLED TO DELEGATE THEIR DUTY, DID THEY IN FACT LEGALLY DO SO VIA THEIR ORDINANCE §102-2.

Preservation of Error: Error on this issue was preserved by way of the summary judgment proceedings in front of the District Court. Specifically, see the issues raised in Bankers Trust’s Motion for Summary Judgment. (App. p. 82).

Standard of Review: Summary judgment rulings are reviewed for correction of errors at law.²²

Argument:

The majority decision in *Madden* walks through the common law general rule that “an abutting property owner [is] not liable for an injury that resulted from a defective sidewalk.”²³ The Court then notes, “The general rule has been sometimes referred to as

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.”)

²² *Slaughter v. Des Moines Univ. Col. Of Osteopathic Med.*, 925 N.W.2d 793, 800 (Iowa 2019).

²³ *Madden*, 848, N.W.2d at 44 (Citing to a multitude of various different states’ opinions – citations omitted).

the ‘Sidewalk Accident Decisions Doctrine’.”²⁴ The Court then covers exceptions to that rule, neither of which applied in *Madden* or apply here.²⁵ The Court then moves on to note that “consistent with the common law rule, it has generally been held that a statute or ordinance that merely imposes a duty to maintain a sidewalk in good repair does not thrust liability for damages onto the abutting property owner.”²⁶ “The no-liability theory is based upon the view that a requirement that abutting property owners maintain sidewalks is for the benefit of the municipality, not pedestrians.”²⁷

The next part of the analysis is where Appellant respectfully asserts the Court erred. The Majority decision in *Madden* then notes, “In contrast, an ordinance or statute that expressly makes an abutting property landowner liable for damages occasioned by the defective condition of sidewalks may give rise to such liability.”²⁸ The word “expressly” should be looked at closely here in our case.

Later in the *Madden* decision, the Majority is analyzing conflict between municipal ordinance and state statute. The Court states, “Here, there is no such conflict between the statute, which relates to maintenance of sidewalks and the City’s ordinance,

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Madden*, 848 N.W.2d at 44-45 (Citing to a multitude of various different states’ opinions – citations omitted).

²⁷ *Id.*

²⁸ *Madden*, 848 N.W.2d at 45.

which expressly states that abutting landowners are liable for damages resulting from sidewalk defects.”²⁹ But does it? What about the ordinance language *expressly* delegates that liability?

Principally, the language in the City ordinance is passive not mandatory (*may* vs. *shall*). The *Madden* Court held that full indemnification was owed by the abutting property owner to Iowa City.³⁰ However, the Court does not explain/analyze why this is the case given the Iowa City ordinance stated, “the abutting property owner may be liable for damages caused by failure to maintain the sidewalk.”³¹ (Emphasis Added).

In our case, the City of Des Moines ordinance language is materially identical.³²

City of Des Moines Municipal Code Section 102-2(d):

“The abutting property owner may be liable for damages caused by failure to maintain the border area.”

(Emphasis added).

²⁹ *Madden*, 848 N.W.2d at 50.

³⁰ *Madden*, 848 N.W.2d at 50.

³¹ *Madden*, 848 N.W.2d at 43, *citing* Iowa City, Iowa, Code Section 16-1A-6.

³² Only difference being the City of Des Moines uses ‘border area’ instead of ‘sidewalk’.

The statute says ‘may’ not ‘shall’. The statute does not say something to the effect of, ‘shall be liable’ or “shall be solely liable”. The language of the ordinance plainly reads as an ordinance that creates a possibility, not a determination as a matter of law. This makes the issue of fault a question for a jury to determine.

III. WHAT ABOUT COMPARATIVE FAULT UNDER 668.5?

Preservation of Error: Error on this issue was preserved by way of the summary judgment proceedings in front of the District Court. Specifically, see the issues raised in Bankers Trust’s Motion for Summary Judgment. (App. p. 82).

Standard of Review: Summary judgment rulings are reviewed for correction of errors at law.³³

Argument:

Given the language “may be liable” is the only guidepost, why could both the City and the abutting property owner then not potentially have fault?³⁴

Testimony of Mr. Rob Silvers was taken during the discovery phase of this case. Mr. Silvers is the Construction Inspection Supervisor for the City of Des

³³ *Slaughter v. Des Moines Univ. Col. Of Osteopathic Med.*, 925 N.W.2d 793, 800 (Iowa 2019).

³⁴ Assuming for sake of argument the State statute does not pre-empt as the *Madden* Dissent argued.

Moines.³⁵ Part of Mr. Silvers' job duties are to run the sidewalk condemnation program for the City of Des Moines.³⁶

Mr. Silvers testified the City has a reactive, not a proactive, sidewalk inspection program.³⁷ Mr. Silvers further testified the City of Des Moines does not provide (or have) enough resources to inspect all of their sidewalks for dangerous conditions.³⁸ The only way a City of Des Moines sidewalk will be inspected is if a complaint is lodged.³⁹ If a complaint is lodged, Mr. Silver either inspects the sidewalk himself or more often delegates the inspection to another employee that he supervises.⁴⁰ The determination of whether the complaint is founded is solely based on a determination by Mr. Silvers or his designees that the sidewalk is defective pursuant to City of Des Moines ordinance 102-43.⁴¹

Given the fact the City does not inspect their sidewalks for dangerous conditions, yet by code defines what is a dangerous sidewalk condition, creates a fact question about the City of Des Moines' fault for Ms. Splittgerber's fall.

Comparative fault principles in Iowa Code Chapter 668 thereby become applicable.

³⁵ Deposition of Rob Silvers – page 3, App. p. 88

³⁶ Deposition of Rob Silvers – page 4, App. p. 88

³⁷ Deposition of Rob Silvers – page 18, App. p. 92

³⁸ Deposition of Rob Silvers – pages 18-20, App. p. 92

³⁹ Deposition of Rob Silvers – page 19, App. p. 92

⁴⁰ Deposition of Rob Silvers – pages 20-24, App. p. 92-93

⁴¹ Deposition of Rob Silvers – pages 23-24, App. p. 93

Additionally, since the City's own ordinance does not expressly hold the abutting property owner liable for not only their own negligence, but also the City's negligence, the City's claim for full indemnification must fail (*See McNally & Nimergood v. Nueman-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 571 (Iowa 2002)...(The Iowa Supreme Court has held multiple times that when a party seeks contractual indemnification, there must be clear and unambiguous intent expressed for a party to seek indemnification from another party for said party's own negligence. The same rule of logic would apply to indemnification by municipal ordinance.).

CONCLUSION

Given the issues with the *Madden* decision, the Court should take this opportunity to readdress the issue of sidewalk maintenance duties. Upon a finding that the City of Des Moines does not have the legal right to delegate a full duty of safety to an abutting property owner, a reversal of the District Court Order in this case is warranted. In turn then, the District Court should be ordered to grant summary judgment to Bankers Trust.

Alternatively, the should could distinguish from *Madden* and reverse the District Court Order and remand for trial on the contribution claim in order for a jury to determine comparative fault.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF FILING

The undersigned hereby certifies that the foregoing Final Brief of Appellant was filed with the Iowa Supreme Court by electronically filing the same on June 23, 2023, pursuant to Iowa R. App. P. 6.902(2) (2013) and Iowa Ct. R. 16.1221(1).

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This Final Brief was served upon the attorney of record for the Appellee by electronic filing and electronic delivery via EDMS on June 23, 2023.

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**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) or (2) because this brief contains 2,805 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).
2. This brief complies with the typeface requirements of Iowa Rule R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Word in 14-point Times New Roman.

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06/23/2023
Date

ATTORNEY'S COST CERTIFICATE

Pursuant to Iowa Rule of Appellate Procedure 6.903(2)(j), the undersigned attorney certifies that the actual cost for producing necessary copies of the foregoing document was \$ N/A . The cost of the copy of the transcript was \$63.00.

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