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. LACL148874)

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY CASE NO. LACL148874

THE HONORABLE JOSEPH SEIDLIN

APPELLANT'S FINAL REPLY BRIEF

ANDERSEN & ASSOCIATES

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REPLY ARGUMENT

I. PRE-EMPTION

The arguments concerning pre-emption of state statute by city ordinance are well flushed out by the Dissent's opinion in *Madden* and as such, no further reply is warranted on this issue.

II. COMPARATIVE FAULT

The reply here focuses on a situation in which the Court upholds *Madden* on the pre-emption issue but still looks at whether the facts of this case are distinguishable in raising a secondary issue of comparative fault.

The City of Des Moines makes argument in its' brief that actually is supportive of the Bank's position. The City of Des Moines argues the Bank's holds the position that the City's ordinance in question does *not* allow for liability on the Bank.[1] This is incorrect. The Bank argues that the City ordinance does not impose ***sole liability*** on the Bank.

The City argues that if their ordinance had instead read that the abutting property owner "will always" be liable when a sidewalk defect causes injury, this would impose too much liability.

[1] City of Des Moines brief, last paragraph, pg. 20.

First, in using the 'will' language, the hypothetical mixes the issue of 'sole' versus 'comparative' liability, with the issue of 'will' versus 'could' liability. The issue here is sole/comparative.

Second, the City goes on to argue, "Adjacent property owners should not be liable for injuries [from sidewalk defect] when the injury results from actual negligent action by a city".[2] The City's argument here is exactly the position of the Bank. The issue is one of comparative fault. The abutting property owner ***may*** be liable and the City ***may*** be liable. The issue is one for a jury to determine. Thereby making the summary judgment finding by the District Court in this case in error.

The only way to parse such a situation is by a jury trial. How else would a determination be made as to whether the responsibility for the alleged defect in the sidewalk was due to negligence of the abutting property owner or negligence of the city? Whether that be direct negligence or general negligence, the question is the same.

The City, later in its' brief, discusses the indemnification issue and again points out why their own ordinance creates a jury question, not a right of indemnification. The City argues, "Using the 'may' language and leaving injuries caused by a city's own negligence to be the responsibility of the city appropriately allocates the burdens between

[2] City of Des Moines brief, pg. 21.

cities and adjacent property owners.".[3] Exactly. The 'may' language rather than 'sole liability' or a right of 'complete indemnification', creates a question of fact as to which entities have potential liability. The City thereby is agreeing that summary judgment was inappropriate. A question of fact is created by their ordinance, not a right of full indemnification as found by the District Court.

The City addresses the indemnification argument by stating that statutory indemnification and contractual indemnification are completely different. This issue is ripe for the Court to address as the *Madden* Court skipped right over the analysis of this issue.

The *Madden* Court stated, "We therefore conclude that when an ordinance or statute validly imposes a maintenance obligation and also imposed 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."[4]. But why?

The *Madden* Court never explains how they reached that conclusion. Just prior to said conclusion, the *Madden* Court wrote that the Iowa City ordinance expressly stated that abutting landowners **are** liable for damages resulting from sidewalk defects. The Iowa City ordinance, just like the City of Des Moines ordinance, did not say that. It said

[3] City of Des Moines Brief, pg. 23 – first continuing paragraph.
[4] *Madden v. City of Iowa City*, 848 N.W.2d 40, 50 (Iowa 2014).

'may be liable'. Neither expressly state the abutting property owners 'are liable' as the *Madden* Court states.

III. PUBLIC POLICY

The City argues that public policy dictates that the District Court be affirmed in this matter. In support, the City discusses a possible outcome where the city has 'sole' liability for sidewalk maintenance. As a point of contention, one argument by the Bank in this case is that the City's ordinance creates a comparative liability situation, not sole liability on the part of the City. Further, the Bank has not argued that the City's ordinance passing on costs of maintenance to the abutting property owner is illegal or not codified within the City's municipal code. The City rests much of their public policy argument on detrimental effects, such as costs, of repairing sidewalks. However, the City passes those costs on to the abutting property owner.[5]

In support of the City's position, it cites a case on general tree owner liability that applies no differently to a municipality than it does to any other residential or commercial property owner.[6] The other case cited by the City is one hundred and twelve years (112) old.[7]

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[5] See deposition of Rob Silvers (App. p. 88-100)
[6] City of Des Moines Brief, pg. 26 citing to *Pietz v. City of Oskaloosa*.
[7] City of Des Moines Brief, pg. 26, citing to *Roney v. City of Des Moines* (Iowa 1911).

The City argues that the Bank does not set forth how the Madden decision creates an unworkable situation in this case and others.[8] That is incorrect and in fact, the City explains it themselves in their brief. The City notes in their brief, "Bankers Trust raises the question of how comparative fault under Chapter 668 applies when a city imposes liability for sidewalk defects on adjacent property owners."[9] This is the reason the *Madden* decision is unworkable because *Madden* did not provide the analysis required to determine when or if full indemnification is warranted, especially in light of the "may be liable" language at issue in this case.

The City argues "This is not the right case to determine the contours of comparative fault in the context of a sidewalk defect liability ordinance."[10] "While that may be an issue that needs to be addressed at some time, this is not the right case because there is no record showing the City of Des Moines was negligent."[11] The City is misguided with this argument as it suggests the District Court held that the City prevailed on summary judgment with a 'lack of negligence' finding. The District Court did not make that determination, nor would it have been appropriate. A reversal and remand is required because that issue is one for a jury to determine. The City can assert it was not negligent in this case….in their closing argument to the jury. These arguments all

[8] City of Des Moines Brief, pgs. 26 & 27
[9] City of Des Moines Brief, pg. 27, first full paragraph.
[10] City of Des Moines Brief, pg. 27
[11] *Id*.

coincide with the prior section discussing how the City's 'may' language creates a comparative fault scenario and how the *Madden* decision does not explain when and why full indemnification is appropriate.

IV. MUNICIPAL IMMUNITY

The City very briefly raises the issue of being entitled to immunity under Iowa Code section 670.4(c).[12] This issue however was not raised by the City at the District Court and as such, error was not preserved, and this argument should not be considered here in this appeal.

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 Court 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.

[12] City of Des Moines Brief, pg. 28

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CERTIFICATE OF FILING

The undersigned hereby certifies that the foregoing Final Reply 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 Reply 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 1,319 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).
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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__.

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