IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kira Alston	:	
	:	
v.	:	No. 2478 C.D. 2010
	:	
Pennsylvania Department of Transportation and City of Philadelphia and Lawrence Cook	:	Submitted: May 13, 2011
	:	
Appeal of: City of Philadelphia	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: September 14, 2011**

The City of Philadelphia (City) appeals from the Order of the Court of Common Pleas of Philadelphia County (trial court) granting Lawrence Cook's (Property Owner) Motion for Non-suit. The trial court entered compulsory nonsuit and held that, based on the evidence presented, the alleged defect in the sidewalk was trivial under the circumstances. (Trial Ct. Op. at 2.) The City filed a post-trial motion for judgment n.o.v. arguing that the defect was of sufficient size for a jury to be able to find Property Owner negligent. The trial court denied the post-trial motion on October 12, 2010, and the City now appeals to this Court.

At approximately 8:45 p.m. on June 1, 2005, Kira Alston (Alston) and her cousin were walking in the vicinity of the northwest corner of 5200 Baltimore Avenue, where the street lighting was dim. (Trial Ct. Op. at 3; Hr'g Tr. at 134-42, July 8, 2010, Supplemental Reproduced Record (S.R.R.) at 123b-25b.) Alston was walking from the street onto the sidewalk, using a handicap ramp installed by the Pennsylvania Department of Transportation (DOT). (Trial Ct. Op. at 3.) As Alston walked up the handicap ramp onto the sidewalk, she "encountered a difference in elevation to the adjacent sidewalk slabs," (Hr'g Tr. at 45, July 9, 2010, Reproduced Record (R.R.) at 34a), that was measured to be 5/8th inch difference. (Trial Ct. Op. at 2.) Alston testified that, as she was walking up the ramp, her foot went "into the dip" or "the crack," which caused her to fall on her knees, then to the side and then on her back with her head "hanging out in the street." (Hr'g Tr. at 141-44, July 8, 2010, R.R. at 26a.) An expert in the field of architecture and property maintenance testified that the difference in elevation was most likely caused by replacing an old concrete slab with a new concrete slab in order to create a handicap ramp, which caused the old concrete slabs around the ramp to shift. (Hr'g Tr. at 78-79, July 9, 2010, R.R. at 42a, S.R.R. at 64b.) From the direction Alston was traveling, the 5/8th inch discrepancy in the sidewalk was not noticeable, but the defect would have been noticeable and avoidable had she been traveling in the opposite direction. (Hr'g Tr. at 92-94, S.R.R. at 68b-69b.) After the fall, Alston underwent numerous surgeries on her leg to stabilize her fractures, heal infections, and correct a drop foot. (Hr'g Tr. at 147-53, July 8, 2010; S.R.R. at 126b-28b.)

The City and DOT settled with Alston over her claims rather than have a jury trial. The City then filed a cross-claim against Property Owner, asserting that "he had primary responsibility to keep the sidewalk in repair and that the municipality only had secondary liability, based on the Political Subdivision Tort Claims Act, 42 Pa. C.S. § 8542(b)(7)."[1] (Trial Ct. Op. at 4.) In order to succeed on this claim, and to recover from Property Owner, the City had to prove Alston's claim against Property Owner. Thus, the question raised was "whether the defect in the pavement was large enough in size to give rise to liability under the circumstances, or whether the defect was so small as to not implicate the liability of the property owner." (Trial Ct. Op. at 4.)

During the hearing before the trial court, the City called numerous witnesses to present testimony and evidence. The City presented Alston's attorney, who took pictures of the sidewalk in February 2007, about twenty months after the accident. (Hr'g Tr. at 69-70, R.R. at 17a.) The attorney testified that he knew the location of

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[1] Section 8542(b)(7) of the Political Subdivision Tort Claims Act states the following:

> The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency: . . . (7) *Sidewalks.*--A dangerous condition of sidewalks within the rights-of-way of streets owned by the local agency, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition. When a local agency is liable for damages under this paragraph by reason of its power and authority to require installation and repair of sidewalks under the care, custody and control of other persons, the local agency shall be secondarily liable only and such other persons shall be primarily liable.

42 Pa. C.S. § 8542 (emphasis in original).

the accident because, when he took the photographs, Alston was present with her mother and father and pointed to where the accident occurred. (Hr'g Tr. at 70, 72-73, R.R. at 17a, S.R.R. at 18b-19b.) Alston's attorney stated that he did not know what the sidewalk looked like at the time of the accident and that he met with Alston about nineteen months after the accident occurred. (Hr'g Tr. at 78-79, R.R at 18a.) The City also presented the testimony of Alston, who recounted the events on the date of the fall and the events after the fall. (Hr'g Tr. at 137-44, R.R. at 25a-26a, S.R.R. at 36b-39b.) Alston testified that the sidewalk was the same the day of the accident as it was the day she took pictures with her attorney. (Hr'g Tr. at 168-69, R.R. at 28a, S.R.R. at 43b-44b.) The City also presented an expert in the field of architecture and property maintenance, who testified that he had inspected the sidewalk, measured the defect, and took pictures on November 7, 2007. (Hr'g Tr. at 53-57, July 9, 2010, R.R. at 36a-37a.) The expert testified that, absent an earthquake, a sidewalk shifts either contemporaneously with the installation of a new sidewalk slab or settles over a standard period of time. (Hr'g Tr. at 84, S.R.R. at 65b.) The expert stated that, most likely, the sidewalk here settled over a period of time, but that he knew the sidewalk "wasn't moving from the time the photographs were taken." (Hr'g Tr. at 85, R.R. at 43a.) However, the expert testified that he did not have any evidence of the existence of the sidewalk prior to February of 2007, which was twenty months after the accident. (Hr'g Tr. at 112-13, R.R. at 46a-47a.) In addition, an employee for the City's Streets Department stated that there were no complaints made to the City about the sidewalk at this location. (Hr'g Tr. at 173, 181.)

The trial court held that it was bound "as a matter of law to find no negligence where the defect is determined to be trivial" and that Property Owner met his standard of care because it would be "both contrary to caselaw and the imposition of an impossible standard of care throughout a modern metropolis to not have ruled as a matter of law that the 5/8 [inch] defect at issue was anything other than trivial[.]" (Trial Ct. Op. at 9 (emphasis omitted).) On appeal, the City argues that: (1) the trial court relied on old cases and, because the Supreme Court held in 1968 that 1/2 inch difference in elevation was not trivial, this Court should likewise hold that 5/8th inch is not trivial because it is greater than 1/2 inch; and (2) the trial court should have taken into account applicable engineering standards when deciding whether the defect was trivial. For the following reasons, we affirm.[2]

"[A]n elevation, a depression or an irregularity on a street or highway may be so trivial that courts, as a matter of law, are bound to hold that there was no negligence in permitting such depression or irregularity to exist." Bosack v. Pittsburgh Railways Co., 410 Pa. 558, 563, 189 A.2d 877, 880 (1963). Yet, "'there is a shadow zone where such question must be submitted to a jury whose duty it is to take into account all the circumstances.'" Henn v. City of Pittsburgh, 343 Pa.

[2] The standard of review this Court exercises when reviewing the "entry of a compulsory nonsuit is to give the plaintiff the benefit of every fact and reasonable inference arising from the evidence; all conflicts in the evidence shall be resolved in favor of the plaintiff." Berman Properties, Inc. v. Delaware County Board of Assessment and Appeals, 658 A.2d 492, 494 (Pa. Cmwlth. 1992). This Court will uphold a compulsory nonsuit where "it is inconceivable, on any reasonable hypothesis, that a mind desiring solely to reach a just and proper conclusion in accordance with the relevant governing principles of law, after viewing the evidence in a light most favorable to the plaintiff, could determine the controlling issue in plaintiff's favor." Stevens v. Department of Transportation, 492 A.2d 490, 492 (Pa. Cmwlth. 1985).

256, 258, 22 A.2d 742, 743 (1941) (quoting Kuntz v. Pittsburgh, 187 A. 287, 289 (Pa. Super. 1936)). "No definite or mathematical rule can be laid down as to the depth or size of a sidewalk depression necessary to convict an owner of [a] premises of negligence in permitting its continued existence." Breskin v. 535 Fifth Ave, 381 Pa. 461, 464, 113 A.2d 316, 318 (1955). It is the duty of the property owner or the city to "maintain the pavement in a condition of reasonable safety, not to insure pedestrians traversing it against any and all accidents." Davis v. Potter, 340 Pa. 485, 487, 17 A.2d 338, 339 (1941).

Here, the trial court found that the 5/8th inch difference in elevation was trivial and that the City's expert even "agreed that there are thousands of sidewalks in Philadelphia with elevation levels of less than one inch." (Trial Ct. Op. at 9.) "'To impose a burden of liability on either municipality or property owner for an imperfection as common and usual as that relied on to create liability in this case would put an intolerable burden on the property owner and the city and encourage carelessness by pedestrians in the use of city streets.'" Van Ormer v. City of Pittsburgh, 347 Pa. 115, 116, 31 A.2d 503, 504 (1943) (quoting German v. City of McKeesport, 8 A.2d 437, 441 (Pa. Super. 1937)).

The City first argues that because our Supreme Court, in Massman v. City of Philadelphia, 430 Pa. 99, 241 A.2d 921 (1968), concluded that a defect of 1/2 inch was not trivial, the defect here is, likewise, not trivial because 5/8th inch is greater than 1/2 inch.[3] However, there is "[n]o definite or mathematical rule," but instead

[3] The City also cites Kirschbaum v. WRGSB Associates, 243 F.3d 145 (3d Cir. 2001), in which 5/8th inch was found not to be trivial; however, cases from the Third Circuit are not binding precedent on this Court. In addition, the City cites other cases in which a difference of

"[w]hat constitutes a defect sufficient to render the property owner liable must be determined in the light of the circumstances of the particular case." Id. at 101, 241 A.2d at 923-24 (quoting Breskin, 381 Pa. at 463-64, 113 A.2d at 318). The circumstances in Massman were very different from this case, as the Massman Court described "the defect [as] a crack, jagged and irregular and clearly discernible upon visual inspection. The crack was one-half inch deep, six inches at its widest point, and twenty-eight inches long" and located in the "walking lanes of City Hall courtyard" in Philadelphia. Id. at 101, 241 A.2d at 922-23. Unlike in Massman, in this case there is not a large, jagged, irregular crack, but instead a sidewalk slab that settled resulting in a difference in elevation between the adjacent sidewalk slab of 5/8th inch. Accordingly, the defects in the two cases are distinguishable.

The City also argues that the existence of engineering standards should be considered in determining whether a defect is trivial. During the hearing, the City's expert testified that there is a federal standard that requires no greater than a quarter of an inch difference in elevation when a curb ramp and walkway are installed. (Hr'g Tr. at 62-67, 69-70, R.R. at 38a-40a.) The City's expert also testified about the standard promulgated by the American Society for Testing Materials that provides for a minimum safe walking surface. (Hr'g Tr. at 66-67, R.R. at 39a.) However, the standards referred to by the City's expert have not been adopted by the City; therefore, they are not binding. (Hr'g Tr. at 125-27, R.R. at 50a.)

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one and one-half inches was found not to be a trivial defect; however, those cases are distinguishable and it is important to note that 5/8th inch is less than one and one-half inches.

We, therefore, agree with the trial court, giving the plaintiff the benefit of every fact and reasonable inference, that the alleged imperfection of this sidewalk slab which settled at most 5/8th inch, is trivial. For these reasons, we affirm the Order of the trial court.

RENÉE COHN JUBELIRER, Judge

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O R D E R

NOW, September 14, 2011, the Order of the Court of Common Pleas of Philadelphia County in the above-captioned matter is hereby **AFFIRMED.**

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RENÉE COHN JUBELIRER, Judge