

**[J-163-2002]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**EASTERN DISTRICT**

RUTH J. WALKER and CHARLES WALKER, H/W	:	No. 16 EAP 2002
	:	
Appellants	:	Appeal from the Order of the Commonwealth Court entered August 22, 2001, at 1851 CD 2000, affirming the Order of the Court of Common Pleas of Philadelphia County entered June 26, 2000, at November Term 1998, No. 003692.
v.	:	
PAULINE ELEBY, ZAKIYA ELEBY, MADALYN JANEEN ELEBY, CLARENCE JAMES ELEBY AND THE CITY OF PHILADELPHIA,	:	
	:	
Appellees	:	ARGUED: October 23, 2002
	:	
APPEAL OF RUTH J. WALKER	:	

**DISSENTING OPINION**

**MADAME JUSTICE NEWMAN**

**DECIDED: February 18, 2004**

Ruth J. Walker (Appellant) tripped and fell on a sidewalk adjacent to 5119 Chestnut Street in the City of Philadelphia. She sued the property owners and the City, alleging in her Complaint that she sustained “severe and debilitating personal injuries” because the sidewalk was in a “broken, cracked and depressed” condition. Reproduced Record at 9. Following trial, the Court of Common Pleas of Philadelphia County (trial court) entered judgment against the property owners in the amount of \$15,000.00. It entered judgment in favor of the City, holding that the local agency enjoyed complete immunity because it did

not own the property abutting the sidewalk and that it did not own the portion of Chestnut Street at issue in this matter, which has been designated a state highway. On appeal, the Commonwealth Court affirmed. The Majority now reverses the Order of the Commonwealth Court and determines that the City of Philadelphia must be deemed to own the portion of Chestnut Street alongside which Appellant Ruth J. Walker was injured. I respectfully disagree.

Appellant asserts, and the Majority agrees, that the following exception to governmental immunity set forth in Section 8542(b) of the Judicial Code, 42 Pa.C.S. § 8542(b), applies here:

(b) Acts which may impose liability.-- 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.

With regard to the instant matter, the most salient feature of the sidewalks exception is that it distinguishes between primary and secondary liability. While primary liability is not at issue here, the Majority believes that the City can be held secondarily liable to Appellant

because of its authority to require owners of property adjacent to Chestnut Street to repair their sidewalks. I do not believe that the exception applies in this case because a municipality is not responsible for state highways located within the municipality. Pursuant to Pennsylvania law, state highways are the property of the Commonwealth. Greene County v. Center Township, 157 A. 777 (Pa. 1931). “The Commonwealth has the exclusive duty for the maintenance and repair of state highways.” Allen v. Mellinger, 625 A.2d 1326 (Pa. Cmwlth. 1993), petition for allowance of appeal denied, 664 A.2d 738 (Pa. 1994)(citing Shollar v. Department of Transportation, 453 A.2d 24 (Pa. Cmwlth. 1982)). I agree with the Commonwealth Court that, consistent with its decisions in Bruce v. Gadson, 561 A.2d 74 (Pa. Cmwlth. 1989), and Lyons v. City of Philadelphia, 632 A.2d 1006 (Pa. Cmwlth. 1993), the adoption of Chestnut Street as a state highway means that the sidewalks adjacent to it do not fall within the limited exception set forth in Section 8542(b)(7) of the Judicial Code. “The clear language of the sidewalk exception requires that the local agency own the sidewalk right-of-way.” Bruce at 75.

Exceptions to governmental immunity are to “be narrowly interpreted given the expressed legislative intent to insulate political subdivisions from tort liability.” Mascaro v. Youth Study Center, 523 A.2d 1118, 1123 (Pa. 1987). Because existing case law supports the proposition that state highways are state property, Greene, a narrow reading of Section 8542(b)(7) leads to the conclusion that the City of Philadelphia does not own the portion of Chestnut Street at issue in this case. Therefore, the City cannot be held secondarily liable for the injuries that Appellant sustained when she fell on a cracked sidewalk adjacent to privately owned real estate.

A determination that the Commonwealth owns the portion of Chestnut Street where Appellant fell leads to the conclusion that she may recover damages only from the owners

of the property adjacent to the sidewalk. While Section 8542(b)(7) imposes secondary liability on a local agency “by reason of its power and authority to require installation and repair of sidewalks under the care, custody and control of other persons,” only primary liability is imposed upon the Commonwealth for a dangerous condition of its sidewalks. Section 8544(b) of the Judicial Code, 42 Pa.C.S. §8522(b) provides in relevant part:

(b) Acts which may impose liability. -- The following acts by a Commonwealth party may result in the imposition of liability on the Commonwealth and the defense of sovereign immunity shall not be raised by claims for damages caused by:

(4) Commonwealth real estate, highways and sidewalks. -- A dangerous condition of Commonwealth agency real estate and sidewalks, including Commonwealth-owned real property, leaseholds in possession of a Commonwealth agency and Commonwealth-owned real property leased by a Commonwealth agency to private persons, and highways under the jurisdiction of a Commonwealth agency . . . .

Because the Commonwealth does not own the property at 5119 Chestnut Street, it cannot be held primarily or secondarily liable to Appellant for her injury. I recognize the unfairness of the fact that if Appellant had fallen one block south of Chestnut Street on a sidewalk adjacent to a road owned by the City of Philadelphia, then imposition of secondary liability on the local agency would be permitted pursuant to the exception to governmental immunity set forth in Section 8542(b)(7). However, because we must read exceptions to immunity narrowly, Mascaro, Appellant may only seek damages from the property owners.

Accordingly, I respectfully dissent and would affirm the Order of the Commonwealth Court.