

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SANDRA H. SMITHERS,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 2004-02-101
)	
BRACEBRIDGE CORPORATION and)	
MBNA AMERICA BANK)	
DELAWARE CORPORATION,)	
)	
Defendants.)	

Submitted: September 16, 2005
Decided: November 4, 2005

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ORDER
ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff, Sandra H. Smithers (hereinafter "Smithers") brings this action against defendants Bracebridge Corporation (hereinafter "Bracebridge") and MBNA America Bank Delaware Corporation (hereinafter "MBNA") for compensatory damages resulting from injuries she sustained on February 5, 2004 when she tripped and fell in the 1000 Block of Walnut Street, Wilmington, Delaware. Smithers relies upon the provisions of Section 42-42 of the Wilmington City Code in part as a basis for her claim. Defendants

collectively move the Court pursuant to Civil Rule 56 for summary judgment dismissing Smithers's claim relying upon the recent Delaware Supreme Court decision in *Schadt v. Latchford*, Del. Supr., 843 A.2d 689 (2004). There, the Court held the provisions of Wilmington City Code Section 42-42, which purports to impose on a land owner responsibility for maintenance and repair of adjoining sidewalk was inconsistent with the Wilmington Charter Section 5-400. In opposing the motion, Smithers argues that her claim is based upon an "obstruction" on the sidewalk which was not addressed by the Court's holding in *Schadt*.

When considering a motion for summary judgment, the Court must analyze the facts and all reasonable inferences therefrom in the light most favorable to the non-moving party. The Court will grant summary judgment when after considering the pleadings and the record where there are no genuine issues of any material fact and the moving party is entitled to judgment as a matter of law. *Browning-Ferris v. Rockford Enterprises*, Del. Super., 642 A.2d 820 (1993). Moreover, summary judgment may not be granted when the record indicates any material fact in dispute or if there exists a basis to inquire more thoroughly into the facts in order to clarify the circumstances. *Wilson v. Dover Skating Center Ltd.*, Del. Super., 566 A.2d 1020 (1989).

Smithers alleges that on February 25, 2002, while walking on the eastern sidewalk in the 1000 block of Walnut Street in Wilmington, Delaware, she tripped over a gray metal pipe which was approximately two inches in diameter. She maintains that the pipe was support for a construction sign that was lying almost entirely across the sidewalk. As a result of this fall, Smithers alleges she struck her knee, left elbow, wrenched the left

shoulder and the left side of her neck, which required medical attention and follow-up treatment.

Smithers alleges Bracebridge and MBNA owned the property adjacent to where she fell. Plaintiff further maintains that the sign was originally used in connection with construction work being performed for Bracebridge and MBNA, and defendants left the exposed conditions for several weeks. Smithers therefore claims MBNA and Bracebridge are liable for negligently creating an unsafe and hazardous condition, and liable for negligence in failing to rectify the condition or warn the public. Smithers conceded during oral argument that she does not claim Bracebridge or MBNA placed the alleged obstruction on the sidewalk, therefore, her claim rests on the negligent failure to remove the obstruction.

The averments in Plaintiff's Complaint in part seeks recovery squarely within the language of Section 42-42 of the Wilmington City Code. The alternate theory of recovery relies upon ordinary negligence. I will address each separately.

The Delaware Supreme Court, in *Schadt v. Latchford, Ibid.* reversed the Superior Court's holding that Wilmington City Code Section 42-42 which place repair and maintenance responsibility for public sidewalks upon an abutting landowner conflicted with § 5-400(a) of the City of Wilmington's Home Rule Charter. In reaching this conclusion, the Court relied upon the language in Section 5-400 which provides:

“The Department of Public Works shall have the power and its duty shall be to perform the following functions; (a) City streets, etc., generally. It shall itself, or by contract, design, construct, repair and maintain city streets, which shall include . . . highways, footways . . .”

Therefore, the Court reasoned that Section 42-42 which shifted repair and maintenance responsibility from the City of Wilmington to abutting landowners was improper, in the absence of an amendment to the Home Rule Charter. The Court went on to hold that such an amendment could only “be made by Wilmington voters or the General Assembly in the form of a properly enacted Charter change and not by ordinance of the Wilmington City Council.

The City of Wilmington’s Home Rule Charter was adopted by referendum on November 7, 1978 and became effective on July 1, 1979, and grants the City of Wilmington complete legislative and administrative power over municipal functions, including the power to enact ordinances necessary and proper for executing any of the city’s express or implied powers. Such authority as set forth in 22 *Del. C.* § 802 provides follows:

“Every municipal corporation in this State... may, [subject] to the conditions and limitations imposed by this chapter, amend its charter so as to have and assume all powers which, under the Constitution of this State, it would be competent for the General Assembly to grant by specific enumeration and which are not denied by statute.” 22 Del C. § 802 (1961).

Thus, the City enjoys complete powers of legislation and administration relating to its municipal functions, but only within the scope of the powers conferred on it by the General Assembly through its Charter. *Gage v. City of Wilmington*, 293 A.2d 555 (citing 1 *Wilm. C.* § 1-101).

The Delaware Supreme Court in *Schadt*, citing *Bivens v. City of Grand Rapids*, analogized, that the Wilmington Charter “stands as its constitution,” and amendments to

that Charter must be enacted by referendum or by an act of the General Assembly where approval by two-thirds of all members of each house is required. 22 Del. C. §§ 811-815.

The Court found that §5-400 clearly and unequivocally mandates that the City *itself, or by contract* repair and maintain, among other things, public sidewalks. Furthermore, that to permit a city to enact an ordinance contrary to the Charter would enable the City to effectively amend the Charter without subjecting the amendment to the scrutiny and approval of the local electorate. Thus, it concluded the city may not validly enact an ordinance that contradicts limitation expressly provided in its charter.

The Court in *Schadt* found that although a grant of municipal sovereignty necessarily assigns wide latitude to make important municipal decisions, the City's home rule Charter, like the state constitution, is read as a limitation on governmental power, and not as a grant of specific powers. The City Charter provision § 5-400 limits the City's ability to delegate the duty to repair and maintain sidewalks to anyone other than by contract. The Court found that Section 42-42 of the Wilmington City Code "represents a wide and inconsistent departure" from the Home Rule Charter, and is invalid.

Therefore, plaintiff may not bring this claim, to the extent it rests upon the Wilmington City Code provision requiring the defendants to maintain and repair the sidewalk. Accordingly, defendants' motion for summary judgment has merit and is granted on this issue.

Plaintiff, also claim Defendants should be held liable for negligence for failure to remove the obstruction from the sidewalk or failing to warn the public that such danger existed. This claim must be analyzed in light of plaintiff's concession that defendants did

not place the items on the sidewalk. Thus, the claim turns on whether under *Schadt* a duty to remove obstruction remains with the adjoining property owner? In *Schadt* the Court held:

“We conclude that because the Wilmington City Charter expressly mandates that the City of Wilmington repair and maintain (emphasis added) city sidewalks adjacent to private property, the ordinance purporting to transfer that duty to private property owners is inconsistent with the express terms of the City Charter.”

The analysis therefore is whether the duty to remove obstructions is included within the language “repair and maintain” as such is contemplated under the Charter provision. In *Schadt* the plaintiff fell while walking on a city sidewalk as a result of the sidewalk being uneven, thus, it was clear that a defect in the sidewalk would come within the definitional requirement. An uneven sidewalk is an ongoing and persistent condition which the City would be put on notice or could have discovered by a program of periodic inspection. However, obstructions on the sidewalk are usually of the nature which are transient and temporary which could easily evade a program of regular normal inspection. To conclude that removal of obstructions come within the language of “repair and maintain” is to extend the language of the Charter provision. Moreover, if the legislature wanted to impose such a duty on the City of Wilmington, it could have easily included such in the Charter provision. A sidewalk can be rendered dangerous or unsafe by an obstruction if it “actually impede[s] the normal and reasonable use of such ways” regardless of whether the obstruction occurs at or above the surface.

Accordingly, there is a genuine issue of material fact whether defendants can be held liable for permitting the obstruction to exist as a dangerous condition, despite

plaintiff's concession that neither MBNA nor Bracebridge is responsible for placing the condition on the sidewalk.

Thus, Defendants' Motion for Summary Judgment is DENIED as the claim for negligence, and GRANTED as it relates to Plaintiff's reliance on Section 42-42 of the Wilmington City Code.

SO ORDERED this 4th day of November, 2005

Alex J. Smalls
Chief Judge

Smithers-OP Oct 05