IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ASHLEY GESTWICKI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N16C-10-002 JRJ
	)	
PINE WOODS, INC.,	)	
	)	
Defendant.	)	

OPINION

Date Submitted: January 25, 2018
Date Decided: April 23, 2018

Upon Defendant Pine Woods, Inc.'s Motion for Summary Judgment: **GRANTED.**

Peter K. Janczyk, Esquire (argued), Edelstein Martin & Nelson, 1000 North West Street, Suite 1200, Wilmington, Delaware, Attorney for Plaintiff.

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Jurden, P.J.

I. INTRODUCTION

Before the Court in this premises liability case is Defendant Pine Woods, Inc.'s ("Pine Woods") Motion for Summary Judgment.[1] For the following reasons, Pine Woods' Motion is **GRANTED.**

II. FACTS

On October 2, 2014, Plaintiff Ashley Gestwicki ("Gestwicki") was walking on an unpaved pedestrian pathway ("Pathway")[2] near Pine Valley Apartments.[3] Pine Woods owns Pine Valley Apartments and the property abutting the Pathway.[4] As Gestwicki was walking on the Pathway, a two to three inch "metal post protruding from the ground" caused her to trip and fall.[5]

Gestwicki alleges that as a result of the fall she sustained serious personal injuries, including, spinal injury, upper and lower extremity injury, radiculopathy,

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[1] Def.'s Mot. Summ. J. (Trans. ID 60850044) (D.I. 16); Def.'s letter regarding property ownership (Trans. ID 61428455) (D.I. 31).

[2] The parties use the terms "pathway" and "walkway" interchangeably to describe the clear zone within a public right-of-way where Gestwicki was injured. *See id.* at ¶¶ 6, 10; Pl.'s Resp. to Def.'s Mot. Summ. J. ¶ 3; Def.'s Mot. Summ. J. ¶ 3. *See* "clear zone" defined *infra* n. 32.

[3] *See* Compl. ¶¶ 4–6 (Trans. ID 59637718) (D.I. 1); *see* Def.'s Mot. Summ. J. Ex. A (photos of the Pathway).

[4] *Id.* at ¶ 4; *see* Def.'s letter regarding property ownership.

[5] *Id.* at ¶ 6; Def.'s Mot. Summ. J. ¶ 4; *see* Def.'s Mot. Summ. J. Ex. A (photos of the sign remnant); *see also* Def.'s Mot. Summ. J. Ex. D (DelDOT work order to correct the "3-inch piece remaining of sign that was removed").

disc herniations, and other permanent injuries.[6] She claims these injuries cause her great pain, inconvenience, anxiety, emotional distress, and work loss.[7]

Gestwicki claims that Pine Woods knew or should have known that pedestrians regularly travel on its property and the condition of the Pathway created an unreasonably dangerous condition. Gestwicki alleges Pine Woods failed to: maintain the Pathway in a reasonably safe condition to prevent injury; remove the metal post; and properly warn pedestrians.[8] Gestwicki further alleges that Pine Woods was negligent in permitting incompetent agents to inspect the Pathway and failing to properly train its agents to inspect and repair the Pathway.[9]

III. PARTIES' CONTENTIONS

For purposes of this motion, Pine Woods concedes that it is the owner of the land abutting the Pathway.[10] Pine Woods argues that under well-established Delaware law it was under no statutory or municipal ordinance mandate to maintain the Pathway,[11] and the metal post that caused Gestwicki to trip and fall was the

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[6] Compl. ¶ 12.
[7] *Id.* at ¶¶ 13, 15.
[8] *Id.* at ¶ 5, 10.
[9] *See id.* at ¶ 11.
[10] Def.'s Mot. Summ. J. ¶ 3.
[11] Def.'s Mot. Summ. J. ¶ 3; *id.* at ¶ 2; *see Lawson v. Wilmington College of Delaware, Inc.*, 2009 WL 27301, at *2 (Del. Super. Jan. 5, 2009); *Eck v. Birthright of Delaware, Inc.*, 559 A.2d 1227, 1228 (Del. 1989) (applying the Rule to a defect *in* a sidewalk); *Massey v. Worth*, 197 A. 673, 674 (Del. Super. Mar. 8, 1938) (applying the Rule to a "*footway* or sidewalk.").

remnant of a street sign installed, maintained, and controlled by the Delaware Department of Transportation ("DelDOT").[12]

In response, Gestwicki argues that her Complaint alleges a dangerous condition *on* the Pathway, not defects *of* the Pathway, caused her injuries, and therefore the case law relied upon by Pine Woods is inapposite.[13] Gestwicki further argues summary judgment is inappropriate because there are genuine issues of material fact as to whether the Pathway is a "sidewalk" under the" abutting landowner liability rule,"[14] and whether the Pathway was maintained and controlled by Pine Woods.[15]

IV. STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[16] The moving party bears the burden of establishing the non-existence of material issues of fact,[17] and the Court must view the record in a light most favorable to the non-moving

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[12] *Id.* at ¶¶ 3–4; *See* Def.'s Answer to the Compl. with Third Party Compl. (Trans. ID 59895205) (D.I. 5). Pine Woods filed a third party complaint against the State of Delaware, Department of Transportation ("DelDOT") on December 1, 2016. DelDOT filed a Motion for Summary Judgment on March 17, 2017, arguing that sovereign immunity barred the third party complaint. The Court granted DelDOT's Motion on June 16, 2017.

[13] Pl.'s Resp. to Def.'s Mot. Summ. J. ¶ 3.

[14] *Id.* at ¶ 2; *Eck v. Birthright of Delaware, Inc.*, 559 A.2d 1227, 1228 (Del. 1989). *See* discussion *infra* n. 28.

[15] *See* Pl.'s letter regarding ownership.

[16] Super. Ct. Civ. R. 56(c).

[17] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

party.[18] If a motion is properly supported, the burden shifts to the non-moving party to establish the existence of material issues of fact.[19] Summary judgment is inappropriate "when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances."[20] Negligence actions are not ordinarily disposed of on a motion for summary judgment,[21] however, "[w]hen the record is such that the evidence is so one-sided that one party should prevail as a matter of law, summary judgment is appropriate."[22]

V. DISCUSSION

In a premises liability case such as this, a landowner's duty to a plaintiff is a matter of law for the Court to decide.[23] It is well established under Delaware law that an abutting landowner is not liable for injuries caused by the defective condition in a footway, curb area, sidewalk, or highway primarily intended for public use,

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[18] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[19] *Moore*, 405 A.2d at 681.
[20] *Mumford & Miller Concrete, Inc. v. New Castle Cty.*, 2007 WL 404771, at *1 (Del. Super. Jan. 31, 2007).
[21] *Reid v. Hindt*, 2005 WL 2143706, at *2 (Del. Super. Aug. 17, 2005).
[22] *Id.* (citations omitted).
[23] *Argoe v. Commerce Square Apartments Ltd. Partnership*, 745 A.2d 251, 254 (Del. Super. Apr. 22, 1999).

absent a statutory duty to repair the defect, unless the landowner caused the defect (hereinafter referred to as the "Abutting Landowner Rule" or "Rule").[24]

In *Eck*, the plaintiff alleged she was injured when she tripped and fell over a defect in the public sidewalk abutting the defendants' properties. The defendants in *Eck* moved for summary judgment, arguing they were not liable for injuries resulting from their failure to repair a defect in the sidewalk they did not cause. The Court granted their motion. On appeal, the *Eck* plaintiffs initially argued that 18 Del.Laws, c. 663 (1889) obligated the defendants to repair the sidewalk, but then conceded in supplemental briefing that the Delaware Supreme Court's decision in *Yacucci v. Tenhoopen*[25] released the defendants from any duty to repair the defective sidewalk under the 1889 statute because that statute does not apply to the City of Wilmington.[26] After conceding such, the plaintiffs in *Eck* urged the Supreme Court to adopt the "'modern trend' of imposing liability on an abutting landowner for a pedestrian's injuries from a defective sidewalk even in the absence of a statutory

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[24] *Lawson*, 2009 WL 27301, at *2 (applying the Rule to a defect in a "sidewalk or *curb area*"); *see Eck*, 559 A.2d at 1228 (applying the Rule to a defect *in* a sidewalk); *Schreppler v. Mayor of Middletown*, 154 A.2d 678, 679 (Del. Super. Oct. 7, 1959); *Massey*, 197 A. at 674 (applying the Rule to a "*footway* or sidewalk.").

[25] *Yacucci v. Tenhoopen*, 550 A.2d 36 (Del. 1988), *aff'g* 550 A.2d 327 (Del. Super. Feb. 22, 1988).

[26] *Eck*, 559 A.2d at 1228.

duty of the owner to repair."[27] The Delaware Supreme Court rejected the *Eck* plaintiffs' argument, holding:

> The long-standing rule in Delaware...has been that an abutting landowner is not liable to pedestrians injured as a result of defects in a sidewalk, absent a statutory mandate to repair or prove that the landowner caused the defects. We decline to reverse this line of cases. Under this settled Delaware law, Superior Court was required to grant defendants' motion because, as a matter of law, defendants did not have a duty to repair the public sidewalk abutting their properties absent notice from the Department of Licenses and Inspection, 2 *Wilm. C.* § 45-15, and because plaintiffs produced no evidence that the defendants caused the defects.[28]

The Abutting Landowner Rule applies here because Gestwicki alleges that, "while walking on the *pathway*"[29] in a clear zone within a public right-of-way, she tripped on and fell over a metal post that was "*protruding from the ground* causing

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[27] *Id.* In making this argument, the plaintiffs in *Eck* were asking the Supreme Court to adopt § 363 of the Restatement (Second) of Torts (a possessor of land in an urban area is liable for injuries that are caused by either a natural or artificial condition on an abutting sidewalk).

[28] *Id.* (citations omitted); *see also Massey*, 197 A. at 674–78 (noting that a "footway or sidewalk" is primarily intended for public use, and holding that a homeowner owed no duty to pedestrians using the footway or sidewalk outside his private home); *Coale v. Rowlands*, 723 A.2d 395, at *1 (Del. 1998) (TABLE) (holding that developers of a shopping mall had no duty to provide a safe crosswalk to a minor who was hit by a vehicle and killed while attempting to cross a highway as he was leaving the shopping mall) (citing *MacGrath v. Levin Properties*, 606 A.2d 1108, 1110 (N.J. Super. A.D. 1992) ("[A] property owner, who is otherwise without fault, owes no duty to pedestrians who are injured on an abutting highway or sidewalk which is *part of the public domain.*") (emphasis added)); *MacGrath*, 606 A.2d at 1110 (holding "that the duty to maintain and repair the *public way* rested solely upon the responsible public entity.") (emphasis added) (citing *Yanhko v. Fane*, 362 A.2d 1 (N.J. 1976)).

[29] The Rule applies to the Pathway at issue because it is akin to a footway or sidewalk primarily for public use and it is located in a clear zone within a public right of way used for pedestrian travel. Compl. ¶ 5 (emphasis added); *see* 17 *Del. C.* § 525(b)(1); Def.'s Mot. Summ. J. Ex. A, B.

a tripping hazard."[30] The term "clear zone" is defined as the total roadside border area within a right-of-way, starting at the edge of the pavement and continuing for a distance of 10 feet perpendicular to the pavement edge.[31] Pictures attached to Pine Woods' Motion, which were taken by Gestwicki and Pine Woods, show the sign remnant to be within inches of the roadway's pavement edge.[32] Thus, Gestwicki was injured while walking in a clear zone within a public right-of-way at the time she was allegedly injured.

There is no evidence that Pine Woods was under any statutory or municipal ordinance mandate to maintain the clear zone within a public right-of-way running along its premises,[33] and there is no evidence that Pine Woods caused any defect in the Pathway.[34] The evidence is undisputed that the metal post that caused Gestwicki to trip and fall was a remnant of a street sign installed and controlled by DelDOT.[35]

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[30] Compl. ¶ 6 (emphasis added). In a letter to Pine Woods' insurer, Gestwicki admitted that "a sign that was imbedded in the pathway" caused her to trip and fall. Def.'s Mot. Summ. J. Ex. C.
[31] 17 *Del. C.* § 525(b)(1) (definition for "clear zone").
[32] Def.'s Mot. Summ. J. Ex. A, B.
[33] Notably, 21 *Del. C.* § 4112 states that any person who attempts to remove a DelDOT sign will be subject to a fine and possible imprisonment.
[34] *See Lawson*, 2009 WL 27301, at *2.
[35] *See* correspondence between counsel for Pine Woods and DelDOT in which DelDOT acknowledges control over the sign remnant; *see* Def.'s Mot. Summ. J. Ex. D (when Pine Woods notified DelDOT of the sign remnant in the clear zone within a public right-of-way, DelDOT responded to Pine Woods' counsel that it would "correct [the] problem."); *see also* 17 *Del. C.* § 525(a), (b)(1). As noted earlier, Pine Woods filed a third party complaint against DelDOT, but the action was dismissed based on sovereign immunity. *See* Order Granting DelDOT's Mot. Summ. J. (Trans. ID 60740124) (D.I. 15). Gestwicki does not respond to Pine Woods' assertion that the sign remnant was under DelDOT's control. *See* Pl.'s Resp. to Def.'s Mot. Summ. J. (Trans. ID 61005121) (D.I. 24). In a letter dated January 25, 2018, Gestwicki states, "The fact that the

The facts here are akin to those found in *Kesting v. Delaware Hotel Associates, L.P.*[36] In *Kesting*, the plaintiff slipped and fell on a pile of wet leaves located at the entrance to a driveway intersecting with a public road.[37] That area was a DelDOT public right-of-way.[38] Consequently, the Court in *Kesting* held that the defendant owed no duty as to the plaintiff's claims.[39] Similar to the plaintiff in *Kesting*, Gestwicki tripped and fell in a clear zone within a public right-of-way.[40] The Rule applies to clear zones within public right-of-ways as part of the public domain.

Although the Rule applies, where an abutting landowner "uses the sidewalk to his individual advantage, or interferes with the sidewalk in such a way as to interfere with the rights of pedestrians thereon, he must use reasonable care to see that such use does not render the sidewalk unsafe or dangerous."[41] This was exactly the case in *King v. Swanson*, where the plaintiff slipped and fell on the sidewalk in front of the defendant's laundromat.[42] While operating the laundromat, the defendant dragged large baskets filled with clothing across the sidewalk and snow,

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dangerous obstruction presumably did not belong to the defendant...." Pl.'s letter regarding ownership at 2 (Trans. ID 6613325) (D.I. 33).

[36] 2014 WL 1285879 (Del. Super. Mar. 31, 2014).

[37] *Id.* at *1.

[38] *Id.*

[39] *Id.* at *2.

[40] 17 *Del. C.* § 525(b)(1); Def.'s Mot. Summ. J. Ex. A, B.

[41] *Massey*, 197 A. at 677.

[42] 216 Ill.App. 294 (Ill. App. Ct. 1919). This Court's decision in *Massey* relied partly upon *King*.

creating the slippery and dangerous condition that injured the plaintiff.[43] The verdict was in the plaintiff's favor and the appellate court affirmed that judgment.[44] The facts in *King* are inapposite to the undisputed facts here because there is no evidence that Pine Woods used the Pathway to its advantage or interfered with the Pathway in any way.

In an attempt to avoid summary judgment, Gestwicki disputes certain factual allegations, but none of those factual disputes is material. Gestwicki argues a material issue of fact exists as to whether the sign remnant was *on* or *of* the Pathway in an effort to avoid application of the Rule.[45] In doing so, Gestwicki relies on *Finn v. City of Philadelphia*, a Pennsylvania Supreme Court premises liability case that held there was a distinction between "on" and "of" when interpreting a Pennsylvania law.[46] But *Finn* is not applicable because the Abutting Landowner Rule is derived from nearly a century of Delaware common law and expressly applies to defects *in* sidewalks or *footways*.[47] And, in any event, the record establishes the remnant was in the Pathway.[48]

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[43] *Id.* at 296.
[44] *Id.* at 300.
[45] Pl.'s Resp. to Def.'s Mot. Summ. J. ¶ 3.
[46] 664 A.2d 1342 (Pa. 1995); *see* 42 Pa.C.S. § 8542(b)(7). The Pennsylvania law enumerated exceptions to governmental immunity.
[47] *See Lawson*, 2009 WL 27301, at *2; *see Eck*, 559 A.2d at 1228; *Schreppler*, 154 A.2d at 679; *Massey*, 197 A. at 674 (applying the Rule to a "footway or sidewalk.") (emphasis added).
[48] Gestwicki's Complaint alleges "a metal post protruding from the ground" caused her to trip and fall. Compl. ¶ 6. In a letter to Pine Woods' insurer, Gestwicki conceded that "a sign...imbedded

In further support of her "on-of" argument, Gestwicki argues that *Russel v. S&S Mgmt., Inc.*, a case involving a business invitee's slip and fall, controls.[49] In *Russel*, the plaintiff slipped and fell in a landscaped area at the base of an exit ramp leading out of a restaurant located inside a shopping center.[50] The defendant, S & S Management, Inc. ("S & S"), leased the building in which the restaurant was located, from the owner, First State Plaza, Associates, L.P. ("First State").[51] When S & S argued that it owed no duty to the plaintiff, the Court considered whether the ramp and area where plaintiff fell were places over which First State had control and whether they constituted a "common area" for which First State was solely responsible for under the lease.[52] The Court also considered whether the area in which the plaintiff incurred her injuries was part of the premises which S & S could have reasonably expected the restaurant's patrons to use.[53] The Court found that First State assumed a duty to maintain the ramp and landscaped area based on deposition testimony that First State often sent a person to the shopping center to remove dangerous conditions.[54] The Court in *Russel* held that "[t]he issue of whether or not the ramp and landscaped area in which Plaintiff fell constitute[d] a 'common area'

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in the pathway" caused her to trip and fall. Def.'s Mot. Summ. J. Ex. C. Pictures in the record provided by both parties show that the sign remnant was clearly *in* the Pathway. *Id.* at Ex. A, B.

[49] 1994 WL 149239 (Del. Super. Mar. 2, 1994).

[50] *Id.* at *1.

[51] *Id.*

[52] *Id.* at *3–4.

[53] *Id.* at *4.

[54] *Russel*, 1994 WL 149239, at *3.

as defined by the Lease Agreement, [was] an issue upon which reasonable minds could differ."[55]

The facts here are nothing like those in *Russel*. There is no lease here. Pine Woods never assumed a duty to remove DelDOT's sign remnant. Gestwicki does not allege that she was a tenant or business invitee of Pine Valley Apartments. And the Pathway is located in a clear zone within a public right-of-way located on Pine Woods' property.[56]

Gestwicki also argues that *Keating v. Best Buy Stores, LP*, which involved a slip and fall outside a Best Buy store, is applicable.[57] In *Keating*, the Court denied summary judgment because there was conflicting testimony over which party was responsible for clearing the sidewalk of ice and snow; in some instances, the store contacted the landlord to remove the snow, but on some occasions, the landlord did not have an employee responsible for clearing sidewalks, so Best Buy employees salted the sidewalk.[58] The facts in *Keating* are inapposite to the facts here because there is no evidence in the record that Pine Woods ever exercised control over the

[55] *Id.* at *4.
[56] Compl. ¶ 6.
[57] 2013 WL 8169756 (Del. Super. Mar. 28, 2013).
[58] *Id.* at *4.

clear zone within a public right-of-way or DelDOT's sign remnant. DelDOT has statutory control over the clear zone within a public right-of-way.[59]

VI. CONCLUSION

WHEREFORE, IT IS HEREBY ORDERED that Defendant Pine Woods, Inc.'s Motion for Summary Judgment is **GRANTED.**

Jan R. Jurden, President Judge

Original to Prothonotary
cc: Peter K. Janczyk, Esq.
Gary W. Alderson, Esq.

[59] *See* 17 *Del. C.* § 525(a), (b)(1).