

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000432-MR

LYNDA SYLVESTER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 01-CI-005607

OAK STREET HARDWARE STORE, INC.;
LEE R. JONES AND HIS WIFE, NELLIE JONES;
CITY OF LOUISVILLE; AND CITY OF
LOUISVILLE, DEPARTMENT OF PUBLIC
WORKS

APPELLEES

AND

NO. 2002-CA-001278-MR

LYNDA SYLVESTER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE
ACTION NO. 01-CI-005607

OAK STREET HARDWARE STORE, INC.;
LEE R. JONES; AND NELLIE JONES

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: BAKER AND SCHRODER, JUDGES; AND HUDDLESTON, SENIOR JUDGE.¹

SCHRODER, JUDGE. Lynda Sylvester appeals from orders of the Jefferson Circuit Court granting the City of Louisville's motion to dismiss and granting summary judgment in favor of Oak Street Hardware Store, Inc. and Lee and Nellie Jones. The appeals proceeded separately and have not been consolidated but were ordered to be heard together by the same panel of this Court. Because the appellant is the same in both appeals and because both appeals originate from one case, we will issue one opinion covering both appeals. We affirm in both appeals.

On August 24, 2000, Lynda Sylvester tripped and fell, sustaining injuries, in a landscaped area owned by the City of Louisville, and located in front of a retail business at 125 West Oak Street, Oak Street Hardware, owned by Lee and Nellie Jones. The area in which Sylvester fell is a part of the sidewalk landscaping, consisting of a small dirt square (which appears to measure approximately 3' x 3') located within the sidewalk next to the curb. The City had removed a pavement square and added mulch, some plants, and a tree. The area was bordered by some small black metal arches or "hoops." Sylvester alleged that, while walking down the sidewalk, she stepped to the side to avoid walking over a metal grate in the sidewalk and

¹ Senior Judge Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

caught her foot in one of the metal "hoops," causing her to trip and fall.

On August 15, 2001 and August 22, 2001, Sylvester filed a complaint and an amended complaint in Jefferson Circuit Court seeking damages for her injuries, naming Oak Street Hardware Store, Inc., Lee and Nellie Jones, the City of Louisville, and the City of Louisville, Department of Public Works, as defendants. (Hereinafter, Oak Street Hardware Store, Inc., and its owners Lee and Nellie Jones will be referred to collectively as "the Joneses". The City of Louisville and the City of Louisville, Department of Public Works, will be referred to collectively as "the City".) The trial court, finding the area to be a public thoroughfare, granted the City's motion to dismiss, on grounds that Sylvester failed to comply with the 90-day notice requirement of KRS 411.110. Sylvester's first appeal (2002-CA-000432-MR) concerns the motion to dismiss. Subsequently, the trial court granted the Joneses' motion for summary judgment, finding that the area in which Sylvester fell was owned by the City, and, citing Reibel v. Woolworth, 301 Ky. 76, 190 S.W.2d 866 (1945), that there was no evidence that the Joneses created a defective or dangerous condition on the thoroughfare by an affirmative act. Sylvester's second appeal (2002-CA-001278-MR) concerns the grant of summary judgment.

We first address Sylvester's appeal against the City (2002-CA-000432-MR) in which she argues that the trial court erred in finding the area in which she fell to be a public thoroughfare. KRS 411.110, entitled, "Action against city for injury from defect in thoroughfare - Service of Notice" provides as follows:

No action shall be maintained against any city in this state because of any injury growing out of any defect in the condition of any bridge, street, sidewalk, alley or other public thoroughfare, unless notice has been given to the mayor, city clerk or clerk of the board of aldermen in the manner provided for the service of notice in actions in the Rules of Civil Procedure. This notice shall be filed within ninety (90) days of the occurrence for which damage is claimed, stating the time of and place where the injury was received and the character and circumstances of the injury, and that the person injured will claim damages therefor from the city. (emphasis added.)

The trial court found that the area in question was a thoroughfare, and therefore covered by the statute, citing Black's Law Dictionary that a thoroughfare is "a street or passage through which one can fare (travel); that is, a street or highway affording an unobstructed exit at each end into another street or public passage."

Sylvester contends that the area in which she fell was neither a sidewalk, nor a public thoroughfare, but a "park-like area" that was created for aesthetic purposes, and that KRS

411.110 does not contain any language as would include this type of area. In support of her argument, Sylvester points to the fact that the purpose of the metal hoops was actually to block pedestrians from walking through the area to avoid damage to the vegetation therein, hence the area cannot be considered a "thoroughfare." We disagree.

There are numerous pictures of the area in the record. The area is part of the streetscape or landscaping of the sidewalk. The tree was planted next to the street curb with sidewalk pavement on the other three sides. Clearly the sidewalk landscaping is an accessory use to the sidewalk use. Likewise, the pictures show a trash can on the pavement near the tree. The trash can obstructs pedestrian traffic, but it, too, is an accessory to the sidewalk use. There is a metal grate near the tree and near the trash can. (This grate appears to be of a type which allows air to go through the sidewalk into the adjacent building.) It, too, is part of the sidewalk.

In a similar case, Hancock v. City of Anchorage, Ky., 299 S.W.2d 794 (1957), the plaintiff was injured due to a loose lid on a city-owned water meter box located in the sidewalk. Even though the meter and water system were maintained as a proprietary function of the city, the Court, nevertheless, held that "the water meter box was located in the sidewalk and [KRS 411.110] specifically covers defects in the sidewalk." Hancock,

299 S.W.2d at 795. The Court further explained that KRS 411.110 "does not exclude defects in a sidewalk of any kind whether of proprietary or government origin." Id. Similarly, we conclude that the landscaped area in the present case is a part of the sidewalk, and any defects therein would be considered defects in the sidewalk. Hence, the notice requirement of KRS 411.110 would apply.

The notice requirement of KRS 411.110 is mandatory and is a condition precedent to the bringing of a suit against a city. Berry v. City of Louisville, Ky., 249 S.W.2d 818, 819 (1952); City of Louisville v. O'Neill, Ky., 440 S.W.2d 265, 266 (1969); Hancock, 299 S.W.2d at 795. It is undisputed that Sylvester did not give notice to the City within 90 days of the accident. Accordingly, the trial court did not err in granting the City's motion to dismiss.

We next address Sylvester's second appeal (2002-CA-001278-MR), in which she argues that the trial court erred in granting the Joneses' motion for summary judgment. The owner or occupant of abutting property is not liable for damages resulting from a defect or dangerous condition in the sidewalk, unless he created the defective or dangerous condition by some affirmative act. Equitable Life Assurance Society v. McClellan, 286 Ky. 17, 149 S.W.2d 730 (1941); Reibel v. Woolworth, 301 Ky. 76, 190 S.W.2d 866 (1945).

The standard of review of a trial court's grant of summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996). We are to view the record in the light most favorable to the party opposing the motion and resolve all doubts in its favor. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

Sylvester contends that the trial court was incorrect in its finding that there was no affirmative evidence that the Joneses created the defective or dangerous condition by an affirmative act. To the contrary, Sylvester contends that the record contains ample evidence that the Joneses affirmatively created the alleged defective or dangerous condition which caused her injuries. In his deposition, Lee Jones testified that when he first moved to the location at 125 West Oak Street, the metal hoops, along with the tree and a "little bit" of mulch, were already there. Lee Jones testified that he added "a lot of mulch and plants" into the square, that he would weed and water, and that he would straighten the metal hoops if they were up or leaning over. Sylvester contends that Lee Jones's acts of adding mulch and vegetation, which obstructed the view of the metal hoops, as well as his repositioning of the hoops,

constituted affirmative acts which created a dangerous or defective condition.

Again, we disagree. Lee Jones did not remove the pavement nor plant the tree, nor did he place the dangerous metal hoops in the landscaped area. The City did all of the above, including initially adding some mulch. Lee Jones merely maintained the landscaping. Adding the extra mulch and adding plants to the square did not create the condition, but simply helped maintain the condition the City created (removing the pavement square and replacing it with landscaping). See Rollins v. Satterfield, Ky., 254 S.W.2d 925 (1953); McClellan, 149 S.W.2d 730. Therefore, we conclude the trial court did not err in granting summary judgment to the Joneses.

For the foregoing reasons, the orders of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Diane E. Bluhm
Michael K. Nisbet
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANT:

Diane E. Bluhm
Louisville, Kentucky

BRIEF FOR APPELLEES, OAK
STREET HARDWARE STORE, INC.,
LEE R. JONES, AND HIS WIFE,
NELLIE JONES:

Michael E. Krauser
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEES,
OAK STREET HARDWARE STORE,
INC., LEE R. JONES, AND HIS
WIFE, NELLIE JONES:

Edward Brutscher
Louisville, Kentucky

BRIEF FOR APPELLEE, CITY OF
LOUISVILLE:

William C. Stone
Director of Law
City of Louisville

Gregory Scott Gowen
Assistant Director of Law
City of Louisville
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE,
CITY OF LOUISVILLE:

Gregory Scott Gowen
Assistant Director of Law
City of Louisville
Louisville, Kentucky