IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thomas Swank,	:	
Appellant	:	
	:	
v.	:	No. 1312 C.D. 2007
	:	Argued: February 12, 2008
Breakneck Creek Regional Authority	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SMITH-RIBNER FILED: April 30, 2008

Thomas Swank (Swank) appeals from the order of the Butler County Court of Common Pleas that denied Swank's motion for a new trial in his action against the Breakneck Creek Regional Authority (Authority) seeking damages for injuries sustained in a fall into an open manhole owned by the Authority.[1] Swank questions whether the trial court erred in entering compulsory nonsuit and refusing to remove it because Swank did not establish liability under the utility service facilities exception to governmental immunity in Section 8542(b)(5) of the Judicial Code, 42 Pa. C.S. §8542(b)(5), due to his failure to prove the Authority's actual or constructive notice of the open manhole cover. He asserts that he was injured by a dangerous condition of the Authority's sanitary sewer system, *i.e.*, an unsecured manhole cover, which any reasonable inspection would have disclosed and that the Authority had no justification for failing to secure the manhole cover.

[1]The Court's review of the trial court's denial of a motion for post-trial relief is limited to determining whether it abused its discretion or committed an error law. *Municipal Authority of Edgeworth v. Borough of Ambridge Water Authority*, 936 A.2d 538 (Pa. Cmwlth. 2007).

In October 2000 Swank commenced an action against the Authority and others, alleging that he sustained an injury on August 4, 1999 when he fell into the opening of a sewer manhole owned and maintained by the Authority as a part of its sewer system. A jury trial was held on February 14 and 15, 2007. Swank testified that on August 4, 1999 he parked his concrete delivery truck along Castle Creek Drive adjacent to a vacant undeveloped lot, where the manhole was located, to rinse off the truck's cement chutes. He fell into the manhole opening while walking to one of the chutes and sustained injuries to his testicles and elbow.

Swank presented testimony from Michael Davidson, the Authority's Manager since 1995, and Eric Winkler, an Authority maintenance worker. They testified that the manhole was constructed before 1989; that the Authority acquired ownership of the sewer system from Seven Fields Borough in 1991 or 1992; and that the manhole cover assembly had four pre-drilled holes to be used to bolt down the manhole cover to the manhole frame, as shown in the photographs presented by Swank. Also, the Authority conducted no regular inspections of its sewer lines and rights-of-way before Swank's injury. The manhole cover had never been bolted to the manhole frame, and no justification existed for the failure to do so. Swank's architectural and structural engineering expert, James Hunt, opined that the Authority's failure to inspect the sewer system and to bolt down the manhole cover during its seven-year ownership of the system exhibited a lack of reasonable care.

At the conclusion of Swank's case-in-chief, the Authority's counsel moved for compulsory nonsuit, asserting that Swank offered no evidence to prove that the Authority had actual or constructive notice of the condition of the manhole as required by the utility service facilities exception to governmental immunity set forth in 42 Pa. C.S. §8542(b)(5). Section 8542(b)(5) provides as follows:

> A dangerous condition of the facilities of steam, *sewer*, water, gas or electric systems owned by the local agency and located within rights-of-way, 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*. (Emphasis added.)

The trial court granted compulsory nonsuit on the basis that Swank failed to prove that the Authority "knew or should have known that the manhole was partially open" and that "the jury would have been left to speculate relative to the time of the displacement of the manhole" had the court not granted a nonsuit. Trial Court's June 29, 2007 Opinion, p. 3. The trial court determined that Swank did not show that the Authority had notice of the fact that the manhole cover was partially off of the manhole and that the Authority could have discovered the open manhole within a sufficient period of time to remedy the condition. It relied upon *Myers v. Penn Traffic Co.*, 606 A.2d 926, 929 (Pa. Super. 1992) (quoting *Moultrey v. Great A & P Tea Co.*, 422 A.2d 593, 596 (Pa. Super. 1980)), holding that under Restatement (Second) of Torts §343 the owner must have notice of a harmful condition and that "the jury may not consider the owner's ultimate liability in the absence of other evidence which tends to prove that the owner had actual notice of the condition or that the condition existed for such a length of time that in the exercise of reasonable care the owner should have known of it."

Swank argues before this Court that he presented sufficient evidence to establish a *prima facie* case against the Authority and to withstand a compulsory nonsuit. He maintains that the trial court disregarded his theory of the case, *i.e.*, the unsecured manhole cover itself was the dangerous condition. Citing *Gall v.*

Allegheny County Health Department, 521 Pa. 68, 555 A.2d 786 (1989), he argues that a local agency is not immune from liability where a plaintiff proves that the dangerous condition created a reasonably foreseeable risk and that the local agency had actual notice or could reasonably be charged with notice of such dangerous condition.

Swank relies upon the admissions by the Authority Manager that the manhole cover should have been secured to the manhole cover assembly and that there was no justification for the Authority's failure to do so. He claims that any reasonable visual inspection by the Authority during its ownership of the sewer system would have disclosed the unsecured manhole cover; that it was foreseeable that the manhole cover would come off the manhole cover assembly and create an opening; and that the manner in which the cover became dislodged is irrelevant. In support, Swank cites *Powell v. Drumheller*, 539 Pa. 484, 495, 653 A.2d 619, 624 (1995), holding that "[a] determination of whether an act is so extraordinary as to constitute a superseding cause is normally one to be made by the jury."

The Authority argues that the trial court did not err in granting the motion for compulsory nonsuit because Swank failed to prove that the Authority had actual notice that the manhole cover had been dislodged. It cites *Morena v. South Hills Health Sys.*, 501 Pa. 634, 639, 462 A.2d 680, 683 (1983), holding that "a jury can not be permitted to reach its verdict on the basis of speculation or conjecture." It further argues that "[b]ut for the unknown person or force that dislodged the manhole cover assembly there would have been no dangerous condition and [Swank] would not have fallen" and that "to allow a jury to consider the issue of when the manhole cover assembly had become dislodged would have been purely speculative." Authority's Brief, p. 7.

A compulsory nonsuit may be entered only if it is clear that a fact finder could not reasonably conclude that essential elements of a cause of action were established by a plaintiff. *Daddona v. Thind*, 891 A.2d 786 (Pa. Cmwlth. 2006). In determining whether to grant or deny a compulsory nonsuit, the court must give the plaintiff the benefit of all reasonable inferences arising from the evidence and must resolve all evidentiary conflicts in the plaintiff's favor. *Shay v. Flight C Helicopter Servs., Inc.*, 822 A.2d 1 (Pa. Super. 2003). The grant of a compulsory nonsuit may be affirmed "only if, giving the appellant the benefit of every reasonable inference and resolving all evidentiary conflicts in his favor, the facts and circumstances nonetheless lead to the conclusion that no liability exists." *Agnew v. Dupler*, 553 Pa. 33, 41, 717 A.2d 519, 523 (1998).

In order to impose liability on a local agency, a plaintiff must satisfy three conditions set forth in 42 Pa. C.S. §8542(a). They are that damages must be recoverable under common law or a statute creating a cause of action if the injury were caused by a person not having available a defense of governmental immunity; the injury must have been caused by the negligent acts of the local agency or its employee acting within the scope of his or her office or duties; and the negligent act must fall within one of the exceptions to governmental immunity in 42 Pa. C.S. §8542(b). *Simko v. County of Allegheny*, 869 A.2d 571 (Pa. Cmwlth. 2005). To establish liability under the utility service facilities exception, Swank had to show that a dangerous condition of the sewer system created a reasonably foreseeable risk of the kind of injury that he sustained and that the Authority had actual notice or "could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to [his injury] to have taken measures to protect against the dangerous condition." It is settled case law that questions of

foreseeability are for the jury. *Wyke v. Ward*, 474 A.2d 375 (Pa. Cmwlth. 1984). Also, the question of whether a local agency had actual notice or could reasonably be charged with constructive notice of a dangerous condition is for the fact finder. *Medicus v. Upper Merion Township*, 475 A.2d 918 (Pa. Cmwlth. 1984).

In his amended complaint, Swank averred that the Authority was negligent in failing, *inter alia*, "to affix the manhole cover to the concrete portion of the sewer system in such a way so as to prevent it from moving and creating the hazard into which [he] fell." *Id*. at ¶20.5. This averment clearly contemplates the unsecured manhole cover itself as the dangerous condition. The Authority Manager and its maintenance worker admitted that the Authority failed to inspect the sewer lines and its rights-of-way on a regular basis and to secure the manhole cover to the concrete manhole cover assembly during its ownership of the sewer system. The Manager conceded that "there's no justification for not bolting [the manhole covers] down" and not placing a "mastic" for "a good water-tight seal" between the manhole cover and the manhole cover assembly. N.T., February 14, 2007 Trial, p. 37; Reproduced Record at 98a. Swank's expert witness opined that the Authority's inaction constituted a lack of reasonable care.

Swank presented sufficient evidence to demonstrate that the Authority should have known of the dangerous condition in the exercise of reasonable care, that it had sufficient time to protect the public from this condition and that it should be charged with constructive notice of the condition. A jury could have found from the evidence that the injury was reasonably foreseeable. Construing Swank's claim as averred, the Court concludes that the trial court erred by requiring Swank to prove actual notice to the Authority of when the manhole cover came off and erred by failing to consider the unsecured manhole cover a dangerous condition.

The Authority nonetheless relies upon *Fenton v. City of Philadelphia*, 561 A.2d 1334 (Pa. Cmwlth. 1989), *aff'd without op.*, 526 Pa. 300, 585 A.2d 1003 (1991), which is not dispositive of the issue. In *Fenton* the plaintiff's son died as a result of an injury sustained from an accident that occurred while attempting to pass a tractor trailer about to make a left turn from Richmond Street onto Butler Street in Philadelphia. The plaintiff maintained throughout that the City was liable under the "trees, traffic controls and street lighting" and "streets" exceptions to governmental immunity in 42 Pa. C.S. §8542(b)(4) and (6), which contain the same language found in the utility service facilities exception requiring a plaintiff to establish a local agency's actual or constructive notice.

The plaintiff's proof included evidence that area residents complained about truck traffic on Butler Street to the City Manager, that the City prohibited large trucks on Butler Street for a short period in 1981 and that due to resurfacing of Richmond Street the City on several occasions had to repaint the lane markings. The plaintiff's expert witness testified that the lack of a left-turn lane was a dangerous condition, and he further testified that the lines painted on Richmond Street were inadequate and confusing and created a dangerous condition because the possibility existed for someone making a left turn onto Butler Street.

After examining the evidence, the Court determined that the plaintiff failed to prove actual or constructive notice to the City of a dangerous condition. The Court concluded that none of the evidence dealt with the specific problem of the lack of a left hand turning lane, or the "lynchpin" of the plaintiff's case. In its view, the Court ascertained no evidence from which the jury could find that the plaintiff's accident was reasonably foreseeable by the City, and therefore she failed to meet this essential element under Section 8542(b).

Unlike in *Fenton*, the evidence presented by Swank was sufficient to establish the Authority's constructive notice of the dangerous condition posed by the unsecured manhole cover, which could be dislodged at any time exposing the manhole opening. The Authority never conducted regular inspections of its sewer lines and rights-of-way before Swank's fall and offered no justification for failing to secure the manhole cover during its more than seven-year period of ownership. Under these circumstances, the mere lack of evidence that the Authority was not specifically informed on a date certain of the unsecured manhole cover before Swank's injury is not essential to establishing constructive notice of the dangerous condition. The Court may affirm the trial court's grant of compulsory nonsuit only if the facts and circumstances lead to the conclusion that no liability exists in the Authority, *see Agnew*, and because the Court cannot reach that conclusion it consequently must reverse the order of the trial court and remand for a new trial. A new trial is warranted where, as here, the trial court improperly entered and then refused to remove a nonsuit. *See Vicari v. Spiegel*, 936 A.2d 503 (Pa. Super. 2007).

DORIS A. SMITH-RIBNER, Judge

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O R D E R

AND NOW, this 30th day of April, 2008, the Court reverses the order of the Court of Common Pleas of Butler County and remands for a new trial. Jurisdiction is relinquished.

DORIS A. SMITH-RIBNER, Judge