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Overcash v. Burkholder

DONNA M. OVERCASH AND EDGAR OVERCASH, HER HUSBAND,
v. LEE R. BURKHOLDER AND DARLENE BURKHOLDER
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Civil Action — Law, No. 2005–1614

Motion for Summary Judgment; Whether Sidewalk Defect is de minimus as a Matter of Law

1. Under Pa.R.C.P. 1035.2, summary judgment is appropriate (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which is a jury trial would require the issues to be submitted to a jury.

2. The moving party has the burden of proving that there is no genuine issue of material fact.

3. The non-moving party may not rest on pleadings alone, but must set forth specific facts which demonstrate a genuine issue for trial.

4. Plaintiff was injured when she tripped on Defendant's sidewalk.

5. The height difference between the two adjoining slabs of sidewalk over which Plaintiff tripped was approximately 1¼ inches.

6. The issue for summary judgment is whether the sidewalk defect was so trivial that it would not be reasonable to hold Defendant liable for its existence.

7. The question of what constitutes a defect must be determined in light of the circumstances of the particular case.

8. A shadow zone exists, where the question of whether a defect exists must be submitted to a jury so that the Court does not fix a dividing line to the fraction of an inch.

9. Summary judgment is appropriate when there are no issues of material fact.

10. The issue presented in this case is a question of fact, and the issue must be submitted to a jury.

Appearances:

Philip S. Cosentino, Esq., *Counsel for Plaintiffs*

Anthony J. Cosentino, Esq., *Counsel for Plaintiffs*

C. Kent Price, Esq., *Counsel for Defendants*

OPINION

Van Horn, J., June 27, 2007

Statement of the Case

Donna M. Overcash and Edgar Overcash ("Plaintiffs") sustained injuries when Donna Overcash visited Lee R. Burkholder and Darlene Burkholder's ("Defendants") home on June 20, 2003, to deliver a requested catalog. Plaintiff parked her car in the driveway of Defendants' residence, and Plaintiffs assert that the sole means of ingress and egress from the driveway to the residence was a sidewalk. Plaintiffs describe the sidewalk as being in a good state of repair, with one exception. There was one area of the sidewalk where a concrete slab was elevated approximately 1¼ inches from the adjacent slab. Plaintiff walked to the front door on the sidewalk without incident, and left the requested materials at the front door. Upon returning to her vehicle, Plaintiff tripped over the elevated portion of the sidewalk, and fell into her vehicle, sustaining bilateral shoulder injuries requiring surgeries and resulting in permanent impairment. Plaintiff had not been on Defendants' property for more than eight years. Plaintiffs note that Defendants were easily able to repair the property after Plaintiff's fall.

Plaintiffs brought a negligence action against Defendants, claiming damages caused by Defendants' negligence, consisting of failure to maintain the sidewalk in a reasonably safe condition; failure to conduct a reasonable inspection to discover the dangerous elevated sidewalk; failure to take remedial steps to repair the defective sidewalk; and failure to warn Plaintiff of the dangerous condition of the sidewalk. Plaintiffs' damages include recovery for Mrs. Overcash's injuries, and loss of consortium damages for Mr. Overcash. Defendants filed a Motion for Summary Judgment claiming that the defect of which Plaintiffs complain is so *de minimis* that an action in negligence cannot be maintained.

After carefully reviewing the submitted briefs and listening to oral arguments presented by counsel, the Court is now ready to render a decision on the Motion for Summary Judgment.

Summary Judgment Standard

Summary judgment is appropriate, according to Pa.R.C.P. 1035.2, "after the relevant pleadings are closed, but within such time as to not unreasonably delay trial...."

> 1. whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
> 2. if, after the completion of discovery relevant to the motion including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

The Supreme Court of Pennsylvania states that the "mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for a trial." Ertel v. The Patriot-News. Co., 674 A.2d 1038, 1042 (1996), cert. denied, 519 U.S. 1008 (1996). "The purpose of summary judgment is to eliminate cases prior to trial where a party cannot make out a claim or a defense after relevant discovery has been completed." Miller v. Sacred Heart Hospital, 753 A.2d 829, ¶10 (Pa. Super. 2000). The moving party has the burden of proving that there is no genuine issue of material fact. Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466 (Pa. 1979). In response, the non-moving party may not rest upon pleadings alone, but must set forth specific facts that demonstrate a genuine issue for trial. Phaff v. Gerner, 303 A.2d 826 (Pa. 1973). In determining whether summary judgment is appropriate, the record should be viewed in the light most favorable to the non-moving party. E.g., Mazetti v. Mercy Hosp. of Pittsburgh, 776 A.2d 938, 945 (Pa. 2001).

In following established precedent, the Court uses this framework for the Summary Judgment issue, as analyzed below.

Discussion

The issue before the Court on Defendant's Motion for Summary Judgment is whether the defect that existed in Defendant's sidewalk was so trivial that "it would be completely unreasonable, impractical and unjustifiable to hold defendant liable for its existence." Massman v. City of Philadelphia, 241 A.2d 921, 923 (Pa. 1968), citing Bosack v. Pittsburgh Railways Co., 189 A.2d 877, 881 (Pa. 1963). The question of what constitutes a defect "sufficient to render the property owner liable must be determined in light of the circumstances of the particular case, and 'except where the defect is obviously trivial, that question must be submitted to the jury.'" Breskin v. 535 Fifth Avenue, 113 A.2d 316, 318 (Pa. 1955), citing Aloia v. City of Washington, 65 A.2d 685, 686 (Pa. 1949). The Supreme Court notes that a shadow zone exists, where the

"question must be submitted to a jury whose duty it is to take into account all the circumstances. To hold otherwise would result in the court ultimately fixing the dividing line to the fraction of an inch, a result which is absurd." Henn v. City of Pittsburgh, 22 A.2d 742, 743 (Pa. 1941), citing Kuntz v. Pittsburgh, 187 A. 287, 289 (Pa. Super. 1936).

Defendants interpret the available authority by arguing that the height difference in the two slabs of sidewalk over which Plaintiff tripped was trivial, or *de minimis*, because the condition of the sidewalk was not unusual. The sidewalk was well maintained and in good repair. The alleged defect was a common, everyday condition of sidewalks universally that pedestrians and passerby would not consider to be dangerous or out of the ordinary, and thus Plaintiffs cannot maintain an action for negligence.

Defendants cite numerous cases to support their position. Defendants begin their argument by explaining Plaintiff's burden in a trip and fall case. Defendants go on to discuss that sidewalks must be maintained so as to not present an unreasonable risk of harm to pedestrians. Defendants assert that a sidewalk defect is trivial if it poses no substantial risk of injury to a pedestrian who exercises ordinary case. Defendants cite Blackwolf v. J.H. Management Co., Not Reported in Cal.Rprt.3d, 2006 WL 1101797 (Cal.App. 2 Dist.) (2006). Not only is this case from California, it is interpreting a California state statute, and a state specific trivial defect doctrine, in which a "property owner is not liable, as a matter of law, for injury or damage caused by a minor, trivial, or insignificant defect in property." Id. at *3. Essentially, however, the concept discussed in Blackwolf is the same issue being discussed in the instant matter: the Court may determine whether a defect is trivial as a matter of law rather than submitting the matter to a jury for decision. Id. at *4. Blackwolf suggests that this determination is made by considering the circumstances surrounding the accident that may make the accident more dangerous than the size of the defect would suggest. Id. Defendants emphasize Blackwolf's point that a "walkway defect is trivial if it poses no substantial risk of injury to a pedestrian who exercises ordinary care" when factors such as the size of the defect, its physical properties, and the conditions surrounding the plaintiff's injury are considered. Id.

Defendants go on to discuss the duty owed to an invitee. Defendants explain that the duty owed to keep premises safe for invitees "applies only to defects or conditions which are in the nature of hidden dangers, traps, snares, pitfalls, and the like, in that they are not known to the invitee, and would not be observed by him in the exercise of ordinary care." Mitchell v. Sinn, 161 A. 538 (Pa. 1932). Defendants point out that Pennsylvania law "does not require sidewalks to be free from defects, imperfections, irregularities, unevennesses, etc., as the floors of buildings." German v. City of McKeesport, 8 A.2d 437, 440 (Pa. Super. 1939), and Dudley v. Feldman, 30 Pa. D. & C.4th 97, 101 (Pa.Com.Pl. Phil. Cty. 1996). All that is required is a reasonably safe condition. See id. The Superior Court found that to "impose liability on the property owner or the city [the defect] must be so large and unusual as to appear dangerous to the ordinary pedestrian and everyday passerby." German, 8 A.2d at 441. In a nonbinding opinion from Adams County, the trial court found that a 2-3 inch height difference in the sidewalk level was a trivial defect, relying on the Bosack and German cases discussed above. Cline v. Statler, 34 D. & C. 4th 289, 291 (Pa.Com.Pl. Adams Cty. 1997). The Cline Court considered the circumstances surrounding the accident: it was daytime; the joints between sidewalk sections are well marked; the deviation in height is small; the sidewalk is in good condition; and there are no holes or breaks in the concrete. Id. at 292. After analysis of these factors, the Cline Court determined that the plaintiff showed only a trivial defect, and failed to establish a prima facie cause of action based on negligence. Id.

Defendants cite several cases in which the Pennsylvania appellate courts found that height differences in sidewalk slabs are trivial defects, and are not a basis for liability. In McGlinn v. City of Philadelphia, the Supreme Court found that a difference of 1½ inches in the level of abutting curbstones did not establish a prima facie case for negligence. 186 A. 747 (Pa. 1936). Similarly, in Newell v. City of Pittsburgh, the Supreme Court determined that it would be "unreasonable to hold that a variation of 1½ inches between the elevation of adjoining ends of flagstones in a street crossing is evidence of negligence on the part of the municipality." 123 A. 768, 769 (Pa. 1924). In Harrison v. City of Pittsburgh, a pedestrian's testimony that she slipped on the metal rim of a manhole cover was insufficient to conclude that the depression in the pavement below the rim of the manhole caused her fall. 44 A.2d 273, 274 (Pa. 1945). The Court went on to note that in addition to the lack of evidence, recovery in Harrison case was precluded because the "duty of the defendants was merely to maintain the pavement in a condition of reasonable safety, not to insure pedestrians traversing it against any and all accidents." Id. The Court found that the elevation was slight and of a trivial nature (two inches at its highest point), and thus there was no negligence in permitting it to exist. See id. In Bullick v. City of Scranton, the Superior Court affirmed the lower court's decision to grant judgment *non obstante veredicto* on the grounds that plaintiffs had not proven actionable negligence. 302 A.2d 849 (Pa. Super. 1973). The plaintiff in Bullick fell when she failed to notice a hole in the road. Id. The hole was described as three feet long, one inch wide, and one-half inch in depth. Id. Defendant also cites Foster v. Borough of West View in this line of cases; however in Foster, the Supreme Court affirmed the judgment of compulsory nonsuit because the plaintiff could not explain how the accident happened. 195 A. 82, 83-84 (Pa. 1937). Therefore, the Court determined that there was "no

evidence upon which the jury could base a finding that the injuries which the plaintiff received were due to the negligence on the part of the defendants." Id.

Defendants also discuss Common Pleas cases that have recognized that trivial defects in a sidewalk cannot impose liability as a matter of law. Lucacos v. Tzinis is a Berks County case in which the plaintiff fell when she stepped backward and encountered a height difference of less than 1½ inches between the concrete sidewalk and the macadam driveway. 76 Pa. D. & C.4th 404, 406 (Pa.Com.Pl. Berks Cty. 2005). The plaintiff took a step back when a child threw a ball toward plaintiff. Id. The trial court stated that this "issue must be considered within the context of the landowner's duty, which takes into account not only the safety of the pedestrian, but also, among other things, the difficulty a landowner faces in the maintenance of sidewalks and driveways." Id. at 408. The court cites the duty discussed in Harrison, above, which is the

"duty to maintain the pavement in a condition of reasonable safety, not to insure pedestrians traversing it against any and all accidents." Id. The court relied on German, McGlinn, and Newell in determining that the "plaintiff's case lacks sufficient evidence to establish that defendants breached their duty to keep the sidewalk/driveway area in a reasonable condition." Defendants cite Ivicic v. Best Buy Inc. for its decision that a one to three inch drop from the finished macadam to the sub-base in a parking lot is a minor imperfection. 77 Pa. D. & C.4th 353, 357 (Pa.Com.Pl. Centre Cty. 2006). The trial court stated that "other than the fact that the two sections do not meet on precisely the same plane, the parking lot is in good condition." Id. at 360. In considering the defect, the court found that the height difference is trivial, and the slight variation in grade does not sustain a negligence action. Id. Ivicic v. Best Buy Inc. is not relevant, however, because this case was reversed and remanded without opinion on December 19, 2006. 918 A.2d 797 (Pa. Super. 2006).

In McCleary v. Lancaster Development Co., et al., the plaintiff tripped and fell on a sidewalk in front of her place of employment. No. 02-3523 (Pa.Com.Pl. Cumberland Cty. 2005) (attached to Defendant's Brief). In this unpublished opinion, the plaintiff claims that the sidewalk joint dividing two panels of the sidewalk is slightly larger and deeper than normal, and that one panel is slightly higher than the other. Id. at 1. The trial court found that the sidewalk defect was trivial, relying on German and Bosack. See id. at 2-3. The court noted that "such gaps or joints exist in all concrete sidewalks and pavement, and that to hold the defendants liable in this case would suggest liability on every property owner whose outdoor walking surface was less than perfect." Id. at 3.

Defendants conclude by acknowledging a height differential of 1 to 1¼ inches existed between two sidewalk panels, as well as the general proposition that the question of what constitutes a dangerous condition is a question that belongs to the jury. Defendants argue, however, that courts are not precluded from entering judgment in a case where the facts establish as a matter of law that a dangerous condition does not exist. Bendas v. White Deer Twp., 611 A.2d 1184, 1187 n.6 (Pa. 1992). Defendants argue that in this case, the height differential is *de minimis* as a matter of law, therefore no action for negligence can be supported. Defendants allege that the photographs of the sidewalk depict no unusual or unreasonably dangerous condition. Therefore, Defendants assert that Plaintiffs' Complaint must be dismissed and Defendants' Motion for Summary Judgment granted.

Plaintiffs interpret the available authority in their favor, finding that the height differential of 1¼ inches between two slabs of concrete on a residential sidewalk in otherwise good condition may be found to be a dangerous condition by a reasonable trier of fact. Plaintiffs note that the sidewalk is in close proximity to where vehicles park, and provides the only means of ingress and egress to the house.

Plaintiffs begin their analysis with a recent, but unpublished opinion in which the Eastern District Court of Pennsylvania found that sufficient dispute of fact existed with respect to a piece of pavement elevated at least 1½ inches above the adjacent sidewalk. Lowe v. Pirozzi, Not Reported in F.Supp.2d, 2006 WL 1147238 (E.D.Pa. 2006). The Court stated that the issue of triviality of the defect made summary judgment close, but difficult. Id. at *6. The Court reached its conclusion by "considering facts and evidence in a light most favorable to the plaintiffs and noting 1) the height of the elevation; 2) the proximity of the elevated portion of concrete sidewalk to the customer's path to the entrance of the Restaurant; and 3) the seasonal regularity with which the defect arose, a jury could find the defect to be less than 'obviously' trivial." Id. In Lowe, the issue of whether the defect in the sidewalk was trivial survived summary judgment to be submitted to a jury.

Plaintiffs note another Eastern District of Pennsylvania case in which the plaintiff tripped and fell over a raised lip of asphalt while walking across the parking lot. Ozer v. Metromedia Restaurant Group, Steak and Ale of Pennsylvania, Inc., et al, Not Reported in F.Supp.2d, 2005 WL 525400 (E.D.Pa. 2005). The Ozer Court found this case to be a similarly close call, but considered the evidence "in a light most favorable to the plaintiffs, and found that the proximity of the raised asphalt to the curb could be found by a jury to be less than trivial because a stumble over the raised asphalt potentially could be exacerbated by

an individual's inability to recover his or her bearings before confronting the curb." This case thus also survived summary judgment to be considered by a jury.

Plaintiffs next address recent Pennsylvania Supreme Court cases on the issue of trivial defects in trip and fall cases. In Massman v. City of Philadelphia, the plaintiff fell after being forced to the right of the walkway in the City Hall courtyard, where she encountered a piece of irregular, broken cement, causing her to fall. 241 A.2d 921, 922 (Pa. 1968). The Court applied the Bosack test for triviality, "whether it would be completely unreasonable, impractical and unjustifiable" to hold defendant liable for the defect's existence. Id. at 923. The Court considered the circumstances: that while the jagged and irregular crack was clearly discernible upon visual inspection, the plaintiff encountered the crack in a throng of people, and may or may not have been able to see it. See id. Therefore, the Court found that the defendant was negligent, and the irregularity, "when viewed in light of all the surrounding circumstances, was clearly not trivial." Id. at 924. In Breskin v. 535 Fifth Avenue, the plaintiff, while walking on a crowded sidewalk, was forced to move the right to avoid several people leaving a building, and her foot caught in a wedge of broken cement. 113 A.2d 316, 317 (Pa. 1955). The plaintiff tripped and was thrown forward. Id. The break was about four inches by five inches and about one to one and one half inches in depth. Id. at 318. The Court could not find as a matter of law that the defect was trivial. Id. In reaching its conclusion, the Court considered that the crowded conditions of the sidewalk, and the men exiting the building, could allow the jury to determine that the plaintiff could not see the defect in the sidewalk in time to avoid it. Id.

In Henn v. City of Pittsburgh, the plaintiff stepped into a hole in the sidewalk, her foot was caught, and she was thrown and injured. 22 A.2d 742, 743 (Pa. 1941). The plaintiff failed to see the hole because the sidewalk was covered with recently fallen snow. Id. The hole was 1½ - 2 inches in depth, and 7-8 inches by 10 inches, and was located in the center of one of the cement blocks of the sidewalk. Id. The Court stated that the hole covered an extended area and was of sufficient depth to catch the shoe of a pedestrian, and was within the direct line of travel on a well-populated street. See id. Therefore, the Court concluded that it was appropriate for a jury to decide the case. Id. at 744.

Plaintiffs discuss the Supreme Court cases cited by Defendants. Plaintiffs distinguish McGlinn v. City of Philadelphia because the evidence available in that case was "scant." Plaintiffs acknowledge that a surveyor identified the height difference between the curbstones as 1½ inches, and that the Court found that plaintiffs failed to establish that a dangerous defect existed. Plaintiffs, however, assert that in the instant matter, they have produced sufficient evidence from which a reasonable jury could find that the defect was not trivial. Plaintiffs explain this additional evidence as the fact that the sidewalk was otherwise level, the sidewalk was the sole means of ingress and egress, the defect was easily correctable, and the Plaintiff was a business invitee whom had not been on the premises for eight to ten years.

Plaintiffs distinguish Foster v. Borough of West View from the instant matter because in Foster, the plaintiff was familiar with the area because she was a five-year resident of the neighborhood, and the walk had been in the same condition for several years prior to the accident, and was plainly visible to the plaintiff. Plaintiff in this action had not been on Defendants' property for more than eight years. Plaintiffs explain that the issue here is whether the homeowner was negligent for breaching a duty owed to a business invitee, whereas in Foster, the issue was whether the municipality owed a duty to all pedestrians for maintaining public sidewalks. Plaintiffs claim that the instant matter presents a higher standard of care owed to Plaintiff, because she was asked to come onto the property for a business-related purpose. Plaintiffs also emphasize that both Foster (1937) and McGlinn (1936) predate Henn v. City of Pittsburgh (1941). These dates are, of course, accurate; however, there are a number of other cases cited by Defendants that were decided after 1941.

Plaintiffs identify a Common Pleas decision that declined to decide as a matter of law the precise issue present here. In Miller v. Columbia Gas of Pennsylvania, Inc., the plaintiff tripped and fell due to a one-half inch depression that existed between two sections of the sidewalk. Vol. 84 Westmoreland Law Journal 157 (May 8, 2002). The Miller Court found the fact that the sidewalk as a whole is even and well maintained, other than the one-half inch depression, to be of particular significance. Id. at 158. The court found that because the remainder of the sidewalk provided for safe passage, it could not state as a matter of law that the depression is trivial. Id.

Plaintiffs next explain why the Common Pleas decisions cited by Defendant are distinguishable. Plaintiffs argue that Lucacos v. Tzinis differs from the instant case because the Lucacos plaintiff tripped while she was moving backward, and was thus acting carelessly. The Lucacos Court notes that the plaintiff was stepping backward, but does not discuss the plaintiff's action as careless. Additionally, as discussed above, the Lucacos Court notes the difficulty a landowner faces in trying to maintain sidewalks and driveways. This point is not addressed by Plaintiffs.

Plaintiffs distinguish Ivicic v. Best Buy, Inc. from the instant matter because the Ivicic injury took place in a commercial parking lot, not a residential sidewalk. Plaintiffs, however, cited their own case

involving a commercial parking lot, Ozer v. Metromedia Restaurant Group, Steak & Ale of Pennsylvania, Inc., above. This point is moot however, because as previously noted, Ivicic was reversed and remanded without opinion.

Finally, Plaintiffs distinguish Cline v. Statler from the instant matter. Cline v. Statler, 34 Pa. D. & C.4th 289 (Pa.Com.Pl. Adams Cty. 1997). Plaintiffs argue that the Cline case differs from the instant matter because the Cline plaintiff was not a business invitee walking on an apparently safe, paved walkway that provided the sole access to the house. Plaintiffs contend that the Cline plaintiff had suffered a stroke, and was going to be unable to testify at trial, and that fact impacted the court's decision, as it found that the plaintiff failed to establish a prima facie case for negligence. The Cline Court did have statements from the plaintiff, although whether these statements were depositions is not clear. The court's decision that the defect was trivial was based on the fact that the photographs show only a small deviation in levels, and other than the fact that the two sections of the sidewalk do not meet on precisely the same plane, the sidewalk is in good condition. Id. at *3. The court concluded that the plaintiff showed nothing more than a trivial defect.

Plaintiffs conclude by arguing that Defendants' Motion for Summary Judgment should be denied because the defect in the sidewalk is not *de minimis* as a matter of law. Plaintiffs argue that a height difference of 1¼ inches between two slabs of concrete on a residential sidewalk in otherwise good condition and in close proximity to where vehicles park, providing the sole means of ingress and egress, which is easily repairable, may be found by a reasonable trier of fact to be a dangerous condition.

In this case, as in Henn v. City of Pittsburgh, a factual question is presented. Is the defect that was present in Defendants' sidewalk trivial? Summary judgment is appropriate when there are no issues of material fact. In this case, there is an issue of material fact, and that issue must be submitted to the jury. See Henn, 22 A.2d at 743. Despite Defendants' argument, the Court does not find that the defect is so obviously trivial that it can be so deemed as a matter of law.

Conclusion

Defendants brought this Motion for Summary Judgment asking that the Court determine that the sidewalk defect is trivial as a matter of law. After an exhaustive analysis of the relevant case law, the Court finds that this sidewalk defect is not obviously trivial and there is a question of fact that must be determined by a jury in light of the particular circumstances of this case. This Court will follow the Pennsylvania Supreme Court's lead in not fixing the dividing line of a trivial defect. Therefore, the Court denies Defendants' Motion for Summary Judgment.

ORDER OF COURT

And now, this 27th day of June, 2007, after consideration of Defendants' Motion for Summary Judgment, briefs submitted by counsel and argument presented to the Court on this matter, it is hereby ordered that Defendants' Motion for Summary Judgment is denied.