2016 IL App (2d) 160231-U
No. 2-16-0231
Order filed November 18, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ANNEMARIE KOMIS, Plaintiff-Appellant, v. EXEL, INC., KRAFT FOODS GLOBAL, INC., and AURORA INDUSTRIAL HOLDING COMPANY, LLC, Defendants (Exel, Inc., and Kraft Foods Global, Inc., Defendants-Appellees).	)	Appeal from the Circuit Court of Kane County. No. 13-L-558 Honorable Mark A. Pheanis, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Burke and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted defendants summary judgment on plaintiff's claim that defendants negligently failed to repair a sidewalk: plaintiff's speculation was insufficient to counter the evidence that the defect was de minimis, and plaintiff did not provide evidence of any aggravating circumstance sufficient to require defendants to repair it.

¶ 2 Plaintiff, Annemarie Komis, appeals the trial court's grant of summary judgment in favor of defendants Exel, Inc., and Kraft Foods Global, Inc. Plaintiff tripped and fell on a portion of

raised sidewalk outside of defendants' building. Plaintiff contends that the trial court wrongly found that the defect was *de minimis* as a matter of law. We affirm.

¶ 3 I. BACKGROUND

¶ 4 This action arose after plaintiff was injured in a fall on a portion of sidewalk outside of defendants' building. The building was a large packaging facility housing employees of both defendants and plaintiff's employer, the Strive Group. The Strive Group had approximately 100 to 150 employees at the facility. The building also contained industrial items.

¶ 5 The portion of sidewalk at issue was located outside of an entrance about five to six feet from a parking lot. Employees of businesses in the building would generally park in the parking lot and enter or leave the building via the sidewalk. However, deposition testimony indicated that people could avoid the defective area in order to enter or exit the building. Photos show that the defect was on a double-or triple-wide area of sidewalk such that it was possible to walk around the defect. There had been no prior complaints about the sidewalk.

¶ 6 On November 15, 2011, plaintiff and three coworkers left the building to go to lunch. The weather was clear, and plaintiff's vision was not obstructed. The group walked to the parking lot four abreast, and plaintiff was looking out to see if any traffic was coming. As they were walking, plaintiff's right toe got caught on a block of raised concrete, and she tripped and fell, injuring her shoulder. Plaintiff's coworkers reported that her fall was caused by the uneven sidewalk. Plaintiff presented deposition evidence that others considered the defect a trip hazard.

¶ 7 Plaintiff never measured the defect, but estimated that it was about 1 ½ to 2 inches. A coworker estimated that it was probably about an inch and a half. An employee of one defendant measured the defect with a machinist scale, which showed a measurement of an inch plus or minus an eighth.

¶ 8 In January 2012, the sidewalk was repaired to prevent a trip hazard. The repair took approximately 30 minutes and cost $810.

¶ 9 Defendant moved for summary judgment, arguing that the defect was *de minimis* because it was less than two inches in height and there were no aggravating circumstances. The trial court granted the motion. The court found that any determination that the defect was two inches required speculation and that, even if it were two inches, that would not automatically move the defect beyond the scope of *de minimis*. Plaintiff appeals.

¶ 10 II. ANALYSIS

¶ 11 Plaintiff contends that the trial court erred in granting summary judgment. She argues that the evidence presents issues of material fact as to the height of the defect and whether aggravating circumstances were present. Defendants contend that the defect was *de minimis* as a matter of law because they provided evidence that the defect was at most 1⅛ inches and plaintiff only speculated as to its height.

¶ 12 "Summary judgment is appropriate where 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *St. Martin v. First Hospitality Group, Inc.*, 2014 IL App (2d) 130505, ¶ 9 (quoting 735 ILCS 5/2-1005(c) (West 2010)). "In determining whether a genuine issue of material fact exits, a court must construe the materials of record strictly against the movant and liberally in favor of the nonmoving party." *Id*. " 'If fair-minded persons could draw different inferences from the undisputed facts, the issues should be submitted to a jury to determine what inference seems most reasonable.' " *Id*. (quoting *Menough v. Woodfield Gardens*, 296 Ill. App. 3d 244, 245-46 (1998)). "We review *de novo* the entry of summary judgment." *Id*.

¶ 13 "To prevail in a negligence action, the plaintiff must prove that the defendant owed a duty, that the defendant breached that duty, and that the plaintiff's injury proximately resulted from that breach." *Id.* ¶ 10. "The existence of a duty generally is a question of law and, therefore, may be resolved on a motion for summary judgment." *Id.*

¶ 14 "An owner or occupier of land is not an absolute insurer of the safety of an invitee." *Id.* ¶ 11. "The duty of an owner or occupier of any premises toward invitees is that of reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them, and he must maintain the premises in a reasonably safe condition." *Id.*

¶ 15 "The primary factors that a court considers in determining the existence of a duty include: " '(1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant.' " *Id.* ¶ 12 (quoting *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 436-37 (2006)).

¶ 16 "The *de minimis* rule originated in cases involving municipalities, where it was noted that '[m]unicipalities do not have a duty to keep all sidewalks in perfect condition at all times.' " *Id.* ¶ 13 (quoting *Gillock v. City of Springfield*, 268 Ill. App. 3d 455, 457 (1994)). "Thus, although a municipality has a duty to keep its property in a reasonably safe condition, it has no duty to repair *de minimis* defects in its sidewalks." *Id.* (citing *Putman v. Village of Bensenville*, 337 Ill. App. 3d 197, 202 (2003), and *Hartung v. Maple Investment & Development Corp.*, 243 Ill. App. 3d 811, 814 (1993)). "The *de minimis* rule stems in large part from the recognition that municipalities would suffer an unreasonable economic burden were they required to keep their sidewalks in perfect condition all the time." *Id.* " 'It is common knowledge that sidewalks are constructed in slabs for the very reason that they must be allowed to expand and contract with

changes in temperature.' " *Id*. (quoting *Hartung*, 243 Ill. App. 3d at 816). "In *Hartung*, we extended the *de minimis* rule to apply to private owners and possessors of land." *Id*. (citing *Hartung*, 243 Ill. App. 3d at 815). "Plaintiff has the burden to prove that the defect was not *de minimis* and may do so by presenting evidence of the size of the defect and of aggravating circumstances." *Burns v. City of Chicago*, 2016 IL App (1st) 151925, ¶ 21.

¶ 17 "Whether a height variance between two sidewalk slabs is *de minimis* depends on all of the pertinent facts, and there is no simple standard to separate *de minimis* defects from actionable ones." *St. Martin*, 2014 IL App (2d) 130505, ¶ 14. "However, it is well established that, absent any aggravating factors, a vertical displacement of less than 2 inches is *de minimis*. Thus, the supreme court has held that, although a displacement of 2 inches in a residential area is actionable, a variation of only 1⅛ inches, absent more, is *de minimis*." *Id*. (citing *Warner v. City of Chicago*, 72 Ill. 2d 100, 104-05 (1978)). In *Birck v. City of Quincy*, 241 Ill. App. 3d 119, 121-22 (1993), the appellate court held that a variance of 1⅞ inches was *de minimis*. Likewise, we have held that a one-inch displacement was *de minimis* (*Putman*, 337 Ill. App. 3d at 202-03) and that a 1½-to-1¾-inch displacement was *de minimis* (*St. Martin*, 2014 IL App (2d) 130505, ¶ 19)).

¶ 18 Plaintiff first contends that the defect could not be considered *de minimis* as a matter of law, because she provided evidence that it was at least two inches in height. Plaintiff argues that her deposition testimony estimating the defect at about 1½ to 2 inches created an issue of material fact concerning its height and that we must assume for purposes of summary judgment that it was 2 inches. However, plaintiff's testimony was not that the defect was two inches. Instead, she merely guessed that it might have been, and she provided no foundation to show that she could prove the two-inch figure at trial through means other than speculation. Meanwhile, the defect was physically measured at a maximum height of 1⅛ inches. Plaintiff did not present

anything to dispute the accuracy of that measurement. "Although a plaintiff may rely on reasonable inferences which may be drawn from the facts considered on a motion for summary judgment, an inference cannot be established on mere speculation, guess or conjecture." *Salinas v. Werton*, 161 Ill. App. 3d 510, 515 (1987). Here, given that the only nonspeculative evidence was that the defect was at most 1⅛ inches, the trial court correctly found that there was no issue of material fact that it was less than 2 inches.

¶ 19 Plaintiff next contends that, even if the defect was under two inches, there were issues of material fact concerning aggravating circumstances that would prevent a determination that the defect was *de minimis* as a matter of law. Plaintiff argues that the defect was outside of the main entrance, was considered a tripping hazard by others, and was a quick and affordable problem to repair.

¶ 20 "[T]he *de minimis* rule cannot be applied blindly to cover every situation. Its application may very well depend on other factors." *Hartung*, 243 Ill. App. 3d at 817. For example, "[i]n a 'busy commercial district,' it is reasonable to infer that a pedestrian could be sufficiently distracted to overlook an otherwise *de minimis* defect." *Putman*, 337 Ill. App. 3d at 205 (quoting *Baker v. City of Granite City*, 75 Ill. App. 3d 157, 160 (1979)). In *Repinski v. Jubilee Oil Co.*, 85 Ill. App. 3d 15, 20-21 (1980), the unreasonableness of a defect was a question for the jury when there was evidence of commercial use of the area. See also *Baker*, 75 Ill. App. 3d at 160 (defect in a commercial district was actionable, but it might not have been actionable in a residential area). But if all reasonable minds would agree that the defendants could not reasonably foresee any danger, then summary judgment is appropriate. See *Repinski*, 85 Ill. App. 3d at 20-21.

¶ 21 Plaintiff relies primarily on *Harris v. Old Kent Bank*, 315 Ill. App. 3d 894 (2000). There, we found that aggravating circumstances applied, and we thus declined to apply the *de minimis*

rule, when the plaintiff specifically alleged that the defendant, a bank, failed to provide a safe means of ingress and egress to the only entrance of its establishment. We noted that the sole purpose of the sidewalk was to provide a safe means of ingress and egress for the bank's invitees, and that it was not unreasonable to presume that the plaintiff could be distracted by reviewing receipts, looking for car keys, or looking toward her car. Further, the economic burden of repairing the area would not be great. *Id*. at 902.

¶ 22 In comparison, in *Hartung*, the plaintiff tripped and fell on a raised portion of sidewalk near a store located in a shopping center. The raised portion of the sidewalk was less than an inch, and the trial court granted summary judgment in favor of the defendant. Noting a lack of pleading or evidence that the area was congested with traffic, we applied the *de minimis* rule. *Hartung*, 243 Ill. App. 3d at 815. We observed that it is a great burden to maintain perfect sidewalks and that requiring landowners to monitor and maintain them perfectly at all times would be harsh and impractical. *Id*. at 817. Further, given the extreme and various weather conditions in Illinois, slight variations in sidewalk elevations are to be expected. *Id*. at 816. Indeed, sidewalks are constructed in slabs for the very reason that they must be allowed to expand and contract with changes in temperature. *Id.* Imperfections in sidewalks can also be avoided by pedestrians more easily than imperfections on stairs. *Id*. Thus, we noted that, while courts have been more inclined to find smaller defects in indoor flooring actionable where it is not exposed to the weather and can be more easily monitored for defects, a minor defect that is routinely encountered in an ordinary sidewalk and that a person exercising ordinary care could easily avoid is not actionable. *Id*. at 816-17.

¶ 23 Likewise, in *St. Martin*, we applied the *de minimis* rule when a hotel guest fell on a 1-to1 ¾-inch displacement of sidewalk just a couple of feet outside of the hotel's entrance. The

plaintiff did not allege that a distraction, heavy foot traffic, or congestion existed. Instead, the plaintiff alleged that the close proximity to the covered entrance of a commercial building was an aggravating circumstance that removed application of the *de minimis* rule. The defendant provided an affidavit from an expert stating that the area was not in need of repair or replacements and did not present a hazardous condition. Applying *Hartung*, we reasoned that, given the extreme weather conditions in Illinois, slight variations in sidewalk elevations are to be expected and sidewalks cannot be perfectly maintained at all times. Further, pedestrians can avoid imperfections in an outdoor walkway more easily than on indoor flooring. Thus, "[r]equiring a landowner to constantly monitor and perfectly maintain outdoor walkways that are exposed to the elements would create an undue burden." *St. Martin*, 2014 IL App (2d) 130505, ¶ 20. We distinguished cases in which the defendant failed to provide a safe means of ingress and egress to a building when the plaintiff might also have been distracted. *Id.* ¶ 22.

¶ 24 In *Bruns v. City of Centralia*, 2014 IL 116998, a case involving the open-and-obvious doctrine, our supreme court discussed what could constitute a distraction as an aggravating circumstance. There, the court held that "the mere fact of looking elsewhere does not constitute a distraction." *Id.* ¶ 22. Instead, there must be some reasonably foreseeable circumstance that required the plaintiff to divert his or her attention from the danger, such as carrying bulky merchandise, performing a specific task, or avoiding another potential hazard such as falling debris. *Id.* ¶¶ 28-29. The issue is not that the plaintiff did not focus attention on the defect. Instead, it is why the plaintiff was looking elsewhere. *Id.* ¶ 30. There must be a reasonably foreseeable actual distraction, not merely any distraction that might conceivably occur. *Id.* ¶ 31.

¶ 25 Here, as in *Hartung*, the uneven portion of sidewalk was the type of imperfection that is routinely encountered on an ordinary sidewalk and that a person exercising ordinary care could

easily avoid. While it was on the main walkway that employees took to the building, a photograph shows that it was on an extra-wide portion of sidewalk. It was next to a parking lot and not immediately outside of a door. While plaintiff presented evidence about the number of employees at the building and contends that she was distracted by looking for traffic, this is not a case like *Harris*, in which the defect was in a busy commercial area open to the public, at the only entrance to the establishment, where patrons could also reasonably be expected to be distracted by things other than the normal activity of watching their surroundings while walking. Instead, here, the defect could easily be avoided, and plaintiff has not provided evidence of a distraction other than simply looking ahead and watching for traffic, which is to be expected in nearly every case involving a trip and fall. Plaintiff did not present evidence that traffic actually presented a hazard that she had to avoid at the time, nor was there evidence that the area, which consisted of a parking lot, was a high traffic area that would require greater caution and hence might be a reasonably foreseeable distraction.

¶ 26 Of particular note is that there certainly were less aggravating circumstances here than in *St. Martin*, where the defect was in a partially covered area just steps from the door to the establishment, and yet we found the aggravating circumstances insufficient. The only difference is that, unlike in *St. Martin*, where the defendant provided an affidavit from an expert stating the opinion that the area was not in need of repair, here repairs actually were made to prevent a tripping hazard at an affordable cost. But the subsequent repairs are insufficient to show that defendants could reasonably foresee a danger, especially in light of the lack of evidence of previous knowledge of the defect, lack of evidence of an inability to avoid the defect, lack of evidence of heavy commercial traffic, and lack of distractions other than the normal activity of

looking for traffic in the nearby parking lot. Accordingly, sufficient aggravating circumstances do not exist to except the defect from application of the *de minimis* rule.

¶ 27 III. CONCLUSION

¶ 28 The trial court properly granted defendants' motion for summary judgment. Accordingly, the judgment of the circuit court of Kane Country is affirmed.

¶ 29 Affirmed.