2019 IL App (2d) 181021-U
No. 2-18-1021
Order filed December 20, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

KAREN STRYKOWSKI,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellant,	)	
	)	
v.	)	No.16-L-0429
	)	
CITY OF ST. CHARLES,	)	Honorable
	)	Susan Clancy Boles,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: Where aggravating circumstances surrounded plaintiff's fall on a downtown sidewalk, the trial court improperly entered summary judgment in defendant city's favor. Where a question of fact existed as to whether defendant had constructive notice of the defect in the sidewalk, defendant was not shielded from liability as a matter of law under the Tort Immunity Act (745 ILCS 10/3-102(a), (b) (West 2015)). Vacated and remanded.

¶ 2 Plaintiff, Karen Strykowski, filed a negligence action against defendant, the City of St. Charles (City), alleging that she sustained "severe and permanent" injuries from falling on an uneven spatial gap in a City sidewalk. The trial court entered summary judgment in favor of defendant on the ground that the defect in the sidewalk was *de minimis*. Plaintiff appeals, arguing

that questions of fact and the circumstances of the case preclude summary judgment. For the reasons that follow, we vacate the judgment of the trial court and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 On August 29, 2015, at approximately 11:30 p.m., plaintiff was injured when she tripped and fell on an uneven expansion joint in a sidewalk owned by defendant. Her negligence action alleged, *inter alia*, that defendant negligently maintained the sidewalk and failed to provide sufficient lighting in the area of the dangerous condition. Discovery depositions were taken of plaintiff; her husband, who had been with her at the time of the fall and returned to the site to take measurements and photographs; defendant's division manager of public services; and an executive assistant to the director of finance for defendant.

¶ 5 Defendant's motion for summary judgment asserted that it had no notice of the defect and therefore was immune from liability pursuant to section 3-102 of the Local Governmental and Governmental Employees Tort Immunity Act (Act) (745 ILCS 10/3-102(a), (b) (West 2015)); that plaintiff's claim was not actionable because the defect was *de minimis*; and that plaintiff offered no concrete evidence of deficient lighting in the area where she fell. Summary judgment was entered on the ground that defendant owed plaintiff no duty of care because the defect was *de minimis.*

¶ 6 II. ANALYSIS

¶ 7 A. Reviewing Standard

¶ 8 Summary judgment should be granted only if the pleadings, depositions and admissions on file, together with any affidavits, establish that no genuine issue of material fact exists so that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2015); *Monson v. City of Danville*, 2018 IL 122486, ¶ 12. Thus, if the record reveals a dispute as to any material

issue of fact, summary judgment must be denied. *Ignarski v. Norbut*, 271 Ill. App. 3d 522, 525 (1995). In determining whether a genuine issue as to any material fact exists, a court must construe the record strictly against the movant and liberally in favor of the opponent. *Adams v. N. Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). "A genuine issue of material fact precluding summary judgment exists where the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts." (Internal quotation marks omitted.) *Monson*, 2018 IL 122486, ¶ 12. Our review of the circuit court's summary judgment ruling is *de novo*. *Id*.

¶ 9 In order to recover for negligence, a plaintiff must allege the defendant owed a duty of care, the defendant breached that duty, and the breach was a proximate cause of his or her injuries. *Monson*, 2018 IL 122486, ¶ 41. "In a negligence action for injuries arising out of defects on public property, a plaintiff must allege that the city had a duty to maintain its property in a reasonably safe condition for those exercising ordinary care and that it had actual or constructive notice of the existence of the defect within a reasonably adequate time to have taken measures to protect against injuries." 745 ILCS 10/3-102(a) (West 2015); *id*.

¶ 10 B. *De Minimis* Defect

¶ 11 Illinois courts follow a *de minimis* rule in assessing injury claims resulting from deviations in adjoining sidewalk slabs. *Monson*, 2018 IL 122486, ¶ 42. Because municipalities are not required to keep their sidewalks in perfect condition at all times, courts hold that slight defects are *de minimis* and not actionable as a matter of law. *Id*. "A sidewalk defect is considered *de minimis* if a reasonably prudent person would not foresee some danger to persons walking on it." *Id*.

¶ 12 There is no mathematical formula or bright-line test for determining whether a sidewalk defect is *de minimis*; rather, the question turns on the facts of each case. *Id*. ¶43. "Factors relevant

to this analysis include the difference in height between adjoining slabs, the anticipated volume of traffic on the sidewalk and whether the sidewalk is located in a commercial or residential area." *Id*. A minor defect may also be actionable where there are other aggravating circumstances, such as dim lighting. *Barrett v. FA Group, LLC*, 2017 IL App (1st) 170168, ¶ 35 (noting that lighting conditions alone may be sufficient to withstand a motion for summary judgment). It is the role of the jury to decide whether a defect is actionable because of the existence of aggravating factors. *Bartkowiak*, 2018 IL App (2d) 170406, ¶ 38.

¶ 13 In this case, plaintiff testified that she fell when she stepped off the higher of two concrete slabs, the heel of her shoe went down into the gap between the slabs, and she pitched forward. She and defendant contest whether both the deviation in height and the width of the gap between the two slabs of concrete were *de minimis* as a matter of law. Plaintiff presented photos to the trial court, along with her testimony and her husband's. Defendant relied on the testimony of its division manager of public service, Jason Born, who described his department's standard procedures. He viewed the site after plaintiff reported her fall and did not see sidewalk conditions that required immediate repair.

¶ 14 Plaintiff alleged that the slab of sidewalk she stepped off was "approximately two inches taller than the slab of sidewalk immediately next to it" and testified in her deposition that the difference in height was "[a] couple of inches at least." Her husband testified that the gap between slabs was about 1 ½ inches. Defendant contends that plaintiff and her husband overstate the height and width of the defect and that the photographs do not support their testimony. After viewing the photos, we are unable to ascertain a precise measurement of the height discrepancy or the width of the gap between concrete slabs. The photos do not clearly show whether the height was more

than two inches, as plaintiff argues, or less than two inches, as defendant argues, or whether the gap was large enough to allow plaintiff's two-inch high heel to become stuck, as plaintiff argues.

¶ 15 It is not necessary, however, to resolve the question of the defect's precise dimensions, as we find that aggravating factors preclude application of the *de minimis* rule as a matter of law. First, both parties' testimony established that plaintiff fell in an area of heavy pedestrian traffic in a commercial, downtown area of St. Charles. See *Monson*, 2018 IL 122486, ¶ 46 ("Injuries on sidewalks located in well-traversed or busy commercial areas are more likely to result in liability than those in residential areas.").

¶ 16 More telling is the evidence of poor lighting in the area at the time of the accident. Plaintiff described the area in which she fell as being "very dark," although there appeared to be a light fixture nearby. The light fixture notwithstanding, plaintiff's husband testified that there was not enough light to see the defect as one approached it. Defendant presented no evidence regarding the quality of the lighting where plaintiff fell, arguing only that the area is surrounded by "restaurants, hotels, and bars," and "there are multiple lighting fixtures along the sidewalk." Although defendant contends that plaintiff's and her husband's testimony was "merely anecdotal and should be given no weight or credence," it is not the court's function to weigh and appraise evidence or make determinations of credibility at the summary judgment stage. *Tim Thompson, Inc. v. Village of Hinsdale*, 247 Ill. App. 3d 863, 872 (1993).

¶ 17 Defendant also argues that plaintiff was required to present expert testimony as to the lighting conditions, citing *Bartowiak*, 2018 IL App (2d) 170406, ¶¶ 6-11, and *Alquadhi v. Standard Parking, Inc.*, 405 Ill. App. 3d 14, 19 (2010). In *Bartowiak*, however, the trial court, not the reviewing court, declared that "the sufficiency of lighting in a commercial or public setting was a subject requiring expert testimony," and insufficient lighting was not in issue as an aggravating

factor because the parties' experts agreed the lighting was sufficient. 2018 IL App (2d) 170406, ¶¶ 6-11). In *Alquadhi*, only the plaintiff testified as to lighting conditions; her expert testified that the failure to apply contrast paint where the curb met raised concrete "impaired visibility" of an otherwise minor defect. 405 Ill. App. 3d at 16, 19. Thus, neither case stands for the proposition that courts require expert deposition testimony in summary judgment proceedings or that they disregard the deposition testimony of the parties or other witnesses when there is no expert testimony. In this case, as witness testimony was the only evidence regarding lighting conditions where plaintiff fell, we find that a fact question exists as to the adequacy of the lighting in the vicinity and at the time of the fall.

¶ 18 Given the totality of the circumstances, we are unable to find that all reasonable minds would agree that the alleged sidewalk defect was so minimal that no danger to pedestrians could reasonably be foreseen *Monson*, 2018 IL 122486, ¶ 47. Because genuine issues of material fact exist with respect to whether the sidewalk defect was *de minimis*, we find defendant was not entitled to a judgment as a matter of law on this issue. *Id*.

¶ 19 C. Constructive Notice

¶ 20 The parties also contest the City's alternative contention that it could not be liable for plaintiff's injuries because it received insufficient notice of the alleged defect. A public entity will not be liable for injury on its property "unless it is proven that it has actual or constructive notice of the existence of [an unsafe condition] in reasonably adequate time prior to an injury to have taken measures to remedy or protect against [the] condition." 745 ILCS 10/3-102(a) (West 2015). "Constructive notice under section 3-102(a) *** is established where a condition has existed for such a length of time, or was so conspicuous, that authorities exercising reasonable care and diligence might have known of it. [Citations.] The burden of proving notice is on the party

charging it." *Burke v. Grillo*, 227 Ill. App. 3d 9, 18 (1992). "The question of notice is generally one of fact, but becomes a question of law if all the evidence when viewed in the light most favorable to the plaintiff so overwhelmingly favors the defendant public entity that no contrary verdict could ever stand." *Zameer v. City of Chicago*, 2013 IL App (1st) 120198, ¶ 14. "It is generally a question of fact for the jury to determine whether a defective condition has existed for a sufficient period of time prior to the injury and was of such a character for the city to be deemed to have constructive notice." *Baker v. City of Granite City*, 75 Ill. App. 3d 157, 161 (1979).

¶ 21 In the instant case, photographs of the sidewalk show vegetation in the gap between slabs, as well as caulk and debris. Plaintiff argues that a clear inference may be drawn from these facts that the defect in the sidewalk "had been in existence for some time." Some photographs of the sidewalk also depicted several spray-painted red dots. The City's witness Jason Born acknowledged that the photographs showed weeds growing between the slabs in question. He also noted the presence of caulk between the slabs and related that, on occasion, the City puts caulk between sidewalk slabs to help repair gaps, "probably" of more than an inch in width. As to the red dots, he stated that his division does not do spray painting, but he acknowledged that, after his department receives a call about a potentially unsafe condition and before it does the repair, he or an employee "will paint the hazard."

¶ 22 Because reasonable persons might draw different inferences from the evidence as to whether the City was at least on constructive notice of the defect in the sidewalk where plaintiff fell, a genuine issue of material fact precluding summary judgment exists on this issue. *Monson*, 2018 IL 122486, ¶ 12.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, we vacate the entry of summary judgment in favor of defendant and remand the matter to the circuit court for further proceedings.

¶ 25 Vacated and remanded.