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NO. 4-16-0234

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December 13, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

ELIZABETH R. FULTON and WARREN S. FULTON, Plaintiffs-Appellants, v. KROGER LIMITED PARTNERSHIP I; BLOOMINGTON, IL REALTY, LLC, an Illinois Limited Liability Company; and TLM REALTY CORP., Defendants (Kroger Limited Partnership I; and Bloomington, IL Realty, LLC, an Illinois Limited Liability Company, Defendants-Appellees).	)	Appeal from Circuit Court of McLean County No. 13AR151 Honorable Rebecca Simmons Foley, Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: In this trip and fall case, plaintiffs failed to come forward with evidence that the defect in the asphalt ramp was more than *de minimis* or that there were any aggravating circumstances, and therefore the summary judgment in defendants' favor is affirmed.

¶ 2 This is an action for personal injuries. The plaintiffs are Elizabeth R. Fulton and Warren S. Fulton, and the defendants are Kroger Limited Partnership I (Kroger) and Bloomington, IL Realty, LLC. (A third defendant, TLM Realty Corp., was defaulted and does not appeal.) Elizabeth R. Fulton allegedly tripped on a defect (variously described as a hole, a crack, or unevenness) in an asphalt ramp at the Kroger store in Bloomington, Illinois. She broke

her arm. Her spouse, Warren S. Fulton, sues for loss of consortium. The trial court granted defendants' motion for summary judgment. We affirm the trial court's judgment because plaintiffs failed to come forward with any evidence that the defect in the ramp was more than *de minimis* or that there were any aggravating circumstances.

¶ 3 I. BACKGROUND

¶ 4 Defendants took the discovery depositions of Elizabeth R. Fulton and Warren S. Fulton on September 3, 2014. It appears from their depositions that on April 15, 2011, during the daylight hours, Elizabeth R. Fulton slipped on an asphalt ramp, which sloped upward from the parking lot to a concrete walkway extending along the front of the store.

¶ 5 The walkway was sheltered by an awning, held up by stone pillars. These pillars stood on concrete peninsular bases, so to speak, which extended out from the walkway and toward the parking lot. These bases had three sides, painted yellow: the left side, the right side, and the side facing the parking lot. In between these bases were the ramps, the strips of sloping asphalt that went from the level of the parking lot up four or five inches to the walkway. From the walkway, the customer entered the store. The left and right sides of the bases curved down to the ramps and progressively tapered as the ramps went higher, so that, at the level of the walkway, the ramps, bases, and walkway were all flush with one another. The remaining, third side of the bases, the side facing the parking lot, was perpendicular, straight up and down. In their depositions, the Fultons referred to the sides of these bases as "curbs."

¶ 6 The basic physical features of the store were familiar to Elizabeth R. Fulton because she had been at the store hundreds of times. On April 15, 2011, she and William S. Fulton arrived at the store by car. He parked in the parking lot of the store, and they got out of the car. It was drizzling, but the rain had no effect on visibility, according to her testimony. The

two of them began walking toward the store. He was walking alongside her, about eight feet away. As she approached the store, she saw the curbs, and she saw the ramps between the curbs. She was eager to get under the awning, out of the rain.

¶ 7 In their deposition testimony, she and Warren S. Fulton appear to agree she did not trip on a curb but that, rather, she tripped on some height difference associated with the ramp directly in front of the store's entrance. She fell, and where she lay, her legs were on the ramp, and the rest of her body was on the concrete walkway.

¶ 8 Defendants' attorney asked Elizabeth R. Fulton:

"Q. All right. And so can you describe what happened then as you were walking from the car to the store?

A. As I was walking?

Q. Sure.

A. Walking. Nothing really occurred until I got closer to the store.

Q. And how close were you to the store?

A. At one of their ramps that they use to take the carts in and out, or at least used to use for that purpose.

Q. And then what happened?

A. My foot caught on an uneven or broken, whatever, piece of asphalt and because it caught I went down.

Q. Which foot?

A. My right.

Q. And when you say caught, what did it caught—catch on?

A. Asphalt. An uneven area or a broken—where—there was a part gone and my foot caught.

Q. Did you see that broken part before you fell?

A. No.

Q. Did you see it after you fell?

A. No.

Q. So what makes you think that there was broken asphalt there then?

A. Pictures that my husband took I think that evening.

* * *

Q. *** Could you please describe to me—and I'm using the word [']defect,[] by the way—the defect in the asphalt on which your foot caught?

A. It was an uneven—God, a crack or hole in the ramp.

Q. Now, you're not talking about the yellow curb when you say ramp, correct?

A. No. I'm talking about the asphalt ramp, handicap ramp or, you know, ramp where they push the carts in so they didn't have to push them up over a curb.

* * *

Q. Okay. And the ramp was made of asphalt, correct?

A. Yes.

* * *

Q. How deep and wide was the crack?

A. That I don't know. The day that I fell, after I fell, I had no interest in, you know, finding out.

Q. Okay. Was the crack there when you went back a month or two later?

A. No. For the most part it had been semi repaired and the paint was redone.

* * *

Q. Okay. Had you ever physically looked at the crack eye to crack before any changes?

A. No, I don't believe so.

Q. So if I asked you how deep and how wide the crack was at the moment that you fell would you be able to give me any details?

A. No."

¶ 9 Defendants' attorney asked her:

"Q. *** Was the ['']curb,['] as we're calling it, visible to you as you were walking along?

A. Yes.

Q. Okay. Was the ramp visible to you as you were walking along?

A. Yes.

Q. Was the incline visible to you as you were walking along?

A. Not as clearly, no.

Q. Okay. At all?

A. I don't recall but I don't believe so, no."

¶ 10 Warren S. Fulton testified he did not actually see her fall. He was looking ahead, and then he looked to the side, and she was lying facedown. Later, in the emergency room, she told him her foot had "hung up" and that "she [had gone] face down." She "wasn't really sure" what her foot had hung up on.

¶ 11 A couple of weeks after the fall, when the two of them went back to the store, he "knew right where she [had gone] down and [it was] pretty apparent what it was." Defendants' attorney asked him:

> "Q. So when you two went back, how did she describe her fall?
>
> A. Just basically the same way, that her foot—her right leg had hung up and she just boom. And as I said, she was to the left, or the east, of the curb because, like I said, we were just—we were six to eight feet apart. And I know from where she was that there's no way that that curb had anything to do with it.
>
> Q. Now, I know you already told me that you didn't see the fall itself, correct?
>
> A. Correct.
>
> * * *
>
> Q. When you went back and you looked at the place where—around where she had fallen.
>
> A. Uh-huh.
>
> Q. Yes? Did you—did you see in your mind what must have caused her fall?
>
> A. Well, yeah. It was very apparent to me.
>
> Q. What do you think that was?

A. Well, from the curb there was a—like an inch and a half that wasn't painted that carried on out from that point and it measured like an inch and a half. And that is what—I mean, even if you saw the yellow, I mean, you would still catch your foot on it. And that's what happened. And it's not that way now.

Q. So when you say an inch and a half, you mean an inch and a half in length?

A. Height.

Q. In height, okay. How about in length?

A. I would say 18—it came out there—yeah. I don't know if 18—I'd say , it came out at least a foot.

Q. Was it completely unpainted?

A. Yes."

Defendants' attorney handed Warren S. Fulton some photographs labeled as deposition exhibit No. 4 and asked him to mark with a pen the irregularity in the asphalt to which he referred. Deposition exhibit No. 4 is in the record. It consists of two photographs, one taken somewhat closer in than the other. They are both photographs of the left corner of one of the concrete peninsular bases, taken from the vantage of someone facing the store, and both photographs include an area of asphalt in front of and to the left of the curb. Both Elizabeth R. Fulton and Warren S. Fulton have drawn on these photographs with pens to indicate the precise place where her foot caught, and they both have indicated the asphalt ramp that adjoins the base on its left (that is, the left side of the base from the vantage of someone facing the front of the store). She has circled the bottom right corner of the ramp. He has drawn a longer, narrow oval,

which overlaps her circle and goes further to the left, encompassing the narrow lip of the ramp—that is, the edge of the wedge, where it meets the parking lot.

¶ 12 II. ANALYSIS

¶ 13 When reviewing this summary judgment, we are supposed to look at all the evidence in the light most favorable to the nonmoving parties, in this case the plaintiffs, drawing all reasonable inferences in their favor. See *Webb v. Ambulance Service Corp.*, 262 Ill. App. 3d 1039, 1042 (1994). It is reasonably inferable that Elizabeth R. Fulton tripped on a height difference of 1 1/2 inches between the parking lot and the lip of the ramp. Given that inference drawn in plaintiffs' favor (and any other inferences that could be reasonably drawn in their favor), we must decide, *de novo*, whether defendants' right to judgment was clear and free from doubt. See *id.* Plaintiffs argue it was not. Let us take their arguments one at a time.

¶ 14 A. For Purposes of the *De Minimis* Rule,
Is a Height Variation in Asphalt Different From
a Height Variation Between the Adjoining Concrete Slabs
of a Sidewalk?

¶ 15 In a case in which someone trips and falls on a sidewalk, a height variation of less than two inches from one concrete slab to the adjoining concrete slab generally is not actionable, even if the sidewalk is privately owned. *St. Martin v. First Hospitality Group, Inc.*, 2014 IL App (2d) 130505, ¶ 19. This is called "the *de minimis* rule." *Id.* Plaintiffs point out, however, that instead of tripping on the upraised slab of a sidewalk, Elizabeth R. Fulton tripped on a height variation in the asphalt, which was all one piece instead of being composed of separate slabs. They contend, therefore, that the *de minimis* rule is inapplicable.

¶ 16 We disagree for two reasons. First, in Illinois, with its extremes of temperature, the ground shifts under asphalt pavement, causing cracks and irregularities in its surface, just as the ground shifts under sidewalks, leaving one slab higher than another. The *de minimis* rule recognizes that trying to maintain perfect pavement, in perpetual competition with this phenomenon of nature, would be quixotic. *Id.* ¶ 16. Second, even if we assumed that the height difference in this case was by design rather than by operation of nature, the appellate court has applied the *de minimis* rule to a one-inch lip that existed by design at the bottom of a sidewalk ramp, where it met a gutter. *Putman v. Village of Bensenville*, 337 Ill. App. 3d 197, 203 (2003). It is true that the sidewalk ramp in *Putman* was municipal property, but the appellate court has extended the *de minimis* rule to "private owners and possessors of land" (*Hartung v. Maple Investment & Development Corp.*, 243 Ill. App. 3d 811, 815 (1993)).

¶ 17 B. How Great Was the Height Variation
Over Which Elizabeth R. Fulton Allegedly Tripped?

¶ 18 Plaintiffs contend that the *de minimis* rule is inapplicable because Elizabeth R. Fulton tripped on a height difference of four or five inches. They cite the following passage in her deposition:

> "Q. With respect to Exhibit [No.] 4, it's two pictures?
>
> A. Uh-huh.
>
> Q. One a little closer than the other of the curb and the asphalt surrounding the curb at approximately the place where you caught your foot; is that correct?
>
> A. Yes.
>
> Q. And as you have—Counsel has used the word [']crack,[] you've used the word [']hole.[] The area that you circled here, is there a height differential

between the foreground, asphalt, and the immediate center ground asphalt in both of these pictures?

A. Yes.

Q. And would that height differential be—well, can you give use an idea of what that height differential is?

A. It was graduated from further out in the asphalt—or in the parking lot up, you know, towards the store and would—I don't know, I suppose maximum height four inches, five inches.

Q. Well, it's not as high as the curb, is it?

A. No."

¶ 19 On the basis of this passage from Elizabeth R. Fulton's deposition, plaintiffs represent to us that she tripped on a height difference of four or five inches. That is not a fair account of the quoted testimony. See Ill. S. Ct. R. 341(h)(6) (eff. Jan. 1, 2016) ("Statement of Facts, which shall contain the facts necessary to an understanding of the case, stated accurately and fairly ***."). All she said was that the ramp was "graduated" and that it rose from the parking lot four or five inches to meet the walkway. We see no evidence of a hole or crack four or five inches deep. To trip over a height difference of four or five inches, she would have had to trip over the front of the curb—the straight-up-and-down side of the square peninsular base facing the parking lot—and she never testified she tripped over the curb. Where the ramp was four or five inches high, it joined the walkway, and there were no four or five inches to trip over. According to her testimony and the circle she drew on exhibit No. 4, she tripped over the thin lip of the ramp or maybe the side of the lip, where it extended out slightly farther than the curb. The only height estimate we have of the lip of the ramp is in Warren S. Fulton's testimony. He

testified it was about 1 1/2 inches high. Common sense would suggest it was considerably less than four or five inches high, which was the maximum height of the ramp at its other end, where it met the walkway.

¶ 20 Plaintiffs argue that when it comes to the amount of the height difference, there is a conflict between the testimony of Elizabeth R. Fulton and that of Warren S. Fulton. We disagree. When asked "[h]ow deep and wide was the crack" over which she tripped, Elizabeth R. Fulton answered, "That I don't know." She testified that she herself never looked at the crack—having just broken her arm, she understandably had no inclination to inspect her surroundings—and that by the time she and Warren S. Fulton returned to the store, the crack had been repaired. Warren S. Fulton testified that when they returned to the store a month or so later, he located the spot where—he inferred—she had tripped and that "it measured like an inch and a half" in "[h]eight."

¶ 21 The burden was on plaintiffs to come forward with evidence that the height difference was more than *de minimis* or, alternatively, that an aggravating circumstance or a combination of aggravating circumstances made the *de minimis* rule inapplicable. This was because (1) the burden was on them to prove a duty (see *Maschhoff v. National Super Markets, Inc.*, 230 Ill. App. 3d 169, 172 (1992)), (2) the existence of a legal duty depended on the reasonable foreseeability of injury (see *id.*), and (3) injury from a *de minimis* defect was not reasonably foreseeable unless an aggravating circumstance was reasonably foreseeable (*Hartung*, 243 Ill. App. 3d at 816-17).

¶ 22 C. The Tendency of the Asphalt Ramp
To Blend in With the Asphalt Parking Lot

¶ 23 Plaintiffs observe that "[t]he unmarked sides of the ramp were clearly such a condition as they could blend in with the rest of the dark asphalt parking lot." But the same is true of adjoining sidewalk slabs. They both are gray. And yet the *de minimis* rule applies to them. *Birck v. City of Quincy*, 241 Ill. App. 3d 119, 122 (1993).

¶ 24 Besides, Elizabeth S. Fulton testified that the curb and the ramp were visible to her as she walked toward the store. She saw the ramp, and then she tripped over it.

¶ 25 D. Does It Make a Difference That a Private Landowner Has a Smaller Area To Maintain Than a Municipality?

¶ 26 Originally, a justification of the *de minimis* rule as applied to municipalities was that, given the inevitable shifting of the ground with freezing and thawing, it would be economically impracticable for a municipality to keep many miles of sidewalk slabs perfectly level with one another. *Id.* at 123. Such impracticality is relevant to the legal question of duty. Whether the defendant owed a duty to the plaintiff is a question of law, and in answering that question, the court should consider how burdensome such a duty would be. *Hanna v. Creative Designers, Inc.*, 2016 IL App (1st) 143727, ¶ 19. Constantly adjusting the sidewalk slabs of an entire city would be too burdensome. *Id.*

¶ 27 Citing *Bledsoe v. Dredge*, 288 Ill. App. 3d 1021, 1024 (1997), plaintiffs argue that "the *de minimis* rule is not always the same for private businesses as it is for the miles of municipal sidewalks that are subject to outdoor deterioration from inclement weather conditions." But *Bledsoe* is distinguishable, as we will explain.

¶ 28 In *Bledsoe*, the floor in the covered entryway of a building was made of marble, and one of the marble slabs had a crack. *Bledsoe*, 288 Ill. App. 3d at 1022. The crack "was approximately three-eighths of an inch in deviation," and the plaintiff tripped over it. *Id.* In

declining to apply the *de minimis* rule in that case, the appellate court contrasted the burden of maintaining this entryway with the greater burden of maintaining "an expanse of sidewalks." *Id.* at 1024 ("[M]onitoring an area such as this entryway is not a burden equivalent to monitoring an expanse of sidewalks.").

¶ 29 The greater expansiveness of sidewalks, however, was not the only distinction the appellate court drew in *Bledsoe*. Sidewalks also were exposed to the weather, whereas the cracked marble slab was "in a partially enclosed entryway"—and hence it was only partially exposed to the weather. *Id.* (Justice Holdridge dissented in *Bledsoe* because he disagreed that the *de minimis* rule should "[depend] upon the *degree* of exposure to the elements." (Emphasis in original.) *Id.* at 1025 (Holdridge, J., dissenting).) *Bledsoe* is distinguishable because the asphalt ramp in the present case was fully exposed to the weather, like a typical sidewalk. It is common knowledge that asphalt develops fissures and other irregularities in response to freezing and thawing.

¶ 30 If, as plaintiffs argue, the applicability of the *de minimis* rule depended not only on the exposure of the sidewalks to weather but also on having a great quantity of sidewalks to maintain, the *de minimis* rule would apply to few private landowners, because few private landowners are comparable to a municipality in the quantity of sidewalks they own. Cases applying the *de minimis* rule to private landowners do not appear to require that they have a large total square footage of sidewalks to maintain. We see no indication in *St. Martin*, for example, that the hotel, which prevailed by application of the *de minimis* rule, owned a lot of sidewalks.

¶ 31 As the plaintiff in *St. Martin* was about to enter the main entrance of the hotel, he tripped over a height difference between adjoining slabs of concrete a couple of feet away from the main entrance. *St. Martin*, 2014 IL App (2d) 130505, ¶ 4. Because the height difference was

less than two inches; because the slabs of concrete were exposed to weather from the sides (they were in a drive-up area, over which a roof extended); and because the plaintiff had produced no evidence of aggravating circumstances, "such as heavy foot traffic, distraction, or congestion," the appellate court held that the *de minimis* rule negated the existence of a duty. *Id.* ¶¶ 19-20. *St. Martin* nowhere says that the hotel had a large quantity of these outdoor concrete slabs to maintain.

¶ 32 We also note that in the earlier case of *Hartung*, in which the appellate court extended the *de minimis* rule to private owners or possessors of land (*Hartung*, 243 Ill. App. 3d at 815), not only the owner of the shopping center but also a liquor store within the shopping center benefitted from the *de minimis* rule, despite the apparent lack of evidence that the liquor store was responsible for the entire square footage of sidewalks at the shopping center, as distinct from the particular area of the sidewalk, near the liquor store, where the plaintiff tripped and fell (*id.* at 812).

¶ 33 E. The Kroger Store's Only Entrance

¶ 34 Plaintiffs point out that "the hazard was right in front of the *only entrance* to the Kroger store." (Emphasis in original.) Likewise, in *Harris v. Old Kent Bank*, 315 Ill. App. 3d 894, 902 (2000), the appellate court noted, in its foreseeability analysis, that "the sidewalk containing the defect provided the only means of ingress and egress to [the] defendant's premises."

¶ 35 The defendant in *Harris* was a bank, and it owned a sidewalk, which ran between the bank building and the marked-off parking spaces where customers parked. The plaintiff was a customer who, after transacting business in the bank, tripped over the edge of a sidewalk slab

as she was returning to her car. *Harris*, 315 Ill. App. 3d at 895. Even though the height difference between the uneven sidewalk slabs was less than two inches (*id.* at 901), the appellate court held the *de minimis* rule to be inapplicable to the bank for the following reasons:

> "The risk of harm must be reasonably foreseeable. Here, the sidewalk containing the defect provided the only means of ingress and egress to defendant's premises. Further, it is not unreasonable to presume that a patron exiting the premises might be reviewing the receipts of her transactions, looking for her car keys, or looking toward her car and, therefore, would not discover the sidewalk defect. Consequently, the risk of harm was reasonably foreseeable. Also, this was not a situation similar to that of a municipality or shopping center where the burden of repairing all defects on miles or hundreds of thousands of square feet would be substantial. [Citations] Here, the economic burden to defendant to repair the defect in the two slabs of concrete would not have been great. Moreover, the amount of sidewalk to be monitored and maintained was small.
>
> Under the particular facts and circumstances of this case where, as noted in the record, plaintiff pleaded in her complaint that defendant '[f]ailed to provide a safe means of ingress and egress for its invitees' and where the sole purpose of the sidewalk in question was to provide access to the only entrance for patrons of defendant's banking facility, we find that a genuine issue of material fact exists as to whether the sidewalk defect was *de minimus* [*sic*]." *Id.* at 902.

¶ 36 For purposes of reasonable foreseeability, though, what difference does it make that the defective sidewalk was the *only* means of ingress and egress? Let us say that, instead, there were two sidewalks, one defective and the other non-defective, by which customers could

approach and leave the bank. Just because there is a non-defective sidewalk, why would it be *un*foreseeable that a customer would trip over the defect in the other sidewalk?

¶ 37 Another difficulty in the above-quoted passage from *Harris* is the *presumption* of a distraction. The appellate court said in *Harris*: "[I]t is not unreasonable to *presume* that a patron exiting the premises might be reviewing the receipts of her transactions, looking for her car keys, or looking toward her car and, therefore, would not discover the sidewalk defect." (Emphasis added.) *Id.* It does not appear, however, that the plaintiff in *Harris* ever actually claimed to have been distracted in any of those ways.

¶ 38 In the subsequent case of *St. Martin*, the appellate court, instead of presuming distraction, required actual proof of distraction or some other aggravating circumstance. *St. Martin*, 2014 IL App (2d) 130505, ¶ 19 ("[P]laintiff has not specifically alleged or provided any evidence that an aggravating circumstance such as heavy foot traffic, distraction, or congestion existed."); see also *Gillock v. City of Springfield*, 268 Ill. App. 3d 455, 458 (1994) ("[A]s part of her case, plaintiff must prove the defect here was not *de minimis*, by presenting *evidence* of the size of the defect *and any aggravating circumstances*." (Emphases added.)).

¶ 39 F. Were There Any Aggravating Circumstances That Might Make the *De Minimis* Rule Inapplicable to the Alleged 1 1/2 Inch Defect?

¶ 40 In *Hartung*, the appellate court remarked that a minor defect in a sidewalk, which otherwise would be nonactionable under the *de minimis* rule, "may be actionable where there are other aggravating factors such as heavy [foot] traffic because pedestrians may be distracted and must be constantly alert to avoid bumping into each other." *Hartung*, 243 Ill. App. 3d at 815. The appellate court cited *Warner v. City of Chicago*, 72 Ill. 2d 100, 104 (1978), in which the supreme

court said: "An unacceptable height variation in one location, such as a busy commercial area where pedestrians must be constantly alert to avoid bumping into one another, may be nonactionable in another area, such as a residential one."

¶ 41 Plaintiffs argue that the rain and the "foot traffic right behind [Elizabeth R.] Fulton" were aggravating circumstances. We do not see how. Assuming that rainfall even qualifies as an aggravating circumstance for purposes of the *de minimis* rule, Elizabeth R. Fulton denied that the light rain (it was drizzling) had any effect on visibility. It was daytime, and she admitted seeing the ramp as she approached the store.

¶ 42 As for the other customer, she never testified that as she approached the store, she was aware of anyone behind her. And because this other customer was behind her, she did not have to "be constantly alert to avoid bumping into" him. *Id.* There was no heavy foot traffic.

¶ 43 In sum, then, in our *de novo* review, we find no genuine issue of material fact as to the existence of a duty, specifically, a duty on the part of defendants to repair the defect in the asphalt of which plaintiffs complain. See 735 ILCS 5/2-1005(c) (West 2014); *Arangold Corp. v. Zehnder,* 204 Ill. 2d 142, 146 (2003). "[A]s part of [their] case, plaintiff[s] must prove the defect here was not *de minimis*, by presenting evidence of the size of the defect and any aggravating circumstances." *Gillock,* 268 Ill. App. 3d at 458. Because of the lack of evidence that the defect was more than *de minimis* or, alternatively, that there was a reasonably foreseeable aggravating circumstance, we conclude that defendants were entitled to judgment as a matter of law, as the trial court correctly ruled. See 735 ILCS 5/2-1005(c) (West 2014); *Gillock*, 268 Ill. App. 3d at 458; *Hartung*, 243 Ill. App. 3d at 815.

¶ 44 III. CONCLUSION

¶ 45 For the reasons stated, we affirm the trial court's judgment.

¶ 46 Affirmed.