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| Kovalenko v New York State Thruway Auth. |
| 2013 NY Slip Op 33965(U) |
| July 22, 2013 |
| Court of Claims |
| Docket Number: 118509 |
| Judge: Frank P. Milano |
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STATE OF NEW YORK COURT OF CLAIMS

**BRACHA KOVALENKO AND IRVING
KOVALENKO,**

Claimants,

DECISION

-v-

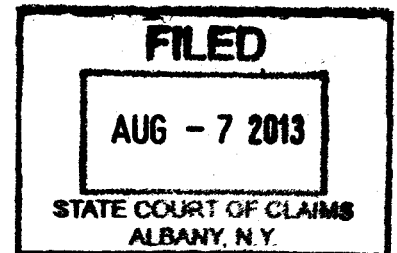
**NEW YORK STATE THRUWAY
AUTHORITY,**

Claim No. 118509

Defendant.

BEFORE:

**HON. FRANK P. MILANO
Judge of the Court of Claims**



APPEARANCES:

**For Claimants:
SUBIN ASSOCIATES, LLP
By: Eric Subin, Esq.**

**For Defendant:
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER,
LLP
By: F. Douglas Novotny, Esq.**

Bracha Kovalenko and Irving Kovalenko, a married couple, bring claim against the New York State Thruway Authority (defendant) for injuries allegedly sustained to Bracha Kovalenko by reason of a trip and fall on October 1, 2009 at the New Baltimore rest area of the New York State Thruway.¹

On October 1, 2009 claimant and her husband were traveling on the New York State Thruway and stopped at the New Baltimore rest area. As she and her husband walked from the

¹ Hereafter, any references to "claimant" will denote reference to Bracha Kovalenko alone.

parking lot to the rest area facilities, at approximately 12:30 p.m., claimant tripped and fell in the area of a pedestrian crosswalk and pedestrian sidewalk, allegedly sustaining injuries. October 1, 2009 was a clear, sunny and dry day.

At trial, three witnesses testified on behalf of claimant--claimant, her husband and claimant's expert, Jeffrey Schwalje, a licensed New York State PE (professional engineer) with an MA in Industrial Health and Safety Engineering. Defendant produced four witnesses (although one of these witnesses was called by claimant on her direct case), all employees of defendant and all of whom had various supervisory responsibilities for rest areas (including the New Baltimore rest area) on the New York State Thruway.

Of the seven trial witnesses, claimant and her husband were the only eyewitnesses to the events of October 1, 2009. Claimant and her husband testified consistently about what happened that day, their accounts of the facts and circumstances surrounding claimant's trip and fall went uncontradicted, and the Court credits their testimony.

As claimant approached the rest area facilities from the parking lot that day, while wearing a skirt and flat, closed-toe shoes, the toes of her right foot tripped over a hole in a pedestrian sidewalk (within a concrete median), causing her to fall to her knees on the concrete surface. The hole over which claimant tripped and its surrounding areas are depicted in admitted photographic trial exhibits 1, 2, D, E and F.

The exhibits and trial testimony revealed that the hole over which claimant tripped was immediately adjacent to a marked pedestrian crosswalk and was within a sloping pedestrian sidewalk, which was itself adjacent to a handicap parking area.

While she fell on October 1, 2009, neither claimant nor her husband reported the incident to anyone in authority that day nor did they create or file an incident report that day or at any time thereafter. No photographs were taken that day. Claimant's husband returned to the rest area six days later to take the photographs which were subsequently admitted as trial exhibits, and he testified the sidewalk defect involved was unchanged from the date of claimant's fall. By reason of persuasive trial testimony (including expert testimony that the sidewalk defect involved had existed in the condition depicted in the admitted photographs for a period of at least one year), the Court finds as a matter of fact that the condition of the involved area as it existed on the date of claimant's fall, October 1, 2009, was substantially the same as that depicted in the admitted photographic trial exhibits.

Although witness testimony as to the exact dimensions of the hole over which claimant tripped varied modestly, a persuasive testimonial consensus emerged that it measured approximately three feet long, between two and three feet wide, and that it was between two and three inches deep at its greatest depth. By reason of credited trial testimony and further, by reference to Exhibits 1, 2, D, E, and F, the Court finds as a matter of fact that the hole measured approximately three feet long, between two and three feet wide, and between two and three inches at its greatest depth, which depth the Court further finds to be in the area of the hole closest to the location from where claimant approached and from where claimant stepped from the roadway to the sidewalk, as she walked from the parking lot to the rest area facilities, and which is the location claimant tripped and fell. On Exhibit 1, the area of the hole where claimant tripped is circled and marked "BK".

Claimant testified that immediately prior to her fall, her husband was one and one-half to two steps directly in front of her, that she was “looking ahead,” looking at her husband’s back, that she “wasn’t looking for anything” and that she did not observe the defect before catching her toe on it, tripping and falling. Upon cross-examination, claimant admitted that the sidewalk defect was an obvious condition.

“As a landowner, [defendant] owes the same duty of care as that of a private individual: the duty to exercise reasonable care under the circumstances in maintaining its property in a safe condition” (Mesick v State of New York, 118 AD2d 214, 216-217 [3d Dept 1986], *lv denied* 68 NY2d 611 [1986]; *see* Preston v State of New York, 59 NY2d 997, 998 [1983]).

However, “[w]hile the State clearly owes a duty to claimants and others entering upon its property to maintain it in a reasonably safe condition under the circumstances, it is not obligated to insure against every injury which may occur” (Smith v State of New York, 260 AD2d 819, 820 [3d Dept 1999]).

In a trip and fall case, “claimant has the burden of establishing a dangerous or defective condition that defendant created or had knowledge (actual or constructive) of, and that such condition was a cause of the accident” (Gonzalez v State of New York, 60 AD3d 1193, 1194 [3d Dept 2009], *lv denied* 13 NY3d 712 [2009], *rearg denied* 15 NY3d 820 [2010]; *see* Seaman v State of New York, 45 AD3d 1126, 1127 [3d Dept 2007]; Heliodore v State of New York, 305 AD2d 708, 709 [3d Dept 2003]; Malossi v State of New York, 255 AD2d 807, 807 [3d Dept 1998]).

The existence of a dangerous condition is generally a question of fact dependent upon the particular facts and circumstances of each case (Moons v Wade Lupe Constr. Co., Inc., 24 AD3d

1005, 1006 [3d Dept 2005]). However, as the Court of Appeals explained in Trincere v County of Suffolk (90 NY2d 976, 977-978 [1997]), an alleged dangerous condition can be so trivial as to be nonactionable as a matter of law.

Further, the defendant's liability for a trip and fall is premised upon proof that it either created the alleged dangerous condition or knew, or in the exercise of reasonable care, should have known that a dangerous condition existed but, nevertheless, failed to remedy the situation within a reasonable time period (Heliodore v State of New York, 305 AD2d 708, 709 [3d Dept 2003]; Diaz v State of New York, 256 AD2d 1010 [3d Dept 1998]; Keir v State of New York, 188 AD2d 918, 919 [3d Dept 1992]).

Where there is insufficient proof that the defendant created or had actual notice of the condition, liability turns on the issue of whether defendant had constructive notice. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (Gordon v American Museum of Natural History, 67 NY2d 836, 837 [1986]; see Moons v Wade Lupe Constr. Co., Inc., 24 AD3d 1005, 1006 [3d Dept 2005]; Zuppardo v State of New York, 186 AD2d 561, 562 [2d Dept 1992]).

Finally, the law provides that "the open and obvious nature of an allegedly dangerous condition does not, standing alone, necessarily obviate a landowner's duty to maintain his or her property in a reasonably safe condition" (MacDonald v City of Schenectady, 308 AD2d 125, 127 [3d Dept 2003]), although such a finding would negate any duty of defendant to warn of the dangerous condition (Soich v Farone, 307 AD2d 658, 659 [3d Dept 2003]) and, additionally,

relates to the issue of the claimant's comparative negligence pursuant to CPLR § 1411 (Tulovic v Chase Manhattan Bank, 309 AD2d 923, 924 -925 [2d Dept 2003]).

To assess defendant's liability, several issues must be addressed and determined. Initially, the Court must determine whether the condition over which claimant tripped was dangerous or whether, on the contrary, it was trivial. Secondly, if found to be dangerous, the Court must determine whether defendant had either actual or constructive notice of the condition and an opportunity to remedy it. The evidence must show that the dangerous condition, if found, proximately caused the injuries alleged and the Court must consider whether the condition was open and obvious and, if so, assess claimant's comparative fault for her injuries.

The Court finds as a matter of fact the sidewalk defect over which claimant tripped to be a dangerous condition. By reason of credited trial testimony, strongly supported by Exhibits 1, 2, D, E, and F, and particularly by Exhibits 1 and 2, which depict the sidewalk hole at closer range, the Court is persuaded that the hole's size, length, width, depth, contours, composition and location render it a dangerous condition.

As earlier determined, the hole measured approximately three feet long, between two and three feet wide, and between two and three inches deep in the location where claimant tripped. Exhibits 1 and 2 depict a hole that is irregularly shaped and which contains a jagged edge along a line in the pedestrian sidewalk which transitions directly from a smooth, sloping sidewalk surface to a subsurface two to three inches below. Exhibit 2, a photo taken further from the hole and taken at a flatter angle than that of Exhibit 1, well documents the abruptness and depth of the drop-off between the sidewalk surface and the subsurface. Moreover, the hole's location is immediately adjacent to a heavily traveled pedestrian crosswalk specifically designed and

delineated to funnel pedestrian traffic from the parking lot to the rest area facilities, and is located within a sloping sidewalk, which claimant's expert described as a handicap curb ramp, adjacent to a handicap parking area. It is not a defect found off the beaten path.

Defendant produced four trial witnesses with varying levels of responsibility and job portfolios in overseeing New York State Thruway rest area grounds and facilities, including the New Baltimore rest area. The trial testimony of these four witnesses together with the documentary evidence admitted on defendant's behalf sought to establish that defendant had no actual notice of the condition at the New Baltimore rest area which caused claimant to trip and fall and, by negative inference, that no constructive notice of it should be imputed to defendant.

Linda Whipple was a seven-year New York State Thruway service area representative responsible for six Albany region rest areas, including New Baltimore. Her activities included observing rest area sidewalks and parking areas and, if seen, reporting and/or photographing observed defects, although in self-contradictory fashion, she testified by turn that it was not her job to report defects and later testified that it was her job responsibility to report dangerous conditions. She would visit the New Baltimore rest area up to three times per week. In her seven years of experience, covering all of her rest areas, she reported one defect (not at New Baltimore). She, in her seven years, never reported a tripping hazard. She never saw the hole over which claimant tripped, as depicted in Exhibit 1, and she never saw the "discolored" pavement, as depicted in Exhibit 2. She testified that had she seen a three foot by two foot by two inch deep defect, she would have reported it.

Michael Osborne, a twenty-five year New York State Thruway employee was a section maintenance supervisor from November, 2006 to May, 2010 with "some" maintenance

supervisory responsibility for the New Baltimore rest area. He visited New Baltimore two to three times per week. Although he testified that he checked pavement in parking lots, he kept no record of such inspections. Mr. Osborne testified that he never saw the defect in question at New Baltimore, nor was he aware of anyone else having seen it or having reported it. He was not responsible for sidewalks or median areas, just paved parking areas, but was unsure who was responsible for sidewalks. Although a supervisor, none of his subordinates were responsible to report sidewalk defects and he was unsure whose job it was to report those defects. He testified that it was "everyone's" duty to observe and report defects.

Joseph Pastula, a twenty-six year New York State Thruway employee, has served as a service area representative, the same job as Linda Whipple, since July, 2007. In October 2009, the New Baltimore rest area was within his jurisdiction and he visited New Baltimore between two and four times per week. He testified that had he observed a dangerous condition or a hazard or defect, he would have documented and reported it. He had never seen the "discolored" pavement depicted in Exhibit 2, nor said he did any of the admitted defendant Exhibits A, B or C (defendant inspection logs for various periods of time which covered the New Baltimore rest area) note that condition. His job duties included examining concrete areas and sidewalks. In six years, covering six rest areas, Mr. Pastula reported two tripping hazards, neither located at New Baltimore. He further testified that had he observed a defect that measured two feet by three feet by two inches deep, as depicted in Exhibit 2, he would have reported it as a tripping hazard.

Finally, Daniel Meier, a division facilities engineer as of October 2009, supervised maintenance crew supervisors. Linda Whipple and Joseph Pastula reported to him. He had supervisory responsibilities for the New Baltimore rest area and he visited annually, at which

time he would conduct a sixty to ninety minute inspection for tripping hazards. He had found no such tripping hazards at New Baltimore. He had never observed the “discoloration” of pavement as depicted in Exhibit 2, nor had it ever been reported to him. Even though Ms. Whipple and Mr. Pastula reported to him, Mr. Meier did not know if they inspected rest areas for tripping hazards.

By reason of the foregoing, the Court is left to believe that on a matter involving a condition which can easily be described as an open and obvious tripping hazard in the middle of a heavily utilized pedestrian crosswalk and sidewalk area at a Thruway rest area, and existing for a number of years (established through subsequently discussed and credited expert testimony), that hazard went unobserved, let alone unreported, by at least four representatives of defendant whose duties included noticing and reporting such hazards, and who had visited the New Baltimore rest area literally thousands of times in the aggregate, over a number of years.

The Court, without further elaboration, or need of it, observes that the testimony of defendant’s witnesses speaks for itself, unworthy of belief or credit. The Court declines to credit any of the defendant’s witnesses.

The claimant’s expert witness, Jeffrey Schwalje, was clear, persuasive and credible. He opined that the two foot by three foot by two inch deep hole depicted in Exhibit 1 had developed over a long period of time, a minimum of three winter cycles of freeze and thaw, and more likely over a number of years longer than that. He noted that a good portion of the sidewalk panel involved had worn away completely, leaving no material to the subsurface, and that such a condition takes years to develop. He observed that the condition in question was in a “critical area,” a locational factor of significance, given its proximity to heavily used pedestrian ingress and egress paths to the rest area parking lots and to nearby handicap parking.

He described, in detail, the process over time by which the pavement degraded, explaining that water began to seep into developing surface cracks and expansion joints, that the freeze/thaw cycle thereafter caused expansion and contraction which resulted in the cracking and breaking down of the concrete sidewalk, and eventually, in a total loss of pavement material.

He persuasively opined that the hazard over which claimant tripped and fell had been degrading over many years, would have been observable over a number of years, and that the hole over which she tripped on October 1, 2009 would have existed in that condition for at least one year prior to her fall and perhaps for up to three years prior to her fall. The Court fully credits Mr. Schwalje's testimony.

The Court finds as a matter of fact, that defendant had constructive notice, if not actual notice, of the dangerous condition which caused claimant to trip and fall on October 1, 2009. It is a condition, clearly, which in the exercise of due diligence, the defendant should have noticed and repaired. Accordingly, the Court finds that the claimant has proven by a preponderance of the credible evidence that defendant was negligent in maintaining the involved area of the New Baltimore rest area, and that negligence caused her to trip and fall on October 1, 2009. The Court, as such, determines that the defendant is culpable, in part, for the injuries sustained by claimant that day.

The claimant, however, is not without share of culpability for her fall and the injuries she thereby suffered. It is axiomatic that pedestrians are obligated to observe their surroundings, watch where they are walking and to take care to avoid readily observable and openly dangerous conditions. The claimant sought, by intimation (she testified that she "probably" would not have seen the "whole of it" due to her husband's back) to suggest that her view of the hole over which

she tripped and fell was blocked by her husband walking in front of her. Beyond failing to prove to the Court's satisfaction that is the reason she failed to apprehend the hole, even were that fact so, it does not absolve the claimant of her responsibility to be vigilant and observant as to where she stepped and where she walked. She testified she was "looking ahead" at her husband's back, that she "wasn't looking for anything" and that she did not see the obvious hole prior to her fall. Claimant bears culpability in equal measure to defendant for her fall. Accordingly, the Court apportions 50% liability for claimant's trip and fall to claimant and 50% liability to defendant.

Let interlocutory judgment be entered accordingly.

Any motions not previously decided are hereby denied.

A conference between the Court and the parties will be scheduled to establish a date for trial of damages on the claim.

Albany, New York
July 22, 2013



FRANK P. MILANO
Judge of the Court of Claims