[Cite as *Holt v. Holmes*, 2011-Ohio-5904.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Clarence Holt	Court of Appeals No. L-10-1363
Appellant	Trial Court No. CI0200905969
v.	
Kevin Holmes, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: November 10, 2011

* * * * *

Clint M. McBee, for appellant.

Alan B. Dills, for appellees Kevin and Kjelli Holmes.

Leslie A. Kovacik, for appellee City of Toledo.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This appeal is before the court following the November 19, 2010 judgment of the Lucas County Court of Common Pleas granting summary judgment in favor defendants-appellees, Kevin and Kjelli Holmes and the city of Toledo, in a slip and fall

action commenced by plaintiff-appellant Clarence Holt. Because we agree that no genuine issues remain for trial, we affirm.

{¶ 2} On August 3, 2009, appellant filed his complaint in this case against homeowners, Kevin and Kjelli Holmes and the city of Toledo. The complaint stated that appellant fell and sustained injury on the uneven, cracked sidewalk in front of the Holmes' residence. Appellant alleged that the Holmeses negligently failed to maintain the sidewalk as required under Toledo Municipal Code sections 911.02 and 911.34. Appellant further claimed that the city of Toledo negligently failed to notify the Holmeses, pursuant to Toledo Municipal Code 911.10, of the defective condition of the sidewalk and/or failed to repair the sidewalk.

{¶ 3} On August 11, 2010, the Holmeses filed a motion for summary judgment. In their motion, they addressed appellant's argument that the Toledo Municipal Code imposed a duty on them to maintain the sidewalk. The Holmeses argued that the provisions did not impose a duty to protect pedestrians; rather, they required that property owners assist the city in the maintenance of the sidewalks.

{¶ 4} On August 16, 2010, the city of Toledo filed a separate motion for summary judgment. The city first argued that it was immune from liability under R.C. Chapter 2744 because the maintenance of sidewalks is a governmental function. The city further argued that, under Toledo Municipal Code 911.10, it did not pass a resolution ordering the homeowners to repair the sidewalk because it was not aware of the defective

condition. Finally, the city asserted that it was not liable for damages from appellant's fall because the condition of the sidewalk was open and obvious.

{¶ 5} An oral hearing on the motions was held on November 17, 2010. After hearing the arguments of the parties, the trial court concluded that, as to the Holmeses, summary judgment was appropriate because the condition of the sidewalk was open and obvious. The court agreed that the city was entitled to immunity or, alternatively, because they had no notice of the alleged defect they could not be charged with the responsibility of repairing it.

{¶ 6} The court journalized its judgment on November 19, 2010. This appeal followed.

{¶ 7} Appellant now presents the following assignments of error for our consideration:

{¶ 8} "I. The trial court committed prejudicial error by granting summary judgment to appellees Kevin Holmes and Kjelli Holmes, and preventing appellant from submitting his case to a jury.

{¶ 9} "II. The trial court also committed prejudicial error by granting summary judgment to appellee city of Toledo, and again preventing appellant from submitting his case to a jury."

{¶ 10} At the outset we note that appellate review of a trial court's grant of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. A motion for summary judgment should only be granted when there remains no

genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66; Civ.R. 56(C). The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 294. However, once the movant supports his or her motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

{¶ 11} Appellant's first assignment of error challenges the trial court's grant of summary judgment to property owners, the Holmeses. Appellant asserts that, pursuant to the Toledo Municipal Code, they had a duty to maintain the sidewalk in front of their home.

{¶ 12} Toledo Municipal Code 911.02 provides:

{¶ 13} "Duty to maintain sidewalks.

{¶ 14} "It shall be the duty of every owner of any lot or parcel of land situated within the corporate limits of the City to keep and maintain good and sufficient sidewalks along all public streets, avenues, boulevards or lanes adjoining thereto."

{¶ 15} Toledo Municipal Code 911.34 states:

{¶ 16} "Civil liability for failure to maintain sidewalks.

{¶ 17} "Every owner of any lot or parcel of land situated within the corporate limits of the City shall keep and maintain good and sufficient sidewalks adjoining such parcel of land along all public streets, avenues, boulevards or lanes and shall cause them to be kept open, in repair and free from any nuisance, including but not limited to, snow and ice."

{¶ 18} Conversely, the Holmeses assert that the above-quoted code sections do not impose a duty to pedestrians injured on a public sidewalk. We initially note that the duty of care owed by a property owner to a person who is injured on the property depends on the status of the injured person. The status of a passerby on a public sidewalk is that of a "licensee." *Gall v. Systems Parking, Inc.* (Oct. 27, 1994), 8th Dist. No. 66159. See, also, *Michalak v. Samuel Geraldo Trust* (June 28, 1996), 6th Dist. No. L-95-332. "[A] landowner owes no duty to a licensee or trespasser except to refrain from willful, wanton, or reckless conduct which is likely to injure him." *Gladon v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 312, 317.

{¶ 19} In support of their argument, the Holmeses rely on this court's case of *Crowe v. Hoffman* (1983), 13 Ohio App.3d 254. In *Crowe*, we stated the general rule that "[a]n owner of property abutting a public sidewalk is not, generally, liable for injuries sustained by a pedestrian thereon." (Citations omitted.) Id. at 255. However, we noted the following three exceptions: 1) where a statute or ordinance imposes a specific duty to keep the adjoining sidewalk in good repair; 2) where the landowner affirmatively creates or negligently maintains the defective or dangerous condition; or 3) where the owner

negligently permits the defective condition to exist for a private use or benefit. (Internal citations omitted.) Id. at 255-256. Additionally, in *Crowe*, the municipal ordinance at issue required prior notice to the landowner ordering the repair of the defective condition.

{¶ 20} In *Michalak v. Sam Geraldo Trust*, supra, this court examined the relevant Toledo Municipal Code sections and concluded that section 911.02 "does not impose a duty on an abutting landowner to keep public sidewalks in good repair for the protection of pedestrians."

{¶ 21} Appellant, in his brief, appears to concede that the Toledo Municipal Code is not a basis for civil liability. However, appellant argues that the other two exceptions set forth in *Crowe*, supra, affirmative acts to create the defect or allowing the defect to exist for a private use or benefit, may create an issue of fact. Specifically, appellant contends that in their motion for summary judgment the Holmeses failed to address these bases for imposing liability.

{¶ 22} Upon review, we must conclude that because there was no evidence presented that the Holmeses either affirmatively created the defect or maintained it for some personal benefit, they were not required to make arguments relative thereto. We further note that under Civ.R. 56, appellant had a reciprocal burden to set forth specific facts demonstrating a genuine issue for trial. Civ.R. 56(E).

{¶ 23} The Holmeses further argued below that they were not liable for appellant's injuries because the defect in the sidewalk was open and obvious. Under Ohio's "open and obvious" doctrine, an occupier or owner of a premises is under no duty to protect or

warn against dangers where the "'nature of the hazard itself serves as a warning.'" The underlying theory of the doctrine is that persons entering the premises may reasonably be expected to "'discover those dangers and take appropriate measures to protect themselves.'" *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573 ¶ 5, quoting *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 644. See, also, *Armstrong v. Meade*, 6th Dist. No. L-06-1322, 2007-Ohio-2820, ¶ 7. Further, a pedestrian is charged with the duty of watching where he is walking. *Backus v. Giant Eagle, Inc.* (1996), 115 Ohio App.3d 155, 158.

{¶ 24} In the instant case, appellant testified in his deposition that he had traversed the allegedly defective area almost daily over the past year prior to his fall. Appellant stated that while walking his 45 pound dog, he would approach the defect from the opposite direction. In other words, he stepped down the approximately four-inch height difference. On the day in question, during daylight hours and while walking his dog, appellant was required to step up when he tripped and fell. Appellant admitted that he was distracted by looking at a garage addition at the time of his fall. We note that the distraction did not rise to the level of an "attendant circumstance" which may have negated the open and obvious nature of the sidewalk. See *Stinson v. Kirk*, 6th Dist. No. OT-06-044, 2007-Ohio-3465, ¶ 25, citing *Humphries v. C.B. Richard Ellis, Inc.*, 10th Dist. No. 05AP-483, 2005-Ohio-6105, ¶ 20.

{¶ 25} Based on the foregoing, we find that the trial court did not err when, as to appellees Kevin and Kjelli Holmes, it granted summary judgment against appellant. Appellant's first assignment of error is not well-taken.

{¶ 26} In appellant's second assignment of error, he contends that the trial court erred when it granted summary judgment to appellee city of Toledo. Appellant argues that issues of fact remain as to whether the city negligently created the defective condition or negligently failed to repair the condition. In support, appellant relies on *Lester v. Hack* (July 24, 1998), 6th Dist. No. L-97-1417. In *Lester*, this court examined whether the city of Toledo, under R.C. 723.01 and *Kimball v. Cincinnati* (1953), 160 Ohio St. 370 (a municipality is not responsible for minor defects), was negligent in its maintenance of a public sidewalk. We noted that because the defect was less than two-inches, it was minor and no duty was owed. Id.

{¶ 27} *Kimball*, *Cash*, and *Lester*, analyze a municipality's duty to a pedestrian under former versions of R.C. 723.01 which required that a municipal corporation keep, inter alia, sidewalks "open, in repair, and free from nuisance." However, the current version of R.C. 723.01 limits liability by stating that "[t]he liability or immunity from liability of a municipal corporation for injury, death or loss to person or property allegedly caused by a failure to perform the responsibilities imposed by this section shall be determined pursuant to divisions (A) and (B)(3) of section 2744.02 of the Revised Code."

{¶ 28} R.C. Chapter 2744 provides immunity to municipalities for various governmental and proprietary functions. Such functions specifically include the maintenance and repair of sidewalks. R.C. 2744.01(C)(2)(e). In addition, R.C. 723.011 permits a municipality to delegate such duties to the abutting owners or occupiers. Once immunity is established it is incumbent on the movant to prove that one of the five exceptions to immunity applies. These exceptions are set forth in R.C. 2744.02(B).

{¶ 29} At the November 17, 2010 hearing on the motions for summary judgment, the trial court questioned the parties about the applicability of any exceptions to immunity. Appellant's counsel stated that there were questions remaining as to whether the city had notice of the defect or caused the defect due to the faulty removal of a tree. Appellant, in his deposition "speculated" that the defective sidewalk could have been caused by a tree being removed. Further, the Holmeses stated in a discovery request for admission that a tree had been removed. Even assuming that a tree had been removed in the area of the damaged sidewalk, there is still no evidence that the city had knowledge of the sidewalk defect prior to appellant's fall or that the tree removal caused the defect. At the hearing, counsel admitted that there was no direct evidence that a tree had ever been removed near the damaged sidewalk. Further, the city submitted an affidavit from Catherine Romero, an engineering technician with the city's sidewalk section, who stated that she logs all sidewalk complaints. Romano stated that prior to appellee Kjelli Holmes' August 20, 2007 call, she had not received any other calls about that section of sidewalk. Based on the foregoing, we find that the city was immune from liability for

any damages due to appellant's fall. Appellant's second assignment of error is not well-taken.

{¶ 30} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE