No.: 22-625

SUPREME COURT OF APPEALS OF WEST VIRGINIA

DENISE ORSO,
Petitioner,

v.

Re:
CIVIL ACTION NO.: CC-23-2020-22
Honorable Miki J. Thompson, Circuit Judge

THE CITY OF LOGAN, WEST VIRGINIA,
a municipal corporation,

Respondent.

BRIEF OF PETITIONER

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III.

STATEMENT OF THE CASE

This case arises from a trip and fall that occurred on October 1, 2018 resulting in very serious injuries to Petitioner Denise Orso. The trip and fall occurred on a sidewalk located on Stratton Street in downtown Logan during the lunch hour at which time Mrs. Orso was taking her customary walk, A 35, 650. As Mrs. Orso described the fall in her deposition she was then approaching three women who were also walking, but in the opposite direction. Each moved over so as to pass one another. A wire with a loop "latched onto" Mrs. Orso's shoe, her right foot was caught in the loop, causing her to "hit the concrete", A 652-653, see photos 667-669. As the result of her injuries Mrs. Orso has undergone three surgeries and extensive therapy and rehabilitation as well as suffering residual problems and physical restrictions, A 650-666.

Mrs. Orso filed suit against the Respondent City of Logan under the authority granted in West Virginia Code, Chapter 17, Article 10, Section 17 asserting that a defective condition of the sidewalk existed which the City had negligently maintained. The City responded with a Motion to Dismiss pursuant to Civil Rule 12(b)(6) arguing that the City had immunity under the West Virginia Tort Claims and Insurance Reform Act, West Virginia Code §29-12A-4. The City argued also that there were no facts in the pleading to the effect that the City had prior notice of the alleged hazard and that insufficient facts had been pled to avoid adverse consequences as the City interpreted were required under the open and obvious doctrine contained in West Virginia Code §55-7-28.

An Amended Complaint which added a second Defendant was noticed and subsequently filed A 131-136. The additional Defendant was the First Baptist Church of Logan, West

Virginia. The church was located on Stratton Street adjacent to the location where Mrs. Orso fell. The wire which tripped Mrs. Orso was loosely wrapped around a post which the church placed contiguous to the sidewalk. The wire was used to block parking in the church's parking lot on Stratton Street, see Exhibits A 107-112.[1] A settlement was reached with Defendant First Baptist Church of Logan, West Virginia. Thereafter the Respondent City of Logan filed its Motion for Summary Judgment arguing that arguing that (1) the City owed no duty to Mrs. Orso because the City did not own the wire loop (2) the Logan City ordinances did not require a duty to maintain the sidewalk (3) that the City had no knowledge of the hazard thus they had no duty to warn of the danger (4) and the claim is barred under the open and obvious doctrine, A 163-177, 444-459. Petitioner Orso responded first that the City's duty and the basis for the City's liability is consistent with the Tort Claims Act under West Virginia Chapter 29, Article 12 A, Section 4(c)(3) and (5); second, that the City's ordinance upon which Respondent relies does not relieve the City from its statutory responsibilities involving sidewalks; third, the Respondent City incorrectly relies upon premises liability principles to support its motion for summary judgment; and fourth that West Virginia Code §§55-7-28 which reinstates the open and obvious doctrine does not require summary judgment in this case, that is particularly so in view of the fact that the City's erroneously relying upon principles of premises liability, A 637-647.

The Circuit Court granted summary judgment by order entered on June 27, 2022, A 8-28. The Order adopts all of the City's argument in their entirety.

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[1]The photographs in A 109, 110, 111 do not show the wire over which Mrs. Orso tripped. Rather, this view is after the changes made after the injury. The locations of the posts however are at the same spots as they were at the time of injury.

IV.

SUMMARY OF ARGUMENT

The Circuit Court reached erroneous conclusion about the applicable law. Further, the Circuit Court improperly used the open and obvious doctrine as contained in W.Va. Code §55-7-28 to make a determination of a genuine issued material fact.

V.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the Circuit Court relied upon principles of premises liability and reached a fact finding concerning a disputed material fact question Rule 19 applies pursuant to provisions 19(1) and (2).

VI.

ARGUMENT

Introduction

Orders awarding summary judgment are subject to a *de novo* review, Gray v. Boyd, 757 S.E. 2 773 (2014). Rule 56(c) of our Rules of Civil Procedure requires the moving party to establish that there is no genuine issue of any material fact and that the movant is entitled to judgment as a matter of law. Petitioner Orso addresses errors made below concerning both the legal and factual elements.

A.

The Circuit Court Committed Errors about the Applicable Law in the Following Particulars.

i.

West Virginia Code §17-10-17 that provides the basis of liability when a municipality fails to maintain its streets and sidewalks in a reasonably safe condition for travel in ordinary modes, with ordinary care, whether by day or night when injury results therefrom. This is an exception to immunity under W.Va. Code §29-12A-4(c)(3).

Under the caption of "Immunity Overview" the Court below concludes that the Respondent City is immune from this lawsuit because the claims made by Mrs. Orso fail to present an exception to immunity under the provisions of West Virginia Code §29-12A-4. According to the Court's decision this grant of absolute immunity grows out of the specific language which is found in the West Virginia Tort Claims Act, Code §29-12A-4, A 13. However, the exception to immunity is contained in the Circuit Court's order itself in paragraph 15, in that this right to sue exists under 17-10-17 and that falls squarely within 29-12-A-4(c)(3). Subsection (c)(3) excepts liability for injury caused by the negligent failure to keep public sidewalks open, in repair.

> "Except as provided in subsection (c) of this section, a political subdivision **is not liable in damages in a civil action for injury**, death or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function," A 13-14.

The Order which is here being appealed is wrong on its face in the conclusion, A 14; paragraph 16 that there is no duty on the City's part. To the contrary, the duty is quite specific. The exception to immunity exists here as it is simply a matter of reading and then applying the

plain language found in 29-12A-4(c)(3). Negligence involving injury from failing to keep sidewalks in repair is an exception to immunity. The other aspects of this Respondent's "no duty" argument as fully adopted by the Circuit Court in its Order are addressed *infra*.

The evidence which raises a jury question and supports this claim is found in the deposition testimony of Logan Street Commissioner Kevin Marcum, A 580-604. In his deposition Mr. Marcum provided internally contradictory testimony. Mr. Marcum's job for more than a decade has been as *Street Commissioner* for Logan which includes Stratton Street which he testified is under the supervision of the State Department of Highways, A 585. In contradiction, the Mayor of Logan, the Code Enforcer/Fire Chief inspect these sidewalks " a lot," A 586, and Mr. Marcum has accompanied them on such inspections, A 588. "We're out on the streets everyday, Monday through Friday," as they have people sweeping the streets in the morning looking out for people's safety, A 588. That may also include meter readers, A 589. Further, the public record in the form of the Logan Banner newspaper dated April 27, 2018 (approximately 5 months before Mrs.Orso's fall) shows sidewalk repairs being done by the Respondent City of Logan which began April 25th on *Stratton Street* in front of the very Courthouse which is a mere block away from where Mrs. Orso fell on her walk, A 608-609. Mr. Marcum acknowledged his recollection of that repair job, funded in part by City money, A 592. In a 2019 article about Logan's acceptance into the home rule program the Mayor when speaking of the virtues of that program as relates to raising increased revenue mused about being able to answer, among other things, the often ask question of:

> "Why don't you fix this sidewalk? What about these streets?" A 612.

ii.

The ownership of the subject wire loop is a red herring as Mrs. Orso tripped on a sidewalk which the City controlled.

It is an undisputed fact that Mrs. Orso tripped over a wire that was laying across the sidewalk, A 9 "the wire stretched out onto the sidewalk," Findings of Fact paragraph 5, A 596, testimony of Kevin Marcum, and A552 "a stretched out on the sidewalk," testimony of Mrs. Orso. It is settled law that parties may be jointly liable in this kind of case, *Lewis v. City of Bluefield*, 48 F.R.D. 435 (S.D. W.Va. 1969); *Burdick v. City of Huntington,* 57 S.E. 2d 885 (1950)*; Johnson v. City of Huntington*, 95 S.E. 1044 (1918); and *Bowen v. City of Huntington*, 14 S.E. 217 (1891). The photos clearly show without controversy that the post which the wire loosely wrapped around was situated immediately adjacent to the pedestrian sidewalk. As further developed hereinafter when considering Logan City ordinances the City maintained control over the sidewalks, A 107. The fact of City control over sidewalks is likewise confirmed by the deposition testimony of Street Commissioner Kevin Marcum, A 585-592. In arriving at the conclusion that ownership and control of the wire loop is required for any liability to Mrs. Orso to exist the Court ignores the aforementioned evidence concerning control by the City of its sidewalks, A 15-16. Moreover, as addressed in arguments ii and iv the Court is wrong in treating this matter under principles of premises liability rather than negligence. Further, even if the case turns on whether the City "controls" the sidewalk as the Marcum testimony and City ordinances certainly indicate that question is one of fact for the jury to decide. In the instant case the Circuit Court has erroneously decided this fact as if it is one of law. For this reason also the award of summary judgment should be reversed.

iii.

The City ordinances upon which the Court relies do no support the conclusion that the City had no duty to pedestrians who walked on the sidewalk.

In its Order granting Summary Judgment the Court concludes that Logan's city ordinances absolve the City of any liability for negligence on the grounds that any duty to maintain had been transferred to owners of properties which abut or are adjacent to the sidewalks, A 18-22. The ordinances which the Order relies on are Sections 23-7.1 and 29. Those ordinances state the following:

> "Sec. 23-7.1. Duty of property owner.
> It shall be the duty of the owner of any real property abutting on or next adjacent to any sidewalk, footway or gutter, to lay and construct proper sidewalks, and to curb, recurb, pave or repave or repair and constantly keep the same in good repair, clean condition and free from snow, ice, dirt or refuse (6-11-68)."
>
> "Sec. 29. Duty of owner of abutting property with reference to sidewalks.
>
> It shall be the duty of the owner of any real property abutting on or next adjacent to or on any sidewalk, footway, or gutter, to lay and construct proper sidewalks, and to curb, recurb, pave or repave, or repair, and keep the same in constant good and clean condition in the manner and within the time required by the council. And if any owner of any such real estate shall fail or refuse to lay and construct such sidewalks, and to do such curbing, recurbing, paving, repaving, or repairing, or to keep the same constantly in good condition and clean, in the manner and within the time required by the said council, it shall be the duty of the said county to cause the same to be done at the expense of the city, and to assess the amount of such expense against said property, and upon the owner thereof, and the amount so assessed against said property shall constitute a lien thereon and shall be collected by the city treasurer in the same manner and at the same time that city taxes on property assessed within the city are collected."

A careful reading of the above ordinances especially when read along with other ordinances contained in the Logan City Code indicate that these ordinances are intended to

address owner's obligations to repair or construct abutting sidewalks. However, in reality as previously described in the Kevin Marcum testimony the City maintains ultimate control over the sidewalks. The ordinances conclusively demonstrate that fact. Section 23-7.2 provides that it is the mayor's duty to report defective sidewalks to City Council, A 616. Council for its part under Section 23-7.3 then orders the adjacent owner "to lay, construct, reconstruct, replace, curb, recurb, pave, repave or repair such sidewalk as specified in the mayor's report," to be completed within 20 days. According to the City Code the procedure takes the form of a show cause order which, if not timely obeyed, can result not only in a hearing before Council but also having the work being done by the City which is followed by an assessment and lien, A 617. Perhaps even a lawsuit will be brought under Section 23-7.8, A 618.

The City Code provide for elaborate requirements, specifications and procedures involving sidewalks, see A 618-634. In fact City Code Section 23.-16 allows for removal of a sidewalk, or even removal of a portion of a sidewalk, if it is determined to be unsuitable and unfit by Logan's City Engineer, A 621. In reality and in practice Logan does "own" its sidewalk, if not by title but by its actual legal authority. This is most certainly a reflection of the amount of control of sidewalks. This reflects a case when words say one thing and the reality is something entirely different.

iv.

The Circuit Court's reliance upon
principles of premises liability is misplaced.

The Court below concludes that the Respondent City is entitled to summary judgment because Mrs. Orso has failed to show that the City had any prior knowledge of the trip hazard

which existed on the sidewalk, in question, A 22-25. In this regard the City and the Court below relies as supporting authority this Court's decision in *Wheeling Park Com'm v. Dattoli*, 787 S.E. 2d 546 (2016). Such reliance its misplaced.

The key to understanding the Circuit Court's error here is found in paragraphs 29 and 30 in which the Court references its reliance on premises liability, A 22. See *Carrier v. City of Huntington*, 501 S.E. 2d 466 (W.Va. 1998) and *Wheeling Park Com'n v. Dattoli*, 787 S.E. 2d 546 (W.Va. 2016) in which this Court clarified its holding in *Carrier*.

In *Carrier* the Court held in no uncertain terms that the City of Huntington's liability was governed by W.Va. Code §17-10-17:

> "When construing W.Va. Code §29-12-A-4(c)(3) or W.Va. Code §17-10-17 this Court *has never applied premises liability principles*," 501 S.E. 2d at 469. (Italics added).

When the appellees in *Dattoli* raised the foregoing holding in *Carrier* the Court did not reject or overrule *Carrier's* holding, rather the Court pointed out that while common negligent principles do apply, premises liability principles do not:

> "When this Court opined in *Carrier* that ordinary premises liability principles do not apply to a claim brought under W.Va. Code §29-12A-4(c) we were referring to the fact that the law imposed different duties of care on possessors of premises with regard to whether a person on private property is an invitee, licensee, on tresspasser," 787 S.E. 2d at pp. 552-553. See also discussion in Watkins supra concerning consideration of negligence and jury determination of issues, and open and obvious argument.

In the case at bar, the Court relies upon premises liability cases, not the more common garden variety negligence actions and principles. The sole exception is *Dattoli* and in *Dattoli* was not suing a municipality governed by §17-10-17. Mrs. Orso here does not argue that there is no

requirement that she 1) establish a duty 2) a negligent breach of that duty, and 3) proximate causation of damages resulted therefrom. The Petitioner submits that the duty as previously identified exists, it was breached, and there are resulting damages therefrom in this case. Moreover, particularly genuine issues of material fact about those issues of negligence and causation remain.

A careful reading of *Dattoli* reveals that nowhere in that decision is W.Va. Code §17-10-17 referenced with the sole exception being footnote 7 wherein the Court plainly emphasizes the differences between *Carrier* and *Dattoli*:

> ". . . we decline to rule that imposing 'negligence' standard on local governments under W.Va. Code §17-10-17, permits this Court to apply common principles developed under premises liability."

In absolute disregard for this precedent the Circuit Court adopts premises liability principles by awarding summary judgment against Mrs. Orso.

The Court refers to and adopts as findings Mr. Marcum's testimony about being uninformed about the dangers of a wire loosely placed at the edge of a downtown walkway beside not one, but two churches and across from apartments, A 23-24. What the balance of the Street Commissioner's testimony demonstrates is that the City of Logan disregarded their duties involving sidewalks because as Mr. Marcum explained it the:

> "Department of Highways owns Stratton Street and Main Street," and as regards the question of his duties for City sidewalks he has "None in that area. Property owners are in charge of sidewalks," A 23 paragraph 26.
>
> . . . .
>
> "it's always been the code." Depo. p. 12.

That testimony contradicts Marcum's other testimony about the fire chief and mayor, inspections and the ordinances as well. However, the "We have no responsibility" argument would allow adjacent landowners to put a wire across their portion of the sidewalk.

In summary, these conclusions by the Court below are flawed and should be rejected and reversed by this Court as unsupported by Court precedent.

v.

The Circuit Court improperly reached findings of disputed fact critical to any decision on the merits of the case.

The Circuit Court concludes its Order granting Summary Judgment with these conclusions:

- The Court finds that it is undisputed that Plaintiff saw the wire loop immediately before she fell but did not see the wire the first time she passed it during her walk, A 27, paragraph 37.

- The Court finds it is beyond genuine dispute that, had the Plaintiff looked she could have seen it earlier. . .. drawing all inferences favorable to the Plaintiff, the Court concludes the open and obvious doctrine bars her claim, Id. paragraph 38.

Parsing the above, the foregoing are fact findings, not law findings. Moreover, they are disputed and they are material to the outcome of the case. A look at what deposition testimony the Court relied on, A 26, indicates that Mrs. Orso *does not say* as the Court concludes that "it is undisputed that [Mrs. Orso] saw the wire loop." In fact the converse is true. She saw it only after her right foot was caught in the wire loop when she fell. It was then too late.

If fact findings such as this are permitted to be made by a Court under the auspices of W.Va. Code §55-7-28 a dangerous precedent will have been established. Here it is improper for the Court to infer as an undisputed fact that just because Mrs. Orso had passed the same spot

previously that she had actually noticed the wire loop or given it any thought at all-and in testimony she denied seeing it until it was wrapped around her right foot. It is highly improper under these disputed facts for a Court to deduce as an absolute disqualifying fact knowledge of something which the claimant denies that when such a finding renders a claimant negligent as a matter of law. But that is what the Order does.

This conclusion conflicts with Court precedent that specifically hold that the City can be held liable *even when they are without notice of a defect at the time of injury*, Burcham v. City of Mullins, 83 S.E. 2d 505 (W.Va. 1954); *Watkins v. City of Clarksburg*, 155 S.E. 2d 1 (W.Va. 1972). *Watkins* also holds that the pedestrian is not required to be looking down so long as she acts consistent with what an ordinary reasonable person would do. The City's liability occurs when, as is the case here, the City chooses to be negligently ignorant of the defect or simply saying that no responsibility exists. The negligence is one of omission, a disregard of responsibility.

VII.

CONCLUSION

For the foregoing reasons the Petitioner prays that this Court review and reverse the Order of Summary Judgment. Remand the case to the Circuit Court of Logan County, West Virginia.

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CERTIFICATE OF SERVICE

The undersigned, James M. Cagle, counsel for the Petitioner, Denise Orso, does hereby certify that a true and correct copy of the ***Brief of Petitioner*** was served via e-filing through File & ServeXpress to Duane J. Ruggier, II, Esq., Evan S. Olds, Esq. counsel for Respondent City of Logan, WV, on this the 27th day of October, 2022.

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