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Trip-and-fall case proceeds

Appeals Court: half-inch protrusion enough for jury

By Pat Murphy

An elderly woman who tripped and fell on a street in Cambridge that was undergoing resurfacing is entitled to a jury trial on her negligence claim, even though the defendant construction contractor asserted that the half-inch defect that allegedly caused the accident was "insubstantial" as a matter of law, the Appeals Court has decided.

In September 2017, plaintiff Joan Arruda tripped and fell in a crosswalk on Thorndike Street in Cambridge. The plaintiff claimed that her foot caught on a granite block that protruded a half inch above the first of two courses of asphalt that defendant Newport Construction had laid in repaving the street.

The defendant moved for summary judgment in response to the plaintiff's negligence complaint, arguing that the half-inch defect was "too minor or insubstantial" to support a negligence claim. Superior Court Judge Christopher K. Barry-Smith granted the defendant's motion, but a unanimous Appeals Court panel reversed.

"Rather than focusing exclusively on the height of the protrusion, the 'necessary inquiry is whether the defect is so minor or insubstantial that a reasonable person would not have anticipated injury and guarded against it,'" Judge Christopher P. Hodgens wrote for the panel. "This broader inquiry, under the reasonable person standard, focuses not just on the height of the defect but also on its origin, location, and duration."

The 10-page decision is *Arruda v. Newport Construction Corp.*, Lawyers Weekly No. 11-076-23.

Robert I. Feinberg

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'VERY TRIABLE CASE'

The plaintiff is represented by Brookline attorneys Robert I. Feinberg and Colleen M. Santora. Feinberg said there has been a "significant increase" in motions for summary judgment over the past several years.

"I hope this appellate decision puts the brakes on defense firms who have brought these motions," he said.

According to Feinberg, an important aspect of the case is that while it involved an injury that occurred on a public way, the negligence claims were against a private contractor rather than a municipal defendant.

"There was a temptation to conflate the standard for liability against municipalities with the common law standard applicable to private entities," Feinberg said. "The Appeals Court decision was clear on the distinction between the two types of defendants. The policy considerations are very different."

Though there is precedent for the proposition that some variation in elevation may be too minimal to support liability under common law, those cases are distinguishable from Arruda, Feinberg said.

"According to the Arruda opinion, the necessary focus against a private contractor is on 'the reasonable man' standard, and that embraces many factors, including the duration of the defect's existence, not simply the size of the elevation," he said. "To the extent we now have clarification in this area of premises liability, I am gratified."

Defense counsel did not respond to a request for comment.

In its brief on appeal, the defendant argued that case law absolving municipalities of liability for minor defects in cases brought under G.L.c. 84, §15 ("Personal injuries or property damage from defective ways") was instructive to the case at hand.

Colleen M. Santora

"[P]olicy considerations should still be made in this case as any greater burden placed on the contractor than the City would inevitably result in an undue burden passed onto the municipality via a higher contract price," defense counsel wrote. "Furthermore, a conclusion that such a trivial change in elevation is actionable would result in an unreasonable burden applicable to all roadways in the Commonwealth."

Boston personal injury attorney Nicholas B. Carter said he sees Arruda as standing for the basic proposition that the vast majority of negligence cases raise questions that should be decided by a jury.

"For an elderly person, falling on concrete or asphalt can result in life-changing injuries," Carter said. "The good thing for the plaintiff here, which makes it a very triable case, is that the construction company knew of the defect and had plans to correct it but delayed for no good reason."

Also weighing against the defendant is the fact that the case was brought by a sympathetic plaintiff, Carter said.

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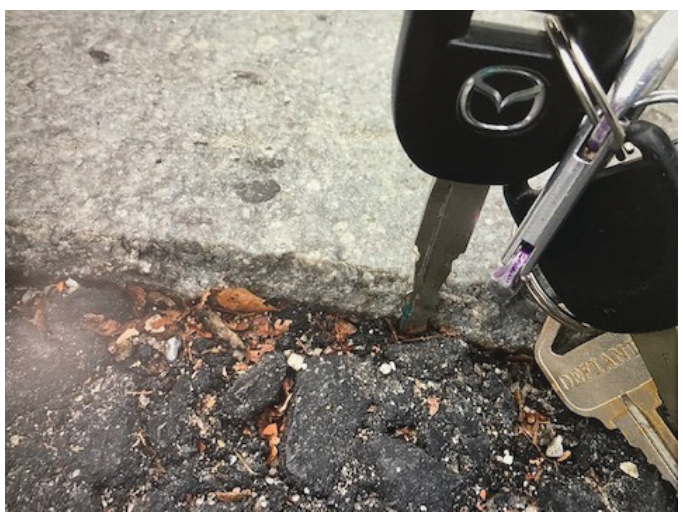
"If you're injured walking with your granddaughter, that increases the sympathy factor," he said. "Grandparents and grandchildren walking together is something people want to see happen in society. [Joan Arruda] won't be viewed as a distracted, blameworthy plaintiff for that reason."

WORK ZONE INJURY

According to court records, the city of Cambridge contracted with the defendant to resurface Thorndike and three other streets. Prior to the plaintiff's injury on Sept. 8, 2017, the defendant dug out the existing asphalt roadway and cobblestone base of Thorndike, laid a new gravel base, and covered the base with a "binder" course of asphalt.

The plaintiff caught her foot on a protruding granite block that was part of the decorative walkway for the crosswalk where her fall occurred. The binder course laid by the defendant left an approximately half-inch lip between the asphalt surface and the top of the protruding granite block.

The surface of the roadway was intended to be flush with the top of the granite block once the contractor laid a second course of asphalt in spring 2018. Meanwhile, the contractor took no steps to post warning signs or traffic cones to alert pedestrians of the hazard allegedly posed by the granite protrusion.



A photograph taken by the plaintiff a week after her accident shows the half-inch lip between the asphalt surface and the top of the protruding granite block.

At approximately 6 p.m. on Sept. 8, 2017, the plaintiff was walking with her granddaughter to attend a neighborhood festival. The two diagonally crossed Thorndike into the crosswalk, where the plaintiff allegedly caught her foot on the protruding granite margin and fell.

In April 2018, the plaintiff sued the defendant in Middlesex Superior Court, claiming she suffered a serious neck injury that required surgery. The plaintiff alleged that the construction company had negligently maintained the roadway and negligently failed to provide a warning of the defect.

In granting the defendant's motion for summary judgment on June 16, 2022, Barry-Smith wrote that in "the context of resurfacing a street, that one-half inch difference in elevation is sufficiently small that a reasonable person — namely, the street contractor — would not anticipate injury and guard against it."

JURY QUESTION

Finding error in the lower court's decision to grant the defendant's motion for summary judgment, the Appeals Court determined that the defendant had failed to demonstrate that the plaintiff had no reasonable expectation of proving an essential element of her negligence case.

As to the existence of a duty of care, Hodgens wrote that the record "shows that Newport was a contractor in the process of reconstructing Thorndike Street. As a matter of law, Newport owed a duty of care to pedestrians, like Arruda, who walked across that street and encountered the construction defect."

For purposes of responding to the defendant's motion for summary judgment, Hodgens wrote that the plaintiff had sufficiently established the remaining elements of her negligence claim, including breach of duty, damages and causation.

In terms of breach of duty, the panel pointed to evidence that the defendant contractor knew about the protruding lip of the granite margin and planned to eliminate it in the spring with the laying of the final course of asphalt that would make the roadway surface flush with the granite.

"At the time of the incident, the granite protrusion lacked any traffic cones, warning signs, or paint," Hodgens wrote. "As Newport's construction manager put it, he believed paint was not necessary because the protrusion was 'not in a pedestrian path of travel.'"

Given the plaintiff's allegations that she and her granddaughter walked diagonally across Thorndike into the crosswalk where Arruda caught her foot on the protruding granite block, fell and sustained injuries, Hodgens noted that jurors "need to sift through these facts and weigh the evidence to decide whether Newport's conduct amounted to a breach of its duty of care and caused the injury to Arruda."

Turning to directly address the defendant's argument that the half-inch defect alleged by the plaintiff was too trivial as a matter of law to support a claim of negligence, Hodgens cited the Supreme Judicial Court's 1985 decision in *Doherty v. Belmont*.

In Belmont, the SJC recognized that at common law "a defect may be so trivial that it could not possibly constitute negligence," but it added that the "necessary inquiry is whether the defect is so minor or insubstantial that a reasonable person would not have anticipated injury and guarded against it."

The panel concluded that the plaintiff's claims met that standard.

"According to [the defendant's] construction manager, a final layer of asphalt could have been applied over the binder layer 'the next day,' but 'the scope of the project' called for leaving the protrusion in place for a 'longer duration' until the spring. In the interim, the protrusion lacked any warning of its unfinished, defective condition at the time of Arruda's injury," Hodgens wrote.

"Based on the record here, a jury could conclude that Newport was aware, or should have been aware, of the defect and should have anticipated a potential injury, but 'nonetheless failed to take steps to eliminate this risk' through adequate warnings or other remedial action," Hodgens said.

The panel further found distinguishable cases cited by the defendant involving municipal liability for minor defects.

"Municipal defendants are aided by a statute that limits liability for injuries resulting from defects in public ways," Hodgens noted. "That statute embodies the public policy that municipalities 'should not be liable for slight or trivial imperfections in public ways which might be caused by weather conditions or traffic patterns.' Newport, however, is not a municipality subject to the road-defect statute, and the alleged defect here was caused by Newport, not weather conditions or traffic patterns."

Arruda v. Newport Construction Corp.

THE ISSUE: Is an elderly woman who tripped and fell on a Cambridge street that was undergoing resurfacing entitled to a jury trial on her negligence claim, notwithstanding the defendant construction contractor's argument that the half-inch defect that allegedly caused the accident was "insubstantial" as a matter of law?

DECISION: Yes (Appeals Court)

LAWYERS: Robert I. Feinberg and Colleen M. Santora, of Feinberg & Alban, Brookline (plaintiff)
Steven C. Kennedy of Kennedy & Kush, Concord (defense)