IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

FILED

January 14, 1997

Cecil W. Crowson
Appellate Court Clerk

REBECCA TREZEVANT HUTTER,	)	
	)	
Plaintiff/Appellant,	)	Shelby Law No. 53098
	)	
vs.	)	
	)	
CITY OF MEMPHIS,	)	Appeal No. 02A01-9507-CV-00156
	)	
Defendant/Appellee.	)	

APPEAL FROM THE CIRCUIT COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE

THE HONORABLE CHARLES A. SEVIER, SPECIAL JUDGE

For the Plaintiff/Appellant:	For the Defendant/Appellee:
Connie Westbrook Memphis, Tennessee	Monice Moore Hagler JoeDae L. Jenkins Memphis, Tennessee

AFFIRMED

HOLLY KIRBY LILLARD, JUDGE

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

ALAN E. HIGHERS, J.

OPINION

This is an action under the Governmental Tort Liability Act ("GTLA") brought by Plaintiff Rebecca Trezevant Hutter ("Hutter") against Defendant City of Memphis ("City"). Hutter stepped off a public road and sustained personal injuries. She sought damages from the City alleging that the City negligently repaved and maintained the road, creating a dangerous condition. The trial court granted summary judgment to the City, finding no dangerous condition. Hutter appeals this decision. We affirm.

At approximately 6:30 p.m. on April 14, 1992, while it was still daylight, Hutter, seventy-six years old, and two of her friends arrived by automobile at the Malone residence at 165 Rose Road in Memphis, Tennessee. Hutter had visited the Malones on many occasions. The driver parked the car on the street abutting 165 Rose Road, with the driver's side wheels along the street and the passenger's side wheels on the grass. Hutter exited the car from the passenger side, stepped onto the grass, and walked across the front of the car to the street. From the street, she walked to the end of Mrs. Malone's driveway and then up the driveway to the house.

About an hour and a half later, after it had become dark outside, Hutter and her friends left the Malone House. Hutter walked down the driveway to the street and then walked along the surface of the street toward the car. As Hutter stepped off the street and onto the grass to return to the passenger side of the car, she stepped into a depression that she claimed was unexpected. She lost her balance and fell backwards onto the pavement. Hutter sustained serious personal injuries from the fall.

Rose Road is a residential street maintained by the City. It has no curbs, gutters, or "no parking" signs. The City repaved Rose Road in 1986, placing a one and a half inch layer of asphalt over the already existing asphalt. An overlay of this width is required for structural support. The City inspected Rose Road after it was resurfaced and determined that it met the City's criteria for safety. The City's manager of street of maintenance, Richard Andrus, Jr. ("Andrus"), noted that the surface of the road was smooth and that there were no problems with the asphalt.

Hutter contends that the City's repaving created an abrupt three to four inch drop-off from Rose Road to the grass. She asserts that this drop-off caused her fall. Hutter also claims that the street lighting was inadequate.

After the City received notice of Hutter's fall, Andrus inspected the area on Rose Road where

Hutter fell. Instead of a three to four inch drop-off, Andrus found only a slight incline, with the street gradually sloping into the grass. Andrus testified that the City's policy is to pave only to the edge of the road, not shoulders or roadside ditches. He stated that Hutter's complaint was the first record that City had of any problems with that area of Rose Road

Hutter filed this action against the City pursuant to the GTLA. Tenn. Code Ann. §§ 29-20-201 to 29-20-407(1980 & Supp. 1996). Both parties moved for partial summary judgment on the issue of liability. After a hearing, the trial court made the following findings: (1) there was no unsafe, defective, or dangerous condition along Rose Road; (2) given Hutter's age, she failed to exercise due care by not watching where she was walking so as to avoid her fall; (3) it would be unduly burdensome and economically infeasible for City to post warning signs throughout Memphis on streets like Rose Road; and (4) no genuine issue of material fact existed. Consequently, the trial court granted summary judgment in favor of City. Hutter appeals the decision of the trial court.

Summary judgment is proper when the movant demonstrates that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.03. On a motion for summary judgment, courts must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence. ***Byrd v. Hall***, 847 S.W.2d 208, 210-11 (Tenn. 1993). Consequently, on appeal, Hutter's contention of a three to four inch drop-off from Rose Road to the grass will be accepted as true, although it is disputed by the City. Summary judgment is only appropriate when the case can be decided on the legal issues alone. ***Id.*** at 210. Because only questions of law are involved, there is no presumption of correctness regarding a trial court's grant of summary judgment. ***Johnson v. EMPE, Inc.***, 837 S.W.2d 62, 68 (Tenn. App. 1992). Therefore, our review of a trial court's order granting summary judgment is ***de novo*** on the record before this Court. ***See Carvell v. Bottoms***, 900 S.W.2d 23, 26 (Tenn. 1995).

The GTLA was discussed at length in ***Helton v. Knox County***, 922 S.W.2d 877 (Tenn. 1996). Under the Act, governmental entities are generally immune from liability for injuries resulting from its activities when "engaged in the exercise and discharge of any of their functions, governmental or proprietary." Tenn. Code Ann. § 29-20-201(a) (1980 & Supp. 1996). The Act then removes immunity under certain circumstances. The removal of immunity in the GTLA "is in derogation of common law and must be strictly construed." ***Helton***, 922 S.W.2d at 882.

At issue in this case are Tennessee Code Annotated § 29-20-203, the removal of immunity for injury caused by the dangerous condition of a street, and Tennessee Code Annotated § 29-20-205, the removal of immunity for an employee's negligent act. Hutter contends that the drop-off from Rose Road to the grass was a "dangerous condition" and that the City was negligent in creating the drop-off. The issue of whether the drop-off was a "dangerous condition" will be discussed first.

Section 29-20-203 of the Tennessee Code Annotated provides:

> (a) Immunity from suit of a governmental entity is removed for any injury caused by a defective, unsafe, or dangerous condition of any street, alley, sidewalk or highway, owned and controlled by such governmental entity . . .
>
> (b) This section shall not apply unless constructive and/or actual notice to the governmental entity of such condition be alleged and proved in addition to the procedural notice required by § 29-20-302 [repealed]. . .

Tenn. Code Ann. § 29-20-203 (1980 & Supp. 1996). Under this section, there is no exception to the removal of immunity for discretionary functions. ***Helton***, 922 S.W.2d at 885.

Whether a particular street is "dangerous" under Tennessee Code Annotated § 29-20-203 is a question of fact. ***Helton***, 922 S.W.2d at 882. A city has "an absolute duty to exercise reasonable care to keep its streets and sidewalks safe for use in the ordinary modes by persons exercising reasonable care." ***City of Winchester v. Finchum***, 201 Tenn. 604, 609, 301 S.W.2d 341, 343-44 (1957). A city is not required to maintain its streets and sidewalks in perfect condition, ***Batts v. City of Nashville***, 22 Tenn. App. 418, 425-26, 123 S.W.2d 1099, 1103-04 (1938), because to do so would make a city the insurer of its public ways. ***Swain v. City of Nashville***, 170 Tenn. 99, 101, 92 S.W.2d 405, 406 (1936). A city is not liable for slight defects or trivial depressions in its public streets or sidewalks, however, the height or depth of a defect is not the dispositive test for liability. ***Batts***, 22 Tenn. App. at 424-26, 123 S.W.2d at 1102-04.

A municipality has no duty to guard against a defect that cannot be reasonably foreseen to cause injury to someone exercising reasonable care. ***See, e.g.***, ***City of Memphis v. McCrady***, 174 Tenn. 162, 165-66, 124 S.W.2d 248, 249 (1938) (finding no duty to guard against a two and half inch rise in block of concrete in a sidewalk); ***Batts***, 22 Tenn. App. at 425, 123 S.W.2d at 1103 (finding no duty to prevent a hole in a sidewalk measuring, in parts, two feet wide and three inches deep). To impose liability, the condition "must be dangerous according to common experience." ***Rye v. City of Nashville***, 156 S.W.2d 460, 462 (Tenn. 1941) (citations omitted). The condition must be so dangerous that a reasonably prudent person would have anticipated harm to come as a result. ***Batts***,

22 Tenn. App. at 425, 123 S.W.2d at 1103; ***see also Rye***, 156 S.W.2d at 462; ***City of Knoxville v. Hood***, 20 Tenn. App. 220, 222, 97 S.W.2d 446, 447 (1936). If the probability of injury to someone exercising reasonable care is so remote that it would be burdensome to require that a city prevent it, then liability will not be imposed. ***Rye***, 156 S.W.2d at 462.

In this case, Hutter presented evidence that there was a three to four inch drop-off from Rose Road to the adjoining grass. Rose Road has no curbs or gutters and there are no signs warning of the drop-off. It is undisputed that the report of Hutter's injury was the first complaint the City had received about that area of the road. The absence of accidents at a particular location is not dispositive, but is an element in the determination of whether it presents a dangerous condition. ***Helton***, 922 S.W.2d at 884.

Under these circumstances, the City could not have reasonably foreseen that a person exercising due care would be injured by a three to four inch drop-off from the road to the adjoining grass. The alleged drop-off is not so dangerous that a reasonable person would have anticipated harm to come as a result. Consequently, City did not owe Hutter a duty to feather the asphalt from the road to the street because the alleged defect is not dangerous "according to common experience." The trial court is affirmed on this issue.

Hutter's complaint also alleges that the City was negligent in repaving Rose Road so as to create a three to four inch drop-off from the road to the grass. Since the drop-off was not a "defective, unsafe or dangerous condition" under Tennessee Code Annotated § 29-20-203, it is doubtful that the creation of the drop-off would be deemed a negligent act. However, we will examine the facts under the pertinent statute.

Under Tennessee Code Annotated § 29-20-205:

> Immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment except if the injury:
>
> > (1) Arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused. . . .

Tenn. Code Ann. § 29-20-205(1) (1980 & Supp. 1996). Therefore, if the condition of the street is deemed dangerous under Tennessee Code Annotated § 29-20-203, there is no exception for a discretionary function. ***Helton***, 922 S.W.2d at 885. However, if the injury results from an act of

negligence by a City employee, there is an exception to the removal of immunity if the injury arises out of the exercise of a discretionary function. ***Id.*** The definition of the term "discretionary function" was discussed by the court in ***Helton***:

> We defined the "discretionary function" exception in *Bowers v. City of Chattanooga*, 826 S.W.2d 427 (Tenn. 1992). In *Bowers*, we adopted the "planning-operational test" to aid in determining whether a particular act was a discretionary function. Under this test, "decisions that rise to the level of planning or policy-making are considered discretionary acts which do not give rise to tort liability." 826 S.W.2d at 430. In contrast, decisions that are merely "operational" or implement prior planning decisions are not "discretionary functions" and may subject the government to tort liability. *Id.* at 430-31. "Planning" decision are those "involving the formulation of basic policy characterized by official judgment, discretion, weighing of alternatives, and public policy choices." *Voit v. Allen County,* 634 N.E.2d 767, 769-70 (Ind. Ct. App. 1994).

Id.

In this case, the City presented undisputed testimony from Andrus that the City had a practice of repaving residential roads with an "inch-and-a-half" of asphalt, in order to get sufficient strength and to prevent frequent repaving. Andrus also testified that the resurfacing material is brought to the prior edge of the road, with no paving on shoulders and ditches, so as not to impede existing water flow. Andrus's undisputed testimony indicates that the decisions that resulted in the alleged drop-off from Rose Road to the adjoining grassy area were the result of "planning" decisions involving "official judgment, discretion, weighing of alternatives and public policy choices." ***Helton***, 922 S.W.2d at 885 (quoting ***Voit v. Allen County***, 634 N.E.2d 767, 769-70 (Ind. Ct. App. 1994)). Therefore, the decisions that led to the drop-off that allegedly caused Hutter's injury were the exercise of a "discretionary function." Tenn. Code Ann. § 29-20-205(1). Consequently, even if creating the drop-off from Rose Road to the adjoining grass was a "negligent act," the City's governmental immunity is not removed for this act.

The decision of the trial court is affirmed. Costs are taxed to Appellant, for which execution may issue if necessary.

HOLLY KIRBY LILLARD, J.

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

ALAN E. HIGHERS, J.