Case Name:

Labancz v. Reeves

Between
Maria Rose Labancz and Imre Labancz, Plaintiffs, and
Michael John Reeves, Norma Patricia Reeves and the
Corporation of the City of Toronto, Defendants

[2007] O.J. No. 4848

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41 M.P.L.R. (4th) 29

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Court File No. 04-CV-2701813CM1

Ontario Superior Court of Justice

B.A. Conway J.

Heard: December 7, 2007.
Judgment: December 12, 2007.

(58 paras.)

Tort law -- Negligence -- Causation -- Motion by defendants, the Reeves, for summary judgment dismissing action dismissed -- Plaintiff claimed that her slip and fall on icy patch of municipal lane was caused by ice buildup from runoff from Reeves' downspout -- Court found there was a genuine issue for trial, as questions remained regarding what caused ice buildup, and whether debris was carried from Reeves' property to lane, thereby impeding drainage -- Whether or not Reeves, non-resident landlords, ought to have known about icy conditions would depend on findings of fact as to what caused conditions, which had to be determined at trial.

Tort law -- Nuisance -- Emissions and contamination -- Injury to person -- Sidewalks -- Water -- Motion by defendants, the Reeves, for summary judgment dismissing action dismissed -- Plaintiff claimed that her slip and fall on icy patch of municipal lane was caused by ice buildup from runoff from Reeves' downspout -- Court found there was a genuine issue for trial, as questions remained regarding what caused ice buildup, and whether debris was carried from Reeves' property to lane, thereby impeding drainage -- Whether or not Reeves, non-resident landlords, ought to have known

about icy conditions would depend on findings of fact as to what caused conditions, which had to be determined at trial.

Civil procedure -- Judgments and orders -- Summary judgments -- To dismiss action -- Whether genuine issue for trial -- Motion by defendants, the Reeves, for summary judgment dismissing action against them dismissed -- Plaintiff claimed that her slip and fall on icy patch of municipal lane was caused by ice buildup from runoff from Reeves' downspout -- Court found there was a genuine issue for trial, as questions remained regarding what caused ice buildup, and whether debris was carried from Reeves' property to lane, thereby impeding drainage -- Trier of fact would need to hear and assess witnesses' evidence and possibly draw inferences, which was not appropriate on a summary judgment motion.

Motion by defendants, the Reeves, for summary judgment dismissing action against them -- Plaintiff brought action for damages for personal injuries against City and Reeves after plaintiff slipped and fell on patch of ice in a municipal lane -- Lane abutted Reeves' property, which had a downspout that drained on to lane -- Lane was graded in two directions toward a catch basin, which was to permit water to drain toward catch basin -- Plaintiff claimed water from Reeves' downspout contributed to buildup of ice over course of winter -- As evidence, plaintiff presented her own affidavit attesting to icy surface, and expert reports which indicated that deficiencies in surface of lane would have impeded proper drainage of water from Reeves' downspout -- Reports also indicated water from Reeves' property could have flowed on to lane by virtue of damaged curb between their property and lane, and that sediment and debris from Reeves' property may also have flowed on to lane, thereby impeding drainage -- Plaintiff also presented statements from two witnesses, attesting to icy condition of lane -- At time of incident Reeves' property was rented out -- HELD: Motion dismissed -- Plaintiff's expert reports contained serious deficiency in that experts assumed a patch of asphalt in area of incident had been put there after incident to remedy defects in surface, when in fact patch was there before incident -- However, Court could not say for certain that reports combined with other evidence did not raise genuine issue for trial, even with incorrect assumption -- Questions remained as to role played by downspout in incident, if any, and whether debris was carried from Reeves' property to lane, thereby impeding drainage -- This would need to be proved at trial, and it was premature at this point to deny plaintiff right to prove case at trial -- Trier of fact would need to hear and assess witnesses' evidence and possibly draw inferences, which was not appropriate on a summary judgment motion -- It could not be readily determined at this stage whether Reeves ought to have known that anything emanating from their property contributed to icy conditions, given they were not living at property -- This would depend on findings of fact as to what actually caused ice to form, which had to be made at trial.

Statutes, Regulations and Rules Cited:

Rules of Civil Procedure, Rule 20.06(1), Rule 57.01(1)

Counsel:

Jeffrey Preszler, for the Plaintiffs.

Martin P. Forget, for the defendants Reeves, moving parties.

Sam Hill, for the City of Toronto.

REASONS FOR DECISION

B.A. CONWAY J.:--

Introduction

1 On her way to work the morning of February 2, 2004, Maria Labancz slipped and fell on a patch of ice in a municipal lane way abutting the Reeves' property at 3 Hillsboro Avenue. She claims that she sustained injuries as a result of the fall. She and Mr. Labancz have sued both the Reeves and the City of Toronto in negligence for damages arising from the incident.

2 The Reeves have moved for summary judgment dismissing the claim against them. They argue that there is no genuine issue for trial since the plaintiffs have no evidence that anything from the Reeves' property caused the ice to form on the lane. They also state that the plaintiffs cannot establish that the Reeves knew or ought to have known that anything on their property created a dangerous condition that could injure someone using the lane.

3 The issue before me is whether the Reeves can meet the test of demonstrating that there is no genuine issue for trial under Rule 20 sufficient to dismiss the claim against them. The City of Toronto, co-defendant, has opposed this summary judgment motion, as have the plaintiffs.

Factual Background

4 The Reeves owned the house from 1988 to September 2005. They had not lived in the house since 1995. The house was occupied by a tenant at the time of the incident.

5 The lane runs to the east of the house. In between the lane and the house is a concrete curb. The Reeves do not own the lane or the curb. They state that they have never assumed control over its condition. The City has admitted that it owned and had jurisdiction over the lane and the curb.

6 Behind the house is the backyard, which is surrounded by a fence. At the time of the incident, there was a downspout which protruded through the fence. The downspout was there when the Reeves purchased the house. Other houses on the lane also had downspouts which drained into the lane at the time of the incident. The downspout on the Reeves' property was removed from the fence and relocated on the brick wall of the house some time after the incident.

7 The lane is graded in two directions towards a catch basin. This grading is designed to permit surface water to drain towards the catch basin in the lane.

8 In the lane immediately to the east of the downspout is a rectangular patch of asphalt. The expert reports assumed that the patching was done after the incident to fix surface irregularities in the lane (I will discuss this further below). In fact, the patch had been done in 2002 and was there at the time of the incident.

9 Ms. Labancz states in her affidavit that she fell on a "large bumpy patch of ice located on the lane way directly adjacent to an eaves trough downspout that was protruding through the wood fence located on the Defendants Reeves' property". She says that the area where she slipped and fell was approximately one metre away from the side of the fence and one metre away from the downspout. On cross-examination, she said that she did not check the downspout after she fell or notice if

there was ice or water running from the downspout to the lane at the time. However, she attaches photographs to her affidavit taken on December 30, 2004 to show that the Reeves' downspout discharged water onto the lane and contributed to the formation of bumpy ice similar to what she encountered in February 2004.

10 Ms. Labancz states that she had walked through the lane way on many occasions on her way to work during the winter before then and believed that there was significant build up of ice in the area where she fell. She says she believes that water from the Reeves' downspout and property contributed to the buildup of ice over the course of the winter.

11 Ms. Labancz was walking with a friend, Ms. Beata Hirosik, at the time she fell. Ms. Hirosik gave a statement describing the incident. She did not make any mention of the downspout or the condition of the lane other than "the street beside 1 Hillsborough [sic] Avenue was not cleared and was covered with ice and fresh snow".

12 Police Constable Trevor Edwards, of the RCMP, was driving by at the time and drove Ms. Labancz to her doctor's office after she fell. He gave a statement dated March 1, 2005 in which he described what he had seen. His only reference to the condition of the lane was "down the lane way I saw two ladies walking on an icy portion of the road". In a subsequent letter to Ms. Labancz' counsel dated December 5, 2006, he stated that the area of the lane way where she fell was completely covered by ice. He said he did not notice the downspout.

13 Both parties have provided weather reports for the period preceding and at the time of the incident setting out the temperature and amount of precipitation which had fallen.

Expert Reports

14 The plaintiffs have obtained 3 reports from Kleinfeldt Consultants Ltd., which conducted an independent engineering assessment of the slip and fall accident. Mr. McGlone, the author of the reports, swore an affidavit for the motion summarizing his findings in the reports.

15 All three reports contain the erroneous assumption that the area of the lane covered by the patch was in a deteriorated state at the time of the accident and that the patch was done on July 12, 2006.

16 The first two reports, dated August 22, 2006 and June 5, 2007, refer to surface irregularities which prevented proper drainage on the lane. They conclude that water had accumulated in a depressed or deteriorated area in the lane and that under freezing conditions this resulted in a buildup of ice which produced a slip and fall hazard.

17 The first two reports conclude that it is probable that there was water flow from the downspout on the Reeves' property which contributed to the accumulation of water in the lane; however, the second report states that ice would not have developed in the absence of surface irregularities which impeded proper drainage.

18 The reports also refer to damage to the curb between the house and the lane. As a result of this damage to the curb, they state that water from the soil on the property west of the curb flowed intermittently and irregularly towards the lane.

19 The reports also observe that there were soil particles on the damaged curb and that this indicates that soil and debris had been carried along as sediment and deposits in the flow from the property west of the curb into the lane.

20 The third report, dated August 11, 2007, goes further. It concludes that it is more probable than not that ice formed in the lane when debris carried in uncontrolled stormwater runoff and plant wastes impeded drainage. It states that ice that was formed in this way would be in the vicinity of the Reeves' property.

21 The August 11, 2007 report describes a sequence of actions by the Reeves that disrupted the natural drainage and led to ice formation, namely, the downspout being different from the acceptable arrangement found at other houses along the lane; the incorrect positioning of the downspout; waste leaves from plants in the garden causing intermittent flow of water over the curb; imperfect drainage leading to deterioration of the concrete at the top surface near the downspout outlet and movement of debris through the failed curb to the lane; and failure to remove seasonal waste plants which added to the debris which then resulted in water-soaked material which persisted in temperatures below zero that led to freeze and thaw accompanied by pavement deterioration.

22 Mr. McGlone states in his affidavit that "ice formed in the area of pavement where the Plaintiff fell, as a result of impeded drainage caused by uncontrolled storm water runoff and plant waste from the Reeves property". He also states "I am unable to support the Defendant Reeves contention that ice could not have formed due to runoff from the downspout, given the freezing temperatures and lack of precipitation".

Position of the Reeves

23 The Reeves take the position that there are two theories that implicate the Reeves in the ice buildup and that both are unsupported by the evidence.

24 The first is that water from the downspout on the Reeves' property caused the ice buildup. They say that this theory is negated by the reports which show freezing weather for the preceding week, the absence of any witness observing water coming from the downspout, and the assumption of Mr. McGlone that it was the deterioration of the lane surface (and not the positioning of the downspout) which led to the ice formation.

25 The Reeves say that even if the downspout was improperly positioned, there is no evidence that the Reeves knew or ought to have known that the downspout drained water onto the lane and that the lane had decayed to a point where this would have resulted in ice buildup. The Reeves did not live in the property and this would have imposed a duty on them to inspect the lane, which they are not required to do.

26 The other theory is that foliage and soil particles escaped from the Reeves' property onto the lane (from the higher grade of their property and the damaged curb) which then caused deterioration of the lane surface and further impeded drainage, causing ice to form. They say that this theory is also predicated on the false assumption that the lane surface had deteriorated. Further, they state that escaping foliage and soil particles cannot form a basis for liability, as this is unforeseeable damage and is contrary to the policy principle set forth in the *Bongiardina* case which I will discuss below.

27 Ms. Reeves, in her second affidavit, rebuts any basis for these theories. Among other things, she states that she never owned or inspected the curb, had no knowledge of any structural damage to the curb, never planted any foliage adjacent to the curb or was aware of any such foliage. She denies knowledge of any conditions which may have occurred on the lane or the curb and which might have contributed to the ice formation as set forth in the reports.

Applicable Legal Principles

Summary Judgment Principles

28 The summary judgment principles are well known. The moving party must demonstrate that there is no genuine issue for trial. The genuine issue must relate to a material fact. The responding party must put its best foot forward and "lead trump or risk losing". The motions judge must assume that the record is complete and that no further evidence would be presented at trial: see *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 26 C.P.C. (4th) 1 (Ont. C.A.); *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.); *1061590 Ontario Ltd. v. Ontario Jockey Club et al.*, [1995] O.J. No. 132 (C.A.).

29 However, in ruling on a motion for summary judgment, the court is not to assess credibility, weigh the evidence or find the facts. Its role is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. Evaluating credibility, weighing evidence and drawing factual inferences are all functions reserved for the trier of fact: *Aguonie, supra*, at p. 172 and 173.

Common Law Duty to Maintain Municipal Property

30 The Ontario Court of Appeal considered the extent of a property owner's liability for maintaining municipal property in the case of *Bongiardina v. York (Regional Municipality)* [2000] O.J. No. 2751. MacPherson J.A., for the court, articulated the overriding principle that there is no common law duty on an owner of an adjacent property to clear ice and snow from a municipal sidewalk or property. That is the legal liability of the municipality, not the adjacent property owner.

31 However, he identified two exceptions to this rule. The first is when the property owner is deemed to be an occupier of the property because it has assumed control of that property. That is not alleged in the case at bar.

32 The second exception is that the property owner has a duty of care to ensure that conditions or activities on his or her property do not flow off the property and cause injury to persons nearby. MacPherson J.A. refers to the case of *Brazzoni v. Timmins (City)*, [1992] O.J. No. 254 (C.A.) in which the Toronto Dominion Bank was held responsible for snow and ice which had accumulated on its roof and fallen onto the nearby sidewalk. In the *Brazzoni* case the Bank was found to have created a dangerous condition which it knew or ought to have known could cause injury to those using the municipal property.

33 MacPherson J.A. concluded by noting that there does not seem to be any good reason in policy to extend liability to the owners of adjacent properties for accidents on public sidewalks.

Summary Judgment in Slip and Fall Cases on Municipal Sidewalks

34 The Reeves cite numerous cases in which the courts have granted motions for summary judgment dismissing claims brought against adjacent property owners for slip and fall incidents on municipal sidewalks.

35 I have reviewed these cases. In each one, the evidence put forth by the plaintiffs was weak or nonexistent, or the pleading did not set out a basis for the defendant to come within the *Bongiardina* exceptions, or the facts themselves pointed more to the inherent features of the property and not to any wrongdoing on the defendant's part. I will review a few of these cases which were decided after *Bongiardina*.

36 For example, in the case of *Graham v. 7-11 Canada Inc.* [2003] O.J. No. 544 (S.C.J.), the plaintiff sued the store when he stepped off a raised tile entranceway of the store onto the sidewalk in front and slipped on ice. Sachs J. found that the statement of claim did not allege that the store had allowed conditions on its property to flow off and create a hazard on the adjacent sidewalk. The only allegation was that the raised tile area sloped toward the sidewalk and that run-off would drain onto the sidewalk. Further, the only evidence was an affidavit of the plaintiff's solicitor, not the plaintiff with personal knowledge, and disclosed no basis for the allegation in the statement of claim. Sachs J. granted the motion, holding that the threshold for providing some evidence that raises a triable issue must amount to more than mere speculation or conjecture.

37 In *Simmons v. Etobicoke (City)* [2002] O.J. No. 306 (S.C.J.), the plaintiffs alleged that the adjacent property sloped towards the sidewalk and that this caused more run-off water to flow onto the adjacent sidewalk, resulting in an accumulation of ice. Pitt J. granted the motion for summary judgment. He found that the mere sloping of a property towards a sidewalk was not sufficient to bring it within the second exception in *Bongiardina*. The motion was granted as there was no evidence that the adjacent property owner did something or failed to do something. The only evidence of the plaintiff in that case was an affidavit containing two paragraphs which expanded on the allegation of the sloping property in the statement of claim.

38 In *Kreska v. Toronto (City)* [2000] O.J. No. 3140 (S.C.J.), the plaintiff slipped on ice on the sidewalk in front of the defendant's restaurant premises. The only evidence relied on by the plaintiff was the admission in the statement of defence that the restaurant occupied the premises on which the restaurant was located. The admission did not refer to the sidewalk at all. Campbell J. found that this was not sufficient to meet either exception in *Bongiardina* and stated "in the absence of at least some evidence to back up his position, I fail to see how the plaintiff can meet the test of establishing a genuine issue of material fact requiring a trial." He noted that "while the threshold for a summary judgment motion of pointing to some credible material evidence giving rise to a triable issue may be low", the respondent had to point to "some" evidence to put its best foot forward.

39 In *Peterson v. Windsor (City)* [2006] O.J. No. 837 (S.C.J.), Nolan J. found that the plaintiffs had not pleaded any facts which could form the basis of a claim in law for the defendants as occupiers of the sidewalk or that they had a common law duty to clear the sidewalks.

40 In *Levy v. Brampton (City)* [2005] O.J. No. 2487 (S.C.J.) the plaintiffs alleged that the school board was liable for negligently piling snow on its property in the vicinity of the sidewalk which then flowed onto the sidewalk. In dismissing the action (which was after a trial, not a summary judgment motion), Spence J. noted that there was no evidence to support a finding that the school board should reasonably have considered that adjacent snow accumulations contained the potential for dangerous flow off onto the sidewalk.

41 By contrast, the plaintiffs argue that their case is more like the situation in *Brazzoni, supra*, and *Taylor et al v. Robinson et. al.* [1933] O.J. No. 357 (C.A). In the latter case, the defendants were held liable for run-off water from their driveway owing to the manner of construction of the driveway which acted as a channel to conduct water onto the sidewalk.

42 They also point to *Ellington v. Castles* [1990] O.J. No. 622 (H.C.J.) in which the defendant property owner was found liable for water expelled from a downspout onto an abutting sidewalk. I note that in that case it was found that the defendant was aware of the existence of the hazard posed by the downspout.

Analysis

43 I am mindful of the fact that this is a summary judgment motion and that my role in narrow and limited. I am not to assess the strength of the plaintiffs' evidence or their chance of success at trial. I have to review the evidence and simply determine whether it gives rise to a genuine issue for trial.

44 The evidence for the plaintiffs consists of Ms. Labancz' affidavit and the statements of the two witnesses, together with the affidavit of Mr. McGlone and attached expert reports. The defendants have provided two affidavits of Ms. Reeves and refer to the expert reports. There are also cross-examinations from the discoveries of Ms. Labancz and a representative of the City of Toronto.

45 This is not a case, such as in *Graham* and *Kreska, supra*, where there was little to no evidence of the plaintiffs. Ms. Labancz' evidence is more detailed regarding the buildup of ice where she fell, her familiarity with the lane and the contribution of the downspout to the ice buildup. The presence of the ice where she fell was supported in the statements of the two witnesses. There are three expert reports of the plaintiffs. I distinguish this case from the other summary judgment cases cited by the Reeves where the threshold evidentiary burden of the plaintiff on the motion had not been met.

46 However, I acknowledge the serious problems in the expert reports. The plaintiffs are going to have to address at trial the incorrect assumption in the reports that the pavement had deteriorated and created a depression at the time of the incident, and that it was repaired on July 12, 2006. To the extent that Mr. McGlone based his conclusions on this assumption, the plaintiffs will have to overcome this in establishing their case against the Reeves.

47 However, I cannot say for certain at this point that the reports combined with the other evidence raise no genuine issues for trial, even with this incorrect assumption. Questions remain as to the role of the downspout, for example: whether the downspout was improperly positioned and what effect that had; whether water was in fact flowing from the downspout at or preceding the time of the incident; whether water from the downspout in some way contributed to surface irregularities on the pavement apart from the patched portion and interfered with the proper drainage in the lane; and whether the positioning of the downspout caused damage to the curb which in turn caused soil and debris run-off into the lane.

48 Further questions remain on whether there was debris which was carried from the Reeves' property over the damaged curb onto the lane; whether there were plants alongside the Reeves' property which added to this debris; and whether this debris and plant material contributed to the imperfect drainage in the lane (apart from the depression in the pavement), causing the ice to build up.

49 The effect of the weather temperatures and amount of precipitation around and preceding the date of the incident will also be to the determination of what in fact caused the icy buildup.

50 All of this will have to be proven at trial. It is premature at this point to deny the plaintiffs the right to prove their case at trial. It must be clear to the motions judge that it is proper to deprive the plaintiffs of their right to trial: *Aguonie, supra*, at p. 174. This is not such a case. The trier of fact will need to hear and assess the witnesses' evidence and possibly draw inferences to make these determinations. None of this is appropriate on a summary judgment motion.

51 In terms of the legal principles, the plaintiffs are claiming that this case falls within the second exception outlined in the *Bongiardina* case. It is possible that if the downspout contributed to the ice

formation, or if debris and plant waste was carried over the curb to the lane and further impeded drainage, this could be a situation where conditions on the Reeves' property flowed onto the lane and caused a dangerous situation. This would be more analogous to the *Brazzoni* case than the ones, such as *Simmons*, where it was simply the slope of the property which created the water run-off.

52 I acknowledge that even if the plaintiffs can establish that anything emanating from the Reeves' property contributed to the dangerous conditions on the ice, they will still have to prove that the Reeves knew or ought to have known of that this condition would create a danger on the lane. The Reeves' evidence is clear that they did not live at the property and were not aware that any of these conditions existed.

53 However, whether they ought to have known really cannot be determined at this stage. This will depend in part on the findings of fact as to what actually caused the ice to form. A trial judge will have to assess whether an absentee landlord should be expected to have known about the source of the problem or its effects on the curb or lane once the material facts have been determined.

54 Finally, the Reeves argue that the statement of claim does not plead any facts upon which liability could be found against them. They say it does not set out what they did or failed to do that could form a basis of liability.

55 Paragraph 8(c) of the statement of claim states that the Reeves "failed to maintain the lane way despite the fact that they knew or ought to have known that ice had formed in the lane way as a result of an eve trough venting runoff into the lane way". Read generously (see *Simmons, supra*), this can form a claim for liability under the second exception in *Bongiardina*, as it refers to the Reeves doing something on their property (the eve trough venting runoff into the lane way) which could flow onto and create a dangerous condition on the lane. I am not prepared to grant summary judgment solely on this basis.

Decision

56 For the reasons above, the motion for summary judgment is dismissed.

57 If the parties are unable to agree on the costs of this motion, I will receive written submissions, not to exceed 3 pages double spaced, from the parties. The plaintiffs and the City of Toronto are to make their submissions on a collective basis, but can include separate bills of costs. Their submissions are to be received within 30 days and the Reeves' submissions within 10 days thereafter, with the plaintiffs and the City having a further 5 days in reply.

58 Pursuant to Rule 20.06(1), I am satisfied that although I have dismissed the motion, it was nevertheless reasonable for the Reeves to have brought the motion in view of the issues concerning the expert reports described above. Costs will therefore be awarded on a partial indemnity scale and will be fixed taking into account the factors in Rule 57.01(1).

B.A. CONWAY J.

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