IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

KRISTIN NEWVINE, *Appellant* v. JERSEY SHORE AREA SCHOOL DISTRICT, *Appellee*	Commonwealth Court Docket Number: **1331 CD 2017** Lower Court Docket No: 16 – 761 APPEAL - 1925(a)

OPINION IN SUPPORT OF ORDER
Issued Pursuant to Pennsylvania Rule of Appellate Procedure 1925(a)

Pursuant to P.R.A.P. 1925(a), this Court issues the following opinion in support of the Order dated August 21, 2017 appealed from by Kristin Newvine.[1] That Order granted summary judgment in favor of the Jersey Shore School District. Kristen Newvine raised five errors on appeal.[2] This Court views the issues on appeal to be essentially (1) whether a governmental

[1] The Order granting summary judgment provided the following reasoning. "The Court believes it is duty bound to follow the conclusion stated by our Supreme Court in Gardner ex rel. Gardner v. CONRAIL, 524 Pa. 445, 453-54, 573 A.2d 1016, 1020 (Pa. 1990) that SECTION 323 OF THE RESTATEMENT (SECOND) OF TORTS does not apply to impose a duty on government that did not already exist. In this case, the hills and ridges doctrine precludes recovery because it Ms. Newvine did not adduce evidence that generally slippery conditions did not exist at the time and place of her fall. *See, e.g.,* Morin v. Traveler's Rest. Motel, Inc., 704 A.2d 1085 (Pa. Super. 1997)."

[2] The five claimed errors are re-stated here verbatim.

1. The Trial Court improperly granted summary judgment to the Defendant Jersey Shore Area School District. The school district is liable for the tri-malleolar right ankle fracture to business invitee student Ms. Newvine caused by a dangerous condition of land it knew of an negligently failed to correct pursuant to Restatement Torts 2nd §343. The school district is not protected from liability by the subsidiary common law refinement of hills and ridges of snow and ice. Here the school district had actual notice of the slippery condition of its parking lots and walkways; and from 5:00 a.m. to 10:00 a.m. it engaged in action to correct the dangerous condition to its business invitee students, teachers and staff before expressly inviting them onto the premises. However, the school district it negligently failed to treat or correct the slippery condition at the area of Ms. Newvine's fall, unlike at all other areas walked upon by the witnesses who were deposed-high school principal and several teachers, one of whom walked into the high school wearing high heels.
2. The Trial Court failed to follow common law existing before the 1978 adoption of the PTSTCA, as follows: The Defendant School District is liable for injuries to business invites such as Plaintiff Ms. Newvine caused by a dangerous condition of its land that it knew of and failed to timely correct pursuant to Restatement Torts 2d §343, and it is not protected from liability by the subsidiary doctrine of hills and ridges and/or general slippery conditions.
3. The Trial Court failed to follow common law existing long before the 1978 adoption of the PSTCA, long before the 1966 adoption of Restatement Torts 2d §323, as follows: A landowner who negligently performs an assumed duty (to salt its parking lots and walkways when there is ice/general slippery conditions) that it does not have under the common law doctrine of hills and ridges, business invitee Ms. Newvine who detrimentally relied on that performance have a cause of action when injured due to the negligent performance of the assumed duty.
4. The Trial Court improperly cited dicta in Gardner ex rel. Gardner v. Conrail, 534 Pa. 450, 573 A.2d 1016 (1990) to the effect that a municipality school district may not assume a duty under Restatement Torts 2d §

agency may assume (by an undertaking) a duty that does not otherwise exist under SECTION 323 OF THE RESTATEMENT (SECOND) OF TORTS ("Section 323"); and (2) even if a governmental agency cannot assume a duty by an undertaking under Section 323, does a duty already exist for a governmental agency to use reasonable care when undertaking to remove snow and ice from its property. After careful consideration of extraordinary briefs by the parties, this Court concluded that it is compelled to find no duty by an undertaking under Section 323 and that, given the hills and ridges doctrine, no duty existed in the circumstances of this case as to the removal of snow and ice from a local agency's property. This Court respectfully submits the following opinion with respect to the issues on appeal and in support of summary judgment.

BRIEF FACTUAL BACKGROUND

A brief background of facts in the light most favorable to the non-moving party follows. This personal injury case arises from a high school student sustaining significant injuries after slipping and falling on the steps from the parking lots 2 and 3 leading to enter her high school on January 12, 2015 at around 10:00 a.m. On that day, the school operated on a 2-hour delay due to freezing rain.[3] From around 5:00 a.m. that day, three salt trucks and a ground crew salted the school's parking lot and walkways.[4] The student stated that parking lot looked normal and no ice or gloss was apparent. The area where Ms. Newvine fell was more slippery than other areas of

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323. A cause of action to a person for injuries due to the negligent performance of an assumed duty by another has been recognized in Pennsylvania common law long before the 1978 adoption of the PSTCA, long before the 1966 adoption of Restatement Torts 2d § 323 and long before the existence of Restatement of Torts 1st § 323. Walker v. Smith, 1 Wash. C.C. 152, 24 Dall. 389, 29 Fed Cas. 54 (C.C. Pa. 1804).

5. The Trial Court failed to apply other Garner language which commented that Defendant landowner would berry likely be liable where its property causes injury and does not merely facilitate injury occurring an adjoining property of another entity. That is: dicta in Gardner does not apply where the School District, with a duty to protect business invitee student Ms. Newvine from a dangerous condition of its premises, assumes a greater duty that is relied upon by business invitee student Ms. Newvine to her detriment.

[3] The inclement weather was "icy, slick, wet, freezing rain and sleet." ¶ 6 of Plaintiff's response to Defendant's motion for summary judgment filed August 2, 2017.

[4] ¶ 8 of Plaintiff's response to Defendant's motion for summary judgment filed August 2, 2017.

the lot. Indeed, the "school's employees missed treating the area of the parking lot where Ms. Newvine parked and the walkway immediately leading to that parking spot[.]"[5]

DISCUSSION

The Court concluded that governmental immunity[6] coupled with the hills and ridges doctrine required summary judgment in this case. In opposition to summary judgment, Ms. Newvine presented the following threshold issue:

> *Can a governmental entity assume a duty **it does not have** and be liable for negligent performance of that duty, such that the district's motion for summary judgment should be denied?" See, Plaintiff's Reply Brief to District's Reply Brief, filed on August 11, 2017 (emphasis added).*

In answering that question, the Court believes it is "duty bound to follow the conclusion stated by our Pennsylvania Supreme Court in Gardner ex rel. Gardner v. CONRAIL, 524 Pa. 445, 453-54, 573 A.2d 1016, 1020 (Pa. 1990). In Gardner, the Supreme Court concluded that SECTION 323 OF THE RESTATEMENT (SECOND) OF TORTS does not apply to impose a duty on government that did not already exist.[7] In deference to this clear conclusion, the Court concluded that the school did not have a duty arising from an undertaking to clear the parking lots and walkways of ice and snow. At the heart of the errors asserted on appeal is whether the Court gave too much deference to that conclusion because it was dicta and because the facts of

[5] ¶ 29 of Plaintiff's response to Defendant's motion for summary judgment filed August 2, 2017.
[6] The Defendant school district enjoys governmental immunity under the Political Subdivision Tort Claim Act, 42 Pa. C.S. § 8541, *et. seq.* which requires a specific statutory exception to impose liability for personal injuries arising from negligence.
[7] The Court specifically stated the following.

> Moreover, Section 323 does not apply to government, for government does not act either gratuitously or for consideration, as is required by Section 323, but pursuant to its required or discretionary duties in the process of governing. Section 323, therefore, cannot be used to create a duty that did not heretofore exist. Gardner ex rel. Gardner v. CONRAIL, 524 Pa. 445, 453-54, 573 A.2d 1016, 1020 (Pa. 1990)

this case are significantly distinguishable from Gardner.[8] The Court agrees that distinctions between the cases exist. For example, in the present case, the dangerous condition that existed on the land of the government (the slippery icy steps) had a much closer causal connection to the injury sustained the dangerous condition of a hole in the fence in Gardner which attracted a child to pass through a train yard of a neighboring property. However, factual distinctions aside, and dicta or no dicta, faced with such a clear statement of the law by the Pennsylvania Supreme Court, this Court is unwilling to make a legal conclusion to the contrary. In keeping with the legal conclusion stated in Gardner, this Court is bound to conclude Section 323 does not impose a duty (that did not otherwise exist) upon a governmental entity from an assumption of an undertaking, such as snow removal. As noted by our Pennsylvania Supreme Court in Love v. Philadelphia,: "[t]he legislature, for reasons of policy, reasons we are not entitled to dilute for sympathy or even outrage at specific instances of blatant tort, has decided that such an immunity does exist, and we must abide, sometimes leaving dreadful injuries, negligently inflicted, uncompensated." Love v. Philadelphia, 518 Pa. 370, 376, 543 A.2d 531, 533 (Pa. 1988).

In addition Ms. Newvine asserts that the Court erred in failing to recognize that a duty did already exist for the school to clear the entrance steps from ice and snow within the time frame at issue in this case. This Court believes the duty to remove natural accumulations of ice and snow is governed by the hills and ridges doctrine, which imposes no duty until the ice forms hills and ridges. Rinaldi v. Levine, 406 Pa. 74, 78, 176 A.2d 623, 625 (Pa. 1926). In the instant case, no hills or ridges had formed. The slippery conditions allegedly arose from the failure of the

[8]"In Gardner, a seven year old boy was injured by a train on land owned by a third party after he climbed through a hole in a fence bordering railroad tracks and attempted to cross the tracks on his way to another hole in a fence on the other side of the tracks next to a municipal playground. Gardner's theory of recovery was that the city, which owned one fence, and SEPTA and Conrail, which owned the other, all contributed to his injury by allowing holes to exist in the fences, and that these holes constituted an attractive nuisance in the form of a "tunnel" which invited children to crawl through it and thereby risk injury on the train tracks." Gardner, supra, 573 A.2d at 1017.

school's employees to remove or alleviate slippery conditions naturally caused by only five hours inclement weather.

For these reasons, this Court respectfully submits that the summary judgment in favor of the Jersey Shore Area School District should be affirmed.

BY THE COURT,

November 16, 2017
Date

Richard A. Gray, J.

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