Volume 16 • Number 2

RAWLE'S REPORTS

THE NATION'S OLDEST LAW OFFICE

www.rawle.com

Philadelphia, PA
215. 575. 4200
Fax 215. 563. 2583

New York, NY
212. 323. 7070
Fax 212. 323. 7099

Marlton, NJ
856. 596. 4800
Fax 856. 596. 6164

Pittsburgh, PA
412. 261. 5700
Fax 412. 261. 5710

Harrisburg, PA
717. 234. 7700
Fax 717. 234. 7710

Wilmington, DE
302. 778. 1200
Fax 302. 778. 1400

Wheeling, WV
304. 232. 1203
Fax 304. 232. 1205

PENNSYLVANIA

GENERAL CASUALTY

CONTRACTOR NOT RESPONSIBLE

Catherine N. Walto

Plaintiff, Gail Holmes, filed suit for personal injuries she sustained after allegedly slipping and falling in her employer's parking lot as she was exiting her car on her way into work. Plaintiff sustained a minimally displaced fracture of the distal fibula and a displaced fracture of the posterior malleolus of the left ankle requiring an open reduction with internal fixation and hospitalization for three days. She had physical therapy and claimed to have permanent limitations as a result of this incident.

The Complaint was filed against About Time Snow and ABC Snow Removal, alleging the companies had negligently performed and supervised snow removal and de-icing services at the accident location. After a four-day trial in Delaware County, the jury found that neither the original snow removal contractor nor the subcontractor that performed the actual work was negligent. Catherine N. Walto successfully defended the subcontractor that actually performed the work.

Plaintiff's employer, a furniture company, hired codefendant, About Time Snow, to perform plowing and salting of several parking lots where it had stores located, including its warehouse distribution center in Malvern, Pennsylvania. The warehouse location was in operation around the clock, with limited exceptions. Pursuant to the primary contract, plowing was self-activated once three inches of snow fell. Salting and additional same-day services could not be performed without the express, prior approval of the furniture company.

About Time Snow entered into a subcontract with the defendant ABC Snow Removal Company. The contract between About Time Snow and ABC Snow Removal Company was a much more extensive contract, with some of the contractual obligations in the subcontract conflicting with the terms of the primary contract between the furniture company and About Time Snow. The subcontract had been drafted by About Time Snow, and had arguably been modified by the parties through a series of email directives from About Time Snow to its subcontractor.

Plaintiff worked in the customer service department at the distribution warehouse. She had worked the evening before this incident occurred and had been released from work early because it was snowing in the area. Plaintiff testified that when she arrived home, she parked

her car inside her attached garage and did not walk or drive anywhere else in between the hours that she left work and when she returned to work the following morning. Plaintiff admitted she knew it had continued to snow throughout the overnight hours, but it had stopped snowing by the time she woke up for work the following morning. She acknowledged that several inches of snow had fallen during that time.

Plaintiff had to be at work by 9:00 a.m. She drove to work and claimed that she did not experience any problems; the roads had been plowed and salted. When she entered the parking lot at the warehouse, she could see where the snow plow blade had pushed aside the snow. She described the cleared areas as the "ruts" left by the snow plow. She pulled into a parking spot that was closest to the front of the building without first looking to see if the parking spot had been cleared of snow. Plaintiff testified that she opened her car door and stepped out of the car without looking at the ground. After she stepped out of her car, she closed the driver's door and began walking, without ever looking down at the ground. She took two to three steps and then fell. She did not see what caused her to fall, either before or after her fall, but assumed she fell on ice. She was assisted by a coworker around to the other side of her car and never passed by the area where the fall occurred.

One of plaintiff's coworkers who testified at trial saw this incident occur through the window next to her desk. Additionally, one of the truck drivers from the warehouse testified that he also saw part of the incident occur. Significantly, each witness had different recollections about the location of the accident and the conditions of the parking lot on the morning of the accident and at the time the fall occurred.

The manager responsible for this facility testified at trial that his normal practice upon arriving at work was to drive around the parking lot to inspect it. He arrived at work between 6:00 a.m. and 6:30 a.m. and drove around the lot. He personally observed that it had been cleared to the bare black top. Salt was spread throughout the parking lot. He parked his car along the fence line and walked across the parking lot toward the entrance, again noting that the lot had been plowed completely and that salt had been spread throughout. In addition to actually seeing salt, he could feel the salt crunching under his boots. He did not call for additional snow removal services as he believed that the work performed by ABC Snow Company had been performed satisfactorily and that the lot did not merit further treatment.

The corporate representative for the defendant, ABC Snow Removal Company, testified that snow plow services were performed at approximately 8:00 p.m., the day before this accident occurred. After the entire lot had been plowed, salt was spread throughout. ABC Snow Removal Company returned at approximately 3:00 a.m. the day of the accident to perform additional touch-up snow plow services and to spread additional salt. ABC Snow plowed around any parked cars in the lot at the time that it performed services there. It did not shovel the walkways or between parked cars as that work was outside the scope of its contractual responsibilities based both on industry standards and specific directions it had received from About Time Snow. At trial, the owner of About Time Snow testified that he believed that the work performed by ABC Snow Removal Company had been performed satisfactorily, and in accordance with the subcontract.

Plaintiff's counsel argued that ABC Snow Removal Company should have actually shoveled between cars and shoveled the parking lot if necessary in addition to plowing it. Emails produced during discovery specifically noted that shoveling was not to be performed by ABC Snow Removal Company without prior approval as the company, who would not pay for these services. Plaintiff argued that not only did ABC Snow Company not perform any shoveling services as required by its contract, ABC was negligent for not requesting permission to shovel parking spots where cars had been parked and snow may have remained between the parked cars. Despite the course of conduct and the emails between the parties, plaintiff argued that the contractual language controlled, thus ABC Snow Removal Company was negligent. Additionally, About Time Snow was negligent because it did not enforce its contract and had overall responsibility

for the work performed by its subcontractors under the prime contract.

Defendant, ABC Snow Removal Company, argued that it had performed its work both in accordance with the contract, as modified by subsequent written directions from About Time Snow, and that the work had been performed in a non-negligent manner. ABC Snow Removal used the emails between the parties to further show that About Time Snow, as well as plaintiff's own employer, had placed severe restrictions on ABC's ability to perform work at this site as those entities routinely substituted their judgment on when and how the work should be performed and limited how much salt could be applied to the parking lot surface.

The jury deliberated for several hours, requesting copies of the various work orders as well as copies of the two contracts. Ultimately, the jury concluded that ABC Snow Removal Company had performed the work in accordance with its contractual duties and was not negligent. Similarly, it found that About Time Snow, as the company with overall responsibility for supervising ABC Snow Removal, was not negligent. The jury never reached the question of whether the plaintiff herself was negligent.

Catherine N. Walto is a partner in Rawle & Henderson's Philadelphia office. She practices throughout Pennsylvania and New Jersey, concentrating her practice on complex litigation including bad faith, premises liability, product liability, construction accidents and commercial matters. She serves as an arbitrator for the Court of Common Pleas for Philadelphia County as well as the U.S. District Court for the Eastern District of Pennsylvania. She received her Bachelor of Arts degree from Wesleyan University in 1985 and Juris Doctorate from Villanova University School of Law in 1991. She was a member of the Moot Court Board from 1989-1990 and Chairperson from 1990-1991.

Cathy is admitted to practice in Pennsylvania and New Jersey. She is also admitted to practice in the U.S. District Courts for the Eastern, Middle, and Western Districts of Pennsylvania, the District of New Jersey, and the U.S. Court of Appeals for the Third Circuit. She has also been admitted *pro hac vice* in Delaware and Virginia.

For more information, contact Cathy at:
(215) 575-4245 • cwalto@rawle.com

NOT LIABLE FOR TRIP-AND-FALL

Suzanne Curran Murphy

Joseph Thompson alleged that he was injured as a result of a trip and fall at a Wawa store in Philadelphia, Pennsylvania. He was 44 years old. The fall occurred at approximately 12:30 p.m. on May 11, 2009. It was daylight and the weather was clear.

Thompson alleged that he entered and exited the store through the same door. As he was exiting, another customer was making his way into the store and Thompson held the door open with his right hand, standing to the right of the door. After he released the door, he turned to his left to walk back to his car. According to Thompson, his right foot got caught on "something" and he began to fall. He tried to regain his balance and collided with a concrete bollard about 20–30 feet away.

Thompson testified that he did not see what caused him to fall. However, an independent witness, unknown to Thompson, testified that he saw Thompson's shoe get caught on a crack in the walkway near the entrance of the convenience store. Photographs of the area showed a very small crack in the corner of the concrete sidewalk in the area where the fall occurred.

Thompson filed a lawsuit in the Philadelphia County Court of Common Pleas. Following discovery, the parties agreed to proceed to "high-low" binding arbitration with a

high of $275,000 and a low of $50,000. At the arbitration, Wawa's store manager testified that Wawa has policies and procedures to ensure that customers of the store are safe from hazards. Workers on each shift perform an inspection of the outside of the property and take corrective measures when warranted. We argued that the crack that plaintiff alleged caused his fall was only slightly longer than the length of a cigarette and was a trivial defect.

Under Pennsylvania law, a business owner is obligated (1) to keep the premises in a "reasonably safe condition" and (2) to warn an invitee or business visitor of latent defects or dangers which it knows exist or in the exercise of reasonable care should have known existed. Although a business owner has a duty to maintain pavement and sidewalks in a reasonably safe condition, there is no duty to ensure that a pedestrian is protected from any and all accidents. If a court concludes that a defect is so trivial that no reasonable juror could impose liability, summary judgment is appropriate.

We cited, without the use of an expert, to the following examples of defects which Pennsylvania courts have found to be so obviously trivial as to preclude liability: (1) a one and a half inch difference between the levels of two abutting curbstones, McGlinn v. City of Philadelphia, *322 Pa. 478, 186 A. 747 (1936)*; (2) a one and a half inch space between the adjoining ends of flagstones at a street crossing, Newell v. City of Pittsburgh, *279 Pa. 202, 123 A. 768 (1924)*; (3) an uneven, rough, unpaved strip of ground that was two to four inches below sidewalk level, Foster v. Borough of West View, *328 Pa. 368, 195 A. 82 (1937)*; (4) a manhole cover that projected two inches above the surface of the street, Harrison v. City of Pittsburgh, *353 Pa. 22, 44 A.2d 273 (1945)*; (5) a hole that was one and seven-eighths inches below the level of pavement and was twelve by fifteen inches in area; and (6) a slight elevation of part of a sidewalk, bordered by a flat strip of iron, Fink v. Eat 'N Park Hospitality Group, Inc., *2005 WL 4876481*.

Thompson claimed that as a result of the fall he sustained a distal comminuted right patellar fracture and a displaced fracture to the pinky finger of his left hand, requiring surgical repair. The finger healed without incident in due course. However, Thompson claimed that he continued to have pain and problems with the right knee. Plaintiff submitted documentation showing a medical lien of approximately $24,000. Contrary to Thompson's claim, the office notes from Dr. Kleinbart, his treating physician, reported excellent results through December 2009. Thompson was also examined by Dr. Stuart Gordon at the request of the defendant. Dr. Gordon found that Thompson had an excellent functional recovery from the right knee and left finger injuries. Dr. Gordon concluded that on physical examination, Thompson had full extension, no atrophy and excellent VMO definition (muscle of the quadriceps) on the right side. Thompson's left finger had full range of motion. Dr. Gordon also noted that Thompson was fully able and competent to continue all activities without restrictions and there was no reason to expect any arthritic process in the right knee in the future.

The testimony of Thompson and his wife regarding damages was exaggerated and not consistent with Thompson's own physician's reports. The inconsistencies were brought out several times during cross-examination and damaged Thompson's credibility.

The arbitrator found in favor of Wawa based upon the trivial nature of the defect and the inconsistencies in Thompson's testimony.

Suzanne Curran Murphy concentrates her practice in the areas of premises liability, construction litigation and school bus/commercial motor vehicle litigation.

Suzanne received her Bachelor of Arts degree from Loyola College in 1989 and Juris Doctorate from Widener University School of Law in 1993.

She is admitted to practice in the state courts of Pennsylvania and New Jersey as well as the United States District Court for the District of New Jersey and the United States District Court for the Eastern District of Pennsylvania.

For more information, contact Suzanne at:
(215) 575-4242 • smurphy@rawle.com