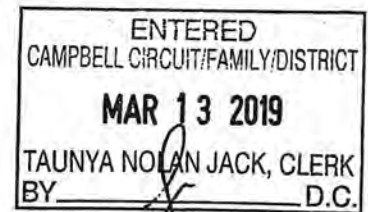


COMMONWEALTH OF KENTUCKY
CAMPBELL CIRCUIT COURT
DIVISION II
CASE NO. 18-CI-401



PAMELA CHESTER

PLAINTIFF

v.

CITY OF NEWPORT, ET AL

DEFENDANTS

OPINION

This matter is before the Court on the Defendants Loyd and Bethany Bowers's Motion for Summary Judgment against the Plaintiff Pamela Chester and on the Defendant City of Newport's separate Motion for Summary Judgment against the Plaintiff. The Court has considered the memoranda of the parties and the record. Defendants City of Newport and City of Newport Public Works shall collectively be hereafter referred to as the City of Newport.

Background

Plaintiff, Pamela Chester, allegedly tripped and fell on an area between the sidewalk and curb on Monroe Street on property owned by the Defendants Loyd and Bethany Bowers. The Defendants live at 630 Monroe Street, and the Plaintiff lives next door at 634 Monroe Street. The accident occurred on November 6, 2017, and Plaintiff alleges personal injuries as a result of her fall. She claims negligence against the Defendant City of Newport and the Defendants Loyd and Bethany Bowers for their failure to pick up leaves, properly maintain the areas between the sidewalk and curb, and for their failure to warn of a hidden dangerous condition. The area between the sidewalk and curb was made up of dirt and stepping stones.

At the time of the accident, the Plaintiff alleges she tripped and fell over a rock that was hidden from view by leaves that fell from a tree. She testified that: 1) at the time of the accident,

she was carrying boxes of adult diapers from her house to a van parked at the curb; 2) that she could see the ground in front of her, but the boxes prevented her from seeing where her feet were stepping; 3) that the boxes came to about her chin with some additional diaper pads on top of the boxes; and 4) that she was aware of the stepping stones and the fact that they were covered with leaves.

Standard of Review

Kentucky courts are permitted to grant summary judgment “if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56.03. In determining whether summary judgment is proper, the “[t]rial judge must examine the evidence, not decide any issue of fact, but to discover if a real issue exists.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Further, “a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Id.* at 482.

The Supreme Court of Kentucky has repeatedly advised that courts should cautiously grant summary judgment. *Id.* As such, this Court will review the record in this case ‘in a light most favorable to the party opposing the motion for summary judgment and [resolve] all doubts ...in [its] favor.’ *Id.* Summary judgment will only be used by this Court “to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against movant. *Id.* at 483 (quoting *Paintsville Hosp. Co. v. Rose*, 683 S.W. 2d 255, 256 (Ky. 1985)). Later, the Kentucky Supreme clarified that the word “impossible” is used in the practical sense, not an absolute sense. *Perkins*

v. Hausladen, 828 S.W. 2d 652 (1992).

Analysis

A. The City of Newport

The City of Newport asserts that it is immune from the claims of the Plaintiff under the Kentucky Claims Against Local Government Act, KRS 65.2003. This statute provides in pertinent part that a local government, such as the City of Newport, shall not be liable for injuries or losses resulting from:

- (3) Any claim arising from the exercise of judicial, quasi-judicial, legislative or quasi-legislative authority or others, exercise of judgment or discretion, vested in the local government, which shall include by example, but not limited to:
 - (d) The exercise of discretion when in the face of competing demands, the local Government determines whether and how to utilize or apply existing resources; or
 - (e) Failure to make an inspection.

Nothing contained in this subsection shall be construed to exempt a local government from liability for negligence arising out of acts or omissions of its employees in carrying out their ministerial duties.

Stated differently, KRS 65.2003 provides that the City of Newport shall not be liable for injuries or losses resulting from the exercise of quasi-legislative authority while exercising its judgment or discretion in performing non-ministerial functions. Significantly, acts or omissions of employees carrying out their ministerial functions are not exempt under the statute. KRS 65.2003(3)(e). A “ministerial act” is performed without the independent exercise of discretion or judgment or, in other words, a mandatory act. *Black’s Law Dictionary*, Eight Edition, page 26. Here, decisions by the City of Newport of when to pick up leaves or to maintain what sidewalks are made in the exercise of judgment and discretion and are, therefore, non-ministerial. See *Siding Sales Inc. v Warren County Water District*, 984 S.W. 2d 490 (Ky. App. 1998). As a

consequence, the Court finds as a matter of law that the role of the City of Newport, in exercising its judgment and discretion concerning leaf pick up and sidewalk maintenance, was non-ministerial and exempt from liability in accordance with the statute under the circumstances of this case.

B. Defendants Loyd and Bethany Bowers

The facts of this case do not lead to a discussion of the open and obvious doctrine, but rather to a determination of whether the Defendants, Loyd and Bethany Bowers, owed the Plaintiff a duty, breached that duty, and resultant injuries followed. *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W. 3d 901, 908 (Ky. 2013). Whether a duty exists is a legal question for the court, and foreseeability is generally the most important factor in determining whether a duty exists. *Id* at 908. In addition, “Kentucky law remains steadfast in its adherence to the traditional notion that duty is associated with the status of the injured party as an invitee, licensee, or trespasser.” *Id* at 909.

To determine the duty owed by these Defendants, the Court must consider the classification of the Plaintiff on their property. The Court finds that the Plaintiff was a licensee. “Under the Restatement (Second) of Torts [section] 330, a licensee is defined as a ‘person who is privileged to enter or remain on land only by virtue of the possessor’s consent.’ A possessor of land owes a licensee a duty to ‘not knowingly let her come upon a hidden peril or willfully or wantonly caus[e] her harm.’” *Smith v. Smith*, 536 S.W. 3d 14, 17 (Ky. 2018).

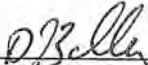
In this case, whether these Defendants should have realized or foreseen that the condition of the area between the sidewalk and street involved a hidden peril or an unreasonable risk of harm to the Plaintiff are questions of fact for a jury to decide. Because of these genuine issues of material fact, summary judgment cannot be granted in favor of Defendants, Loyd and Bethany

Bowers.

IT IS NOW THEREFORE ORDERED AND ADJUDGED that the Motion for Summary Judgment by the City of Newport and the City of Newport Public Works Division against the Plaintiff is GRANTED, and the Defendants City of Newport and City of Newport Public Works Division are hereby dismissed from this action with prejudice.

IT IS FURTHER ORDERED that the Motion for Summary Judgment by the Defendants, Loyd and Bethany Bowers, against the Plaintiff is DENIED.

This 13 day of March, 2019.



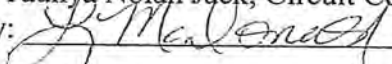
Daniel J. Zalla, Judge
Campbell Circuit Court Div. 2

CLERK'S CERTIFICATION

I hereby certify that a true and accurate copy of the foregoing Order was served this 13 day of March, 2019, by regular mail, postage prepaid, upon the following individuals:

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