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Evidence and Practice Tips

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Bartkowiak v. City of Aurora: A Limit on the *De Minimis* Doctrine

In a recent Illinois Court of Appeals, Second District, decision, *Bartkowiak v. City of Aurora,* 2018 IL App (2d) 170406, the court considered whether a verdict that was overturned due to the jury's answer to a special interrogatory on the *de minimis* rule should have been reinstated. The facts of the case and the court's analysis provide valuable lessons to defense practitioners litigating a trip-and-fall case involving a shallow depression, hole, or defect.

Background Facts and Trial Court Proceedings

The plaintiff in *Bartkowiak* claimed to have fallen in a hole or defect at a Metra station in Aurora in December 2011. *Bartlpwiak,* 2018 IL App (2d) 170406, ¶ 3. The plaintiff alleged that she fell after catching her toe in a depression located in a parking lot pavement seam while walking to her car. *Id.* ¶ 3. The plaintiff filed suit against the City of Aurora and claimed that the City had failed to maintain the parking lot in a reasonably safe condition and had failed to provide adequate lighting so that pedestrians could see potential defects in the lot. *Id.* ¶ 4.

After some initial discovery, the City filed a motion for summary judgment, arguing that it did not have constructive notice of the defect at issue and that the defect was *de minimis* based on its shallow depth. *Id.* ¶ 6. Plaintiff argued in response that the defect was not *de minimis* because, as she had testified at her deposition, the defect was four inches deep. *Id.* She also argued that the lighting in the parking lot was insufficient and that she was distracted by pedestrian and vehicular traffic when she fell such that the open and obvious defense should not apply. *Id.* The trial court denied the motion for summary judgment, finding a factual dispute as to whether the defect was *de minimis* and/or open and obvious. *Id.* ¶ 7.

The trial court denied the City's initial motion for summary judgment, and the parties engaged in expert discovery. Notably, plaintiff's own expert found that the lighting in the parking lot was sufficient and that the defect at issue was only one-and-a-half inches deep (although he opined that it was an unreasonably dangerous condition). *Id.*¶¶ 9-10.

After expert discovery, the City of Aurora filed a motion to reconsider the ruling on its prior motion for summary judgment, citing plaintiff's expert's opinions that the lighting was sufficient and that the defect was only one-and-a-half inches deep. *Id.* ¶ 8. Plaintiff responded that her expert's opinions did not defeat her own testimony regarding the lighting and depth of the defect. *Id.* ¶ 9. Moreover, she argued that even accepting her expert's opinions, aggravating factors, such as the amount of pedestrian and vehicular traffic, nevertheless rendered the *de minimis* doctrine inapplicable. *Id.* ¶ 10.

The trial court granted the motion to reconsider in part and denied it in part. *Id.* ¶ 11. The court found that because the adequacy of lighting requires expert testimony, the plaintiff's expert's opinion that the lighting was adequate foreclosed that portion of her claim. The court then denied the motion to reconsider as to the *de minimis* and open and

obvious arguments, finding that the plaintiff's testimony that the defect was four inches deep created a genuine issue of material fact. *Id.*

Trial ultimately commenced in the *Bartkowiak* matter, and the testimony was largely consistent with the above. At trial, the plaintiff admitted she had not measured the depth of the defect, but estimated it was four inches deep. *Id.* ¶ 17. The City's witnesses testified regarding their inspection and maintenance practices and that they would have patched the defect at issue if discovered. *Id.* ¶ 18.

In the jury instructions conference, the City tendered a special interrogatory to the jury that asked, "Did the condition that Plaintiff claims to have caused her injuries have a vertical difference of 1.5 inches or less?" *Id.* ¶ 20 (emphasis added). Plaintiff objected on the basis that the special interrogatory would not test the general verdict given that the fall occurred in a high-volume pedestrian area, that the defendant's witnesses had testified that the defect was a tripping hazard, and that the jury could determine the defect was an unreasonably dangerous condition even if it was less than one-and-a-half inches. *Id.* ¶ 21. The trial court disagreed, allowing the special interrogatory. The trial court found that the case law on the *de minimis* issue was well settled that at certain heights (which it found to be less than two inches), claims such as this were not actionable. *Id.*

The jury returned a verdict for the plaintiff in the amount of $920,000, reduced by 50% to $460,000 for her contributory negligence. *Id.* ¶ 22. The jury also answered "YES" to the special interrogatory, finding that the condition was one and a half inches or less. *Id.* The trial court found this to be inconsistent with the verdict for the plaintiff. The court ruled that the defect was *de minimis* and not actionable and entered judgment for the City. *Id.*

Following the court's ruling, the plaintiff filed a motion to reinstate the verdict for the plaintiff. The court denied the motion, making the following statements within its order: (1) the only reason the court did not grant summary judgment was because of the factual dispute as to the depth of the defect; (2) the aggravating factors which could render an otherwise slight defect actionable were not found here; (3) the *de minimis* issue involves a duty question to be resolved by the court; and (4) the use of the special interrogatory resolved the factual question as to whether the defect was *de minimis* and allowed the court to then determine the duty question which ultimately tested the jury's general verdict. *Id.*

The plaintiff thereafter timely appealed the court's decision. *Id.* ¶ 23.

Second District Decision Reversing Trial Court

On appeal, the plaintiff argued that the special interrogatory asking whether the "condition" had a vertical difference of one and a half inches or less should not have been given to the jury. *Id.* ¶ 25. Special interrogatories are used to test a jury's verdict against the jury's decision as to an ultimate issue of fact. A special interrogatory is proper if it relates to an ultimate issue of fact upon which the rights of the parties depend and an answer to the special interrogatory is inconsistent with a general verdict that may be returned. *Id.* (citing *Simmons v. Garces,* 198 Ill. 2d 541, 555 (2002)).

The plaintiff's claim that the special interrogatory should not have been given rested on two specific arguments: (1) that the special interrogatory was not determinative of an ultimate issue of facts on which the parties depended; and (2) that the answer to the special interrogatory was not inconsistent with the general verdict for plaintiff. *Bartkowiak*, 2018 IL App (2d) 170406, ¶ 30. The second district explained that both arguments turned on whether aggravating factors made the depression an unreasonable risk regardless of the depth of the depression. *Id.*

The City argued in response that the special interrogatory was proper because the trial court previously had ruled on summary judgment that no aggravating factors were present. *Id.* ¶ 31. The City argued that as a result, the only factual

issue to be decided at trial was the depth of the defect in which the plaintiff fell. The court rejected this argument, explaining summary judgment had been granted only on the sufficiency of the lighting in the parking lot and not whether aggravating factors existed. *Id.*

The appellate court then went on to find that the aggravating circumstances presented at the summary judgment and trial stages raised a question of fact on the issue of negligence. The court found important that: (1) there was evidence that the size of the defect was not insubstantial; (2) the defect was located in an area in which pedestrians were likely to encounter the defect; (3) the defect contained broken asphalt; (4) the defect was deep enough that it caused plaintiff to become stuck and then fall forward; (5) the parking lot had a bottleneck design; (6) the parking lot was congested at the time of plaintiff's fall; and (7) the City's employees had testified that the defect needed to be repaired and was a tripping hazard. *Id.* ¶ 36.

Based on all of these facts, the court found that the trial court erred in holding that no aggravating factors rendered the defect, which was otherwise *de minimis*, actionable. *Id.* ¶ 38. The court explained that issues of material fact rendered the holding that the defect was *de minimis* as a matter of law error. On this basis, the trial court should not have given the special interrogatory because it did not relate to an ultimate issue of fact upon which the rights of the plaintiff and the City depended. *Id.*

The court also found that the answer to the special interrogatory was not inconsistent with the verdict for the plaintiff. Regardless of whether the depth of the defect rendered it *de minimis* under the case law, issues of material fact as to aggravating factors existed that may have rendered the plaintiff's claim actionable. *Id.* On this basis, the second district reversed the trial court's ruling and instructed the trial court to reinstate the verdict for plaintiff. *Id.* ¶¶ 38, 40.

Conclusion

The *Bartkowiak* decision offers a detailed and thoughtful analysis of the *de minimis* doctrine and should be reviewed by any defense attorney who wants to raise a *de minimis* defense. Based on some favorable case law, defense attorneys often become convinced that summary judgment will be granted simply due to the size of a defect. *Bartkowiak* provides a warning, however, that there may be aggravating factors that render such a claim actionable even if the defect at issue is less than two inches in depth. Further, the factors in *Bartkowiak* provide a helpful checklist for evidence that plaintiffs may present to defeat summary judgment based on the *de minimis* doctrine.

About the Author

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