Not Reported in Cal.Rptr.3d, 2006 WL 1101797 (Cal.App. 2 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2006 WL 1101797 (Cal.App. 2 Dist.))

Court of Appeal, Second District, Division 5, California.
BLACKWOLF, Plaintiff and Appellant,
v.
J.H. MANAGEMENT COMPANY, LLC, et al., Defendants and Respondents.

No. B183176.
(Los Angeles County Super. Ct. No. PC034566).
April 27, 2006.

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Barbara M. Scheper, Judge. Reversed.
Law Offices of Leonard M. Friedman, Leonard M. Friedman, Paul F. Sowa, for Plaintiff and Appel- lant.

Archer Norris, Richard W. Vanis, Jr., Christina M. MacNeil; Dunn **Koes** LLP, Pamela E. Dunn and Daniel J. **Koes**, for Defendants and Respondents.

MOSK, J.

***1** Plaintiff and appellant Blackwolf (plaintiff) appeals the trial court's grant of summary judgment in favor of defendants and respondents J.H. Management Company, LLC and Coastal Meadowridge, LLC (collectively, defendants) in plaintiff's action for premises liability and negligence for injuries sustained when he fell on a cement walkway in an apartment complex owned and managed by defendants. Plaintiff claims his fall was caused when his foot was caught in a crack in the cement walkway. He contends the trial court erred by concluding that the crack was trivial, and therefore not dangerous, as a matter of law because there were triable issues of material fact concerning the dangerousness of the crack, and because the trial court improperly disregarded certain pertinent facts and applied the wrong legal standard. Plaintiff also appeals the trial court's denial of his request for leave to file a first amended complaint and the denial of his motion for a new trial based on newly discovered evidence.

The crack measured between 1 1/2 inches in depth and 1 1/2 to 2 inches in width, was irregularly shaped with jagged edges, and had loose and deteriorating patching material lodged within it as the result of a previous repair effort. Plaintiff raised triable issues of fact as to whether this crack presented a substantial danger to pedestrians exercising ordinary care while using the walkway. We therefore reverse the summary judgment. Because we reverse the summary judgment, we need not reach the issues as to whether the trial court abused its discretion by denying plaintiff's motion to amend the complaint to add a cause of action for negligent repair of the walkway, and by denying plaintiff's motion for a new trial based on newly discovered evidence.

BACKGROUND

Defendant Coastal Meadowridge, LLC owned the Meadowridge Apartments, a 176-unit residential apartment complex located in Santa Clarita, California. Defendant J.H. Management Company, LLC managed and maintained the Meadowridge Apartments. At the time of the accident, plaintiff had lived as a tenant in the Meadowridge Apartments for approximately seven years.

On a sunny morning on May 1, 2003, between 9:00 a.m. and 11:00 a.m., plaintiff fell and sustained injuries when his foot was caught in a crack in a curved cement walkway located near a parking lot at the Meadowridge Apartments. In various spots, the crack in the walkway measured between 1 1/2 to 2 inches in width and between 1 1/2 to 2 inches in depth, had an irregular shape, and contained jagged edges as the result of previous patch-

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ing. In some places, the patching material was loose and deteriorating. A photograph that the parties agree accurately depicts the condition of the walkway at the time of the accident shows some leaves and twigs lodged within the crack itself, but no leaves, twigs, debris, or other obstructions on any other part of the walkway.

From January 1, 2002 to the date of the accident, plaintiff used his van, which he ordinarily parked in a space directly in front of the cracked portion of the walkway, approximately three to four times per week. Before the accident, plaintiff had never seen or noticed the crack in the walkway. Before the accident, no other tenants in the Meadowridge Apartments had ever reported falling as a result of the condition of the walkway.

***2** Plaintiff filed the instant action on March 8, 2004, alleging causes of action for general negligence and premises liability. On December 7, 2004, defendants filed a motion for summary judgment on the ground that the crack in the sidewalk was a trivial defect for which they had no duty to repair or to warn. Plaintiff opposed the motion on the ground that triable issues of material fact existed, and that the matter was one for the jury to decide. The trial court granted summary judgment in defendants' favor following a hearing on the motion on March 2, 2005.

After summary judgment was granted, plaintiff sought leave to amend the complaint to allege a cause of action for negligent undertaking of repairs, arguing that the crack in the walkway was substantially larger before the date of plaintiff's accident, and that defendants had failed to exercise due care in repairing the crack. Plaintiff also filed a motion for a new trial on the ground that there was newly discovered evidence, and that the trial court had applied improper legal standards and failed to consider all pertinent facts before granting summary judgment. In support of both the motion to amend and the motion for a new trial, plaintiff submitted the deposition testimony of a tenant who lived in the Meadowridge Apartments, who attested to the size of the crack before and after its repair. Defendants opposed the motion to amend the complaint as untimely and because the negligent repair cause of action plaintiff proposed to add was duplicative of the general negligence cause of action asserted in the original complaint. Defendants opposed the motion for a new trial on the ground that the deposition testimony was not new evidence, as both plaintiff and his counsel had been aware of the deponent's identity and anticipated testimony before plaintiff's opposition to the motion for summary judgment was due. The trial court denied plaintiff's motion for a new trial and the motion for leave to file an amended complaint.

Plaintiff filed the instant appeal, challenging the grant of summary judgment, the denial of his request to file an amended complaint, and the denial of the motion for a new trial.[FN1]

FN1. We deny defendant's motion to strike plaintiff's reply brief and plaintiff's motion for monetary sanctions.

DISCUSSION

A. Standard of Review

Summary judgment is granted when a moving party establishes the right to entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v.. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.)

Summary judgment is a drastic procedure, however, and should be used cautiously so that it is not a substitute for a trial on the merits as a means of determining the facts. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 183.) "Upon a motion in summary judgment, the controlling question before the trial court is whether there is a material issue of fact to be tried. If the trial court determines there is one, it is powerless to proceed further. The issue must be decided in trial by the

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finder of fact." (*Haskell v. Carli* (1987) 195 Cal.App.3d 124, 132; see also *Brown v. Bleiberg* (1982) 32 Cal.3d 426, 436, fn. 7.) On appeal from a summary judgment, an appellate court "review[s] the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained." (*Guz v. Bechtel National, Inc.*(2000) 24 Cal.4th 317, 334.)

B. Trivial Defect Doctrine

***3** Civil Code section 1714, subdivision (a) provides in relevant part as follows: "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself." That statute "embodies the public policy of this state and in a very general sense imposes a duty upon every person to exercise reasonable care to avoid injury to every other person." (*Lundy v. California Realty* (1985) 170 Cal.App.3d 813, 818.) Any analysis of "duty" in a premises liability case must therefore begin with this fundamental policy. (Thomas, Kelegian, Gutierrez, Premises Liability in California (2005 ed.) § 1:2, p. 3.) Civil Code section 1714 does not, however, itself establish the existence of a legal duty on the part of the defendant in a particular case. (*Lundy v. California Realty, supra,* 170 Cal.App.3d at p. 818.) The determination of whether such a legal duty exists is a question of law that involves the balancing of various factors, including policy considerations for and against imposing liability under the circumstances. (*Id.* at p. 819.) A court may therefore conclude as a matter of law that a landowner owes no duty of care to a person injured on the landowner's property under certain circumstances. (*Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, 927 (*Caloroso*); *Ursino v. Big Boy Restaurants* (1987) 192 Cal.App.3d 394, 398 (*Ursino*) .)

The trivial defect doctrine is that a property owner is not liable, as a matter of law, for injury or damage caused by a minor, trivial, or insignificant defect in property. (*Caloroso, supra,* 122 Cal.App.4th at p. 927.) The doctrine originated as a means of shielding public entities from liability for conditions on public property that are "of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used." (Gov.Code, § 830.2) It is equally applicable, however, to private, non-governmental landowners. (*Ibid.; Ursino, supra,* 192 Cal.App.3d at pp. 398-399.)

Although the trivial defect doctrine is sometimes referred to as the "trivial defect defense," "it is not an affirmative defense but rather an aspect of duty that [a] plaintiff must plead and prove ." (*Caloroso, supra,* 122 Cal.App.4th at p. 927.) The "aspect of duty" referred to by the court in *Caloroso* is the existence, or scope of duty owed by a landowner to the plaintiff. In other words, it is part of a plaintiff's prima facie case to establish that a condition is dangerous, thereby triggering a duty on the part of a landowner to repair or warn. A landowner owes no duty with regard to a trivial defect. (*Ursino, supra,* 192 Cal.App.3d at p. 398.)

***4** The trivial defect doctrine permits a court to determine whether a defect is trivial as a matter of law, rather than submitting the matter to a jury to decide. (*Ursino, supra,* 192 Cal.App.3d at p. 399.) Whether a crack in a cement walkway is or is not dangerous "does not rest solely on the size of the crack in the walkway, since a tape measure alone cannot be used to determine whether the defect was trivial. A court should decide whether a defect may be dangerous only after considering all of the circumstances surrounding the accident that might make the defect more dangerous than its size alone would suggest. [Citation.] Aside from the size of the defect, the court should consider whether the

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walkway had any broken pieces or jagged edges and other conditions of the walkway surrounding the defect, such as whether there was debris, grease or water concealing the defect, as well as whether the accident occurred at night in an unlighted area or some other condition obstructed a pedestrian's view of the defect." (*Caloroso, supra,* 122 Cal.App.4th at p. 927.) After considering all of these factors, if reasonable minds can reach only one conclusion-that the defect or condition at issue presented no substantial risk of injury-the issue is a question of law, properly resolved by way of summary judgment. (*Id.* at p. 929.)

Courts have held that an uneven or cracked sidewalk is a trivial defect and therefore not dangerous as a matter of law. (*Barrett v. City of Claremont* (1953) 41 Cal.2d 70; *Whiting v. City of National City* (1937) 9 Cal.2d 163; *Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 727; *Graves v. Roman* (1952) 113 Cal.App.2d 584, 586-587.) In *Ursino, supra,* 192 Cal.App.3d at page 398, the court said: "[P]ersons who maintain walkways, whether public or private, are not required to maintain them in an absolutely perfect condition. The duty of care imposed on a property owner, even one with actual notice, does not require the repair of minor defects." The court in *Ursino* explained the rationale underlying the trivial defect doctrine as follows: "The rule which permits a court to determine 'triviality' as a matter of law rather than always submitting the issue to a jury provides a check valve for the elimination from the court system of unwarranted litigation which attempts to impose upon a property owner what amounts to absolute liability for injury to persons who come upon the property." (*Id.* at p. 399.)

A walkway defect is trivial if it poses no substantial risk of injury to a pedestrian who exercises ordinary care. (*Caloroso, supra,* 122 Cal.App.4th at p. 929; *Dunn v. Wagner* (1937) 22 Cal .App.2d 51, 54.) The size of the defect, its physical properties, and the conditions surrounding the plaintiff's injury are factors a court should consider in determining whether or not a defect is trivial. (*Caloroso, supra,* 122 Cal.App.4th at p. 927.)

Although a court is not precluded from determining, as a matter of law, that a given walkway defect is trivial, it cannot make such a determination if the size, nature and quality of the defect, or the circumstances surrounding the plaintiff's injury, raise triable issues of material fact that the defect or other conditions of the walkway presented a danger to pedestrians who exercise ordinary care.

C. Issues of Material Fact

1. Size

***5** The parties agree that the crack measured between 1 1/2 to 2 inches in depth "in various places" and between 1 1/2 to 2 inches in width. "It is to be noted that when the size of the depression begins to stretch beyond one inch the courts have been reluctant to find that the defect is not dangerous as a matter of law." (*Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 726.) Size alone, however, is not determinative of whether the crack presented a dangerous condition. "The decision whether the defect is dangerous as a matter of law does not rest solely on the size of the crack in the walkway, since a tape measure alone cannot be used to determine whether the defect was trivial." (*Caloroso, supra,* 122 Cal.App.4th at p. 927.) Size is thus but one factor to be considered, as there is no fixed, arbitrary measurement for determining when a defect is trivial as a matter of law and when it becomes a question of fact as to whether it is dangerous. (*Beck v.. City of Palo Alto* (1957) 150 Cal.App.2d 39, 43-44.) Nevertheless, of the various factors, "[t]he most important of these factors is the physical size of the defect." (Thomas, Kelegian, Gutierrez, *supra,* Premises Liability in California, § 3:46 at p. 222.) In addition to the size of the defect, "the court should view the intrinsic nature and quality of the defect to see if, for example, it consists of the mere nonalignment of two horizontal slabs or whether it consists of a jagged and deep hole. The court should also look at other factors such as

whether the accident occurred at night in an unlighted area. Furthermore, the court should see if there is any evidence that other persons have been injured on this same defect." (*Fielder, supra,* 71 Cal.App .3d at p. 734.)

2. Nature and Quality of the Alleged Defect

The nature and quality of the alleged defect at issue here precludes summary judgment. Photographs that the parties agree accurately depict the condition of the walkway at the time of plaintiff's accident show that the crack is a depression that extends along the entire width of the walkway. The crack is irregular in shape, has jagged edges, and appears to have been previously patched. In some places, the patching material is loose and deteriorating, and broken pieces of patching material are lodged within the crack. In other places, the patching material is worn away completely. Small twigs and leaves are lodged in portions of the crack where the patching material has worn away. There are no leaves, twigs, or other debris concealing the crack from view, nor is there debris of any sort elsewhere on the walkway. The evidence shows that the crack at issue here was more than the "mere nonalignment of two horizontal slabs." (*Fielder, supra,* 71 Cal.App.3d at p. 734.)

Although the accident occurred during daylight hours, and there were no debris or obstructions elsewhere on the walkway, leaves and twigs lodged within the crack itself could have concealed its depth of 2 1/2 inches. These conditions show that a triable issue exists concerning the dangerousness of the crack, and as to whether the crack presented a substantial risk of injury. Because reasonable minds could differ on these issues, we conclude that the alleged defect is not trivial as a matter of law. (See Thomas, Kelegian, Gutierrez, *supra,* Premises Liability in California, § 3:51, p. 225 ["The standard for the court to use in making the preliminary determination of triviality is fairly stringent"].) Summary judgment is therefore not appropriate.

***6** Because we conclude that the nature and quality of the alleged defect preclude summary judgment in this case, we need not determine whether the trial court erred by denying plaintiff's motion for leave to amend or by denying the motion for a new trial.

DISPOSITION

The judgment is reversed. Plaintiff is awarded his costs on appeal.

We concur: TURNER, P.J., and ARMSTRONG, J.

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