

CANADA / JUDGMENT

Fingerhut v. Longwood

2009 BCSC 1839

COURT

Supreme Court of British Columbia

DECIDED

23 April 2009

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2009 BCSC 1839 Fingerhut v. Longwood IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Fingerhut v. Longwood, 2009 BCSC 1839 Date: 20090423 Docket: S46250 Registry:

Nanaimo Between: David Fingerhut Plaintiff And: Longwood Station Ltd. Defendant Before: The

Honourable Mr. Justice Metzger Oral Reasons for Judgment Counsel for the Plaintiff: J. Vanstone

Counsel for the Defendant: H. Bromley Place of Trial/Hearing: Nanaimo, B.C. April 23, 2009 Place

and Date of Judgment: Nanaimo, B.C. April 23, 2009

- [1] THE COURT: This action arises out of a fall suffered by the plaintiff in a gap between two speed bumps. The speed bump was across the roadway in the usual manner, except that rather than one continuous rising in the pavement, there was a gap in the middle that made it into two speed bumps laid end to end with a space in between.
- [2] The accident occurred on May 10, 2004, in the parking lot of a shopping mall in Nanaimo called Longwood Station, which was owned by the defendant. It was a clear, dry morning, and the plaintiff was wearing his prescription glasses. The plaintiff is retired and resides in California. He was born on December 25, 1924. He had travelled to Nanaimo to visit a friend named George Loepp. Mr. Loepp was 67 on the day of the fall. He lived in nearby condominiums. George Loepp drove the plaintiff to the mall to accompany Mr. Loepp in his shopping. This was the plaintiff's first time in the mall.
- [3] The action is brought pursuant to the Occupiers Liability Act, R.S.B.C. 1996, c. 337.
- [4] Damages have been agreed upon in the amount of \$92,663.40. The only issue is liability.
- [5] There are two pairs of these end-to-end speed bumps which are on either side of the main entrance to the Thrifty store that the plaintiff and his friend were going towards. The gap between the speed bumps goes down to the road level. The defendant had a regular maintenance schedule of painting the entire parking lot once a year. This included the speed bumps. The timing of the painting depended on the existence of certain specific weather conditions that did not occur until later that year.

- [6] The plaintiff chose to traverse the speed bump rather than go around it. He did not see the gap in the middle of the speed bump. When his left foot went down into the gap, he fell and sustained injuries.

Issues

- [7] The plaintiff's position is that the defendant breached its statutory duty to the plaintiff when it failed to provide adequate warning on the change in elevation caused by the gap between the speed bumps, and that failure caused him to fall and sustain his injuries.
- [8] The defendant's position is that it had a properly implemented system of maintenance and that the plaintiff is solely responsible for his fall or was contributorily negligent by failing to keep a reasonable outlook.

Analysis

- [9] The defendant admits that it is an occupier within the meaning of the Occupiers Liability Act. Accordingly, the defendant owed a duty to the plaintiff pursuant to s. 3(1) of the Act. The defendant admitted it had a duty to take reasonable steps to ensure people using the premises are reasonably safe.
- [10] However, the case law is clear that the duty is not absolute and occupiers are not insurers or guarantors liable for any damages suffered by persons entering their premises. Their responsibility is only to take "that care as in all the circumstances of the case is reasonable." (See *Lesage v. Royal Bank of Canada*, [1987] B.C.J. No. 2310.)
- [11] Therefore, the test is one of reasonableness, not perfection. (See *Thuveson v. Robert H. Ash & Associates*, 1997 CanLII 801; and *Jacobsen v. Lumberland Building Materials Ltd.*, [1997] B.C.J. No. 3154.)
- [12] This duty of care does not extend so far as to require the defendant to remove every possibility of danger. The plaintiff did not have to keep his eyes glued to the ground, but he had a duty to be aware of his surroundings. (See *Robinson v. British Columbia*, [1998] B.C.J. No. 1962.)
- [13] I am satisfied that in the case before me the painting of the speed bump in order to warn of a danger failed. It, in fact, concealed a danger. There is no doubt the defendant was aware of the danger, as it had painted the word "step" in bold white letters in the hollow of the gap. I accept that the word "step" was worn and incomplete due to the rigors of the winter and traffic, and I am satisfied that the defendant had a maintenance scheme in place that met the industry standard. However, where the defendant breached its duty was in painting the gap the same colour as the speed bump. This, in effect, changed the gap into a trap. I am satisfied that had the gap been left unpainted, it would have warned of the danger by the sharp contrast to the colour of the rest of the speed bump. Subsequent to this fall, the defendant made certain the gap was a different colour than the speed bump.

- [14] Thus, I find the defendant has breached its duty.
- [15] I now consider whether the painting of the gap was the proximate cause of the plaintiff's fall. (See *Coleman v. Yen Hoy Enterprises Ltd.*, 2000 BCSC 0276, and *Wickam v. 270792 B.C. Ltd.*, [1997] B.C.J. No. 671.)
- [16] The onus is on the plaintiff to show that the painting of the gap caused his accident. I am satisfied that he has met that onus. This painting error created the illusion that the two speed bumps were one, thus, the plaintiff was not alerted to the danger. The plaintiff was aware of his surroundings and that he was walking over a speed bump. He was not inattentive. This accident could easily have been avoided by painting the gap a contrasting colour, or otherwise making sure the gap was not camouflaged by painting it the same colour as the speed bump.
- [17] There was a reasonable system of maintenance in place and the system was followed on the day of the accident. However, that is not the point in this case. Even if the word "step" had been in immaculate condition, the breach occasioned by the defendant was the failure to appreciate that painting of the gap the same colour as the speed bump disguised the danger rather than warning of it.
- [18] I am satisfied that the plaintiff did take reasonable care throughout his walk to the store. The plaintiff was alert to his surroundings, including where he was going, the presence of vehicle traffic, and the existence of the speed bump. This is not the situation of someone walking over uneven ground where he might have expected unusual hazards to exist. He was not required to have his eyes glued to the ground. (See *Coleman (supra)* para 19; *Pedan v. Lark Holdings Ltd.*, [1981] B.C.J. No. 1052; and *McCrank v. Enderby*, [1987] B.C.J. No. 553.)
- [19] The existence of an alternate route to the store is not a defence. Had the occupier wished patrons to use an alternate route, it could have constructed a crosswalk at the eastern side of Thrifty Foods, as it had on the western side. I am satisfied by the evidence of George Loepp that the angled route taken by himself and the plaintiff to the entrance of the Thrifty store was a regular one, used by many patrons. The occupier knew this was a common route by pedestrians; otherwise it would not have bothered painting the word "step" in the depression.
- [20] There is no evidence relating to the history of prior falls, as the mall has been sold to new owners who have not provided such information. Decision
- [21] The defendant is liable, for the reasons set out above.
- [22] The plaintiff is awarded damages in the amount agreed.
- [23] The plaintiff will have his costs. If there is a dispute between the parties on costs, the parties are at liberty to speak to that question. "R.W. Metzger, J." The Honourable Mr. Justice Metzger

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