

MARGOLIS EDELSTEIN

MUNICIPAL LIABILITY TREE ROOTS & SIDEWALK SLIPS AND FALLS

By: **Barry Kronthal**

PHILADELPHIA OFFICE
The Curtis Center
170 S. Independence Mall W.
Suite 400E
Philadelphia, PA 19106-3337
215-922-1100

PITTSBURGH OFFICE
525 William Penn Place
Suite 3300
Pittsburgh, PA 15219
412-281-4256

WESTERN PA OFFICE
983 Third Street
Beaver, PA 15009
724-774-6000

SCRANTON OFFICE
220 Penn Avenue
Suite 305
Scranton, PA 18503
570-342-4231

MARGOLIS EDELSTEIN

Barry Kronthal, Esquire
3510 Trindle Road
Camp Hill, PA 17011
717-760-7503
FAX 717-975-8124

bkronthal@margolisedelstein.com

CENTRAL PA OFFICE
P.O. Box 628
Hollidaysburg, PA 16648
814-659-5064

SOUTH NEW JERSEY OFFICE
100 Century Parkway
Suite 200
Mount Laurel, NJ 08054
856-727-6000

NORTH NEW JERSEY OFFICE
Connell Corporate Center
Three Hundred Connell Drive
Suite 6200
Berkeley Heights, NJ 07922
908-790-1401

DELAWARE OFFICE
750 Shipyard Drive
Suite 102
Wilmington, DE 19801
302-888-1112

www.margolisedelstein.com

MUNICIPAL LIABILITY
TREE ROOTS AND SIDEWALK SLIPS AND FALLS

The dockets of Pennsylvania are replete with law suits arising from trips and falls on public sidewalks. Many times, these falls result from tree roots causing an uneven sidewalk. And, quite often, these same trees are in some way regulated by the municipality. The following discussion analyzes the law applicable to a situation involving a plaintiff who trips over an uneven sidewalk caused by tree roots.

A local governmental agency (i.e. a non-Commonwealth/State agency) enjoys immunity from suit unless one of a number of exceptions apply. 42 Pa. Cons. Stat. Section 8542. The only two exceptions which are relevant to this discussion are the exceptions for sidewalks and/or trees. 42 Pa. Cons. Stat. Sections 8542(b)(4) and (7).

The trees and sidewalk exceptions state, in relevant part, that:

The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency:

. . . .

(4) *Trees*, . . . - A dangerous condition of trees. . . . under the care, custody or control of the local agency, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that

. . . .

(7) *Sidewalks*. - A dangerous condition of sidewalks within the rights-of-way of streets owned by the local agency. . . . When a local agency is liable for damages under this paragraph by reason of its power and authority to require installation and repair of sidewalks under the care, custody and control of other persons, the local agency shall be secondarily liable only and such other persons shall be primarily liable.

42 Pa. Cons. Stat. Sections 8542(b)(4) and (7).

Given that there is a clear intent by the legislature to insulate governmental entities from exposure to tort liability, the exceptions to governmental immunity are to be strictly/narrowly

construed against injured plaintiffs. Mascaro v. Youth Study Center, 514 Pa. 351, 523 A.2d 1118 (1987); Thomas v. City of Philadelphia, 668 A.2d 292 (Pa. Commw. 1995); Smith v. Manson, 806 A.2d 518 (Pa. Commw. 2002), appeal denied, 576 Pa. 727, 841 A.2d 533 (2003); Jones v. City of Philadelphia, 893 A.2d 837 (Pa. Commw. 2006), re-argument denied, appeal denied, 589 Pa. 733, 909 A.2d 306 (2007); Alston v. PW-Philadelphia Weekly, 980 A.2d 215 (Pa. Commw. 2009).

Thus, in order to prove liability against a municipality for an uneven sidewalk, in the absence of having anything to do with a tree, a plaintiff must establish that the sidewalk was "within the rights-of-way of streets owned by the local agency. . . ." 42 Pa. Const. Stat. Section 8542 (b)(7). Without an admission by the local agency of this fact, it is incumbent on the plaintiff to establish this by way of some type of land survey. An easement in the sidewalk to allow the local agency to make repairs is not sufficient to establish liability under Section 8542 (b)(7). See Gray v. Logue, 654 A.2d 109 (Pa. Commw. 1995), appeal denied, 541 Pa. 628, 661 A.2d 875 (1996). Moreover, it must be established that the plaintiff's injury resulted from a dangerous or defective condition of the sidewalk itself. Finn v. City of Philadelphia, 165, Pa. Commw. 255, 645 A.2d 320 (1994), appeal granted, 538 Pa. 675, 649 A.2d 676, affirmed, 541 Pa. 596, 664 A.2d 1342 (1995). The defect or dangerous condition is limited solely to negligent design or construction of the sidewalk, or to a defect in the internal structural integrity of the sidewalk. Id.

Thus, in a case where the sidewalk's unevenness is caused by tree roots, a plaintiff will attempt to rely upon the tree exception quoted above. The plaintiff will likely try to augment its argument, if possible, with a showing that the local agency regulated the care and treatment of the tree in question. In many municipalities, local ordinances are enacted setting forth what a

resident may or may not do with certain trees.

Under the tree exception, a plaintiff must establish, inter alia, that the tree itself (like with the sidewalk exception) caused the injury to the plaintiff and that the tree was under the "care, custody or control. . . ." of the local agency. 42 Pa. Cons. Stat. Section 8542(b)(4). These are two of the most litigated aspects of Section 8542(b)(4). With respect to whether the tree itself caused the injury, in Hedglin v. City of Scranton, 139 Pa. Commw. 201, 590. A.2d 62 (1991), the plaintiff brought an action against the city to recover for damages for injuries sustained when he tripped over debris left by city employees after they had trimmed trees. Specifically, when he attempted to break his fall, he leaned against the broken window of a building. It was this broken window, and not the downed tree limbs, which caused the plaintiff's injuries. The tree exception to governmental immunity was invoked by the city in a motion for summary judgment. In holding that the city was entitled to summary judgment based upon Section 8542(b)(4), the Pennsylvania Commonwealth Court stated that:

However, in Crowell v. City of Philadelphia, 131 Pa. Commonwealth Ct. 418, 425, 570, A.2d 626, 630 (1990), this court, in construing the language of the trees, traffic controls and street lighting exception, held that the "dangerous condition of the [tree or] traffic directional sign itself" must cause the injury rather than merely facilitating the injury, before the exception will be applicable. (Emphasis added). In the matter now before us, the facts do not show that the trees actually caused the injury; cuttings from them on the ground merely facilitated the injury. The injury was caused by the broken window in the structure. Accordingly, the tree exception cannot be the basis for the city's liability.

Id. at 204-205, 509 A.2d at 64. (emphasis in original) (emphasis added).

Similarly, in Levan v. the City of Allentown, 62 Pa. D. & C. 4th 258 (Lehigh County, 2003), the plaintiff brought a negligence action against the City of Allentown when she tripped over a raised grate on a sidewalk. The raised grate was caused by a tree that had been moved as a result of an automobile accident. In granting summary judgment to the City of Allentown, the

Lehigh County Court of Common Pleas, after reviewing the trees exception quoted above, stated that:

The trees exception cannot apply since Mrs. Levan's fall did not result from a dangerous condition of the tree. The movement of the tree from the accident may have raised the grate but that is not what the exception, which must be strictly construed, is meant to encompass. Because of the clear intent to insulate government from exposure to tort liability for any of its acts, exceptions carved out by the legislature from this general rule are strictly construed. *Kile*, 537 Pa. at 506, 645 A.2d at 185; *Love v. the City of Philadelphia*, 518 Pa. 370, 543 A.2d 531 (1988); *Snyder v. Harmon*, 522 Pa. 424, 562 A.2d 307(1989).

Id. at 262. (emphasis added). Thus, it appears relatively clear that a plaintiff must establish that the tree itself (i.e. in the instant scenario, the roots) caused the plaintiff to fall. Accordingly, when a plaintiff trips over an uneven sidewalk caused by tree roots, and not the roots themselves, the local governmental agency is immune from suit under Section 8542(b)(4).

Notwithstanding the foregoing, as noted above, in order to invoke the trees exception, a plaintiff must also establish that the local agency had “care, custody, or control. . .” of the subject tree. 42 Pa. Cons. Stat. Section 8542(b)(4) In *Osborne v. Cambridge Township*, 736 A.2d. 715 (Pa. Commw. 1999), the Commonwealth Court of Pennsylvania dealt with the issue of care, custody and control under Section 8542(b)(4). Specifically, *Osborne* dealt with a tree that had fallen on a roadway, resulting in an accident that killed the plaintiff. In finding against the plaintiff under the “care, custody, or control. . .” requirement of Section 8542, the Commonwealth Court stated that:

In this case, none of the elements necessary to fall within the exception were met. First, no evidence was entered that the fallen tree was within the township's care, custody or control because there was no evidence that the tree was on Township property or the open portion of the Township's road right-of-way.

Id. 736 A.2d at 720. (footnote omitted) (emphasis added). See also, *Mylett v. Adamsky*, 139 Pa. Commw. 637, 642, 591 A.2d 341, 343 (1991) (“The exception for the dangerous condition of

trees. . . did not apply in this case because the tree was never ‘under the care, custody, or control’ of the Township since it was not situated on Township property, either before or after it fell.”) (emphasis added).

Thus, the afore cited case law seems to indicate that in order to establish that the local agency had “care, custody, or control. . . .,” of the subject tree(s), it must be established that the tree was located on the local governmental agency’s property. Absence such a showing, there cannot be liability under Section 8542(b)(4). However, as noted above, a plaintiff may attempt to show "de facto" care, custody and control through municipal ordinances regulating the subject tree(s).

In order to refute such an argument, however, cases interpreting the real property exception to governmental immunity, which also requires care, custody and or control, can be examined. See Mylett, supra, in which the Commonwealth Court in examining the care, custody or control issue stated that: "[w]hile, admittedly, Costello involved the real property exception, rather than the trees exception, we believe that the language used therein regarding what constitutes care, custody, and control applies equally. . . ." to those cases involving the trees exception. Id., 139 Pa. Commw. 637, 644-645, 591 A.2d 341, 345.

In Costello v. Pittsburgh Athletic Co., 652 F. Supp. 1579 (W.D. Pa. 1987)(applying Pennsylvania law), the plaintiff sued the City of Pittsburgh for injuries sustained when a rocket from a post game fireworks display landed in the stands and exploded. In granting the city summary judgment, the District Court rejected, inter alia, the plaintiffs’ argument that the city assumed care, custody and control over the fireworks display when it inspected and approved the display by stating that:

Plaintiffs argue that the stadium was in fact under the City’s custody and control because the City Fire Department inspected and approved the fireworks and

permitted the display to go on. These averments amount to no more than a failure to properly inspect or supervise, and that will not satisfy the real property exception. To accept plaintiffs' theory of control would make the City potentially liable under the real property exception each time it conducted an inspection, even where as here the City did not own the property. We do not believe this was the intent or purpose of the Act.

Id. At 1580 (citations omitted).

Similarly, in Buffalini v. Shrader, 112 Pa. Commw. 228, 535 A.2d 684 (1987), the Pennsylvania Commonwealth Court, in dealing with another case under the real property exception, held that zoning ordinances enacted by a local township do not provide the township with sufficient control over reality within its boundaries to amount to "possession" of that reality for purposes of the governmental immunity statute. See also, City of Pittsburgh v. Estate of Stahlman, 677 A.2d 384 (Pa. Commw. 1996) (duty to inspect privately owned buildings for safety violations is not control or possession); Mentger v. Ognibene, 126 Pa. Commw. 178, 559 A.2d 79 (1989), appeal denied, 523 Pa. 644, 565 A.2d 1168 (1990) (possession does not include the control exercised by a governmental agency over construction projects within its boundaries through ordinances regulating such projects). Thus, a municipality can argue that its attempts to regulate trees within its territorial limits do not, much like zoning, inspection/safety, and/or other regulatory statutes, provide the municipality with sufficient control over the trees to amount to "care, custody, or control . . ." for purposes of the governmental immunity statute. 42 Pa. Cons. Stat. § 8542 (b)(4). See Psichos v. Sauvion and the City of Philadelphia, 103 Pa. Commw. 517, 520 A.2d 945 (1987), in which the Commonwealth Court declined to find liability against a municipality despite the fact that it had an ordinance in place regulating trees.

In Psichos, supra, the plaintiff alleged that she tripped over a raised sidewalk, caused by the roots of a tree. Also, the plaintiff argued that the city had care, custody, and control over the tree based upon the following Philadelphia city statute:

The Fairmount Park Commission shall have custody and control of the street trees on the streets of Philadelphia and shall make rules and regulations regarding the planting, setting out, removal, maintenance, protection and care of said trees as are necessary. Such rules and regulations shall also prohibit any action deemed to be detrimental to the life of said trees.

Id. at 519, 520 A.2d at 946.

The Commonwealth Court then held, however, that:

In the instant case, there was no evidence that the City created a dangerous condition or obstruction on the sidewalk when the tree was planted. The owner had the primary duty, then and thereafter, of keeping the pavement in repair. If the roots, thereafter, caused a dangerous condition, it was the owner's primary duty to correct it. Under the ordinance of the city, the primary duty to keep the pavement in repair and in travelable condition for pedestrians did not shift to the City.

Id. at 521, 520 A.2d at 947 (emphasis added). Thus, the court held that the property owner had no right of contribution/indemnity against the city.

Similarly, in Welde v. Beneficial Partners, L.P., 2006 WL 255, 9482 (E.D. Pa. 2006)(applying Pennsylvania law), the plaintiff alleged that she tripped and fell on a sidewalk. As a result, she brought suit against the property owner and the municipality. In ruling upon a motion to join additional defendants, the United States District Court for the Eastern District of Pennsylvania, addressed the same issue as in Psichos. Specifically, in holding that the property owner had no right of indemnity/contribution against the municipality, the District Court stated that:

In cases involving slip and fall injuries on sidewalks, there are two general categories of cases, each of which has its own rules regarding liability. In cases in which the injury was caused by a failure to maintain or repair the sidewalk, that is where the defect “was occasioned, or knowingly permitted to exist, by either the tenant in sole possession or the owner,” Golden v. City of Philadelphia, 57 A.2d 429, 430 (Pa. Super. Ct. 1948), the primary duty is on the property owner or tenant. The “[c]ity’s liability to see that the sidewalk is left in repair is secondary.” Psichos v. Sauvion, 529 A.2d 945, 946 (Pa. Commw. CT. 1987). In these cases, if a plaintiff recovers from the city, the city may, in turn, seek indemnification from the property owner who is primarily liable. Because the

property owner is primarily liable, it cannot seek indemnification from the city. Golden, 57 A.2d at 430. In contrast, where the defect is as a result of the construction or design of the sidewalk, and such defect was created by the municipality, the municipality is the “active tortfeasor,” and it cannot seek indemnification from the property owner. Id. Where the city itself has created a hazardous condition through its contractors or architects, the property owner has no duty to eliminate the condition. Psichos, 520 A.2d at 946. Therefore, there can be no occasion for the property owner to seek indemnification or contribution from the municipality. Applying these general principles to the case at hand, compels us to conclude that Beneficial Partners [the property owners] cannot demonstrate any circumstances under which it would be entitled to indemnification or contribution from the city or its contractors. . . .

Id. at 3. (footnote omitted) (emphasis added). See also, Ratner v. City of Philadelphia, 110 Pa. Commw. 253, 532 A.2d 68 (1987); Restifo v. City of Philadelphia, 151 Pa. Commw. 27, 617 A.2d 818 (1992); Burns v. City of Philadelphia, 740 A.2d 773 (Pa. Commw. 1999); 42 Pa. Cons. Stat. Section 8542(b)(7)(“When a local agency is liable for damages under this paragraph by reason of its power and authority to require installation and repair of sidewalks under the care, custody and control of other persons, the local agency shall be secondarily liable only and such other persons shall be primarily liable.”)(emphasis added).

Thus, even in a situation where a uneven sidewalk is caused by a tree, and it can be established that the civilian property owner knew or should have known of the problem, liability can be shifted to the property owner through indemnification. This is even despite the existence of municipal ordinances regulating “the planting, setting out, removal, maintenance, protection and care of said trees.” Psichos, at 519, 520 A.2d at 946.

MARGOLIS EDELSTEIN

Please feel free to contact Mr. Kronthal should you care to discuss this topic in further detail.



Barry A. Kronthal
P. 717-760-7503
bkronthal@margolisedelstein.com

Mr. Kronthal is admitted to practice before the United States District Courts for the Middle and Eastern Districts of Pennsylvania and the Northern District of New York, and the United States Court of Appeals for the Third Circuit. He is a member of the American Bar Association, Fidelity and Surety Law Conference, the Pennsylvania, Cumberland County and Dauphin County Bar Associations and the Harrisburg Claims Association. Mr. Kronthal has testified before the Pennsylvania Senate Judiciary Committee on tort reform legislation, and lectures to insurance companies and trade groups regarding various aspects of automobile and products liability litigation.

Margolis Edelstein has been meeting the litigation needs of its clients for more than four decades. The firm began as an insurance defense boutique. Today, it has evolved into a full service litigation provider to the insurance industry and major corporations, with more than 120 attorneys at eight offices, serving Delaware, New Jersey, Pennsylvania and West Virginia. View our Practice Areas to obtain more information about the firm's experience and capabilities.

Margolis Edelstein has received the Martindale-Hubbell legal ability rating of AV (signifying "very high to preeminent"), the highest rating available.

Any information contained in, or linked to our Web site is not intended to convey legal advice. There is absolutely no substitute for a thorough consultation with a qualified attorney as to your specific fact situation.

www.margolisedelstein.com