IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

HOWARD LUDLOW,	)	
	)	
Plaintiff/Appellee,	)	**Shelby Circuit No. 48265 T.D.**
	)	
VS.	)	**Appeal No. 02A01-9408-CV-00196**
	)	
MEMPHIS-SHELBY COUNTY	)	
AIRPORT AUTHORITY,	)	
	)	
Defendant/Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE
THE HONORABLE WYETH CHANDLER, JUDGE

FILED

December 21, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

DAVID O. PRICE
Memphis, Tennessee
Attorney for Appellant

STEPHEN R. LEFFLER
Memphis, Tennessee
Attorney for Appellee

AFFIRMED

ALAN E. HIGHERS, JUDGE

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

PAUL G. SUMMERS, SP. J.

This appeal arises from a trip and fall accident which occurred on property owned

by the Defendant-Appellant Memphis and Shelby County Airport Authority ("Airport"). The lower court, sitting without a jury, found that the Airport's failure to properly designate a change in elevation at the base of an approach ramp created a dangerous condition which proximately caused personal injury to the Plaintiff-Appellee, Howard T. Ludlow ("Ludlow"). The lower court assessed Ludlow's negligence at 40%. The Airport appeals the trial court's decision.

At approximately 1:00 p.m. on September 29, 1991 Ludlow was at the Memphis Airport with the intention of boarding a Northwest Airlines flight to Pensacola, Florida. As he approached the Northwest Airlines entrance to the airport terminal, Ludlow tripped and fell on a raised concrete "lip" at the base of a pedestrian approach ramp. The curb in question borders the roadway. The curb was reduced from its original height of six inches to its current height of one and one-half inches in order to create an approach ramp, facilitating access to the terminal building for passengers with luggage. According to the Airport, the new curb was not constructed to be flush with the roadway because a sufficient thickness of concrete was required to cover the re-enforced steel structure over which the curb was built. The Airport painted a yellow strip across the top, horizontal plane of the one and one-half inch curb at the point where the curb meets the roadway; however, the yellow paint was chipped and barely visible at the time of Ludlow's accident. While the inside, vertical plane of the one and one-half inch curb was not painted yellow, other portions of the curb along the roadway were painted yellow on both the horizontal and vertical planes. Airport officials testified that the curb is painted yellow solely to indicate a no parking area, not to indicate an increase in elevation between the roadway and the approach ramp.

As a result of his fall, Ludlow fractured his left arm in two places. The trial court rendered a verdict in favor of Ludlow in the amount of $31,697.68. The trial court reduced the verdict by 40% to account for Ludlow's comparative negligence.

This case was tried by a court sitting without a jury. Thus, we review the case *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent

error of law. T.R.A.P. 13(d).

The first issue the Airport presents for this Court's review is whether the trial court erred in denying the Airport's motion for summary judgment. In Bradford v. City of Clarksville, 885 S.W.2d 78, 80 (Tenn. App. 1994), this Court stated: "A trial court's denial of a motion for summary judgment, predicated upon the existence of a genuine issue of material fact, is not reviewable on appeal when a judgment is subsequently rendered after a trial on the merits." In the present case, the lower court found that a genuine issue of material fact existed as to whether the Airport's failure to maintain the paint on the one and one-half inch raised lip of the approach ramp constituted negligence. Accordingly, we decline to review the trial court's denial of the Airport's motion.

The second issue on appeal is whether Ludlow failed to prove a *prima facie* cause of action concerning notice, the existence of a dangerous or defective condition, and waiver of immunity. Because this case involves the Airport, a governmental entity created pursuant to T.C.A. § 42-3-103, Ludlow's cause of action is controlled by, and must be brought in strict compliance with, the Tennessee Governmental Tort Liability Act, T.C.A. § 29-20-101 *et seq.* (1980 & Supp. 1995). Although governmental entities such as the Airport are largely immune from suit, immunity may be removed in limited situations. T.C.A. § 29-20-204 provides:

> (a) Immunity from suit of a governmental entity is removed for any injury caused by the dangerous or defective condition of any public building, structure, dam, reservoir other public improvement owned and controlled by such governmental entity.
>
> (b) Immunity is not removed for latent defective conditions, nor shall this section apply unless constructive and/or actual notice to the governmental entity of such condition be alleged and proved . . .

Initially, this Court must determine whether the Airport's maintenance of the raised one and one-half inch, poorly painted, concrete lip at the base of an approach ramp constitutes a dangerous condition. Testimony at trial revealed that the Airport, at some point, painted the horizontal, or top, plane of the one and one-half inch curb yellow. However, the paint was chipped and hardly visible at the time of Ludlow's accident. The trial court stated:

> [h]ad this condition been at the foot of the driveway, possibly your driveway and everyone else's driveway where you don't get the heavy pedestrian traffic, certainly there is no need for painting of any sort or any other sort of warning. But we are talking about a place where thousands and thousands of people walk in and out every day.

We agree. The Airport constructed the approach ramp in question in order to facilitate the flow of passengers, with baggage, from the parking area into the terminal building. A wide, marked, pedestrian crossing zone leads from the parking area to the approach ramp. A raised curb at the base of an approach ramp which is inadequately, if at all, marked to indicate an increase in elevation invites danger. We find unpersuasive the Airport's argument that a raised concrete lip on an approach ramp is not dangerous according to "common experience." Particularly at a large international airport, where passengers are frequently rushed and burdened with luggage, an unmarked concrete lip on what the Airport acknowledges to be an approach *ramp*, is a dangerous condition.

The Airport contends that, because Ludlow was the first person to report an accident due to the raised concrete lip, the lip was not dangerous. We disagree. The courts of this state have frequently found that a dangerous condition exists where there is no evidence that the accident under consideration has previously occurred. See generally Bradford, 885 S.W.2d at 82 (Tenn. App. 1994) (finding that meter lid which caused plaintiff's injuries constituted a dangerous condition, despite fact that meter lid had existed in defective state for twenty years and there was no evidence of previous accidents); McGaughy v. City of Memphis, 823 S.W.2d 209, 214 (Tenn. App. 1991) (holding defendants liable for deaths resulting from dangerous condition created by high powered electric power lines that were not properly insulated); Swafford v. City of Chattanooga, 743 S.W.2d 174, 177 (Tenn. App. 1987) (finding dangerous condition where city failed to properly delineate five lane thoroughfare).

Although we find that the concrete lip created a dangerous condition, this Court may impose liability on the Airport only if we find that the Airport had actual or constructive notice of the dangerous condition. T.C.A. § 29-20-204(b). In Kirby v. Macon County, 892 S.W.2d 403, 409 (Tenn. 1994), the Tennessee Supreme Court stated that "'[a]ctual notice' has been defined by our Court as 'knowledge of facts and circumstances sufficiently

pertinent in character to enable reasonably cautious and prudent persons to investigate and ascertain as to the ultimate facts.'" Doyle Reed, the Airport's Director of Operations and Public Safety, testified, without contradiction, that Ludlow's accident was the first reported accident allegedly caused by the concrete lip at the base of the approach ramp. We conclude that the Airport did not have actual notice of the dangerous condition presented by the concrete lip prior to Ludlow's accident.

'"Constructive notice' is 'information or knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it.'" Id. at 409. In the present case, the approach ramp is bordered on both sides by six inch, brightly painted, yellow curbs. It is foreseeable that a reasonable person would believe that the unpainted portion in the middle; that is, the base of the approach ramp, was flush with the designated pedestrian crosswalk. On the record before us, we conclude that, in the exercise of reasonable diligence, the Airport should have noticed, and remedied, the hazard presented by the raised one and one-half inch lip at the base of the approach ramp. Further, as the designer and builder of the ramp, the Airport was charged with notice of its condition.

The final issue the Airport presents for this Court's review is whether the trial court erred in assessing Ludlow's contributory negligence at only 40%. The Airport argues that, because Ludlow had visited the Memphis Airport before, his knowledge of any dangerous condition was equal to or superior than that of the Airport itself, and therefore should preclude Ludlow's recovery. Ludlow testified that he had been to the Memphis Airport and successfully traversed the same concrete lip on previous occasions. However, Doyle Reed testified that he had been the Airport's Director of Public Safety for twenty years. We cannot agree with counsel's argument that an Airport visitor's knowledge of a dangerous condition at the Airport is equal to or superior than the knowledge of the full-time public safety director.

The trial court assessed Ludlow's negligence at 40%. In considering the Airport's contention that the trial court's assessment of Ludlow's negligence was too low, we find

Morrow v. Town of Madisonville, 737 S.W.2d 547, 549 (Tenn. App. 1987) persuasive: "a citizen walking along a street does not have to keep his eyes on the pavement all the time; he may presume the city has done its duty. It is not negligence to fail to look for danger which under the surrounding circumstances he had no reason to apprehend.'" (quoting Batts v. City of Nashville, 22 Tenn. App. 418, 426-27, 123 S.W.2d 1099, 1104 (1938)). Ludlow's uncontradicted testimony was that he was not in a rush. He was wearing his prescription glasses. Simply put, Ludlow was walking into the Memphis Airport much as any other traveler, talking to companions and preparing to board an airplane. He had no reason to anticipate anticipate danger. Although this Court declines to charge Ludlow with superior knowledge of the various dangerous conditions that may exist at the Airport, we recognize that Ludlow had a duty to use due care with regard to the path he chose. We conclude that the evidence does not preponderate against the trial court's finding that Ludlow was 40% negligent.

Accordingly, the judgment of the trial court is affirmed. Costs on appeal are taxed to the Appellant.

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HIGHERS, J.

CONCUR:

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CRAWFORD, P.J., W.S.

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SUMMERS, SP. J.