

## Charney v. City of Wildwood

Charney v. City of Wildwood, No. 08-4241; U.S. District Court (DNJ); opinion by [Rodriguez](#), S.U.S.D.J.; filed August 18, 2010. DDS No. 36-7-xxxx [19 pp.]

Plaintiff Natalie Charney brought this action against Wildwood for injuries allegedly sustained when she tripped and fell on the Wildwood boardwalk in August 2006. Charney contends that Wildwood breached its duty to her and other pedestrians by allowing a hole in the boardwalk to persist despite having actual and constructive notice of the dangerous condition and sufficient time to take remedial measures.

Presently before the court is a motion for summary judgment filed by Wildwood.

**Held:** Summary judgment will be granted because Charney failed to establish that the hole in the boardwalk plank constituted a dangerous condition, or that any action Wildwood took to protect against the hole or the failure to take such action was palpably unreasonable.

Charney contends that she was injured as a result of a dangerous condition on public property, thus her claim falls under the New Jersey Tort Claims Act.

Wildwood's summary judgment motion seeks dismissal of Charney's complaint on three grounds: (1) the defect in the boardwalk was not a dangerous condition; (2) Wildwood had no actual or constructive notice of a dangerous condition; and (3) the action or inaction of Wildwood related to the condition was not palpably unreasonable.

As a preliminary matter, it is apparent that there is a genuine issue of material fact related to whether Wildwood had notice of the boardwalk hole. Wildwood claims to make thorough inspections of the boardwalk on a daily basis. Unless the hole that tripped Charney coincidentally formed some short time before the incident, it is plausible that Wildwood observed the hole during one of its daily inspections. Furthermore, Charney presents evidence that boards on either side of the incident board were replaced, and that the center nail was installed to resecure the incident board after the improperly driven pneumatic nail splintered the end of the board. This evidence of repairs near the incident location is not conclusive, because it is possible that the boards were replaced and the center nail was installed before the hole actually formed. Nevertheless, it is reasonable to accept that the center nail was installed to resecure the end of the board after a maintenance worker observed the small hole. While not conclusive, this evidence of repairs near the incident hole further increases the likelihood that Wildwood observed the defect.

Even if plaintiff can establish that Wildwood had notice of the boardwalk hole, the court must determine whether the hole constituted a dangerous condition, and whether Wildwood's failure to repair the hole was palpably unreasonable.

Although it is difficult to precisely define what, exactly, may constitute a dangerous condition, the cases that consider small holes, voids or height deviations in walkways or roadway surfaces generally hold that such defects are not dangerous conditions as defined by the Tort Claims Act. Pedestrians must expect

some areas of imperfection on walkway surfaces, and not every defect in a walkway surface is actionable. The hole in this case, measuring one and one-half inch deep, and one and one-quarter inch wide at its largest point, is the kind of minor defect that does not qualify as a dangerous condition under the Tort Claims Act. The court finds that a reasonable fact finder could not resolve the dangerous condition question in favor of Charney.

Charney argues that Wildwood was palpably unreasonable, because, despite having notice of the incident hole, Wildwood failed to recognize it as a dangerous condition and therefore left the hole unrepaired. Even assuming, however, that Wildwood had notice of the hole, it cannot be said that the decision to leave a one-and-one-half-inch-deep, one-and-one-quarter-inch-wide triangular hole unrepaired was palpably unreasonable. At worst, the decision to leave small boardwalk defects unrepaired was negligent. Wildwood arguably could have made more thorough and effective repairs of the boardwalk. Perfection, however, is not required under the Tort Claims Act. Wildwood made daily inspections of the boardwalk and repaired those defects it deemed sufficiently hazardous. Wildwood's failure to remedy a small defect in a walkway surface cannot be said to constitute the kind of "outrageous" or "patently unacceptable" behavior that rises to the level of palpable unreasonableness. Imperfections in boardwalk surfaces are commonplace, and the failure of a public entity to remedy every small defect in a boardwalk cannot be deemed palpably unreasonable. Accordingly, the court finds a reasonable fact finder could not resolve the palpable unreasonableness question in favor of Charney.

Defendant's motion for summary judgment is granted.

— By Debra McLoughlin

For plaintiff — James J. Pettit (Law Offices of Gene Locks) For defendants — Donald A. Powell (Powell, Birchmeier & Powell).