IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

WILLIAM & IRENE SHIMANSKY,)
Plaintiffs Below/Appellants,)
v.) C.A. No.: CPU4-12-001030
DONALD J. CLAYTON,)
DBA BATHROOMS BY DON,)
Defendant Below/Appellee.	,)

Submitted: March 26, 2013 Decided: April 23, 2013

Robert C. McDonald, Esq.
Silverman McDonald & Friedman
1010 N. Bancroft Parkway
Wilmington, DE 19805
Attorney for
Plaintiffs Below/Appellants

William J. Rhodunda, Jr., Esq. Rhodunda & Williams, LLC 1220 N. Market Street Wilmington, DE 19801 Attorney for Defendant Below/Appellee

MEMORANDUM OPINION & ORDER

The instant case is an appeal de novo brought pursuant to 10 Del. C. § 9570 et. seq. from the Justice of the Peace Court. On January 19, 2012, the Justice of the Peace Court entered judgment in favor of Defendant Below/Appellee Donald J. Clayton. The same day, Plaintiffs Below/Appellants William and Irene Shimansky (collectively "Plaintiffs") filed a Notice of Appeal and Complaint on Appeal in this Court.

It is the Shimanskys' position that Mr. Clayton negligently installed a sump pump and, as a result, they incurred damages in the amount of \$2,581.89. It is Mr. Clayton's position that the

installation was not negligent, rather, the damage to the sump pump was caused by either a third party or a product defect.

Trial was held on March 26, 2013 in the Court of Common Pleas. At trial, the parties stipulated that there was a code violation, which was remedied and released by a county inspector. Mrs. Shimansky and George Rogers, a service technician for Horizon Services ("Horizon"), testified during Plaintiffs' case-in-chief. At the close of Plaintiffs' case, Defendant moved for a Directed Verdict pursuant to *Court of Common Pleas Civ. R.* 50(a). The Court reserved decision. Mr. Clayton was the sole witness to testify for the defense. At the close of Defendant's case, Defendant renewed his Motion for Directed Verdict. The Court reserved decision on the Motion and the parties proceeded to closing arguments. At the conclusion of trial, the Court reserved decision. This is the Court's Final Decision and Order.

FACTS

In early July 2009, the Shimansky's hired Mr. Clayton to install a new drainage system and sump pump in the Shimansky's basement. Mr. Clayton had previously installed a bathroom and performed various other home-construction type jobs. The parties agreed that Mr. Shimansky was to choose the particular type and brand of sump pump to be installed. Mr. Shimansky selected the Basement Watchdog Combination Sump Pump System. Mr. Clayton purchased the requested sump pump, along with a battery backup. The entire job—which included the digging and cutting of concrete to lay the drainage pipe, as well as the purchase and

¹ Although William Shimansky is a party in this action, and he was listed as a witness for the Plaintiffs on the Civil Case Management Order, Mr. Shimansky failed to appear at trial, and no explanation was offered for his absence.

² The Plaintiffs were issued a Violation Notice for code violations relating to permits. The document reads, in relevant part: "bathroom conversion and basement sump added – no permits on file – work by Don Clayton, no permits on file." The Violation Notice was issued on February 15, 2011 – over a year after Mr. Clayton completed the sump pump and drainage system installation. Joint Exhibit 001001.

installation of the sump pump and backup battery-totaled \$4,750.00. After the job was completed, Mr. Clayton returned, at Mrs. Shimanskys request, on three separate occasions to address her concerns with the operation of the sump pump. On his second visit, Mr. Clayton replaced the sump pump at no charge. After Mr. Clayton's third visit, Mr. Clayton refused to continue performing repair work on the sump pump. Mrs. Shimansky believed the sump pump was still not operating properly, so she contacted Horizon Services.

George Rogers was called by the Plaintiffs as a fact witness. Plaintiffs made no effort to qualify Mr. Rogers as an expert.³ Mr. Rogers testified that he went to the Shimansky residence on December 31, 2010, because the sump pump was not working properly. Mr. Rogers testified that he is not a licensed plumber; rather, he is a service technician for Horizon, and he works strictly in plumbing. According to Mr. Rogers, he discovered that the housing of the sump pump had cracked and the crock was filled with oil. He explained that oil cools down the system, and when the housing cracked the oil leaked into the crock which caused the sump pump to break. Mr. Rogers noted that the backup battery was working, and thus there was no flooding in the basement. Mr. Rogers also testified that the sump pump ran into the domestic sewer line, which was "not allowed." Mr. Rogers did not testify why the drainage configuration is "not allowed," and he did not testify that the drainage system was in violation of any specific code or regulation. Mr. Rogers testified that he installed a new, different type of sump pump as well as a backup

³Delaware Rule of Evidence 702 provides: If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. D.R.E. 702. See also Bowen v. E.I. DuPont de Nemours & Co., Inc., 906 A.2d 787, 794 (Del. 2006); M.G. Bancorporation, Inc. v. Le Beau, 737 A.2d 513, 519 (Del. Supr. 1999).

sump pump.⁴ Additionally, "to fully make sure that she [Mrs. Shimansky] didn't have any issues," Mr. Rogers re-routed the entire drain line to the back of the house. Mr. Rogers did not testify that the existing drainage system was improperly installed, and he did not testify that the configuration of the drainage system is what caused the sump pump to malfunction. The work performed by Mr. Rogers totaled \$2,581.89.⁵ This total was not broken down into the cost for each of the various services provided by Horizon

Mrs. Shimansky testified that when Mr. Clayton installed the sump pump, he instructed her to contact him if the red light on the sump pump turned on. According to Mrs. Shimansky, one week after the sump pump was installed an alarm sounded and the red light turned on. Mr. Clayton serviced the sump pump and advised Mrs. Shimansky that, if there were future problems, she should unplug the electric connection and contact him. Within two months, the red light turned on again. This time, Mr. Clayton replaced the entire sump pump at no charge. Sometime thereafter the red light turned on again, Mr. Clayton, along with members of his work crew, returned to service the sump pump for a third time. Upon inspection, Mr. Clayton stated that someone had been fooling around with the sump pump. When Mr. Clayton and his staff left, he said they would return the following day; however, no one returned to the Shimansky residence as promised. Mrs. Shimansky called Mr. Clayton regarding the promised work, but Mr. Clayton informed her that he had spoken to her son, and he no longer wanted to do business with her. The next day, Mrs. Shimansky contacted Horizon. Mrs. Shimansky testified that she has not had any problems with the sump pump and drainage system installed by Horizon.

⁴ Mr. Rogers testified that he installed a Zolar Primary Sump Pump and a Guardian Backup Sump Pump, which is water-powered.

⁵ Joint Exhibit 001003.

At the conclusion of Plaintiffs' case-in-chief, the defense moved for a Directed Verdict, on the grounds that Plaintiffs had failed to meet their burden to establish liability. The defense argued: (1) there was no evidence that Mr. Clayton improperly installed the sump pump; (2) there was no evidence that Mr. Clayton offered a warranty that could be enforced, and; (3) damages had not been established. The Court reserved decision on the motion, and Mr. Clayton proceeded with his case-in-chief.

Mr. Clayton was the sole witness to testify for the defense. Mr. Clayton testified that he purchased and installed the sump pump that Mr. Shimansky picked out. Mr. Clayton also testified that Mr. Shimansky demanded that the sump pump drain into the domestic sewer line. Mr. Clayton offered a 90 day warranty on his workmanship, but he did not offer a separate warranty on repairs to the sump pump. Additionally, the sump pump carried its own warranty.6 According to Mr. Clayton, Mrs. Shimansky called him one week after the sump pump was installed, complaining that the alarm kept sounding. Mr. Clayton saw nothing wrong with the sump pump, and explained to Mr. Shimansky that once a week, according to the manufacturer specifications, the sump pump would run automatically and the alarm would go off to indicate it was working. Mr. Clayton did not read the manual to see how long the alarm would stay on. Mr. Clayton testified that he never told Mrs. Shimansky to unplug the system. About a month later, around August 2009, Mr. Clayton was called to the Shimansky residence a second time. Mr. Clayton discovered that the drainage hose had been disconnected, the pump was not running, and the pump was "slushing water around." Mr. Clayton removed the sump pump and replaced it with a new one. Mr. Clayton also informed Mrs. Shimansky that someone had tinkered with the sump pump. Over a year later, Mrs. Shimansky contacted Mr. Clayton a third time. Mr. Clayton found that the drainage line had again been disconnected. Mr. Clayton did not see any

⁶ Joint Exhibit 001018.

oil in the well. Mr. Clayton reconnected the drainage line and told Mrs. Shimansky that he would return the next day because he "was getting nowhere talking to [her]." After he left, Mr. Clayton contacted Mrs. Shimansky's son and informed him that he could not keep repairing the sump pump.

At the close of his case-in-chief, Mr. Clayton renewed his Motion for Directed Verdict.

The Court again reserved decision and the parties presented their closing arguments.

LEGAL STANDARD

The first issue before the Court is whether Plaintiffs presented enough evidence to survive Mr. Clayton's Motion for Directed Verdict. The Court finds that there is no substantial evidence supporting a verdict for the Plaintiff. Therefore, Mr. Clayton's Motion for Directed Verdict must be granted.

Court of Common Pleas Civil Rule 50(a) governs Motions for Directed Verdict, and provides that:

[a] party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. A motion for a directed verdict shall state the specific grounds therefor.

It is well established in Delaware law that, when considering a motion for directed verdict, the court must consider the evidence in the light most favorable to the non-moving party.⁷ To find in favor of the moving defendant, the court should be convinced that there is no substantial evidence to support a verdict for the plaintiff.⁸

⁷ Gannett Co., Inc. v. Re, 496 A.2d 553, 557 (Del. 1985); Moody v. Nationwide Mut. Ins. Co., 549 A.2d 291, 293 (Del. 1988); Wilson v. Klabe Const. Co., 2003 WL 22931390, at *3 (Del. Com. Pl. July 22, 2003).

⁸ McCarthy v. Mayor of Wilmington, 100 A.2d 739, 740 (Del. Super. 1953).

DISCUSSION

To establish a prima facie case for negligence, a plaintiff must prove by a preponderance of the evidence that: (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached that duty of care; (3) the defendant's breach proximately caused the plaintiff's harm, and; (4) the plaintiff suffered harm.⁹

Expert testimony is required to establish the standard of care Mr. Clayton owed the Shimanskys. "It is settled law in Delaware that the standard of care applicable to a professional can be established only through expert testimony." The work performed by Mr. Clayton required specialized knowledge and skill acquired through special training and experience, and is thus properly classified as "professional". Therefore, the Plaintiffs must proffer expert testimony to establish the applicable standard of care.

Expert testimony is also required to show that Mr. Clayton's alleged breach of that duty proximately caused the Shimanskys' harm. "When the issue of proximate cause is presented in a context which is not a matter of common knowledge, expert testimony may provide a sufficient basis for a finding of causation, but in the absence of such expert testimony it may not be made."

The Court finds that the proper installation of a sump pump and drainage system is beyond the common knowledge. Therefore, an expert is required on the issue of proximate cause.

⁹ Jones v. Crawford, 1 A.3d 299, 302 (Del. 2010) (citation omitted).

¹⁰ Robinson v. J.C. Penny Co., Inc., 977 A.2d 899, 2009 WL 2158106 (Table), at *1 (Del. 2009) (citation omitted).

¹¹ Restatement (Second) of Torts § 299A (West 2009). See also Small v. Super Fresh Food Markets, Inc., 2010 WL 530071, at *3 (Del. Super. Feb. 12, 2010).

¹² Money v. Manville Asbestos Disease Comp. Trust Fund, 596 A.2d 1372, at 1376 (Del. 1991).

¹³ See Mazda Motor Corp. v. Lindahl, 706 A.2d 526, 533(Del. 1998); Erhart v. Direct TV, Inc., 2012 WL 3834912, at *2 (Del. Super. Aug. 30, 2012); McLaren v. Mercedes Benz USA, LLC, 2006 WL 1515834, at *4 (Del. Super. March 15, 2006).

At trial, the Plaintiffs did not offer any expert testimony to support their position. Therefore, the Plaintiffs failed to prove, by a preponderance of the evidence, two essential elements of their negligence claim: that Mr. Clayton breached the applicable duty of care, and that this alleged breach was the proximate cause of the Plaintiffs' harm.

Even if the Court were to treat Mr. Rogers as an expert, Mr. Clayton would still prevail on his Motion for Directed Verdict. Liability on the part of Mr. Clayton cannot be inferred from Mr. Rogers' testimony. Mr. Rogers testified that when he went to the Shimansky residence to service the sump pump it was cracked. He did not indicate how long it had been cracked, what caused the crack, or even if a reasonable person would have noticed the crack. Mr. Rogers did not testify that the installation of the pump itself was performed improperly, or that the pump was inappropriate for the job. Mr. Rogers testified that running the drain into the sewer line was "not allowed." However, Mr. Rogers' bare assertion with no supporting evidence is not sufficient to impute liability on Mr. Clayton. Mr. Rogers did not say what entity prohibited such configuration. He did not suggest that the drainage configuration fell short of workmanlike quality. Most importantly, Mr. Rogers did not claim that the drainage configuration was in any way related to the crack in the sump pump. Simply put, Mr. Rogers did not testify that the work performed by Mr. Clayton caused the damage to the sump pump. Therefore, even if Mr. Rogers' testimony were classified as "expert," his testimony still fails to prove, by a preponderance of the evidence, the third element of the negligence claim-that Mr. Clayton's alleged breach was the proximate cause of Plaintiff's harm.

Because the Court finds that Plaintiffs failed to establish two elements of a successful negligence action, it need not reach the issue of damages.

ORDER

For the foregoing reasons, judgment is hereby entered in favor of Mr. Clayton and against Plaintiffs.

IT IS SO ORDERED, this 23rd day of April, 2013.

The Honorable Carl C. Danberg

Judge

cc: Tamu White, Supervisor, Civil Department