SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
1 THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947
TELEPHONE (302) 856-5264

December 3, 2013

Andrea G. Green, Esq.
Law Office of Andrea G. Green, LLC
28412 Dupont Boulevard, Suite 104
Millsboro, DE 19966

Thomas J. Gerard, Esq.
Marshall, Dennehey, Warner,
Coleman & Goggin
1220 North Market Street, 5th Floor
P.O. Box 8888
Wilmington, DE 19899

RE: *Audrey E. Sweiger v. Delaware Park, L.L.C. & Delaware Racing Ass'n d/b/a Delaware Park*,
C.A. No. S11C-10-020 RFS
Date submitted: October 8, 2013

Upon Defendants' Motion for Summary Judgment. **DENIED**.

Dear Counsel:

Before the Court is Defendants' Delaware Park, L.L.C. and Delaware Racing Association d/b/a Delaware Park ("Defendants'") Motion for Summary Judgment against Plaintiff Audrey E. Sweiger ("Plaintiff"). For the reasons that follow, Defendants' Motion is **DENIED**.

Facts

This Motion stems from an incident which occurred on the evening of January 13, 2010. On that date, Plaintiff, an eighty-one-year-old woman, visited Defendants' establishment and was present in Defendants' casino at about 6:20 p.m. Plaintiff claims that she left the casino area and entered an adjacent glass-enclosed alcove, which Plaintiff believed to be a smoking room. Plaintiff then attempted to re-enter the casino through a different entrance and in doing so, walked into a unmarked glass window and fell to the floor. Plaintiff suffered bodily injuries as a result. Other glass windows within the wall contained decals, but the one into which Plaintiff walked did not.

Standard of Review

Summary judgment will be granted only if the moving party, who bears the initial burden, can establish that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[1] The Court examines all of the evidence, and the reasonable inferences therefrom, in the light most favorable to the non-moving party.[2] Using this lens, only if the moving party establishes that no factual questions indeed exist does the burden shifts to the non-moving party to

[1] *See, e.g.*, *Direct Capital Corp. v. Ultrafine Techs., Inc.*, 2012 WL 1409392, at *1 (Del. Super. Jan. 3, 2012) (citations omitted) (iterating the exacting standard of summary judgment).

[2] *Id.*

establish the existence of such factual questions which must "go beyond the bare allegations of the complaint."[3]

Analysis

Parties' Contentions

Defendants argue that this Court should grant summary judgment in their favor because Plaintiff cannot make out a *prima facie* case of negligence. Specifically, Defendants contend that they did not owe Plaintiff a duty to warn her of the existence of the glass window. For support, Defendants cite *Talmo v. Union Park Automotive*, in which the Delaware Supreme Court affirmed this Court's granting summary judgment against a plaintiff who also brought suit against a business after walking into a plate glass window on the business's premises.[4] Defendants also submit that Plaintiff cannot distinguish her case from *Talmo* because in that case, the Court held that a business owner does not owe a business invitee a duty to warn of the existence of a glass window, even if the window at issue was improperly lit. Further, Defendants argue that Plaintiff's attempt to distinguish her case from *Talmo* on the presence of her expert, Julius Pereira ("Pereira"), is futile because the *Talmo* holding did not hinge on the absence of a plaintiff's expert. Defendants also assert that

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[3] *Id.*

[4] *Talmo v. Union Park Automotive*, 2012 WL 730332, at *3 (Del. Mar. 7, 2012).

Plaintiff's claim regarding the improper lighting around the glass window at the time of her injury is a baseless allegation because her expert, Pereira, a licensed architect, has not opined on the quality of the lighting at the time of the injury, did not analyze the lighting at the site of the injury, and has not discussed any relevant lighting standards.

Defendants also argue that Pereira may not attest to the existence of Defendants' legal duty in tort because, as this Court held in *Brown v. Dover Downs, Inc.*, the Court, and not a plaintiff's expert, determines the existence of a legal duty.[5] The falsity in Plaintiff's denial that she is using Pereira to establish such a duty is apparent from her citing him as the only evidence establishing a dangerous condition. Defendants also stress the clear factual similarities between *Brown* and this case, such as the *Brown* plaintiff's failed attempt, like the attempt of Plaintiff in this case, to use her advanced age as a way to argue for the existence of a heightened duty.

Plaintiff principally argues that the glass window at Defendants' establishment constituted a dangerous condition, that Defendants knew or should have known of this condition, and that Defendants breached a standard of care by not affixing some kind of warning on the glass or providing proper lighting in the alcove. Plaintiff submits that her case differs from *Talmo* because the *Talmo* plaintiff walked into the

[5] *Brown v. Dover Downs, Inc.*, 2011 WL 3907536, at *6 (Del. Super. Aug. 22, 2011).

window "during the daytime in a fully lit showroom," as opposed to during the nighttime in a "dimly lit alcove from a more brightly lit casino floor."[6] This, plus the lights and distractions from the casino on the other side of the glass, makes the question of whether a warning was warranted one for the jury. Additionally, Plaintiff notes that in *Talmo*, summary judgment was appropriate because the Plaintiff in that case, unlike the Plaintiff in this case, did not present any expert testimony.[7]

Plaintiff denies using Pereira to create the existence of a legal duty; rather, she argues that Delaware law clearly establishes a business owner's duty to warn a business invitee of dangerous conditions.[8] She also distinguishes this case from *Brown* because, as she claims, the Court in *Brown* relied, in part, on a Kentucky appellate decision that rejected the creation of a *per se* dangerous condition without "produc[ing] evidence of any type of industry standard, statutory law, or common-law rule that could arguably reflect a duty on the part of [the a]ppellee . . . ."[9] On the contrary, Plaintiff stresses that Pereira's report laid out the relevant industry

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[6] Pl.'s Resp. Defs.' Mot. Summ. J. at 2.

[7] Plaintiff describes how her expert, Pereira, came to the conclusion that Defendants' actions created a dangerous condition.

[8] *Id.* at 1–3 (citing *Hess v. U.S.*, 666 F. Supp. 666 (D. Del. 1987); *Howard v. Food Fair Stores*, 201 A.2d 639 (Del. 1964)).

[9] *Brown*, 2011 WL 3907536, at *5 (quoting and citing *Jones v. Abner*, 335 S.W.3d 471, 476–77 (Ky. Ct. App.) (emphasis omitted)).

standards.

Discussion

"Under Delaware law, to succeed under a negligence claim, a plaintiff must prove: (1) that the defendant owed plaintiff a duty and (2) the breach of that duty proximately caused plaintiff's injury."[10] When "the two parties are a landowner (Defendant)and [a] business invitee[] (Plaintiff[]) . . . [the] landowner has a duty to employ reasonable measures to warn to protect [a] business invitee[] of a condition that poses unreasonable risk of harm if [the landowner] know[s] or should know of such condition."[11] However, "there is no duty upon the [land]owner to warn an invitee of a dangerous condition which is obvious to a person of ordinary care and prudence."[12] Therefore, "if a danger is so apparent that the invitee can reasonably be expected to notice it and protect against it, the condition itself constitutes adequate warning."[13]

The Court begins by analyzing the Delaware Supreme Court's holding in

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[10] *Staedt v. Air Base Carpet, Inc.*, 2011 WL 6140883, at *2 (Del. Super. Dec. 6, 2011) (citation omitted) (internal quotation marks omitted).

[11] *Id.* (citation omitted).

[12] *Niblett v. Pennsylvania R. Co.*, 158 A.2d 580, 582 (Del. Super. 1960) (citations omitted).

[13] *Id.* (citations omitted).

Talmo. In that case, the plaintiff walked into a plate glass window while visiting the defendant's car dealership during the daytime. In finding that summary judgment was proper due to the plaintiffs' failure to establish a *prima facie* case of negligence, the Court addressed the plaintiff's contentions that the defendant failed to warn customers of the window's existence and failed to provide proper lighting:

> Owners and occupiers of property are under no duty to warn persons on their premises about the existence of windows. As for the improper lighting claim, it is undisputed that [the plaintiff] visited the [defendant's] car dealership during the day. Even accepting as true that the lighting in the store was not "proper," the [plaintiff's] claim must fail as a matter of law, because any customer exercising reasonable care (as [the plaintiff] was required to do) would notice a window before walking into it, particularly in the daytime.[14]

It would seem from *Talmo* that the existence of an ordinary glass window on a landowner's premises alone requires no warning. It would also seem, however, that a plaintiff's improper lighting argument, or more broadly, a visibility argument that encompasses both improper lighting and distractions on the other side of the glass, does not fail *per se*. Rather, this Court interprets the *Talmo* holding to dictate that, although a business invitee is owed no duty to be provided a properly-lit, distraction-free glass window *during the daytime*, the invitee is owed such a duty

[14] *Talmo v. Union Park Automotive*, 2012 WL 730332, at *3 (Del. Mar. 7, 2012).

under different circumstances (*i.e.* during the nighttime).[15] This interpretation recognizes that there can be an *exception* to the rule freeing a landowner from the obligation to warn an invitee of apparent dangers. Similar to a Delaware slip-and-fall case, where distractions may negate a plaintiff's duty to observe a dangerous condition,[16] the Court of Appeals of Minnesota laid out this exception in *Taney v. Independent School District*:

> Landowners must . . . protect entrants from dangerous conditions on the land, even open and obvious conditions, if there is a reasonable expectation that the entrant's attention will be distracted from the danger. In fact, where there is some distraction or other reason which will excuse the failure to see that which is in plain sight, it can be said that a person has exercised that degree of care required of an ordinarily prudent person. Further, a condition that is obvious during the day may not be obvious at night.[17]

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[15] Plaintiff's age, however, bears no relevance in determining the existence of this duty. *Brown*, 2011 WL 3907536, at *7 n.71 ("The Court does not find the alleged elderly age of the clientele to which Defendant caters to be a relevant factor in assessing the existence of a duty herein . . . .").

[16] *See, e.g.*, *Howard v. Food Fair Stores, New Castle, Inc.*, 201 A.2d 638, 642 ("[I]t appears that a customer walking along an aisle of a store glancing at shelves displaying merchandise lining the aisle may be excused from keeping a constant lookout on the floor to observe a dangerous condition, particularly in view of the customer's right to assume a safe condition on the floor.").

[17] *Taney v. Indep. Sch. Dist.*, 673 N.W.2d 497, 502–03 (Minn. Ct. App. 2004) (citations omitted) (internal quotation marks omitted). This Court recognizes that the plaintiff in *Taney* did not walk into a glass wall, but rather missed a nine-inch drop off and fell after pushing through a set of glass doors. This Court agrees with the *Taney* Court's reasoning, however, that a duty owed to an invitee may change with special circumstances and is not immutable. *See id.* at 503 ("[I]t was not unreasonable for the jury to conclude either that (a) the nine-inch drop-off was an open and obvious dangerous condition, but that Taney's attention was distracted from the danger, or (b) that the nine-inch drop-off, which would have been open and obvious to Taney during the

As the Delaware Supreme Court's language in *Talmo* clearly does not dictate a *per se* rule regarding glass windows, this Court finds that the Delaware Supreme Court implicitly recognized an exception to the apparent danger rule. Whether the exception actually applies to this case (*i.e.* whether Plaintiff was indeed distracted from the apparent danger of the window, or whether the danger of the window was not apparent due to the fact that the injury occurred during the night) constitutes questions for the trier of fact to answer.

Preliminarily, this Court agrees with Defendants that the *Talmo* holding did not hinge on the presence of a plaintiff's expert. Applying *Talmo* to this case, the Court finds that Plaintiff's argument that Defendants were negligent because of their failure to place decals on the window must fail because Defendants were not required to warn Plaintiff of the existence of the glass window.[18] Plaintiff could, however, present a visibility argument regarding improper lighting and distractions because she alleges circumstances which would trigger the exception to the apparent danger rule (*i.e.*, distractions and nighttime).

The Court's ruling on this Motion makes no reference to the admissibility of

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day, was not obvious at night." *Id.* at 503. Thus, this Court does not consider the difference in the injuries which occurred to be relevant.

[18] *Talmo*, 2012 WL 730332, at *3.

the testimony of Plaintiff's expert, Pereira, except to rule that Defendants are correct that under this Court's decision in *Brown*, Plaintiff may not use Pereira to establish the existence of a legal duty.[19] Defendants have filed a Motion *in Limine* to exclude Pereira's testimony, and the Court will address that motion in due course. Presently, the Court only rules that based on the record before it, factual questions exist, and thus precluding summary judgment.

Based on the above, Defendants' Motion is **DENIED**.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

Cc: Prothonotary
Judicial Case Manager

[19] *Brown*, 2011 WL 3907536, at *6.