IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

PAULA DILKS and GERALD DILKS, Plaintiffs, v. KAREN MORRIS and ALAN LEVINSON and MOBAC, INC., Defendants.	)))))))))))	C.A. No.: 02C-07-189 CLS

Upon Consideration of Defendant Karen Morris and Alan Levinson's and Co-Defendant Mobac Inc.'s, Renewed Motions for Summary Judgment - DENIED

Date submitted: December 6, 2004.
Date decided: February 25, 2005.

MEMORANDUM OPINION

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SCOTT, J.

I. INTRODUCTION

Karen Morris and Alan Levinson (hereinafter the "Defendants") and Mobac Inc., (hereinafter "Mobac") have separately filed Renewed Motions for Summary Judgment against Paula Dilks and Gerald Dilks (hereinafter the "Plaintiff").[1] The Court will address both Motions in this opinion. Upon a review of the Motions, oral argument and the record, this Court concludes that both Renewed Motions for Summary Judgment should be DENIED.

II. BACKGROUND

This is a personal injury action arising from a trip and fall that occurred at the Defendants' residence, 211 Adams Dam Road, Greenville, Delaware, on July 24, 2000. At the time of the incident, the Defendants had contracted with Mobac to complete a construction project on the Defendants' property. The injury occurred while the Plaintiff, a business invitee, was returning the Defendants' dog to their residence after caring for it while the Defendants were on vacation. The Plaintiff alleges that as she attempted to enter the residence through a rear entrance she fell into a hidden construction "ditch". The record also indicates that at the time she fell the dog she was walking suddenly jerked forward, pulling her along.

Plaintiff alleges in the complaint that as a result of the negligence of the Defendants and Mobac she suffered serious, debilitating and permanent injuries to her neck, back, head, shoulders, legs and suffered emotional distress. Consequently, the Plaintiff also alleges that she has had to expend significant sums of money on medical treatment and will be required to continue to do so. The Plaintiff alleges that the Defendants were negligent in that they breached their duty to ensure that their property was safe to enter and if it was not, then they breached their

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[1] Paula Dilks is the Plaintiff whose trip and fall is the centerpiece of this action. Gerald Dilks, the husband of the Plaintiff, joins in this action as a Co-Plaintiff with a claim solely for loss of consortium of his wife.

duty to warn of any dangerous conditions on the property. As to Mobac, the Plaintiff alleges that they were negligent in that they breached their duty to warn of any dangerous conditions on the property.

III. STANDARD OF REVIEW

Summary judgment may only be granted when no genuine issue of material fact exists.[2] The moving party bears the burden of establishing the non-existence of genuine issues of material fact.[3] If the burden is met, the burden shifts to the non-moving party to establish the existence of genuine issues of material fact.[4] "Where the moving party produces an affidavit or other evidence sufficient under Super Court Civil Rule 56 in support of its motion and the burden shifts, then the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial."[5] If genuine issues of material fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is inappropriate.[6]

The court must view the facts in the light most favorable to the non-moving party.[7] Summary judgment is generally not appropriate for actions based on negligence.[8] It is rare in a

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[2] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. Supr. 1979).

[3] *Id*.

[4] *Id*. at 681.

[5] Super. Ct. Civ. R. 56(e); *Ramsey v. State Farm Mut. Auto. Ins. Co.*, 2004 WL 2240164 *1 (Del. Super. 2004)(citing *Celotex Corp v. Catrett*, 477 U.S. 317, 322-23 (1986)).

[6] *Ebersole v. Lowengrub*, 180 A.2d 467, 469-70 (Del. Supr. 1962).

[7] *Lupo v. Med. Ctr. of Delaware*, 1996 WL 111132 *2 (Del. Super. 1996).

[8] *Ebersole*, 180 A.2d at 468.

negligence action "because the moving party must demonstrate 'not only that there are no conflicts in the factual contentions of the parties but that, also, the only reasonable inferences to be drawn from the uncontested facts are adverse to the plaintiff.'"[9] If a party demonstrates facts that warrant a grant of summary judgment, the decision becomes one of a matter of law.[10]

IV. DISCUSSION

In Delaware, in order to recover in a negligence action, a plaintiff must prove by a preponderance of the evidence that the defendant owed a duty to the plaintiff, and that a breach of that duty proximately caused plaintiff's injury.[11] The duty owed to the plaintiff by the defendant depends upon the nature of the relationship. One such relationship is that of a landowner and business invitee. A business invitee has been defined as "one who is invited to enter onto another's land or premises for the purpose of doing business."[12]

"A landowner's duty to a business invitee is that once the landowner knows, or should know, of a condition which poses an unreasonable risk of harm to an invitee, the landowner must employ reasonable measures to warn the invitee or protect her from harm."[13] Where a dangerous condition exists on the land, the Delaware Supreme Court has held that a business invitee may

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[9] *Upshur v. Bodie's Dairy Mkt.*, 2003 WL 21999598 *3 (Del. Super. 2003).

[10] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. Supr. 1967).

[11] *Russell v. K-Mart Corp.*, 761 A.2d 1, 5 (Del. Supr. 2000).(Internal citations omitted). *See also* 57A Am. Jur. 2d *Negligence* § 71 (2004); *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 422 n.9 (3rd Cir. 2002).(Internal citation omitted).

[12] William L. Prosser & W. Page Keeton, Torts § 61 (4th ed. 1971). According to *DiOssi v. Maroney*, 548 A.2d 1361 (Del. Supr. 1988), a business invitee is "entitled to expect that the premises would be free of any dangerous condition known or discoverable by the possessor of the land." *Id.* at 1366.

[13] *Boubaris v. Hale, Inc.*, 1996 WL 658821 *2 (Del. Super.). (Internal citations omitted).

still recover for injuries even if he or she had knowledge of the dangerous condition.[14] A mere warning of a known danger is insufficient for the landowner to fulfill his duty to the business invitee.[15]

A. Defendant Karin Morris and Alan Levinson's Contentions

Morris and Levinson first argue that the Motion should be granted because Plaintiff has failed to prove that the Defendants were the proximate cause of her injuries, and negligence, without proximate cause, will not sustain a cause of action.[16] Secondly, Defendants contend that recovery should be barred because Plaintiff appreciated the danger of the construction and assumed the risk.[17]

According to Defendants, Plaintiff admitted that the sole reason for her fall on their property was the dog jerking forward too quickly. It is their contention that the dog caused the fall, and Plaintiff has failed to prove the causation needed for recovery. Viewing the facts in the light most favorable to the nonmoving party, however, it appears that while Plaintiff did state that the dog made her fall, she also stated that if it had not been for the ditch on the Morris/Levinson property, she may have regained her footing.

Morris and Levinson also proffer that Dilk's deposition indicates that she was watching where she was going with extreme care because she appreciated the danger of the construction

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[14] *Koutoufaris v. Dick*, 604 A.2d 390, 398 (Del. Supr. 1992).

[15] *Boubaris*, 1996 WL 658821 at *2.

[16] *Duphily v. Delaware Elec. Co-op., Inc.*, 662 A.2d 821, 828 (Del. Supr. 1995). (Internal citation omitted).

[17] *Henry v. Diamond State Tel. Co.,* 1971 WL 125452 *2 (Del. Super.)(holding that "Delaware law clearly establishes the proposition that when an individual is faced with a known and obvious hazard he may not disregard it and then recover damages for injuries which could have been avoided.").

site. It is uncontroverted that Dilks is a business invitee of Morris and Levinson. She was paid to be on their property to care for their dog. While Defendants acknowledge the duty owed to business invitees, they argue that because she noticed the debris, nails and various other construction materials, the danger was open and obvious and precluded any warning.

This Court finds that as a result of Plaintiff's deposition that stated she fell into the ditch, there is a genuine issue of fact as to whether the dog or the dangerous condition of the construction site was the proximate cause of her injuries. Due to its fact intensive nature, whether Plaintiff's cautious movements in and around the site constituted an assumption of the risk remains a question of fact for the jury to resolve.[18] Finally, in denying the Motion, this Court finds that a genuine issue of material fact exists as to whether Morris and Levinson fulfilled their duty as landowners in warning and protecting Plaintiff.[19]

B. Defendant Mobac Inc.'s Contentions

Like the Defendants, Mobac also argues that Plaintiff assumed the risk by navigating the dog through the construction site. As stated previously, whether Plaintiff was contributorily negligent is a question of fact for the jury. Although Plaintiff conceded that she was watching where she was going and was aware of the construction, this Court cannot conclude as a matter of law that Mobac was without any fault for the ditch in which Plaintiff fell.

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[18] *See Binsau v. Garstin*, 177 A.2d 636, 640 (Del. Supr. 1962)(holding that whether servant assumed the risk or was contributorily negligent in climbing on a roof at the direction of his master was a fact question for the jury).

[19] *See DiOssi*, 548 A.2d at 1367, where the Delaware Supreme Court held that a landowner is required to exercise "ordinary care to reasonably anticipate, and to protect the business [invitee] from, the likelihood that third persons will pose a danger to the business visitor, who, unlike the social guest, is required to be on the premises. Whether Morris and Levinson exercised ordinary care to protect Plaintiff from Mobac's construction site is an issue of fact.

This Court disagrees with Mobac that Plaintiff has failed to establish that a dangerous condition existed on the property. As discussed previously, Plaintiff, in addition to stating the dog caused her fall, also stated that she fell into a ditch. Viewing the facts in the light most favorable to Plaintiff, this Court finds that whether the construction area was dangerous is a genuine issue of material fact.

V. CONCLUSION

For the above reasons, the Court finds genuine issues of material fact exist as to causation, the duty to warn, and assumption of the risk. The Court, therefore, DENIES the Defendant's Renewed Motion for Summary Judgment and the Co-Defendant's Renewed Motion for Summary Judgement.

IT IS SO ORDERED.

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Calvin L. Scott, Jr., Judge