

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

E. SCOTT BRADLEY  
JUDGE

1 The Circle, Suite 2  
GEORGETOWN, DE 19947  
TELEPHONE (302) 856-5256

April 8, 2019

Philip T. Edwards, Esquire  
Murphy & Landon  
1011 Centre Road, Suite 210  
Wilmington, DE 19805

Shae L. Chasanov, Esquire  
Swartz Campbell, LLC  
300 Delaware Avenue, Suite 1410  
Wilmington, DE 19801

Re: *Donna Fleischmann v. Blue Surf Condominium, LLC*  
Civil Action No. S17C-08-022 ESB

FILED PROTHONOTARY  
SUSSEX COUNTY  
2019 APR 8 P 3:26

Date Submitted: April 5, 2019

Dear Counsel:

This is my decision on Defendant Blue Surf Condominium, LLC's Motion for Summary Judgment in this case where Plaintiff Donna Fleischmann fell on the sidewalk after exiting Blue Surf's building. Blue Surf owns a condominium and commercial shop at 98 Garfield Parkway, Bethany Beach, Delaware. The sidewalk adjacent to Blue Surf's building is owned by the Town of Bethany Beach. The Blue Surf building has a Grotto's Pizza inside. Fleischmann and her family ate at Grotto's Pizza on July 29, 2016. After eating, Fleischmann exited the Blue Surf building by going down a set of stairs on the side of the building which allows for ingress and

egress out to the sidewalk. As Fleischmann stepped on to the sidewalk from the stairs her foot landed in a “broken concrete hole,” causing her to lose her balance and fall. There are two issues before me now. One, whether Blue Surf had a duty to repair the “broken concrete hole” in the sidewalk. Two, whether Blue Surf had a duty to warn Fleischmann of the “broken concrete hole” in the sidewalk.

### Standard of Review

In a motion for summary judgment, the moving party bears the burden of proving “no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”<sup>1</sup> Summary judgment is only appropriate when, after viewing all the evidence in a light most favorable to the nonmoving party, the Court finds no genuine issue of material fact.<sup>2</sup>

### Duty to Repair

The longstanding rule in Delaware is that an abutting landowner is not liable to pedestrians injured as a result of defects in a sidewalk, absent a statutory duty to repair the defect, unless the landowner caused the defect.<sup>3</sup> Neither exists here. Blue Surf did not cause the defect in the sidewalk. Blue Surf also does not have a statutory

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<sup>1</sup> Sup.Ct. Civ. R. 56; *see also Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

<sup>2</sup> *Gill v. Nationwide Mut. Ins. Co.*, 1994 WL 150902, at \*2 (Del. Super. Feb. 22, 1994).

<sup>3</sup> *Lawson v. Wilmington College of Del., Inc.*, 2009 WL 27301, at \*2 (Del. Super. Jan 5, 2009).

duty to repair the defect in the sidewalk. Flesischmann argues that since Section 20.3 of the Bethany Beach Town Charter requires a landowner to pay for the cost of repairing sidewalks, the landowner essentially has a duty to repair them. That is not a correct reading of the entire section. Section 20 clearly makes the town responsible for repairing the sidewalks and authorizes the town to hire contractors to do the actual repairs. Section 20 also establishes a procedure to pass the town's cost of repair on to the property owners. There is a meaningful difference between a "duty to repair" and a "duty to pay." Blue Surf has the latter, not the former.

I will grant Blue Surf's Motion for Summary Judgment on the "Duty to Repair" issue.

#### Duty to Warn

It is also a longstanding rule in Delaware that a property owner owes a business invitee a duty to provide safe ingress and egress, including a duty to warn or protect against hazards on adjacent property.<sup>4</sup> Since the concrete defect was, as best as I can tell at this point, within a few feet of Blue Surf's building and in the area of ingress or egress to Blue Surf's building, I conclude that it is reasonable to impose a duty to warn of the "broken concrete hole" upon Blue Surf. Obviously, there comes a point where the defect would be too far away from Blue Surf's building so as to not require

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<sup>4</sup> *Wilmington Country Club v. Cowee*, 747 A.2d 1087, 1092 (Del. 2000).

a warning. That does not appear to be the case here. Finally, the issue of the obviousness of the defect cannot be resolved at this time. In reaching this decision, I have concluded that the two longstanding rules impose separate and distinct obligations on landowners.

I will deny Blue Surf Condominium, LLC's Motion for Summary Judgment on the "Duty to Warn" issue.

Defendant Blue Surf Condominium, LLC's Motion for Summary Judgment is granted in part and denied in part.

Very truly yours,



E. Scott Bradley

ESB/jwc

cc: Prothonotary's Office

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