



Plaintiff Lisa First sues Defendants Off the Hook Restaurant Group LLC, and Indian River Restaurant LLC t/a Hooked Up Ale House & Raw Bar (hereinafter, the “Restaurant”) and Millville Town Center Associates, LLC (hereinafter, the “Landlord”) for injuries she suffered on their premises. Ms. First, a patron of the Restaurant, allegedly suffered her injuries in a portion of the shopping center’s common area that the Restaurant had designated as a smoking area for its customers (the “smoking area” or the “area”).

The Restaurant moves for summary judgment on a single ground—that it owed no duty to Ms. First in tort because the Landlord had the exclusive contractual duty to repair and maintain the smoking area. For the reasons to follow, the undisputed facts of record establish that the Restaurant owed Ms. First—its customer—a duty (1) to take reasonable precautions to keep her safe in the smoking area, and (2) to warn her of foreseeable dangers in that area.

### **FACTS OF RECORD**

The relevant facts are neither extensive nor in dispute. The Restaurant is the Landlord’s commercial tenant. Ms. First patronized the Restaurant on October 3, 2022.<sup>1</sup> While there, she had several drinks over the course of a few hours.<sup>2</sup> She then exited the Restaurant to smoke a cigarette,<sup>3</sup> and proceeded to an area (1) immediately adjacent to the Restaurant, (2) designated by the Restaurant as its smoking area, (3) that contained signage placed there by the Restaurant that directed her to the area.<sup>4</sup> There, Ms. First suffered personal injuries caused by an allegedly

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<sup>1</sup> D.I. 50, Ex. A at 7:17-8:5.

<sup>2</sup> D.I. 42, Ex. A at 18:2-8.

<sup>3</sup> *Id.* at 18:18-19.

<sup>4</sup> D.I. 50, Ex. A at 27:14-28:1; D.I. 42, Ex. A at 18:18-19:12.

hazardous condition on the property.<sup>5</sup> The area was not part of the Restaurant's exclusive tenancy; rather, it was a part of the shopping center's common area.<sup>6</sup>

The lease between the Restaurant and the Landlord contains four relevant provisions. First, it recites that the smoking area is part of the shopping center's common area.<sup>7</sup> Second, it grants the Restaurant—and the other tenants—“a nonexclusive license, in common with [the Landlord and others] to use the [c]ommon [a]reas.”<sup>8</sup> Third, the lease provides that “such license will at all times be subject to the exclusive control and management by [the Landlord], the rights of [the Landlord] and of other tenants.”<sup>9</sup> Fourth, the lease identified the Landlord as the party responsible for maintaining the common area and repairing any defective conditions as deemed appropriate by the Landlord.<sup>10</sup>

### **ARGUMENTS OF THE PARTIES**

The Restaurant contends that only the Landlord had a duty to warn Ms. First of physical hazards in the smoking area and to make the area reasonably safe for her use.<sup>11</sup> In support, the Restaurant relies primarily on lease provisions that give the Landlord the responsibility to repair unsafe conditions in the common areas.<sup>12</sup> To this end, the Restaurant argues that these lease provisions absolve it of any duty in negligence owed to Ms. First. Finally, the Restaurant emphasizes several remaining factual disputes regarding possible *breaches* of duties of care, notice, whether Ms. First was comparatively negligent, and the need to apportion responsibility between it and the Landlord.

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<sup>5</sup> D.I. 42, Ex. A at 19:2-12.

<sup>6</sup> D.I. 42, Ex. D.

<sup>7</sup> D.I. 40, Ex. B Section 6.1.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* Section 6.2.

<sup>11</sup> D.I. 40 ¶ 7.

<sup>12</sup> *Id.* ¶ 10.

Ms. First and the Landlord oppose the motion on multiple grounds. First, they emphasize that the Restaurant designated the area as *its* smoking area.<sup>13</sup> That alone, they contend, generated duties for the Restaurant (1) to warn business invitees of the potential hazard in the area and (2) to take reasonable efforts to remedy the hazard by notifying the Landlord that the hazardous condition needed repair. In further support, they emphasize the general tort law recognition that two commercial entities—such as a landlord and tenant—may simultaneously exercise sufficient control over a premises to generate concomitant duties to warn and keep the land reasonably safe from readily knowable hazards.<sup>14</sup> Finally, they contend that the Landlord’s contractual duty to repair the common area does not absolve the Restaurant of its duties in tort when the circumstances demonstrate that the Restaurant exercised control over the area.

#### **STANDARD**

Under Superior Court Civil Rule 56, the Court must view the evidence in the light most favorable to the non-moving party.<sup>15</sup> When doing so, summary judgment should be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.”<sup>16</sup>

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<sup>13</sup> D.I. 42 ¶ 5.

<sup>14</sup> *Id.* ¶ 8.

<sup>15</sup> *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 99 (Del. 1992).

<sup>16</sup> Super. Ct. Civ. R. 56(c).

## ANALYSIS

Generally, it is the Court that determines whether a duty or duties exist in tort.<sup>17</sup> Then, the trier of fact generally decides whether a defendant breached one or more of those duties.<sup>18</sup>

In this case, the Restatement (Second) of Torts § 343 (1965) (“Section 343”) defines the scope of the Restaurant’s duties. That section, long recognized as reflective of Delaware common law, provides when a possessor of land owe duties in negligence to its business invitees.<sup>19</sup> Namely, Section 343 provides:

[a] possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect against the danger.

Accordingly, under Section 343, the question regarding whether a defendant qualifies as a “possessor” of land becomes a threshold issue. In this case, if the Restaurant was considered a possessor of the smoking area, it will be subject to liability if later determined to have breached its duties. As a possessor, the Restaurant would owe duties to Ms. First to take reasonable action to make the area safe against foreseeable dangers and to provide reasonable warnings regarding known, or readily knowable, dangers in the area.<sup>20</sup>

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<sup>17</sup> See *Cash v. East Coast Prop. Mgmt., Inc.*, 7 A.3d 484, 2010 WL 4272925, at \*3 (Del. Oct. 29, 2010) (TABLE) (“Whether a defendant has a legal duty is a question of law, not fact, and is for the court to decide.”).

<sup>18</sup> See *Troise v. Herman Miller, Inc.*, 1989 WL 64119, at \*5 (Del. Super. May 18, 1989) (“Whether or not they fulfilled their duty is a question of fact for the trier of fact to decide.”).

<sup>19</sup> See, e.g., *DiOssi v. Maroney*, 548 A.2d 1361, 1365–66 (Del. 1988) (applying Restatement (Second) of Torts § 343).

<sup>20</sup> *Ward v. Shoney’s, Inc.*, 817 A.2d 799, 801–02 (Del. 2003); see also *Short-Karr v. RB Gyms, Inc.*, 2015 WL 7776734, at \*2 (Del. Super. Nov. 20, 2015) (“A landowner owes a duty of reasonable

Section 328E of the Restatement (Second) of Torts provides the definition of possessor as used in Section 343. The definition requires the defendant to both occupy the land and demonstrate the intent to control it.<sup>21</sup> Delaware case law further expands this definition of control to include the “authority to manage, direct, superintend, restrict or regulate.”<sup>22</sup>

The Restaurant correctly recognizes, in part, that lease provisions in commercial tenancies are relevant pieces of evidence in premises liability cases. For instance, contractual provisions may be dispositive of issues of indemnity. They may also be important to other aspects of negligence claims such as notice. They are not, however, singularly dispositive regarding duties owed in tort to third parties.

In commercial tenancies, landlords or, alternatively, tenants may exert sole control over land that contains a dangerous condition.<sup>23</sup> In such cases, one or the other is considered the sole possessor for purposes of potential Section 343 liability. In other cases, a landlord and tenant may jointly retain sufficient control over the land to owe simultaneous duties to business invitees who suffer injury because of a dangerous condition on the land.<sup>24</sup>

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care to his business invitees to maintain the premises in a reasonably safe condition, or to warn the invitees of any latent or concealed danger.”).

<sup>21</sup> See Restatement (Second) of Torts § 328E (a) (defining s possessor of land as “a person who is in occupation of the land with intent to control it”).

<sup>22</sup> *Richard v. Faw, Casson & Co., LLP*, 2022 WL 973443, at \*3 (Del. Super. Mar. 31, 2022) (quoting *Craig v. A.A.R. Realty Corp.*, 576 A.2d 688, 695 (Del. Super.), *aff’d*, 571 A.2d 786 (Del. 1989)).

<sup>23</sup> *Cf. Sandt v. Del. Solid Waste Auth.*, 1994 WL 680114, at \*3 (Del. Super. Sept. 22, 1994) (commenting that “[a] non-owner possessor of land may be liable if it has actual control over the premises”).

<sup>24</sup> See *Koutoufaris v. Dick*, 604 A.2d 390, 402 (Del. 1992) (finding that a landowner’s “actual control of the premises is a sufficient basis for positing a claim by a business invitee even if that control [was] shared jointly, with another party . . . .”); see also *Monroe Park Apartments Corp. v. Bennett*, 232 A.2d 105, 108 (Del. 1967) (“The test is whether the control was actual, not whether it was exclusive. Unquestionably, control may be actual though joint.”); *Richard*, 2022 WL 973443, at \*3 (noting that actual control “can be shared”); Restatement (Second) of Torts 360 cmt.

Here, the undisputed facts demonstrate that the Restaurant qualifies as a co-possessor of the smoking area. No reasonable jury could conclude otherwise when considering the facts in the light most favorable to the Restaurant. First, the lease recognized that the Restaurant had an unrestricted license to use the common area and to permit its customers to use it.<sup>25</sup> An unrestricted license for use denotes joint control. Second, pursuant to that unrestricted license, the Restaurant directed its customers to a portion of the common area: the area the Restaurant designated as *its* smoking area. Third, the Restaurant demonstrated its intent to exert direct control over the smoking area by erecting signs and directing its customers there for their use. In light of these undisputed facts, while the Landlord had an obligation under the lease to maintain the property in a reasonably safe condition, that contractual duty did not absolve the Restaurant of its independent duty in tort to take reasonable measures to do the same.<sup>26</sup> Stated more directly, the Restaurant’s unfettered contractual right to use the common area coupled with its actual use of the smoking area made it a possessor of the land as a matter of law.<sup>27</sup>

As a final note, the Restaurant emphasizes many factual disputes in the record that are immaterial to the question before the Court. They will be material to separate jury questions such as breach, foreseeability, comparative negligence, and potential

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a. (expressly recognizing that both the lessor and the lessee can be subject to liability to third persons in common areas).

<sup>25</sup> D.I. 40, Ex. B Section 6.2.

<sup>26</sup> For instance, while the landlord assumed the obligation in the lease to perform repairs in the common area, there will likely be a factual issue for trial regarding whether the Restaurant breached its duty to keep the area reasonably safe because it failed to report an unsafe condition to the landlord for repair.

<sup>27</sup> The Restaurant would also alternatively owe a parallel duty to warn in this case under the caselaw recognizing adjacent land possessor’s duties to keep adjacent land safe for business invitees. *See e.g. Wilmington Country Club v. Cowee*, 747 A.2d 1087, 1092 (Del. 2000) (recognizing that “Delaware law provides that a property owner owes a business invitee a duty to . . . warn or protect against hazards on adjacent property” which the property owner knows or should know its invitees are using) (citations omitted).

apportionment of liability between the Restaurant and the Landlord. They are not material facts, however, that impact this motion.

### **CONCLUSION**

For the reasons above, the Restaurant had the duty to take reasonable action to make the area it designated as its smoking area safe for Ms. First. It also had the duty to provide her a reasonable warning regarding any unsafe conditions in the smoking area that it knew about or should have known about. As a result, the Restaurant's motion for summary judgment is **DENIED**.

**IT IS SO ORDERED.**

/s/ Jeffrey J Clark  
Resident Judge