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Case Number 417,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CONCORD SQUARE ASSOCIATES, LLC, a limited liability company	)	
Defendant Below, Appellant/Cross Appellee	)	**No. 417, 2014**
v.	)	
KEVIN A. BROKUS,	)	**ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE**
Plaintiff Below, Appellee/Cross Appellant.	)	**C.A. No.: N12C-01-098 JAP**

APPELLEE'S ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

WEIK, NITSCHE, DOUGHERTY & GALBRAITH

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DATED: November 30, 2014

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NATURE OF PROCEEDINGS

This case arises out of a personal injury claim brought by Plaintiff, Kevin A. Brokus. On February 4, 2011, Mr. Brokus slipped and fell on ice at Concord Square Shopping Center. At the time of the incident, Mr. Brokus was an employee of Oreck Vacuums located in the Concord Square Shopping Center. On January 16, 2012, Mr. Brokus filed a lawsuit against Defendant, Concord Square Associates, LLC, the owner of Concord Square Shopping Center. The first jury trial began on November 14, 2013.

At the close of Plaintiff's case in the first jury trial held in this matter, Defendant moved for Judgment as a Matter of Law, and contended that it owed no duty to Plaintiff. The Court reserved its decision, but found Plaintiff negligent as a matter of law.

At the beginning of closing arguments, the Court determined that the jury should decide whether Plaintiff was negligent. On November 20, 2013, the jury apportioned Brokus's negligence at sixteen (16%) percent and Concord Square's negligence at eighty-four (84%) percent.

On November 25, 2013, the Court *sua sponte* ordered a new trial, as it found that the apportionment of negligence was "contrary to the great weight of the evidence and justice would miscarry if allowed to stand…."[1]

A second jury trial began on April 21, 2014. That jury apportioned Brokus's negligence at twenty-five (25%) percent and Concord Square's negligence at seventy-five (75%) percent.[2]

After the second trial, Concord Square renewed its Motion for Judgment as a Matter of Law and contended: (1) it did not owe Brokus a duty with respect to snow and ice removal; (2) it acted reasonably as a matter of law; and (3) Brokus's negligence was greater than 50%.[3] On July 3, 2014, the Court denied Defendant's Motion.[4]

Concord Square and Brokus filed timely Notices of Appeal with this Court on August 4, 2014. This is Plaintiff-Below/Appellee's Answering Brief respectfully requesting the Court deny Concord Square's appeal and Cross Appellant's Opening Brief on Appeal, seeking reversal of the Superior Court's decision granting a new trial, and remanding the case to the lower court to reinstate the first jury's verdict.

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[1] A copy of the Court's Order is attached hereto as Exhibit C (B15).
[2] A copy of the second jury's verdict sheet is attached hereto as Exhibit D (B17).
[3] Def's Motion for Judgment as a Matter of Law attached hereto as Exhibit E (B19).
[4] Mem. Op. attached as Exhibit F (B23).

SUMMARY OF ARGUMENT

I. The Superior Court correctly denied Concord Square's Motion for Judgment as a Matter of Law on the issue of duty, as under any reasonable view of the evidence the jury could and did justifiably find for the non-moving party.

II. The Superior Court correctly denied Concord Square's Motion for Judgment as a Matter of Law, since there was no testimony provided by Oreck on the obligations between it and Concord Square, and Concord Square's actions were unreasonable under the circumstances.

III. The Superior Court correctly denied Concord Square's Motion for Judgment as a Matter of Law, as the comparative negligence of Brokus was solely for the jury to decide.

Plaintiff/Appellee/Cross Appellant's Argument on Appeal

I. The Superior Court abused its discretion when it *sua sponte* ordered a second trial, as it was for a jury to decide the percentage of negligence of the parties based on the evidence presented.

STATEMENT OF FACTS

On February 4, 2011, Brokus sustained injuries as a result of a slip and fall on the property of Concord Square. On January 16, 2012, a personal injury lawsuit was filed. (D.I. 1).

On November 18, 2013, a jury trial began in this action. Brokus testified that he is twenty-seven years of age. (B35). He graduated from Concord High School where he took special education classes. (B35). Since 2006, he was employed as a vacuum technician for Oreck Vacuums, located on Concord Pike, in Wilmington, Delaware. (B35). Mr. Brokus was scheduled to work on February 4, 2011. On the aforementioned date, Mr. Brokus was wearing jeans, a t-shirt and sneakers. (B36). He arrived to work around 9 a.m., and there was snow and ice on the ground. (B36).

On February 4, around 11 a.m., Brokus heard a knock at the back door of the Oreck store and saw a delivery driver. (B36). The store had a front and back entrance. (B36). Brokus went and retrieved his jacket to unload the delivery truck. (B36). The delivery truck was approximately fifteen (15) to twenty (20) feet from the back entrance of the store. (B36). The concrete back entrance that he needed to traverse was covered in snow and ice. (B37). Directly behind the back door was a drain that allowed melted snow from the roof to drain off to the back

entrance. (B37). He proceeded to walk down a decline over the icy conditions from the back of the store to the delivery truck. (B37). Mr. Brokus was able to walk across the icy conditions four times (B37). Mr. Brokus could see in front of him as he carried a small box. He slipped and fell, landed on the ice, and sustained injuries to his back and tailbone. (B37-38). Mr. Brokus took photographs depicting the condition of the back entrance of the Oreck store. (B38). Mr. Brokus testified that if he did not go out to get the delivery packages, he most likely would have been fired. (B48).

As a result of the fall, he sustained injuries to his knees, neck, and lower back. (B40). Ultimately, on October 25, 2011, Dr. Bruce Rudin performed back surgery on Brokus. (B40).

Mr. Brokus testified that no employee of Oreck ever placed salt in the back of the store or performed snow and ice removal for the back entrance of the store. (B39). Mr. Brokus did not perform any snow removal for the sidewalk in the front of the store but some Oreck employees did. (B43). Oreck employees used a cracked plastic shovel to remove snow from the sidewalk in the front of the store. (B43-46).

Jennifer Leonard testified that she was the property manager for Capano Management Company. (B57). There is also another property manager for

Capano Management Company named Jenny Banco. Ms. Leonard is not employed by Concord Square, and Concord Square has no employees. (B57). Capano Management was retained by Concord Square to handle property management and leasing. (B61). Her duties as property manager include: (1) coordinating maintenance requests, and (2) the general upkeep and care of commercial properties. (B57). One of the properties that she manages is Concord Square. (B57).

Ms. Leonard was aware and familiar with the lease that was entered between Concord Square and Oreck. (B59). She was familiar with the lease in reference to the common areas. (B59). The Lease between Concord Square and Oreck was entered into on December 18, 1998. (B59). Ms. Leonard was not employed with Concord Square when the lease was originally entered into. (B59). Ms. Leonard testified that Section 5.1 of the Lease provided that the "common areas shall be the grounds, parking areas, malls, driveways, walks, entrances, exits and service areas and service roads in the Entire Premises . . . ." (B59). She further stated that there is an exit that takes you to the back of the Oreck store. (B59).

Ms. Leonard could not say how many times she was on the property of Concord Square between January and February 2011. Capano Management does not have any employees with an office on the property of Concord Square. (B57). She personally never had communications with any Oreck employee informing

them that it was her belief that Oreck was responsible to maintain the back entrance of the store. (B62). Moreover, she could not provide the name of her contact person at Oreck. (B60-63).

Ms. Leonard stated that the area immediately behind Oreck was not a "common area". (B61). According to Ms. Leonard, the only common area in the back of the stores was the drive lane. (B61). Ms. Leonard testified that the area immediately behind Oreck does not have a name. (B65). Concord Square called it the back area. (B65). According to Ms. Leonard, there is no name for the area from the drive lane to the back entrance of the Oreck store. (B65).

Ms. Leonard was not aware of any written requirement that Oreck perform snow or ice removal for the back entrance of the store. (B63). In addition, she never saw any employee of Oreck perform snow or ice removal behind the store. (B63). Ms. Leonard never directed her maintenance staff to perform an inspection of the back entrance of the Oreck store. (B63). The maintenance staff is not only responsible for the maintenance of Concord Square, but also the many other Capano Management properties. (B63). The staff does not keep records as to how often they perform maintenance related tasks at Concord Square. (B63-66).

Ms. Leonard could not state how often she directed maintenance staff to go out to Concord Square in January and February 2011. (B66). Following a

maintenance request, there is no requirement that staff provide a written report of any tasks completed. (B66). Ms. Leonard testified she has no way of knowing if the tasks assigned are actually completed. (B66).

She testified that the lease required Oreck to perform snow and ice removal for the sidewalk located in the front of the store. (B62). There are no sidewalks located behind the store. (B62). There is no written requirement that Oreck perform snow or ice removal for the back entrance of the store where the incident occurred. (B63).

On November 20, 2013, the first jury returned a verdict in favor of the Plaintiff. On November 25, 2013, the Court *sua sponte* ordered a new trial. The Court found the jury's apportionment of Plaintiff's 16% negligence was contrary to the great weight of the evidence.[5] On December 2, 2013, the Court held a teleconference to establish the issues that were to be addressed at a second trial. The previously entered judgment was vacated on December 3, 2013. The second trial was to go forward as to the negligence of each party, if any.[6]

A second trial began on April 21, 2014. Testimony at the second trial came from Mr. Brokus and Ms. Leonard. Mr. Brokus and Ms. Leonard provided similar testimony to that which was provided in the first trial. (B25).

[5] Exhibit C (B15).
[6] Super. Ct. Civ. Proceeding Sheet attached as Exhibit I (B95).

A second jury determined Mr. Brokus was 25% negligent and that Concord Square was 75% negligent.[7]

[7] Exhibit D (B17).

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY DENIED CONCORD SQUARE'S MOTION FOR JUDGMENT AS A MATTER OF LAW ON THE ISSUE OF DUTY, AS UNDER ANY REASONABLE VIEW OF THE EVIDENCE, THE JURY COULD AND DID JUSTIFIABLY FIND FOR THE NON-MOVING PARTY.

A. QUESTION PRESENTED

Whether the trial court erred when it denied Concord Square's Motion for Judgment as a Matter of Law on the issue of duty. This issue was preserved in the trial court via Concord Square's Renewed Motion for Judgment as a Matter of Law. (D.I. 89).

B. SCOPE OF REVIEW

Concord Square appeals the trial court's decision to deny its motion for judgment as a matter of law. The appropriate standard of appellate review requires this Court to determine "whether under any reasonable view of the evidence, the jury could have justifiably found for the non-moving party."[8]

An interpretation of contractual language is a question of law.[9] To the "extent the trial court's interpretation of the contract rests upon findings extrinsic to the contract, or upon inferences drawn from those findings, [the Court must] defer

[8] *Bell Sports, Inc. v. Yarusso*, 759 A.2d 582, 587 (Del. 2000).
[9] *AT&T Corp. v. Lillis*, 953 A.2d 241, 251-252 (Del. 2008).

to the trial court's findings, unless the findings are not supported by the record or unless the inferences drawn from those findings are not the product of an orderly or logical deductive reasoning process.[10]

C. MERITS OF ARGUMENT

Pursuant to the Lease, Defendant owed a duty to remove snow and ice from the area where the fall occurred. It failed to do so and as a result it breached its duty owed to Brokus.

Concord Square as the owner of the shopping center did not give up all control and possession of the back of the Oreck store. Moreover, it cannot shield itself from liability by delegating or contracting away its legal duties while retaining the right to enjoy the benefits associated with that ownership.[11] Concord Square had an affirmative duty to keep its premises reasonably safe from the natural accumulation of snow and ice.[12] It did not discharge its affirmative duty to remove snow and ice via the Lease.[13]

Concord Square retained a snow removal company (Paoli Services) to remove snow from a large portion of the property. Concord Square contends that it had no duty to remove snow and ice where the fall occurred since its tenant

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[10] *Id.*
[11] *Argoe v. Commerce Square Apts., Ltd.* 745 A.2d 251 (Del. Super. 1999).
[12] *Woods v. Prices Corner Shopping Ctr.* 541 A.2d 574, 576 (Del. Super. 1988).
[13] Mem. Op. at p. 5. (B27).

(Oreck) was responsible. (Appellant's Opening Br. at p. 16). The Defendant states it is appropriate to start with the lease between Concord Square and Oreck. (Appellant's Opening Br. at p. 11). Brokus disagrees. It is appropriate to begin with the Complaint that was filed and Concord Square's subsequent Answer.[14]

Plaintiff's Complaint states that he fell in the back entrance area behind the Oreck store.[15] Absent from Concord Square's Answer and Affirmative Defenses is any allegation that another party other than Plaintiff was responsible for the incident that occurred or for snow and ice removal.[16] Defendant asserted no contractual obligation on Oreck for snow and ice removal for the back of the store. More importantly, Defendant at no point in time sought to bring in Oreck as a third-party defendant.[17] Plaintiff could not bring a claim against Oreck as it was his employer.[18]

Concord Square alleges that it was not responsible for snow or ice removal in the area where Plaintiff fell. Rather, Oreck was responsible. Yet, it failed to add Oreck to this action or call any representative of Oreck at either trial.[19]

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[14] D.I. 1 and 7.
[15] D.I. 1 at ¶ 5.
[16] D.I. 7.
[17] *See,* Docket Entries (B1-12).
[18] 19 *Del. C.* § 2304.
[19] Plaintiff does not attempt to shift the burden of proof. It was Plaintiff's burden at trial and that burden was met.

Concord Square acknowledges that a Lease existed and that for the entirety of that Lease, it has always believed Oreck was responsible for snow and ice removal for the area behind the store. (Appellant's Opening Br. at p. 12.). It does not provide any section of the Lease to support its contention. The only evidence to support this allegation is the testimony of Ms. Leonard. Simply put, Ms. Leonard did not draft the Lease or participate in the negotiation of the lease. (B59). Ms. Leonard had no communications with any Oreck employee informing them that it was her belief that Oreck was responsible to maintain the back entrance of the store. (B62). Concord Square asserts that Oreck is responsible for snow and ice removal in the area of the fall. This assertion is not based on the expressed terms of the Lease or because Ms. Leonard informed Oreck it was their responsibility. (B62). Rather, Concord Square believes Oreck was responsible for the snow and ice removal in the area of the back of the store, simply because they say so. This argument is without merit.

Now addressing the contentions of Concord Square, Plaintiff submits that the trial court correctly held that there was "no written agreement that obligated Oreck to remove the ice and snow behind its store."[20] The lease was the only agreement between Oreck and Concord Square entered into evidence at trial.[21] The Lease only required Oreck to remove ice and snow from the "sidewalks

[20] Mem. Op. at p. 5. (B27).
[21] Lease, Appellant's Appendix A73-129.

immediately adjoining the Rental unit."[22] Both Brokus and Ms. Leonard testified that there are no sidewalks behind the store where the fall occurred. (B43, B62). The only sidewalk is located in the front of the Oreck store. (B62). Thus, the Lease did not require Oreck to remove any snow or ice from the back of the store, as was confirmed by Ms. Leonard. (B63).

Concord Square attempts to argue that Mr. Brokus fell outside the fire lane and within the "dumpster area". (Appellant's Opening Br. at p. 11). To be clear there is no such designation ("dumpster area") found within the Lease. Moreover, Mr. Brokus never said the area where the incident occurred was the "dumpster area". He testified that he fell five feet from the delivery truck and about eight feet from the dumpster. (B38). Any attempt to now call the area of the incident, the "dumpster area" serves the purpose of trying to shift responsibility to the tenant, which is erroneous.

Of great significance to this issue is Ms. Leonard's testimony. According to Ms. Leonard, the area behind the store does not have a name rather "[they] call it the back area." (B65) However, the Lease does not list the area as the back area. (B65). Both juries were smart enough to see through Concord Square's wordplay. Conveniently, Concord Square does not have a name for the area of the incident. Simply put, Concord Square will not call the area of the incident anything listed

[22] Lease, § 19.1(g) Appellant's Appendix A109-110.

under the "common areas", so instead its "nameless". Now in its briefing, Concord Square calls the area of the incident the "dumpster area", which is contrary to the testimony of Mr. Brokus and Ms. Leonard. (B38, B65).

The only testimony of where Mr. Brokus fell came from him. He specifically stated he fell five feet from the delivery truck and about eight feet from the dumpster. (B38). There is no magical line to differentiate the back service entrance to the alleged "dumpster area" or any other name other than a "common area". Defendant's attempt to focus on the dumpster is a red herring. Whether the Defendant owed Plaintiff a duty to remove snow and ice from the area has nothing to do with the dumpster. The focus must be on the Lease and its terms.

The Lease only required Oreck to remove ice and snow from "sidewalks immediately adjoining the Rental Unit."[23] There is no other requirement in the Lease that stated Oreck was responsible for snow and ice removal for any other area except the sidewalk. It is undisputed that there are no sidewalks in the back of the Oreck store. (B43, B62). The trial court was correct in finding that there was no written obligation that Oreck remove snow and ice from behind its store, as it was Concord Square's obligation based on the Lease.[24]

[23] Lease at § 19.1(g). Appellant's Appendix A109-110.
[24] Mem. Op. at p. 5 (B27).

Moreover, the Lease expressly stated that it "*shall not be modified in any way except by writing by both parties.*"[25] (emphasis added). No such writing was introduced at trial. Concord Square ignores this glaring weakness in its reliance upon the Lease.

Next, Concord Square attempts to circumvent the clear and unambiguous terms of the Lease by an alleged oral "understanding" along with the actions of the parties to the contract (Oreck and Concord Square). Under Delaware law, the Court must give "priority to the parties' intentions as reflected in the four corners of the agreement" when interpreting a contract.[26] Again, Concord Square cannot escape the unambiguous terms of the contract, *i.e.*, that the Lease cannot be modified except by a writing between the parties. Because the Lease is clear and unambiguous, the plain meaning of the contract terms and provisions controls.[27] As a consequence, there is no need to consider extrinsic evidence in deciding the intentions of the parties.[28]

The only so-called extrinsic evidence of the "understanding" of Concord Square and Oreck concerning snow and ice removal came from Ms. Leonard. No

[25] Lease at § 22.2. Appellant's Appendix A114.
[26] *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.* 36 A.3d 776, 779 (Del. 2012) (citing *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009)).
[27] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010).
[28] *See, GMG Capital Invest, LLC*, at 783.

tenants testified at either trial.[29] This is critical since Concord Square is arguing the "parties" had an understanding about snow and ice removal for the back of the store. Stated differently, Oreck has said nothing via a representative, trial testimony or a subsequent writing. As a result, Brokus respectfully submits that any case law cited by Concord Square concerning the parties' interpretation of their respective obligations or the conduct of the parties does not need to be addressed. Concord Square is attempting to have this Court determine the actions of the parties to the Lease by relying solely upon the testimony of Ms. Leonard. Simply put, she cannot speak for Oreck. More importantly, she cannot change the clear and unambiguous terms of the contract.

As the trial court correctly found, the evidence at trial regarding the understanding of the parties was scant and solely came from Ms. Leonard.[30] And to be clear, Ms. Leonard was not even an employee of either party to the Lease (Oreck and Concord Square). (B57). Ms. Leonard has no authority to speak for Oreck, and even if she did, her testimony did not change the clear and unambiguous terms of Sections 19.1(g) and 22.2 of the Lease.

Assuming *arguendo*, the Court finds Ms. Leonard could speak for both parties of the Lease and Sections 19.1(g) and 22.2 of the Lease are ambiguous;

[29] Mem. Op. at p. 6. (B28).
[30] *Id.*

there still remains more than sufficient evidence that the jury could have justifiably found Concord Square owed a duty to Brokus.[31]

The term "common areas" is defined in the Lease as "the grounds, parking areas, malls, driveways, walks, entrances, exits and service areas and service roads in the Entire Premises from time to time designated as such by the Landlord."[32] Ms. Leonard testified that the area where Mr. Brokus fell did not have a name, but rather it was called the back area. (B65). Somehow, the tenant is responsible to remove snow and ice from the "nameless" area, not based on the Lease or because Ms. Leonard advised the tenant it was their responsibility, but because Ms. Leonard says so. (B43, B62, B65). This is without merit.

The jury was free to read the clear and unambiguous language of Sections 5.1, 19.1(g) and 22.2 and decide for themselves if the testimony of Ms. Leonard made any sense concerning who was responsible for snow and ice removal for the area where Mr. Brokus fell. Both juries were free to find the back area where Mr. Brokus fell was an area listed under Section 5.1 "Common Areas." Mr. Brokus exited from a service door and walked on an icy concrete roadway to pick-up boxes from a delivery truck. Concord Square can attempt to call the area of the incident the "dumpster area" or any other name it chooses, but it cannot rely upon

[31] *See, Bell Sports, Inc.* at 587.
[32] Lease, at § 5.1. Appellant's Appendix A81.

the Lease to support its contentions. There is no getting around the aforementioned sections of the Lease, which are clear and place responsibility for snow and ice removal for the back entrance on Concord Square.

Appellant's reliance on *Brown v. F.W. Baird, LLC*, 956 A.2d 642 (Del. 2008) (TABLE) and *Spence v. Layaou Landscaping, Inc.*, 2013 WL 6114873, at *8 (Del. Super. Oct. 31, 2013) are misplaced. In *Brown*, the contract did not require a snow removal contractor to remove snow until requested by the store. The contract was the basis for summary judgment being granted. The contract clearly required notice to be provided to the snow removal contractor.[33] Here, there is no requirement in the Lease that notice be provided to Concord Square. The Lease is clear as to who is responsible for snow and ice removal – Concord Square.

In essence, Concord Square cannot rely upon the conduct of the parties because no tenant, including Oreck, provided testimony at either trial. More importantly, the Lease could not be modified, unless done so in writing by the parties. No such writing exists and the Lease controls. In addition, Concord Square was required to perform snow and ice removal for the back entrance of the Oreck store. The credibility of Ms. Leonard like any witness was for a jury to decide.[34] Both juries clearly did not believe her unilateral view of the lease

[33] *Brown v. F.W. Baird, LLC* 956 A.2d 642, at *2 (Del. 2008) (TABLE).
[34] *Young v. Frase*, 702 A.2d 1234, 1236 (Del. 1997).

entered into by Concord Square and Oreck. As a result, the trial court correctly denied the motion for judgment as a matter of law.

II. THE SUPERIOR COURT CORRECTLY DENIED CONCORD SQUARE'S MOTION FOR JUDGMENT AS A MATTER OF LAW SINCE THERE WAS NO TESTIMONY PROVIDED BY ORECK ON THE OBLIGATIONS BETWEEN IT AND CONCORD SQUARE, AND CONCORD SQUARE'S ACTIONS WERE UNREASONABLE UNDER THE CIRCUMSTANCES.

A. QUESTION PRESENTED

Whether the trial court erred in denying Concord Square's Motion for Judgment as a Matter of Law in finding Concord Square did not act reasonably.

This question was preserved at trial via Concord Square's Renewed Motion for Judgment as a Matter of Law. (D.I. 89).

B. SCOPE OF REVIEW

Concord Square appeals the trial court's decision to deny its motion for judgment as a matter of law. The appropriate standard of appellate review requires this Court to determine "whether under any reasonable view of the evidence, the jury could have justifiably found for the non-moving party."[35]

C. MERITS OF THE ARGUMENT

Concord Square argues that it acted reasonably as a matter of law. (Appellant's Opening Br. at p. 18). Brokus disagrees. The action, or better yet

[35] *Bell Sports, Inc. v. Yarusso*, 759 A.2d 582, 587 (Del. 2000).

inaction of Concord Square, was a breach of the duty owed to Brokus. Concord Square had a duty to act as a reasonably prudent person or entity would under the circumstances presented.[36] Concord Square relies upon its unilateral understanding of the Lease entered into by Oreck and Concord Square. This argument is without merit for the reasons stated above under argument one.[37]

Concord Square again relies upon the Lease and the testimony of Ms. Leonard to support its contention that it not only acted reasonably but acted consistently with the parties' interpretation of that contract. Under any reasonable view of the evidence, there is more than enough evidence to support both verdicts and the trial court's decision.[38]

First, Concord Square changes the parties to the Lease in this section of its brief. (Appellant's Opening Br. at p. 18-19). Concord Square argues that "[t]he only evidence on record is that Concord Square Associates and Capano Management interpreted the lease to exclude the rear dumpster area from the 'common areas' …." (Appellant's Opening Br. at p. 18-19). The parties to the Lease are Concord Square and Oreck – not Capano Management. Under its first argument, Concord Square alleged that Ms. Leonard was able to testify about the

[36] *Delmarva Power & Light Co. v. Burrows*, 435 A.2d 716, 718 (Del. 1981).
[37] The trial court also found the argument of Concord Square to be without merit. Mem. Op. at p. 7. (B29).
[38] *Bell Sports, Inc.*, at 587.

interpretation of the parties to the contract concerning snow and ice removal. (Appellant's Opening Br. 18-19). Again, she cannot. Now, Capano Management can somehow speak for Oreck concerning Oreck's interpretation of the lease. This too is incorrect. There was no testimony at either trial from Oreck, and no one can speak for Oreck outside of what is in the four corners of the contract.[39]

Second, Concord Square contends that Brokus failed to call any witnesses from Oreck to rebut Concord Square's interpretation of the Lease. (Appellant's Opening Br. at p. 19). Concord Square misses the point. Brokus met his burden of establishing a duty owed by introducing the Lease and questioning Ms. Leonard about the Lease. The Lease "shall not be modified in any way except by a writing by both parties."[40] To be clear, the parties are Concord Square and Oreck – not Capano Management. Ms. Leonard is an employee of Capano Management. (B57). She is not an employee of Concord Square, and Concord Square has no employees. (B57). Despite the foregoing, Concord Square somehow believes Ms. Leonard has the ability to speak for Concord Square, Capano Management and Oreck concerning a Lease that she (1) did not draft; (2) did not participate in negotiating; and (3) was not an employee of Capano Management when the Lease was entered into. (B57, B59).

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[39] *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.* 36 A.3d 776, 779 (Del. 2012) (citing *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009)).

[40] Lease at § 22.2. Appellant's Appendix A114.

Next, Concord Square argues that Brokus's argument was essentially that Concord Square's interpretation of the lease was unreasonable under the circumstances, and there was no evidence to support that claim. (Appellant's Opening Br. at p. 19). There was more than enough evidence to show that the inactions of Concord Square were not reasonable.

Assuming *arguendo*, that Ms. Leonard can speak for both parties of the lease – which she cannot, Brokus submits the actions of Concord Square still were unreasonable. There was no testimony from Oreck, thus there can be no reliance on allegations of what it may or may not have done over the 13 year period of the contract.[41] Ms. Leonard provides the only support for Concord Square's contention of acting reasonably. Her testimony supports inaction - not reasonable conduct.

Ms. Leonard could not state how often she directed maintenance staff to go out to Concord Square. (B66). There was no requirement that staff provide a written report of any tasks completed at Concord Square. (B66). Ms. Leonard has no way of knowing if the tasks are actually completed. (B63-66). Capano Management does not have any employees with an office on the property of

[41] There was no requirement that Brokus call any witness from Oreck. The Lease is clear and unambiguous. Moreover, Concord Square could have called a witness from Oreck to support its allegation that Oreck was responsible for snow and ice removal. Concord Square did not even attempt to bring Oreck into this action to support its contention that Oreck was responsible for snow and ice removal for the area in question. (B1-12).

Concord Square. (B57). Ms. Leonard had no communications with any Oreck employee informing them that it was her belief that Oreck was responsible to maintain the back entrance of the store. (B62). Moreover, she could not provide the name of her contact person at Oreck. (B60-63). This is ample support to show that Concord Square through its property manager, Ms. Leonard, does nothing to make sure the area behind the Oreck store is safe.

Concerning the lease, Ms. Leonards' testimony is even more fatal to Concord Square's argument. Ms. Leonard was not aware of any written requirement that Oreck perform snow or ice removal for the back entrance of the store. (B63). In addition, she never saw any employee of Oreck perform snow or ice removal behind the store. (B63). Ms. Leonard never directed her maintenance staff to perform an inspection of the back entrance of the Oreck store. (B63). The staff does not keep records as to how often they perform maintenance related tasks at Concord Square. (B63-66).

In conclusion, there is no written requirement that Oreck perform snow or ice removal for the back entrance of the store. (B63). Ms. Leonard has never told Oreck that she believes Oreck is responsible for removing snow and ice for the back entrance of the store. (B62). She has never seen Oreck remove snow or ice from the back of the store. (B63). And Concord Square can't point to any part of the Lease that requires Oreck to remove snow and ice from the back entrance.

(B63). Brokus respectfully submits that the numerous inactions of Concord Square provide plenty of support that Concord Square did not act reasonably. Lastly, Concord Square's inaction was a breach of the duty owed to Brokus and both juries were free to reject the testimony of Ms. Leonard if they did not find her credible.[42]

[42] *See, Debernard v. Reed*, 277 A.2d 684, 685 (Del. 1971).

III. THE SUPERIOR COURT CORRECTLY DENIED CONCORD SQUARE'S MOTION FOR JUDGMENT AS A MATTER OF LAW, AS BROKUS'S COMPARATIVE NEGLIGENCE WAS SOLELY FOR THE JURY TO DECIDE.

A. QUESTION PRESENTED

Whether the trial court erred when it denied Concord Square's Motion for Judgment as a Matter of Law in not finding Brokus more than 50% negligent. This issue was preserved at trial via Concord Square's Renewed Motion for Judgment as a Matter of Law. (D.I. 89).

B. SCOPE OF REVIEW

This is Concord Square's appeal from the trial court's decision to deny its renewed motion for judgment as a matter of law. The appropriate standard of appellate review requires this Court to determine "whether under any reasonable view of the evidence, the jury could have justifiably found for the non-moving party."[43]

C. MERITS OF ARGUMENT

The first jury rightfully decided the percentage of Brokus's comparative negligence.

[43] *Bell Sports, Inc. v. Yarusso*, 759 A.2d 582, 587 (Del. 2000).

In most cases the degree of comparative negligence of Plaintiff is an issue for the jury.[44] This case is no exception.[45] In rare cases, where the evidence so requires a finding that plaintiff's negligence was greater than the defendant, a trial court may bar recovery.[46]

As the trial court found, viewing the facts in the light most favorable to Plaintiff, Brokus testified that he believed he would lose his job, if he did not help unload the delivery truck. (B48). Concord Square considers Brokus's explanation as "his eleventh hour allegation" and that his assertion was not raised until his second trial. (Appellant's Opening Br. at p. 22-23). Concord Square ignores the testimony of Mr. Brokus during the first trial. Mr. Brokus testified that if he did not go out to get the delivery packages, he most likely would be fired. (B48). Thus, his testimony was consistent at both trials and Defendant's attempt to characterize him as having a "revisionist history" is baseless.

In Mr. Brokus's mind, he was presented with no other option but to traverse the dangerous condition that was created by Concord Square or risk losing his job. His decision to not risk losing his job and walk over the condition was reasonable – unlike the inaction of Concord Square. Concord Square appears to take issue with Mr. Brokus's unwillingness to use a cracked shovel to remove snow and ice from

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[44] *Coker v McDonald's Corp.*, 537 A.2d 549 (Del. Super. 1987).
[45] Mem. Op. at p. 7 (B29).
[46] *Trievel v. Sabo*, 714 A.2d 742 (Del. 1998).

the back entrance. Concord Square further points out to this Court that Brokus testified it was not his job to remove snow and ice from the back entrance. Mr. Brokus is correct; it was not his job to remove snow and ice from the back entrance of Oreck. Based on the lease, that job belonged to Concord Square.[47] Moreover, Concord Square's allegation that Brokus could have easily used the cracked shovel and removed the snow and ice completely misses the point. There was no testimony that Mr. Brokus was required to remove snow and ice from anywhere on the premises of Concord Square.

Next, the Defendant argues that *Helm v. 206 Massachusetts Avenue, LLC,* 2013 WL 6591544 (Del. Super. Dec. 12, 2013) supports its contention. Again, Plaintiff disagrees. In *Helm*, plaintiff fell down an unlit stairway. The court found that plaintiff had no compelling reason for urging her to walk down the unlit stairway.[48] *Helm* was not binding on the lower court. More importantly, the lower court in this action concluded that the *Helm* court's finding cannot be reconciled with this Court's definition of secondary risk in *Koutofaris v. Dick*, 604 A.2d 390 (Del. 1992).[49] Here, Brokus believed he would lose his job if he did not help unload the truck. This could and did lead the trier of fact to conclude he had a compelling reason for traversing the ice. It is clear Defendant does not think that

[47] Lease, §5.1, Appellant Appendix A81.
[48] *Id.* at *3.
[49] Mem. Op. at p. 11 (B33).

Plaintiff would have been fired or even disciplined if he refused to not unload the truck. Obviously, both juries disagreed. Stated differently, two juries found in favor of Brokus based on the evidence presented. The issue was rightfully decided by the jury and enormous deference should be given to that verdict.[50] For the foregoing reasons, Concord Square's appeal should be denied.

[50] *Coker*, 537 A.2d 549; *Young*, at 1236.

I. THE COURT BELOW ABUSED ITS DISCRETION WHEN IT *SUA SPONTE* ORDERED A SECOND TRIAL, AS IT WAS FOR A JURY TO DECIDE THE PERCENTAGE OF NEGLIGENCE OF THE PARTIES, WHICH WAS DONE BASED ON THE EVIDENCE PRESENTED.

A. Question Presented

Whether the Court abused its discretion in finding the first jury's verdict was against the great weight of the evidence. This issue was raised prior to a jury being selected in the second trial (Exhibit J (B98)).

B. Scope of Review.

This is Brokus's appeal from the decision of the Court below to *sua sponte* order a second trial on the degree of negligence of Plaintiff and Defendant, if any. On an appeal from the granting of a new trial, this Court's scope and standard of review is for abuse of discretion.[51]

C. Merits of Argument

"Under Delaware law, enormous deference is given to jury verdicts."[52] Trial courts are to yield to a jury's decision, in the face of a reasonable difference of opinion.[53] A jury award should be set aside only in the rare case where it is "clear

[51] *Young v. Frase*, 702 A.2d 1234, 1236 (Del. 1997).
[52] *Id.*, at 1236.
[53] *Storey v. Castner*, 314 A.2d 187, 193 (Del. 1973); *Medical Center of Del. v. Lougheed*, 661 A.2d 1055, 1061 (Del. 1995).

that the award is so grossly out of proportion to the injuries suffered as to shock the Court's conscience and sense of justice."[54] In this action, the trial court did not find the amount of damages to shock its conscience.[55] Rather, it found the apportionment of negligence amongst the parties to be "contrary to the great weight of the evidence and justice would miscarry if allowed to stand…."[56] The trial court found that based on the evidence presented, the apportionment of Plaintiff's negligence was contrary to the great weight of the evidence. As a result, a second trial occurred that was essentially a replay of the first trial.[57] Mr. Brokus contends that the trial court's granting of a new trial exceeded the bounds of reason in light of the facts presented.[58]

In both trials, Concord Square relied heavily on the testimony of Ms. Leonard. Her duties as property manager included: coordinating maintenance requests, and the general upkeep and care of commercial properties. (B57). Yet, she could not state how often she directed maintenance staff to go out to Concord Square Shopping Center. (B66). Moreover, there was no requirement that staff provide a written report of any tasks completed at Concord Square. (B66). Ms.

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[54] *Mills v. Telenczak,* 345 A.2d 424, 426 (Del. 1975) (internal citations omitted).
[55] Exhibit C at (B15).
[56] *Id.*
[57] Exhibit E at (B25).
[58] *Peters v. Gelb*, 314 A.2d 901, 903 (Del. 1973).

Leonard also testified she has no way of knowing if the tasks are actually completed. (B63-66).

Concord Square also relied on Ms. Leonard's testimony in support of its contention that it owed no duty to perform snow or ice removal behind the Oreck store where Brokus's fall occurred. Ms. Leonard was aware and familiar with the lease that was entered into between Concord Square and Oreck. (B59). Her testimony was that tenants were supposed to remove snow and ice from behind the stores. The Lease between Oreck and Concord Square expressly states that "the Lease shall not be modified in any way except by writing by both parties."[59] No such writing was ever introduced at trial. The only support for such an understanding came from Ms. Leonard. The jury was free to reject the testimony of Ms. Leonard if they did not find her credible.[60]

As long as there is a sufficient evidentiary basis for the jury verdict, the verdict should not be disturbed.[61] A trial judge should not overturn a jury verdict, unless after review of all the evidence, the evidence is greatly against the verdict and a reasonable jury would not reach the outcome.[62] Here, a second jury

[59] Exhibit F at (B28).
[60] *See, Debernard v. Reed*, 277 A.2d 684, 685 (Del. 1971).
[61] *See, Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979).
[62] *Id.*

essentially reached the same outcome as the first jury *i.e.*, Concord Square's negligence was far greater than Plaintiff's comparative negligence.

With respect to liability, the trial court stated that the two trials were essentially the same.[63] Yet, Plaintiff's negligence at 16% shocked the Court's conscience and 25% did not. The Court provided no reasoning as to the evidence that supported the 9% difference shocking its conscious.[64]

Delaware law states that the jury is the sole trier of fact responsible for assessing the credibility of witnesses and resolving conflicting testimony.[65] The trial court needed to determine whether the first jury's award was within a range supported by the evidence.[66] Here, 16% negligence is within the range of 25%. Brokus submits that the small difference in the percentages of negligence further illustrates that the first verdict was within the range of the evidence presented at trial. As a result, the trial court abused its discretion in granting a new trial *sua sponte*, as the first verdict fell within the range of the second verdict.

A second jury heard essentially the same testimony from Mr. Brokus and Ms. Leonard as the first jury. Similar to the verdict reached in the first trial, the second jury found Concord Square more negligent than Mr. Brokus. Thus, twenty-

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[63] Exhibit F at (B25).
[64] *Id.*
[65] *Young*, at 1237 (internal citations omitted).
[66] *Young*, at 1237-38.

four individuals heard testimony in this matter and unanimously came to essentially the same conclusion – that Concord Square breached its duty in failing to remove snow and ice from the back entrance of Oreck, which caused Plaintiff's injuries.

Of greater significance than the jury verdicts is the trial court's finding that the second verdict did not shock the conscience of the Court.[67] Failure to provide any reasoning as to how the evidence supported Brokus being 25% and not 16% negligent amounts to an abuse of discretion by the Court.[68] Furthermore, for the Court to find that the second jury reasonably could have reached the result it did is additional support for the reasonableness of the first verdict. Without any reasoning being supplied by the Court, one is left to guess whether Brokus being found 17% negligent would have arisen to shock the conscious of the court or whether any percentage less than 25% but greater than 16% would have shocked the conscious of the Court. As a result, the first jury's verdict should be reinstated as it was supported by the evidence presented.[69]

Delaware law holds that the duty to exercise discretion by a trial judge will include the duty to make a record to show what factors the court considered and

[67] Exhibit F (B25).
[68] *See, Young*, at 1237-38.
[69] *Camper*, at 465.

the reasons for the decision.[70] The Court's Order granting a new trial provides no factors that the trial court considered in reaching its decision that the apportionment of negligence was against the great weight of the evidence.[71] Prior to a jury being selected in the second trial, the Court stated that it "felt the jury's previous apportionment of [16] percent of the negligence to the plaintiff… was *wildly disproportionate* to what the evidence showed…."[72] (emphasis added). Devoid from the Court's Order is what evidence led it to reach this conclusion.

Plaintiff next contends that the Court's basis for the need for a second trial is contrary to the Court's conclusion after the second trial. Stated differently, the Court found the second trial to be largely a replay of the first trial.[73] Having stated the second trial was a replay of the first is additional support that shows the first verdict was not "wildly disproportionate to what the evidence showed".[74]

Lastly, the trial court abused its discretion, by not supplying its factors for granting a new trial *sua sponte*.[75] As this Court has stated before "[t]he lack of reasons makes it extremely difficult to give deference to the discretionary power of

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[70] *Id.*, at 458.
[71] Exhibit C (B15).
[72] Exhibit J at (B98). It is undisputed that the first jury found Plaintiff 16% negligent and not 13%.
[73] Exhibit F (B25).
[74] B98.
[75] *See, Camper* at 466.

the Trial Judge…."[76] Based on the foregoing, Cross Appellant respectfully submits that the case should be remanded to the lower court and the first jury's verdict reinstated, as the evidence supported the verdict reached.

[76] *Id.*

CONCLUSION

For the reasons set forth in the attached Appellee's Answering Brief, Appellee respectfully requests that Concord Square's Appeal be DENIED in its entirety. For the reasons set for in the attached Cross Appellant's Opening Brief on Cross-Appeal, Kevin A. Brokus respectfully requests that this case be REMANDED to the lower court to reinstate the first jury's verdict attributing 16% negligence against Plaintiff.

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