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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CONCORD SQUARE ASSOCIATES, LLC, a limited liability company,	)	*No.: 417, 2014*
Defendant below, Appellant/Cross-Appellee,	)	*Court below: Superior Court of the State of Delaware in and for New Castle County*
v.	)	*C.A. No.: 12C-01-098 JAP*
KEVIN A. BROKUS,	)	
Plaintiff below, Appellee/Cross-Appellant.	)	

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

Law Offices of Chrissinger & Baumberger

/s/Nancy C. Cobb
NANCY CHRISSINGER COBB
(#2393)
3 Mill Road, Suite 301
Wilmington, DE 19806
(302) 777-0100
Attorney for Appellant Concord Square Associates, LLC

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SUMMARY OF ARGUMENT ON CROSS-APPEAL

1. Assuming *arguendo*, that Concord Square's appeal is denied, the Superior Court *sua sponte* grant of a new trial should be affirmed because the first jury verdict was against the great weight of the evidence. At the first trial, there was sufficient evidence that showed Concord Square did not breach a duty based on the parties' interpretation of the Lease over a 13-year period. Additionally, Brokus' conscious awareness of the hazardous condition and his knowing voluntary assumption of the risk should have rendered the apportionment of fault to tip in favor of Concord Square.

STATEMENT OF FACTS

Concord Square incorporates by reference and relies on the statement of facts set forth in its Opening Brief. However, counsel did overlook the bold statement made by Brokus on re-direct examination at the first trial to the effect that he "would likely be fired" if he refused to unload the FedEx truck. (B-48). Counsel apologizes to the Court and to Appellee's counsel for the error. The basis, or lack thereof, for that statement was fleshed out at the second trial and counsel stands by the assertion that the allegation was an eleventh hour allegation.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN DENYING CONCORD SQUARE'S MOTION FOR JUDGMENT AS A MATTER OF LAW ON THE EXISTENCE OF A DUTY.

In responding to Concord Square's argument relative to the existence of a legal duty, Brokus fails to address the crux of the same: a landlord *may* be liable to its *tenants* in situations involving a natural accumulation of snow and ice on *common approaches and passageways* where the landlord has *retained control to the exclusion of tenants*. *Monroe Park Apartments Corp. v. Bennett,* 232 A.2d 105 (Del. 1967) (emphasis added). Brokus' response fails to address this legal standard within the confines of the facts of this case. Those facts show that Concord Square most assuredly did *not* retain exclusive control of the dumpster area; indeed, the unrebutted evidence was to the contrary: that area was reserved for the exclusive use of Oreck. Oreck, not Concord Square and not any other tenant of or at Concord Square, received deliveries there. Oreck, not Concord Square and not any other tenant of or at Concord Square, purchased and utilized the dumpster there. Oreck employees, not Concord Square employees or employees of any other tenant of or at Concord Square, used the area for smoke breaks. Under these unrebutted facts, application of the legal standard enunciated in *Monroe Park Apartments* and

applied in such cases as *Scott*[1] mandated a determination that Concord Square did not owe Brokus a duty to undertake snow and ice removal efforts.

Concord Square's decision not to pursue a third-party claim against Oreck has no bearing on the analysis of a legal duty. Indeed, Superior Court Civil Rule 20 is a permissive joinder standard, and the factors required for Civil Rule 19(a), requiring joinder, are not present here. Brokus' argument that since Concord Square did not point the finger at Oreck in its Answer or bring a third-party claim against Oreck, Oreck cannot be responsible is flawed and unpersuasive. Moreover, Concord Square did in fact raise the issue when it noted as an affirmative defense that, "The claims asserted by plaintiff were proximately caused by an intervening and/or superseding cause." (Answer, D.I. 7).

Brokus next argues that Concord Square does not provide any section of the Lease to support its contention that it did not owe a duty to Brokus; rather, Concord Square solely relies on the testimony of Ms. Leonard. (Appellee's Answering Br. at 13). Such argument is misguided. In fact, the crux of Concord Square's argument in its Opening Brief relies on the Lease to support its contention that Concord Square did not retain control over the area in which Brokus claims to have fallen.

[1] *Scott v. Acadia Realty Trust*, 2009 WL 5177152 (Del. Super. Dec. 8, 2008), *aff'd* 11 A.3d 228 (Del. 2010).

Brokus' acknowledgement that the area where Brokus allegedly fell is "nameless" supports Concord Square's argument that the area was not a driveway, fire lane, or parking area, i.e, a "common area." (Appellee's Answering Br. at 15). As mandated by the Lease, Concord Square only retained control over "common areas"—areas specifically defined in the lease. The meaning of "common area" is not an expansive definition; rather, the Lease delineates the specific areas of inclusion. Importantly absent is any area that describes where Brokus allegedly slipped and fell. Thus, Brokus' non-categorization of the area where Brokus fell furthers Concord Square's argument that it is not a common area in which Concord Square retained control.

Moreover, to the extent that both Brokus and the Trial Judge focused on the lack of a specific written agreement relative to this particular area, that focus is misplaced. Brokus argues that the Lease may not be modified except by written agreement. (Appellee's Answering Br. at 16). However, there was no need to "modify" the Lease in this regard. The Lease provides that Concord Square's obligations relative to snow and ice removal relate to common areas only as those are delineated within the Lease. The area where Brokus claims to have fallen, under any version of his testimony, is not within the definition of a common area.

To that end, Brokus claims that he never testified that he fell within the "dumpster area." (Appellee's Answering Br. at 14). The evidence, however, was

to the contrary. Emergency Room records, an exhibit offered by the Plaintiff, provided a history of slipping on a step. (Ex. A). At trial, he testified that he took pictures to show where he fell and each of those pictures show an area adjacent to the dumpster. (A-11). On further cross examination he stated that he fell ten feet (10') from the door and that the dumpster itself sits approximately twelve feet (12') from the door. (A-15, B-045).

Brokus next argues that since none of the Oreck representatives testified, any case law cited by Concord Square concerning parties' interpretation of the obligations under the Lease need not be addressed. (Appellee's Answering Br. at 17). To the contrary, the cases are directly on point. Concord Square, through Ms. Leonard, provided testimony as to the interpretation of the Lease provisions by both parties. She specifically testified about Oreck's conduct in conformity with Concord Square's interpretation. It was thereafter Brokus' burden to call a witness from Oreck to rebut Concord Square's interpretation of the Lease. In the absence of any such rebuttal evidence proffered by Brokus, the case law cited and the facts cited herein are dispositive—Concord Square did not act negligently under the Lease.

Lastly, Brokus argues that Property Manager Jennifer Leonard was not a credible witness to testify in regards to the interpretation of the Lease because she did not draft or negotiate its terms. (Appellee's Answering Br. at 23). Brokus also

takes issue with Ms. Leonard's status as an employee of Capano Management Company. Ms. Leonard testified that Concord Square Associates itself does not have any employees. Rather, the principles contracted with Capano Management to manage this commercial property. As such, Ms. Leonard was able to testify as to the parties' dealings over the duration of the Lease. In that time, over a 13-year period before this accident, there was no evidence presented that either party to the Lease interpreted it to require the landlord to shovel the snow from the area where Brokus fell. Conveniently, despite Ms. Leonard's apparent "lack of credibility," Brokus uses Ms. Leonard's "significan[t]" testimony to support his argument that the area where Brokus fell is not a "common area." (Appellee's Answering Br. at 14-15). Therefore, Ms. Leonard was a credible witness to testify as to the interpretation of the Lease.

II. THE SUPERIOR COURT ERRED IN DENYING CONCORD SQUARE'S MOTION FOR JUDGMENT AS A MATTER OF LAW WHERE THERE WAS NO EVIDENCE OF NEGLIGENCE.

The allegation against Concord Square was one of negligence. Negligence is the duty to act as a reasonably prudent person or entity would under the circumstances. *Delmarva Power & Light Co. v. Burrows*, 435 A.2d 716, 718 (Del. 1981). The burden of proving negligence rests with the party alleging it. In responding to Concord Square's arguments in this regard, Brokus seemingly forgets that he bears the burden of proving Concord Square acted unreasonably under the totality of the circumstances. Concord Square bore no burden in this regard.

Concord Square presented evidence that, as an entity without employees, it contracted with Capano Management Company for the management of the property. Brokus presented no evidence that doing so was negligent or unreasonable. Concord Square presented evidence that it, through its contracted property manager, interpreted the Lease to exclude from the definition of "common areas" the area where Brokus claims to have fallen and that such an interpretation meant that it did not provide snow and ice removal services for areas requiring shoveling. (A-22, A-58). Concord Square provided unrebutted testimony that there was no record and no recollection of any request, comment, or complaint by Oreck to suggest that Oreck's interpretation did not mirror Concord

Square's. (A-24, A-52-53). Brokus presented no evidence that a reliance on the past relationship was unreasonable. He could have attempted to do so, but he did not. In order for there to be negligence, there must be a finding that this conduct was not reasonable under the totality of the circumstances. As noted in Concord Square's Opening Brief, no *reasonable* jury could so conclude and Judgment as a Matter of Law was proper.

III. THE SUPERIOR COURT ERRED IN DENYING CONCORD SQUARE'S MOTION FOR JUDGMENT AS A MATTER OF LAW ON THE ISSUE OF COMPARATIVE NEGLIGENCE WHERE PLAINTIFF BROKUS NOT ONLY OBSERVED AND PERCEIVED THE HAZARD, BUT ALSO ACTUALLY EXPERIENCED IT BEFORE WALKING OVER THE SNOW AND ICE FOR A SEVENTH TIME.

Brokus argues that the issue of comparative negligence was one for the jury. He alleges that in [his] mind, he was presented with no other option but to traverse the dangerous condition or risk losing his job. (Appellee's Answering Br. at 28). That argument may "fly" if this incident had occurred on the first round trip; it cannot be used as justification for continuing to knowingly walk over a slippery, untreated surface without even making an effort at redress or remedy. It cannot be used as justification for failing to attempt to use a shovel that was conveniently located inside the very door one is using. It cannot be used as justification for failing to report the conditions or inquiring about options. It cannot be used as a justification for not asking the Fed Ex truck to move to the front entrance.

Brokus argues that he had no duty to undertake snow and ice removal. (Appellee's Answering Br. at 29). This is just another way of stating, as he did on multiple occasions, that it "wasn't [his] job." (A-13). Whether Brokus had a duty to undertake snow and ice removal services is irrelevant. He did have a duty to take steps for his own safety. *Trievel v. Sabo*, 714 A.2d 742, 745 (Del. 1998) (citing *Dammer v. Metropolitan Merchandise Mart, Inc.*, 217 A.2d 688 (Del. 1966) and *Winkler v. Delaware State Fair, Inc.*,1992 WL 53412 (Del. Feb. 20, 1992)).

He did have a duty not to knowingly and unnecessarily take risks. *Helm v. 206 Massachusetts Avenue, LLC*, 2013 WL 6591544 (Del. Dec. 12, 2013), *rev'd on other grounds* 2014 WL 7272771 (Del. Dec. 19, 2014); *see also Spencer v. Wal-Mart*, 930 A.2d 881 (Del. 2007).[2] For these reasons and those stated in the Opening Brief, it was incumbent upon the Trial Court to bar recovery as a matter of law. *Trievel v. Sabo*, 714 A.2d 742 (Del. 1998).

[2] *Helm* is included in the compendium of unreported decisions attached to Concord Square's Opening Brief.

ARGUMENT

I. ASSUMING *ARGUENDO*, IF CONCORD SQUARE'S APPEAL IS DENIED, THE SUPERIOR COURT'S *SUA SPONTE* GRANT OF A NEW TRIAL SHOULD BE AFFIRMED BECAUSE THE FIRST JURY VERDICT WAS AGAINST THE GREAT WEIGHT OF THE EVIDENCE.

A. Question Presented

Whether the Superior Court's *sua sponte* grant of a new trial should be affirmed based on the weight of the evidence presented to the jury. This issue was raised prior to a jury being selected in the second trial. Exhibit J (B98).

B. Scope of Review

A trial court's order for a new trial is reviewed by the Delaware Supreme Court under an abuse of discretion standard. *Young v. Frase,* 702 A.2d 1234, 1236 (Del. 1997). "Under Delaware law, enormous deference is given to jury verdicts." *Id.* "Accordingly, a jury award should be set aside only in the unusual case where it is 'clear that the award is so grossly out of proportion to the injuries suffered as to shock the Court's conscience and sense of justice.'" *Id.* at 1237 (quoting *Mills v. Telenczak*, 345 A.2d 424, 426 (Del. 1975)).

C. Merits of Argument

Assuming arguendo*, if Concord Square's appeal is denied, the first jury's verdict should not be reinstated because the Superior Court did not abuse its discretion in* sua sponte *ordering a new trial.*

Delaware Superior Court Civil Rule 59(c) permits the Court to grant a new trial on its own initiative for any reason for which it might have granted a new trial on motion of a party. In order to grant a new trial, "a trial judge is only permitted to set aside a jury verdict when in his [or her] judgment it is at least against the great weight of the evidence." *Story v. Camper*, 401 A.2d 458, 465 (Del. 1979). "[T]he test is whether the lower Court's decision exceeded the bounds of reason in view of the circumstances." *Peters v. Gelb*, 314 A.2d 901, 903 (Del. 1973) (internal quotations omitted).

Here, the trial court's determination that the first jury verdict apportionment of negligence was against the great weight of the evidence, under the circumstances, was proper. Accordingly, there was sufficient evidence to conclude that Brokus' percentage of fault should have been higher than Concord Square's or, at the least, the percentages of fault should have been closer together.

Assuming *arguendo* that Concord Square owed Brokus a duty of care, there was sufficient evidence to show Concord Square did not breach that duty. The only evidence on record is that Concord Square interpreted the lease to exclude the rear dumpster area from the "common areas" over which snow plow services would be provided. (A-24, A-58). The burden was on Brokus to show that it was not, and in failing to provide testimony from Oreck representatives to dispute this understanding, the evidence showed that Concord Square acted reasonably.

Based on this understanding of the Lease, Concord Square acted reasonably by not plowing the rear dumpster area where Brokus fell. There was no evidence presented and no argument made that the interpretation by the signatories to the contract of their respective duties under the contract was an unreasonable one. In the absence of any such evidence, there could be no "negligence" found on the part of Concord Square.

Additionally, Brokus' conscious awareness of the hazardous condition, his refusal to even attempt to use an available snow shovel for any purpose other than holding the door open while he took post-incident photographs, and his knowing determination to walk across the area repeatedly constituted causal negligence, which far outweighed any negligence of Concord Square.

As required, the trial court judge provided sufficient reasoning on the record to support his order for a new trial. (Appellee's Exhibit C at B-015-016). The court noted that "during the course of trial the court ruled that Plaintiff was negligent as a matter of law." Additionally, the court "belatedly reconsidered its ruling that Plaintiff was negligent as a matter of law." In doing so, the court believed "counsel had insufficient time to adjust their closing arguments after the court advised them of its reconsideration of its rulings." Therefore, Brokus' contention that the trial court abused its discretion by not supplying its factors granting a new trial *sua sponte* is flawed.

The crux of Brokus' argument boils down to one question: why does 16 percent negligence shock the Court's conscience, but 25 percent negligence does not? Concord Square would argue that the latter should have shocked the conscience of the Court given the totality of the circumstances; however, the simple answer is that the test in granting a *sua sponte* new trial is based on the totality of the circumstances—not on a bright-line test. Brokus posits whether 17 percent negligence in this case would have shocked the conscience. The simple answer, again, is that it is not a bright-line test. Accordingly, the court's *sua sponte* grant of a new trial was not outside the bounds of reason.

CONCLUSION

Based on the foregoing reasoning, Concord Square Associates requests that this Court enter an Order reversing the decision of the Superior Court and grant it Judgment as a Matter of Law.

Law Offices of Chrissinger & Baumberger

/s/Nancy Chrissinger Cobb_____

NANCY CHRISSINGER COBB,
ESQUIRE (#2393)
3 Mill Road, Suite 301
Wilmington, DE 19806
(302) 777-0100
Attorney for Appellant Concord Square Associates, LLC

DATED: December 30, 2014