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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DINAH JONES and WILLIAM POTTER, Plaintiffs Below, Appellants, vs. CLYDE SPINELLI, LLC, dba, PINE VALLEY APARTMENTS, Defendant Below, Appellee	No.: 442,2016 Court Below: Superior Court of the State of Delaware, New Castle County, C.A. No.: N14C-12-159 PRW

APPELLANTS' OPENING BRIEF

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Date: November 28, 2016

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NATURE AND STAGE OF PROCEEDINGS

This action involves a version of a slip and fall which occurred on February 16, 2013 in New Castle County, Delaware. Plaintiff Dinah Jones (hereinafter "Plaintiff Jones") alleges personal injuries as a result of fall she sustained in the office of the defendant. She was part of a group of people attempting to pay an overdue rental which was in court. She was there for a lengthy amount of time when her 77 year old mother-in-law, Dorothy Oberly, (hereinafter "Oberly") bumped up against a space heater which was lying on the floor. As plaintiff Jones grabbed her as she was falling, they both fell and plaintiff Jones landed on her back and elbow. As a result she sustained a shattered right elbow which necessitated surgery. There are also medical bills for her treatment for the injury she sustained. Lastly, her husband plaintiff William Potter (hereinafter "Plaintiff Potter) has a claim for loss of consortium.

Defendant has denied liability. It has stated a few affirmative defenses. The most important are it argued comparative/contributory negligence against plaintiff Jones. It also argued that it was the negligence of a third party.

Discovery has been held and expert reports have been provided within the time frames allowed under the Trial Court scheduling order.

On May 20, 2016 defendant filed a motion for summary judgment. The basis of defendant's argument was somewhat confusing. It seemed to argue the space heater was a dangerous condition, however, it was Oberly's breach and not the defendant.

On June 10, 2016 plaintiffs filed their motion to answer defendant's motion for summary judgment. Arguing, at best, this was a joint and several liability situation between Oberly and the defendant, pursuant to 10 Del. C. § 6301. In defendant's case, allowing people to stand for a lengthy period of time with a space heater laying close by was negligent.

On June 14, 2016, defendant wrote a letter to the Trial Court stating plaintiffs used some language from the Restatement (Third) of Torts (2000). The defendant stated This Court does not follow the Restatement (Third) of Torts (2000).

On June 15, 2016, plaintiffs wrote a letter to the Trial Court stating in their opinion what the Court has not agreed with in the Restatement (Third) of Torts

(2000), does not involve what plaintiffs wrote in their brief. However, to not possibly use improper cites, plaintiffs used basically the same language from Restatement (Second) of Torts (1977).

On July 8, 2016, oral argument was held. There were not a lot of questions by the Court at oral argument. After a brief recess the Trial Court entered It's opinion granting defendant's motion for summary judgment. The Trial Court followed up with an order on the same day. In essence, the Trial Court's order was that Oberly was negligent, while as a matter of law, the employee of the defendant was not negligent. Therefore, the Trial Court granted summary judgment.

On July 15, 2016, plaintiffs filed a timely motion for reargument emphasizing the Supreme Court decision in *Koutoufaris v. Dick*, 604 A.2d 390 (Del. 1991) has made clearly established law that even if someone, usually the plaintiff, is aware of a defective or dangerous condition, it still may be the responsibility of the defendant to remedy the condition. It is a factual balancing test between plaintiff and defendant. Plaintiffs argued that a reasonable jury could believe this was a defective condition, and the defendant's employee was obviously aware of same.

On July 21, 2016 defendant filed its response to plaintiffs' motion for reargument stating plaintiff has made the same argument in its response to defendant's summary judgment motion.

On August 5, 2016 the Trial Court entered an order regarding the motion for reargument basically stating nothing stated by the plaintiffs was persuasive, or it was rehash of a previous argument in opposition of summary judgment. Therefore, the decision for summary judgment stood.

On August 29, 2016 an appeal to This Court was made by the plaintiff based on the rulings made by the Trial Court. This is plaintiffs' opening brief in support of their appeal to overturn the Trial Court's granting of the summary judgment motion by the defendant.

SUMMARY OF ARGUMENT

1. Summary judgment is appropriate only when, upon an examination of the record in the light most favorable to the non-movant, there exist no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. When the record indicates that a material fact is in dispute or if it would be advantageous to inquire more thoroughly into the facts to clarify the application of the law to the circumstances, summary judgment should not be granted.

2. In this case, there is a major dispute as to an issue of material fact, and the evidence, when viewed in light most favorable to the plaintiffs is such that a finder of fact could very reasonably find there was a dangerous condition in its property, and the plaintiffs were business invitees. However, the defendant made no attempt to remedy the situation, and, as a result, a severe injury occurred. These facts are included, but not limited to, a small space heater was on the floor approximately in the middle of the room and was there for at least a forty minute period of time in which the plaintiff Jones and Oberly were left standing. Oberly was well over 70 years of age, with the space heater within a few feet of her. No one was offered a chair, the space heater was not moved until after the fall, and they were not asked to leave the room. The actions taken by the defendant's agent was an extremely arguable failure to perceive a known risk to the business invitees in the room. The defendant's agent failed to take any remedial measures to protect against what ended up occurring. The Trial Court erred in finding that there was absolutely no negligence on the part of defendant, and granted summary judgment. Therefore, summary judgment in this matter is inappropriate and the Trial Court's decision should be reversed.

STATEMENT OF THE FACTS

Plaintiff Jones, along with her husband Plaintiff Potter, Plaintiff Potter's mother, Oberly, and his brother, John Yonker (hereinafter "Yonker"), made an appointment to try to reconcile a debt owed by them, which was already in suit, with the manager when they were tenants at Defendant's apartment complex. (A8 and A9)

At that point, plaintiffs resided in Northeast, MD which is a 45 minute drive from the apartment complex. (A10)

Upon arriving, they went inside and the door was open to the apartment complex and they entered into the room where the assistant manager Audra Greenlee (hereinafter "Greenlee") was seated at her desk to discuss the unpaid debt. (A11)

There was a relatively lengthy discussion with Greenlee regarding the debt and how to pay the debt. At all times, plaintiffs and their family were standing talking to Greenlee. Eventually, it was decided that plaintiff Potter and Yonker would get a money order for partial payment of the amount owed. (A12)

After Potter and Yonker left to get the money order, Jones and Oberly, who was 77 years old at the time, remained standing. (A13) They attempted to engage in conversation with Greenlee, but "she didn't really want to be bothered". (A14)

At no time did the Greenlee offer them a chair. There was a chair up against a desk which was to the right of the Greenlee as they walked into the office. (A15) There was a space heater located on the middle of the floor of the room which was close to where both Jones and Oberly where standing.(A15) The space heater was approximately one square foot. (A21) During the time while standing in the office, Oberly was moving from one leg to another. (A16) Oberly was also shifting her legs from one side to another and moving around the room. (A17, A18) As was her normal personality, she was talking basically all the time and was not planted in one spot. (A17)

Upon return of plaintiff Potter, he brought a money order in the amount of $500.00. Yonker did not accompany him back to the premises after retrieving the money order. (A19)

After well over a half hour of standing, Oberly's foot hit the space heater which caused her to fall. Jones instinctively attempted to help Oberly and both Oberly and plaintiff Jones ended up on the ground. In so doing, plaintiff Jones landed with her elbow on the concrete floor causing a comminuted fracture of the elbow. She also hit her head which caused some bleeding to the front of the face and broken glasses. (A20, A21)

As soon as the fall occurred, an employee of the defendant Clyde Spinelli, Jr. (hereinafter "Spinelli, Jr."), picked up the space heater and put it off to the side. (A22)

At no time did either Greenlee or Spinelli, Jr. ask if plaintiff Jones was ok. (A22, A23) Greenlee has stated she thought plaintiff Jones and Oberly were perfectly fine.

Almost immediately thereafter, Plaintiffs and Oberly left the premises and went to the emergency room. (A24)

ARGUMENT

I. THE SUPERIOR COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST PLAINTIFFS WHERE PLAINTIFFS PROFERRED EVIDENCE THAT CREATES GENUINE ISSUES OF MATERIAL FACT.

(1.) Question Presented

Did the Trial Judge err in granting summary judgment against the Plaintiffs? Plaintiffs preserved the right to appeal this issue in both their motion in response to defendant's motion for summary judgment (A2) and plaintiffs' motion for reargument (A1-2) and also oral argument (A1).

(2.) Scope of Review

On a grant of summary judgment, This Court reviews the matter *de novo*. *LaPoint vs. AmerisourceBergen Corp.*, 970 A.2d 185, 191 (Del. 2009). Summary judgment is granted by the trial court upon a showing that there is no genuine issue of material fact and that the moving party if entitled to judgment as a matter of law. Super. Ct. Civ. R. 56 (c). When the record is incomplete or conflicting, issues turning on knowledge make summary judgment inappropriate. *In Re Asbestos Litigation*, 673 A.2d 159, 163 (Del. 1996). "Under no circumstances" will summary judgment be granted if there is a material fact in dispute or if it seems more desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances. *Ebersole v. Lowengrub*, 180 A.2d 467-470 (Del. 1962).

(3.) Merits of Argument

A. At the worst, this is a case of joint and several liability on the part of Oberly, and the defendant pursuant to 10 Del. C. § 6301.

Any negligence on the part of Oberly would be both joint and several with the negligence of the defendant. Both negligence produced the same injury to plaintiff Jones, in this case, a completely decimated right elbow. 10 Del. C. § 6301. The obvious import of the joint and several statute is any liability on the part of either tortfeastor makes them responsible for the complete harm to the plaintiff. Restatement (Second) of Torts § 875 cmt. (b), § 879 cmt. (a) (1977).

Obviously, plaintiff Jones was in no way responsible for what occurred. She was simply attempting to save her mother-in-law from injury, and in so doing, suffered extreme injury.

It is a quintessential fact question as to whether having an elderly woman stand for forty minutes on a concrete floor, with a space heater on the floor within a couple feet of her, not offering her a chair, or do anything about the heater, was extremely foreseeable about what did occur, would occur. In fact, it is almost destined to occur that such a person would either lose their balance, or forget the heater was present.

There is no dispute that plaintiff Jones has no responsibility for this action in terms of comparative or contributory negligence. She was simply a rescuer of Oberly, and, in so doing, sustained a serious injury. It is clear Delaware law that a rescuer is able to recover against a tortfeastor. In *Schwartzman v. Delaware Coach Co.*, 264 A.2d 519, 520 (Del. Super. 1970), the Court found in that particular case strictly a verbal warning would not make a person a rescuer. However, it is clear someone who puts themselves in danger for another would be able to sue the tortfeasor. It is also a Standard Jury Instruction; Liability to Rescuers 10.9.

In essence, if the jury finds the defendant is 1% liable for the injury sustained by the plaintiffs, they have the right to receive full compensation from the defendant.

B. It is settled Delaware law, specifically *Koutoufaris v. Dick*, 604 A.2d 390 (Del. 1991), it is a jury question to do a balancing act of comparative negligence between Oberly and the defendant.

In *Koutoufaris, Supra*, at 396-398, the Court has ruled with the advent of the Delaware comparative negligence statute, 10 Del. C. § 8132, secondary assumption of the risk was abrogated. Therefore, it is up for the jury to make a decision as to whether a plaintiff who knew of a risk was negligent or more negligent than a defendant who allowed a dangerous condition to exist on it's property.

Parenthetically, in plaintiffs' motion for reargument the undersigned cites the case of *Koutoufaris, Supra.* It is unfortunate the undersigned minimized the holding of the case using Restatement (Second) of Torts § 343 A (1966). The Court in *Koutoufaris* at 398 expressly refused to adopt the Restatement. The only thing that can be said on the undersigned's behalf is, quite frankly, it is a

reasonable possibility that the jury is going to end up making a decision who was more at fault, plaintiff for not walking out the premises, as opposed to defendant not removing the space heater or doing something to alleviate the hazard.

The holding in *Koutoufaris, Supra.*, has uniformly been applied in this state. In *Spencer v. Wal-Mart Stores East, LP*, 930 A.2d 886 (Del. 2007) at pages 886-887, This Court found that even though the plaintiff was walking through a stream of water as a result of melting snow, instead of on the sidewalk in the parking lot, and she was familiar with the area, it was still a fact question to determine the respective liabilities of plaintiff and defendant.

The Court in *Patton v. Simone*, 624 A.2d 844 (Del. 1992), did find the defendant was not proximately responsible for the accident and also owed no duty to the plaintiff Patton for a variety of reasons. However This Court found it was a jury question as to the degrees of negligence even though the plaintiff was an 18 month employee, knew the elevator shaft was without a door and gate, knew that the chain was not in place to the elevator, knew there was nothing to prevent entry into the elevator shaft whether the elevator was on the floor or not, made a deliberate choice to stay on the floor in which he fell down the elevator, dragged the palette backward towards the elevator shaft, even though there were other alternatives available to him, could have recalled the elevator in addition to replacing the chain, and could have possibly changed to a different chore on the floor without going anywhere near the shaft. However, his acts were a secondary assumption of the risk and their degree remained a jury question. *Id. 852-853.*

In *Chubb v. Harrigan*¸1992 Del. LEXIS 439 (Del. Supr.), at pages 2-3, (copy attached), This Court affirmed the verdict for the plaintiff even though she knew there was ice and snow. The defendant's failure to clear the ice and snow held it responsible for her injuries. *See also, Woods v. Prices Corner Shopping Center Merchants Assoc.*, 541 A.2d 574 (Del. Super. 1988)

In *Jardel Co. v. Hughes*, 523 A.2d 518 (Del. 1987) held at pages 525-526, that it was an issue for the jury, even though the plaintiff knew the area in which she was assaulted was unlighted, the defendant could well know that such a situation in a commercial establishment could lead to serious crimes. Therefore, what happened to the plaintiff was certainly foreseeable.

In *Staedt v. Air Base Carpet Mart*, 2011 Del. Super. LEXIS 3647 at pages 2-4, (copy attached) the Court held, summary judgment was not appropriate even though plaintiff tripped over an obvious wooden palette that was on the floor the

entire time prior to the incident. Even though plaintiff backed up and fell over an obvious wooden palette, the fact that the defendant's forklift was backing up still made it an issue for the jury.

In *Dilks v. Morris,* 2005 Del. Super. LEXIS 55 at page 5, (copy attached) the Superior Court refused to grant summary judgment even though the plaintiff stated the dog made her fall, but made a comment except for a ditch on the property, she may have regained her footing made it a fact question.

In *Cook v. E.I. DuPont De Nemours Co,* 2001 Del. Super. LEXIS 452 at page 7 (copy attached), the Court held that there was an issue of triable fact when even though the plaintiff had already made four or five trips on a pad because an employee of DuPont made the statement that the pad could malfunction and someone could get injured.

In *Curties v. Hill Top Developers, Inc.*, 18 Cal. Rptr. 2d 445 (Ca. App. 1993) the Court reversed the judgment of the Trial Court and opined it was a jury question to decide the culpability of the apartment complex, versus the plaintiff. The plaintiff was taking out the trash on a dewy and frosty morning in rubber soled sandals or thongs and tripped and fell down a sloping lawn to the dumpster. In that case, it is a path he had taken once or twice a day because it was the most convenient route. The Court found at 447-448 a strict assumption of the risk should not be used as determined by the Trial Court. It was a secondary assumption of the risk, and therefore, the relative fault of the plaintiff and defendant should be assessed by the jury.

The defendant in its original motion for summary judgment cites one case that has really no applicability to the issue at hand. In *Polaski v. Dover Downs,* 49 A.3d 1193, 1195 (Del. 2012), the plaintiff when going for a cigarette, walked off the curb painted yellow and the area was well lighted. The plaintiff saw what she was doing. This Court described the curb as "normal".

The Trial Court, in It's order for summary judgment at page 5, seems to go back to the Restatement (Second) of Torts § 343-343 A which has not been followed by the Court in *Koutoufaris, Supra.*

The Court in *Koutoufaris, Supra,* did cite one case where there would be no argument about comparative negligence, *Swagger v. Crystal,* 379 N.W.2d 183 (Minn. Ct. App. 1985) In that case, the Court held at page 185-186, the plaintiff had the common sense to know that the baseball players do not have the ability to

control where the ball goes at all times. The plaintiff made a conscious decision to sit where there was no netting to protect against potential injury. It should be noted that law may still be good. However, there have been numerous recent actions filed against ballparks across the country for lack of protection for fans watching games.

What plaintiffs seriously contest in the Trial Court's reasoning is the length of time that both Oberly and plaintiff Jones were standing makes it more clear that there was no responsibility on the part of the defendant. The plaintiffs, as it is stated, believe the opposite. Considering the reason which they were there, and the length of time they were standing. The overall scenario is the space heater can become an oblivious situation to an ordinary prudent person. Therefore, the longer someone stands there, the less it is going to be an open and obvious danger, and, in fact, makes it more of a danger. The Trial Court seems to state, if Oberly missed the heater once, she is solely responsible to miss it forever.

The Trial Court in It's order cites a few cases that are factually dissimilar to support the grant of summary judgment.

In *Talmo v. Union Park Auto*, 38 A.3d 1255, 1262 (Del. 2012), the plaintiff actually walked through a door with a window and he already been there once that day.

In *Colyer v. Speedway LLC*, 981 F. Supp. 2d 634-641 (E.D. Ky. 2013), the Court held that someone walking down a commercial establishment should be aware there was a box on the floor when the plaintiff was walking down an aisle and there was a stock person close by. Thus the Court, found her primarily responsible for the fall. Also, the Court followed Restatement (Second) of Torts § 343 A (1966) *Id. at 642.*

In *Maeder v. Paetz Grocery Co.*, 147 N.W. 2d 211, 217 (Iowa 1966), the Court held the plaintiff, whom was a regular patron at the store, was primarily responsible for not accepting the reality that walking by an employee stocking things there may well have something on the ground near which he/she was stocking.

In *Espinoza v. Hemar Supermarket, Inc.*, 841 N.Y.S. 2d 680, 681 (N.Y. App. Div. 2007), the Court held the plaintiff was primarily responsible when she fell over a stack of milk crates in the aisle. At the same time the manager of the defendant's grocery store was restocking the milk shelf in the vicinity where plaintiff fell.

In *Conrad v. Sears Roebuck & Co,* 2005 Ohio App. LEXIS 1571 at pages 16-17, (copy attached) the Court held the plaintiff was primarily responsible where the evidence specifically showed upon checking out, plaintiff was within a couple feet of a box where she fell with a sign right next to the box over which she fell.

There are cases where plaintiff just blatantly ignores a situation that is obvious. These cases include a person walking through a door with a plate glass window even though he had been there before. People in supermarkets not realizing there are boxes on the floor when employees are stocking items, and a person standing next to a sign indicating a problem. Certainly, it is common sense the plaintiff assumes a greater share of liability in cases such as above.

However, in this case, we have a scenario where there is a space heater on the ground next to a woman well into her 70s who is standing for over forty minutes in a very small place. The obvious intention of everyone in the room is in terms of trying to settle a debt to keep from going to court. Jones and Oberly were not focused on anything else besides that. It is obviously not a comfortable situation. Jones and Oberly are attempting to keep a conversation even though the defendant's employee could not care. Obviously, Oberly was not comfortable standing and to leave the space heater, in this scenario, is certainly a jury question as to being reasonable. This is not a blatant ignoring of the obvious. There are a lot of things transpiring over the course of time and it is certainly foreseeable to the defendant, that an elderly lady may lose her balance or forget where she was walking under those circumstances.

As asked by the Trial Court to the undersigned at oral argument (A25), the jury may well find that both Oberly and plaintiff Jones should have exited the premises. However, they can easily find that a commercial establishment that has a business invitee in their premises, needs to do what is necessary so someone does not trip over a space heater that is very near their feet while they are standing for an extended period of time. The Trial Court erred in finding that there was no liability against the defendant, under this set of circumstances, as a matter of law. Also, not one case cited by defendant or the Trial Court, except possibly *Polaski, supra.,* as plaintiffs can read, concludes zero responsibility on the part of the defendant. The cases reflect there is certainly more culpability on the part of the plaintiffs. Plaintiff Jones, in this case, did no wrong.

Also, the Trial Court's question to plaintiffs' attorney at oral argument why the Plaintiff Jones and Oberly did not just leave the room is instructive. It seems to

presuppose the space heater was a dangerous condition in the room which could necessitate Plaintiff Jones and Oberly leave the room. If not, there was no reason for them to leave. While that is one of the possibilities, the other possibilities would certain include giving them a chair, removing the space heater, or telling them they had to leave the room until Plaintiff Potter came back with a money order. These are fact questions.

Since *Koutoufaris, Supra*, This Court, and all Delaware Courts, in almost every situation, has made it a jury decision as to the comparative negligence of plaintiff and defendant. Obviously in this case, we do not have an argument about plaintiff and defendant. Therefore, the jury should make a decision as to whether Oberly, herself, was 100% responsible for what did happen. The cited couple of cases in the state and a few in other states by the defendant and the Trial Court, are far more egregious in the part of the plaintiff in terms of knowing of a hazard and ignoring it. Even then, the cases cited seem not to conclude the defendant had obviously no negligence.

In sum, the Trial Court based its ruling on the fact the space heater was known to the plaintiffs. Of that, there is no dispute. However, the cases cited by plaintiffs, the Courts in Delaware have allowed with such knowledge of a defective condition, to routinely go to trial. Respectfully, those cases are more of a close call, than plaintiffs' case. With its size and its placement, the space heater is something that you would need to give constant attention. Under circumstances present that day, it is very arguable that is the last thing a reasonably prudent person would be thinking. The defendant was fully aware of all that was transpiring. However, the defendant, through its representative, made no effort to alleviate an extremely hazardous situation. In all deference to the Trial Court, this is not a case to be decided summarily. The jury can find what it wants, but it is it's decision as to the respective liabilities, if any, of Oberly and the defendant.

CONCLUSION

For the aforementioned reasons, the Superior Court's order granting Summary Judgment to Defendant Clyde Spinelli, LLC d/b/a Pine Valley Apartments should be reversed, and the case remanded to Superior Court for trial by jury.

Respectfully submitted,

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Dated: November 28, 2016

EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

DINAH JONES and WILLIAM POTTER,	)	
Plaintiffs,	)	
v.	)	C.A. No.: N14C-12-159 PRW
CLYDE SPINELLI, LLC, dba PINE VALLEY APARTMENTS,	)	
Defendant.	)	

Submitted: July 8, 2016
Decided: July 8, 2016

ORDER

Upon Defendant Clyde Spinelli, LLC, dba Pine Valley Apartments' Motion to Dismiss upon Summary Judgment,
GRANTED.

This 8th day of July, 2016, having considered Defendant Clyde Spinelli, LLC, *dba* Pine Valley Apartments' ("Pine Valley") Motion to Dismiss (for Summary Judgment) (D.I. 22); the Plaintiffs' response thereto (D.I. 24); the parties' arguments at the hearing of this motion on this date; and the record in this matter, it appears to the Court that:

(1) Plaintiffs Ms. Dinah Jones and Mr. William Potter, her husband, filed a Complaint on December 17, 2014 (D.I. 1), alleging negligence and loss of consortium against Pine Valley for failing to offer seating to Ms. Jones and Ms.

Dorothy Oberly and for negligent placement of a space heater in Pine Valley's office.[1]

(2) On February 6, 2013, Ms. Jones, Mr. Potter, Mr. John Yonker, and Ms. Oberly, went to pay an overdue rent bill at Pine Valley's business office.[2] They entered through a reception area, then into an inner office where they met with the apartment complex's administrative assistant, Ms. Audra Greenlee.[3]

(3) After a twenty-minute discussion, Mr. Potter and Mr. Yonker left the office to get a money order for the overdue rent.[4] Ms. Jones and Ms. Oberly remained in the inner office.[5] Ms. Greenlee did not offer the women a seat while they waited.[6] Instead they remained standing in the office until Mr. Potter returned, approximately twenty-minutes later.[7]

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1 Compl. ¶ 19.

2 *Id.* at ¶ 4. Plf.'s Resp. in Opp'n to Def.'s Mot. to Dismiss 1-2. Mr. Yonker is Mr. Potter's brother. Ms. Oberly is Mr. Potter's mother. In February 2013, Ms. Oberly was seventy-seven years old.

3 Plf.'s Resp. in Opp'n to Def.'s Mot. to Dismiss 2.

4 *Id.* at 2.

5 *Id.*

6 *Id.*

7 *Id.*

(4) A small ("foot and a half") space heater was located on the floor in the middle of the office.[8] Sometime after Mr. Potter's return, Ms. Oberly allegedly hit her foot on the space heater and tripped.[9] Ms. Jones reached out to stop her from falling, but ended up on the ground herself with Ms. Oberly on top of her.[10]

(5) Ms. Jones was bleeding from her head and immediately complained of right elbow pain.[11] Mr. Potter took her to Union Hospital where doctors determined she suffered a fractured right elbow, which required surgery, and other injuries.[12]

(6) Pine Valley now moves for summary judgment on the grounds that the Plaintiffs have failed to prove that Pine Valley breached any duty of care to Ms. Jones. Specifically, Pine Valley argues it is not liable for Ms. Jones's injuries because the "dangerous condition" – the space heater that Ms. Oberly fell into or on – was open and obvious.[13]

(7) Delaware Superior Court Civil Rule 56 permits granting summary judgment upon a showing "that there is no genuine issue as to any material fact and

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8 *Id.*, Compl. ¶ 8; Def.'s Mot. to Dismiss Ex. E, Photo.

9 Plf.'s Resp. in Opp'n to Def.'s Mot. to Dismiss 2.

10 *Id.*

11 *Id.*

12 Compl. ¶ 17.

13 Mot. to Dismiss 4-6.

that the moving party is entitled to judgment as a matter of law."[14] In considering the motion, "[a]ll facts and reasonable inferences must be considered in a light most favorable to the non-moving party."[15] The moving party bears the burden of establishing the non-existence of any material issue of fact, and upon such a showing the non-moving party must establish a genuine issue of material fact exists.[16]

(8) Negligence claims are particularly resistant to resolution through summary judgment.[17] Unresolved issues of fact as to the defendant's negligence, proximate cause, and the parties' respective degrees of negligence usually present questions of fact for the jury.[18] In rare cases, however, summary judgment is appropriate.[19]

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[14] Super. Ct. Civ. R. 56(c); *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962) (Summary judgment will not be granted if there is a material fact in dispute or if "it seems desirable to inquire thoroughly into [the facts] to clarify the application of the law to the circumstances.").

[15] *Nutt v. A.C. & S. Co., Inc.*, 517 A.2d 690, 692 (Del. Super. Ct. 1986).

[16] *See, e.g., Shonts v. McDowell*, 2003 WL 22853659, at *1 (Del. Super. Ct. Aug. 5, 2003) (discussing standard for summary judgment).

[17] *Ebersole*, 54 Del. at 468.

[18] *Trievel v. Sabo*, 714 A.2d 742, 745 (Del. 1998).

[19] *See, e.g., Trievel*, 714 A.2d at 745 ("where the evidence requires a finding that a plaintiff's negligence exceeded that of the defendant, it is the duty of the trial court, as a matter of law, to bar recovery"); *Polaski v. Dover Downs, Inc.*, 2012 WL 1413577, at *2-3 (Del. Super. Ct. Jan. 20, 2012), *aff'd*, 49 A.3d 1193 (Del. 2012) (granting summary judgment where danger presented to the plaintiff was obvious as a matter of law).

(9) "In order to prevail in a negligence action, a plaintiff must show, by a preponderance of the evidence, that a defendant's negligent act or omission breached a duty of care owed to plaintiff in a way that proximately caused the plaintiff['s] injury."[20] As a business owner, Pine Valley owed all business invitees, including Ms. Jones,[21] a duty "to protect them against both dangers [known] to exist and those which with reasonable care [might be discovered]."[22] For Ms. Jones, that specific duty here would be to protect her not from a fall herself, but from the need to rescue Ms. Oberly from a fall over the space heater.

(10) Assuming for the purposes of this motion only that the space heater was a "danger," *i.e.* a potential tripping hazard, Pine Valley is correct in stating that there is no duty to warn of or protect invitees from an open and obvious

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[20] *Polaski*, 2012 WL 1413577, at *2 (quoting *Brown v. F.W. Baird, L.L.C.*, 2008 WL 324661, at *2 (Del. Super. Ct. Feb. 7, 2008)).

[21] A business invitee is "a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." REST. (SECOND) OF TORTS § 332 (3) (1965). The parties do not appear to dispute that Ms. Jones, Ms. Oberly and Mr. Potter were business invitees.

[22] *Kanoy v. Crothall Am., Inc.*, 1988 WL 15367, at *2 (Del. Super. Ct. Feb. 8, 1988); *Manucci v. Stop n' Shop Cos., Inc.*, 1989 WL 48587 at *2 (Del. Super. Ct. May 4, 1989). *See also* REST. (SECOND) OF TORTS § 343 (1965) (stating that a landowner is liable for physical harm 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 them against the danger."); *Yancy v. Tri State Mall Ltd. P'ship*, 2014 WL 2538805, at *2-3 (Del. Super. Ct. May 29, 2014) (following the Restatement (Second)).

danger.[23] An "open and obvious danger" has been described as one that "create[s] a risk of harm that is visible, . . . is a well known danger, or what is discernible by causal inspection . . . to those of ordinary intelligence."[24] It is "a danger [that] is so apparent that the invitee can reasonably be expected to notice it and protect against it, [because] the condition itself constitutes adequate warning."[25] Generally, whether a dangerous condition exists and whether the danger was apparent to the plaintiff are questions for the jury.[26] But in "very clear cases" this is not so.[27]

(11) This is such a clear case. It is undisputed that the office space heater was open and obvious. In Ms. Jones's deposition, she admitted that the women saw the space heater on the office's floor.[28] Specifically, Ms. Jones describes the

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23 *Niblett v. Pennsylvania R. Co.*, 158 A.2d 580, 582 (Del. Super. Ct. 1960) ("there is no duty upon the owner to warn an invitee of a dangerous condition which is obvious to a person of ordinary care and prudence.").

24 *Macey v. AAA-1 Pool Builders & Serv. Co.*, 1993 WL 189481, at *3 (Del. Super. Ct. Apr. 30, 1993) (quoting AmLawProdLiab 3d § 33:26 at 56). *See also Polaski*, 2012 WL 1413577, at *2 (noting duty-to-warn principle articulated in *Macey*, a product liability rather than a condition on the land case, helpful in the latter).

25 *Niblett*, 158 A.2d at 582-83 (finding that as a matter of law "there was no duty . . . to either warn deceased of, or protect him from, the danger inherent in his act of crossing the [train] tracks.").

26 *Williamson v. Wilmington Hous. Auth.*, 208 A.2d 304, 305-06 (Del. 1965).

27 *Id.*

28 Def.'s Mot. to Dismiss Ex. F, Jones Dep. 29-32.

location of the space heater as in "the center of the room"[29] with approximately two feet of clearance around it.[30] The space heater was being used in and was placed in the ordinary manner one would expect of that common appliance. Ms. Jones admits that the women noticed the space heater when Mr. Potter was told to get a money order; that occurred, by her own account, approximately twenty minutes before Ms. Oberly fell.[31] The space heater wasn't even partially hidden or difficult to see.[32] Both women knew of its existence and location. In fact, both Ms. Jones and Ms. Oberly successfully maneuvered around the space heater while they waited for Mr. Potter's return, demonstrating that they knew about the space heater and appreciated its "danger."[33] A space heater in the middle of a floor should be obvious to a person of ordinary care and prudence. After clearly noticing it, Ms. Oberly could be expected to protect herself against space heater; and no one would reasonably expect to have to protect Ms. Jones from having to

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29 *Id.* at 30.

30 *Id.* at 31.

31 *Id.* at 32.

32 *Horton v. Lempesis*, 1990 WL 990093, at *1 (Del. Com. Pl. Oct. 22, 1990), *aff'd sub nom. Horton v. Lempesis*, 1992 WL 19986 (Del. Super. Ct. Jan. 28, 1992) (granting summary judgment for negligence claim where "[n]o reasonable inference can be drawn from the record that any latent or concealed danger existed").

33 Def.'s Mot. to Dismiss Ex. F, Jones Dep. 33 ("**Q.** [T]o get from close to Audra [Greenlee]'s desk to closer to the other desk you would have had to walk around the space heater? **A.** We walked past it or behind it.").

rescue Ms. Oberly from the result of her potential contact with the peril it represented.[34]

(12) In short, Pine Valley had no duty to warn or protect Ms. Jones, as a potential rescuer, (or Ms. Oberly, the actual tripper) from the space heater because it posed an open and obvious danger. Even under the facts interpreted in the best light for Ms. Jones, Pine Valley is due judgment as a matter of law and its motion for summary judgment should be granted.

(13) Lastly, the Plaintiffs complain also of Ms. Greenlee's alleged negligent behavior while the ladies waited. No doubt, taking the evidence in the light most favorable to Ms. Jones, she and her mother-in-law were offered no seat

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[34] *Polaski v. Dover Downs, Inc.*, 2012 WL 1413577, at *2-3 (Del. Super. Ct. Jan. 20, 2012), *aff'd*, 49 A.3d 1193 (Del. 2012) (granting summary judgment because "[a] change in elevation on this well-lit, defect-free sidewalk leading down to a handicapped ramp is not a dangerous condition" and the "change in elevation should be obvious to a person of ordinary care and prudence"); *Talmo v. Union Park Auto.*, 38 A.3d 1255 (Del. 2012) (affirming summary judgment for store where no reasonable jury could find store negligent for plaintiff's collision with a stationary plate glass, floor-to-ceiling window).

Admittedly, Delaware cases involving the "open and obvious" doctrine are limited and mostly involve curbs, sidewalks, snow, ice, or other "slippery" liquids – distinguishable from the case here involving an appliance on the ground. But other jurisdictions have granted summary judgment under similar conditions. *See, e.g.*, *Colyer v. Speedway, LLC*, 981 F. Supp. 2d 634, 636 (E.D. Ky. 2013) (granting summary judgment because a box – sitting on the floor of a gas station that plaintiff admitted to have seen prior to her fall and attempted to walk around – was an open-and-obvious condition); *Meader v. Paetz Grocery Co.*, 147 N.W.2d 211, 217 (Iowa 1966) (holding that grocery box placed on the ground with ample room for customers to move around was an open and obvious danger); *Espinoza v. Hemar Supermarket, Inc.*, 841 N.Y.S.2d 680 (N.Y. App. Div. 2007) (milk crate in grocery store was open and obvious danger); *Conrad v. Sears, Roebuck & Co.*, 2005 WL 758199, at *4 (Ohio Ct. App. Apr. 5, 2005) (display box was an open and obvious danger because plaintiff stood next to display for over four minutes, the plaintiff had an unobstructed view of the display, there was ample space between the plaintiff and the display, and there were no distractions).

for the over forty minutes they were in Ms. Greenlee's office. This was rude, not negligent, behavior. And this Court may only enforce in a civil negligence action the rule to be followed by those exercising ordinary care, not the rule of etiquette followed by those exercising common decency. Thus, this churlish behavior, while regrettable, is not actionable. The space heater, the alleged "dangerous condition," was "open and obvious."[35] It was even more so as Ms. Oberly and Ms. Jones stood by it for the span they did. That Ms. Greenlee allowed them to stand that long does not convert bad manners to actionable negligence.

(14) Because, for the reasons set forth herein and on the record of the hearing of this motion, the Court finds that no material issue of fact exists and that Defendant Pine Valley is entitled to judgment as a matter of law, Pine Valley's Motion to Dismiss upon Summary Judgment all claims brought by Ms. Jones and Mr. Potter is **GRANTED.**

IT IS SO ORDERED.

PAUL R. WALLACE, JUDGE

Original to Prothonotary

cc: All counsel via File & Serve

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35 *Niblett v. Pennsylvania R. Co.*, 158 A.2d 580, 582 (Del. Super. Ct. 1960).

EXHIBIT B

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

DINAH JONES and WILLIAM POTTER,	)	
Plaintiffs,	)	
v.	)	C.A. No.: N14C-12-159 PRW
CLYDE SPINELLI, LLC, dba PINE VALLEY APARTMENTS,	)	
Defendant.	)	

Submitted: July 21, 2016
Decided: August 5, 2016

ORDER

Upon Plaintiffs Dinah Jones and William Potter's Motion for Reargument, **DENIED.**

This 5th day of August, 2016, having considered Plaintiffs Dinah Jones ("Jones") and William Potter's[1] Motion to for Reargument (D.I. 29); the Defendant Clyde Spinelli, LLC, *dba* Pine Valley Apartments' ("Pine Valley") response thereto (D.I. 30); and the record in this matter, it appears to the Court that:

(1) A motion for reargument under Superior Court Civil Rule 59(e) permits the Court to reconsider "its findings of fact, conclusions of law, or

[1] William Potter, Dinah Jones's husband, is a party to her negligence action because he brought a loss-of-consortium claim.

judgment . . ."[2] It is not, however, an avenue for the moving party to raise new arguments or to rehash those already resolved by the Court.[3] The moving party has the burden to demonstrate newly discovered evidence, a change in the law, or manifest injustice.[4] The motion will be denied unless the Court has "overlooked a controlling precedent or legal principles," or "has misapprehended the law or facts such as would have changed the outcome of the decision" challenged.[5]

(2) Jones argues that the Court overlooked "obvious" factual questions related to Pine Valley's alleged negligence when granting summary judgment and dismissing all of her claims.[6]

(3) Summary judgment is appropriate where, considering all facts and reasonable inferences in the light most favorable to the non-moving party, there is "no genuine issue as to any material fact" such that "the moving party is entitled to

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2 *Hessler, Inc. v. Farrell*, 260 A.2d 701, 702 (Del. 1969) ("The manifest purpose of all Rule 59 motions is to afford the Trial Court an opportunity to correct errors prior to an appeal . . ."); *Cummings v. Jimmy's Grille, Inc.*, 2000 WL 1211167, at *2 (Del. Super. Ct. August 9, 2000). *See also* Super. Ct. Civ. R. 59(e) ("The Court will determine from the motion and answer whether reargument will be granted.").

3 *CNH America, LLC v. Am. Cas. Co. of Reading, Pa.*, 2014 WL 1724844, at *1 (Del. Super. Ct. Apr. 29, 2014); *Reid v. Hindt*, 2008 WL 2943373, at *1 (Del. Super. Ct. July 31, 2008).

4 *Reid*, 2008 WL 2943373, at *1.

5 *Jimmy's Grille,* 2000 WL 1211167, at *2.

6 *See* Order, *Jones v. Clyde Spinelli, LLC*, 2016 WL 3752409 (Del. Super. Ct. July 8, 2016) (following oral argument, the Court granted Pine Valley summary judgment under Superior Court Rule 56, finding that no material issue of fact remained as to Jones's negligence claim and Pine Valley was due judgment as a matter of law).

judgment as a matter of law."[7] The Court recognized when it granted Pine Valley's dispositive motion, as it still does now, that negligence claims are particularly resistant to resolution through summary judgment.[8] But that's not so where the issues are exceptionally clear.[9]

(4) Jones argues that multiple factual disputes should have precluded the Court from granting summary judgment. She contends that only a jury could determine whether Pine Valley was negligent in either (a) failing to offer seating to Jones and her mother-in-law Ms. Dorothy Oberly while they waited approximately forty minutes in Pine Valley's business office, or (b) improperly placing or failing to warn Jones and Oberly of a small ("foot and a half") space heater located in the middle of the office floor, which Oberly allegedly fell over, resulting in Jones's injuries from an attempted rescue.[10] She cites a number of alleged factual disputes related to these issues including: whether Ms. Oberly was a joint tortfeasor; the

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7 *See* Order at *1-2 (citing Super. Ct. Civ. R. 56(c); *Ebersole v. Lowengrub*, 180 A.2d 467, 468–69 (Del. 1962) (Summary judgment will not be granted if there is a material fact in dispute or if "it seems desirable to inquire thoroughly into [the facts] to clarify the application of the law to the circumstances."); and *Nutt v. A.C. & S. Co., Inc.*, 517 A.2d 690, 692 (Del. Super. Ct. 1986) (In considering a motion for summary judgment, "[a]ll facts and reasonable inferences must be considered in a light most favorable to the non-moving party.")).

8 *See* Order at *2 (citing, for example, *Trievel v. Sabo*, 714 A.2d 742, 745 (Del. 1998); *Polaski v. Dover Downs, Inc.*, 2012 WL 1413577, at *2-3 (Del. Super. Ct. Jan. 20, 2012), *aff'd*, 49 A.3d 1193 (Del. 2012)).

9 *Id.* at *2-3.

10 Mot. for Rearg. at ¶¶ 6-7, 9 (D.I. 29).

size of the space heater; whether the space heater's location was forgotten by Jones or Oberly; whether the space heater was unobtrusive or hidden; whether Pine Valley's agent created a dangerous situation; and whether the agent could have prevented Ms. Oberly's fall.[11] But Jones offers no record evidence to support that any of these "disputes" are real. Instead, she argues that a jury could imagine three alternative scenarios in which Pine Valley might have prevented Jones from being injured, and then infer that a breach of duty occurred.[12]

(5) While there may be countless ways that Pine Valley could have avoided this lawsuit, Jones listing them does not constitute new arguments appropriate for consideration during a motion for reargument. As the Court found, given the specific circumstances here, there is no viable negligence claim left to her. In again examining Jones's opposition to summary judgment and her request for reconsideration, the Court concludes that the present motion is a mere "rehash" of her prior arguments. As she did in opposition to summary judgment, Jones's core complaint is that Pine Valley's agent was negligent in failing to offer Jones or her companion seating and that the space heater was used or positioned in some dangerous manner.[13] The Court considered these precise claims during the

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11 *Id.*

12 *Id.* at ¶ 9 (According to Jones, Pine Valley could have moved the space heater, offered the ladies seats, or asked them to leave the office).

13 *Id.* at ¶¶ 7, 9.

summary judgment proceedings. Jones's arguments are a simple reconstitution of her written and oral opposition to summary judgment – with no arguments or facts that have not been previously addressed by this Court. Nor has she cited case law not considered by this Court that would change the outcome of the underlying decision.

(6) Accordingly, Jones does not offer a basis for reargument under Rule 59,[14] and, for the foregoing reasons, Jones's Motion for Reargument is **DENIED**.

IT IS SO ORDERED.

PAUL R. WALLACE, JUDGE

Original to Prothonotary

cc: All counsel via File & Serve

[14] *See Miles, Inc. v. Cookson Am., Inc.*, 677 A.2d 505, 506 (Del. Ch. 1995) ("Where, as here, the motion for reargument represents a mere rehash of arguments already made at trial and during post-trial briefing, the motion must be denied.").

Chubb v. Harrigan

Supreme Court of Delaware

October 27, 1992, Submitted ; November 9, 1992, Decided

No. 490, 1991

Reporter
1992 Del. LEXIS 439

BILLIE M. CHUBB and JANET V. GRILLO, as Executrices of the Estate of Robert Venable, Defendants Below, Appellants, v. EVA HARRIGAN and DAVID HARRIGAN, her husband. Plaintiffs Below, Appellees.

Subsequent History: [*1] Mandate Issued November 25, 1992. Released for Publication December 22, 1992.

Prior History: Court Below: Superior Court of the State of Delaware in and for New Castle County. C.A. No. 87C-MY-125

Disposition: AFFIRMED.

Core Terms

business invitee, property owner, premises, notice, icy, directed verdict, discharged, attended, visitor, steps, snow, contributory negligence, factual issue, premises safe, trier of fact, rock salt, handicapped, non-movant, injuries, reserved, residual, parties, patient, spread, lived

Case Summary

Procedural Posture

Defendant executrices sought review judgment of the Superior Court of the State of Delaware in and for New Castle County, which, upon a jury verdict, awarded damages for personal injuries to plaintiff employee of the visiting nurse association.

Overview

The executrices sought review of the jury verdict awarding damages for personal injuries received by the employee when she slipped on ice after tending to the decedent. Because the decedent lived alone and was handicapped he relied upon members of his family to perform outside chores such as the removal of ice and snow. Although he apparently had no fixed procedure, he would also call a nearby service station operator to remove snow. The executrices conceded that the employee was a business invitee to whom the property owner owed a duty to render the premises reasonably safe. The trial court dismissed the executrices motion for a directed verdict. On review, the court affirmed. The court held that the duty extended to protection against dangers posed by the natural accumulation of ice and snow. The court held that although handicapped, the decedent had access to relatives and third parties to assist him in discharging the duty of a property owner.

Outcome

The court affirmed the judgment, which, upon a jury verdict, awarded damages for personal injuries to an employee of the visiting nurse association in her personal injury action against the executrices.

LexisNexis® Headnotes

Torts > ... > Defenses > Comparative Fault > General Overview

Torts > ... > Defenses > Contributory Negligence > General Overview

Torts > ... > Contributory Negligence > Procedural Matters > Province of Court & Jury

Torts > ... > Elements > Duty > General Overview

Torts > Premises & Property Liability > General Premises Liability > General Overview

Torts > ... > General Premises Liability > Dangerous Conditions > General Overview

Torts > ... > General Premises Liability > Dangerous Conditions > Known Dangers

Torts > ... > General Premises Liability > Defenses > Comparative Fault & Contributory Negligence

Torts > ... > General Premises Liability > Duties of Care > General Overview

Torts > ... > Duty On Premises > Invitees > General Overview

Torts > ... > Duty On Premises > Invitees > Business Invitees

Torts > ... > General Premises Liability > Types of Premises > Stores

HN1 A business invitee is owed by the property owner a duty to render the premises reasonably safe. That duty extends to protection against dangers posed by the natural accumulation of ice and snow. Even if a business invitee has direct notice of the dangerous condition the property owner is not relieved of his residual duty of care. The business invitee's contributory negligence, if any, does not preclude her claim as a business invitee but may serve to reduce, or defeat, her recovery under comparative negligence standards. Except in the rare instances, issues of contributory negligence are reserved for determination by the trier of fact.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

HN2 When faced with a motion for a directed verdict at the conclusion of the evidence, or a subsequent motion for judgment notwithstanding the verdict, the trial court's duty is clear. If, but only if, the facts permit reasonable persons to draw but one inference, adverse to the non-moving party, is the movant entitled to judgment as a matter of law. If, under any reasonable view of the evidence, the jury could find in favor of the non-movant, the factual issues must be submitted to the jury for determination.

Judges: Before MOORE, WALSH and HOLLAND, Justices.

Opinion by: BY THE COURT; JOSEPH T. WALSH

Opinion

ORDER

This 9th day of November, 1992, upon consideration of the briefs of the parties and oral argument it appears that:

(1) The defendants-appellants, the executrices of the Estate of Robert Venable ("Venable"), appeal from a jury verdict in the Superior Court awarding damages for personal injuries to the plaintiff-appellee, Eva Harrigan ("Harrigan"). Harrigan, an employee of the Visiting Nurse Association, was injured when she slipped on ice while leaving Venable's residence after ministering to Venable, an invalid. Defendants contend that the Superior Court erred in not directing a verdict in their favor on the issue of whether Venable owed any duty to render the premises safe for Harrigan.

(2) Harrigan presented the following evidence at trial. Venable had suffered from multiple sclerosis for many years and at the time of the incident giving rise to this **[*2]** action was bedridden. He lived alone and was attended on a daily basis by the Visiting Nurse Association. Harrigan, a nurse's aide, had frequently attended to Venable's needs. On the morning of February 5, 1986, Harrigan visited Venable as her first patient of the day. As she entered the house, Harrigan noticed that ice had formed on the front steps from the previous night's ice storm. She managed to enter the premises and advised Venable of the icy conditions. He asked her to spread rock salt, which he kept on the premises, over the icy area. She did so and thereafter remained in the house for approximately two hours attending to her patient. When Harrigan

left the house she noticed that the steps were still icy. While negotiating the steps, using the hand rail, she fell and was seriously injured.

Because Venable lived alone and was handicapped he relied upon members of his family to perform outside chores such as the removal of ice and snow. Although he apparently had no fixed procedure, he would also call a nearby service station operator to remove snow.

(3) In moving for a directed verdict in the Superior Court, defendants contended that, in view of Harrigan's actual **[*3]** notice of the icy condition and her attempts to alleviate the condition through the spreading of rock salt, Venable owed no further duty to his visitor. In the absence of any further duty, they argued, Venable could not be held responsible for Harrigan's injuries. The Superior Court ruled that the facts posed a factual issue for the jury, concerning whether Venable had discharged his residual duty as the property owner to render the premises safe for a business invitee. Given the standard which governs the granting of a directed verdict, we cannot conclude that the Superior Court erred in its ruling.

(4) Defendants concede that Harrigan was ***HN1*** a business invitee to whom the property owner owed a duty to render the premises reasonably safe. *DiOssi v. Maroney, Del. Supr., 548 A.2d 1361 (1988)*. That duty extends to protection against dangers posed by the natural accumulation of ice and snow. *Woods v. Prices Corner Shopping Center Merchants Association, Del. Super., 541 A.2d 574 (1988)*. Even though Harrigan, as a business invitee, had direct notice of the dangerous condition, Venable as the property owner was not relieved **[*4]** of his residual duty of care. *Koutoufaris v. Dick, Del. Supr., 604 A.2d 390 (1992)*. Harrigan's contributory negligence, if any, does not preclude her claim as a business invitee but may serve to reduce, or defeat, her recovery under comparative negligence standards. *Id. at 398*. Except in the rare instances, issues of contributory negligence are reserved for determination by the trier of fact. *Yankanwich v. Wharton, Del. Supr., 460 A.2d 1326, 1331 (1983)*.

(5) ***HN2*** When faced with a motion for a directed verdict at the conclusion of the evidence, or a subsequent motion for judgment n.o.v., the trial court's duty is clear. If, but only if, the facts permit reasonable persons to draw but one inference, adverse to the non-moving party, is the movant entitled to judgment as a matter of law. *Eustice v. Rupert, Del. Supr., 460 A.2d 507, 509 (1983)*. If, under any reasonable view of the evidence, the jury could find in favor of the non-movant, the factual issues must be submitted to the jury for determination. *Ebersole v. Lowengrub, Del. Supr., 208 A.2d 495, 498 (1965)*. **[*5]** This case presents a close question, particularly in view of Venable's limited ability to exercise independent care for the safety of others, but we do not find the facts to admit only one factual conclusion. Although handicapped, Venable had access to relatives and third parties to assist him in discharging the duty of a property owner. Having elected to live alone and maintain a property to which visitors were expected to come to care for his needs, he owed a duty to exercise reasonable care for their safety. He could not discharge that duty by shifting responsibility to a visitor who was required by virtue of her employment duties to enter and leave the premises. The Superior Court correctly determined that the issue of whether Venable fully discharged his duty as a landowner was reserved to the trier of fact.

(6) Defendants also complain of the trial court's refusal to permit defendants' counsel to comment on matters not in evidence in apparent rebuttal to a statement made by Harrigan's counsel concerning medical payments. The trial court has broad discretion in controlling argument to the jury and limiting counsel to discussion of relevant evidence. D.R.E. 403. We find **[*6]** no abuse of discretion in this ruling.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is,

AFFIRMED.

BY THE COURT:

Joseph T. Walsh, Justice

Conrad v. Sears, Roebuck & Co.

Court of Appeals of Ohio, Tenth Appellate District, Franklin County

April 5, 2005, Opinion Rendered

No. 04AP-479

Reporter
2005-Ohio-1626; 2005 Ohio App. LEXIS 1571

Mary Jo Conrad, Plaintiff-Appellant, v. Sears, Roebuck and Company, Defendant-Appellee.

Prior History: **[**1]** APPEAL from the Franklin County Court of Common Pleas. (C.P.C. No. 03CVC02-1510).

Core Terms

box, customer, displayer, summary judgment, attendant circumstances, injuries, hazard, floor, checkout, blocked, counter, Photographs, front, business invitee, storeowner, hole

Case Summary

Procedural Posture

Plaintiff personal injury victim filed an action against defendant department store alleging that it was liable for her injuries after she tripped and fell over a small box which was negligently placed in the aisle. The Franklin County Court of Common Pleas (Ohio) granted the store's motion for summary judgment. The victim appealed.

Overview

After purchasing items at the customer service desk, the victim fell over a display box. The victim argued that the trial court committed error in granting summary judgment and holding that the display box that she fell over was open and obvious and that the attendant circumstances did not bar the application of the open and obvious rule. The appellate court held that summary judgment was properly granted. Reviewing the video, the photos, and the testimony, it was clear that the victim's view of the box on the floor was not blocked during all of the four minutes that she stood in the aisle. While her view may have been partially blocked by the customer in front of her, it was not blocked after she approached the cashier. The so-called attendant circumstances the victim raised were common circumstances that occur in a store. There were no circumstances which significantly enhanced the danger of the defect. The cashier did not prevent the victim from looking down and seeing the display box. The employee was merely during her job in performing the transaction with the victim.

Outcome

The judgment of the trial court was affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Summary Judgment Review > General Overview

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1 In reviewing a trial court's decision to grant summary judgment, a court of appeals reviews the matter de novo.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN2 Summary judgment is appropriate when there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, and that conclusion is adverse to the moving party whose entitled to have the evidence construed most strongly in their favor.

Torts > Premises & Property Liability > General Premises Liability > General Overview

Torts > ... > General Premises Liability > Duties of Care > General Overview

Torts > ... > Duty On Premises > Invitees > General Overview

Torts > ... > Duty On Premises > Invitees > Business Invitees

Torts > ... > General Premises Liability > Types of Premises > Stores

HN3 Store owners are not insurers against all accidents and injuries to their business invitees. Liability for injuries sustained on a store owner's premises will only result when the evidence demonstrates that a store owner breached a duty of care it owes to its invitees. The duty is one of ordinary care of maintaining the business premises in a reasonably safe condition so that invitees are not unnecessarily and unreasonably exposed to danger. Business invitees are under a duty to provide for their own safety, which includes an affirmative duty to look where they are walking.

Torts > Premises & Property Liability > General Premises Liability > General Overview

Torts > ... > General Premises Liability > Dangerous Conditions > General Overview

Torts > ... > General Premises Liability > Dangerous Conditions > Duty to Warn

Torts > ... > General Premises Liability > Dangerous Conditions > Obvious Dangers

Torts > ... > General Premises Liability > Defenses > General Overview

Torts > ... > Duty On Premises > Invitees > General Overview

Torts > ... > Duty On Premises > Invitees > Business Invitees

Torts > ... > General Premises Liability > Types of Premises > Stores

HN4 The ″open and obvious″ defense provides that a store owner owes no duty to warn business invitees entering the property of open and obvious dangers on the property. The rationale behind this rule is that the open and obvious nature of the hazard itself serves as a warning. Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves.

Civil Procedure > Appeals > Standards of Review > General Overview

Torts > Premises & Property Liability > General Premises Liability > General Overview

Torts > ... > General Premises Liability > Dangerous Conditions > Obvious Dangers

HN5 An exception to the open and obvious doctrine applies when there are attendant circumstances surrounding the event that would distract a patron causing a reduction in the degree of care an ordinary person would exercise at the time. To determine whether there were attendant circumstances which distracted a victim from observing what otherwise was an open and obvious hazard depends on the facts of the particular case.

Civil Procedure > Appeals > Summary Judgment Review > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

Torts > Premises & Property Liability > General Premises Liability > General Overview

Torts > ... > General Premises Liability > Dangerous Conditions > Obvious Dangers

HN6 an appellate court reviews the facts of a case from the materials properly submitted in conjunction with a motion for summary judgment in order to determine whether the open and obvious hazard defense is applicable as a matter of law or whether it presents a jury question because of incumbent circumstances which, construed most favorably to the appellant, limit its application.

Torts > Premises & Property Liability > General Premises Liability > General Overview

Torts > ... > General Premises Liability > Dangerous Conditions > Obvious Dangers

HN7 With respect to the open and obvious doctrine, attendant circumstances are distractions that would reduce the degree of care that an ordinary person would exhibit at the time of the incident. Attendant circumstances must divert the attention of the pedestrian, significantly enhance the danger of the defect, and contribute to the fall.

Counsel: Steve J. Edwards, for appellant.

Schottenstein, Zox & Dunn, and Jeremy M. Grayem, for appellee.

Judges: BROWN, P.J., and BRYANT, J., concur. McCORMAC, J., retired, of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

Opinion by: McCORMAC

Opinion

(REGULAR CALENDAR)

McCORMAC, J.

[*P1] Plaintiff-appellant, Mary Jo Conrad, commenced an action in the Franklin County Court of Common Pleas alleging that defendant-appellee, Sears, Roebuck and Company (″Sears″), was liable for damages to injuries to her as a business invitee at the Hilliard-Rome Road store where appellant tripped and fell over a small box which was negligently placed in the aisle by Sears.

[*P2] Sears answered, alleging as pertinent herein, that appellant's damages and injuries were caused in full or in part by her own negligence, which negligence was greater than the negligence, if any, of Sears.

[*P3] Subsequently, Sears moved for summary judgment on the basis that appellant's injuries were caused by an open and obvious condition **[**2]** on Sears' premises and that there was no genuine issue as to any material fact as demonstrated by the attached affidavit of Shannon Maxwell and the deposition of appellant.

[*P4] Appellant submitted an affidavit in opposition to Sears' motion for summary judgment alleging that there are genuine issues of material fact as to whether the box that appellant fell over was open and obvious. Appellant attached in support of her memorandum contra her affidavit, an affidavit of appellant's expert, Gerald Burko, photographs, and the customer accident report.

[*P5] The trial court granted summary judgment to Sears and entered final judgment thereon.

[*P6] Appellant appeals, asserting the following assignment of error:

> The trial court committed error in granting summary judgment and holding that the displayer box that plaintiff fell over was open and obvious and that the attendant circumstances did not bar the application of the open and obvious rule.

[*P7] ***HN1*** In reviewing a trial court's decision to grant summary judgment, a court of appeals reviews the matter de novo. ***HN2*** Summary judgment is appropriate when there is no genuine

issue of material fact, the [**3] moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, and that conclusion is adverse to the moving party whose entitled to have the evidence construed most strongly in their favor. *Horton v. Harwick Chem. Corp. (1995), 73 Ohio St.3d 679, 1995 Ohio 286, 653 N.E.2d 1196*.

[*P8] Appellant was in appellee's store to purchase merchandise and, thus, was a business invitee to whom Sears owed a duty of reasonable care. After appellant had selected several items, she went to the front of the store to the service desk to pay for those items at the only cash register that was open. After she waited for about four minutes in line behind another customer, she completed her transaction and turned to leave the store at which time she fell over a displayer box causing the injuries for which she brings this action. The wooden displayer box had been placed on the floor near the service counter checkout line. Photographs show it to be clearly discernible, although it was placed on the floor in a position that might present a hazard to an unobservant invitee. There is no issue of fact but that the box was on the floor and that appellant tripped over it, [**4] falling and causing her injuries. Appellant denies having seen the box prior to tripping over it and there is no evidence to the contrary.

[*P9] The key issue is whether the box presented an open and obvious hazard which the store could reasonably expect a customer to see and to avoid.

[*P10] ***HN3*** Storeowners are not insurers against all accidents and injuries to their business invitees. *Johnson v. Wagner Provision Co. (1943), 141 Ohio St. 584, 49 N.E.2d 925*. Liability for injuries sustained on a storeowners premises will only result when the evidence demonstrates that a storeowner breached a duty of care it owes to its invitees. The duty is one of ordinary care of maintaining the business premises in a reasonably safe condition so that invitees are not unnecessarily and unreasonably exposed to danger. *Campbell v. Hughes Provision Co. (1950), 153 Ohio St. 9, 90 N.E.2d 694*. Business invitees are under a duty to provide for their own safety, which includes an affirmative duty to look where they are walking. *Parsons v. Lawson Co. (1989), 57 Ohio App.3d 49, 566 N.E.2d 698*. In *Armstrong v. Best Buy Co., 99 Ohio St. 3d 79, 2003 Ohio 2573, 788 N.E.2d 1088*, the Ohio [**5] Supreme Court reaffirmed the viability of the ″open and obvious″ defense to storeowners' liability. ***HN4*** This defense provides that a storeowner owes no duty to warn business invitees entering the property of open and obvious dangers on the property. The rationale behind this rule ″is that the open and obvious nature of the hazard itself serves as a warning. Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves.″ *Id. at P5*.

[*P11] ***HN5*** An exception to the open and obvious doctrine applies when there are attendant circumstances surrounding the event that would distract the shopper causing a reduction in the degree of care an ordinary person would exercise at the time. See *Cummin v. Image Mart, Inc., Franklin App. No. 03AP-1284, 2004 Ohio 2840*. To determine whether there were attendant circumstances which distracted appellant from observing what otherwise was an open and obvious hazard in the form of the displayer box depends on the facts of the particular case; it is necessary that we review those facts in order to determine whether there is a genuine issue of material fact [**6] in regard to whether the open and obvious defense should apply in this case.

[*P12] ***HN6*** We review the facts of the case from the materials properly submitted in conjunction with the motion for summary judgment in order to determine whether the open and obvious hazard defense is applicable as a matter of law or whether it presents a jury question because of incumbent circumstances which, construed most favorably to appellant, limit its application.

[*P13] In the recent case of *Collins v. McDonald's Corp., Cuyahoga App. No. 83282, 2004 Ohio 4074*, the Eighth District Court of Appeals reversed a summary judgment in favor of McDonald's when a patron tripped on a hole in the sidewalk of the restaurant's property and fell, sustaining injuries. Summary judgment had been granted by the trial court on the basis that the hole in the sidewalk was open and obvious as a matter of law. On appeal, the court found that whether the hole was an open and obvious danger was an issue of fact which precluded summary judgment under *Civ.R. 56(C)*. The court noted that a patron does not have a duty to constantly look downward in order to avoid any potential dangers that **[**7]** were on or near the ground, citing *Texler v. D.O. Summers Cleaners & Shirt Laundry Co. (1998), 81 Ohio St.3d 677, 1998 Ohio 602, 693 N.E.2d 271*. In *Collins*, the court, after reviewing the attendant circumstances, concluded that Collins never saw the hole in the sidewalk because he was distracted by people in front of him at the time he fell and that the presence of other patrons who were obstructing his view were factors beyond his control that contributed to his fall. The court also pointed out that the burden of proof to establish the open and obvious defense was upon defendant and that, from a poor quality photograph with no verbal description, one could not discern the depth of the hole or its size in relation to the building since only a small section of the parking lot is depicted in the photograph.

[*P14] In this case, we first review the statements of appellant taken from her deposition which was filed with the court. Appellant had driven to the Hilliard-Rome Road Sears Hardware Store in order to shop for a trimmer. She had been at the store several times previously and was somewhat familiar with the store. A store employee had brought the trimmer up to the register and appellant **[**8]** also carried a little bag of items to the only register which was open, which was the customer service register. She paid for her purchases, picked up the items and turned around. The next thing she knew, she was on the floor. She fell over a little box that was to her right that had a sign on the top and a wire basket where the store ads were held in the basket. She did not have a shopping cart and had not passed the customer service desk upon entering the store. She testified that there was one person in front of her at the checkout line but had no idea as to how long she stood there before she was checked out.

[*P15] On cross-examination, she verified the pictures taken by the store manager, Shannon Maxwell, which showed the box and its probable placement. She did not recall talking to any other customers but may have exchanged some words with the checkout employee but could not recall a conversation. She declined an offer to carry the packages out, as they were not heavy. Immediately upon checking out, she turned to the right and fell. She could not describe anything that would have blocked her view of the displayer, although she said it was so low that she did not believe **[**9]** she would have seen it unless she turned her head straight down. There was no merchandise blocking her view as far as she knew. There was an accident report made at the scene.

[*P16] Shannon Maxwell's affidavit provides pictures of the customer service desk/checkout counter where appellant purchased her items. Pictures show the displayer box and metal stand in the location they had been prior to and until the time of appellant's accident. Additionally, Sears had a security surveillance camera located on the customer service counter at the time appellant purchased her items. The surveillance videotape reveals that appellant stood directly beside the displayer and metal stand for over four minutes while she was purchasing her items.

[*P17] Photographs, as verbally described by the Sears customer accident report, shows that the displayer box was rectangular with dimensions of two feet by one foot, six inches in height, and light brown in color. It was located on the floor next to the checkout with a basket and a sign

adjacent to it. There was no obstruction and the box was visible, had a person looked.

[*P18] Appellant claims the following attendant circumstances **[**10]** that should prevent the open and obvious hazard doctrine from being a defense as a matter of law. Primarily she claims that the displayer box was difficult to see because of the color of the box and the white-yellow tile floor. She stated she took only one step after leaving the checkout counter and that her view was obscured by the customer standing in front of her previous to her being engaged by Sears' cashier. She claims that these attendant circumstances limited the open and obvious hazard doctrine as applied to her.

[*P19] A review of the photographs shows the box to be clearly discernable and its location was further pinpointed by the stand with the sign that was adjacent on the far side of the box that would alert a customer to the fact that one must move to the side of that area in order to avoid making contact. There was ample space to safely walk out of the store had the customer avoided the box on the floor.

[*P20] Reviewing the video, the photos, and the testimony, it is clear that appellant's view of the box on the floor was not blocked during all of the four minutes that she stood in the aisle. While her view may have been partially blocked by the customer **[**11]** in front of her, it was not blocked after she approached the cashier. The so-called attendant circumstances appellant raises are common circumstances that occur in a store. Often there are other customers blocking or partially blocking the view of someone who follows them. Generally there is conversation with the employee at the checkout counter, but that usual situation does not negate the responsibility of a customer to look before proceeding. This case is distinguishable from the recent *Collins* case where the opportunity to observe was much more limited and where there was less evidence of the discernability of the hazard.

[*P21] ***HN7*** Attendant circumstances are distractions that would reduce the degree of care that an ordinary person would exhibit at the time of the incident. *Burstion v. Chong-Hadaway, Inc. (Mar. 2, 2000), Franklin App. No. 99AP-701, 2000 Ohio App. LEXIS 747*. Attendant circumstances must ″divert the attention of the pedestrian, significantly enhance the danger of the defect and contribute to the fall.″ In this case, none of the circumstances appellant asserts significantly enhance the danger of the defect. The cashier did not prevent appellant from looking down and seeing the **[**12]** displayer. Sears' employee was merely during her job in performing the transaction with appellant. In fact, the video shows that appellant looked to her left several times during the transaction and could have looked to her right to see the displayer box prior to leaving the counter. While the customer in front of appellant may have obscured her view of the box when he was purchasing his items, nothing obscured her view once he completed his transaction and left the counter.

[*P22] Appellant's assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN, P.J., and BRYANT, J., concur.

McCORMAC, J., retired, of the Tenth Appellate District, assigned to active duty under authority of *Section 6(C), Article IV, Ohio Constitution*.

Cook v. E.I. Dupont De Nemours & Co.

Superior Court of Delaware, New Castle

May 15, 2001, Submitted ; August 20, 2001, Decided

C.A. No. 99C-01-023

Reporter
2001 Del. Super. LEXIS 452; 2001 WL 1482685

RONALD L. COOK, and his wife ELLA COOK v. E.I. DUPONT DE NEMOURS AND COMPANY, a Delaware corporation, Defendant.

Disposition: **[*1]** DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DENIED.

Core Terms

DuPont, pad, independent contractor, warn, hauling, Contractor, conditions, truck, summary judgment motion, dumping, invitee, site, operations, landowner, injuries, landfill, premises, genuine

Case Summary

Procedural Posture

Plaintiff husband was injured at a work site. He sued for negligence, and plaintiff wife sued for loss of consortium. Defendant company moved for summary judgment on the issue of duty to the husband.

Overview

The husband worked for the employer, who entered into a contract with the company for hauling. The husband was hurt when he slipped and fell on an asphalt pad at the company's landfill. The court held that the company sufficiently interjected itself into the daily hauling operations of the employer to such an extent that genuine issues of material fact existed on the issue of control. The issues of whether the husband should have known of the condition and whether his conduct constituted contributory negligence remained questions of fact for the jury.

Outcome

The motion was denied.

LexisNexis® Headnotes

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

HN1 Summary judgment may only be granted where the pleadings, depositions, answers to interrogatories, admissions on file and affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

a judgment as a matter of law. Del. Super. Ct. R. Civ. P. 56(c). The moving party bears the initial burden of showing that a genuine material issue of fact does not exist. If a motion is properly supported, the burden shifts to the non-moving party to demonstrate that there are material issues of fact. If, after viewing the record in the light most favorable to the nonmoving party, the court finds no genuine issue of material fact, summary judgment is appropriate. Summary judgment will be denied where the proffered evidence provides a reasonable indication that a material fact is in dispute.

Contracts Law > Third Parties > Delegation of Performance

Torts > Premises & Property Liability > General Premises Liability > General Overview

Torts > ... > General Premises Liability > Defenses > Independent Contractors

Torts > Vicarious Liability > Independent Contractors

HN2 It is settled law in Delaware that the control exercised by the landowner must go directly to the manner and methods used by the independent contractor while performing the delegated task. While the concept of active control is an elastic one, it is ordinarily not inferred from the mere retention by the owner or general contractor of a right to inspect the work of an independent contractor or to exercise general superintendence over such work in order to assure complicity with the contract terms. However, if the authority exerted by the owner over the work is insufficient to render it liable under the general rule regarding active control, the owner may still be liable to some extent if it retained sufficient control over part of the work or if it retained possessory control over the work premises during the work.

Torts > Business Torts > General Overview

Torts > Premises & Property Liability > General Premises Liability > General Overview

Torts > ... > General Premises Liability > Dangerous Conditions > General Overview

Torts > ... > General Premises Liability > Dangerous Conditions > Known Dangers

Torts > ... > General Premises Liability > Dangerous Conditions > Obvious Dangers

Torts > ... > General Premises Liability > Defenses > Independent Contractors

Torts > ... > Duty On Premises > Invitees > General Overview

Torts > ... > Duty On Premises > Invitees > Business Invitees

Torts > Vicarious Liability > Independent Contractors

HN3 Delaware courts have long held that the duty owed to an independent contractor is that of a business invitee, and that such a duty can be imposed upon a party by agreement or otherwise. By imposing such a duty, those who have responsibility for workplace safety must take reasonable measures to ensure the safety of those at the worksite. However, where an independent contractor knows of dangerous conditions on the property, the landowner owns no duty to an employee of that independent contractor. The condition itself is considered an adequate warning where the danger is so apparent that the invitee can be expected to notice and protect against it. The Delaware Supreme Court has lightened this harsh rule, holding that a business invitee's knowledge of a dangerous condition is not a complete bar to a claim against a landowner. Although a warning gives the invitee knowledge of the danger, the invitee may still claim damages for injuries resulting from the harm caused by the dangerous condition and, therefore, a landowner's duty is not fulfilled by merely warning the business invitee of the danger.

Counsel: W. Christopher Componovo, Esquire, and Joseph J. Rhoades, Esquire, of the Law Offices of Joseph J. Rhoades of Wilmington, Delaware for the Plaintiffs.

Mark L. Reardon, Esquire, of Elzufon Austin Reardon Tarlov & Mondell, P.A. of Wilmington, Delaware for the Defendant.

Judges: Peggy L. Ableman, Judge.

Opinion by: Peggy L. Ableman

Opinion

MEMORANDUM OPINION

ABLEMAN, JUDGE

The present action concerns a work-site accident which resulted in personal injuries to Plaintiff Ronald L. Cook and loss of consortium to his wife, Plaintiff Ella Cook. For present purposes, it will be necessary to refer only to Plaintiff Ronald L. Cook's (hereafter referred to as "Plaintiff" or "Cook") claims and role in this action. Defendant, E.I. DuPont de Nemours & Company (hereafter "DuPont"), has filed a Motion for Summary Judgment. The issues presented are whether the facts, when viewed in the light most favorable to plaintiff, prove as a matter of law that (1) DuPont did not owe a duty to the plaintiff, and (2) that the plaintiff's knowledge of the danger negated DuPont's duty to warn. This is the Court's decision on defendant's **[*2]** motion.

STATEMENT OF FACTS

Plaintiff was a truck driver employed by Brandywine Construction Company, Inc. (hereinafter "BCCI"). Pursuant to a contract entered into between BCCI and DuPont on June 20, 1994, BCCI was to provide DuPont with around-the-clock hauling of press cake material, know as Iron Rich, [1] from DuPont's Edgemoor facility to DuPont's Cherry Island Landfill ("Cherry Island"). [2] DuPont used Cherry Island, located approximately one mile from the Edgemoor facility, as a staging area for Iron Rich.

[*3] At approximately 4:00 a.m. on January 25, 1997, while plaintiff was working his usual 11:00 p.m. to 6:00 a.m. shift, he slipped and fell on an asphalt pad at the Cherry Island landfill during delivery of a load of Iron Rich. Plaintiff asserts that the accident occurred when his feet slipped out from under him, causing him to land on his tailbone and causing his helmet to hit the ground. As a result of his slip and fall, plaintiff suffered injuries to his head, neck, back and legs and underwent three lower back operations and one neck operation.

At the time of the delivery on January 25, 1997, plaintiff was the only BCCI employee working at either the Edgemoor facility or Cherry Island. Plaintiff, who was a BCCI truck driver at the Edgemoor facility for over two years at the time of his fall, kept to the following work routine: While inside the BCCI office trailer located on the Edgemoor site, plaintiff would receive a radio communication from DuPont indicating that a load of Iron Rich was ready for hauling. Plaintiff would then drive his dump truck to the specified bay where he would hook a trailer loaded with Iron Rich to the truck. Once connected, plaintiff would drive through **[*4]** the main gate of the Edgemoor facility to Cherry Island where he would dump the Iron Rich from the truck before returning to the BCC trailer to await the next dispatch call. During his employment with BCCI, Cook would make anywhere from seven to nine of these round trips between the Edgemoor facility and Cherry Island per shift.

In order to fully perform the activity of dumping the press-cake at Cherry Island, it was necessary for plaintiff to use a paddle [3] to scrape or sweep the rear of the trucks and tailgates to ensure that press-cake would not fall onto the roadway once the vehicle left Cherry Island. The results of an investigation completed by BCCI after plaintiff's accident revealed that plaintiff neither acted unsafely nor violated any safety rules. Subsequent to plaintiff's fall, the President of BCCI, David M. McGuigan, wrote to the Safety, Health and Environmental Manager at DuPont, Leonard J. Fasullo, and confirmed DuPont's suggestion that an

[1] Iron Rich is a press cake by-product of DuPont's Netsche filter process. Iron Rich is a neutral, soil-like material which is utilized as daily cover for landfills. *Defendant E.I. Dupont de Nemours & Company's Memorandum In Support of Its Motion for Summary Judgment* (hereafter "Defendant's Motion for Summary Judgment") at fn. 1.

[2] The contract incorporated two other documents into the agreement between DuPont and BCCI. The first of these documents is entitled "Scope of Work," the second is "General Conditions."

[3] The paddles were located on BCCI's trucks; however, they were owned by DuPont and provided by them for BCCI's use.

additional operator be brought in to work on weekend days to ensure that the dumping was cleared over the weekend. Mr. McGuigan additionally requested that a laborer with "non-slip" shoes be permitted to work each shift at the pad **[*5]** on Cherry Island. DuPont approved BCCI's request for hiring of a weekend operator, but denied BCCI's request for a laborer with "non-slip" shoes.

STANDARD OF REVIEW

HN1 Summary judgment may only be granted where the pleadings, depositions, answers to interrogatories, admissions on file and affidavits, if any, "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." [4] The moving party bears the initial burden of showing that a genuine material issue of fact does not exist. [5] If a motion is properly supported, the burden shifts to the non-moving party to demonstrate that there are material issues of fact. [6] If, after viewing the record in the light most favorable to the nonmoving party, the Court finds no genuine issue of material fact, summary judgment is appropriate. [7] Summary judgment will be denied where the proffered **[*6]** evidence provides "a reasonable indication that a material fact is in dispute." [8]

CONTENTION OF PARTIES

Plaintiff filed suit alleging that his injuries were proximately caused by DuPont's failure to provide adequate footing and traction, failure to provide safety supervision, failure to provide adequate lighting, and failure to warn plaintiff of the dangers associated with hauling Iron Rich. In addition, plaintiff contends that his injuries were caused because DuPont was negligent in requiring plaintiff to engage in dangerous conduct, and DuPont failed to observe and prevent BCCI, its independent contractor, **[*7]** from engaging in unsafe job processes. [9]

DuPont has filed this motion for summary judgment. It argues that it does not owe a duty to plaintiff since landowners are not liable for the torts created by the contracted work or the condition of the premises of an independent contractor hired by the owner, unless "the owner retains the power to control the methods and manner of doing the work." [10] Additionally, DuPont contends that plaintiff cannot recover because any duty it may have had to warn plaintiff was obviated by his knowledge of the conditions existing on the asphalt pad at Cherry Island. [11]

[*8] DISCUSSION

As to defendant's first contention, ***HN2*** it is settled law in Delaware that the control exercised by the landowner must go directly to the manner and methods used by the independent contractor while performing the delegated task. [12] While the concept of active control is an "elastic one," [13] **[*9]** it is "'ordinarily not inferred from the mere retention by the owner or general contractor of a right to inspect the work of an independent contractor or to exercise general superintendence over such work in order to assure complicity with the contract terms.'"

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[4] Del. Super. Ct. Civ. R. 56(c).

[5] *Brzoska v. Olson, Del. Supr., 668 A.2d 1355, 1364 (1995)*.

[6] *Id.*

[7] *Alabi v. DHL Airways, Inc., Del. Super., 583 A.2d 1358, 1361 (1990)*; *Hammond v. Colt Ind. Operating Corp., Del. Super., 565 A.2d 558, 560 (1989)*.

[8] *Ebersole v. Lowengrub, Del. Super., 54 Del. 463, 180 A.2d 467, 470 (1962)*.

[9] Complaint at PP10 and 11.

[10] *Rabar v. E.I. duPont deNemours & Co., Inc., Del. Super., 415 A.2d 499, 506 (1980)*; *Williams v. Cantera, Del. Super., 274 A.2d 698 (1971)*. *See also* *Boubaris v. Newark Newsstand, Del. Super., 1996 Del. Super. LEXIS 481*, C.A. No. 93C-09-064 (Oct. 22, 1996) (ORDER).

[11] *See Boubaris*, C.A. No. 93C-09-064 at 3 ("where a condition is obvious or easily discoverable by the plaintiff, the duty to make safe or warn is obviated") (citing *Niblett v. Pennsylvania Railroad Co., Del. Super., 52 Del. 380, 158 A.2d 580 (1960))*.

[12] *O'Connor v. Diamond State Telephone Co., Del. Super., 503 A.2d 661, 663 (1985)* (citing *Cantera, 274 A.2d at 700*).

[13] *503 A.2d at 662* (citing *Seeney v. Dover Country Club Apartments, Inc., 318 A.2d 619*).

[14] However, if the authority exerted by the owner over the work is insufficient to render it liable under the general rule regarding active control, "'the owner may still be liable to some extent if it retained sufficient control over part of the work or if it retained possessory control over the work premises during the work.'" [15]

In the present case, plaintiff was an employee of an independent contractor hired by DuPont to haul press-cake from DuPont's plant to DuPont's landfill. In support of its argument that it did not exercise active control over the method and manner of BCCI's work, DuPont relies upon the following evidence of record.

Plaintiff testified that he was hired and paid by BCCI, [16] that his job training and work schedule were provided by BCCI, [17] that BCCI owned and maintained the trucks used for hauling the Iron Rich, [18] and that the only contact he had with a DuPont employee was the radio communications indicating a press cake load was ready to be hauled. [19] Leonard J. Fasullo, [20] testified that the responsibility for the day-to-day operations of hauling Iron Rich between the **[*10]** Edgemoor facility and Cherry Island was the responsibility of BCCI. [21] Fasullo also testified that BCCI designed and built (albeit with DuPont's permission and at DuPont's expense) the asphalt pad at Cherry Island to facilitate the hauling and dumping process. [22] Additionally, Fasullo testified that, at BCCI's request, DuPont installed lighting at Cherry Island to facilitate nighttime operations. [23]

Richard F. Rowe, Jr., BCCI's Superintendent on the Edgemoor project, testified that "we [BCCI] are in communications with their [DuPont] people and it is everyday . . . . We speak to DuPont everyday that we are there . . . . There is not a day that you don't **[*11]** talk to their supervisors." [24] Rowe also testified that, BCCI's haulers were satisfied with the improved lighting conditions. [25] Rowe also testified that he did not recall any complaints from his haulers after the lights were installed on the pad at Cherry Island and he confirmed that BCCI did not make any subsequent request of DuPont for additional lighting. [26]

In deciding defendant's summary judgment motion, the contractual agreements entered into between the parties represent additional relevant evidence regarding the existence of a duty owed to plaintiff. In the "Scope of Work" Contract (dated March 30, 1994 and incorporated in the June 20, 1994 "Price Agreement"), the operation of Cherry Island is identified as being "physically separate from the plant, [requiring] frequent communications to DuPont supervision on the status of the various operations." [27] The contract additionally **[*12]** states that "the safety of the drivers when unloading trailers is the responsibility of the Contractor." [28] Regarding the clean up of spills, the contract notes that "the Contractor shall perform all necessary housekeeping to insure work areas are properly maintained and that any spills are cleaned up immediately" [29] and "the Contractor is also responsible for reporting and cleaning of all spills

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[14] *Id. See also* *Bryant v. Delmarva Power & Light Co., Del. Super., 1995 Del. Super. LEXIS 438*, C.A. No. 89C-08-070, Babiarz, J. (Oct. 2, 1995) (Mem. Op.).

[15] *Bryant*, C.A. No. 89C-08-070 at 15 (citing Restatement (Second) of Torts) §§ 414, 422(a) (1965); *Rabar, 415 A.2d at 506*. *See Boubaris*, C.A. No. 93C-09-064 at 3.

[16] Deposition of Ronald L. Cook, p. 29, 32 (hereafter "Cook, p. ___").

[17] *Id.* at p. 34-35.

[18] *Id.* at p. 37.

[19] *Id.* at p. 114.

[20] DuPont's Safety, Heath and Environmental Manager.

[21] Deposition of Leonard Joseph Fasullo, p. 22 (hereafter "Fasullo, p. ___").

[22] *Id.* at p. 21-22.

[23] *Id.* at p. 30-31.

[24] Deposition of Richard F. Rowe, p. 23 (hereafter "Rowe, p. ___").

[25] *Id.* at p. 87.

[26] *Id.* at p. 87-89.

[27] Scope of Work Contract, dated March 30, 1994, at Section A, P3.

[28] *Id.* at Section A, P4.

[29] *Id.* at Section A, P5.

incurred during the transportation of materials . . . ." [30]

The Price Agreement, subsequently entered into between the parties on June 20, 1994, set forth the additional following conditions:

> Scope of Work -- . . . CONTRACTOR (BCCI) will provide a sufficient number of skilled workers and appropriate supervision . . . . [31]
>
> Site Conditions -- Contractor and their tier subcontractors shall be required to furnish to DuPont **[*13]** a written program that all Contractor and subcontractor employees shall be required to follow while on the job site. Minimum acceptable program shall meet OSHA and DuPont's requirements. [32]

Viewing the facts in the light most favorable to the plaintiff, the Court finds that DuPont sufficiently "interjected itself" into the day-to-day hauling operations of BCCI to such an extent that genuine issues of material fact exist on the issue of control. In making this ruling, the Court specifically relies upon the following evidence. First, there was a DuPont supervisor present at the construction site on a daily basis. [33] Second, there was a DuPont supervisor engaged in communication with BCCI on a daily basis. Third, DuPont supplied tools to BCCI, at least on one occasion. Fourth, DuPont actively controlled, directed, and restricted the movements of the BCCI employees, including plaintiff. Fifth, DuPont inspected BCCI's offices and vehicles, **[*14]** and retained the ability to search the premises in case of a problem. Based upon these facts, the Court finds that the question of whether defendant DuPont assumed control over plaintiff is an appropriate factual issue for the jury and cannot be determined as a matter of law.

Turning to DuPont's second contention, that plaintiff's knowledge of the condition of the pad at Cherry Island negated any duty to warn on behalf of DuPont, the Court **[*15]** finds that the issue cannot be determined on a summary judgment motion. It is uncontroverted that at the time of Cook's injury, BCCI was an independent contractor of DuPont and plaintiff was an employee of BCCI. ***HN3*** Delaware courts have long held that the duty owed to an independent contractor is that of a business invitee, [34] and that such a duty can be imposed upon a party "'by agreement or otherwise.'" [35] By imposing such a duty, "those who have responsibility for workplace safety must take reasonable measures to ensure the safety of those at the worksite." [36] However, where an independent contractor knows of dangerous conditions on the property, the landowner owns no duty to an employee of that independent contractor. [37] The condition itself is considered an adequate warning where the danger is so apparent that the invitee can be expected to notice and protect against it. [38] The Supreme Court has lightened this harsh rule, holding that "a business invitee's knowledge of a dangerous condition is not a complete bar to a claim against a landowner." [39] The Court stated that, although a warning gives the invitee knowledge of the danger, the invitee may still claim

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[30] *Id.* at Section C, P2, Summary.

[31] Price Agreement, dated June 20, 1994, at P2.

[32] *Id.* at P14.

[33] *See Boubaris*, C.A. No. 93C-09-064 at 3-4 (The court found that the defendant "shared possessory control of the work premises by remaining open for business while [an independent contractor performed its inventory duties]"). *But see*, *Bowles v. White Oak, Inc., Del. Super., 1988 Del. Super. LEXIS 314*, Del Pesco, J. (Sept. 15, 1988) (Mem. Op.) (having a supervisor on the construction site on a daily basis who inspected the premises and who told subcontractors what needed to be done, was not supportive of active involvement in the contractor's work).

[34] *See* *DiOssi v. Maroney, Del. Supr., 548 A.2d 1361 (1988)*.

[35] *Figgs v. Bellevue Holding Co., Del. Super., 652 A.2d 1084, 1092 (1994)* (quoting *Rabar, 415 A.2d at 505*).

[36] *Restatement (Second) of Torts § 343*; *Li v. Capano Builders, Inc., Del. Dist., 1999 U.S. Dist. LEXIS 4427 (1999)* (citation omitted); *Morris v. Hitchens, Del. Super., 1993 Del. Super. LEXIS 122*, C.A. No. 91C-05-045, Lee, J. (Mar. 18, 1993), Mem. Op. at 3.

[37] *Morris*, C.A. No. 91C-05-045 at 2 (citing *Seeney, 318 A.2d at 623*).

[38] *Niblett, 158 A.2d at 582*.

[39] *Boubaris*, C.A. No. 93C-09-064 at 4 (citing *Koutoufaris v. Dick, Del. Supr., 604 A.2d 390, 394-98 (1992)*.

damages for injuries **[*16]** resulting from the harm caused by the dangerous condition and, therefore, a landowner's duty is not fulfilled by merely warning the business invitee of the danger. [40]

In the present case, DuPont assumes that plaintiff's four or five prior trips to **[*17]** the same asphalt pad on the evening of his fall are sufficient to relieve it of its duty to warn with regard to the condition of the pad. Plaintiff, on the other hand, submits that DuPont can be held liable because it voluntarily assumed responsibility for implementing safety measures at the Cherry Island landfill. In support of this argument, plaintiff relies upon the testimony of Richard F. Rowe, Jr., who indicated to DuPont that changes needed to be made regarding safety at the dumping site. [41] Rowe also testified that he had conversations with DuPont regarding construction of a new pad "so that [BCCI haulers] could function" and because "you didn't want somebody getting hurt, falling." [42] In addition, Rowe testified that upon completion of the pad, DuPont reimbursed BCCI for its construction costs. [43]

This Court finds that, as a result of DuPont's acknowledgement of the dangerous condition of the pad, there is a genuine issue of **[*18]** fact as to whether plaintiff should have known of the condition at the time of his fall or whether DuPont's acknowledgement of the conditions of the danger fulfilled its duty to warn BCCI employees. [44] In addition, the issue of whether plaintiff's conduct constituted contributory negligence, considering his knowledge of the potential conditions that might exist on the pad, remains a question of fact for the jury to resolve. [45]

CONCLUSION

For all of the foregoing reasons, Defendant E.I. DuPont de Nemours & Company's Motion for Summary Judgment is hereby **DENIED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

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[40] *Id.*

[41] Rowe, p. 74.

[42] *Id.* at p. 73-74.

[43] *Id.* at p. 77.

[44] *See Boubaris*, C.A. No. 93C-09-064 at 4-5.

[45] Since the Court finds that plaintiff's contributory negligence is a question of fact for the jury, it thereby refrains from ruling on the applicability of the peculiar risk doctrine raised by plaintiff.

Dilks v. Morris

Superior Court of Delaware, New Castle

December 6, 2004, Submitted ; February 25, 2005, Decided

C.A. No.: 02C-07-189 CLS

Reporter
2005 Del. Super. LEXIS 55; 2005 WL 445530

PAULA DILKS and GERALD DILKS, Plaintiffs, v. KAREN MORRIS and ALAN LEVINSON and MOBAC, INC., Defendants.

Notice: [*1] THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Disposition: Defendants' renewed motions for summary judgment denied.

Core Terms

business invitee, dog, genuine issue of material fact, dangerous condition, summary judgment, landowner, warn, assumption of risk, injuries, alleges, ditch, site

Case Summary

Procedural Posture

Plaintiff, an injured party, sued defendants, homeowners and a contractor, to recover damages for personal injuries. The homeowners and the contractor separately moved for summary judgment on the claims.

Overview

The contractor was performing work at the property owner's residence when the injured party, a business invitee, returned the owners dog to their residence after caring for the dog while the owners were on vacation. The injured party alleged 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 suddenly jerked forward, pulling her along. The owners and contractor argued that the injured party failed to show that they were the proximate cause of the injuries, and that the injured party assumed the risk. Viewing the facts in the light most favorable to the nonmoving party, the court held that it appeared that while the injured party did state that the dog made her fall, she also stated that if it had not been for the ditch, she may have regained her footing. Thus, there was a triable issue of fact as to causation. Due to its fact intensive nature, the court held that whether the injured party's movements in and around the site constituted an assumption of the risk remained a question of fact for the jury to resolve.

Outcome

The motions for summary judgment were denied.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1 Summary judgment may only be granted when no genuine issue of material fact exists.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN2 The moving party on a summary judgment motion bears the burden of establishing the non-existence of genuine issues of material fact. If the burden is met, the burden shifts to the non-moving party to establish the existence of genuine issues of material fact. Where the moving party produces an affidavit or other evidence sufficient under Del. Super. Ct. R. Civ. P. 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.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN3 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.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN4 In a summary judgment action, the court must view the facts in the light most favorable to the non-moving party.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Torts > Negligence > General Overview

HN5 Summary judgment is generally not appropriate for actions based on negligence. It is rare in a 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. If a party demonstrates facts that warrant a grant of summary judgment, the decision becomes one of a matter of law.

Torts > Negligence > General Overview

Torts > Negligence > Elements

Torts > Premises & Property Liability > General Premises Liability > General Overview

Torts > ... > Duty On Premises > Invitees > General Overview

Torts > ... > Duty On Premises > Invitees > Business Invitees

HN6 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. 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.

Torts > Negligence > General Overview

Torts > Premises & Property Liability > General Premises Liability > General Overview

Torts > ... > General Premises Liability > Dangerous Conditions > General Overview

Torts > ... > General Premises Liability > Dangerous Conditions > Known Dangers

Torts > ... > Duty On Premises > Invitees > General Overview

Torts > ... > Duty On Premises > Invitees > Business Invitees

HN7 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. Where a dangerous condition exists on the land, the Delaware Supreme Court has held that a business invitee may still recover for injuries even if he or she had knowledge of the dangerous condition. A mere warning of a known danger is insufficient for the landowner to fulfill his duty to the business invitee.

Counsel: Lois J. Dawson, Esquire, Attorney for Plaintiff Paula Dilks, Wilmington, Delaware.

Richard W. Pell, Esquire, Attorney for Defendant Mobac, Inc., Wilmington, Delaware, Tybout, Redfearn & Pell.

Christian J. Singewalde, Esquire, Natalie L. Palladino, Esquire, Attorneys for Defendants Karen Morris and Alan Levinson, Wilmington, Delaware, White and Williams LLP.

Judges: Calvin L. Scott, Jr., Judge.

Opinion by: Calvin L. Scott , Jr.

Opinion

MEMORANDUM OPINION

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.

[*2] 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 **[*3]** they breached their duty to ensure that their property was safe to enter and if it was not, then they breached their 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

HN1 Summary judgment may only be granted

[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.

when no genuine issue of material fact exists. [2] **[*4]** ***HN2*** 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] ***HN3*** 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]

HN4 The court must view the facts in the light most favorable to the non-moving party. [7] **[*5]** ***HN5*** Summary judgment is generally not appropriate for actions based on negligence. [8] It is rare in a 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

HN6 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. **[*6]** 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]

HN7 "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] **[*7]** Where a dangerous condition exists on the land, the Delaware Supreme Court has held that a business invitee may 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

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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 Del. Super. LEXIS 329, 2004 WL 2240164 *1 (Del. Super. 2004)* (citing *Celotex Corp v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986))*.

[6] *Ebersole v. Lowengrub, 54 Del. 463, 180 A.2d 467, 469-70, 4 Storey 463 (Del. Supr. 1962)*.

[7] *Lupo v. Med. Ctr. of Delaware, 1996 Del. Super. LEXIS 46, 1996 WL 111132 *2 (Del. Super. 1996)*.

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

[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* 57 A 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 Del. Super. LEXIS 481, 1996 WL 658821 *2 (Del. Super.)*. (Internal citations omitted).

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

[15] *Boubaris, 1996 Del. Super. LEXIS 481, 1996 WL 658821 at *2*.

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]

[*8] 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 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 **[*9]** 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]

[*10] 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.

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.

[*11] IT IS SO ORDERED.

Calvin L. Scott, Jr., Judge

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[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.").

[18] *See Binsau v. Garstin, 54 Del. 423, 177 A.2d 636, 640, 4 Storey 423 (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.

Staedt v. Air Base Carpet Mart

Superior Court of Delaware, New Castle

September 6, 2011, Submitted; December 6, 2011, Decided; December 6, 2011, Filed

C.A. No. N10C-07-075 CLS

Reporter
2011 Del. Super. LEXIS 3647

JOSEPH STAEDT and MARIE STAEDT, Plaintiffs, v. AIR BASE CARPET MART, INC. a Delaware Corporation, Defendant.

Notice: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Prior History: [*1] On Defendant's Motion for Summary Judgment.

Disposition: DENIED.

Core Terms

summary judgment, injuries, pallet, wooden, warn, genuine issue of material fact, proximate cause, invitees

Counsel: Bayard J. Snyder, Esq., Snyder & Associates, P.A., Wilmington, Delaware. Attorney for Plaintiffs.

Cheryl A. Ward, Esq., Reger Rizzo & Darnall, LLP, Wilmington, Delaware. Attorney for Defendant.

Judges: Judge Calvin L. Scott, Jr.

Opinion by: Calvin L. Scott, Jr.

Opinion

ORDER

J. Scott

Introduction

Before the Court is Defendant's, Air Base Carpet Mart, Inc. ("Defendant"), Motion for Summary Judgment pursuant to Superior Court Civil Rule 56. The Plaintiffs, Joseph and Marie Staedt ("Plaintiffs"), responded in opposition to this motion. The Court reviewed the parties' submissions and for the reasons discussed below, the Defendant's Motion for Summary Judgment is **DENIED**.

Facts

This is a negligence action arising from Plaintiff's, Joseph Staedt ("Mr. Staedt") trip and fall at Defendant's business. On December 6, 2008, Plaintiffs and their two children were business invitees at Defendant's principal place of business located in New Castle, Delaware. At the time of the incident, Plaintiff Joseph was carrying his fourteen-month-old son. Prior to the incident, Defendant's employee operated a powered industrial truck/forklift to remove a roll of carpet. Mr. Staedt testified that he **[*2]** heard the employee state, "heads up, I'm going to be backing up."[1] At that time, Mr. Staedt tripped on a wooden pallet, fell backwards, and landed on his right elbow. Defendant contends, and Plaintiffs acknowledge, that the wooden pallet was on the floor at all times while they shopped.

On July 9, 2010, Plaintiffs filed a Complaint against Defendant for their negligent conduct in causing Mr. Staedt's injuries. Mr. Staedt seeks damages for injuries resulting from his fall at

[1] Pls. Resp. to Mot. Summ. J., ¶ 2.

Airbase. Plaintiff, Marie Staedt ("Mrs. Staedt") alleges loss of consortium and severe emotional distress.

Parties' Contentions

On August 3, 2011, Defendant filed a Motion for Summary Judgment alleging no genuine issues of material fact exist because Plaintiffs acknowledge that the wooden pallet was open and obvious. Specifically, Defendant argues that under Delaware law, because the condition was open and obvious, it is not liable for injuries to any business invitee's physical injuries. Therefore, Defendant argues that summary judgment must be granted.

On September 6, 2011, Plaintiffs filed their Response to Defendant's Motion for Summary Judgment. Plaintiffs argue that the forklift **[*3]** driver had a duty to warn Mr. Staedt that he backing up, and of the wooden pallet left on the sales room floor. They argue, but for the immediate danger of the forklift backing up, Mr. Staedt would not have stepped back and tripped over the wooden pallet. Therefore, genuine issues of material fact concerning a duty to warn and causation still exist. For these reasons, Plaintiffs assert that summary judgment must be denied.

Standard of Review

The Court may grant summary judgment 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 any material fact and that the moving part is entitled to summary judgment as a matter of law."[2] The moving party bears the initial burden of showing that no material issues of fact are present.[3] Once such a showing is made, the burden shifts to the non-moving party to demonstrate that there are material issues of fact in dispute.[4] In considering a motion for summary judgment, the Court must view the record in a light most favorable to the non-moving party.[5] "Summary judgment will not be granted when a more thorough inquiry into the facts is desirable to **[*4]** clarify the application of the law to the circumstances."[6]

Discussion

Pursuant to Superior Court Civil Rule 56, summary judgment is inappropriate in this case. "Generally speaking, issues of negligence are not susceptible of summary adjudication . . . . [Q]uestions of proximate cause except in rare cases are questions of fact ordinarily to be submitted to the jury for decision."[7] Therefore, summary judgment will be granted only when there is an absence of a genuine issue of any material fact as to negligence or proximate cause.[8]

Under Delaware law, to succeed under a negligence claim, a plaintiff must prove: (1) that the defendant owed plaintiff a duty and (2) the "breach of that duty proximately caused plaintiff's injury."[9] Here, the two parties are a landowner (Defendant) and business invitees (Plaintiffs). Under such relationship, a landowner has a duty to employ reasonable measures to warn or protect business invitees of a condition that **[*5]** poses unreasonable risk of harm if they know or should know of such condition.[10]

The Delaware Supreme Court held in *Koutoufaris*

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[2] Super. Ct. Civ. R. 56(c); *Burkhart v. Davies, 602 A.2d 56, 59 (Del. 1991)*.

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

[4] *Id. at 681*.

[5] *Burkhart, 602 A.2d at 59*.

[6] *Phillip-Postle v. BJ Prods., Inc., 2006 WL 1720073, at *1 (Del. Super. Ct. Apr. 26, 2006)*.

[7] *Ebersole v. Lowengrub, 180 A.2d 467, 468 (Del. 1962)*.

[8] *Id.* "[T]he 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." *Upshur v. Bodie's Dairy Mkt., 2003 WL 21999598, at *3 (Del. Super. Ct. Jan. 22, 2003)*.

[9] *Dilks v. Morris, 2005 WL 445530, at *2 (Del. Super. Ct. Feb. 25, 2005)*.

[10] *Id.*

v. Dick,[11] that a business invitee may still recover for injuries if they knew of the dangerous condition. In *Dilks v. Morris*,[12] the plaintiff sued the defendant for injuries sustained when she fell into a hidden construction "ditch."[13] The defendants argued that because debris, nails, and various other construction materials were open and obvious, they were not required to provide a warning.[14] The court denied the motion for summary judgment because a genuine issue of material fact existed as to the proximate cause of her injuries.[15]

Similar to the defendants in *Dilks*, Defendant argues that because (1) Plaintiffs acknowledge in their depositions that the wooden pallet was on the floor the entire time prior to the incident; and (2) Plaintiffs agree that the pallet was not hidden, the wooden pallet was open and obvious. Therefore, they argue, they had no duty to warn.

However, when viewing the record in light most favorable to the non-moving party, a genuine issue of material fact exists as to the proximate cause of Mr. Staedt's injuries.

As a genuine **[*6]** issue of material facts exists as to the proximate cause and whether Defendant fulfilled its duty in warning and protecting Plaintiff, summary judgment is **DENIED**.

Conclusion

Based on the foregoing, Defendant's Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

/s/ CALVIN L. SCOTT

Judge Calvin L. Scott, Jr.

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[11] *604 A.2d 390, 398 (Del. 1992)*.

[12] *2005 WL 445530, at *1 (Del. Super. Ct. Feb. 25, 2005)*.

[13] *Id.*

[14] *Id.* at *2.

[15] *Id.*