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Case Number 442,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DINAH JONES and WILLIAM POTTER,	:	
	:	
Plaintiffs Below,	:	No.: 442,2016
Appellants,	:	
	:	On Appeal from the
v.	:	Superior Court of the
	:	State of Delaware
CLYDE SPINELLI, LLC, dba,	:	C.A. No. N14C-12-159-PRW
PINE VALLEY APARTMENTS,[1]	:	
	:	
Defendants Below,	:	
Appellee	:	

ANSWERING BRIEF OF APPELLEE CLYDE SPINELLI, LLC, dba PINE VALLEY APARTMENTS

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Dated: December 22, 2016

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[1] The case was captioned incorrectly below. The actual name of the Defendant/Appellee is Pinewoods, Inc., a Delaware corporation.

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NATURE & STAGE OF PROCEEDINGS

Plaintiffs below and Appellants Dinah Jones ("Jones") and William Potter ("Potter") (collectively "Plaintiffs") filed suit against Defendant below and Appellee Clyde Spinelli, LLC d/b/a Pine Valley Apartments ("Defendant") on December 17, 2014,[1] alleging that Jones was injured as a result of a fall that occurred on Defendant's premises on February 16, 2013. Defendant denied all allegations of negligence and asserted several affirmative defenses when it answered the Complaint on March 31, 2015.[2]

The trial court entered a Trial Scheduling Order on August 21, 2015[3] which set the date for discovery cutoff as April 29, 2016 and the deadline for the filing of dispositive motions as June 3, 2016. Defendant filed its Motion to Dismiss on May 20, 2015[4] and Plaintiffs filed a response in opposition on June 10, 2016.[5]

Defendant wrote to the trial court on June 14, 2016 bringing to the Court's attention that a major portion of Plaintiffs' argument in opposition to the Motion was predicated upon the *Restatement (Third) of Torts* and noting that this Court has declined to adopt *any* sections of the *Restatement (Third).*[6] On June 16, 2016, Plaintiffs wrote to the court in response that Delaware courts are, "at best … not

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[1] D.I. 1.
[2] D.I. 8.
[3] D.I. 17.
[4] D.I. 22.
[5] D.I. 24.
[6] D.I. 25.

fond of" the *Restatement (Third)*, however the "applicable sections" of the *Restatement (Third)* are identical or "virtually identical" to those of the *Restatement (Second) of Torts* as to the "fundamentals of joint and several liability."[7]

On July 8, 2016, the trial court took oral argument on the Motion, issued a ruling from the bench, and issued a written Order granting the Motion.[8] Plaintiffs moved for reargument on July 15, 2016,[9] Defendant filed a response on July 21, 2016,[10] and the trial court issued an Order denying that Motion on August 5, 2016.[11]

Plaintiffs filed their Notice of Appeal to this Court on October 24, 2016,[12] this Court issued its Briefing Schedule on October 26, 2016, and Plaintiffs filed their Opening Brief on November 28, 2016 (and a substituted Opening Brief on December 6, 2016).

This is Defendant below and Appellee's Answering Brief.

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[7] D.I. 26.
[8] D.I. 27.
[9] D.I. 29.
[10] D.I. 30.
[11] D.I. 32.
[12] D.I. 36.

SUMMARY OF ARGUMENTS

1. Admitted as to when summary judgment is appropriate or inappropriate.

2. Denied that the trial court committed legal error when it concluded that this is one of those "rare cases" where unresolved issues of fact as to the parties' and a non-party's negligence and the proximate cause of plaintiff's injuries can, when viewed in the light most favorable to the non-moving party, justify summary judgment in favor of defendant.

COUNTERSTATEMENT OF THE FACTS

Plaintiffs Jones and Potter are husband and wife. John Yonker ("Yonker") is Potter's brother and Dorothy Oberly ("Oberly") is his mother. Audra Greenlee ("Greenlee") is the manager of Defendant's Pine Valley apartment complex.

Potter, Oberly and Yonker were tenants in one of Defendant's apartments. At some point, they stopped paying the rent and Defendant began summary possession action against them in the Justice of the Peace court.

Potter made an appointment to go to Pine Valley to make a payment towards the rent. Jones, Potter, Oberly and Yonker went to the apartment complex office on February 6, 2013 to make the rent payment and when they arrived all four went in together.

Jones, Potter, Oberly and Yonker walked into and through the "outer office" reception area then through a door marked "employees only" into the "inner office" where Greenlee was sitting at her desk against the left (south) wall of the office.[13] Potter offered to make a cash payment of $500 but Greenlee said she could not accept cash and that he needed to get a money order. Potter and Yonker left to get the money order and Jones and Oberly inexplicably remained behind in the office.

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[13] Photographs of the office appear at Greenlee transcript B211, B214, B222, B223.

Greenlee asked Jones and Oberly to take seats in the outer office reception area while they waited but they declined to do so. There was at least one chair next to Greenlee's desk that did not have "stuff" piled on it and there was another chair pushed under a desk across from Greenlee's desk. Rather than sitting down in one of those chairs or going out to the reception area to sit down, Jones and Oberly moved about the room while trying to engage Greenlee in conversation but Greenlee "wasn't very talkative" and "was busy doing her thing" so Oberly and Jones "just stood around" in the office and waited.

There was a small approximately one foot square electric space heater in the center of the room with two or three feet of clearance all around it. Jones said she and Oberly probably noticed the space heater when Potter and Yonker left to get the money order and while she and Oberly moved about in the office they walked "past" "behind" and "around" the space heater sitting in the middle of the room.

Jones said that Greenlee never offered them a chair but Greenlee denies this. Jones also said that neither she nor Oberly ever asked to sit down even though Oberly was standing right next to the unoccupied desk chair, that nothing was said to either Greenlee or Spinelli about Oberly's knees or the need to sit down, that Oberly never complained, that Jones herself did not know why she did not think that Oberly may need to sit down, that she did not know why she was not worried

about Oberly standing even though she knew "her knees were bad," and that Oberly was "moving from one leg to the other."

Greenlee said that when she offered them seats in the outer office Oberly said she was fine even though she "seemed to be pacing from one leg to the other."

Maintenance man Clyde Spinelli, Jr. said he came to the office to discuss a work order with Greenlee and he took a seat adjacent to her desk and waited for her to finish her conversation with the visitors. He stayed because the visitors were argumentative with Greenlee and were pacing around the office and behind Greenlee's chair. Spinelli heard Greenlee offer them seats but they ignored her. Oberly appeared to Spinelli to be unstable on her feet, shifting her weight back and forth from one foot to another while she and Jones continued talking and pacing.

Potter and Yonker returned after approximately 20 minutes but Yonker left and just Potter came back into the office. Potter went over to Greenlee's desk to fill out the money order while Jones and Oberly were standing between Greenlee's desk and the space heater.

Jones said she looked over at Oberly as she "pranced" about the office and saw Oberly's right foot hit the space heater. Jones reached for Oberly and both fell to the floor. Both Spinelli and Greenlee said that Oberly did not fall over the space heater. Spinelli said Potter was at Greenlee's desk with his back to the two women when Oberly moved towards him. Oberly appeared to twist around to look at

something when she was approximately three feet away from the space heater. She lifted one foot and appeared to lose her balance. She fell to the floor while Jones grabbed her and fell to the floor landing on top of her.

Greenlee and Spinelli jumped up to offer assistance. Potter helped Jones up off the floor and seated her in the chair that Spinelli had vacated. When Oberly got up she appeared to be fine.

Potter said they must have tripped over the space heater. Greenlee said that was impossible since the small space heater was not in the area where they were nor was it knocked over or moved. Greenlee said she did not witness the entire fall because of the angle of her chair but she did have a direct view of the space heater and stated that the fall did not take place near the heater.

After helping his wife, Potter returned to Greenlee's desk to continue writing out the money order. The three then left with no further assistance needed by Oberly or Jones.

ARGUMENT

I. DENIED. THE TRIAL COURT DID NOT COMMIT LEGAL ERROR WHEN IT GRANTED SUMMARY JUDGMENT TO DEFENDANT.

A. Denied. The doctrine of joint and several liability has no applicability here.

B. Denied. Absent a showing of material fact at the summary judgment stage, the question of comparative negligence between a Defendant and a non-party tortfeasor is immaterial.

1. Question Presented Stated Affirmatively

The question on appeal is whether the trial court committed legal error when it concluded, after viewing the facts in the light most favorable to Plaintiffs, that Defendant met its burden to show that there were no material issues of fact in dispute, thus Defendant was entitled to summary judgment as a matter of law, and that Plaintiffs failed to meet their burden to show the existence of a material issue of fact after the trial court found that Defendant had met its burden in this "rare case" where unresolved issues of fact as to the parties' and a non-party's negligence and the proximate cause of plaintiff's injuries to show that even when the evidence was viewed in the light most favorable to the non-moving party, summary judgment was justified.

2. Standard of Review

This Court reviews *de novo* the trial court's grant of summary judgment to determine whether the court correctly determined that Plaintiffs could not proceed

under any reasonably conceivable set of circumstances susceptible of proof under the Complaint.[14] Summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case."[15]

3. Merits of Argument

a. The Factual Record when Discovery Closed

The following facts were on the record when discovery closed on April 29, 2016, and are presented here in the light most favorable to Plaintiffs, even those that are disputed by Defendant:

- Plaintiffs Jones and Potter are husband and wife;
- Oberly is Potter's mother and Yonker is his brother;[16]
- Potter, Oberly and Yonker were tenants of Defendant's Pine Valley apartment complex;[17]
- At some point, they stopped paying the rent on the apartment;[18]
- Potter made an appointment to go to Pine Valley to make a payment towards the rent;[19]
- Jones, Potter, Oberly and Yonker went to the apartment complex office on February 6, 2013 to make the rent payment and when they arrived all four went in together;[20]

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[14] *Kofron v. Amoco Chemicals Corp.*, 441 A.2d 226, 227 (Del. 1982).
[15] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[16] Jones transcript at 7:16 at B7.
[17] *Id.* at 8:19 at B8.
[18] *Id.* at 10:10 at B10.
[19] *Id.* at 13:20 at B13.
[20] *Id.* at 17:21 at B17.

- Jones, Potter, Oberly and Yonker walked through the reception area and into the "inner office" where apartment complex manager Greenlee was sitting at her desk against the left (south) wall of the office;[21]
- Potter offered to make a cash payment of $500 but Greenlee said she could not accept cash and that he needed to get a money order;[22]
- So Potter and Yonker left to get the money order and Jones and Oberly remained behind in the office;[23]
- There were chairs next to Greenlee's desk but those "had stuff on them;"[24]
- Oberly tried to engage Greenlee in conversation but "she wasn't very talkative" and "was busy doing her thing" so Oberly and Jones "just stood around;"[25]
- There was a small electric space heater, approximately one foot square, that was sitting in the center of the room with two or three feet of clearance all around it;[26]
- Jones said she and Oberly "probably" noticed the space heater when Potter and Yonker left to get the money order and she and Oberly moved about in the room[27] and as she and Oberly moved about the office while waiting they walked "past" "behind" and "around" the space heater sitting in the middle of the room;[28]
- Jones said Greenlee never offered them a chair and neither she nor Oberly ever asked to sit down;[29]
- Potter and Yonker returned after approximately 20 minutes but Yonker left and only Potter came back into the office;[30]
- Potter went to Greenlee's desk to fill out the money order while Jones and Oberly stood between Greenlee's desk and the space heater;[31]

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[21] *Id.* at 18:1-21:23 at B18-B21.
[22] *Id.* at 25:8 at B25.
[23] *Id.* at 25:16 at B25.
[24] *Id.* at 25:23 at B25.
[25] *Id.* at 27:5 at B27.
[26] *Id.* at 29:14 at B29, 31:3-14 at B31, 39:15 at B39.
[27] *Id.* at 31:19-32:5 at B31-B32.
[28] *Id.* at 32:12 at B32.
[29] *Id.* at 41:14 B41.
[30] *Id.* at 33:11 at B33; Greenlee transcript 54:20 at B176.

- Jones looked over at Oberly as she "pranced" about the office and saw Oberly's right foot hit the space heater, Jones reached for Oberly and both fell to the floor;[32]
- Maintenance man Clyde Spinelli, Jr. had come into the office and was sitting in a chair near the door when Oberly and Jones fell;[33]
- Spinelli didn't have to clear anything off that chair before he sat down in it;[34]
- There was also an empty chair pushed up to desk across from Greenlee's desk;[35]
- Jones did not at the time think that Oberly needed to sit[36] and she, Jones, never suggested to Oberly that she sit down at the desk;[37]
- Oberly never complained and never showed signs that she was uncomfortable, she just kept shifting her legs and moving around[38] and Jones could not think of any reason why Oberly would not have seen the space heater before the fall.[39]

b. Plaintiffs' Allegations against Defendant

Plaintiffs' Complaint alleged that Defendant:

- Created a dangerous condition by placing a space heater on the floor of the office;[40]
- Failed to provide some "type of [seating] arrangement" for Plaintiffs with actual or constructive knowledge that Jones and Oberly would have to stand for over 40 minutes, and that this would cause Oberly to make "involuntary movement[s]" which would place her in contact with the space heater;[41] and

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[31] *Id.* at 35:11-36:18 at B35-B36.
[32] *Id.* at 38:13-39:2 at B38-B39.
[33] *Id.* at 40:13 at B40.
[34] *Id.* at 41:3 at B41.
[35] *Id.* at 41:19 at B41.
[36] *Id.* at 42:9 at B42.
[37] *Id.* at 43:9 at B43.
[38] *Id.* at 45:1-22 at B45.
[39] *Id.* at 46:14 at B46.
[40] D.I. 1 at ¶19.
[41] D.I. 1 at ¶19b.

- Failed to conduct "the business meeting in a non-negligent manner in terms of making the office safe to transact business."[42]

c. Defendant's arguments for Summary Judgment

The arguments raised by Defendant in its summary judgment Motion that remain relevant are that:

- Even when viewed in a light most favorable to Plaintiffs, the record facts do not support their allegations against Defendant or directly contradicts them;[43]
- As business invitees, Defendant owed Jones and Oberly a duty to exercise reasonable care to protect them from foreseeable dangers they might encounter while on Defendant's property, but that duty does not completely absolve them from their own responsibility to maintain a proper lookout;[44]
- Questions regarding the existence of negligence are generally reserved for the jury, but this case is one of those "rare instances" when the facts permit reasonable persons to draw but one inference thus making it appropriate for the Court to enter judgment;[45]
- The factual record, even when viewed in the light most favorable to Plaintiffs, adequately supports the proposition that "there [are] no genuine issue[s] of fact relating to the question[s] of negligence and that the proven facts preclude the conclusion of negligence on [Defendant's] part;[46]
- The factual record cannot support a finding that Defendant breached its duty to its business invitees or, in the alternative, that it was Defendant's and not Oberly's negligence that proximately caused Jones' injury;[47]

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[42] *Id.* at ¶19c.
[43] D.I. 22 at ¶3.
[44] *Id.* at ¶4.
[45] *Id.* at ¶5.
[46] *Id.*
[47] *Id.*

- Plaintiffs bore the ultimate burden to demonstrate all of the elements of their claims, including the existence of a dangerous condition;[48] and
- Conceding for purposes of its Motion (only) that Oberly actually did trip over the heater, the record is clear that Jones thought the space heater was open and obvious and that both Oberly and Jones were well aware of its placement with, as Jones described it, adequate clearance around it and that as the record now stands, Plaintiffs cannot establish that the location and placement of the space heater constituted a dangerous condition.[49]

d. Plaintiffs' arguments in opposition to Summary Judgment

In Plaintiffs' response to Defendant's Motion, the relevant arguments were that:

- There were questions of negligence in this case that "can only be answered by the jury;"[50]
- Although Defendant (raised the affirmative defense) of the negligence of another in its Answer and is now stating "all the negligence" is on Oberly, that Defendant "did not third party in Oberly;"[51]
- Whether Oberly was negligent is irrelevant per 10 *Del.C.* §6301, "Delaware's joint and several liability statute" because what must be shown under that statute is that "two separate tortfeasors contribute[d] to the same injury;"[52]
- The *Restatement (Third) of Torts* places the burden of joining "any other potential responsible person on the defendant"[53] and the *Restatement (Third)* "does not permit the responsibility of a non-party … to be submitted to the factfinder;"[54] and

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[48] *Id.* at ¶6.
[49] *Id.*
[50] D.I. 24 at ¶3.
[51] *Id.* at ¶4.
[52] *Id.* at ¶5.
[53] *Id.* at ¶7.
[54] *Id.* at ¶10.

- As a "worst case scenario," that Plaintiffs only need to show that Defendant was "1% percent" negligent.[55]

e. Invoking the *Restatement (Third) of Torts*

Defendant subsequently brought to Plaintiffs' attention that their Response to the Motion contained "a significant error of law" before writing to the trial court to argue that "a major portion" of Plaintiffs' argument in their Response was predicated upon the *Restatement (Third) of Torts* and that in *Riedel v. ICI Americas Inc.*[56] this Court had declined to adopt *any* sections of the *Restatement (Third)* thus that remains the law in Delaware.[57] Plaintiffs' letter to the court in response stated that Delaware courts are "at best … not fond of" the *Restatement (Third)*, however the applicable sections of the *Restatement (Third)* are identical or "virtually identical" to those of the *Restatement (Second) of Torts*, as to the "fundamentals of joint and several liability."[58]

f. Decision of the Superior Court

Following consideration of the facts set forth in the papers and at oral argument - in a light most favorable to Plaintiffs – the trial court found that Defendant did not offer seats to Oberly and Jones[59] and that there was nothing

[55] *Id.* at ¶12.
[56] 968 A.2d 17, 20 (Del. 2009).
[57] D.I. 25.
[58] D.I. 26.
[59] Hearing transcript at 16:7 at B113; D.I. 27 at ¶3.

unusual about the placement of the small space heater in the office[60] before holding that:

- Movant bears the burden to establish the "nonexistence of a material issue of fact"[61] and upon such a showing the non-moving party must then establish a genuine issue of material fact exists;[62]
- There are no "genuine issues of material fact of moment here" largely because "there is agreement as to what happened;"[63]
- Negligence claims are "particularly resistant to resolution through summary judgment"[64] and unresolved issues of fact as to negligence and proximate cause are usually questions of fact for the jury[65] but in rare cases summary judgment is appropriate and this is one of those cases;[66]
- In this business invitee scenario, Defendant had a duty to Jones and Oberly to protect them from dangers known to exist as well as those which could be discovered with "reasonable care;"[67]
- Assuming for the purposes of the Motion that the space heater was a dangerous tripping hazard, Defendant's duty specific to Jones was to protect her from the need to rescue Oberly not from Oberly's "fall itself"[68] but Defendant correctly stated that it had no duty to warn or protect its invitees from an open and obvious danger and the space heater was such a hazard;[69]
- Here the "danger" that created the risk of harm was visible, well known or discernible by casual inspection by persons of ordinary intelligence[70] and was a "danger" that was so apparent that the invitee could reasonably

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[60] *Id.* at 16:18 at B113.
[61] *Id.* at 18:3 at B115.
[62] *Id.* at 18:5 at B115; D.I. 27 at ¶7.
[63] *Id.* at 18:7 at B115.
[64] *Id.* at 18:13 at B115.
[65] *Id.* at 18:15 at B115.
[66] *Id.* at 18:21 at B115; D.I. 27 at ¶8.
[67] *Id.* at 19:7 at B116; D.I. 27 at ¶9.
[68] *Id.* at 19:15 at B116.
[69] *Id.* at 19:21 at B116; D.I. 27 at ¶10.
[70] *Id.* at 20:2 at B117.

be expected to notice it and protect herself against it because the condition itself constituted adequate warning.[71]

The trial court further held that it was clear to the court in this case that the court could determine as a matter of law whether a dangerous condition existed and whether the danger was apparent to plaintiff[72] after finding that:

- Jones had testified that she and Oberly saw the space heater on the floor before the fall and described its location with specificity;[73]
- The space heater was not hidden or difficult to see;[74] and
- The evidence showed that both women knew it was there and had "successfully maneuvered around" it as they waited, thus demonstrating they appreciated the "danger" of tripping and falling over it.

Therefore, the court held that after having clearly noticed it, Oberly could be expected to protect herself from falling over it[75] and that no one "would reasonably expect to have to protect Ms. Jones from having to rescue Ms. Oberly as a result of her potential contact with it."[76] The court also held that having Oberly stand for 40 minutes had nothing to do with the determination of negligence,[77] instead the question is actually the space heater and the danger it posed.[78]

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[71] *Id.* at 20:6 at B117; D.I. 27 at ¶10.
[72] *Id.* at 20:10 at B117.
[73] *Id.* at 20:17 at B117.
[74] *Id.* at 21:7 at B118.
[75] *Id.* at 21:17 at B118; D.I. 27 at ¶11.
[76] *Id.* at 21:19 at B118; D.I. 27 at ¶11.
[77] *Id.* at 22:14 at B118.
[78] *Id.* at 22:18 at B119; D.I. 27 at ¶13.

g. Plaintiffs' Motion for Reargument

Plaintiffs moved for Reargument, arguing in relevant part that:

- Even though the court "appears to have concluded" that Oberly was basically or entirely at fault, such a finding should not end the case;[79]
- That there was no showing of why 10 *Del.C.* §6301 does not apply thus Plaintiffs must only show 1% of negligence by Defendant;[80] and
- That *Koutoufaris v. Dick*[81] stands for the proposition that *Restatement (Second)* §343A(1) should apply as to Defendant's anticipation of harm to its invitees despite the obviousness of the danger.[82]

In its Order denying that Motion, the trial court held in relevant part that Plaintiffs' motion offered no record evidence to support that any of the factual disputes raised in their argument were real[83] and that the Motion was simply a "rehash" of Plaintiffs' prior arguments.[84]

h. Plaintiffs' Arguments on Appeal

Turning now to Plaintiffs' Opening Brief to this Court, Defendant respectfully submits that the factual arguments therein were unavailing below and are unavailing on appeal. Moreover, those arguments simply do not address the issue on appeal which is whether the trial court erred as a matter of law by granting summary judgment to Defendant.

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[79] D.I. 29 at ¶1.
[80] *Id.* at ¶3.
[81] 604 A.2d 390 (Del. 1992).
[82] D.I. 29 at ¶1.
[83] D.I. 32 at ¶4.
[84] *Id.* at ¶5.

The trial court correctly concluded that Plaintiffs' claim that Defendant's failure to provide seating[85] was not actionable. Further, there is no dispute that Defendant had a duty to make its premises reasonably safe for its business invitees or that Jones was not an invitee.[86] Nor is there a question that to sustain their action alleging a breach of that duty, Plaintiffs had to show that:

- There was an unsafe condition on Defendant's premises;
- The unsafe condition caused Plaintiffs' injuries; and
- Defendant had notice of the unsafe condition or should have discovered it by a reasonable inspection.[87]

Defendant raised several issues in its dispositive motion, including that on the closed factual record of this case Plaintiffs would be unable to prove that the placement of Defendant's space heater was a dangerous condition when that record reflected that Jones thought the space heater was open and obvious and that both she and Oberly were well aware of its location with, as Jones described it, adequate clearance around it.[88]

The trial court held that in spite of the overwhelming propensity to rule otherwise, that on the facts in this case it was appropriate to conclude as a matter of law that Defendant had no duty to warn or protect Jones and Oberly from the space

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[85] D.I. 1 at ¶19b.
[86] *DiOssi v. Maroney,* 548 A.2d 1361, 1365 (Del. 1988).
[87] *Hazel v. Delaware Supermarkets, Inc.,* 953 A.2d 705, 709 (Del. 2008); *Talmo v. Union Park Auto.,* 38 A.3d 1255 (Del. 2012).
[88] D.I. at ¶6.

heater because, to the extent it even was a "danger," it posed an open and obvious hazard.[89] In reviewing the decision of the court below, this Court is "free to draw [its] own inferences in making factual determinations and in evaluating the legal significance of the evidence."[90] The facts of record, including any reasonable inferences to be drawn therefrom, must be viewed in the light most favorable to the nonmoving party.[91] But this Court does not have to accept "conclusory allegations unsupported by specific facts, nor do we draw unreasonable inferences in the plaintiff's favor."[92] In a case such as this where the evidence "is merely colorable, or is not significantly probative, summary judgment may be granted.[93] In the view of this Court

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.[94]

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[89] D.I. 27 at ¶12.
[90] *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996).
[91] *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 191 (Del. 2009).
[92] *Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1160 (Del. 2010)
[93] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986).
[94] *Burkhart,* 602 A.2d at 59.

At page 11 of their Opening Brief, Plaintiffs state that "[a]ny negligence on the part of Oberly would be joint and several with the negligence of the [Defendant]." Plaintiffs offer no support for this proposition nor do they explain how it is germane to issue on appeal. Having raised this issue below without success, it seems that Plaintiffs continue to misapprehend Delaware's *Uniform Contribution Among Tortfeasors Law*.[95] That law has nothing to do with determination of liability. Rather, "'[i]t permits contribution among all tortfeasors whom the injured person could hold liable jointly and severally for the same damage or injury to his person or property'. In short, it is joint or several *liability*, rather than joint or concurring *negligence*, which determines the right of contribution."[96]

Plaintiffs' factual arguments at pages 11-12 of their Opening Brief are equally unavailing and the argument at page 12 that a finding of 1% negligence against Defendant means that Plaintiffs can recover "full compensation" from Defendant is both incorrect and inapplicable to the issue on appeal. Likewise, the cite to *Koutoufaris v. Dick*[97] at page 12 of the Brief is irrelevant to the issue on appeal.

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[95] 10 *Del.C.* § 6301 *et seq.*
[96] *Lutz v. Boltz,* 100 A.2d 647, 648 (Del. Super. 1953)(emphasis in the original).
[97] 604 A.2d 390 (Del. 1992).

Plaintiffs seem to be arguing that "joint and several liability" has some relevance to the determination of comparative negligence. Pursuant to the Delaware statute, the apportionment of comparative negligence can only be considered by the trier of fact after the elements of each actor's individual negligence (duty, breach of duty, and proximate causation) have first been determined.[98] Here, the trial court summarily determined Plaintiffs could not prove those elements.

Equally unavailing is Plaintiffs' cite to *Spencer v. Wal-Mart Stores E., LP*,[99] at page 13 of the Brief. In *Spencer,* the plaintiff was injured when she walked through a stream of water in the defendant's parking lot and purportedly slipped on some ice that had formed under the stream.[100] One of the three issues on appeal was whether the trial court gave an improper jury instruction as to plaintiff's knowledge of the hazardous condition. The instruction given allowed for the landowner's duty to be satisfied if a warning is given but still required the jury to consider the degree of plaintiff's secondary assumption of risk as part of its determination of her comparative fault.[101] On appeal, this Court held that plaintiff had secondarily "assumed the risk of proceeding through the water" when she walked through the stream instead of using the sidewalk thus plaintiff was aware of

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[98] *Moffitt v. Carroll*, 640 A.2d 169, 175 (Del. 1994). *See also* 10 *Del.C.* § 8132.
[99] *Spencer v. Wal-Mart Stores E., LP*, 930 A.2d 881, 886 (Del. 2007).
[100] *Id.*
[101] *Id.* at 886.

defendant's breach and unreasonably chose to encounter the risk.[102] Again, that issue has no relevance to this appeal; the holding below was not that Jones or Oberly assumed a risk, rather it was that to the extent there was a "danger" it was open and obvious.

Equally unavailing on the question before this Court is Plaintiffs' citation to *Patton v. Simone*[103] at page 13 of their Opening Brief. Defendant Equifax was commissioned by the premise liability carrier to conduct a general liability survey and building inspection "in conjunction with" plaintiff employer's "on-going loss control program." The *Patton* court "formally adopted" the *Restatement (Second) of Torts* §324A as Delaware law in consideration of Equifax's liability to plaintiff. Section 324A subjects a defendant who renders services to another to liability to a third person if the defendant failed to exercise reasonable care in that undertaking if:

- Defendant's failure to exercise reasonable care increased the risk of harm; or
- Defendant undertook to perform a duty owed by the other to the third person; or
- Plaintiff's harm was because of her reliance upon of the other or the third person upon defendant's undertaking.[104]

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[102] *Id.*
[103] *Patton v. Simone*, 626 A.2d 844, 849 (Del. Super. 1992).
[104] *Restatement (Second) of Torts* §324A (1965).

In this case the trial court did not reach consideration of Section 324A nor did it need to once it concluded that Plaintiffs could not as a matter of law support their allegations of the existence of a dangerous condition. Moreover, the holding in *Patton* was that plaintiff had to show that defendant Equifax assumed an obligation or intended to render services for the benefit of another.[105] Again, that does not comport with the issue on appeal or the facts of this case.

Plaintiffs' citations to *Chubb v. Harrigan*[106] and *Woods v. Prices Corner Shopping Ctr. Merchants Ass'n*[107] on page 14 of their Brief are inapposite to the question now before this Court. Both of those cases pertained to "dangers associated with natural accumulations of ice and snow" which were unquestionably considered to be a dangerous condition that was open and obvious. Moreover, Chubb acknowledged that there are "rare instances" when issues of contributory negligence do not have to go to the jury.[108]

Plaintiffs cited to *Jardel Co., Inc. v. Hughes*[109] at page 14 of their Brief for the proposition that what happened to Jones was foreseeable. *Jardel* is too dissimilar from this case to be of any relevance on the question presented on appeal.

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[105] *Patton,* 626 A.2d at 849.
[106] *Chubb v. Harrigan,* 618 A.2d 90 (Del. 1992).
[107] *Woods v. Prices Corner Shopping Ctr. Merchants Ass'n,* 541 A.2d 574, 576 (Del. Super. 1988).
[108] *Chubb,* 618 A.2d 90.
[109] *Jardel Co., Inc. v. Hughes,* 523 A.2d 518, 525 (Del. 1987).

Jardel was about a heinous assault upon a store employee in a shopping mall parking lot by third party thugs and came before this Court on appeal of the trial court's failure to issue a directed verdict for defendants on the issue of liability (and several evidentiary rulings during the trial). Noting that the "crucial inquiry is the extent of the danger which a landlord must reasonably foresee," this Court adopted the standard set forth in Section 344 of the *Restatement (Second) of Torts*, which approves the concept that incidents of *criminal activity* provide a duty to foresee specific criminal conduct and concluded that although a property owner is "no more an insurer or guarantor of public safety than are police agencies, there is a residual obligation of reasonable care to protect business invitees from the acts of third persons."[110]

Defendant concedes that the Superior Court reached Plaintiffs' desired conclusion on similar facts in *Staedt v. Air Base Carpet Mart, Inc.*[111] cited by Plaintiffs on page 14 of their Brief. However, *Staedt* is neither persuasive nor determinative here because a single case cannot support the proposition that after its review of the evidence, again, in the light most favorable to Plaintiffs, the trial court's findings of fact and law are not supportable and the trial judge's

[110] *Jardel,* 523 A.2d at 524- 525.
[111] *Staedt v. Air Base Carpet Mart, Inc.,* 2011 WL 6140883 (Del. Super. 2011).

conclusions therefrom were not the product of an orderly and deductive reasoning process.[112]

Further, *Dilks v. Morris*[113] cited at page 15 of the Brief differs factually from this case because plaintiff fell into a *hidden* construction "ditch". *Cook v. E.I. Dupont De Nemours & Co.*[114] cited at page 15 of the Brief is also distinguishable. The issue in *Cook* was the control a property owner had over the employee of an independent contractor and relevant to this case, the court held after a bench trial that there was "no question" that plaintiff was aware of the dangers present, which makes it curious what additional evidence was provided at trial that the court did not already have when it denied defendant's summary judgment motion on the same issues.[115]

Beginning at page 17 of their Brief, Plaintiffs addressed the cases that the trial court analyzed on page 8 of its written Order largely in an attempt to distinguish those cases from the facts presented here to support the proposition that this case is not about "a blatant ignoring of the obvious."[116] Plaintiffs have again missed the point of the issue on appeal by arguing, incorrectly, that the trial court erred by finding there was no liability as to Defendant. The trial court did not pass

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[112] *Stone v. Stone*, 550 A.2d 35 at *1 (Del. 1988).
[113] *Dilks v. Morris*, 2005 WL 445530, at *1 (Del. Super. 2005).
[114] *Cook v. E.I. Dupont De Nemours & Co.*, 2003 WL 21246544 (Del. Super. 2003).
[115] *Id.* at *4.
[116] Opening Brief at p.19.

judgment on the relative liability of the parties; it simply held that Plaintiffs failed, as a matter of law, to meet the requisite threshold showing of material facts in support of an element of their claims against Defendant. Moreover, Defendant disagrees with Plaintiffs' argument that the court's questioning as to why Jones and Oberly stayed in the room "presupposes the space heater was a dangerous condition."[117] A closer reading of the hearing transcript reveals that those questions were so that the court could understand that absent some sort of custodial relationship or even coercion, why Jones and Oberly didn't simply leave the office with Potter and Yonker.[118]

Appellee respectfully submits that the trial court's holding is on all fours, as to an open and obvious hazard doctrine, with the seminal Delaware case of *Niblett v. Pennsylvania R. Co.,* which held that "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."[119] More importantly, by finding that no material facts remain in dispute as to the "danger" posed by the space heater, this case comports with the holding in *Polaski v. Dover Downs, Inc.*[120] thus allowing the trial court to conclude

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[117] *Id.* at p.20.
[118] Hearing transcript at p.11 at B108.
[119] 158 A.2d 580, 582 (Del. Super. 1960).
[120] 49 A.3d 1193 (Del. 2012).

that Plaintiffs could not sustain their burden of proof as a required element of their case.

CONCLUSION

For all of the factual and legal arguments set forth herein, Defendant below and Appellee respectfully submits that the trial court's decisions were not in error and thus should be AFFIRMED.

Respectfully submitted,

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