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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S CORRECTED OPENING BRIEF ON APPEAL

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DATED: November 10, 2014

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NATURE OF PROCEEDINGS

This is a claim for personal injuries stemming from an alleged accident on February 4, 2011. Plaintiff/Appellee, Kevin Brokus, was an employee of Oreck at Concord Square shopping center. He claimed that he slipped and fell on accumulated snow or ice while moving packages from a delivery truck to the Oreck store room. He filed suit against Concord Square Associates, LLC, the owner of Concord Square. Plaintiff alleged that the snow and ice created a hazardous condition.

The matter was tried to a jury from November 14-16, 2013 ("the first trial") and again on April 21, 2014 ("the second trial"). At the conclusion of the Plaintiff's case on November 15, 2013, Defendant moved for Judgment as a Matter of Law. The Court reserved decision and the matter proceeded to a jury.

Following the first trial, the Court *sua sponte* granted a new trial. On April 21, 2014, following the conclusion of the Plaintiff's case, the Defendant again moved for Judgment as a Matter of Law. The Court again reserved decision. On April 21, 2014, the jury returned a verdict in which it found that both parties were negligent and that both parties' negligence proximately caused the incident. The jury apportioned the negligence 25 percent to Plaintiff and 75 percent to Defendant.

Thereafter, Defendant renewed its Motion for Judgment as a Matter of Law. On July 3, 2014, the Court issued a Memorandum Opinion (Ex. A) denying Defendant's renewed motion for judgment as a matter of law. Defendant timely filed this appeal.

The Plaintiff filed a cross-appeal. This is Defendant-Below/Appellant Concord Square Associates, LLC's Opening Brief on Appeal.

SUMMARY OF ARGUMENT

1. The Superior Court erred when it failed to grant Concord Square's Motion for Judgment as a Matter of Law because the undisputed evidence revealed that Concord Square did not retain actual or exclusive control over the area where Plaintiff Brokus claimed to have fallen. As such, Concord Square did owe a duty to its tenant.
2. The Superior Court erred when it failed to grant Concord Square's Motion for Judgment as a Matter of Law in that there was no evidence to support Plaintiff Brokus' allegations that Concord Square acted negligently. Brokus failed to meet his burden of proof when the only testimony or evidence on record was that both Concord Square and its tenant Oreck interpreted their lease provisions to include the dumpster area within the parameters of the "common areas" and for 13 years preceding this accident each acted in conformance with that interpretation. Where those dumpster areas were not within the common areas, the lease did not provide for snow or ice removal services. Brokus provided no evidence to support a claim that a reasonably prudent landlord would not have acted in accordance with that interpretation.
3. The Superior Court erred when it failed to grant Concord Square's Motion for Judgment as a Matter of Law in that no reasonable jury could conclude that Brokus' actions were not at least 51% of the causal negligence. Brokus

observed the "hazardous" condition (the accumulated snow and ice), recognized the danger of it, actually experienced the hazardous condition when he slipped while walking over it multiple times before his fall, failed to take any steps to remedy the hazardous condition despite there being a snow shovel within arm's reach, failed to report the condition, and then walked on it a seventh time.

STATEMENT OF FACTS

Concord Square Associates, LLC ("Concord Square") owns the Concord Square shopping center on Route 202 in New Castle County, Delaware. (A-20, A-44). Concord Square contracted with Capano Management, Inc. to lease stores and manage the property on its behalf. (*Id.*). Oreck Stores, Inc. is a tenant at Concord Square and has been since Concord Square opened in 1998. (A-19, A-45-46).

Concord Square is an L-shaped shopping center. Each unit has a rear entrance. (A-20, A-57). There is a dedicated fire lane delineated by striping. (A-20, A-47-48). Between each back entrance and the fire lane, there is a back area for the use of that tenant. (A-20, A-57). Each tenant is responsible for its own trash removal, i.e., procuring and maintaining the necessary trash dumpster for that tenant's use. (A-20, A-56). At the rear of a unit, each tenant is provided sufficient space for its dumpster. (A-20, A-55-56). Each dumpster is for the exclusive use of that tenant. (*See* A-20; A-61). In addition, tenant employees, such as those from Oreck, used that area for storage, receiving deliveries and "smoke breaks." (A-13-14, A-20, A-38, A-58).

Concord Square does not provide the dumpster. (A-20, A-56). Concord Square does not provide trash removal services. (*Id.*). Concord Square does not hold that area open to the public nor is any other tenant to use the rear-area of

another tenant's premise. (*See id.*). In short, Concord Square turns exclusive control of the rear-area over adjacent to each unit to each tenant. (*See id.*).

The lease between Concord Square and Oreck ("the Lease") documents that Concord Square will provide snow removal services to "common areas," including driveways, the fire lane and parking areas. (A-19, A-50-51). The lease further provides that Oreck is responsible for snow removal for all sidewalks associated with its premises. (A-21, A-48). As the Property Manager Jennifer Leonard testified, "we plow, they shovel." (A-22, A-58). In furtherance of this, Concord Square[1] provided snow removal services for the fire lane at the rear of the store. (A-24, A-58). However, the snow plows could not plow the areas where the respective tenant dumpsters were located. (*See id.*).

Plaintiff Kevin Brokus was an employee at Oreck on or about February 4, 2011. (A-9, A-31). On that day, he went out the back door for a smoke break. (*See* A-13-14). Sometime later, he responded to a knock on the back door of the store. (A-9, A-33). FedEx was making a delivery. (*Id.*). Mr. Brokus and the Manager on Duty, Derrick McFaye, exited the store to unload the truck. (A-9, A-35). The FedEx delivery driver would bring the packages to the edge of the truck and the Oreck employees would carry them into the Oreck store. (A-10). The

[1] The actual snow removal contract was between Capano Management Company, Inc. and Paoli Services; however, the contract was for the benefit of Concord Square Associates.

Manager was called back into the store to assist a customer and Brokus continued unloading the truck. (A-11).

Brokus was well aware of what he called a snow and ice accumulation. (A-10, A-34). He could see it. (*Id.*). He could also see the orange snow shovel near the rear entrance to the store. (A-15, A-41). On his first trip out to the truck and back to the store, while his Manager was still present, he had difficulty walking back and forth over the snow and ice. (A-14, A-35-36). He did not complain to his manager. (*See id.*). He did not use the shovel because "it wasn't [his] job." (A-13). The same held true for his second and third round-trips out to the truck. (A-10, A-35-36). After his fourth trip out to the truck and while on his way back into the store, i.e., his eighth time traversing the area, he allegedly slipped and fell. (*Id.*).

While the Emergency Room documents suggest that Brokus fell on the step itself, he testified that he fell in the area near the dumpster. (A-15-16, A-39). While he was waiting for his mother to come pick him up, he took the opportunity to walk outside again and snap some pictures of the doorway and the snow leading up to it. (A-15-16, A-37, 40-41). While doing this, he again had difficulty negotiating the snow and ice. (*Id.*). Neither Brokus nor his manager contacted the Property Manager, Capano Management Company, about the situation. (*See* A-23,

A-60). Indeed, this lawsuit was the first notice to Concord Square or Capano Management that Brokus claimed to have fallen. (*Id.*).

At the second trial, Brokus claimed that he traversed the area because he was afraid he would lose his job if he refused to do so. (A-42). He agreed that he had never made such an allegation before and agreed that he had no basis for that belief.

ARGUMENT I

THE SUPERIOR COURT ERRED IN DENYING CONCORD SQUARE'S MOTION FOR JUDGMENT AS A MATTER OF LAW ON THE ISSUE OF DUTY WHERE THERE WAS NO EVIDENCE THAT CONCORD SQUARE RETAINED ACTUAL CONTROL OF THE AREA WHERE PLAINTIFF FELL.

A. Question Presented

Whether the trial court erred when it denied Concord Square's Motion for Judgment as a Matter of Law where the undisputed evidence was that Concord Square, as a landlord, had not retained "actual control to the exclusion of the tenants" over the area where Brokus fell. This issue was preserved in the trial court in the motions for judgment as a matter of law made on November 19, 2013 and April 22, 2014 and in Defendant's Renewed Motion for Judgment as a Matter of Law. (D.I. 89).

B. Scope of Review

The Delaware Supreme "Court's standard of review from a ruling on a motion for judgment as a matter of law is whether under any *reasonable* view of the evidence, the jury could have justifiably found for the non-moving party." *Bell Sports, Inc. v. Yarusso*, 759 A.2d 582, 587 (Del. 2000) (emphasis added).

Said review is *de novo*. *Trievel v. Sabo*, 714 A.2d 742 (Del. 1998).

A determination as to the existence of a duty is a question of law. Questions of law are reviewed *de novo*. *AT&T Corp. v. Lillis*, 953 A.2d 241, 251-52 (Del. 2008).

C. Merits of Argument

Concord Square did not owe a duty relative to snow and ice removal to Brokus, an employee of a tenant who claimed to have been injured in an area over which Oreck, the tenant, had exclusive control.

This case sounds in negligence. To prevail on a negligence claim, a plaintiff must prove that: a defendant owed [him] a duty of care, the [defendant] breached that duty, and the breach proximately caused an injury." *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011). Thus, the burden of proof for each element of this case rested with Mr. Brokus.

Whether a duty exists is a question of law. *Id.* "If no duty exists, a trial court is authorized to grant judgment as a matter of law." *Keating v. Best Buy Stores, LP*, 2013 WL 8169756, at *2 (Del. Super. Ct. Mar. 28, 2013).

In the context of the duty of a landlord, this Court defined and limited that obligation almost fifty years ago. "[A] Landord owes to [its] tenants a duty of reasonable care as to natural accumulations of ice and snow in *common approaches and passageways over which he has retained control to exclusion of tenants*, so as to such areas reasonably safe." *Monroe Park Apartments Corp. v*

Bennett, 232 A.2d 105 (Del. 1967) (*emphasis added*). That duty does not apply to the case at bar.

It is appropriate to start with the lease between Concord Square and Oreck to determine whether Concord Square retained control to the exclusion of the tenants over the area in which Brokus claims to have fallen.[2] It did not. In this instance, the lease calls for Concord Square to retain control over the driveways, fire lane, and parking areas. (A-19, A-50-51). Contrary to the notation in the Superior Court decision, this accident did not occur in the fire lane. (A-10-11, 12, A-36).[3] The fire lane is delineated by striping. (A-20, A-47-48). According to Brokus, he fell outside the fire lane and within the dumpster area. (A-10-11, 12; A-36). Thus, by the terms of the lease, this was not an area over which Concord Square retained control. Moreover, the unrebutted testimony was that this area of the premises was for the exclusive use of Oreck. (A-20, A-61).

In *Monroe*, *supra*, the Court found that the landlord of a multi-apartment building had a duty, *in the absence of statute or agreement*, to remove natural accumulations of ice or snow from a walkway designed and used for the ingress and egress of tenants. *Id.* at 106 (emphasis added). The agreement, in the case at

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[2] In light of the Emergency Room records, Concord Square does not concede that Plaintiff fell where he claims to have fallen; however, for purposes of this appeal, Concord Square agrees that the Court must view the facts in a light most favorable to Brokus.

[3] *See* Mem. Opinion at 6. It appears that the trial court believes the entire area behind the Concord Square mall constituted the "fire lane." The trial court apparently over looked Ms. Leonard's testimony that the fire lane was striped when it concluded that the entire area behind the rear of the stores was a "fire lane."

bar, is the Lease. That Lease calls for snow removal from the common areas; with regard to the rear of the premises, the "common area" is limited to the fire lane.

Contract interpretation is generally a question of law. *See, e.g., Global Energy Finance LLC v. Peabody Energy Corp.*, 2010 WL 4056164, at *2 (Del. Super. Ct. Oct. 14, 2010). Where an element of a contract is subject to interpretation, extrinsic evidence of the contracting parties' conduct may be used by the court. *Id.* The trial judge advised the jurors that he would interpret the contract for them. He did not. However, in connection with the Renewed Motion for Judgment as a Matter of Law, he did. The trial court concluded that the lease provided no obligation on the part of Oreck to remove snow or ice from the rear area of the store. Such an interpretation is at odds with the unrebutted testimony regarding the intent and conduct of the signatories to the lease.

In determining whether a duty exists in the setting of a commercial landlord, the court will look at the totality of the circumstances. The issue is whether the landlord exercised *actual* control (as opposed to the right to control) over the area of the premises in question. As noted, "actual control " over premises "sufficient for liability in these circumstances in not compelled merely by lease provisions, but rather by the landlord's actual conduct." *Heaps v. Luna*, 2012 WL 7760048 (Del. Super. Ct. Dec. 31, 2012). There was no evidence on this record to support a claim that Concord Square exercised actual control over the area where Brokus

claims he fell. Indeed, the unrebutted evidence was to the contrary. Concord Square delineated the fire lane (over which it did exercise control) via striping. (A-20, A-47-48). Concord Square did not provide the requisite dumpsters; rather, each tenant procured its own dumpster for its exclusive use. (A-20, A-56). The back entrances were for the exclusive use of the respective tenants. (*See id.*). Tenants would complain if other tenants (or their employees) wandered into the complaining tenant's back area. (A-57). When faced with facts such as these, courts have routinely held that the landlord did not owe a duty to a tenant's employee or customer. *See, e.g.*, *Volkswagen of America v. Costello*, 880 A.2d 230 (Del. 2005); *Scott v. Acadia Realty Trust, et al.*, 2009 WL 5177152 (Del. Super. Ct. Dec. 8, 2009), *aff'd* 11 A.3d 228 (Del. 2010); *Heaps*, 2012 WL 7760048; *Lewis v. Route 13 Outlet Mkt.*, 1995 WL 654070 (Del. Super. Ct. Oct. 26, 1995), *aff'd* 1996 WL 313498 (Del. 1996); *Blair v. Berlo Vending Corp.*, 287 A.2d 696 (Del. Super. Ct. 1972).

As the Superior Court noted, the dumpster area behind the stores was not specifically defined in the lease. *See Mem. Op.* at 6-7. However, that fact is far from dispositive. Particularly instructive on this point is the decision in *Scott*, *supra*. Acadia Realty Trust (Acadia) owned Brandywine Towne Center and leased a portion of it to Target. A Target employee slipped and fell on ice in a parking lot. Looking at each of the provisions of the lease as well as the conduct of the

parties to the lease, the court concluded that the rights of Acadia were "subordinate" to those of Target and, hence, Acadia did not owe plaintiff a duty. The court noted that the lease provisions, while perhaps not ambiguous, were not silent as to certain elements of the claim, specifically, whose duty it was to remove ice and snow from the area of the parking lot where plaintiff fell. *Id* at *7. Similarly in this case, as Concord Square noted throughout the proceedings, the provisions of the lease and the conduct of the parties to it lead to but one conclusion: Concord Square did not retain active control over the rear dumpster-area of the Oreck premises. (*See, e.g.*, A-20, A-56).

One form of extrinsic evidence is the conduct of the parties. Another is the parties' interpretation of their respective obligations. *See, e.g.*, *Heaps*, 2012 WL 7760048. Before the Superior Court there was no evidence other than that both Oreck and Concord Square Associates interpreted the lease to divest Concord Square of any obligation to provide snow and ice removal from the rear dumpster area of the Oreck premises. First, the lease clearly requires Oreck to perform snow and ice removal services for those areas used by Oreck's customers, i.e., the front entrance. (A-21, A-48). Second, in the ten-plus years that Oreck had been a tenant, there was no documentation of any request by Oreck that Concord Square provide snow and ice removal services, or indeed, any maintenance services to that area. (*See* A-23-24, A-59). As Property Manager Jennifer Leonard testified, there

were multiple instances where tenants, including Oreck, contacted Capano Management relative to issues and requests at Concord Square. (A-24, A-52-53). Conspicuously absent from those communications was any inquiry, demand, or request about removing snow and ice from the rear dumpster areas. Thus, Oreck acted in a manner inconsistent with Brokus' current claim that Concord Square retained control over the area and had an obligation to remove snow or ice. Third, neither Brokus nor anyone on behalf of Oreck contacted Concord Square Associates to report this alleged fall. (*See* A-23, A-60). Again, this is inconsistent with any interpretation other than that Oreck and Concord Square Associates understood the rear dumpster area to be part of the Oreck premises.

In *Brown*, the Delaware Supreme Court found defendant did not owe a duty to plaintiff. *Brown v. F.W. Baird, L.L.C.*, 956 A.2d 642 (Del. 2008). Plaintiff was a delivery person who slipped and fell in the parking lot of a convenience store. Plaintiff filed suit against the snow removal contractor. *Id.* However, under the terms of the contract, the contractor was not required to remove snow until the convenience store requested the contractor to do so. *Id.* Since there was no request made, there was no duty to perform work and no duty owed to plaintiff. *Id.* Similarly, in *Spence*, the court found there was no duty owed to plaintiff when the evidence showed that defendant never plowed the front employee lot where

plaintiff fell. *Spence v. Layaou Landscaping, Inc.*, 2013 WL 6114873, at *8 (Del. Super. Ct. Oct. 31, 2013).

Here, the Lease agreement between Concord Square and Oreck supports the conclusion that the back area was for the exclusive use of Oreck. Each witness testified that the dumpster, which is located in the back area where the accident occurred, was for Oreck's exclusive use. (*See, e.g.*, A-13-14, A-20, A-38, 61). This was confirmed in testimony by Ms. Leonard. (A-20, A-61). While the back area was not specifically defined in the lease; the interpretation of a legal duty does not depend on it. There is no evidence that any other tenant used the back area where the accident occurred.

Similar to the facts of *Brown* and *Spence*, under the contract between Concord Square and Oreck, Concord Square was under no duty to remove snow or ice from the back area. Oreck did not at anytime before the accident request Concord Square to remove snow or ice from the back area. (*See* A-23, A-60). Nor did Concord Square ever remove snow or ice from the back area before the accident. (A-20, 21, A-59). Therefore, under a reasonable view of the evidence, a jury could not justifiably find that Concord Square would be responsible for removing snow and ice from the back area because the back area was used exclusively by Oreck.

ARGUMENT II

THE SUPERIOR COURT ERRED IN DENYING CONCORD SQUARE'S MOTION FOR JUDGMENT AS A MATTER OF LAW WHERE THERE WAS NO EVIDENCE THAT CONCORD SQUARE'S RELIANCE ON ITS INTERPRETATION OF THE RESPECTIVE OBLIGATIONS BETWEEN IT AND ORECK WAS UNREASONABLE.

A. Question Presented

Whether the trial court erred when it denied Concord Square's motion for judgment as a matter of law where the undisputed evidence was that Concord Square and its tenant, Oreck, interpreted the lease's definition of "common areas" to exclude the dumpster area behind the Oreck store and there was no evidence that a reasonably prudent landlord would have acted differently under the circumstances. This issue was preserved in the trial court in the motions for judgment as a matter of law made on November 19, 2013 and April 22, 2014 and in Defendant's renewed motion for judgment as a matter of law. (D.I. 89)

B. Scope of Review

The Delaware Supreme "Court's standard of review from a ruling on a motion for judgment as a matter of law is whether under any *reasonable* view of the evidence, the jury could have justifiably found for the non-moving party." *Bell Sports, Inc. v. Yarusso*, 759 A.2d 582, 587 (Del. 2000) (emphasis added).

Said review is *de novo*. *Trievel v Sabo*, 714 A.2d 742 (Del. 1998).

C. Merits of the Argument

Concord Square acted reasonably as a matter of law.

As noted above, the evidence mandated the conclusion that Concord Square did not retain control over the area in question and, as such, owed no duty to Brokus. That conclusion should end the inquiry. However, the facts in this case compel another conclusion as well: that Concord Square Associates acted reasonably as a matter of law.

Where a duty is imposed upon a landlord, that duty is not absolute; that is, there has been no abrogation of the "negligence" standard. Delaware law measures a duty owed as a duty to act as a reasonably prudent person or entity would under the circumstances. *Delmarva Power & Light Co. v. Burrows*, 435 A.2d 716, 718 (Del. 1981). Hence, the focus of any inquiry would be on the actions of landlord whether those actions were reasonable under the totality of the circumstances.

Ms. Leonard testified that Capano Management was the property management company for Concord Square Associates. (A-18-20, A-44). There was a contract by which Capano Management agreed to manage the property on behalf of Concord Square to include, in turn, contracting for snow and ice removal services for the common areas. (A-19-20, A-50-51). The only evidence on record is that Concord Square Associates and Capano Management interpreted the lease to exclude the rear dumpster area from the "common areas" over which snow plow

services would be provided. (A-24, A-58). To that end, the evidence was that the landlord did not provide such services to the tenants. (*Id.*). And, that was the crux of case: were the actions (or inactions) of the landlord reasonable under the circumstances? The burden was on Brokus to show that it was not. He failed to do so and judgment as a matter of law was proper.

Concord Square acted in conformance with its interpretation of the respective duties under the lease. Although his counsel never framed the question in this fashion, by necessity the gist of Brokus' argument was that Concord Square's interpretation of the lease was unreasonable under the circumstances. What evidence was there to support that claim? Brokus called no witness from Oreck to rebut Concord Square's interpretation of the lease. Indeed, Oreck's conduct over a 13 year period before this accident—coupled with its failure to even report this accident—leads to the conclusion that it did not interpret the lease to require the landlord to shovel the snow from the dumpster area. There was no evidence presented and no argument actually made that the interpretation by the signatories to the contract of their respective duties under the contract was an unreasonable one. In the absence of any such evidence, there could be no "negligence" found on the part of Concord Square.

ARGUMENT III

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

A. Question Presented

Whether the trial court erred when it denied Concord Square's motion for judgment as a matter of law where the undisputed evidence was that Plaintiff Brokus saw the hazardous condition, appreciated it specific danger, actually experienced the condition when he slipped while walking on it and, nevertheless, voluntarily walked across the snow for a seventh time. This issue was preserved in the trial court in the motions for judgment as a matter of law made on November 19, 2013 and April 22, 2014 and in Defendant's Renewed Motion for Judgment as a Matter of Law. (D.I. 89).

B. Scope of Review

The Delaware Supreme "Court's standard of review from a ruling on a motion for judgment as a matter of law is whether under any *reasonable* view of the evidence, the jury could have justifiably found for the non-moving party." *Bell Sports, Inc. v. Yarusso*, 759 A.2d 582, 587 (Del. 2000) (emphasis added).

Said review is *de novo*. *Trievel v Sabo*, 714 A.2d 742 (Del. 1998).

C. Merits of Argument.

Brokus' actions constituted causative comparative negligence of at least 51%.

Delaware has adopted the modified comparative negligence standard. 10 *Del. C.* § 8132 (2014). This standard bars plaintiffs' recovery for damages from negligence if his or her own contributory negligence is greater than the defendant's negligence. *Id.* Following the close of the Plaintiff's case, Concord Square moved for judgment as a matter of law on the grounds that Brokus' "comparative" negligence exceeded any negligence on its part. Questions of the degree of negligence are ordinarily one for the jury unless "but one conclusion can be drawn or inferred from the facts." *Coker v. McDonald's Corp.*, 537 A.2d 549, 551 (Del. 1987). Stated differently, "in rare cases, however, where the evidence requires a finding that a plaintiffs' negligence exceeded that of the defendant, it is the duty of the trial just, as a matter of law, to bar recovery." *Trievel v. Sabo*, 714 A.2d 742 (Del. 1998). Such is the case at bar.

In *Trievel*, *supra*, this Court affirmed the grant of a Motion for Judgment as a Matter of Law. Trievel pedaled her bike across Delaware Route 1 where she was struck and killed by a vehicle driven by Sabo. The evidence presented suggested that a vehicle in the right lane of travel had slowed to allow Trievel to cross which would have alerted Sabo to the condition ahead and that Sabo may have changed

lanes in response to that. *Trievel*, 714 A.2d at 746. The trial court and this Court rejected those arguments as being contradicted by other evidence in the case. *Id.*

Here, only one conclusion can be reasonably inferred the facts: Brokus' conscious awareness of the hazardous conditions, his refusal to even attempt to use an available snow shovel for any purpose other than holding the door open while he took post-incident photographs, and his knowing determination to walk across the area repeatedly constituted causal negligence which far outweighed any negligence of Concord Square. Plaintiff testified that he saw the condition of the back area before February 4, 2011. (A-10, A-34). He was able to see what he called an accumulation of snow and ice. (*Id.*). On that date, he knowingly traversed that area *seven* times before he claims to have fallen and, indeed, twice thereafter. (A-10, A-35-36). He testified that the area was slippery, he had difficulty walking back and forth and he knew it was dangerous. (*Id.*). He did not complain to the manager on duty (who was present and, at least initially, assisting with the unloading). (A-14, A-35-36). He did not ask the FedEx driver to move around front where the goods could be brought in the front door. Instead, he walked over the snow and ice. (*Id.*).

Plaintiff's sole explanation for his actions was his eleventh hour allegation that he would have lost his job if he refused to unload the truck. (A-42). The trial court concluded that the same could constitute a "compelling" reason to walk over

the ice and snow. *Mem. Op.* at 8. The trial court appears to conclude that the absence of such a "compelling" reason was a prerequisite to a grant of a motion for judgment as a matter of law. *Id.* (citing *Helm v 206 Massachusetts Avenue, LLC.*, 2013 WL 6591544 (Del. Super. Ct. Dec. 12, 2013)). The *Helm* case does not turn on the existence of a compelling reason and Concord Square can find no authority so concluding.

Moreover, the evidence mandates the conclusion that Brokus was never threatened with the loss of his job. Indeed, since he did not complain to the manager on duty, he agreed that there was no real basis for his allegation.[4] All claims of negligence, including comparative negligence are to be judged on the "reasonable person" standard. No reasonable person when faced with the situation Brokus contends he encountered would both fail to take any precautions for his own safety and knowingly ventured across the snow and ice seven times.

In *Helm*, the plaintiff fell down a flight of stairs at a rental unit. *Helm*, 2013 WL 6591544.[5] In granting summary judgment, the Superior Court concluded that plaintiff's testimony that she was aware the stairwell was very dark and she realized there was a safety issue yet proceeded anyway precluded her recovery

[4] Plaintiff further agreed that he did not raise this claim of a threatened job loss as an explanation for his actions until the second trial. However, the 'revisionist history' nature of that testimony relates to the credibility of the testimony.

[5] That matter is presently on appeal to this Court, No. 146, 2014.

under either the theory of comparative negligence or primary assumption of the risk. *Id.*

Here, the facts are remarkably similar to *Helm*. Like Mrs. Helm, Brokus perceived the hazardous conditions, appreciated the danger, and yet proceeded. (A-10, A-34). Unlike Mrs. Helm, Brokus actually *experienced* the ramifications of the conditions when he slipped and slid about during his first, second and third round trips to the truck. (A-14, A-35-36).

The court in *Helm* further concluded that Mrs. Helm's assumed the risk of her own injury and that it was primary assumption of the risk. Candidly, the specific defense of primary assumption of the risk was not raised in Concord Square's Answer to this first-notice lawsuit. However, the trial court read Concord Square's Renewed Motion for Judgment as a Matter of Law to rely upon the *Helm* decision as support for a proposition that Brokus assumed the risk of his injury and that the same constituted primary assumption of the risk. *Mem. Op.* at 11-12. The trial court declined to apply the rationale of the *Helm* case because it found no "bargained-for agreement" shifting the risk of harm to the plaintiff. *Id.* In so concluding, the trial court seemed to suggest that a specific consent is necessary. Rather, the case law is to the effect that a party's consent to the specific risk of harm "can be manifested by circumstantial words or conduct." *Croom v. Pressley*, 1994 WL 466013 (Del. Super. Ct. July 29, 1994). Brokus' circumstantial words

through his failure to report the condition he encountered and his conduct through knowingly continuing to walk across a dangerous patch of snow and ice after having narrowly avoided injury rise to the level of primary assumption of the risk. *See, e.g.*, *Brady v. White*, 2006 WL 2790914 (Del. Super. Ct. Sept. 27, 2006).

CONCLUSION

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

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