EFiled: Jan 06 2017 12:29PM EST
Filing ID 60030944
Case Number 442,2016

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' REPLY BRIEF

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Date: January 6, 2017

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases:

Statutes:

Other Authorities:

ARGUMENT

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

A. Defendant misconstrues the importance of joint and several liability in this case.

Initially, Plaintiffs find it interesting that Defendant has stated its version of the facts. As the Court is well aware, on a case such as this dealing with summary judgment the facts of the record, including any reasonable inferences to draw therefrom, must be viewed in the light most favorable to the non moving party. *LaPoint vs. AmerisourceBergen Corp., 970 A.2d 185 (Del. 2009)* However, hopefully, This Court will allow this case to be presented to a jury. It would be nice to have the jury hear a version of events, specifically the differences between Greenlee and Spinelli, Jr. Defendant did not feel the need to include Spinelli, Jr.'s deposition even though he stated he was present throughout the course of events from the time Plaintiffs arrived until the fall occurred.

In terms of joint and several liability, frankly, Plaintiffs do not understand what Defendant is arguing. Obviously, Plaintiffs believe Defendant was negligent. The Plaintiffs would not be in This Court, let alone filing suit if they believed otherwise. There are three realistic alternatives for the jury. One is they find Defendant solely liable. The second is they find Oberly solely liable. The last is

they find both Defendant and Oberly liable. There can be no dispute that if the jury finds negligence and proximate cause on the part of Oberly and Defendant, 10 Del. C. § 6301 *et seq.* applies. Any negligence and proximate cause on the part of Oberly and Defendant contributed to the same injury to Plaintiff Jones. Just as obviously, the statute and Restatement cited in Plaintiffs' Opening Brief, mandate each are responsible for the full amount of damages to the Plaintiffs. This is why it is called joint and **several** liability.

Obviously, what makes this case different from the normal fact pattern is there is no realistic argument of comparative negligence against Plaintiff Jones. Every case cited by the Trial Court, the case cited by the Defendant, and the cases cited by Plaintiffs deal with the scenario where it is a question of whether the Plaintiff can proceed to trial where the issue is comparative negligence, if any, between his/her behavior and defendant's behavior. Since there is no dispute Plaintiff Jones is in any way negligent in this matter, Plaintiffs have no idea how Defendant can argue that a finding of 1% negligence against Defendant means Plaintiffs cannot recover full compensation from Defendant.

Plaintiffs also find it remarkable that Defendant discounts *Koutoufaris v. Dick, 604 A.2d 390 (Del. 1992)* as being irrelevant to this case. From the time it became law in 1992, it is the seminal case even if plaintiff knows of a hazard, it is still a fact question when the defendant also has knowledge or should have had

knowledge of the same hazard. This appeal is primarily based on the premise that it was foreseeable on the part of the Defendant that a space heater sitting in the middle of the room under the circumstances that have been related throughout Plaintiffs' Opening Brief and even in Defendant's Answering Brief, constituted a hazard. It is agreed Defendant knew the space heater was located where it was. The only issue the Trial Court has really ruled is since Oberly knew about the space heater, she was 100% responsible. *Koutoufaris, supra* holds otherwise.

B. Defendant ignores the factual scenarios in the cases cited by Plaintiffs that would have precluded summary judgment.

Defendant tries to distinguish some of the cases cited by Plaintiffs showing fact scenarios where, under all circumstances, those plaintiffs had a greater knowledge of the danger than the facts in the instant case. In the cases cited, the Courts have ruled they are fact issues. The Defendant usually ignores those fact scenarios, except in one case that will be discussed immediately hereafter, and predominately talks about other legal issues that were involved in the cases.

Unfortunately, Plaintiffs argument about the fact pattern in *Jardel Co. v Hughes, 523 A.2d 518 (Del. 1987)* is incorrect. Plaintiffs used the fact scenario in *Koutoufaris v. Dick, supra* in which the plaintiff had knowledge of how dark it was in the parking lot, and encountered that known risk. In *Jardel*, that was not the case. Obviously, since Plaintiffs are relying heavily on *Koutoufaris* which has been cited in almost every case where there is an issue of whether a plaintiff knew of a

hazard should go to trial or be adjudged as a matter of law for defendant, it is beyond unfortunate Plaintiffs misstated the fact scenario in *Jardel*. The undersigned apologizes to This Court and the Defendant.

However, the *Jardel* case is extremely important in terms of what This Court determined to be foreseeability and the scope of duty. At 523-525, the Court reasoned that property crimes can lead to more serious crimes, which happened to the plaintiff in that instance. Therefore, it was foreseeable on the part of defendant to protect against such eventualities. Therefore, it was a jury question as to whether the safety precautions which were put in effect by the defendant to protect business invitees were sufficient. The Court formulated a well reasoned requirement for a duty to prevent foreseeable acts. In this case, the argument centers around a third party actor. The Plaintiffs suspect this is not what the *Jardel* Court had in mind about a third party actor. However, it was most foreseeable to Defendant that an elderly woman would be a greater risk.

In *Spencer v. Wal-Mart Stores East, LP., 930 A.2d 886 (Del. 2007)* there were some legal issues in front of the Court. However, there was no dispute the fact scenario cited in Plaintiffs' Opening Brief was a jury issue. In that case, the jury must have found comparative negligence arising to contributory negligence on the part of the plaintiff or no negligence on the part of defendant. One of the main

arguments on appeal was the instruction on comparative negligence. However, This Court confirmed it was a jury question.

In *Patton v. Simone, 626 A.2d 844 (Del. Super. 1992)*[1], Defendant again ignores the fact scenario in which the Court stated was a jury question, even with all the knowledge plaintiff had with the potential hazards with the elevator. The Court cited *Koutoufaris, supra*. However, the Court found the defendant, for a variety of reasons, had no real responsibility to protect the plaintiff in that instance, and, therefore, had no duty to the plaintiff.

Defendant then talks about Plaintiffs' reference to *Chubb v. Harrigan¸1992 Del. LEXIS 439 (Del. Supr.)* and *Woods v. Prices Corner Shopping Center Merchants Assoc., 541 A.2d 574 (Del. Super. 1988)*. The Plaintiffs are perplexed about what point Defendant is trying to make. Defendant states the "dangers associated with the natural accumulations for ice and snow which were unquestionably considered to be a dangerous condition that was open and obvious", at page 23. That is what we have in this case, an open dangerous condition.

In the fact scenario in *Chubb*, at page 3, the healthcare worker knew there was ice on the step going or leaving the person's house in which she was taking care. However, she encountered that known risk and fell and hurt herself gravely.

[1] Unfortunately, Plaintiffs in their Opening Brief, miscited the case. The cite is correct as stated above.

The Court found it was a jury question since the defendant could have had someone clear the step.

In the *Woods* case, as Defendant agrees, it was an open and obvious notice to the plaintiff that there was ice and snow in the parking lot. However, that case could go in front of a jury to determine the respective negligence. In *Woods*, at page 576-577 the Court relied on Restatement (Second) of Torts § 343 A. Obviously, the *Koutoufaris* Court has gone beyond that Restatement and has made the respective negligence between plaintiff and defendant a factual balancing test when both knew of a dangerous condition.

In *Dilks v. Morris, 2005 Del. Super. LEXIS 55*, the Defendant is correct that there is an allegation that the hole was hidden, but it was undisputed there was obvious extensive construction where plaintiff fell. The Defendant ignored that aspect. The Court denied summary judgment. It also ignores what the Court opines as to the holding in *Koutoufaris v. Dick, supra* at page 4.

In *Cook v. E.I. DuPont De Nemours Co., 2001 Del. Super. LEXIS 452,* the Defendant ignores the Court allowed the case go to trial under the facts submitted by that plaintiff and related by Plaintiffs. In *Cook v. E.I. DuPont De Nemours Co., 2003 Del. Super. LEXIS 203* (copy attached) The Court made its findings of fact after hearing the evidence in a bench trial. The Defendant states it has no idea what was learned at trial for the Court to make the decision it did on the part of the

defendant. A fair reading of the opinion shows exactly why the Court rendered the decision at page 6-7. The primary reason was the Court found, after hearing the evidence, DuPont did not have enough control over the work place to owe a duty to the plaintiff. The Court also noted, plaintiff's allegation of poor lighting was unproven, and the evidence at trial showed the plaintiff knew the asphalt became slippery when walking on it. Therefore, after trial, the verdict was on the behalf of the defendant.

In *Staedt v. Air Base Carpet Mart, 2011 Del. Super. LEXIS 3647,*the Defendant is left with the recourse that it is just a poorly decided case.

Defendant then, somehow, seems to argue the Court did not find there was no negligence on the part of defendant. Plaintiffs wish that was the case because then there should be no argument why the case should not go to trial. Plaintiffs do agree the Trial Court focused basically entirely that Oberly knew there was a space heater on the floor. However, a reading of the Court's order granting Defendant's motion for summary judgment at page 9, states, "This was rude, not negligent, behavior." Further down the Trial Court opines, "Thus, this churlish behavior, while regrettable, is not actionable." While the Trial Court never really discusses why it is not negligent behavior, It seems to absolve the Defendant of negligence.

Defendant also makes the assertion that the Court's question to Plaintiffs' counsel as to why Plaintiff Jones and Oberly stayed in the room had nothing to do

with it presupposing the space heater was a dangerous condition. Its response was that the Trial Court was wondering why Plaintiff Jones and Oberly did not simply leave the office with Plaintiff Potter and Yonker. A fair reading of the oral argument and the Trial Court's Orders belies that contention.

Plaintiffs also refers This Court to the Trial Court's order dated July 8, 2016, on page 5, "Assuming for the purposes of this motion only that the space heater was a "danger," *i.e.* a potential tripping hazard." Plaintiffs do not know how it can not be considered a potential tripping hazard. If so, it is a hazard. Again, this is a fact decision to be made.

Defendant cites the case of *Niblett v. Pennsylvania R. Co., 158 A.2d 580 (Del. Super. 1960)* in support of its position, and which the Trial Court cited. The Superior Court in *Niblett* at 582, states "but 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." That is not the law in the State of Delaware in 2017, except maybe in absolute clear cases as the two cited at the end of this brief. It was not the law as of *Woods, supra* which used the Restatement (Second) of Torts § 343 A. It is certainly not the law for the last twenty-five years as of *Koutoufaris v. Dick, 604 A.2d 390 (Del. 1992).*

The only other case Defendant cites throughout all the motions and briefs is *Polaski v. Dover Downs, Inc., 49 A.3d 1193 (Del. 2012).* As stated in Plaintiffs'

Opening Brief, the Court found that the plaintiff in a well lighted area fell and hurt herself while walking off, what the Court called a "normal" curb, with no damage or debris, painted yellow was not negligence on the part of the defendant. There was no hazard or defective condition.

As also stated in Plaintiffs' Opening Brief, the only other Delaware case cited by defendant or the Trial Court is *Talmo v. Union Park Auto, 38 A.3d 1255 (Del. 2012)* where the gentleman walked through a plate glass window in broad daylight. The Court found he should have noticed there was a window, and since it was daylight, the lighting made no difference. Again, there was no hazard or defective condition.

Every case cited by the Plaintiffs, except for *Jardel v. Hughes, supra,* are situations where the plaintiff knew there was a potential hazard. However, in every case the Court allowed it to get in front of a jury or to trial, unless there were other legal issues involved that preempted that from occurring. There are no other legal issues in this case. Defendant throughout the motions and it's Answering Brief, and respectfully, the Trial Court in both of It's opinions ignores This Court's extremely well followed case of *Koutoufaris v. Dick, supra*. It is the case in the State of Delaware which defines what should occur in terms when plaintiff and defendant know of a hazard. It holds that the fact finder decides except in just the most blatantly obvious circumstances. In the present case, Plaintiffs submit this is

far from a blatantly obvious situation and there was a hazard. Thus, this is a fact question, and it is not ripe for judicial determination of summary judgment.

CONCLUSION

For the aforementioned reasons as well as those stated in Appellants' Opening Brief, 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: January 6, 2017

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

Superior Court of Delaware, New Castle

March 28, 2003, Submitted ; May 30, 2003, Decided

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

Reporter
2003 Del. Super. LEXIS 203 *; 2003 WL 21246544

RONALD L. COOK and His Wife, ELLEN COOK, Plaintiffs, v. E.I. DUPONT DE NEMOURS AND COMPANY, A Delaware Corporation, Defendant.

Disposition: [*1] Defendant's Motion for Judgment as a Matter of Law DENIED. Verdict after Bench Trial on Liability For Defendant.

Core Terms

pad, active control, truck, independent contractor, lighting, asphalt, dumping, hazard, hauling, trailer, matter of law, regulations, driver, summary judgment motion, general contractor, contract work, slippery, site

Case Summary

Procedural Posture
Plaintiff truck driver filed a negligence action against defendant property owner after he slipped and fell on the property owner's property while working as an independent contractor for the property owner. The property owner filed a motion for judgment as a matter of law.

Overview
The driver was employed by a construction company. The construction company was under contract with the property owner as an independent contractor to provide around-the-clock hauling of a specified material. The driver slipped and fell while acting within the course and scope of his employment. In entering judgment for the property owner as to liability, the superior court found that the driver failed to prove negligence on the part of the property owner by a preponderance of the evidence. The evidence presented at trial clearly established that the property owner was not responsible for all day-to-day operations of hauling. In addition, the evidence showed that the driver and his coworkers were all aware that the pad on which the driver fell had a tendency to become slippery when the hauled substance accumulated there. Thus, the driver failed to show that the property owner exercised "active control" over the manner and method of his work so as to be liable for breach of duty.

Outcome
The property owner's motion for judgment as a matter of law was denied. After a bench trial, a verdict on liability was entered for the property owner.

LexisNexis® Headnotes

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

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

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

HN1 A property owner is not liable for injuries to the employee of an independent contractor, unless the owner retains the active control over the manner

in which the work is carried out and the methods used. The same is true for a general contractor that retains no active control over a subcontractor.

Labor & Employment Law > Employment Relationships > Independent Contractors

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

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

HN2 A landowner is under no duty to protect an employee of an independent contractor from hazards inherent in the performance of the contract, provided that the landowner does not retain active control of the methods and manner of the contract performance.

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

HN3 Adoption of "generalized" safety rules and regulations regarding the use of property does not equate to "active control."

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Judges: Jan R. Jurden, Judge.

Opinion by: Jan R. Jurden

Opinion

MEMORANDUM OPINION

JURDEN, J.

This is the Court's Memorandum Opinion regarding Defendant, E.I. DuPont de Nemours & Co.'s ("Defendant" or "DuPont") Motion for Judgment as a Matter of Law and the Court's decision following the bench trial on liability.

I. PROCEDURAL BACKGROUND

On February 24, 2003, the parties commenced a bench trial on the issue of liability. At the close of Plaintiff's case-in-chief on February 28, 2003, DuPont presented a Motion for Judgment as a Matter of Law. The Court heard oral argument on the motion and requested briefing. The parties timely filed their letter memoranda and the matter is ripe for decision.

II. FACTUAL BACKGROUND

On January 25, 1997, Ronald L. Cook ("Plaintiff" or "Cook") was injured when he slipped and fell at the Cherry Island Landfill ("Cherry Island") owned by DuPont. **[*2]** At all times relevant to this case, Plaintiff was acting within the course and scope of his employment with Brandywine Construction Company, Inc. ("BCCI"). BCCI was under contract with DuPont as an independent contractor to provide DuPont with around-the-clock hauling of a press cake material, known as Iron Rich, [1] from DuPont's Edgemoor facility to Cherry Island. DuPont used Cherry Island, located approximately one mile from the Edgemoor facility, as a staging area for Iron Rich. At the time of his slip and fall, Plaintiff was employed by BCCI as a truck driver. Plaintiff was one of approximately eight Teamsters hired by BCCI to haul Iron Rich from Edgemoor to Cherry Island pursuant to BCCI's contract with DuPont. Plaintiff had worked for BCCI in that capacity for more than two years at the time of his slip and fall.

[*3] On January 25, 1997, Plaintiff was working his usual 11:00 p.m. to 6:00 a.m. shift. During that shift, Plaintiff was the only BCCI employee working at either Edgemoor or Cherry Island. Plaintiff's work routine was as follows: while inside BCCI's office trailer located on the Edgemoor site, Plaintiff would receive a radio communication from

[1] Iron Rich is a press cake byproduct of DuPont's Netsche filter process. Iron Rich is a neutral, soil-like material which is utilized as daily cover for landfills. Iron Rich is brown in color and slippery when wet.

DuPont indicating that a load of Iron Rich was ready for hauling. Plaintiff would drive BCCI's Mack tandem dump truck to the specified bay, and hook-up a trailer loaded with the Iron Rich to the truck. Then, Plaintiff would exit through the main gate of the Edgemoor facility, drive to Cherry Island, empty the Iron Rich from the truck and return to BCCI's office trailer to await the next dispatch call. Throughout Plaintiff's term of employment with BCCI, he made seven to nine runs per shift, and as of the date of his injury, he made hundreds and possibly thousands of trips to and from Edgemoor and Cherry Island.

It is undisputed that, at the time of his injury, Plaintiff was an employee of BCCI and BCCI was an independent contractor of DuPont. Plaintiff was hired and paid by BCCI. Plaintiff's job training was provided by BCCI. BCCI set the work **[*4]** schedules of the BCCI Iron Rich haulers. BCCI dictated the number of BCCI employees that would work each shift and owned and maintained the trucks used for hauling the Iron Rich. The only contact the Plaintiff typically had with DuPont employees was a radio communication indicating when a press cake load was ready to be hauled to Cherry Island.

The evidence presented at trial clearly established that BCCI, not DuPont, was responsible for all day-to-day operations of hauling Iron Rich between Edgemoor and Cherry Island. BCCI designed and built an asphalt pad at Cherry Island to facilitate the hauling and dumping process. DuPont approved and paid for construction of the pad at BCCI's request. Similarly, in response to a request from BCCI, DuPont installed lighting at Cherry Island to facilitate BCCI's nighttime operations. According to BCCI's superintendent on the Edgemoor project, BCCI's haulers were satisfied with the improved lighting conditions. The lights installed were high intensity neon floodlights on poles angled towards the asphalt pad. BCCI's superintendent recalled no complaints from his haulers after the lights were installed and confirmed that BCCI made no subsequent request **[*5]** of DuPont for additional lighting. At the time of Plaintiff's slip and fall, the lighting fixtures had been in place for at least two years. The Plaintiff testified he "never saw a reason" to carry a flashlight when dumping Iron Rich at Cherry Island. The evidence established that BCCI was responsible for the safety of its drivers while unloading Iron Rich at Cherry Island and that BCCI was responsible for cleaning the unloading area in order to keep the area reasonably safe.

At trial, the evidence presented established that on January 25, 1997 at approximately 4:00 a.m., five hours after the start of his shift, Plaintiff exited the cab of his truck at Cherry Island in order to dump the Iron Rich and slipped and fell on the asphalt pad. He landed on his back. Plaintiff admitted that the asphalt pad was in the same condition as it had been during his four or five previous deliveries to Cherry Island that night. The only change to the asphalt pad throughout the night resulted from Plaintiff's own dumping of Iron Rich. The evidence further established that the lighting conditions were constant throughout Plaintiff's entire work shift and were such that Plaintiff considered it unnecessary **[*6]** to request additional lighting.

It is clear that it was common knowledge among BCCI's haulers that the asphalt pad would become slippery when Iron Rich accumulated on the pad. One BCCI truck driver testified that when the asphalt pad was wet, he sometimes found it necessary to hold on to the side of the trailer as he walked from the truck cab to the back of the truck.

DuPont denies that it was negligent and argues in its motion that Plaintiff was an employee of an independent contractor and that his injuries resulted from performance of duties within the scope of his independent contractor employment. Furthermore, DuPont asserts that the slipperiness of the Iron Rich, to the extent such might be considered a danger, was apparent to and well known by Plaintiff.

III. DISCUSSION

It is important to note that prior to trial DuPont moved for summary judgment and the Court denied its motion. [2] The issues addressed by this Court in DuPont's summary judgment motion included:

> Whether the facts, when viewed in the light most favorable to the 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 **[*7]** negated DuPont's duty to warn. [3]

Of course, the standard this Court must apply on a motion for judgment as a matter of law is different from that on a motion for summary judgment. The issue now before this Court on DuPont's Motion for Judgment as a Matter of Law is whether there is a legally sufficient evidentiary basis for a reasonable jury to find that DuPont exerted sufficient control over the method and manner of Plaintiff's contract work so as to be liable for his work-related injuries.

The general rule of law is "that ***HN1*** a property owner is not liable for injuries to the employee of an independent contractor, 'unless the owner retains the active control over the manner in which the work is carried out and the methods used.' The same is true for a general contractor that retains no active control over a subcontractor." [4] In *Williams v. Cantera*, this Court held that ***HN2*** a landowner is under **[*8]** no duty to protect an employee of an independent contractor from hazards inherent in the performance of the contract, provided that the landowner does not retain active control of the methods and manner of the contract performance. [5]

[*9] Both the Delaware Supreme Court and this Court have addressed what constitutes "active control." [6] **[*11]** In *In re Asbestos Litig. Roca Trial Group*, [7] the Court granted DuPont's Motion for Summary Judgment on the issue of whether DuPont exerted legally sufficient control over the work of an employee of an independent contractor so as to render DuPont liable for the employee's injuries. The Court held:

> I'm satisfied that the Summary Judgment motion should be granted on the issues of control and assumption of safety; that as I and other courts have written before, the evidence has to show that the employer actually controlled the details or the methods of work.

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[2] *See* Cook v. E.I. DuPont Nemours & Co., 2001 WL 1482685 (Del. Super.).

[3] *Id* at *1.

[4] *Murson v. Henry Francis DuPont Winterthur Museum, Inc.*, 2001 WL 898590, at *1 (Del. Supr.) (citations omitted). For example, O'Connor v. Diamond State Tel. Co., 503 A.2d 661, 663 (Del. Super. 1985), Seeney v. Dover Country Club Apartments, Inc., 318 A.2d 619, 621 (Del. Super. 1974) and Williams v. Cantera, 274 A.2d 698, 700 (Del. Super. 1971) stand for the proposition that,

> neither an owner nor general contractor has a duty to protect an independent contractor's employee from hazards created by the doing of contract work or the condition of the premises or the manner in which the work is performed unless the owner or general contractor retains active control over the manner in which the work is carried out and the methods used.

O'Connor, 503 A.2d at 663.

[5] 274 A.2d at 700.

[6] *See Murson,*, 2001 WL 8985900, at *1 (landowner acting as it's own general contractor, providing safety guidelines, inspecting the work, or submitting change orders does not constitute active control); *Rafferty v. Century Eng'g, Inc.*, 2002 WL 480958, at *7-8 (Del. Super.) (authority to suspend work due to failure of the contractor to correct unsafe conditions, failure to carry out provision of the contract, and conditions considered unsuitable for the prosecution of the work, not sufficient); *Kilgore v. R.J. Kroener, Inc.*, 2002 WL 480944, at *6 (Del. Super.); Bryant v. Delmarva Power & Light Co., Del. Super., 1995 WL 653987 (1995) (scheduling phases of work; providing materials; constructing a temporary site-office and storage facility; determining who could have access to certain areas on the project site; making security arrangements for the site; and advising his independent contractor of observed safety violations not sufficient) Figgs v. Bellevue Holding Co., 652 A.2d 1084, 1092 (Del. Super. 1994) (sufficient control of work area where defendant dictated the number of workers to be used by the subcontractor and supplied all construction materials, tools, equipment, and facilities); Seeney, 318 A.2d at 621 (active control is "not inferred from the mere retention by the owner or general contractor of a right to inspect the work of an independent contractor" or general superintendence over the contractual work.).

[7] Tr. Mot. Summ. J., Del. Super., C.A. No. 01C-10-063, Babiarz, J. (July 1, 2002) (bench ruling granting Dupont's Motion for Summary Judgment).

> And in none of the cases that are before the court, DuPont, Rhone-Poulenc, Chrysler and GM is that the case.
> These are clearly independent subcontractors who were asked to come in and do some maintenance work for any of those companies, and Mr. Roca happened to work for one of them.
>
> Each of those companies also had safety rules and regulations, as most large companies do. But those safety regulations were of a generalized nature, and the adoption of such regulations is obviously something the courts and society **[*10]** ought to encourage, and don't want to penalize a party who adopts them.
> The regulations here in each of those four companies, as I said, were generalized, hard hats, no smoking, this and that, and were not particularized with regard to assuming a duty to protect an employee of a subcontractor from asbestos hazards. [8]

At trial, the testimony of Plaintiff and other BCCI drivers established that each driver exercised his independent judgment in carrying out the actual dumping of the Iron Rich at Cherry Island, and that their employer controlled the method and manner of the dumping process: (1) how and where to open the gate; (2) how and where to back onto the asphalt pad; (3) how and where to open the trailer gate; (4) how and where to empty the trailer; (5) how and where to scrape the trailer; (6) how and where to walk between the cab and the trailer; (7) what shoes or boots to wear; and (8) whether to carry a flashlight. Each of the elements of the actual contract work was left to the sole discretion of the drivers and their employer, BCCI. Significantly, it was also BCCI's sole prerogative, not DuPont's, as to when an operator would be present at Cherry Island for purposes of clearing the pad. [9]

[*12] Plaintiff points out that at all times relevant to Plaintiff's work DuPont personnel at Edgemoor retained responsibility for enforcing the general protocols for maintaining a safe work site. As DuPont concedes in its motion, DuPont required *all* personnel on its sites to enter and exit the DuPont facility through a security gate. DuPont required all personnel at Edgemoor--contractor and employee alike--to wear a safety helmet, safety glasses and use restricted smoking and eating areas. DuPont required all personnel at Edgemoor--contractor and employee alike--to maintain clean trucks and travel within the relevant speed limit. [10] According to DuPont, such "generalized safety protocols" do not, as a matter of law, constitute "active control" of the methods and manner of the contract work. This Court previously held, in response to this very same argument, 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." [11] Consequently, the Court is not able to rule as a matter of law on the issue of active control. Nor can the Court conclude that there is "no legally **[*13]** sufficient" evidentiary basis for Plaintiff's claim.

However, with that said, the Court is able to render a verdict as the *fact finder* in this case, because Plaintiff has failed to prove negligence on the part of DuPont by a preponderance of the evidence. Plaintiff presented his case-in-chief and has been fully heard on the issue of liability. After carefully considering all of the evidence and assessing the credibility of the witnesses, the Court is simply not persuaded that DuPont breached any duty owed to Plaintiff. First, the Court is not satisfied by a preponderance of the evidence that DuPont exercised "active control" over the manner and method of work. Like the court in *Roca*, the Court finds that ***HN3*** adoption of "generalized" safety rules and regulations does not equate to "active

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[8] *Id.* at 63-64.

[9] The following witnesses testified on this point: Ron Cook, Richard Rowe, Walter Comegys, Leroy Kempski, Jim Smith, Len Fasullo, Ken Creasey.

[10] The following witnesses testified on this point: Len Fasullo and Ken Creasey.

[11] *Cook, 2001 WL 1482685, at *4*.

control". Nor were DuPont's safety rules and regulations "particularized with regard **[*14]** to assuming a duty to protect" Plaintiff from the hazards of his contract work. Second, Plaintiff's contention of inadequate lighting is wholly unavailing. Plaintiff presented no credible evidence showing that the lighting was inadequate and no evidence whatsoever that lighting was a proximate cause of Plaintiff's fall. Third, there is no question that Plaintiff knew that the dumping area was slippery. The slippery nature of the pad was an inherent hazard of this type of contract work. BCCI took steps, at DuPont's expense, to reduce the hazard, but the lighting and asphalt pad did not eliminate the hazard. Plaintiff offered no evidence to show what measures would have or could have eliminated the hazard or made the dumping area less hazardous.

For the foregoing reasons, the Court, as fact finder, finds for the defendant, DuPont.

Jan R. Jurden, Judge

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