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Case Number 149,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL LAINE,	:	No. 149,2017
	:	
Plaintiff -Below,	:	
Appellant,	:	Court Below: Superior Court of
	:	the State of Delaware
v.	:	C.A. No.: K15C-12-008WLW
	:	
SPEEDWAY, LLC,	:	
	:	
Defendant-Below,	:	
Appellee	:	

AMENDED APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

EXHIBITS TO THE BRIEF

TABLE OF CITATIONS

Cases **Page**

Statutes and Rules

APPENDIX TABLE OF CONTENTS

NATURE OF THE PROCEEDINGS

Plaintiff-Below, Appellant Michael Laine ("Plaintiff") filed suit against Defendant-Below, Appellee Speedway, LLC ("Defendant"), alleging that he was seriously injured while stepping down from the bus shuttle that he was operating for Modern Maturity Center at a fuel pump on Defendant's convenience store-gas station property, because he slipped on ice on a surface near the pump. Plaintiff alleges that his fall and injuries were caused by the dangerous, icy condition which Defendant negligently failed to give notice of and correct. Defendant denied negligence and filed a Motion for Summary Judgment which was granted by the trial court. [See Ex. A.] Plaintiff filed an Appeal to this Court. This is Plaintiff's Opening Brief contesting the granting of the Motion for Summary Judgment by the trial court.

SUMMARY OF ARGUMENT

I. The icy conditions of the premises which caused Plaintiff's fall existed before any "storm" occurred and was known by two employees of Defendant, who negligently failed to take any action to remediate the icy conditions or give notice thereof to Plaintiff and other customers.

II. The Continuing Storm Doctrine upon which the trial court based its decision in granting summary judgment should not have been applied, based upon the facts of this case.

STATEMENT OF FACTS

Plaintiff in this action is Michael Laine who was 62 years of age when this fall occurred. (A-16). He was employed by Modern Maturity Center as a shuttle bus driver to transport elderly and often disabled adults to appointments and back and forth to the Center. (A-20). On January 10, 2014, when this fall occurred, he reported to work at 6:00 a.m. to pick up his bus, and, at 7:05 a.m., he left the Center to fuel his bus at Defendant's convenience store-gas station. (A-23). The roads en route were wet but not icy, and a light rain or drizzle was falling. (A-25).

Plaintiff pulled up to a pump on Defendant's premises to fuel his bus. (A-31). He did not notice any ice, but it was drizzling, and the area where the pump was located was extremely dark. (A-37-38). Other customers were fueling vehicles in the same area, since the store opened at 6:00 a.m. (A-37). When he stepped out of his bus, both feet slipped on ice, and he fell landing on the asphalt and striking his back and head against the steps of the bus. (A-31=32). He reported the fall to Jessica Lorilla, an employee of Defendant, who came to assist him. (A-32-33). Subsequently, an Incident Report was written by John Tetuan. (A-67-68). The fall occurred at 7:15 a.m. (A-37)

After his fall, Plaintiff did not feel that he was injured, and he went on to complete his trips. (A-46, A-50). Unfortunately, he began to feel his injuries whose effects intensified over the following two days. (A-51-55). Subsequent

medical treatment was necessary for the injuries sustained in the fall, which included two cervical surgeries, two left shoulder surgeries or procedures, and substantial physical therapy, medication, and chiropractic care. (A-56-62). He incurred over $300,000.00 in medical expenses, and, to date, he has not been able to return to gainful employment. (A-63).

Defendant had two employees on duty at the time of the fall, neither of whom observed the fall. (A-73-74). They were Jessica Lorilia and John Tetuan, both of whom are no longer employed by Defendant. (A-74). John Tetuan left the Defendant's employment and allegedly resides somewhere in Nebraska but could not be located for a deposition. (A-74). Jessica Lorilla was located, and her deposition was taken. (A-69). She arrived at work on the date of the fall at 5:00 a.m. to open the store at 6:00 a.m., and Mr. Tetuan was already on duty. (A-70-71). Ms. Lorilia went about her normal opening chores, but, at 7:00 a.m., according to her testimony, she slipped on ice at the front door of the store. (A-80-83) She immediately notified Mr. Tetuan who supposedly called the ice and snow removal company to come and put down salt or ice melter to remediate the icy condition. Neither employee took any personal action to either remediate the icy condition of the premises or to warn customers of the hazard. (A-86). In fact, business at the store proceeded as normal. Ms. Lorilla worked part-time at the store, sometimes leaving work at 11:00 a.m. or 1:00 p.m. (A-72). On the date of

the fall, she could not remember the exact time when she left work, but, while she was there, she did not see any ice remediation of any nature whatsoever. (A-89). Subsequently, Defendant produced a statement through discovery from the Brick Doctor, showing remediation work, but the bill contains no time of treatment, merely a date of January 10, 2014, so there is no proof of when, or if, the work was done.

Plaintiff filed this lawsuit, claiming negligence on the part of the Defendant for failure to maintain the premises in a reasonably safe condition, failure to make reasonable inspections of the premises, failure to warn Plaintiff of the hazardous conditions that existed, and failure to remove ice at the pump where he fell. (A-19). Defendant does not deny the existence of the icy condition of the premises, which caused Plaintiff's fall and subsequent injuries but relies upon the Continuing Storm Doctrine to relieve Defendant of a duty of care owed to Plaintiff and other business invitees. This is the basis of Defendant's Motion for Summary Judgment which was accepted by the trial court in granting the Motion. (A-9-14).

Succinctly stated, the Continuing Storm Doctrine allows a property owner to await the end of a storm and a reasonable time thereafter to remove snow and ice, with no duty of care owed to persons injured on his or her property during this period of time. (A-12). In opposing the Summary Judgment Motion, Plaintiff advanced two arguments. First, the hazardous condition causing the injury to

Plaintiff existed before any storm occurred, so the Doctrine does not apply. Second, the facts of the case do not warrant application of the Doctrine.

On the first ground, Plaintiff fell on ice at 7:15 a.m., and, prior to his fall, Defendant had two employees on duty on the premises commencing at 5:00 a. m., who had a duty to inspect the premises and make it safe for patrons who would be at the store when it opened at 6:00 a.m. and thereafter. This was well before the time when Defendant alleges that the storm commenced, namely, at 6:54 a.m., when it started raining. The two employees had a duty to inspect the premises for icing, and, if the condition could not be remediated because the icing was too severe for the premises to be made safe before opening, they had a duty to warn Plaintiff and other customers through the use of cones or tape or simply by not opening for business. Ms. Lorilia's deposition reveals that she slipped on ice at 7:00 a.m. at the front door of the store and told fellow employee Tetuan about the conditions; he allegedly called the snow and ice removal contractor, Brick Doctor. (A-87). All of this occurred before Plaintiff fell at 7:15 a.m. Defendant alleges that the "storm" started when rain commenced at 6:45 a.m., and this was the finding of the trial court. (A-95). It is difficult to imagine, and it would certainly be a factual issue viewed in a light most favorable to the Plaintiff, how the ice accumulation which caused Plaintiff's fall could have occurred in the 21 minutes between the supposed onset of a storm and when he fell, when the only valid

weather report showing commencement of rain indicates commencement at 6:54 a.m. with temperatures at 32 degrees F. as will be stated later herein. (A-102-103).

On the second ground that Plaintiff relied upon, namely, that the weather event did not rise to the level of a storm to activate the Continuing Storm Doctrine, it was pointed out that all other activities in the area were proceeding on a normal basis. Defendant was open for business all day. (A-96). Capital School District, which covered the area where Defendant's store is located, was open for school all day. (A-96). Plaintiff was permitted to carry elderly and disabled patrons of the Modern Maturity Center all day. (A-96). The climatological data do not support a serious weather event. (A-96). Plaintiff put into evidence a certified copy of the U.S. Department of Commerce, National Oceanic and Atmospheric Administration's Quality Controlled Local Climatological Data for Dover AFB Airport for the month of January 2014. This shows climatological readings taken at various times during the day when the fall occurred, January 10, 2014. At 0620 hours, it reports: "overcast; no precipitation noted; 32 degrees F." and, in the precipitation column, it shows a "T" which means that precipitation was not sufficient in quantity to measure. At 0654 hours, it shows: "rain; 32 degrees F." ,and again, "T" for precipitation. At 0658 hours, the last reading before Plaintiff fell at 0715 hours, it shows: "rain; 32 degrees F.", and "T" for precipitation. (A-102-103). These readings do not show ice or freezing rain and certainly do not

show any weather event sufficient to trigger the existence of the Continuing Storm Doctrine.

The lower court stated its conclusion at paragraph 9 of its opinion:

> There is no dispute that precipitation was ongoing at the time of the fall. The parties do not dispute that the ice was caused by that precipitation. As a matter of law, the falling precipitation was sufficient to invoke the continuing storm doctrine. Summary judgment is thus appropriate.

(Exhibit "A" , ¶9, p. 4 – A-12). As stated previously, Plaintiff certainly agrees that rain was falling at the time of Plaintiff's fall, but Plaintiff respectfully disagrees with the statement that the parties do not dispute that the ice where Plaintiff fell was caused by the precipitation. On the contrary, Plaintiff contends that the ice which caused his fall pre-existed the falling of precipitation, which was supported by the climatological report showing that it started at 6:54 a.m. and 32 degrees F. with no measurable accumulation of rain. Plaintiff, of course, respectfully disagrees with the lower court that this rain event was sufficient to trigger the existence of the Continuing Storm Doctrine.

ARGUMENT

I. THE DEFENDANT WAS NEGLIGENT WHICH WAS THE PROXIMATE CAUSE OF PLAINTIFF'S FALL, IN THAT DEFENDANT FAILED TO TAKE ACTION TO REMOVE THE HAZARDOUS ICE CONDITION BEFORE THE FALL.

(1.) QUESTION PRESENTED:

Question preserved in the trial court according to the trial court's decision (A-9-14) and factual statements argued. (A70, 71, 86)

(2.) SCOPE OF REVIEW:

On appeal from a grant of summary judgment, this Court reviews the matter *de novo*. *LaPointe v. AmerisourceBergen Corp.,* 720 A.2d 185, 191 (Del. 2009). Summary judgment is granted by the trial court upon a showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Super. Ct. Civ. R. 56(c). The record must be read in a light most favorable to the party against whom summary judgment is sought. *Matas v. Green*, 171 A.2d 916 (Del. 1961). If there is any evidence supporting a favorable conclusion to the nonmoving party, "viewing" rather than stated facts in the light most favorable to him, summary judgment must be denied. *Plant v. Catalytic Constr. Co.* 287 A.2d 682 (Del. Super. Ct. aff'd. 297 A.2d 37 (Del. 1971)). At the summary judgment stage, all reasonable inferences must be drawn favorably to the nonmoving party, and the evidence must be viewed most favorably to that.

Sweetman v. Strescon Indus., Inc., 389 A.2d 1319 (Del. Super. Ct. 1978). Issues of negligence are not generally susceptible to summary judgment adjudication. *Ebersole v. Lowengrub*, 180 A.2d 467 (Del. 1962).

(3.) MERITS OF ARGUMENT:

Plaintiff has proven that Defendant negligently failed to remove the accumulation of ice which caused the fall and which existed before the rain event occurred.

Defendant had two employees on duty at 5:00 a.m. on January 10, 2014, Jessica Lorilia and John Tetuan. Only Ms. Lorilia could be found to be deposed, since Tetuan has left the employ of Defendant and allegedly lives in Nebraska. Ms. Lorilia testified that she slipped on ice at 7:00 a.m. at the front door of the store. The climatological data show only that rain started at 0654 hours, just six minutes before she slipped. Viewing the facts more favorably to the Plaintiff, there is a factual issue over whether rain could have formed ice in that period of time sufficient to cause her to slip. Plaintiff argues that the ice existed when these two employees came to work at 5:00 a.m. and that they were negligent in not taking immediate remedial action.

Even if Ms. Lorilia was correct about the time of her slip on the ice, this still gave her and her co-employee 15 minutes before Plaintiff fell at 7:15 a.m., to take positive remedial action by putting up cones or tape notifying patrons of the ice. However, she did nothing other than notify her fellow employee, Tetuan, of the

ice, who supposedly put in a call to the snow and ice removal contractor which did not appear, if at all, prior to Ms. Lorilia's leaving the store at either 11:00 a.m. or 1:00 p.m. Further, both employees did nothing whatsoever on their own to personally remediate the icy condition.

Plaintiff argues that he fell because of ice which existed before the alleged storm commenced, and, therefore, his claim is not barred by the Continuing Storm Doctrine. In *Moore v. Pettinaro Enterprises,* 2016 W.L. 7188106 (Del. Super. Dec 9, 2016), the issue was whether the plaintiff slipped and fell in defendant's parking lot from a current storm occurring on January 28, 2013, or from the remnants of a prior snow storm which occurred on January 25, 2013. Summary judgment was denied, because the Continuing Storm Doctrine does not apply where the plaintiff was injured as a result of a fall caused by snow and ice existing from a prior storm.

The same is true in our case, in which a factual issue is raised about the ice which caused the fall having been present before the alleged storm occurred. This being the case, Defendant's employees were negligent in failing to take remedial actions to take care of the ice which was discovered before Plaintiff fell.

II. THE SUPERIOR COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT HOLDING THAT THE CONTINUING STORM DOCTRINE APPLIED TO THE FACTS OF THIS CASE.

(1.) QUESTION PRESENTED:

Question preserved in the trial court according to the trial court's decision (A-9-14) and factual statements argued (A-9-11, 102, 103).

(2). SCOPE OF REVIEW:

On appeal from a grant of summary judgment, this Court reviews the matter *de novo*. *LaPointe v. AmerisourceBergen Corp.,* 720 A.2d 185, 191 (Del. 2009). Summary judgment is granted by the trial court upon a showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Super. Ct. Civ. R. 56(c). The record must be read in a light most favorable to the party against whom summary judgment is sought. *Matas v. Green,* 171 A.2d 916 (Del. 1961). If there is any evidence supporting a favorable conclusion to the nonmoving party, "viewing" rather than stated facts in the light most favorable to him, summary judgment must be denied. *Plant v. Catalytic Constr. Co.* 287 A.2d 682 (Del. Super. Ct. aff'd. 297 A.2d 37 (Del. 1971)). At the summary judgment stage, all reasonable inferences must be drawn favorably to the nonmoving party, and the evidence must be viewed most favorably to that. *Sweetman v. Strescon Indus., Inc.*, 389 A.2d 1319 (Del. Super. Ct. 1978). Issues of

negligence are not generally susceptible to summary judgment adjudication. *Ebersole v. Lowengrub*, 180 A.2d 467 (Del. 1962).

(3.) MERITS OF ARGUMENT:

The Continuing Storm Doctrine does not apply to the facts of this case.

All agree that the Continuing Storm Doctrine comes from a judicial decision handed down by the Superior Court in *Young v. Saroukos*, 185 A.2d 274 (Del. Super. Ct. 1962). The facts of that case show that the plaintiff fell on a ramp entrance to her apartment complex at 9:30 p.m. on March 4, 1960. *Id.* at 275. The weather cited by the court at the time showed seven to eight inches of snow falling on March 3, 1960, continuing into March 4, 1960, with continuing snow flurries late in the evening of March 4, 1960, and temperatures in the low 20s on both days and winds being high with gusts measured 38 to 50 miles per hour. *Id* at 275. After an exhaustive research of cases from other jurisdictions, the Superior Court adopted the following language which has become our Continuing Storm Doctrine:

> "'The authorities are in substantial accord in support of the rule that a business establishment, landlord, carrier, or other inviter, in the absence of unusual circumstances, is permitted to await the end of the storm and a reasonable time thereafter to remove ice and snow from an outdoor entrance walk, platform, or steps. The general controlling principle is that changing conditions due to the pending storm render it inexpedient and impracticable to take earlier effective action, and that ordinary care does not require it.'"

(Emphasis not supplied.) *Id.* at 282. This case was decided in 1962, based upon a storm which occurred in 1960, now over 57 years ago. The obvious intent of the rule was to relieve the landlord or owner of liability where the severity of the storm made it "inexpedient and impracticable" to remove ice and snow from walkways and other areas until the storm subsided and then for "a reasonable time thereafter" to conduct remediation to make the premises safe again. Obviously, shoveling snow and ice during the storm with high winds would serve no purpose whatsoever and would endanger the land owner and his employees in the performance of a fruitless gesture.

Unlike the conditions which existed 57 years ago, we now live in an era in which commercial and residential property owners contract with companies which provide highly mechanized snow and ice removal equipment, which companies provide this service based upon the weather, so that our ability to attend work, school, appointments, and recreational functions is rarely, if ever, delayed. Our application to the Court on behalf of the Plaintiff is to determine if this judicially created rule should not be limited to severe ice and snow storms disabling the public under the facts of *Young v. Saroukos* where this rule was judicially created.

Our research has revealed no decision of the Delaware Supreme Court on the Continuing Storm Doctrine with one exception. That case, cited in detail by the Defendant and also relied upon by the lower court, is *Cash v. E. Coast Prop.*

Magmt., Inc., cited as 7 A.3d 484 (Table), 2010 WL 4272925 (Del. Oct. 29, 2010). The facts of *Cash* are strikingly similar to the facts of our case. Cash was a nurse visiting patients at apartment complexes throughout the day. She noticed a misty drizzle throughout the day, continuing at the time of her fall. She did not see any snow, sleet, or freezing rain and did not have any difficulty driving to the apartment complex or walking on the ground at any of the other locations she visited that day. As she stepped on a portion of the sidewalk leading into the apartment complex where she intended to see a patient, she slipped and fell on a sheet of ice that appeared wet but did not show any noticeable snow or ice. *Id.* at 2010 Del. Super. LEXIS 235 at 3. The Superior Court, relying upon *Woods v. Prices Corner Shopping Center Merchants Ass'n.*, 581 A.2d 574, 577 (Del. Super. 1988), quoted that:

> "An owner or occupier of land, which is held open with an implied invitation to the public to come upon the land for the mutual benefit of the public and the land owner or the occupier, has an affirmative duty to keep the premises reasonably safe from the hazards associated with natural accumulations of ice and snow."

The Superior Court then compared the weather conditions of this case with the weather conditions in *Young*, noting that in *Young*, snow continued to fall regularly and continuously throughout the day, and the evidence in *Cash* showed only a "light drizzle" continuing at the time of Cash's fall. The court then granted summary judgment in favor of the defendants based upon the Continuing Storm Doctrine, stating:

> "The controlling principle in the 'continuing storm' doctrine is that 'changing conditions due to the pending storm render it inexpedient and impracticable to take earlier effective actions and that ordinary care does not require it.' The court finds that a land owner has no legal duty to begin ice removal until precipitation has stopped, regardless of the severity of the storm. The law requires only reasonable care."

Id. at 4. This decision was appealed to the Delaware Supreme Court where it was affirmed without a published opinion. *See Cash v. East Coast Property Mgmt. Co., Inc.*, Docket No. 339, 2010, reported at 7 A.3d 484 (Del. 2010).

Other than the factual statements in *Cash*, we have found no case apart from the decision of the lower court in our case, which would extend the Continuing Storm Doctrine to cover a rain event. The lower court's decision will certainly be interpreted as precedent that rain is sufficient to activate the Continuing Storm Doctrine. The lower court stated at paragraph 9:

> "As a matter of law, the falling precipitation was sufficient to invoke the continuing storm doctrine. Summary judgment is thus appropriate."

(Ex. A, ¶9, p. 4). This was further confirmed in the decision in which the lower court stated:

> "Contrary to Mr. Laine's position, if it was indeed raining at the time of the incident, it suggests that the continuing storm doctrine is applicable."

(Ex. A, ¶13, p.5).

The decision of the court below, extending the Continuing Storm Doctrine to a rain event, is a huge departure from the facts of *Young* which judicially created the Doctrine. If the decision of the court below is

permitted to stand, it is submitted that at least two undesirable results will occur. First, any Plaintiff injured in any weather event will not be able to recover for his or her injuries. Second, the landowner may well be lax in his duty to make safe any dangerous condition on the land which the land owner either knows about or, upon reasonable inspection, should discover, knowing that, if the cause of the injury is weather-related, he or she as the land owner will be relieved from this duty. Our sincere application on behalf of the Plaintiff is that the Court should not extend the Continuing Storm Doctrine beyond facts similar to those which created the Doctrine in *Young* and certainly not extend the Doctrine to cover facts readily apparent in our case.

CONCLUSION

For the aforesaid reasons, the Superior Court's Order granting summary judgment to Defendant should be reversed, and the case should be remanded to the Superior Court for trial by jury.

Respectfully submitted,

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