EFiled: May 31 2017 09:55AM EDT
Filing ID 60661359
Case Number 149,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL LAINE,	:	
	:	
Plaintiff-Below,	:	
Appellant,	:	No.: 149, 2017
	:	
v.	:	
	:	Court Below: Superior Court of the
SPEEDWAY LLC,	:	State of Delaware in and for Kent
	:	County
Defendant-Below,	:	C.A. No. K15-C-12-008 WLW
Appellee.	:	

APPELLEE'S ANSWERING BRIEF ON APPEAL

MARSHALL DENNEHEY WARNER
COLEMAN & GOGGIN

GARY H. KAPLAN, ESQ. (I.D. #2965)
Telephone: (302) 552-4321
Email: ghkaplan@mdwcg.com
JESSICA L. TYLER, ESQ. (I.D. #5458)
Telephone: (302) 552-4370
Email: jltyler@mdwcg.com
1007 N. Orange Street, Suite 600
P.O. Box 8888
Wilmington, DE 19899-888
Fax: (302) 552-4370

Counsel for Defendant Below, Appellee Speedway LLC

DATED: May 31, 2017

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases

Statutes

Court Rules

NATURE OF THE PROCEEDINGS

Plaintiff Michael Laine ("Mr. Laine" or "Appellant") filed this action in Superior Court on December 8, 2015 against Hess Corporation. (A15-A18) On December 24, 2015, Speedway LLC ("Speedway" or "Appellee") was substituted for Hess Corporation by agreement of the parties. (B1-B2) Mr. Laine asserted this personal injury claim as a result of an alleged slip and fall incident that occurred on January 10, 2014 at the now-Speedway convenience store located at 31 N. DuPont Highway, Dover, Delaware 19901. (A15-A18) Mr. Laine fell at 7:15 a.m. during an ongoing storm while exiting the shuttle bus he was driving for work. (B186)

Speedway answered the Complaint and asserted affirmative defenses including Delaware's long-standing Continuing Storm Doctrine. (B3-B7) On August 10, 2016, Speedway filed a motion for summary judgment. (B8-B71) On August 16, 2016, Mr. Laine filed his opposition. (B72-B162)

Mr. Laine's expert discovery cutoff deadline was September 7, 2016 and he did not identify or disclose a meteorologist or other liability expert. (B163) Nor did he request an extension of time to retain an expert. Following oral argument on September 23, 2016, the Court denied Speedway's motion *without prejudice*, holding that while there was an ongoing storm at the time of Mr. Laine's fall, he should have until the close of discovery to develop facts in support of his arguments. (B164-B183, A94-A100)

After the Court issued its decision on September 23, 2016, Mr. Laine did not propound further discovery to Speedway. Before discovery closed on January 10, 2017, the parties exchanged certified NOAA weather records which documented the freezing rain storm at issue. On January 12, 2017, Speedway renewed its motion for summary judgment. (B184-B256) On January 20, 2017, Mr. Laine opposed the motion. (B257-B303)

During the pendency of the *Michael Laine v. Speedway* litigation, Mr. Laine's workers' compensation carrier, Ace Insurance Company, filed a separate subrogation action against Speedway and Cincinnati Insurance Companies ("Cincinnati") seeking reimbursement for both PIP eligible expenses and non-PIP eligible expenses it paid for Mr. Laine. (B304-B308) Cincinnati provided PIP coverage for the vehicle Mr. Laine was exiting as he fell. Ace Insurance Company's subrogation action was filed on January 11, 2016. (B304-B308)

On November 16, 2016, Cincinnati filed an Amended Complaint, substituting itself for Ace Insurance Company and demanding from Speedway the PIP eligible expenses it paid on Mr. Laine's behalf. (B309-B313) On December 21, 2016, Speedway answered the Complaint. (B314-B320) On January 2, 2017, the case was reassigned to the Honorable Judge Witham who also presided over *Michael Laine v. Speedway.* (B321)

No further action occurred in the *Cincinnati Insurance Companies v. Speedway* PIP subrogation matter until counsel for Cincinnati filed a letter in *Michael Laine v. Speedway* on February 6, 2017 requesting to intervene in the liability suit for the sole purpose of opposing Speedway's summary judgment motion. (B322-B323) In the letter, counsel stated that Cincinnati had retained a meteorologist and intended to rely upon that expert to oppose Speedway's motion. (B322-B323) On February 8, 2017, the Court advised Cincinnati that it must file a motion, rather than a letter, for its request to be considered. (B324) The Court also provided notice to the parties in *Michael Laine v. Speedway* that oral argument on Speedway's motion was scheduled for March 10, 2017. (B325)

On February 9, 2017, Cincinnati filed its motion to intervene. (B326-B334) Speedway opposed on the basis that a limited intervention was not contemplated under Superior Court Rule 24 and further, that a PIP carrier cannot intervene in a liability action per the plain language of 21 Del. C. §2118. (B335-B351) Over Speedway's objections, the Commissioner granted Cincinnati's motion at oral argument on February 23, 2017. (B352) On March 1, 2017, Cincinnati filed its opposition to Speedway's summary judgment motion to which Speedway responded on March 8, 2017. (B353-B371) All parties presented argument at the hearing on March 10, 2017. (B372-B398) The Superior Court reserved decision.

On March 21, 2017, the Court granted summary judgment in favor of Speedway. (A9-A14)

Mr. Laine's appeal followed. Cincinnati did not appeal the trial court decision. This is Speedway's Answering Brief on appeal.

SUMMARY OF THE ARGUMENT

1. It is denied that there is any evidence in the record to substantiate Appellant's argument on appeal that the icy condition in the parking lot existed prior to January 10, 2014. Appellant raises the argument of pre-existing ice for the first time on appeal and therefore he did not properly preserve this issue for the Supreme Court. It is further denied that Appellee was negligent in any manner.

2. It is denied that the Superior Court erred in applying the Continuing Storm Doctrine and dismissing all claims against Appellee. The Continuing Storm Doctrine squarely applies to the facts of this case and to the ongoing storm of January 10, 2014. It is further denied that Appellee was negligent in any manner.

STATEMENT OF FACTS

On January 10, 2014, a winter storm moved through the State of Delaware. (B186-B187, B213) Certified records from the National Oceanic and Atmospheric Administration ("NOAA") show precipitation coupled with below/at freezing air temperatures by 6:07a.m. (B213) Freezing rain began at 6:54a.m. and precipitation continued throughout the day. (B186-B187, B213) Mr. Laine fell at 7:15a.m. (B186, B195, Tr. Laine, p. 27:3-18)

At 7:00a.m., after the freezing rain began and before Mr. Laine's incident, employee Jessica Lorilla stepped outside at the now-Speedway Convenience Store located at 31 N. DuPont Highway in Dover, noticed the icy conditions, and advised her supervisor, John Tetuan. (B187, Tr. Lorilla, p. 21:22-22:18; 50:12-51:23) Ms. Lorilla recalled icy and rainy weather conditions at 7a.m. and testified she had no reason to dispute the weather records. (B218-B219, Tr. Lorilla, p. 50:14-21; 51:16-23) In response to Ms. Lorilla's report, Mr. Tetuan contacted The Brick Doctor, the snow and ice contractor. (B223) The contractor responded that day and salted the parking lot. (B225)

Mr. Laine was employed as a driver for Modern Maturity. (B186) At 7:05a.m., he drove his work vehicle from Modern Maturity to the Speedway Store to fuel his vehicle. (B186, Tr. Laine, p. 27:3-14) As he was driving, he noticed it was precipitating and the roads were wet. (B186, Tr. Laine, p. 27:23-28:23) He

described the precipitation as an icy rain that "stayed all day." (B196, Tr. Laine, p. 28:21-23)

At 7:15a.m., and during the ongoing freezing precipitation, Mr. Laine exited his vehicle next to pump 15 and allegedly slipped and fell on ice. (B186, Tr. Laine, p. 38:5-17; p. 44:16-45:15; p. 47:22-49:23) He contends that the parking lot was covered with a sheet of ice. (B186, Tr. Laine, p. 44:16-24; p. 49:16-18) In an Incident Report completed that day by Mr. Tetuan, with Mr. Laine's input, he described the weather conditions at the time of his fall as "icy" and "rainy." (B209) At his deposition, he confirmed those conditions. (B203-B205; Tr. Laine, p. 60:18-23) In an Affidavit, Mr. Laine acknowledged the conditions of "freezing rain and rain" that day, corroborating the certified NOAA records, *supra.* (B160-B162)

In his Complaint, Mr. Laine alleged that Speedway maintained an unsafe condition on its premises by negligently permitting ice to form at its gas pump area; by failing to reasonably inspect the premises for unsafe icy conditions; and by failing to warn business invitees of the hazard. (A15-A18) The Superior Court ruled that his claims (and Cincinnati's subrogation action) fail as a matter of law because Speedway owed no duty of care under Delaware's Continuing Storm Doctrine. (A9-A14)

ARGUMENT

I. THIS APPEAL IS THE FIRST TIME PLAINTIFF ASSERTS THAT THE ICE EXISTED ON THE PREMISES BEFORE JANUARY 10, 2014 AND THERE IS NO EVIDENCE IN THE RECORD TO SUBSTANTIATE THIS THEORY.

A. Question Presented.

Whether Plaintiff can present an argument he did not raise in the Superior Court. (A11, B74-B77, B259-B262); *See* Supreme Court Rule 8.

B. Scope of Review.

The Delaware Supreme Court reviews a Superior Court decision granting summary judgment *de novo*. *Hazel v. Del. Supermarkets, Inc.*, 953 A.2d 705, 708-709 (Del. 2008). Only questions fairly presented to the trial court may be presented for review. Supreme Court Rule 8; *Shawe v. Elting*, 2017 LEXIS 62, *4, 20-21, 32 (Del. 2017). *See also* Supreme Court Rule 14(b)(vi)(1) ("Where a party did not preserve the question in the trial court, counsel shall state why the interests of justice exception to Rule 8 may be applicable).

C. Merits of the Argument.

The Superior Court correctly captured Plaintiff's argument in both oppositions to summary judgment: first, that the storm of January 10, 2014 was insufficient to trigger the Continuing Storm Doctrine and second, that the Court should find Speedway liable because it had two employees present who could have

taken earlier action. (A11, B74-B77, B259-B262). These are the only two issues on appeal.

Speedway filed its Motion for Summary Judgment on August 10, 2016. In opposition, Plaintiff argued that Speedway had not shown it was inexpedient and impracticable to remediate the ice before 7:15a.m. because two employees were on site. (B262) He conceded there was "freezing rain" in the morning, but argued nonetheless there was no storm because the accumulation was traceable. (B75). In his opposition to Speedway's renewed Motion, Plaintiff again conceded that "if there was a continuing storm, it did not exist on January 7, 8, or 9 but commenced on January 10 as rain between 6:00 and 7:00 a.m." (B259, n. 5) Yet, Plaintiff urged the Court to apply the Doctrine to snow storms only – not rain storms. (B260-B262) In addition, Plaintiff argued that an expert meteorologist's report which was not written or disclosed should be admissible in the liability trial even though his deadline had long passed. (B261, n. 6)

Upon intervention by Cincinnati, Cincinnati opposed Speedway's motion with an affidavit from a meteorologist which was submitted four months after the passing of Plaintiff's deadline. (B352, B357-B358) Assuming arguendo that the affidavit was admissible, it merely stated that rain – not ice – accumulated on January 10th. (B357-B358) In fact, Dr. Lee did not opine that ice pre-existed the January 10, 2014 storm. (B357-B358) Thus, the assertion that Plaintiff fell on

"pre-existing ice" was not presented until Cincinnati filed its opposition to Speedway's renewed motion on March 1, 2017 and stated, without citation to the record, that "the ice which existed pre-existed the storm." (B353)

In sum, Plaintiff did not assert to the trial court that ice existed at Speedway's premises before the storm of January 10, 2014. Now on appeal, he wishes to adopt Cincinnati's assertion of prior ice when there are no facts in the record to support such a claim. Procedurally, Plaintiff is foreclosed from shifting his position on appeal pursuant to Supreme Court Rule 8. Further, he has not shown that the interests of justice require this Court to consider his new argument. Plaintiff and Cincinnati collaborated on the meteorologist and on opposing Speedway's motion. Plaintiff had the opportunity to present this argument to the trial court and chose not to. However, such an argument is futile because there are no facts in the record inferring that a sheet of ice was already on Speedway's premises when the storm began on January 10, 2014.

Plaintiff's arguments on appeal are identical to those rejected by this Court in *Cash v. East Coast Property Management, Inc.*, 7 A.3d 484 (Del. 2010). In *Cash,* plaintiff claimed that the ice she slipped on was there prior to the ongoing storm at issue, yet this Court held that her contention was unsupported by the record. *Id.* The same is true here. Plaintiff contends there is a factual issue. However, there are no facts to substantiate his claim.

II. THE CONTINUING STORM DOCTRINE APPLIES TO THE FACTS OF THIS CASE AND BARS PLAINTIFF'S CLAIMS AS WELL AS CINCINNATI'S SUBROGATION ACTION.

A. Question Presented.

Whether the Superior Court correctly determined that the Continuing Storm Doctrine bars plaintiff's claims because there was an ongoing freezing rain event causing ice to form at the premises. (B8-B13, B184-B190)

B. Scope of Review.

The Delaware Supreme Court reviews a Superior Court decision granting summary judgment *de novo*. *Hazel v. Del. Supermarkets, Inc.*, 953 A.2d 705, 708-709 (Del. 2008).

C. Merits of the Argument.

For several decades, Delaware courts have consistently held that a land or business owner is permitted to await the end of a storm and a reasonable time thereafter to remove ice and snow from its premises; this is referred to as the Continuing Storm Doctrine. *Young v. Saroukos*, 55 Del. 149 (Del. Super. 1962); *Woods v. Prices Corner Shopping Center Merchant Ass'n*, 541 A.2d 574 (Del. Super. 1988); *Schnares v. General Floor Indus.*, 2015 Del. Super. LEXIS 446 (Del. Super. Ct. Sept. 3, 2015). The Continuing Storm Doctrine suspends the general duty of care owed to business invitees to maintain the premises in a safe condition. *Elder v. Dover Downs, Inc.*, 2012 Del. Super. LEXIS 300 (Del. Super.

Ct. Jul. 2, 2012). The Doctrine includes ice accumulation due to freezing rain. *Morris v. Theta Vest, Inc.,* 2009 Del. Super. LEXIS 91 (Del. Super Ct. Mar. 10, 2009), *aff'd*, 977 A.2d 899 (Del. 2009).

A storm need not be "raging" in order for a land or business owner to wait until the end of a storm before removing ice and snow from its premises. In *Cash,* the plaintiff sued after slipping on ice outside of defendant's property. *Cash v. East Coast Property Management, Inc.*, 7 A.3d 484 (Del. 2010). Evidence presented at trial showed that only a light drizzle continued at the time of the plaintiff's fall. *Cash*, 7 A.3d at *11. The Superior Court held that the Continuing Storm Doctrine applied and this Court affirmed on appeal. The Court explained that so long as moisture is falling and freezing on the ground, it is unreasonable and impracticable to expect the owner of the premises to take earlier action. *Id.* at *11-12.

Moreover, efforts to remediate snow or ice during an ongoing storm, whether successful or unsuccessful, do not give rise to the assumption of a duty of care to the Plaintiff. *Id*. at *6-7, citing *Kovach v. Brandywine Innkeepers, Ltd. P'ship*, 2001 Del. Super. LEXIS 373 (Del. Super. Ct. Oct. 1, 2001). Therefore, Speedway's call to its snow and ice contractor, The Brick Doctor, has no bearing on the application of the Doctrine in this case.

In addition, Speedway is aware of two additional Superior Court decisions which determined there was an ongoing storm on January 10, 2014. In *Buchanan*,

currently on appeal to this Court from the same plaintiff's firm, the Superior Court granted Summary Judgment holding that a storm was ongoing when plaintiff fell. *Buchanan v. TD Bank, N.A., et al.*, Del. Super. Ct., No. K15C-12-020 RBY, Young, R. (Apr. 7, 2017)(B398-B407). Similarly, in *Vicks*, plaintiff also alleged that she sustained injuries after she slipped and fell on January 10, 2014 while on defendant's premises. Defendant filed a Motion To Dismiss and in granting the motion, the Court noted that her claims were both procedurally barred by the statute of limitations and substantively barred: "Plaintiff's claims have no merit under the Continuing Storm Doctrine. Specifically, at the time that Plaintiff suffered her alleged injuries, Defendant did not owe Plaintiff any duty to remove snow or ice at the Apartments because a winter storm was ongoing." *Vicks v. Justison Landing Apartments*, 2016 Del. Super. LEXIS 175, *4 (Del. Super. Ct. Apr. 28, 2016).

In *Day*, the Superior Court reiterated that the Continuing Storm Doctrine has been "consistently applied over the last five decades" and it stands even when plaintiffs advance various theories in opposition to it. *Day v. Wilcox Landscaping, Inc., et al.*, 2017 Del. Super. LEXIS 97 (Del. Super. Ct. Feb. 28, 2017). In *Day*, among other unsuccessful theories, plaintiff argued the defendants should have performed pre-storm efforts to treat the parking lot. The Court soundly rejected that argument, holding that plaintiff "can point to *no* common law doctrine

requiring a landowner to take reasonable efforts to prevent snow and ice from accumulating…finding that a landowner [must undertake these efforts] would swallow the rule." *Id.*

In Mr. Laine's case, the ongoing freezing rain, made possible by precipitation and below/at freezing temperatures, began prior to 7a.m. and continued through the time of his incident. As a matter of law, reasonable conduct for Speedway was to await the storm's end to remediate ice. *See Cash*, 7 A.3d 484. The absence of a legal duty to remove icy conditions renders moot the question of whether Speedway exercised reasonable care. *Id.* Plaintiff misconstrues the Continuing Storm Doctrine, arguing that defendant must produce some additional evidence that it was inexpedient and impracticable to take earlier action. Yet, the inexpedient and impracticable language from *Young* is merely used to explain the rationale. *See Cash infra* (moisture falling and freezing on the ground is precisely what makes it unreasonable and impracticable to take earlier action). *See also Demby v. Del. Racing Ass'n*, 2016 Del. Super. LEXIS 54, *3 (Del. Super. Ct. Jan. 28, 2016)(rejecting plaintiff's argument that defendant owed a duty of care, including plaintiff's contention that the icy area should have been roped off).

In sum, the Continuing Storm Doctrine applies and eliminates a legal duty when there is an ongoing storm that has not completely abated, regardless of its strength. *See* cases *supra* and *Elder v. Dover Downs, Inc.*, 2012 Del. Super.

LEXIS 300, *12 (Del. Super. Ct. Jul. 2, 2012) *aff'd* 58 A.3d 982 (lulls in the storm do not counteract the Doctrine); *See also Saienni v. 3 Mill Park Court, LLC*, 2016 Del. Super. LEXIS 606 (Del. Super. Ct. Nov. 28, 2016)(plaintiff's differing recollection of the state of the storm was insufficient to avoid summary judgment).

Plaintiff's contention that the Continuing Storm Doctrine should not cover a "rain event" is contradicted by this Court's *Cash* decision, decades of case law, and public policy. The severity of the storm is irrelevant. The question is whether Plaintiff fell due to an ongoing precipitation event which caused slippery conditions. Mr. Laine testified that while it was precipitating, the parking lot was covered in a sheet of ice. He has conceded numerous times that there was ongoing freezing rain before, during, and after his fall. As in *Cash*, the weather records document an ongoing storm as well. Following his argument to its logical conclusion, if he did not fall due to the ongoing storm, and thus does not know what caused his fall, he cannot present a claim against Speedway under Delaware law. *Brown v. Gartside*, 2004 Del. Super. LEXIS 83 (Del. Super. Ct. Mar. 5, 2004); *Juras v. The Council of the Devon*, Del. Super. Ct., No. N11C-04-119 MJB, Brady, J. (May 31, 2012). As to the Continuing Storm Doctrine, the case law has established that:

> The doctrine is intended not only to shield landowners from repeatedly subjecting themselves to the elements and dangerous conditions in order to clear property, but also to encourage landowners to make an effort to clear public areas during a

> storm without fear of incurring liability where there otherwise would be none.

Day, 2017 Del. Super. LEXIS 97, *9. Speedway contacted the snow and ice contractor upon observation of the weather conditions. While Speedway acted to protect the public on January 10, 2014, under the law it is not subject to liability for personal injuries which occur as a result of an ongoing precipitation event.

Appellee respectfully requests that this Honorable Court uphold the principles of the Continuing Storm Doctrine and affirm the Superior Court's decision granting judgment in its favor.

CONCLUSION

WHEREFORE, Defendant Below, Appellee, Speedway LLC respectfully requests that this Honorable Court deny Appellant's appeal, affirm the Superior Court's decision below granting judgment as to all claims in Speedway LLC's favor and grant Speedway LLC any other additional relief the Court deems just and proper.

MARSHALL DENNEHEY WARNER
COLEMAN & GOGGIN

/s/ Jessica L. Tyler
GARY H. KAPLAN, ESQ. (I.D. #2965)
Telephone: (302) 552-4321
Email: ghkaplan@mdwcg.com
JESSICA L. TYLER, ESQ. (I.D. #5458)
Telephone: (302) 552-4370
Email: jltyler@mdwcg.com
1007 N. Orange Street, Suite 600
P.O. Box 8888
Wilmington, DE 19899-888
Fax: (302) 552-4370

Counsel for Defendant Below, Appellee Speedway LLC

DATED: May 31, 2017