IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

BEVERLY SLICER and		
L. CURTIS SLICER, JR.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**C.A. No. 08C-04-191 MJB**
	)	
MICHELE R. HILL,	)	**CONSOLIDATED**
WESTFIELD INSURANCE, a foreign	)	
corporation, ABLE EQUITY CORP.,	)	**JURY TRIAL**
a Delaware corporation, ABLE	)	**DEMANDED**
ASSOCIATES, L.P., a Delaware	)	
corporation, DLR PROPERTIES, L.P.,	)	
a Delaware corporation, KOHL'S	)	
DEPARTMENT STORES, INC., a	)	
Delaware corporation, OEKOS	)	
KIRKWOOD, LLC, a Delaware	)	
Limited Liability Company, and	)	
OEKOS MANAGEMENT CORP., a	)	
Delaware corporation,	)	
	)	
Defendants.	)	

Submitted: March 5, 2012
Decided: April 20, 2012

Upon Defendant Oekos Kirkwood, LLC & Oekos Management Corp.'s Motion for Summary Judgment, **DENIED**.
Upon Defendants Able Associates' and DLR Properties' Motion for Summary Judgment as to All Counts in the Crossclaims of Defendant Oekos Kirkwood, LLC, **GRANTED**.

Upon Defendants Able Associates' and DLR Properties' Motion for Summary Judgment as to All Counts in Plaintiffs' Complaint, **GRANTED**.
Upon Defendant Kohl's Department Stores, Inc.'s Motion for Summary Judgment, **GRANTED**.

OPINION AND ORDER

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Matthew O. Donelson, Esquire, Elzufon, Austin, Reardon, Tarlov & Mondell, P.A., Wilmington, Delaware, Attorney for Defendant Oekos Kirkwood, LLC.

Brian M. Gottesman, Esquire, Berger Harris, Wilmington, Delaware, Attorney for Defendants DLR Properties and Able Associates.

David G. Culley, Esquire, Tybout, Redfern & Pell, Wilmington, Delaware, Attorney for Defendant Kohl's Department Stores, Inc.

Stephen J. Milewski, Esquire, White & Williams LLP, Wilmington, Delaware, Attorney for Defendant Westfield Insurance Co.

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BRADY, J.

I. INTRODUCTION

A. Facts

This is a personal injury action wherein Beverly Slicer ("Plaintiff") and L. Curtis Slicer, Jr. (collectively, "Plaintiffs") brought suit against multiple defendants to recover damages sustained when Plaintiff was struck by an automobile driven by Defendant Michele Hill ("Hill") in the access road or fire lane in front of the Kohl's store at the Kirkwood Plaza Shopping Center in Wilmington ("the property"), Delaware on October 20, 2007. Plaintiffs allege Defendants Able Associates, L.P. ("Able"), DLR Properties ("DLR"), Kohl's Department Stores, Inc. ("Kohl's"), and Oekos Kirkwood, LLC and Oekos Management Corporation (collectively, "Oekos") are negligent for Plaintiff's injuries because they failed to provide her a safe means of ingress and egress, and they failed to remediate or warn her of a hazardous condition upon the property, the lack of a marked crosswalk to provide Plaintiff safe ingress and egress. Able and DLR, sold the property to Oekos on October 11, 2007. Kohl's leases the space its store occupies from Oekos. A crosswalk existed in front of Kohl's prior to the summer of 2006, when the parking lot was repaved.

B. Procedural History

Oekos filed its Motion for Summary Judgment on October 31. 2011. Plaintiffs responded on November 10, 2011. Kohl's joined in Oekos's Motion on November 11, 2011. The Court heard arguments on December 5, 2011. The Court reserved decision until after the deadline for filing motions for summary judgment, January 6, 2012. The Court received the transcript for the arguments on January 9, 2012. Able and DLR joined Oekos's Motion on February 6, 2012.

Able and DLR filed their Motion for Summary Judgment as to Plaintiffs' claims on June 24, 2011. Plaintiffs filed their opposition on July 5, 2011. The Court heard arguments on July 11, 2011. The Court heard additional arguments on October 27, 2011. The Court received transcripts on January 10, 2011.

Kohl's filed its Motion for Summary Judgment on January 4, 2012. Oekos filed an Opposition on February 27, 2012. Plaintiffs filed their Response on February 28, 2012. The Court heard argument on March 5, 2012.

Able and DLR filed their Motion for Summary Judgment as to Oekos's Crossclaims on February 6, 2012. Oekos filed its Opposition on February 27, 2012. The Court heard argument on March 5, 2012.

C. Parties' Contentions

Oekos's Motion for Summary Judgment

Oekos contends it is entitled to summary judgment because Plaintiff has failed to demonstrate that an unsafe condition existed on the property or that Oekos had knowledge of a dangerous condition. Oekos also contends that, even if it was negligent, Plaintiff's comparative negligence bars recovery.

Plaintiffs contend that, given the specific facts of the case, a material question of fact exists as to whether lack of a crosswalk was an unreasonably dangerous condition, and that Plaintiff is not barred from recovery as a matter of law because the question of negligence is a determination for a trier of fact and the law under which to make such a finding is inapplicable to the present case.

Able and DLR's Motions for Summary Judgment

Able and DLR seek summary judgment from all of Plaintiffs' claims and all of Oekos's crossclaims on the basis that Able and DLR relinquished all ownership and control over the property to Oekos in their purchase and sale agreement with Oekos. They contend the agreement expressly prohibits Oekos from seeking indemnity or contribution from them. They seek attorneys fees and costs on the basis that Oekos unnecessarily prolonged their stay in the litigation by not dropping its cross claims earlier.

Oekos contends the purchase agreement does not foreclose it from seeking indemnity or contribution, because the lack of a crosswalk was a concealed dangerous condition. Oekos argues that a genuine issue of material fact exists as to whether Oekos had sufficient time to discover and remedy the dangerous condition because it purchased the property nine days before the accident.

Plaintiffs and Oekos contend that Able and DLR should have disclosed the prior existence of a crosswalk to Oekos and should have warned Oekos a crosswalk used to exist on the property.

Kohl's Motion for Summary Judgment

Kohl's seeks summary judgment on the basis that, pursuant to its lease with Oekos, it lacked control of the fire lane where Plaintiff was injured and therefore owed her no duty to provide safe ingress and egress or warn her of dangerous conditions in that area.

Oekos and Plaintiffs oppose Kohl's motion, contending that Kohl's self-imposed design standards required it to provide crosswalks in front of its stores, and that Kohl's

was responsible as a lesee to warn Plaintiff of a discovered unsafe condition in a common area.

II. DISCUSSION

Summary judgment is only appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[1] Summary judgment will not be granted when, with the evidence produced, there is reasonable indication a material fact is in dispute.[2]

A possessor of land is liable for physical harm caused to a business invitee by a condition on the land if "he knows of it, or if by the exercise of reasonable care he would discover the condition and, realizing that it involves an unreasonable risk of harm to the business invitee, give him warning."[3] One who conducts business owes a duty to patrons to maintain property in a reasonably safe condition, as to conditions discoverable upon reasonable inspection.[4] The test allows the premises owner an opportunity to correct discovered hazardous conditions.[5] Whether a dangerous condition existed depends upon "the facts and circumstances of each case and is a question of fact for the jury to determine, except in very clear cases."[6] Whether a traffic control device needs to be

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[1] Super. Ct. Civ. R. 56(c).
[2] *Ebersole v. Lowengrub*, 180 A.2d 467, 469 (1962); *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[3] *Hamm v. Ramunno*, 281 A.2d 601, 603 (Del. 1971); *Holman v. Univ. of Del.*, 2011 WL 1557924, *5 (D. Del. Apr. 21, 2011); RESTATEMENT (SECOND) TORTS § 343.
[4] *Woods v. Prices Corner Shopping Ctr.*, 541 A.2d 574, 575 (Del. Super. Apr, 7, 1988); *Talmo v. Union Park Auto.*, 2011 WL , 5335391, *2 (Del. Super. Nov. 1, 2011).
[5] *Woods*, 541 A.2d at 575; *Talmo*, 2011 WL , 5335391 at *2.
[6] *Calaway v. Scrivener*, 1991 WL 113437, *1 (Del. Super. June 12, 1991).

placed on private property for safety purposes also is a question of fact dependent upon the property's unique characteristics.[7]

A. Oekos is not entitled to summary judgment because whether a dangerous condition existed is an issue in contention, and Plaintiff is not barred from recovery as a matter of law.

Oekos does not dispute it owed Slicer a duty to warn of dangerous known conditions. Therefore, to prevail on a motion for summary judgment, Oekos must show no genuine issue of fact exists as to the question of negligence and "that the proven facts preclude the conclusion of negligence on its part."[8] Oekos argues Plaintiffs have failed to demonstrate the existence of an unsafe condition on the property, specifically that the lack of a crosswalk is an unsafe condition. Oekos also argues Plaintiffs have failed to demonstrate Oekos had knowledge of any dangerous condition.

Oekos has not shown that there is no issue of material fact that a lack of a crosswalk is not a dangerous condition. Although Oekos purchased the property a mere nine days prior to the cause of action, Oekos had the property inspected by an independent company prior to purchasing the property.[9] A jury must determine whether lack of a crosswalk is a dangerous condition which Oekos should have corrected or about which Oekos should have warned Plaintiff, and whether, given the property's specific characteristics, a crosswalk was necessary to make the area, where Plaintiff was struck, safe.

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[7] *Wilmington Country Club v. Cowee*, 747 A.2d 1087, 1096 (Del. 2000).
[8] *Hazel v. Del. Supermarkets, Inc.*, 953 A.2d 705, 709 (Del. 2008).
[9] Def.'s Mot. for Summ. J. 5.

Oekos argues Defendant Hill testified she was blinded by the sun, and therefore would not have seen Plaintiff regardless of whether there was a crosswalk.[10] However, Defendant Hill also testified that if a crosswalk was present, she may have stopped earlier.[11] This issue is one for the jury to decide.

Oekos also argues Delaware's comparative negligence statue bars Plaintiff's recovery because her negligence exceeded that of Oekos's negligence. The statue diminishes damages in proportion to the amount of negligence attributed to the plaintiff.[12] Oekos relies on *Trievel v. Sabo* as support for the contention that the Court should bar Plaintiff's recovery as a matter of law because her negligence exceeds that of Oekos.[13] However, the facts of *Trievel* are highly unusual and easily distinguishable from those of the instant case. In *Trievel*, Sharon Trievel was riding her bike across a busy state highway and directly in the path of several oncoming vehicles, thereby placing herself in an area that was primarily the domain of automobiles traveling at a high rate of speed, when she was struck and killed by a pickup truck.[14] The Supreme Court stated Trievel's negligence in riding in front of an oncoming car was "obvious" and found that the "overwhelming evidence" demonstrated that Trievel's negligence was greater than any evidence attributable to the defendant driver.[15] In this case, Plaintiff was in a parking lot, near the entryway of a store, crossing a lane of travel which was a shared domain of pedestrians and vehicles. Further, the record in this case does not contain overwhelming evidence that Plaintiff was negligent. It is for the jury to decide this issue of comparative

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[10] Hill Dep. 38.
[11] *Id.* at 49-51.
[12] 10 *Del. C.* § 8132.
[13] 714 A.2d 742 (Del. 1998).
[14] *Id.* at 743.
[15] *Id.* at 746.

negligence, and the extent of it. Therefore, Oekos's Motion for Summary Judgment is **DENIED**.

B. Able and DLR are entitled to summary judgment as to all counts in Plaintiffs' Complaint and all counts in the cross claims of Oekos.

Generally, a vendor of property is not liable to a vendee for liability arising from the property after the vendee has taken possession.[16] However, under the Restatement (Second) of Torts § 353, a vendor of land who conceals or fails to disclose to a vendee any condition involving unreasonable risks to persons upon the land is subject to liability after a vendee has taken possession if the vendee did not know of the condition or risk and the vendor knew of the condition or risk and had reason to believe the vendee would not discover the condition or realize the risk.[17] A comment to the Restatement provision states:

> A vendor, innocent of conscious deception, is entitled to expect . . . that his vendee will discover a condition which would be disclosed by such an inspection as the vendee should make **before buying** the land and taking possession . . . . A vendor, therefore, is not required to exercise care to disclose dangerous conditions or to have an ordinarily retentive memory as to their existence, unless the condition is one which such an inspection by the vendee would not discover.[18]

In Delaware, under the doctrine of *caveat emptor*, after transfer of possession and control of a premises, a vendor is not liable for damages caused by defects in the premises.[19] Despite *caveat emptor*, a purchaser could still recover on proof of fraudulent

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[16] RESTATEMENT (SECOND) OF TORTS § 352 (1965).
[17] RESTATEMENT (SECOND) OF TORTS § 353 (1965).
[18] *Id.* cmt. c (emphasis added).
[19] *George v. Kuschwa*, 1986 WL 6588, *5 (Del. Super. May 21, 1986) *aff'd*, 518 A.2d 983 (Del. 1986) (citing 77 AM.JUR.2D VENDOR AND PURCHASER § 329 (1975)).

misrepresentation and concealment of the defective condition of the premises.[20] "Fraudulent concealment consists of some 'action affirmative in nature designed or intended to prevent, and which does prevent, the discovery of facts giving rise to the fraudulent claim, some artifice to prevent knowledge of facts or some representation intended to exclude suspicion and prevent inquiry,'" as well as silence where a vendor has a duty to speak.[21]

Delaware Courts have acknowledged that, where *caveat emptor* applies, allowing a vendee a cause of action for conditions existing on the land transferred where there has been no fraudulent concealment would subject the vendor to liability it did not bargain for.[22] Here, if lack of a crosswalk is a dangerous condition, Able and DLR could not possibly have concealed the condition at issue, as it is one Oekos should have noticed upon reasonable inspection prior to purchasing the property.

1. **Plaintiffs' Claims**

Plaintiffs argue Able and DLR are liable for Plaintiff's injuries because they created a defective condition on the property by removing a prior existing crosswalk, and because they failed to disclose to Oekos the prior existence of a crosswalk upon the property. Plaintiffs cite Restatement (Second) of Torts § 373, under which a vendor of land, who creates or negligently permits the existence of a structure or artificial condition on land which involves an unreasonable risk of harm to others outside the land, is subject to liability regardless of whether a vendee knows of or has discovered the condition, until the vendee discovers the condition.[23] However, § 373 clearly contemplates application to

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[20] *Id.*
[21] *Id.*
[22] *Gordon v. Nat'l R.R. Passenger Corp.*, 1997 WL 298320 (Del. Ch. Mar. 19, 1997).
[23] RESTATEMENT (SECOND) OF TORTS § 373 (1965).

affirmative and present conditions on land.[24] The provision's illustration features a dangerous condition involving telephone and electric wire poles causing the injury of electric shock.[25]

Section 373 is inapplicable to the present case. The condition to which Plaintiffs argue § 373 applies is a lack of crosswalk. A crosswalk is a condition Plaintiffs argue to be the opposite of an unreasonable risk of harm and, rather, a measure to protect pedestrians like Plaintiff from an unreasonable risk of harm. Further, the crosswalk was not a present condition at the time of the cause of action. The prior existence of a crosswalk is simply not within the scope of structures and artificial conditions contemplated by § 373. Therefore, Able and DLR are not subject to liability on the basis that they should have informed Oekos of the prior existence of a crosswalk on the property, and their Motion for Summary Judgment as to All Counts in Plaintiffs' Complaint is **GRANTED**.

2. Oekos's Claims

Oekos claims it is shielded from liability for Plaintiff's injuries because Able and DLR, as vendors, failed to disclose the existence of a dangerous condition on the property to Oekos, the vendee, under the Restatement (Second) of Torts § 353. However, Able and DLR are not subject to liability for Oekos's cross claims because § 9.3 of Oekos's purchase agreement with Able and DLR disclaims warranties and guarantees, and releases Able and DLR from liability or indemnification for Plaintiffs' claims. In

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[24] *See e.g. Cavanaugh v. Pappas*, 222 A.2d 34 (Union County Ct. 1966) (applying § 373 where a sidewalk was in such despair as to create a nuisance); *Royal Indem. Co. v. Caleco, Inc.*, CIV.A.03-CV-2281, 2004 WL 2612288 (E.D. Pa. Nov. 9, 2004) (applying § 373 where the condition was a bridge); *Williams v. Haight*, 2004 WL 5868029 (Pa. Com. Pl. Dec. 1, 2004) (declining to apply § 373 to a home filled with combustible garbage, refuse, and debris).

[25] RESTATEMENT (SECOND) OF TORTS § 373 illus.

Delaware, a transferor of property may disclaim warranties by using express language in the indorsement with words such as "without warranties."[26] "[A]n effective release terminates the rights of the party executing and delivering the release and . . . is a bar to recovery on the claim released."[27] "If the claim falls within the plain language of the release, then the claim should be dismissed."[28]

Section 9.3 of the purchase agreement is a "Purchase-As Is; Release" provision, wherein Oekos acknowledged it purchased the property in "its 'as-is, where is' condition 'with all faults' and defects as of the closing date and specifically and expressly without any warranties, representations, or guarantees."[29] The provision releases Able and DLR from:

> all claims which buyer . . . has or may have arising from or related to any matter or thing related to or in connection with the property, including . . . construction defects, errors, or omissions in the design or construction of all or any portion of the property . . . including any claim for indemnification, [or] contribution.[30]

The language of the provision creates an effective release,[31] and Plaintiffs' claims fall within the plain language of § 9.3 as a claim arising out of a construction defect, error, or omission in design. Therefore, the agreement serves as a bar to Oekos's recovery on cross claims against Able and DLR, and Able and DLR's Motion for Summary Judgment as to All Counts in the Crossclaims of Oekos is **GRANTED**.

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[26] 6 *Del. C.* § 3-416 (the UCC).
[27] *Seven Instruments, LLC v. AD Capital, LLC*, 32 A.3d 391, 396 (Del. Ch. Nov. 21, 2011).
[28] *Id.*
[29] Agreement of Purchase and Sale § 9.3, Able & DLR Mot. for Summ. J. as to Cross Claims Ex. A at 31-32.
[30] *Id.*
[31] *See Seven Instruments, LLC*, 32 A.3d at 396.

Generally, a prevailing party is not entitled to attorney fees in litigation.[32] Courts apply an exception to the general rule where a losing party has acted in "bad faith, vexatiously, wantonly, or for oppressive reasons,"[33] for the purpose of deterring abusive litigation.[34] Delaware courts have applied the exception where they concluded a defendant's primary goal was to prolong litigation and thus control over a company that was the subject of the litigation.[35]

Considering Able and DLR sold the property to Oekos only nine days before the cause of action, Plaintiffs and Oekos did not exercise bad faith in attempting to assert liability against Able and DLR. Accordingly, Able and DLR are not entitled to attorney's fees.

C. Kohl's is entitled to summary judgment because it lacked control over the portion of the property where Plaintiff was injured.

Generally, a shopping center owner who retains control and has a duty to maintain the common areas is liable to patrons who are injured in an area under exclusive possession and control of the shopping center.[36] Delaware has recognized that the duty of care of a premises occupant limited to areas of land over which the occupant has possession or control.[37] In Delaware, "a landlord owes a duty to a plaintiff when the landlord has retained 'actual control'" of the premises.[38] "The test that has been established by this Court to determine whether a landlord has retained 'actual control'

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[32] *Kaung v. Cole Nat. Corp.*, 884 A.2d 500, 506 (Del. 2005).
[33] *Id.* (quoting *Brice v. State*, 704 A.2d 1176, 1178 (Del. 1998)).
[34] *Id.*
[35] *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, (Del. 1998) *aff'g*, 705 A.2d 225 (Del. Ch. 1997).
[36] 60 AM. JUR. 2D. PREMISES LIABILITY § 445.
[37] *Volkswagen of Am., Inc. v. Costello*, 880 A.2d 230, 234 (Del. 2005).
[38] *Scott v. Acadia Realty Trust*, 2009 WL 5177152, *5 (Del. Super. Dec. 8, 2009) *aff'd*, 2010 WL 5123824 (Del. Dec. 16, 2010).

over the premises for purposes of liability is whether the landlord has the authority to 'manage, direct, superintend, restrict or regulate [the property]."[39] Actual control is more than just the "abstract authority to regulate."[40] The specific factual setting of a case ultimately dictates whether a party was in actual control of land such that a duty to warn arises.[41] This Court has held that the language of the lease between a landlord and a lesee of commercial property dictates the apportionment of control over the leased property between the parties.[42]

Here, Kohl's lease with Able, and then Oekos, demonstrates it lacked the power to manage, direct, superintend, restrict, or regulate the portion of the property where Plaintiff was injured. Kohl's leased only the portion of the property contained within the walls of the building space the Kohl's store occupies.[43] The lease designates that, at all times, "Common Areas" are subject to exclusive control of the "Landlord."[44] "Common Areas" include parking areas, sidewalks, walkways, service drives, driveways, roadways, and access ways.[45] The lease grants Kohl's, its business invitees, employees, and customers, a "nonexclusive right (in common with Landlord and all other tenants of the Center, and the employees, customers, and invitees of such tenants), to use the Common Areas subject to such reasonable regulations as Landlord may from time to time uniformly impose and enforce on all tenants . . . ."[46] The lease specifically outlines that

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[39] *Id.*
[40] *Id.*
[41] *Id.*; 60 AM. JUR. 2D. PREMISES LIABILITY § 445; *see Craig v. A.A.R. Realty Corp.*, 576 A.2d 688, 695 (Del. Super. 1989) *aff'd,* 571 A.2d 786 (Del. 1989).
[42] *Scott*, 2009 WL 5177152 at *6.
[43] Lease Art. 2.1.
[44] *Id.* Art. 6.1.
[45] *Id.*
[46] *Id.* Art. 6.2

the landlord maintain, repair, replace, and keep the Common Areas in safe condition.[47] The "Maintenance by Tenant" section pertains only to aspects of the building and includes absolutely nothing about the parking lot, sidewalks, or driveways.[48] Other provisions in the lease about the parking lot demonstrate the control of that area belonged to the landlord. For example, the landlord reserved the right to expand and build within the parking lot, and the landlord agreed not to decrease parking spaces within the center or alter the premises "to materially affect pedestrian or vehicular access to and from the Premises from the Common Areas or ingress and egress to and fro the Center from the roads surrounding the Center without obtaining prior written consent of the Tenant."[49]

The language of the lease between Kohl's and Oekos plainly demonstrates that the landlord, first Able, then Oekos, maintained full authority to manage, direct, superintend, restrict, or regulate the portion of the property where Plaintiff was injured. Kohl's lacked control over the area. For this reason, Kohl's did not owe Plaintiff a duty to provide safe ingress and egress in the area or warn her of the alleged dangerous condition, the lack of a crosswalk. Additionally, Kohl's could not be expected to have implemented its internal safety standards for crosswalks. First, the design criteria were effective from 1997 to 2000, and the Kohl's store at issue was designed in 2006. Further, Kohl's lacked a possessory right to install a crosswalk, even if the design criteria applied. Kohl's cannot be held liable for failing to advise Oekos of its crosswalk standards, because whether and how Oekos would have adhered to the standards is entirely speculative and would attenuate proximate causation.

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[47] *Id.* Arts. 7.1, 10.1(b).
[48] *Id.* Art. 10.2.
[49] *Id.* Art. 6.3.

It follows that no issue of material fact exists as to whether Kohl's must indemnify Oekos pursuant to the terms of its lease, because the lease provides Kohl's would "maintain public liability insurance, insuring Tenant, and also Landlord as an additional insured, against claims, demands, or actions for injury to or death . . . made by or on behalf of any persons, firm or corporation, *arising from, related to, or connected with the conduct and operation of tenant's business in the Premises*."[50] Since the lease defines "the Premises" to be the area contained within the walls of the building where Kohl's operates its business,[51] and Plaintiff's injury arose in the parking lot and apart from Kohl's operation of business in the Premises, Kohl's is not obligated to indemnify Oekos for liability arising from the incident.

Kohl's additionally did not have a duty to warn Plaintiff as a lesee, as Oekos and Plaintiffs contend. Under *Kendzierski v. Delaware Fed. Credit Union*,[52] this Court held that a lessee, which was in a better position than a remote lessor to discover latent defects, must provide warning of a hazardous condition affecting ingress and egress, even though the lessor retains control over the area of ingress and egress.[53] The hazardous condition in *Kendzierski* was loose bricks on steps to the building's entrance,[54] a "latent" defect.[55] The Court found that the Credit Union, as the premises occupier, was in a superior position to discover the "*non-apparent*" dangerous condition than the lessor State.[56]

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[50] *Id.* Art. 12.2(b).
[51] *Id.* Art. 2.1 (emphasis added).
[52] 2009 WL 342895 (Del. Super. Feb. 4, 2009).
[53] *Id.* at *5.
[54] *Id.* at *1.
[55] *Id.* at *5.
[56] *Id.* at *6.

The claimed dangerous condition in this case, a lack of a crosswalk, is a patent defect, meaning it is open to observation or discoverable by reasonable inspection.[57] If lack of a crosswalk is a dangerous condition, a fact under contention in this case, Kohl's was in no better a position than Oekos to observe that condition and warn against or remediate its danger. Therefore, Oekos's and Plaintiffs' position that Kohl's was liable because it was in a better position to observe the allegedly dangerous condition than Oekos lacks merit. Therefore, Kohl's Motion for Summary Judgment is **GRANTED**.

III. CONCLUSION

For all the foregoing reasons, Oekos's Motion for Summary Judgment is **DENIED**, Able and DLR's Motions for Summary Judgment are **GRANTED**, and Kohl's Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

/s/
M. Jane Brady
Superior Court Judge

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[57] *George v. Kuschwa*, 1986 WL 6588, *6 (Del. Super. May 21, 1986).