IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

C. STEPHEN HEAPS, individually; and, As Administrator of the Estate of JENNIFER HEAPS, deceased; and as Parent and Next Friend of OWEN HEAPS and EMMA HEAPS, minors;	)	
Plaintiffs	)	
	)	C.A. No. N10C-08-233-RRC
v.	)	
BELLA LUNA; CHURCH STREET ASSOCIATES; and JANICE ELDER d/b/a BELLA LUNA	)	
Defendants	)	

Submitted: October 2, 2012
Decided: December 31, 2012

Upon Defendant Church Street Associates' Motion for Summary Judgment.
GRANTED.

Upon Plaintiffs' Motion in Limine.
DENIED AS MOOT.

MEMORANDUM OPINION

Timothy E. Lengkeek, Esquire, Young Conaway Stargatt & Taylor, LLP, Wilmington, Delaware, Attorney for Plaintiffs

Stephen P. Casarino, Esquire, Casarino Christman Shalk Ransom & Doss, P.A., Wilmington, Delaware, Attorney for Defendant Church Street Associates

COOCH, R. J.

I. INTRODUCTION

A commercial landlord defendant, who leased property to a retailer, moves for summary judgment against the estate and family of a wrongful death claimant who tripped while exiting the retailer's store. Defendant tripped on a mannequin that was placed on a raised stoop used by the retailer for product displays. The stoop was just outside the storefront's main entrance. The trip injured claimant who then developed a rare medical condition, allegedly caused by the fall, and subsequently died.

This Court must now determine whether the landlord exercised sufficient control over the raised stoop, entryway, and/or mannequin, such that the landlord is potentially liable for the claimant's injuries. The landlord contends that the stoop, entryway, and mannequin were under the tenant's actual control and therefore, the landlord had no liability. Plaintiffs assert that the lease provisions and the parties' conduct demonstrate that the landlord retained control and, therefore, compels liability.

Although the landlord retained the right to control portions of the tenant's premises through the lease, the Court finds, looking at the facts in a light most favorable to Plaintiffs, that the landlord's conduct was insufficient to constitute "actual control" and was thereby insufficient to compel liability. Defendant's Motion for Summary

Judgment is **GRANTED.** Plaintiffs' contemporaneous Motion *in Limine* is **DENIED AS MOOT**.[1]

II. FACTUAL AND PROCEDURAL HISTORY

On August 25, 2009, Jennifer Heaps ("Mrs. Heaps"), while leaving Bella Luna, a store in Rehoboth Beach, Delaware, tripped and fell over a mannequin near the store's main entrance. Mrs. Heaps sustained personal injuries including a left foot fracture. Subsequently, Mrs. Heaps developed an occlusive pulmonary thromboembolism or deep vein thrombosis and died, allegedly as a result of the injuries caused by the fall.

Janice Elder operated Bella Luna. Elder rented the retail space from Church Street Associates ("Church Street"). Bella Luna had operated in the same location for approximately eight years. Bella Luna's retail site had two entrances, a main public entrance from Rehoboth Avenue and another along an adjacent alley owned by Church Street. The alley is situated between Rehoboth Avenue and Baltimore Avenue and is a common area for tenants of various properties owned by Church Streets.

The Rehoboth Avenue entrance features a single step onto a stoop, which leads to Bella Luna's front door. Elder and her staff would often display merchandise on a metal mannequin on the raised stoop at the Rehoboth Avenue entrance. Elder had placed the mannequin on the raised stoop since she started operating Bella Luna.

[1] Plaintiffs' motion *in limine* sought to exclude evidence and argument at trial about the "lack of prior falls" that supposedly occurred at Bella Luna.

The tenancy was governed by a lease agreement. In pertinent part, paragraph 16 of the lease provides:

> All facilities furnished by the Landlord in or near the leased property, including but not limited to: hallways, foyers, stairways, sidewalks, paved and landscaped areas, and other areas and improvements provided by the Landlord for the general use, in common, of tenants, their officers, agents, suppliers, employees and customers, shall at all times be subject to the exclusive control and management by the Landlord; and the Landlord shall have the right, from time to time, to establish, modify and enforce reasonable rules and regulations with respect to all facilities and areas mentioned herein.[2]

In Paragraph 23, the lease prohibited the "display of merchandise outside of the exterior walls of the leased premises" without the "express consent of the Landlord."[3] Separately, the lease provided a list of "Rules and Regulations" which, in pertinent part, prohibited tenants from using any "sidewalk, hall, passages, exits, entrances, [or] stairways . . . for any purpose other than for ingress to and egress from their respective premises."[4]

The Landlord's property manager, Jennifer Burton, testified at her deposition that the leased premises included only "the inside of the store" and that the mannequin was placed outside the "exterior walls."[5] However, Burton stated she did not draft the

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[2] Lease Agreement at ¶ 16.

[3] *Id*. at ¶ 23

[4] *Id*. at p. 12.

[5] Deposition of Jennifer Burton p. 31

lease and was not sure whether the lease only covered the store's interior.[6] Burton testified that she "checked in" monthly with Elder and, after Mrs. Heaps' injury, reminded Elder that permission was required before using the stoop for "business and marketing."[7] Burton explained she visited Bella Luna in part because she liked the store and not necessarily just in her property manager capacity.[8]

Mrs. Heaps' husband, C. Stephen Heaps, brought this action individually and as the administrator of Mrs. Heaps' estate, along with Mrs. Heaps' children (collectively "Plaintiffs"). Plaintiffs' original claim was brought against Church Street, Bella Luna, and Janice Elder. Plaintiffs have settled their claims against Bella Luna and Elder. Church Street is the only remaining Defendant.

III. THE PARTIES' CONTENTIONS

A. Defendant's Contentions

Defendant argues, primarily relying on Delaware case law, that it is not responsible for Mrs. Heaps' injuries because the mannequin was placed where it was by the tenant, and that Church Street did not maintain "actual control" over the stoop. Defendant contends that for it to incur liability for Mrs. Heaps' injuries, Church Street would have needed to have exercised "actual control," rather than merely

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[6] *Id.*

[7] *Id.* at 13.

[8] *Id.*

manifest its intent to retain control in the lease. Defendant emphasizes that the mannequin was not a physical property defect, but rather was a hazard owned and placed by the tenant.

Additionally, Church Street asserts that, while the lease does provide that the landlord retained exclusive control over portions of the leasehold, including common areas, the stoop where Mrs. Heaps tripped on the mannequin was not included within those lease provisions.

Defendant contends that issues of control between Defendant and the retailer can be determined by the Court at this juncture as a matter of law.

B. Plaintiffs' Contentions

Plaintiffs argue that the parties understood that the lease gave the landlord control over all the demised premises outside the unit's exterior walls, which "undoubtedly" included the entryway and step outside of Bella Luna. Plaintiffs contend that the rules and regulations also evidenced the parties' intent that the landlord retained control specifically over the outside public entryway and step in front of Bella Luna.

Plaintiffs assert that there can be no real dispute that the landlord retained control over the outside entryway and step. Plaintiffs argue that Defendant's position that the alley was the only "common area" controlled by the landlord disregards the clear language from the lease, the rules and regulations, and the parties' dealings.

Plaintiffs contend that if the landlord intended to only control the alley, it would have plainly indicated that in the lease.

Plaintiffs contend that the cases Defendant relies upon are inapposite because they "either involved parties where there was no written lease . . . [or] the landlord's rights in the lease were limited to a right of entry and request for repairs . . . or the injury occurred on what was clearly a portion of the demised premises."[9]

Plaintiffs state that, "[i]f anything, the issue of control is a material issue of fact that can only be resolved by the jury."[10]

IV. STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[11] The Court must view the facts in the light most favorable to the non-moving party.[12] Once a non-moving party establishes that no material facts are disputed, the non-movant must demonstrate a factual issue through admissible evidence.[13] More than "some

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[9] Plaintiff's Response Br. at p.4.

[10] *Id*. at p.3.

[11] Super. Ct. Civ. R. 56(c).

[12] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1970).

[13] See Super. Ct. Civ. R. 56(e); *Phillips v. Del. Power. & Light Co*., 261 A.2d 281, 285 (Del. 1966).

metaphysical doubt as to material facts" must be demonstrated.[14] Summary judgment will result where the party bearing the burden of proof fails to adduce sufficient essential claim elements.[15] "The disposition of litigation by motion for summary judgment should, when possible, be encouraged for it should result in a prompt, expeditious and economical ending of lawsuits."[16]

V. DISCUSSION

A. AS THE LANDLORD, CHURCH STREET DID NOT EXERCISE "ACTUAL CONTROL" OVER THE STOOP AND THEREFORE CANNOT BE POTENTIALLY LIABLE FOR MRS. HEAPS' INJURIES.

Numerous Delaware cases have addressed the "control" issues raised by this motion. "Control in the context of the duty owed by a landlord means the authority to manage, direct, superintend, restrict or regulate."[17] To determine whether a non-possessory landlord owed a duty to protect business invitees from hazardous conditions requires analysis of "whether the landowner/landlord had control of the

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[14] *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995) (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

[15] *Talmo v. Union Park Auto*., 2012 WL 730332, at *2, 38 A.3d 1255 (TABLE) (Del. Mar. 7, 2012) (citing *Burkhart v. Davies*, 602 A.2d 56, 60 (Del. 1991) and *Hazel v. Delaware Supermarkets, Inc,* 953 A.2d 705, 709 (Del. 2008)).

[16] *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc*., 871 A.2d 428, 443 (Del. 2005) (quoting *Davis v. University of Delaware,* 240 A.2d 583, 584 (Del.1968)).

[17] *Craig v. A.A.R. Realty Corp*., 576 A.2d 688, 695 (Del. Super. 1989) *aff'd*, 571 A.2d 786 (Del. 1990) (citation omitted).

premises."[18] "The element of duty in a negligence action is an issue of law for the Court to decide."[19] "Neither the right to inspect the premises by the landlord, nor the reservation of a right to inspect coupled with the right to retake control under certain circumstances amounts to control."[20]

The precise issue here is whether the landlord "exercised actual control" over the area where the accident occurred.[21] The mere fact that a landowner has the right to inspect or retake a parcel does not constitute actual control.[22] Actual control does not require exclusive control, but rather some degree of actual control.[23] Finally, although possession and control are related concepts, "it is possible for a landowner to retain some possession, but relinquish all control to a lessee or another party."[24]

In *Lewis v. Route 13 Outlet Mkt.*, a plaintiff sued for personal injuries after falling off a stool in a pet store.[25] Summary judgment was granted for the landlord because the Court found the landlord did not have sufficient control over the store's

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[18] *Lewis v. Route 13 Outlet Mkt.*, 1995 WL 654070, *2 (Del. Super. Oct. 26, 1995) *aff'd*, 1996 WL 313498, 679 A.2d 469 (TABLE) (Del. May 30, 1996) (citing *Craig*, 576 A.2d 688, 695 (1989)).

[19] *Kandravi v. J. & J Corp.*, 1991 WL 68960, *1 (Del. Super. Apr. 24, 1991) (citation omitted).

[20] *Lewis*, 1995 WL 654070 at *2.

[21] *Id*. at *4-5.

[22] *Johnson* v. *1001 Mattlind Way, LLC*, 2012 WL 1409341, at *2 (Del. Super. Jan. 9, 2012).

[23] *Monroe Park Apartments Corp. v. Bennett*, 232 A.2d 105 (Del. 1967).

[24] *Volkswagen of Am. v. Costello,* 880 A.2d 230, 234 (Del. 2005).

[25] *Lewis*, 1995 WL 654070 (Del. Super. Oct. 26, 1995).

premises or the stool.[26] The landlord in *Lewis* was involved in the store's operation by establishing store hours, creating cleanliness standards, and providing maintenance.[27] The stool in question had been left behind by the landlord's prior tenant and the current tenant continued to use it with the landlord's consent. Despite the landlord's involvement, the Court determined that the landlord's control was insufficient to hold the landlord liable for the injuries.[28]

In *Blair v. Berlo Vending Corp*,[29] plaintiff sustained personal injuries when a restaurant chair collapsed.[30] The plaintiff sued the tenant restaurant owner and the property owner.[31] The Court determined that the lease provision providing the landlord's right to inspect and repair did not constitute actual control to impute liability.[32] The landlord had not supplied the chair nor was the chair part of the

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[26] *Id*. at *2.

[27] *Id*. at *1.

[28] *Id*. at *2.

[29] 287 A.2d 696 (Del. Super. 1972).

[30] *Id*. at 696.

[31] *Id*. at 697.

[32] *Id*.

leasehold.[33] The court granted summary judgment and held that a landlord is not liable for injuries sustained by a defect caused by a tenant.[34]

Recently, in *Johnson v. Mattlind Way, LLC*,[35] summary judgment was granted in an action where a tenant's employee tripped and sustained personal injuries.[36] While the Court found the landlord retained some control over the leasehold's interior, the particular "control" present did not rise to the level of "actual control."[37] Specifically, the Court reasoned the landlord did not enter the premises regularly or influence the leasehold's normal routine; therefore, the landlord did not exercise actual control and could not be held liable.[38]

Plaintiffs' rely upon *Kendzierski v. Delaware Federal Credit Union*[39] and its citation to the Restatement (Second) of Torts for their assertion that a landowner who leases a portion of land and retains a portion in his own control is subject to liability to the lessee's guests for injury caused by dangerous conditions, if the landlord reasonably "could have discovered the condition and the unreasonable risk involved

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[33] *Id*. at 696.

[34] *Id*. at 697.

[35] 2012 WL 1409341 (Del. Super. Jan. 9, 2012).

[36] *Id*. at *2.

[37] *Id*. at *1-2.

[38] *Id*. at *2.

[39] 2009 WL 342895 (Del. Super. Feb. 4, 2009).

therein and could have made the condition safe."[40] However, in *Kendzierski*, the court analyzed whether the landlord was responsible for latent dangers, whereas the hazard over which Mrs. Heaps tripped was not a structural or physical defect, but rather an implement specifically used to market Bella Luna's merchandise. [41]

Here, the lease provided that the landlord retained exclusive control over the facilities furnished "in or near the leased property, including but not limited to: hallways, foyers, [and] stairway . . ."[42] The lease explicitly prohibited merchandise displays outside the exterior walls.[43] In the landlord's rules and regulations attached to the lease, the landlord limited the use of entrances, exits, and passages strictly for "ingress to and egress from their respective premises."[44]

It is clear that through the lease provisions and the rules and regulations, Church Street intended to retain control over the unit's exterior, including the stoop, by forbidding exterior merchandise displays without Church Street's express consent,

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[40] See RESTATEMENT (SECOND) OF TORTS §360 ("A possessor of land who leases a part thereof and retains in his own control any other part which the lessee is entitled to use as appurtenant to the part leased to him, is subject to liability to his lessee and others lawfully upon his land with the consent of the lessee or sublesee or a sublesee for physical harm caused by a dangerous condition upon that part of land ***retained in the lessor's control***, ***if the lessor by the exercise of reasonable care*** could have discovered the condition and the unreasonable risk involved therein and could have made the condition safe.") (emphasis added).

[41] *Kendzierski*, 2009 WL 342895, at *5.

[42] Lease Agreement at ¶ 16.

[43] *Id*. at ¶ 23.

[44] *Id*. at p. 12.

and by limiting the stoop's use to ingress and egress. The test however, is not whether a landlord retained control, such as through a lease, but, rather, whether the landlord's involvement with the leasehold constituted actual control.

Plaintiffs contend that the landlord's clear manifestation of intent to retain control through the lease is sufficient control to impute liability. The case law counsels otherwise. Parties can include provisions in a lease providing any number of limitations or exclusions. "Actual control," however, over a property sufficient for liability in these circumstances is not compelled merely by lease provisions, but rather by the landlord's actual conduct.

Such a conclusion is supported by the case law. The landlord in *Lewis* was held not to have exercised actual control despite being active in the tenant's operations and permitting the tenant to use a stool from a prior tenant. Defendant exercised far less actual control than the landlord in *Lewis*. The mannequin was owned and placed by Bella Luna and there is no evidence that Defendant was involved in store operations.

Lease provisions whereby a landlord retains some control have also been held insufficient to compel liability. In *Blair*, lease provisions providing rights to inspection and repair did not constitute actual control because the landlord did not supply the chair which injured a plaintiff. Here, while through the lease Defendant retained control more explicitly than the landlord in *Blair*, the common factor is that

both are mere lease provisions unpaired with actual control. Furthermore, as in *Johnson*, although Defendant's agent entered the premises regularly, it was not to influence the leasehold's routine, but rather because "she liked the store."[45]

Kendzierski is inapposite. While theoretically Church Street retained control over the common areas through the lease and could have discovered the mannequin's placement on the stoop, the defect was not a structural latent defect; rather, it was a marketing tool specifically used by Bella Luna to display merchandise.

Even though, through the lease agreement, Defendant retained authority to control the stoop and to prevent merchandise displays, it did not exercise actual control over the stoop or act to prevent the mannequin's display. Viewing the facts in a light most favorable to Plaintiffs, the landlord had minimal involvement in Bella Luna's operations, at least with respect to the Rehoboth avenue entrance, and had no rights in the mannequin. Since Defendant did not exercise actual control, Defendant had no duty to Plaintiffs and cannot be potentially liable for Mrs. Heaps' injuries.[46]

B. THE ANALYSIS OF "ACTUAL CONTROL" IN THESE CIRCUMSTANCES IS A LEGAL QUESTION FOR THE COURT.

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[45] Deposition of Jennifer Burton p. 13.

[46] The Court need not reach Defendant's additional argument addressing whether the stoop or entryway was a "common area" under the lease because the Court finds that Defendant did not exercise "actual control," irrespective of the lease's provisions.

Plaintiffs primarily argue that the defendant manifested sufficient actual control as a matter of law to impute liability through the lease provisions and Defendant's actions.[47] Alternatively, however, Plaintiffs briefly mention, somewhat in passing, that "if anything, the issue of control is a material issue of fact that can only be resolved by the jury."[48] Plaintiffs thus appear to contend, in the alternative, that it is improper to resolve this issue on summary judgment. In support thereof, Plaintiffs rely upon *Koutafaris v. Dick*.[49]

In *Koutafaris,* the Delaware Supreme Court affirmed the trial court's holding that, as a matter of law, the lease at issue did not transfer control over a leasehold's security from a landlord to a tenant because the lease was silent on that issue. The Court noted that "[o]rdinarily, disputed questions of control between distinct entities are best reserved for jury determination. But given the common identity of the parties chargeable with premises control in this case, we agree with the Superior Court that the issue of control is one of law."[50]

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[47] Plaintiffs state that this Court " . . . as a matter of law, [should] find that Church Street retained actual control [ ] e.g. the ability to 'restrict' or 'regulate' over the outside entrance and deny Church Street's Motion [for] Summary Judgment. " Letter of Mr. Lengkeek to Court (September 26, 2012). Given this position, it would seem that Plaintiffs could have filed a cross-motion for summary judgment on this issue.

[48] Pl's Response Br. at ¶ 8.

[49] 604 A.2d 390, 402 (Del. 1992)

[50] *Id*. at 402.

Koutafaris is distinguishable from the present case in many respects. *Koutafaris* involved an assault in a restaurant parking lot that was owned by a landlord. The Koutafarises were the owners of the parking lot and the restaurant. The Koutafarises leased the parking lot and restaurant to a corporation whose sole stockholders were the Koutafarises. Additionally, the Koutafarises transferred certain maintenance responsibilities to a partnership whose sole partners were also the Koutafarises. None of the leases addressed which entity was responsible for safety and security of the premises.

Although the Court did note that control issues are ordinarily "best reserved for jury determination,"[51] the Court found that control under those circumstances was a legal issue for the Court. The court reasoned that the Koutafarises controlled the "nature and extent of security on the premises" because of the "common identity of the parties."[52]

While not citing *Koutafaris* specifically, on summary judgment the Delaware Superior Court recently held in *Scott v Acadia Realty Trust*[53] as a matter of law that a lease transferred control of a parking facility from the property owner to the tenant. In *Scott*, this Court was persuaded that the tenant had actual control over its parking

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[51] *Id*. at 402.

[52] *Id*. at 402.

[53] 2009 WL 5177152 (Del. Super. Dec. 8, 2009) *aff'd*, 11 A.3d 228 (Del. 2010).

lot, as opposed to the property owner, because under the lease: (1) the tenant was required to purchase insurance specifically for the parking lot; (2) the tenant was permitted to use the parking lot as an "outside sales area" and; (3) the property owner was required to obtain the tenant's written consent before making any changes to the parking lot.[54]

Nothing from *Koutafaris* or *Scott* impacts this Court's conclusion that a showing of actual control is required to impute liability upon a landlord, or this Court's conclusion that Church Associates did not exercise actual control under the circumstances of this case. There is no common identity of ownership between Bella Luna and Church Street in this case. The sole issue raised by the Plaintiffs' reliance upon *Koutafaris* and *Scott* is whether the question of control is a question best reserved for a jury, and thus not ripe for summary judgment.

In both cases, the reviewing courts concluded that control issues were legal issues for the Court to decide. While in *Koutafaris*, the Delaware Supreme Court seemingly determined the control analysis was a legal one because of the common identity of ownership, in *Scott*, the Superior Court determined that control was a legal

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[54] *Id.* at *7-8. *Scott* does not impact the Court's analysis of whether Defendant actually controlled the stoop, entryway, or the mannequin. In *Scott*, this Court concluded that the tenant exercised actual control over the parking lot through detailed lease provisions and did not address any facts of actual control by either the landlord or the tenant which affected the analysis. While this case contains lease provisions demonstrating the landlord's ***retained control***, there are no facts that the defendant landlord ***exercised actual control***. Conversely, there is sufficient evidence that the tenant exercised actual control over the stoop, entryway, mannequin, and all store operations.

issue primarily because it required the Court's interpretation of a lease. Of the two, *Scott* is more apt case to the analysis in this case. While the present case involves factual analysis, it also requires this Court's analysis of those facts against the lease provisions.

While this Court does not conclude ultimately that the lease provisions themselves constituted actual control under these circumstances, to reach that conclusion, this Court is required to conduct a legal analysis contrasting the lease's provisions against the facts, a responsibility for the Court and not the jury. This Court finds that while the factual control questions contemplated in *Koutafaris* may be best reserved for a jury, where those facts require application to a lease agreement, the analysis is ultimately a legal one, (as argued by both parties) proper for the Court's determination on summary judgment.

VI. CONCLUSION

Viewing the facts in a light most favorable to Plaintiffs, the Court concludes that Defendant never exercised actual control over the stoop, entryway, or mannequin despite retaining those rights through the lease provisions. Therefore, Defendant cannot be liable for injuries resulting from Mrs. Heaps' tripping over the mannequin. This holding not only is supported by case law, but comports with common sense. Although in some circumstances, the factual analysis of a control dispute may be best reserved for jury determination as a factual issue, this is not such a case. In the

circumstances of this case, the Court must interpret lease control provisions and contrast them to the actual control exercised, the decision is properly before the Court and therefore resolvable through summary judgment. Defendant's Motion for Summary Judgment is **GRANTED**. Plaintiffs' Motion in *Limine* is **DENIED AS MOOT**.

IT IS SO ORDERED.

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Richard R. Cooch, R.J.

oc: Prothonotary