SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

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Re: ***Robinson v. NRG Energy, Inc.*;**
C.A. No. 07C-09-004 THG

On Defendants Parsons Energy & Chemical Group, Inc. and Parsons Corporation's Motion for Summary Judgment. GRANTED

On Defendant Precision Resource Company's Motion for Summary Judgment. RESERVED

Date Submitted: December 6, 2010
Date Decided: February 28, 2011

Dear Counsel,

Pending before the Court are two Motions for Summary Judgment. For the reasons stated herein, Defendants Parsons Energy & Chemical Group, Inc. and Parsons Corporation's (collectively, "Parsons") Motion for Summary Judgment is GRANTED. Defendant Precision Resource Company's ("Precision") Motion for Summary Judgment is RESERVED.

I. Facts & Procedural Background Common to Both Motions for Summary Judgment

On or about November 3, 2005, Lawrence Robinson ("Robinson") fell into a high voltage duct bank while working at the Indian River Power Plant ("IRPP"). IRPP is owned by defendants NRG Energy, Inc., Indian River Operations, Inc., Indian River Power LLC, and Indian River IGCC LLC (collectively, "NRG defendants"). An allegedly defective rectangular concrete cover on top of a duct bank fell into the duct bank as Robinson walked on top of it. As a result, Robinson fell and sustained injuries.

Robinson and his wife (collectively, "Plaintiffs") filed suit against the NRG defendants, as well as Stone & Webster Construction, Inc., Stone & Webster, Inc., Precision, Parsons, and J.J. White, Inc. Plaintiffs allege each defendant caused Robinson's injuries by negligently: failing to maintain the premise, failing to inspect properly the premises, failing to warn adequately individuals lawfully on the premise of dangerous conditions; and failing to prevent workers from traversing the area where Mr. Robinson was allegedly injured, an area that Plaintiffs contend was unsafe and dangerous for entry. Summary judgment has already been granted in favor of Stone & Webster Construction, Inc., Stone & Webster, Inc., and J.J. White, Inc.

Precision was retained by the NRG defendants to provide temporary employees to the IRPP on an as-needed basis. Several years before the date of Robinson's injury, Parsons served as the supplemental maintenance contractor at IRPC. In September of 1991, Parsons replaced the concrete duct bank covers at the site.

II. Standard of Review

Summary judgment is only appropriate where, viewing the facts in the light most favorable to the non-moving party, the moving party has demonstrated that there is no genuine issue of

material fact and the moving party is entitled to judgment as a matter of law.[1] The moving party bears the burden of establishing the non-existence of material issues of fact.[2] Once the moving party has met its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact.[3] Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.[4] If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of his or her case, summary judgment must be granted.[5] "A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."[6] If, however, material issues of fact exist, or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, summary judgment is inappropriate.[7]

Due to the fact-specific nature of negligence claims, negligence actions are rarely disposed of by way of summary judgment.[8] Nevertheless, if the movant shows that, under the uncontroverted

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[1] *Dambro v. Meyer*, 974 A.2d 121, 138 (Del. 2009).

[2] *Moore v. Sizemore,* 405 A.2d 679, 680 (Del. 1979).

[3] *Id.* at 681.

[4] Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-323 (1986).

[5] *Burkhart v. Davies,* 602 A.2d 56, 59 (Del. 1991).

[6] *Id.* at 59 (quoting *Celotex*, 477 U.S. at 322-23).

[7] *Ebersole v. Lowengrub,* 180 A.2d 467, 470 (Del. 1962).

[8] *Morris v. Theta Vest, Inc.*, 2009 WL 693253, at *1 (Del. Super.).

facts, the plaintiff cannot establish the elements necessary to sustain a negligence claim, the Court will find in favor of the defendant's motion.[9] A negligence claim is comprised of four elements: (1) the presence of a duty owed by the defendant to the plaintiff, (2) a breach of this duty, (3) causation, both legal and proximate, and (4) resultant injury to plaintiff.[10]

III. Parsons' Motion for Summary Judgment

Parsons argues summary judgment should be granted in its favor for three reasons: (1) the six year statute of repose contained in Delaware Builder's Statute[11] shields Parsons from liability arising from its replacement of the concrete duct bank covers in September 1991; (2) Parsons did not owe a legal duty to Robinson at the time of the incident; and (3) there is no causal link between the repairs made by Parsons to some of the concrete duct bank covers in 2002 and Robinson's fall.

A. The applicable statute of repose bars any claim against Parsons founded on Parsons' replacement of the concrete duct bank covers in 1991.

Section 8127 of Title 10 of the Delaware Code provides, in brief summary, that no action in tort to recover damages resulting from any alleged deficiency in the construction of an improvement to real property shall be brought after six years from the date of payment or job completion. Parsons argues this section bars any action on behalf of Plaintiffs for the work Parsons performed with regard to the replacement of the concrete duct bank covers in 1991. Plaintiffs do not dispute this contention in their answering brief and the Court cannot conceive of any reason why the statute of repose would not apply to these circumstances. Therefore, the only basis of any claim against Parsons must

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[9] *Id*.

[10] *Id*.; *see also Duphily v. Delaware Elec. Co-op., Inc.*, 662 A.2d 821, 828 (Del. 1995).

[11] 10 *Del. C.* § 8127.

concern the repair work Parsons did in 2002.

B. Parsons did not owe a legal duty to Plaintiffs on the date of the incident.

Parsons contends that Plaintiffs cannot establish the first element of a negligence claim: the existence of a legal duty to the plaintiff at the time of the incident. In support of its argument, Parsons argues Plaintiffs have set forth no evidence that Parsons exercised any actual control over the concrete duct bank covers at the time of the incident, or for several years prior. The question of whether a defendant owed a duty to the plaintiff is traditionally an issue for the Court.[12]

Parsons' supplemental maintenance contract at the IRPP had expired several years prior to November 3, 2005. It is undisputed that several other contractors had been responsible for supplemental maintenance at IRPP after Parsons' contract expired and prior to the date of the incident. Plaintiffs expert notes that regular safety audits are the industry norm. The Court agrees with Parsons' observation that public policy does not favor a ruling from this Court that a contractor who has long left a job site has a continuing duty to ensure that the conditions at that site remain safe where other contractors have subsequently been charged with maintaining the premises.

C. If Parsons did have a duty to Plaintiffs, Plaintiffs' claims fail for want of causation.

As noted, Parsons made repairs to concrete duct bank covers in April 2002 by replacing some of the covers. However, Parsons argues that Plaintiffs cannot demonstrate that the repairs made by Parsons at that time are connected to Robinson's fall and, therefore, the claims fail for want of proximate causation. Plaintiffs contend, however, that Parsons' liability cannot be severed by the existence of subsequent maintenance contractors because Parsons was the last contractor to perform "major maintenance and/or construction work activity in the area where [Robinson] fell." In support

[12] *O'Connor v. Diamond State Tel. Co., et al.*, 503 A.2d 661, 663 (Del. Super. 1985).

of this assertion, Plaintiffs cite to a work order issued on January 21, 2002. Pursuant thereto, the contractor was directed to "Repair concreted covers over cable trench behind Chlorine Building. Many covers are cracked and are a safety hazard." Although the work order does not identify the contractor, the parties agree Parsons completed this job.

When deposed, Robinson testified that the cover that gave way did not break but fell into the hole beneath it. Robinson did not feel the slab slide. Robinson also testified that he was coming out of the maintenance shop or storage warehouse when he fell. He cannot identify which slab it was that gave way. The slab was not cracked to the best of Robinson's recollection. After the incident it was noted that the concrete slab was not broken. Several workers lifted it and put it "back into position." There has been no evidence presented that indicates the Chlorine Building is located near where Robinson believes he fell.

In sum, then, Plaintiffs claim that Robinson fell in an unspecified area due to a shifting in the concrete slab that showed no sign of damage and Parsons is liable because they performed some work pursuant to a work order in the area of the Chlorine Building three years prior. Proximate cause is a legal concept concerning the question of whether a defendant should be held accountable for his or her negligence.[13] A plaintiff "must demonstrate by a preponderance of the evidence a natural, unbroken chain of causation between the defendant's negligent act and the resulting harm to the plaintiff."[14] Plaintiffs cannot do this. Plaintiffs attempt to establish their claims by way of an inspection conducted and photographs taken of a concrete slab that is not the slab in question. Moreover, the inspection was conducted and the photographs were taken more seven years after the

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[13] *Spicer v. Osunkoya*, 2001 WL 36291589, at *5 (Del. Super.).

[14] *Id*.

incident. Parsons' Motion for Summary Judgment is granted.

IV. Defendant Precision's Motion for Summary Judgment

The Court reserves its ruling on Precision's Motion for Summary Judgment. I will use the pretrial conference scheduled for Thursday, March 3, 2011, to question the parties further and to permit the parties to make additional argument.

V. Conclusion

For the reasons articulated, *supra*, Parsons' Motion for Summary Judgment is granted as to the claims concerning Parsons' installation of concrete duct covers in 1991 due to the applicable statute of repose. Summary judgment is granted as to the claims concerning Parsons' work at the IRPP in 2002 because (a) Parsons did not owe a legal duty to Plaintiffs at the time of the accident and, in the alternative, (b) Plaintiffs have failed to produce competent evidence that Parsons' work proximately caused Robinson's injury.

The Court hereby reserves a ruling on Precision's Motion for Summary Judgment.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

oc: Prothonotory