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

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| JENNIFER FOLEY, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | C.A. No. 05C-05-176-PLA |
| | ) | |
| ELKTON PLAZA ASSOCIATES, LLC and KONSTANTINOS "GUS" TSIONAS, | ) | |
| | ) | |
| | ) | |
| Defendants. | ) | |

UPON PLAINTIFF'S MOTION FOR NEW TRIAL
**DENIED.**

Submitted: January 16, 2007
Decided: March 30, 2007

## MEMORANDUM OPINION

Roger D. Landon, Esquire, MURPHY SPADARO & LANDON., Wilmington, Delaware. Attorney for Plaintiff.

Stephen P. Casarino, Esquire, CASARINO CHRISTMAN & SHALK, Wilmington, Delaware. Attorney for Defendants.

**ABLEMAN, JUDGE**

## I.

Plaintiff Jennifer Foley ("Foley") filed this negligence action after she slipped and fell on ice in a parking lot owned by Elkton Plaza Associates, LLC and Konstantinos "Gus" Tsionas (collectively "Defendants"). Following trial the jury awarded Foley damages, but found that she and the Defendants were equally liable. Now before the Court is Foley's motion for a new trial pursuant to SUPERIOR COURT CIVIL RULE 59.[1]

Foley claims she is entitled to a new trial because the verdict was the result of a compromise by the jury on the issue of liability, brought about by the lack of clarity in the jury instructions, the Court's response to the jury's question regarding the duty owed to Foley, and the distraction of the jury during Foley's counsel's rebuttal argument.[2] The Court finds that there are no persuasive indicia of a compromise verdict; the instructions given to the jury, and the answer to their lone question, did not undermine the jury's ability to perform its duty intelligently and were informative and true statements of the law that were neither misleading nor confusing; and the brief lapse in a few of the jurors' attention during rebuttal argument was not prejudicial. Accordingly, Foley's motion must be **DENIED**.

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[1] *See* Docket 86. "Docket #" refers to the number assigned by LexisNexis File & Serve.

[2] *Id.*, ¶ 1.

## II.

Christina School District ("District") leased property from the Defendants located at 136A and 136B Elkton Road in Newark, Delaware ("Property"). The lease agreement entered into between the District and the Defendants stated in pertinent part:

> **3. Care and Maintenance of Premises.** … Lessee shall, at his own expense and at all times, maintain the premises in good and safe condition[.] … Lessee shall also maintain in good condition such portions adjacent to the premises, such as sidewalks, driveways, lawns and shrubbery, which would otherwise be required to be maintained by Lessor.[3]

The District used the Property to operate its "Networks" program, which was implemented to teach, train and benefit handicapped children. Foley was a teacher for the District's Networks program and, as such, reported to work at the Property.[4]

In January 2004, Foley was walking towards her vehicle in the Property's parking lot. As she was attempting to enter her vehicle through the driver's side door, she slipped and fell on ice that had allegedly accumulated in the parking lot. Foley hit her head, right hip and right shoulder and purportedly sustained serious injuries.[5]

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[3] *Id.*, Ex. B.

[4] *See* Docket 1, ¶ 6.

[5] *Id.*, ¶¶ 7-8.

Foley subsequently filed this action alleging the Defendants were negligent in that they created a hazardous condition by not properly removing the ice; failed to inspect the premises to ascertain the existence of a hazardous condition; failed to maintain the premises and thereby allowed to exist a hazardous condition; failed to correct a known hazardous condition which would cause injury; failed to warn of the existence of a hazardous condition; and failed to adequately supervise those persons responsible for the maintenance of the premises.[6]

Trial was held in December 2006. At the prayer conference, which was held near the closing stages of trial and prior to instructing the jury, Foley's counsel took issue with the following jury instruction:

> DUTY OF OWNER OR OCCUPIER OF BUSINESS TO KEEP PREMISES SAFE FROM HAZARDS OF SNOW AND ICE
>
> A property owner or occupant has a duty to keep the premises, including sidewalks, parking lots and entry ramps, reasonably safe from the hazards associated with the natural accumulation of ice and snow. Although a property owner or occupant is not an insurer of the safety of its invitees, the owner must take reasonable steps to make the premises safe. The owner or occupant of the premises may relieve itself of liability, even though an invitee may be injured on the premises, by taking reasonable steps to make the area safe. The owner or occupant is entitled to await the end of the snowfall and a reasonable time thereafter to take action to make the premises safe from the hazardous condition caused by the accumulation of ice and snow.

[6] *Id.*, ¶ 9.

It is not enough, however, merely to warn an invitee of the hazard.

If a property owner or occupant is aware of a dangerous accumulation of ice or snow, or if it is aware of conditions on the property that make the dangerous accumulation of ice and snow in a particular location, under foreseeable circumstances likely, then the property owner or occupant has a duty to prevent the dangerous accumulation of ice or snow there. An accumulation of ice or snow is dangerous if its presence makes it more likely than an unsuspecting pedestrian walking across it will slip and fall.

If you find that the defendant failed to take reasonable steps to keep the premises free from the hazard of snow and ice accumulations, then you must find the defendant negligent.[7]

Foley's counsel instead proposed the following instruction:

DUTY OF OWNER TO KEEP PREMISES SAFE FROM HAZARDS OF SNOW AND ICE

A commercial landlord has a duty to keep the premises, including the parking lot, reasonably safe from the hazards associated with the accumulation of ice and snow. Although a business owner landlord is not an insurer of the safety of its invitees, the owner must take reasonable steps to make the premises safe. The owner of the premises may relieve itself of liability, even though an invitee may be injured on the premises, by taking reasonable steps to make the area safe. The business owner is entitled to await the end of the snowfall or ice accumulation and a reasonable time thereafter to take action to make the premises safe from the hazardous condition caused by the accumulation of ice and/or snow. It is not enough, however, merely to warn an invitee of the hazard.

[7] *See* Docket 63, Jury Instructions, p. 8.

> If you find that the defendants failed to take reasonable steps to keep the premises free from the hazard of snow and ice accumulations, then you must find the defendant negligent.[8]

The prayer conference concluded with the Court rejecting Foley's proposed instruction and informing counsel that, instead, the first aforementioned instruction would be given to the jury. Trial resumed and counsel proceeded with closing arguments. During Foley's counsel's rebuttal argument, the Court took notice that the Bailiff had handed *one* lunch menu to a juror who reviewed the menu briefly and passed it along to two or three other jurors, who also reviewed the menu briefly.[9] Closing arguments then ended, the Court instructed the jury, and the jury began its deliberations.

During deliberations, the jury sent a note to the Court asking the following:

> Does the lease supersede the law or vice versa? We are referring to the Duty of Owner on Page 8 of the Jury Instructions.[10]

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[8] *See* Docket 86, Ex. D.

[9] The Court did not notice a menu being circulated until one of the jurors placed it on the ground so as to avoid being distracted during the closing argument. The Court tried to signal its displeasure with the practice to the Bailiff but did not want to interrupt counsel's argument. Needless to say, the Bailiff has been admonished for his lapse of judgment as the Court would never have authorized or approved of such a practice.

[10] *See* Docket 86, ¶ 3.

Foley asked the Court to instruct the jury that the law (as stated *supra* and originally in the "Duty of Owner or Occupier" section of the jury instructions) supersedes the lease (as stated *supra* and originally in Section "3." of the lease agreement). Defendants took the position that the jury should be told that neither the lease nor the law supersedes the other. The Court, with the parties' concurrence, responded to the jury's question as follows:

> The lease does not supersede the law, nor does the law supersede the lease. It is one of the things you may consider in reaching your decision. You have a hard job.[11]

The jury returned to deliberate and ultimately reached a verdict in favor of Foley in the amount of $625,000. The jury further determined that Foley was 50 percent negligent and the Defendants were 50 percent negligent. Foley now alleges that, after the jury announced its verdict and was dismissed by the Court, the Bailiff informed Foley and her counsel that during its deliberations, the jury had voted on liability three times and the vote was 7-5 each time. Although the Bailiff denies ever making that statement, the Court will accept Foley's allegation as true for purposes of this motion.[12]

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[11] *Id.*, ¶ 3.

[12] *Id.*, ¶¶ 1-2.

## III.

Foley now seeks a new trial on all issues of liability and damages. She claims she is entitled to a new trial because the jury's verdict on the issue of liability was the result of a compromise. According to Foley, the Bailiff's comment regarding the jury's multiple 7-5 votes, coupled with the eventual 50 percent comparative negligence finding and an award of approximately 50 percent of Foley's claimed special damages, "screams" compromise on liability.[13]

Foley attributes the cause of the jury's alleged compromise to the lack of clarity in the jury instructions; the Court's response to the jury's question; and the Bailiff's distraction of the jury during Foley's counsel's rebuttal argument. Specifically, Foley maintains that the instruction given by the Court concerning the duty of the "owner or occupier" confused the jury as is evidenced by their question to the Court as to whether the law superseded the lease or vice versa. Foley argues that, had the Court given the jury her counsel's proposed instruction in the first place, the potential for confusion would have been eliminated. That is, the jury would not have had to grapple with whether the law or lease superseded the other because the proposed instruction would have made clear that the jury was to consider only the duty

[13] *Id.*, ¶ 3.

of the Defendants (owner/landlord), as the District (occupier/tenant) owed no duty to Foley by virtue of the "exclusivity" provision under DEL. CODE ANN. tit. 19, § 2304 ("SECTION 2304") of the Delaware Workers' Compensation Act.[14]

Foley also contends that the Court's response to the jury's question did not alleviate their confusion and, as a result, they returned to deliberate with the same dilemma they had before they asked the question. Foley instead suggests that the Court should have told the jury that the law supersedes the lease by imparting to the jury the following:

> [T]he Duty instruction outlines the standard of care which the law requires the landlord defendant in this case to meet. If it attempts to delegate that duty to a third person (in this case [the District] by virtue of the lease), it is not relieved of its legal duty owed to the plaintiff if the third person fails to undertake the duty which landlord attempted to delegate. Or, more plainly, if you find that neither [the District] nor the landlord used reasonable care to keep the parking lot reasonably safe from the hazards associated with the natural accumulation of ice and snow, you must find the landlord negligent.[15]

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[14] *Id.*, ¶ 4. SECTION 2304 provides: "Every employer and employee, adult and minor, except as expressly excluded in this chapter, shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence and to the exclusion of all other rights and remedies."

[15] Docket 86, ¶ 6.

As support for her claim that the Defendants' duty to Foley was not relieved by virtue of the lease, Foley cites to *Koutoufaris v. Dick*[16] for the legal concept that actual control of the property gives rise to the legal duty. That is, the commercial landlord who exercises actual control over the property, although it may be joint control with the tenant, owes a duty of care to invitees of the tenant, regardless of whether the landlord attempted to contract away that duty via a lease. According to Foley, because in this case both the Defendants (owner/landlord) and the District (occupier/tenant) exercised actual control over the parking lot where Foley was injured, the Defendants continued to owe a duty to invitees despite the language contained in the lease; hence Foley's rationale for telling the jury that the law supersedes the lease.[17]

Lastly, Foley claims that the jury was not focused on her counsel's rebuttal argument because the "Bailiff had actually circulated lunch menus to the jurors during the rebuttal argument which appeared to cause at least some of the jurors to be distracted[.]"[18] Foley contends that, even though the jurors were not purposefully inattentive, they were distracted during a

[16] 604 A.2d 390 (Del. 1992).

[17] *See* Docket 86, ¶ 5.

[18] *Id.*, ¶ 7.

critical portion of her counsel's argument on liability and, therefore, such distraction was prejudicial to her case.[19]

Defendants respond by contending that there was no compromise or confusion on the part of the jury. They argue that the Bailiff's comment to Foley's counsel regarding the jury's multiple 7-5 votes on liability is not evidence of a compromise and should not be considered by the Court because it is unsubstantiated hearsay and not relevant. Defendants also disagree that the jury's damages award suggests a compromise because Foley's statement that damages were roughly 50 percent of her claimed special damages is simply not true. Rather, Defendants maintain that special damages were only past medical bills of approximately $34,000 and past lost wages of approximately $140,000, and all "future claims were contested and did not have to be considered by the jury."[20]

Defendants further contend that the instruction given by the Court concerning the duty of the "owner or occupier" was a proper statement of the law and has been used previously in numerous cases.[21] Also, Defendants

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[19] *Id.*

[20] *See* Docket 88, p. 2-3.

[21] Defendants cite to the following cases as examples of when the same instruction was used: *Kovach v. Brandywine Innkeepers*, 2001 WL 1198944 (Del. Super. Ct. Oct. 1, 2001); *Agro v. Commerce Square Apartments*, 745 A.2d 251 (Del. Super. Ct. 1999); *Adamkiewicz v. Milford Diner*, 1991 WL 35709 (Del. Super. Ct. Feb. 13, 1991).

claim that the jury's question to the Court does not imply that it was confused about the Defendants' duty to Foley because, ultimately, the jury determined that the Defendants breached their duty in a manner proximately causing injury to Foley. Therefore, according to the Defendants, whether the jury was confused and struggling with the duty issue is immaterial, as it eventually concluded that the Defendants were liable.[22]

## IV.

The standard of review on a motion for a new trial is well settled. A jury's verdict is presumed to be correct and just.[23] As such, the Court must give extreme deference to the findings of the jury and exercise its power to grant a new trial cautiously.[24] The Court will not set aside a jury's verdict unless there is a clear indication that the verdict "was the result of passion, prejudice, partiality, [] corruption[, or confusion]; or that it was manifestly the result of disregard of the evidence or applicable rules of law."[25] Stated differently, a jury's verdict will not be disturbed unless it shocks the Court's

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[22] *See* Docket 88, p. 2-4. Defendants admittedly have "no recall of lunch menus" being passed out during opposing counsel's rebuttal argument and, as such, addressed Foley's claim that the jury's distraction was prejudicial as merely speculative. *Id.*, p. 3.

[23] *Reineke v. Tease*, 2007 WL 537725, at *1 (Del. Super. Ct. Mar. 19, 2001).

[24] *Maier v. Santucci*, 697 A.2d 747, 749 (Del. 1997).

[25] *Storey v. Castner*, 314 A.2d 187, 193 (Del. 1973); *Reinco, Inc. v. Thompson*, 906 A.2d 103, 111 (Del. 2006). *See also Reinco*, 906 A.2d at 103, fn 15 ("While we have at least acknowledged that a new trial is warranted if the jury's verdict was *clearly* the result of jury confusion, our case law is limited on the issue.") (emphasis in original).

"conscience and sense of justice; and unless the injustice of allowing the verdict is clear."[26] Further, the Court "will also order a new trial when the jury's verdict is tainted by legal error committed by the … [C]ourt during the trial[,]"[27] or "when the result appears to be a compromise verdict."[28]

## V.

### A. Compromise Verdict

"A compromise verdict results when jurors resolve their inability to make a determination with unanimity as to liability by finding inadequate damages."[29] "However, an insufficient damages verdict, standing alone, does not necessarily indicate a compromise."[30] "Rather, the compromise must be evident from other factors of record[]"[31] which demonstrate "that the deficient monetary award resulted from an impermissible compromise."[32] "Indeed, if inadequate damages was the sole test for a

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[26] *Storey*, 314 A.2d at 193.

[27] *Clark v. Wingo*, 2003 WL 21538030, at *1 (Del. Super. Ct. Jan. 21, 2003).

[28] *Welsh v. Del. Clinical & Lab. Physicians, P.A.*, 2001 WL 392400, at *2 (Del. Super. Ct. Mar. 19, 2001).

[29] *Pryer v. C.O. 3 Slavic*, 251 F.3d 448, 462 (3d Cir. 2001). *See also Bennett v. Andree*, 252 A.2d 100, 103 (Del. 1969).

[30] *Mekdeci v. Merrell Nat. Labs*, 711 F.2d 1510, 1513-1514 (11th Cir. 1983).

[31] *Pryer*, 251 F.3d at 462.

[32] *Mekdeci*, 711 F.2d at 1513-1514.

compromise, Rule 59(a) would have little or no purpose."[33] Therefore, "[t]o determine whether a verdict is a compromise verdict, a court looks for a close question of liability, a damages award that is grossly inadequate, and other circumstances such as length of jury deliberation."[34] "If sufficiently persuasive indicia of a compromise are present, then the issues of liability and damages are inseparable and a complete new trial is necessary."[35]

In Delaware, there are several cases in which this Court has determined that the jury's verdict was a compromise.[36] This case, however, is not one them. Although there was a close question of liability presented in this case, as is evidenced by the jury's finding that each party was 50 percent negligent, the jury's ultimate award of damages was not grossly

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[33] *Burger King Corp. v. Mason*, 710 F.2d 1480, 1487 (11th Cir. 1983).

[34] *Nat'l R.R. Passenger Corp. v. Koch Indus., Inc.*, 701 F.2d 108, 110 (10th Cir. 1983).

[35] *Mekdeci*, 711 F.2d at 1513-1514.

[36] *See Bennett v. Andree*, 252 A.2d 100, 103 (Del. 1969) ("In the trial of this case, the issue of liability was hotly disputed and the evidence upon it was in direct conflict. In the opinion of the trial judge the inadequacy of the verdict was such as to create a strong suspicion that it was a compromise by the jury on the issue of liability."); *Rentz v. Ford*, 1990 WL 74291, at *3 (Del. Super. Ct. May 14, 1990) ("When the issue of liability in a negligence case is hotly disputed and the evidence upon it is in direct conflict, the inadequacy of the verdict may give rise to the suspicion of a compromise by the jury on the issue of liability."); *Elia v. Pellak*, 1986 WL 631206, at *1 (Del. Super. Ct. July 8, 1986) ("If the jury found liability on the part of the defendant, the amount of damages awarded was grossly inadequate. Therefore, the Court can come to no other conclusion but that this was a compromise verdict."); *Poston v. McShane*, 1985 WL 189271, at *1 (Del. Super. Ct. Sept. 13, 1985) ("Moreover, it is possible that the low verdict resulted from a compromise on the issue of liability."); *Thorpe v. Gurczenski*, 269 A.2d 559, 562 (Del. Super. Ct. June 25, 1969) ("Since the inadequacy of the award in this case raises the possibility of a compromise verdict, … a new trial on all the issues is necessary.").

inadequate. Foley is to receive $312,500, or 50 percent of the jury's $625,000 award. This amount is nearly twice as much as Foley's claimed damages of $34,000 for past medical bills and $134,000 for past lost wages. While Foley expected much more for future special and general damages, given her claims that she will incur future medical expenses, life care expenses, and loss of earnings, the Court finds that the jury's remaining award allocated for future damages is not inadequate. The evidence presented by Foley, which attempted to show that she will incur a significant amount of future expenses and losses, such as the testimony of the life care planner and economist, was likely offset in the minds of the jury by evidence revealing that she may not be as debilitated in the future as she claims. Defendants' expert's testimony discounting the extent of Foley's disability and testimony that she has a relatively normal social life, extensively travels, and is away from home for extended periods of time, all serve to minimize the impact of her dire health projections. The damages award is, therefore, not inadequate given the evidence presented at trial.

As for the Bailiff's comment regarding the jury's multiple 7-5 votes on liability, the Court does not find that this "screams" compromise.[37]

[37] The Court has admonished the Bailiff for disclosing any information to counsel and for "eavesdropping" on the deliberations to the extent he did so. The Court presumes that counsel is fully aware that such disclosures violate the Bailiff's oath.

Neither the parties nor the Court can say with any amount of certainty what the jury's votes on liability entailed. Were they voting as to the liability of Foley, the District, or the Defendants? Was their vote with respect to the percentage of liability to attribute to Foley, the District, or the Defendants? It is impossible to know and, as a result, the jury's preliminary votes can not be given as much credence as Foley attributes to them. Juries vote numerous times during their deliberations and, more often than not, the result of the voting is non-unanimous. That is precisely the reason that further deliberations are necessary prior to reaching a verdict.

In all, the jury came to a unanimous decision in finding that each party was equally liable and awarded Foley a damages award that was adequate. Therefore, the Court is satisfied that the jury's verdict was not a compromise.

**B. Jury Instruction and Question**

"A party is not entitled to a particular jury instruction but does have the unqualified right to have the jury instructed on a correct statement of the substance of the law."[38] It follows that a party "has no right to contest the

[38] *Koutoufaris*, 604 A.2d at 399.

particular language of an instruction so long as the instruction correctly states the law."[39]

Ascertaining the "propriety of a jury instruction does not demand perfection."[40] In general, a jury instruction is appropriate if it is "'reasonably informative and not misleading, judged by common practices and standards of verbal communication.'"[41] An instruction is not proper if it undermines "the jury's ability to 'intelligently perform its duty in returning a verdict.'"[42] In examining a jury instruction, "the entire instruction is considered with no statement to be viewed out of context"[43] and with the expectation that there will be "'some inaccuracies and inaptness in statement … in any charge."[44]

Viewed in its entirety, as it must, the "Duty of Owner or Occupier" instruction[45] that was given to the jury in this case, and with which Foley takes issue, is an accurate statement of the law. The Court agrees with

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[39] *Wolhar v. Gen. Motors Corp.*, 1998 WL 472785, at *3 (Del. Super. Ct. July 1, 1998).

[40] *Haas v. United Techns. Corp.*, 450 A.2d 1173, 1179 (Del. 1982).

[41] *Id.* (citations omitted).

[42] *Sirmans v. Penn*, 588 A.2d 1103, 1104 (Del. 1991) (citations omitted).

[43] *Haas*, 450 A.2d at 1179.

[44] *Sirmans*, 588 A.2d at 1004 (citation omitted).

[45] *See* Section II.

Foley's contention that, under *Koutoufaris*,[46] the Defendants (owner/landlord) continued to owe a duty of care to Foley as an invitee because of the Defendants' actual control over the Property. That is, the Defendants' attempt to delegate their duty to the District by virtue of the lease[47] did not absolve them of their duty to keep the premises reasonably safe from the hazards associated with natural accumulations of ice and snow.[48] However, merely because the Defendants continued to owe a duty of care, does not suggest that the District (occupier/tenant) was discharged of its duty to do the same. Stated otherwise, the District's duty to maintain the premises in reasonably safe conditions for invitees was not diminished

[46] 604 A.2d 390.

[47] To reiterate, the pertinent section of the lease agreement stated: "Lessee shall, at his own expense and at all times, maintain the premises in good and safe condition[.] … Lessee shall also maintain in good condition such portions adjacent to the premises, such as sidewalks, driveways, lawns and shrubbery, which would otherwise be required to be maintained by Lessor." *See* Docket 86, Ex. B.

[48] *See Woods v Prices Corner Shopping Ctr. Merchs. Ass'n*, 541 A.2d 574, 577 (Del. Super. Ct. 1988) ("[A]n owner or occupier of land … has an affirmative duty to keep the premises reasonably safe from the hazards associated with natural accumulations of ice or snow.")

due to the Defendants owing a like duty.[49] Moreover, Foley's inability to bring a direct action against the District because of the "exclusivity" provision under SECTION 2304 of the Delaware Workers' Compensation Act is of no consequence, and also does not serve to alleviate the District's duty. Therefore, Foley's contention that the jury should only have been informed of the Defendants' duty because the District owed no duty to Foley is simply not true. The District *did* owe a duty to Foley and other invitees and it was appropriate to apprise the jury of that duty.

Foley's proposed jury instruction,[50] which effectively removed the "or occupier" language, would have served to mislead the jury into assuming that the issue of liability as between the Defendants and the District did not exist when, in fact, the evidence at trial presented a genuine dispute concerning the respective responsibilities of the Defendants and the District. This conflicting evidence included, among other things, the testimony from representatives of the District that it frequently salted the walkways and did

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[49] *See Evans v. United Bank of Ill., N.A.*, 226 Ill. App. 3d 526, 538 (Ill. App. Ct. 1992) ("Merely because tenants may have assumed the duty to remove snow and ice does not remove the duty from an otherwise liable landlord. Both the tenant and the landlord may have a coexisting duty to third parties based on the lease terms."); *Cochran v. Great Atl. & Pac. Tea Co., Inc.*, 561 N.E.2d 229, 938 (Ill. App. Ct. 1990) (citation omitted) ("There is no doctrine of 'partial duty.' Duty either exists or does not, and if it does, it is not diminished in any way because someone else simultaneously owes a like duty. Defendant [occupier/tenant] had a duty to plaintiff. That duty is not to be diminished merely because the landowner also might have owed a like duty.").

[50] *See* Section II.

make efforts to maintain the area free of ice and snow, the fact that certain parking spaces were used exclusively by employees of the District during the weekdays when school was in session, but by patrons of the other retail establishments on the Property on the weekends, and testimony which revealed that the Defendants also accepted some responsibility for maintaining the entire parking lot. All of this created a factual issue for the jury to determine whether the Defendants had *any* liability for snow and ice removal, and to what extent if any. By omitting the phrase "or occupier," the jury would have been unfairly misled into assuming that no issue existed with respect to that responsibility when, to the contrary, that issue was perhaps the most thorny aspect of the jury's fact finding responsibility. Therefore, Foley's counsel's proposed instruction was not warranted because it would have been an inaccurate statement of the law.

The same holds true for Foley's proposed answer to the jury's lone question of whether the law supersedes the lease or vice versa.[51] Once again, there are no bases in the law or facts for informing the jury that, as Foley would have it, the law supersedes the lease. The Defendants and the

[51] To reiterate, the jury posed the following question at trial: "Does the lease supersede the law or vice versa? We are referring to the Duty of Owner on Page 8 of the Jury Instructions." Docket 86, ¶ 3. The Court's answer to that question was: "The lease does not supersede the law, nor does the law supersede the lease. It is one of the things you may consider in reaching your decision. You have a hard job." *Id.*

District each had a duty to Foley and other invitees, and imparting to the jury that the Defendants' duty (i.e. the law) supersedes the District's duty (i.e. the lease) would have been misleading and contrary to the evidence presented. Such an answer would have had the same unfair effect as Foley was attempting to accomplish with the proposed instruction, that is, to focus the jury's attention on the Defendants' duty and ignore the duty of the District. This would have been improper. Nonetheless, while the Court considered the jury's question to be the most troublesome part of their fact-finding duties, because the evidence was not at all clear as to where the responsibility to remove the snow and ice lied, the jury resolved that issue by not attributing any liability to the District as evidenced by their finding that the Defendants were 50 percent negligent and Foley was 50 percent negligent.

In short, the Court finds that the "Duty of Owner or Occupier" instruction that was given, and the Court's answer that the law does not supersede the lease nor does the lease supersede the law, did not undermine the jury's ability to perform its duty intelligently. The Court's instruction and answer were informative and true statements of the law that were neither misleading nor confusing.

### C. Jury Distraction

To warrant a new trial based on juror misconduct, the complaining party must show that the complained of conduct was prejudicial.[52] Brief lapses in jurors' attention that are not prejudicial may be excused.[53] In this case, contrary to Foley's assertion, the Court recollects that only *one* menu was given to a juror who briefly reviewed it and passed it on to, at most, three other jurors. This lasted for no more than one to two minutes during Foley's counsel's rebuttal argument. This lapse of attention by a few of the jurors was only brief and momentary and, therefore, does not amount to prejudicial conduct.

## VI.

Based on the foregoing, the Court finds that the verdict in this case was not the result of a compromise, the instructions to the jury and the answer to their question was proper, and the brief lapse in a few of the

[52] *See Massey v. State*, 541 A.2d 1254, 1257 (Del. 1988) ("Generally, a defendant must prove he was 'indentifiabl[y] prejudice[d]' by the juror misconduct.") (citations omitted) (alteration in original); *Angstadt v. Lippman*, 2006 WL 1679593, at *2 (Del. Super. Ct. May 2, 2006) ("[W]hen asserting a claim of juror misconduct, the complaining party bears the burden to demonstrate that 'there is a reasonable probability of juror taint of an inherently prejudicial nature[.]'") (citation omitted); *State v. Barnett*, 864 A.2d 979, 992 (Del. Super. Ct. 2005) ("Thus, to warrant a new trial based on juror misconduct, the Defendant must show actual prejudice[.]").

[53] *See* 24 AM. JUR. 2D PROOF OF FACTS § 633.

jurors' attention was not prejudicial. Accordingly, Foley's motion for a new trial is **DENIED**.

**IT IS SO ORDERED**.

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**Peggy L. Ableman, Judge**

Original to Prothonotary