IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Harriet Winter, a minor by Fiona Winter, her parent and natural guardian and Fiona Winter, as parent and natural guardian of Harriet Winter, a minor,	:	
Appellants	:	
v.	:	No. 1839 C.D. 2010
City of Pittsburgh, Forest City Enterprises, Inc., and Commonwealth of Pennsylvania Department of Conservation and Natural Resources	:	Argued: April 5, 2011

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: May 13, 2011**

Harriet Winter (Minor) and Fiona Winter (Mother), as Minor's parent and guardian (collectively, Plaintiffs), appeal the Order of the Court of Common Pleas of Allegheny County (trial court), which granted the Motion for Summary Judgment (Motion) filed by Forest City Enterprises, Inc. (FCE) and the City of Pittsburgh (City) (collectively, Defendants). The trial court determined that, pursuant to Carrender v. Fitterer, 503 Pa. 178, 469 A.2d 120 (1983), Defendants

did not owe Plaintiffs a duty to maintain the area where Minor slipped and fell on ice because the danger was a known and obvious risk.

Plaintiffs initiated a negligence/premises liability action against the Defendants seeking damages for bodily injuries suffered by Minor on December 24, 2005, as a result of Minor slipping on snow and ice that had accumulated on the Station Square River Front Trail (Trail). The Complaint alleged that Defendants[1] were negligent in causing and/or permitting the accumulations of snow and ice to exist on the Trail for an unreasonable period of time and in failing to remove, cordon off, or warn users of the dangerous condition. On the day of her injury, Minor, a resident of Missouri, was fourteen years old and in Pittsburgh for the first time. Minor rode with her parents and friends to Station Square, where they parked their cars in a parking lot. The group rode the Monongahela Incline to Mt. Washington, walked along Grandview Avenue, and then rode the Duquesne Incline back down to East Carson Street. A friend led Minor and the group to the Trail, which they traversed back to their parked cars. The Trail was approximately fifteen feet wide, paved, and enclosed by fencing on both sides. Amphitheatre tenting abutted the middle portion of one side of the Trail and railroad tracks and a river abutted the entire other side. While walking on the Trail, Mother instructed the group to be careful because the Trail was slippery. Minor testified that the Trail contained patches of bumpy ice and snow in certain places and that other places were clear. Additionally, Minor testified that she did not see the ridge/patch of ice that caused her fall before she walked over that area, slipped, and fell.

[1] The Commonwealth of Pennsylvania, Department of Conservation and Natural Resources (Commonwealth) was originally named a defendant, but the trial court granted the Commonwealth's motion for summary judgment and that order has not been appealed.

FCE filed the Motion, which the City joined, on the basis that the Defendants owed no duty to Minor as owners or possessors of the land as a matter of law because Minor voluntarily and knowingly encountered the patch of ice on which she fell. The trial court granted summary judgment to the Defendants, stating that:

> [t]he undisputed facts here show that both the injured minor and her parent observed ice on the path yet chose to continue despite the recognized hazard. Under Carrender, the danger was open and obvious by Plaintiffs' own admission. As a result, the crucial element of *duty* cannot be made out.

(Trial Ct. Op. at 1-2 (emphasis in original).) Plaintiffs now appeal to this Court.

"Summary Judgment is appropriate only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Pritts v. Department of Transportation, 969 A.2d 1, 3 (Pa. Cmwlth.), appeal denied, 603 Pa. 697, 983 A.2d 730 (2009). "To successfully challenge a motion for summary judgment, a party must show through depositions, interrogatories, admissions or affidavits that there are genuine issues of material fact to present at trial." Id. Our review of a trial court order granting summary judgment is limited to determining whether the trial court erred as a matter of law or abused its discretion. Irish v. Lehigh County Housing Authority, 751 A.2d 1201, 1203 n.4 (Pa. Cmwlth. 2000). When reviewing a trial court's grant of summary judgment, this Court "must examine the record in a light most favorable to the non-moving party, accepting as true all well-pleaded facts and reasonable inferences" drawn from those facts. Id.

On appeal, this Court must determine whether the trial court erred in granting summary judgment and finding that Defendants owed no duty to Minor pursuant to the Supreme Court's decision in Carrender.

The standard of care a possessor of land owes to one who enters upon the land depends on whether the person entering is a trespasser, licensee, or invitee. Carrender, 503 Pa. at 184, 469 A.2d at 123. The parties in this case agree that Minor was a business invitee. A possessor of land owes a duty to invitees to protect them from foreseeable harm. Id. at 185, 469 A.2d at 123. If conditions of the land are known to or discoverable by the possessor, it is subject to liability only where it:

> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to the invitee, and
> (b) should expect that [the invitee] will not discover or realize the danger, or will fail to protect [herself] against it, and
> (c) fails to exercise reasonable care to protect [the invitee] against the danger.

Id. (quoting Restatement (Second) of Torts § 343A (1965) (Restatement)). "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is *known or obvious to them*, unless the possessor should anticipate the harm despite such knowledge or obviousness." Restatement, § 343A(1) (emphasis added). A danger is deemed to be "obvious" when "both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment." Restatement, § 343A, comment b. For a danger to be "known," it "must not only be known to exist, but . . . also be

recognized that it is dangerous, and the probability and gravity of the threatened harm must be appreciated." Id. "Although the question of whether a danger was known or obvious is usually a question of fact for the jury, the question may be decided by the court where reasonable minds could not differ as to the conclusion." Carrender, 503 Pa. at 185-86, 469 A.2d at 124.

In Carrender, the plaintiff, who was going to an appointment at a chiropractic clinic where she had been a patient for seven years, parked her car on an inclined portion of a parking lot that was covered with ice, even though other areas of the lot were free of ice and snow. Id. at 181-82, 469 A.2d at 121. Before getting out of her car, the plaintiff became aware of the ice on the parking lot, but despite the fact that she wore a prosthesis consisting of an artificial lower leg and knew that the prosthesis made maneuvering on ice particularly dangerous for her, the plaintiff did not move her car, requiring her to walk across the ice. The plaintiff successfully negotiated the ice when walking from her car to the clinic's door but, after she had returned to her car and was reaching into her purse for her car keys, she slipped on the ice and fell. Id. at 183, 469 A.2d at 122. The plaintiff brought an action against the owners of the parking lot and chiropractic clinic for the injuries she sustained from falling on the ice in the parking lot, and she recovered damages in a jury trial.

On appeal, our Supreme Court first examined whether the case should have proceeded to the jury on the theory that the defendants owed the plaintiff a duty when she knew that the parking lot was covered with ice. The Supreme Court held that the defendants owed no duty to the plaintiff to warn her of the ice on the

parking lot. Id. at 184, 469 A.2d at 123. The Supreme Court then discussed the duty owed by a possessor of land to an invitee, and concluded that, because *there was uncontradicted evidence that the ice was both obvious and known to the plaintiff*, the defendants could have reasonably expected that the ice would have been avoided and, therefore, owed no duty to the plaintiff. Id. at 186-87, 469 A.2d at 124.

After resolving the ultimate question of whether any duty was owed to the plaintiff, the Supreme Court, in Carrender, discussed the issue raised by the plaintiff concerning the appropriate theoretical analysis to be applied when issues of assumption of the risk and duty of a possessor of land to invitees were involved in the same case. The Supreme Court stated:

> [T]he doctrine of assumption of risk operates merely as a counterpart to the possessor's lack of duty to protect the invitee from those risks. . . . It is precisely because the invitee assumes the risk of injury from obvious and avoidable dangers that the possessor owes the invitee no duty to take measures to alleviate those dangers. Thus, to say that the invitee assumed the risk of injury from a known and avoidable danger is simply another way of expressing the lack of any duty on the part of the possessor to protect the invitee against such dangers.

Id. at 188, 469 A.2d at 125 (citations omitted). The Supreme Court also discussed the doctrine of comparative negligence and concluded that there had to be two negligent acts for comparative negligence to apply. Negligence requires a duty of care; however, in Carrender, the "legal consequence of [the plaintiff's] assumption of a known and avoidable risk is that the possessor of land is *relieved of a duty of care* to [her]." Id. at 188-89, 469 A.2d at 125 (emphasis added). In the absence of a duty of care, the doctrine of comparative negligence did not apply.

Plaintiffs argue that the facts of this case are distinguishable from Carrender and that the trial court erred in holding that Defendants did not owe Plaintiffs a duty of care. Defendants, on the other hand, argue that the trial court correctly applied the Carrender analysis in this case and correctly determined that they owed no duty to Minor because she assumed the risk by knowingly walking on the icy Trail. Defendants argue that the testimony of Plaintiffs establishes that the existence of the snow and ice was a known and obvious risk. Citing Mother's testimony that she warned Minor to be careful because the walkway was "slippery," Defendants contend that Minor was aware of the slipping hazard and appreciated the risk when walking on the Trail. (Mother's Dep. at 15, R.R. at 55; Minor's Dep. at 32-33, R.R. at 65-66.)

In Carrender, the plaintiff personally saw the ice before stepping onto it and appreciated the risk of traversing it because she had walked over the ice patch once before. As the Supreme Court subsequently noted in Howell v. Clyde, 533 Pa. 151, 620 A.2d 1107 (1993), "[b]ecause there was no question in Carrender as to whether the risk was intelligently and voluntarily taken, the court was able to decide that there was no duty as a matter of law." Howell, 533 Pa. at 157, 620 A.2d at 1110. However, as Minor's testimony reveals in this case, she did not appreciate the risk of walking on the ice that caused her to fall because she did not see the ice before stepping on it. Unlike Carrender, where the plaintiff testified that she was aware of the specific patch of ice that caused her to slip and fall and that she appreciated the risk of traversing over that patch of ice, id., 503 Pa. at 186, 469 A.2d at 124, in this case Minor testified that she did not see the patch of ice that caused her to fall before walking over it. (Minor Dep. at 49, R.R. at 85E.)

While Minor was aware of the general wintery conditions of the Trail, she testified that she was walking carefully along the Trail and trying to avoid icy patches and that she did not see the patch of ice she unknowingly walked on that caused her to slip and fall.[2]

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[2] Minor testified, in relevant part:

Q. As you're walking along before the accident did you notice any ice or snow on that pavement?
A. It was snowy a little bit on the ground and some ice.
Q. Why don't you tell me how the accident happened?
A. I was walking and then I guess I hit a patch of ice and slipped when I was walking on the sidewalk.
Q. The area where you hit the patch of ice, were you still in between the tent on the right side and the fence on the left?
. . .
A. I think I was pretty much in the middle [of the Trail].
. . .
Q. The patch of ice you fell on, how big was it?
A. I'm not sure, it was all pretty icy on there.
Q. Was the whole sidewalk or walkway icy in that area?
A. It was like ice and snow mixed in together.
Q. How thick was it?
A. I'm not sure, it was just like bumpy, dirty ice.
Q. Can you give me any description of how wide it might have been?
A. I think it pretty much covered the whole walkway.
. . .
Q. Prior to that you had seen other patches of ice on that walkway?
A. A couple, but not really as much in the middle.
. . .
Q. From the point that you crossed the road and entered on the walkway to the point that you fell, did you notice any other snow or ice on the trail in any places?
A. There was some, yes.
Q. And did you try to avoid that as you were walking when you saw it?
A. Yes, we tried to walk in like the snow covered, so it was less icy on our feet.
. . .
Q. Did you see [the patch of ice that you fell on] before you fell?
A. **No.**
Q. Do you know why you didn't see that?
A. No, it was probably covered by snow or something.
. . .
Q. Okay. Did you notice any difference in the walkway before you got to the tent area or after you left the tent area?

The facts in this case are similar to the injury which occurred in Ferencz v. Milie, 517 Pa. 141, 535 A.2d 59 (1987), which was not cited by the parties. Although analyzed in the context of a legal malpractice claim, the Supreme Court reversed an order granting the defendant hospital a compulsory non-suit and, instead, remanded for further proceedings. In Ferencz, the plaintiff was a business invitee of a hospital and was seriously injured when she slipped and fell on a patch of ice located in a parking area. One of the plaintiff's daughters worked at the hospital and testified that the hospital's maintenance personnel had plowed the parking lot after a three-inch snow fall on the Thursday evening before the Saturday morning accident and that "the ice in the parking lot area was plainly visible at night from the glare of car headlights on it [which is] the area from which the maintenance personnel had removed the snow." Id. at 146, 535 A.2d at 62. The plaintiff testified that she was watching where she was going and did not see any snow or ice between her car and the driveway. As the plaintiff exited the parking lot, she had to watch for oncoming vehicles while walking down the middle of the ramp or driveway, and she slipped and fell on a patch of ice on the

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A. Difference in the conditions?
Q. Yes.
A. At the end, walking towards the parking lot, it was kind of melting.
. . .
A. At the end it was kind of melting, like the snow, at the very end before the parking []lot.
Q. But it was frozen in this area (indicating)?
A. It was frozen from the shade of the tent.
Q. In terms of the questions you were asked, you were asked about a patch of ice, was this whole area covered with ice or was parts of it, were there patches of snow, could you describe that for me?
A. There was a lot of ice pretty much all over the sidewalk and there was some parts of it where it was patchy and covered with snow and kind of bumpy ice.

(Minor Dep. at 27, 32-33, 48-49, 53; R.R. at 85A-85E, 85H (emphasis added).)

driveway. Id. at 147, 535 A.2d at 62. The plaintiff's other daughter, who was with the plaintiff when the plaintiff fell, testified that "she was unable to observe the presence of any ice [where the plaintiff fell] until she knelt beside [the plaintiff] and observed that the ice was clear and smooth like a mirror." Id. at 147, 535 A.2d at 63. The trial court in that case granted a compulsory non-suit to the defendant, and the Superior Court affirmed because the ice was clearly visible and, thus, the hospital would have no duty to the plaintiff. On appeal, the Supreme Court acknowledged that, under Carrender, "[i]f the ice patch was indeed *obvious* and *avoidable*, the hospital would have owed [the plaintiff] no duty to remove it." Id. at 150, 535 A.2d at 64 (emphasis added). However, in Ferencz, the Supreme Court stated that plaintiff had enough evidence in the record to go to the jury on her claim against the hospital:

> It would also have been perfectly reasonable for a jury to have concluded that, while *this particular ice patch* was reasonably discoverable by the hospital and visible in artificial light, it *was also hard to see in daylight and it was, therefore, not a known or obvious danger to [the plaintiff]* who was properly on the lookout for incoming automobiles while she was walking on the parking lot driveway.

Id. at 150-51, 535 A.2d at 64 (emphasis added).

Similar to Ferencz, we cannot conclude as a matter of law that the particular patch of ice on which Minor slipped and fell was known, obvious, and avoidable to her because she testified that she did not see the patch of ice, (Minor Dep. at 49, R.R. at 85E), and, thus, she may not have appreciated the risk of walking over it before she fell. We, therefore, cannot conclude as a matter of law that Defendants here, who are possessors of land under the Restatement, had no duty to protect

Minor, a business invitee, from foreseeable harm.[3] Because we are at the summary judgment stage in the proceedings and must view the record in a light most favorable to Plaintiffs, we conclude that this case must be remanded for further proceedings.

Accordingly, the Order of the trial court is reversed and this matter is remanded for further proceedings.

RENÉE COHN JUBELIRER, Judge

[3] Because of our disposition, we do not reach the issue of whether Minor, because of her age, had the capacity to appreciate the danger of walking on the icy Trail.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Harriet Winter, a minor by Fiona Winter, her parent and natural guardian and Fiona Winter, as parent and natural guardian of Harriet Winter, a minor,	:	
Appellants	:	
v.	:	No. 1839 C.D. 2010
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O R D E R

NOW, May 13, 2011, the Order of the Court of Common Pleas of Allegheny County granting summary judgment in favor of Forest City Enterprises, Inc. and the City of Pittsburgh in the above-captioned matter is hereby **REVERSED**, and this matter is **REMANDED** for further proceedings.

Jurisdiction relinquished.

RENÉE COHN JUBELIRER, Judge