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

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| JAMES J. TALMO and LORRAINE TALMO, Plaintiffs, v. UNION PARK AUTOMOTIVE, Defendant. | ) | C.A. No. 09C-06-258 PLA |

Submitted: October 24, 2011
Decided: November 1, 2011

OPINION

On remand from the Delaware Supreme Court, this Court must decide whether a personal injury plaintiff can survive summary judgment where the plaintiff has proffered virtually no evidence, in the form of expert opinion or otherwise, of the defendant's negligence. The Court finds that the answer is no, and the defendant's Motion for Summary Judgment pursuant to Superior Court Civil Rule 56 will be GRANTED.

Plaintiffs James J. Talmo and Lorraine Talmo have filed this lawsuit against Defendant Union Park Automotive Group, Inc. ("Union Park") in connection with injuries that Mr. Talmo allegedly incurred while patronizing the Union Park car dealership in Wilmington, Delaware. Plaintiffs allege that Union Park was negligent in maintaining its premises for business invitees like Mr. Talmo. After the court-imposed deadline for submitting expert reports had passed, Union Park

moved for summary judgment, arguing that Plaintiffs could not prove their case without expert testimony. Upon review of the record in this case, the Court finds that the Plaintiffs have failed to produce any evidence by which a jury could find that Union Park was negligent in maintaining its premises. Accordingly, Union Park's motion for summary judgment will be granted.

## I. Facts

On July 2, 2007, James Talmo visited the Union Park dealership on Pennsylvania Avenue in Wilmington, Delaware to look at a particular vehicle. Mr. Talmo sustained injuries when he walked into a plate glass window that he thought was an opening to the outside. Mr. Talmo and his wife subsequently filed this lawsuit in Superior Court seeking damages for personal injuries and loss of consortium that allegedly resulted from the incident. They claimed primarily that Union Park negligently failed to take reasonable steps to secure the business premises for business invitees like Talmo. In particular, Plaintiffs asserted that Union Park failed to provide proper lighting, failed to take adequate precautions to prevent the plate glass window from becoming a danger to customers, and failed to warn, either orally or through signs, of the existence of the window.

On September 24, 2010, Union Park moved for summary judgment on the basis that the Plaintiffs had not disclosed any expert opinion on Union Park's liability, even though the deadline imposed by the trial scheduling order had

already passed. Union Park also moved for partial summary judgment with respect to damages on the same day. The Plaintiffs did not respond to Union Park's Motion for Summary Judgment by the Court-ordered deadline, although they did timely respond to Union Park's Motion for Partial Summary Judgment. This Court subsequently entered summary judgment in Union Park's favor on November 5, 2010 and explained that the entry of summary judgment mooted Union Park's Motion for Partial Summary Judgment.[1]

On November 15, 2010, Plaintiffs moved for relief from judgment on the ground that their attorney had never received a copy of Union Park's Motion for Summary Judgment on liability or the judge's letter establishing a deadline to respond. The Court denied Plaintiffs' motion "for the reasons set forth in [Union Park's] response."[2] Plaintiffs subsequently appealed. The Supreme Court vacated this Court's decision and remanded the case for re-consideration of the underlying summary judgment motion.[3]

## II. Standard of Review

Summary judgment is appropriate where the record presents no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[4] When considering a motion for summary judgment, the Court must view the record

[1] *Talmo v. Union Park Automotive*, C.A. No. 09C-06-258 (Del. Super. Nov. 5, 2010) (ORDER).
[2] *Talmo v. Union Park Automotive*, C.A. No. 09C-06-258 (Del. Super. Nov. 22, 2010) (ORDER).
[3] *Talmo v. Union Park Automotive*, No. 752, 2010 (Del. Apr. 28, 20110 (ORDER).
[4] Super. Ct. Civ. R. 56(c).

in the light most favorable to the non-moving party, and the Court must draw all reasonable inferences in favor of the non-moving party.[5]

On a motion for summary judgment, the moving party bears the initial burden of showing that there are no material facts in dispute.[6] If the moving party meets this burden, then the burden shifts to the non-moving party to set forth specific facts in its response to the motion for summary judgment that go beyond the bare allegations of the complaint.[7] Where a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial," the Court must enter summary judgment against that party.[8]

## III. Discussion

The Court must decide whether the record reveals a factual dispute as to whether Union Park breached its duty of care to Mr. Talmo on the date of the incident. In Delaware, storekeepers and business proprietors have a duty to their patrons to exercise due care to keep the property in a reasonably safe condition as to any condition which is known to the business operator or which should have been known in the exercise of reasonable care or diligence.[9] However, storekeepers are not the insurers of their patrons and have only a duty to exercise

[5] *E.g.*, *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 100 (Del. 1992).
[6] *Manucci v. The Stop 'n' Shop Companies, Inc.*, 1989 WL 48587, *2 (Del. Super. May 4, 1989).
[7] *Id.* at *3.
[8] *Id.* at *4.
[9] *Woods v. Prices Corner Shopping Center Merchants Ass'n*, 541 A.2d 574 (Del. Super. 1988).

the same standard of care that reasonably prudent storekeepers would exercise in similar circumstances to keep the premises in reasonably safe condition for their customers' use.[10]

Union Park asserts that it is entitled to summary judgment because Plaintiffs have provided no expert testimony as to Union Park's alleged negligence. In premises liability cases, expert testimony about matters such as poor lighting conditions or unreasonably dangerous conditions can be helpful.[11] However, as Plaintiffs correctly observe, expert testimony is unnecessary and generally inadmissible where the facts themselves can be adequately presented to the jury, and the facts are of such nature that an ordinary person could understand them and draw correct inferences.[12]

The parties' disagreement about the necessity or admissibility of expert testimony in this case is a red herring. Plaintiffs have failed to proffer any evidence beyond the bare allegations of the complaint that would lead a reasonable jury to conclude that Union Park breached its duty of care to its patrons on the date of Mr. Talmo's injury. Plaintiffs have simply asserted that there was construction on the premises on the day Mr. Talmo visited and that he walked into a plate-glass window, injuring himself. Plaintiffs do not explain what unreasonably dangerous

[10] *Robelen Piano Co. v. DiFonzo*, 144 A.2d 241, 243-44 (Del. 1961).
[11] *See Brown v. Gartside*, 2004 WL 2828061, *2 (Del. Super. Mar. 5, 2004).
[12] *See Robelen Piano Co.*, 144 A.2d 241 (Del. Super. 1961) (holding that expert opinion about what caused the plaintiff's fall on an icy patch of sidewalk was inadmissible).

or defective condition of which Union Park should have been aware existed on the day of the incident, or what measures Union Park should have taken to correct it. Indeed, Plaintiffs have presented no evidence – not even photographs of the premises – suggesting in any way that the window was negligently designed or maintained in a way that made it an unreasonable hazard for Union Park's customers. Once the burden shifted to Plaintiffs, it was incumbent upon them to set forth specific facts in response to the motion beyond the bare allegations of the complaint. Plaintiffs have failed to do so.

## IV. Conclusion

The Court recognizes the unfortunate nature of the events leading to Mr. Talmo's injury and sympathizes with the Plaintiffs' desire to hold someone accountable. However, the law does not permit the Court to infer that Union Park *must* have been negligent simply because an accident occurred on Union Park's premises. The Plaintiffs have the burden of producing evidence to prove that there was an unreasonably dangerous condition on Union Park's premises, of which Union Park was or should have been aware, and that it failed to take appropriate measures to correct the problem. Long after the close of discovery in this case, the Plaintiffs have produced no evidence from which a reasonable jury could conclude that Union Park breached a duty of care owed to Mr. Talmo as a business invitee.

Accordingly, the Court must enter summary judgment in favor of the Defendant. Union Park's Motion for Summary Judgment is hereby GRANTED.

**IT IS SO ORDERED.**

*/s/ Peggy L. Ableman*
**PEGGY L. ABLEMAN, JUDGE**

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