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

Thomas D. Roberts,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Daystar Sills, Inc., Diamond Hill F/D/B/A Crystal Concrete, Inc., and Polar Mechanical, Inc.,	)	C.A. No. 05C-04-189 CLS
	)	
Defendants.	)	
	)	

Date Submitted: October 6, 2008
Date Decided: December 8, 2008

On Defendants' Motion for Summary Judgment – **GRANTED.**

ORDER

Kenneth F. Carmine, Esq., 840 North Union Street, P.O. Box 30409, Wilmington, DE 19805.

Jeffrey S. Friedman, Esq., 1010 N. Bancroft Parkway, Suite 22, Wilmington, DE 19805.

Scott, J.

Introduction

Before the Court are the defendants' Daystar Sills, Diamond Hill and Polar Mechanical, Inc.'s (hereinafter referred to collectively as "the defendants") motion for summary judgment. Plaintiff filed an action against the defendants alleging that he sustained injuries after he fell of scaffolding on a construction site. The issue is whether Plaintiff must produce expert testimony on the standard of care in order to establish the defendants' alleged breach of duty. Because the Court finds that an expert is needed to establish the standard of care in this case and Plaintiff failed to identify such an expert, the defendants' motion for summary judgment is **GRANTED**.

Background

On May 26, 2004, Plaintiff was employed by Peninsula Acoustical as a medal stud and drywall mechanic at the Peoples Station Project on Route 40 in Glasgow, Delaware. Plaintiff alleges that he was working on a scaffold installing drywall when a wheel on the scaffolding rolled into a "box-out"[1] in the concrete floor. The scaffold tilted over causing Plaintiff to fall to the ground shattering his left heel bone. Daystar Sills was the general contractor on the job at People's Station and was responsible for determining

[1] A "box-out" refers to a cut-out area in the concrete floor around a stub-up. Stub-ups are either water drains or water supply pipes which are brought up through the sub-floor. When concrete is poured, the box-out forms a frame around the pipe coming up through the floor.

the placement of the box-outs. Crystal Concrete, a subsidiary of Daystar Sills, was responsible for pouring the concrete at the job site. Polar Mechanical, also a subsidiary of Daystar Sills, performed the plumbing and installed the stub-ups. There was approximately 6-8 box-outs sporadically placed around the site. The box-outs were not marked in anyway to make them evident to those working around the holes. The concrete was poured flush with the box outs leaving no barrier to stop any object from falling into them.

On April 19, 2005, plaintiff filed this personal injury suit against the defendants alleging negligence. The Court issued a Trial Scheduling Order on January 4, 2008 requiring Plaintiff to produce all of his Expert Reports by April 30, 2008. Plaintiff failed to produce any expert reports pertaining to the standard of care.

Parties' Contentions

The defendants deny that the box-outs in the concrete floor constituted a defective condition. They claim that without an expert, Plaintiff is unable to prove that the existence of the box-outs created a defective condition or that the defendants' failure to cover the box-outs or provide warnings fell below the applicable standard of care. Plaintiff disagrees and argues that expert testimony is not necessary to establish that leaving open holes in a

floor where trade persons are expected to be working, without being warned or alerted to the holes, presents a defective condition.

Standard of Review

The Court may grant summary judgment if it concludes that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law."[2] The moving party bears the initial burden of showing that no material issues of fact are present.[3] Once such a showing is made, the burden shifts to the nonmoving party to demonstrate that there are material issues of fact in dispute.[4] In considering a motion for summary judgment, the Court must view the record in a light most favorable to the nonmoving party.[5] The Court's decision must be based solely on the record presented and not on all evidence "potentially possible."[6]

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[2] Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[3] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[4] *Id*. at 681.
[5] *Burkhart*, 602 A.2d at 59.
[6] *Rochester v. Katalan*, 320 A.2d 704, 708 (Del. 1974) (*citing United States v. Article Consisting of 36 Boxes*, 284 F.Supp. 107 (D. Del. 1968), *aff'd*, 415 F.2d 369 (3d Cir. 1969)).

Discussion

In *Handler v. Tlapechco,*[7] the Delaware Supreme Court announced the general rule that a general contractor does not have a duty to protect an independent contractor's employees from the hazards of working at a job site unless the general contractor (1) actively controls the manner and method of performing the contract work; or (2) voluntarily undertakes the responsibility for implementing safety measures; or (3) retains possessory control over the work premises during the work. At the outset, the Court questions whether the defendants owed a duty to the Plaintiff. The defendants however, do not take issue with the element of duty but rather focus their attention on Plaintiff's failure to produce expert reports in order to establish the applicable standard of care.

When a judicial decision or legislative enactment has not established the standard of care, the determination of that standard must be made by the jury.[8] In *Robelen Piano Company v. DiFonzo,*[9] the Delaware Supreme Court held that:

> The standard of care required of all defendants in tort actions is that of a reasonably prudent man. That standard, however, is not a definite rule easily applicable to every state of facts. The details of the standard, of

[7] 2006 WL 1561721 (Del.)
[8] *Delmarva Power & Light v. Stout***,** 380 A.2d 1365 (Del. 1977).
[9] 169 A.2d 240, 244-5 (Del. 1961).

> necessity, must be formulated in each particular case in light of its peculiar facts. In each case the question comes down to 'what a reasonable man would have done under the circumstances.' In close or doubtful cases, . . . that question is to be determined by the jury.

It is well established under Delaware law that "as a general rule the standard of care applicable to a profession can only be established through expert testimony. An exception to this rule exists, however, when a professional's mistake is so apparent that a layman, exercising his common sense is perfectly competent to determine whether there was negligence."[10] Plaintiff claims that expert testimony is not required to establish the standard of care applicable in this case. The Court does not agree.

Plaintiff's reliance on *Hazel v. Delaware Supermarkets, Inc.*[11] is misplaced. In *Hazel,* the plaintiff sustained injuries after falling in the frozen food aisle of a grocery store. Expert testimony was not required in that case because it is within the common knowledge of a lay jury whether water on the floor, in the aisle of a public grocery store, creates an unsafe condition. Likewise in *Delmarva Power & Light v. Stout,*[12] the plaintiff sustained injuries after bumping her head on a metal meter box placed on a utility pole by the defendant. Expert testimony was not required in that case

[10] *Weaver v. Lukoff,* 1986 WL 17121 (Del.); *Abegglan v. Berry Refrigeration, et. al.,* Del. Super., C.A. No. 03-08-061, Scott, J. (Dec. 2, 2005) (Mem. Op).
[11] 953 A.2d 705 (Del. 2008).
[12] 380 A.2d 1365 (Del. 1977).

because it is within the common knowledge of a lay jury whether placing a metal meter box low on a utility pole on a residential street in a metropolitan area creates an unsafe condition. In both of these instances, a lay jury was able, without any specialized knowledge, to determine whether the defendant exercised care of a reasonably prudent person in creating such conditions.

The facts of this case are distinguishable and the Court finds the decision in *Abegglan v. Berry Refrigeration et. al.,*[13] instructive. In *Abegglan,* the plaintiff suffered injuries as a result of falling ceiling tile. The plaintiff claimed that Berry Refrigeration negligently repaired a leaking ice machine which caused water to drip onto the floor causing the tile to fall. The Court ruled that expert testimony was needed to determine exactly what blowing out an ice machine line entails and means, and whether the repairman's actions caused the ceiling tile to fall or whether the leaking of water prior to the repair caused the tile to fall. The Court found that a lay jury is not familiar with the proper procedures for repairing an ice machine and that without expert testimony to explain such procedures; the jury would be left to speculate as to whether the repairs were reasonably conducted.

[13] Del. Super., C.A. No. 03-08-061, Scott, J. (Dec. 2, 2005) (Mem. Op).

Similarly in this case, a lay jury is not acquainted with the routine practices observed at a closed construction site. A lay jury has common knowledge of what conditions are expected and reasonable in a grocery store or when walking down a residential street but the determination of what conditions are expected and reasonable at a closed construction site requires specialized knowledge. Without an expert to explain the routine practices and acceptable conditions at a closed construction site, where trade persons are trained to work in and around precarious conditions, the jury would be left to speculate as to the standard of care. Plaintiff has failed to produce an expert to offer such expertise and thus has failed to establish a prima facie case of negligence. Accordingly, the defendants' motion is **GRANTED.**

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.