IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

DEBORAH TEDESCO and ANTHONY TEDESCO, husband and wife,	:	C.A. No: 04C-06-037 (RBY)
Plaintiffs,	:	
v.	:	
ROBERT HARRIS, d/b/a GULF STREAM HOMES, INC., RYAN HOMES, INC., NVR, INC., WILGUS MANAGEMENT and COURTS OF SOUTHAMPTTON HOMEOWNERS ASSOCIATION, INC.	:	
Defendants.	:	

Submitted: June 2, 2006
Decided: June 15, 2006

Wayne N. Elliott, Esq., Prickett, Jones & Elliott, P.A., Dover, Delaware for Plaintiffs.

B. Wilson Redfearn, Esq., Tybout, Redfearn & Pell, Wilmington, Delaware for NVR., Inc.,

Vincent Bifferato, Jr., Esq., Bifferato, Gentilotti, Biden & Balick, Wilmington, Delaware for Defendants Robert Harris, Gulf Stream Homes, Inc., and Southampton Land, Ltd.

Sean A. Dolan, Esq., Marshall, Dennehey, Warner, Coleman & Goggin, Wilmington, Delaware for Defendants Wilgus Management and Courts of Southampton Homeowner's Association, Inc.

OPINION
UPON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
GRANTED IN PART
DENIED IN PART

Young, J.

FACTS

In this case, on or about August 18, 2002, was walking from her home in the development known as Courts of Southampton, Ocean View, Sussex County, Delaware, towards the community swimming pool also in that development. Her route was northbound on Marion Lane, crossing William Chandler Blvd., continuing westbound on the sidewalk along Chandler, and then walking on a continuous sidewalk northbound along Greenport Lane. She had transversed something in the area of 200 feet from her home to that point. The swimming pool was further along in the same general direction.

On Greenport Lane, however, Plaintiff fell. Once she went down to sidewalk level, her momentum, presumably, allowed her movement to continue. Ultimately, she ended in a swale some 4 feet to 6 feet below sidewalk level, the side of which began on her right, directly at the east edge of the sidewalk.

Allegedly sustaining injuries as a result of the fall, she has sued two groups of Defendants. First, there are Robert Harris, Gulf Stream Homes, Inc., Gulf Stream Development Corp., and Southhampton Land Ltd. NVR, Inc. These are referred to collectively as the "development Defendants." By agreement of all parties, they are responsible, if at all, for only the allegations associated with an absence of a fence at the area above the swale.

Second, there are Wilgus Management and Courts of Southampton Homeowners Association, Inc., referred to collectively as the "management defendants." By agreement of all parties, they are responsible, if at all, for only the allegations associated with the condition of the sidewalk at the area of Plaintiff's original slip and fall.

On said date, Plaintiff, walking the same route she had walked frequently

before without incident, fell. In her re-creation of events, Plaintiff has alleged her foot slipped on one or more of three paint drops, each approximately the size of a quarter. If that condition were a basis of liability and injury to Plaintiff, the Management Defendants would be responsible. Otherwise, not.

After the initial slip, Plaintiff went off the sidewalk and into the abutting swale. No fence divided the sidewalk from the swale. If that condition were a basis of liability and injury to Plaintiff, the development Defendants would be responsible. Otherwise, not.

STANDARD OF REVIEW

Summary judgment should be rendered if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[1] The facts must be viewed in the light most favorable to the non-moving party.[2] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.[3] However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.[4] Generally, issues of negligence are not appropriate for summary judgment.[5] Summary judgment may only be entered, if the

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1 Super. Ct. Civ. R. 56(c).

2 *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 780 (Del. Super. Ct. 1995).

3 *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

4 *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

5 *Ebersole*, 180 A.2d at 469.

movant demonstrates the absence of any genuine issue of material fact of negligence.[6]

DECISION

I. Motion for Summary Judgment by Defendants Wilgus Management and Courts of Southampton Homeowners' Association, Inc.

The first issue is whether 3 "quarter-sized" dried drops of paintt create a dangerous or defective condition. The second is whether the that condition caused the fall. The third is whether management Defendants had notice of the condition.

Plaintiffs allege that Ms. Tedesco slipped and fell on 3 drops of paintt, each the size of a quarter. Whether or not she slipped at a spot where the paintt drops existed is highly questionable. Since, at one point in her deposition, she took the position that such was the location (to "95% certainty", she said at one place in her deposition), this would appear to create a jury question. Where she fell, however, is not the issue at this juncture. Rather, the Plaintiffs must show those 3 paint drops caused her fall. Such a showing does not readily appear in the record. This is, though, a Summary Judgment Motion in a situation where facts may be clearer at trial from the Plaintiffs than they might be during discovery depositions. That is not to suggest that any change from or improper bootstrapping of discovery commitments can be created, but things can sometimes, with legitimacy, flesh out. Hence, Plaintiffs' case will not fail as a matter of law at this time on this basis.

Beyond showing that the paintt drops caused the fall, however, Plaintiffs must show that the management Defendants knew of the paintt drop condition (or should

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[6] *Id.*

have known of it), and that it was a dangerous condition to begin with.[7]

Plaintiffs admit that they have no idea how long the paintt drops had been present at the site. Moreover, Plaintiffs walked that self-same route frequently on their way to the swimming pool, without even noticing the presence of those drops previously. If they were long extant, Plaintiffs should have seen them as well as anyone else. If they had recently arrived, Plaintiff would need to exhibit (and she, admittedly cannot) that the management defendants had, or should have had, notice.

Nothing in the record reflects evidence or inference which might permit a jury to conclude that the management Defendants could be held to have notice of the presence of the paint drops.

Saying that really obviates the necessity of determining whether those drops created a dangerous condition. Nevertheless, regarding that element, it is noteworthy that Plaintiffs' expert rather goes out of his way to dismiss the involvement of the paint drops. On pages 96 and 97 of his deposition, he states that, had Ms. Tedesco fallen straight down or fallen to her left, he would have no criticism of anything that occurred. Hence, there is no expert opinion that the three quarter-sized paintt drops created a dangerous condition. That, too, as a matter of law, precludes liability on the part of the management Defendants.

Accordingly, the Motion for Summary Judgment by Defendants Wilgus Management and Courts of Southhampton Homeowners' Association, Inc. is **GRANTED**.

II. Motion for Summary Judgment by Defendants Robert Harris, Gulf Stream Homes Inc., Gulf Stream Development Corp., Southampton Land, LTD, NVR, Inc.

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[7] *Howard v. Food Fair Stores, New Castle, Inc.,* 201 A. 2d 638, 640 (Del. 1964).

Plaintiffs go on to assert that liability should attach to the development Defendants. This is on the theory that, dangerous condition or no, the paintt drops legitimately might be found by a jury to have been the cause of the fall. Although with some reservation, the Court, as above, agreed – at this particular posture of the case – with Plaintiffs that a jury question could exist.

The theory then goes that, Plaintiff having fallen, the injury came from, or was worsened by, her fall into a swale beside the sidewalk, which was occasioned by the absence of a fence along the area of sidewalk about the swale.

Plaintiffs' expert, Harrison, admits that he has no code or regulatory material to require the installation of a fence or guardrail at that location. He claims, however, that "within a reasonable degree of civil/safety engineering certainty" the sidewalk was unsafe, because of that absence. He also states that relevant building codes do require that premises "be built for safe use at all times." This causes him some difficulty, though, when he says in his report that "a site visit quickly reveals a sidewalk edge condition that should have bothered any responsible adult 'lay person'." To the same effect, in his deposition, at page 104, he agrees that the condition should be apparent as a hazard to anyone.

That being his testimony, and setting aside for the moment the question it begs relative to Plaintiff's comparative negligence, can the requirements of D.R.E. 702 and the so-called "Daubert Test"[8] be met? Certainly, whether the fenceless condition was safe or not would be a fact question. If we assume, without deciding, that Harrison's opinion could assist the trier of fact to determine that fact, the question is whether there is any evidence to support the expert's testimony's being based on data or being the product of reliable principles, which the witness has applied? Harrison's response

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[8] *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993).

is that no code provision or regulation is needed. Rather, he states that the National Safety Counsel lists falls as a major injury factor in America, making fall accident readily foreseeable. From that non-specific statement, he opines that "the spirit and intent" of general safety considerations demand – in this case – a fence.

I do not see anything which would amount to adequate scientific basis to permit the testimony of this witness to usurp or add to or interfere with or comment upon the very basic jury question of whether or not that sidewalk, in its fenceless but otherwise entirely normal condition, was unreasonably dangerous for Ms. Tedesco, proximately causing the Plaintiff's injury.

Accordingly, Harrison may not offer any opinions on that issue.

That leads to the next question of whether any case remains for the jury. As indicated, the safety of that sidewalk situation would be a question for the fact trier. That is not, in itself, determinative, of course. Plaintiffs must also show that any unsafe condition caused an injury.[9] Counsel for Plaintiffs has argued that the jury can certainly hear evidence from Ms. Tedesco that her actual complaints are from the fall down into the swale, as opposed to from the slip on the sidewalk. That is because, argues counsel, it's just a matter of common sense that falling an additional four feet into a rocky swale would, at least, enhance any injury condition resulting from the initial slip. Since there now exists, as a matter of law, no claim associated with the initial fall, and since Tedesco has a pre-existing history of medical conditions, the need for expert medical testimony associating medical conditions with the fall into the swale would appear to be necessary.

At this point in the case, and given the posture of definitive medical material as presently known by the Court, Plaintiffs may be able to provide sufficient proof to

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[9] *Howard*, 201 A. 2d at 640 (citing Robelen Piano Co. V. DiFonzo, 169 A. 2d 240 (Del. 1961)0.

get past a motion for directed verdict.

Accordingly, the Motion for Summary Judgment by Defendants Robert Harris, Gulf Stream Homes, Inc., Gulf Stream Development Corp., and Southampton Land Ltd., NVR, Inc., is **DENIED** without prejudice to further Motion.

SO ORDERED.

/S/ ROBERT B.YOUNG
J.

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