SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

December 20, 2006

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RE: Donna D. Van Auken v. David A. Bramble, Inc.
C.A. No. 05C-09-029-ESB

Date Submitted: September 19, 2006

Dear Counsel:

This is my decision on defendant David A. Bramble, Inc.'s ("Bramble") motion for summary judgment in this personal injury case. The plaintiff is Donna D. Van Auken ("Van Auken"). Van Auken was traveling on County Route 371 in Sussex County, Delaware, when her vehicle left the paved roadway and dropped down onto the dirt shoulder, causing it to roll over several times. Bramble had just recently reconstructed this portion of the roadway pursuant to a contract with the State of Delaware (the "State"). Van Auken filed a complaint, alleging that Bramble negligently constructed an inadequately compacted dirt shoulder that dropped sharply off of the roadway. Bramble filed an answer and a motion for summary judgment, alleging that it constructed the shoulder in accordance with its contract with the State,[1] and that Van Auken has no expert witness who would testify that Bramble's work was both negligent and the proximate cause of her accident. Bramble did not file an affidavit in support of its motion. Van Auken filed two affidavits in opposition to it. One of the affidavits was submitted by Van Auken herself. It repeats the factual allegations in her complaint and establishes the shoulder drop-off at 11 inches. The other affidavit was submitted by an eye witness to Van Auken's accident and other accidents at the same spot. The eye witness lives near the accident scene and his statements are consistent with Van Auken's allegations.

Summary judgment may be granted only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact.[2] Once the moving party meets its burden, then the burden shifts to the non-moving party to establish the

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[1] *Hercules, Inc., et al. v. United States*, 516 U.S. 417, 116 S.Ct. 981 (1996).
[2] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

existence of material issues of fact.[3] Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, then the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.[4] If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of her case, then summary judgment must be granted.[5] If, however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is inappropriate.[6]

The factual record before me, based on the affidavits, is that the shoulder was soft and 11 inches below the roadway at the time of Van Auken's accident and that it caused Van Auken and others to crash. Bramble has not submitted to me its contract with the State. Thus, I can not determine if Bramble's construction of a soft shoulder 11 inches below the roadway complied with its contract with the State. Regarding Bramble's argument that Van Auken needs an expert witness, it is well-settled law that no expert is needed where the negligence is so obvious as to be within the common knowledge and experience of the jury.[7] It certainly appears that Bramble's alleged construction of the shoulder in this manner is obviously negligent and could have caused Van Auken's vehicle to crash. Given this, I have concluded that Van Auken does not need an expert on negligence and proximate causation. Viewing the facts in the light most favorable to Van Auken, as I must do at this stage of the proceedings, summary judgment can not be granted in Bramble's favor. Therefore, Bramble's motion for summary judgment is denied.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

oc: Prothonotary

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[3] *Id.* at 681.

[4] Super. Ct. Civ. R. 56(3); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

[5] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. den.*, 112 S.Ct. 1946 (1992); *Celotex Corp.*, 477 U.S. 317 (1986).

[6] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[7] *Brooke v. Elihu-Evans*, 1996 WL 659491 at *1 (Del. Supr.).