IN THE SUPREME COURT OF THE STATE OF DELAWARE

SHARON CASH,	§	
	§	No. 339, 2010
Plaintiff Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
EAST COAST PROPERTY MANAGEMENT, INC., SUSSEX COUNTY SENIOR SERVICES, INC., d/b/a CHEER and/or CHEER APARTMENTS, L.P.,	§	C. A. No. 08C-08-213
	§	
Defendants Below,	§	
Appellees.	§	

Submitted: September 29, 2010
Decided: October 29, 2010

Before **STEELE**, Chief Justice, **HOLLAND** and **JACOBS**, Justices.

O R D E R

This 29th day of October 2010, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Sharon Cash ("Cash"), the plaintiff below, appeals from a Superior Court order granting summary judgment to the defendants-appellees, Sussex County Senior Services, Inc., d/b/a Cheer and/or Cheer Apartments ("Cheer"), and East Coast Property Management, Inc. ("East Coast"). On appeal, Cash claims that the trial court erred in holding that there were no material facts in dispute as to whether Cheer and East Coast had a legal duty to clean the sidewalk at the location

where she fell. Alternatively, Cash claims that the trial court erred in determining that the defendants' policy, of removing snow and ice during inclement weather, did not give rise to liability. We find no error and affirm.

2. The following facts are undisputed. Cheer Apartments is a residential apartment complex located in Georgetown, Delaware. Most of its residents are senior citizens. Cheer owns the apartment complex, and East Coast maintains it. Both Cheer and East Coast are responsible for clearing snow or ice from the apartment complex's parking lot and sidewalks.

3. On February 13, 2007, at around 2:30 p.m., Cash, who was a nurse, went to visit a patient at the apartment complex.[1] As Cash stepped onto the sidewalk in front of the building, she slipped and fell on a sheet of ice. No warning signs were posted near the sidewalk alerting her to the slippery conditions.

4. On August 25, 2008, Cash brought an action against Cheer and East Coast, charging them with failure to exercise reasonable care in maintaining the apartment complex's sidewalks, which caused her to fall. During the course of litigation, several depositions were taken focusing on two key issues: (i) the

[1] All parties agree that Cash was a business invitee on Cheer's property at the time of her fall.

weather conditions on February 13, 2007, and (ii) the defendants' snow and ice removal procedure.[2]

5. On July 31, 2009, the defendants moved for summary judgment. After Cash obtained an additional six-month discovery extension, the Superior Court granted summary judgment in favor of the defendants on June 8, 2010. This appeal followed.

6. On appeal, Cash advances two reasons why this Court should reverse the Superior Court's grant of summary judgment against her. First, Cash claims that the trial court erred in concluding that the defendants had no legal duty to remove the ice on the sidewalk. Second, Cash claims that even if the trial court correctly ruled that Cheer and East Coast had no preexisting legal duty, they voluntarily assumed a duty based on their conduct, and then carried out that duty unreasonably.

7. This Court reviews a trial court's grant of summary judgment *de novo*.[3] To succeed on a summary judgment motion, the moving party must establish that there are no material facts in dispute.[4] All evidence must be viewed in the light

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[2] Sharon Cash, Arlene Littleton (Cheer's Executive Director), Kenneth Bock (Cheer's Deputy Director), Nicole Green (East Coast's Property Manager), Gary Harmon (Cheer's Maintenance man), and Ronald Ruark (East Coast's Maintenance man) were deposed.

[3] *Shea v. Matassa*, 918 A.2d 1090, 1093 (Del. 2007).

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

most favorable to the non-moving party,[5] meaning that the Court accepts all the non-moving party's version of any disputed facts.[6] From those accepted facts, the Court must draw all rational inferences that favor the non-moving party.[7] The moving party is entitled to judgment as a matter of law where the facts permit a reasonable person to draw only one inference.[8]

8. Cash first claims that the Superior Court erred in concluding that Cheer and East Coast had no duty to clear away the ice on the sidewalk. Cash posits several possible factual scenarios that (she argues) would permit a jury to find in her favor. Specifically: (i) the ice had formed because of re-frozen melted snow from a previous storm; therefore, the defendants had a duty to remove the ice; (ii) because the February 13 storm was minor, the defendants had a duty to clear away the ice before the storm was over; (iii) the storm had stopped; therefore, the defendants' duty to remove the ice was triggered; (iv) the defendants "created the

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[5] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992).

[6] *Id.* at 99-100. ("The role of a trial court when faced with a motion for summary judgment is to identify disputed factual issues whose resolution is necessary to decide the case, but not to decide such issues. In discharging this function, the court must view the evidence in the light most favorable to the non-moving party. This means it will accept as established all undisputed factual assertions, made by either party, and accept the non-movant's version of any disputed facts. From those accepted facts the court will draw all rational inferences which favor the non-moving party.") (internal citations omitted).

[7] *Id*.

[8] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967) ("[W]hen the facts permit reasonable persons to draw from them but one inference . . . the question becomes one for decision as a matter of law.").

illusion" that the conditions were safe and, therefore, had a duty to warn Cash of the ice on the sidewalk; and (v) this case had unusual circumstances that required the defendants to remove the ice before the storm ended. These arguments are next addressed.

9. Cash first argues that a jury could have found that on February 13, the ice on the sidewalk formed from snow that had melted and then re-froze. She theorizes that snow could have been left over from a previous storm on February 6 or 7, which defendants failed properly to remove. That snow, Cash says, could have melted and re-froze on the sidewalk, thereby causing a new icy condition. This argument is unsupported by the record. There was no precipitation between February 8, 2007 and February 13, 2007. Nor during that period did Cheer or East Coast receive any reports of icy conditions, even though the temperatures had remained near or below 32° F. Further, on the day before Cash fell, the temperature reached a high of 44° F, well above the freezing point of water. Cash admitted that she did not see any snow or ice as she walked towards the apartment complex on February 13. Thus, the evidence of record does not support an inference that the ice patch on which Cash slipped was created by snow left over from a previous storm that melted and then re-froze.

10. Cash next contends that a jury could have found that because the February 13 storm was minor, Cheer and East Coast had a duty to remove the ice.

Essentially, Cash argues that the trial court incorrectly applied the "continuous storm" doctrine set forth in *Young v. Saroukos*.[9] In *Young,* a tenant slipped and fell on a ramp entrance located in front of her apartment. The tenant sued her landlord, arguing that the landlord had a duty to keep the ramp entrance free and clear from ice and snow. The court found that on the date of the accident, there was a large snowstorm that was ongoing at the time of the tenant's accident. The court held that although a landlord has an affirmative duty to keep the premises safe from hazards associated with natural accumulations of ice and snow, "a business establishment, landlord, carrier, or other inviter . . . is permitted to await the end of the storm and a reasonable time thereafter to remove ice and snow from an outdoor entrance walk, platform, or steps."[10]

11. Cash's argument must fail. She asserts that the trial court should have considered, fact-intensively, the type, length, and intensity of the storm in deciding whether *Young* applies. She cites no case law in support of her position. Furthermore, in connection with this very storm, we previously considered those factors in *Morris v. Theta Vest*,[11] a slip-and-fall case arising from the same

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[9] *Young v. Saroukos*, 185 A.2d 274, 282 (Del. Super. Ct. 1962).

[10] *Id*. (citing *Reuter v. Iowa Trust & Sav. Bank*, 57 N.W.2d 225 (Iowa 1953) and *Walker v. Mem. Hosp*., 45 S.E.2d 898 (Va. 1948)).

[11] 2009 WL 693253 (Del. Super. Ct. Mar. 10, 2009), *aff'd* 977 A.2d 899 (Table), 2009 WL 2246777 (Del. 2009).

February 13 storm at issue here.[12] In *Morris*, this Court affirmed a grant of summary judgment in favor of the landowner, holding that, as a matter of law, the landowner acts reasonably in waiting until a storm ends before being required to clear any entrances.[13] Here, as in *Morris*, the trial court did not err in applying the *Young* standard.

12. Cash next claims that the trial court erred in granting summary judgment because a jury could have found that the storm had ended, at which point the defendants had a duty to remove the ice. This claim fails for lack of a factual predicate. There is no evidence that the storm had ended by the time Cash fell. In her affidavit, Cash testified that a misty drizzle fell throughout the day, and continued up to the time of her fall. She repeated those statements at her deposition, testifying that there was a "misty drizzly rain" continuing throughout the day and at the time of her fall. The weather reports, together with the testimony of Cheer and East Coast employees, further show that the storm continued through the day. Only one inference arises from those facts—that the storm had not yet ended at the time Cash fell.

13. Next, Cash claims that the Superior Court erred in granting summary judgment because a jury could have found that the defendants had created an

[12] The *Morris* property is located less than fifteen miles away from the Cheer apartment complex.

[13] *Morris*, 2009 WL 693253, at *1.

"illusion" that it was safe to walk in the area, by removing ice from all of the areas except from the sidewalk where she fell. Therefore, according to Cash, defendants had a duty to warn her of the unsafe icy conditions. Cash's claim, however, is not supported by the record. The deposition testimony and timesheets of Gary Harmon, Cheer's maintenance man, show that he salted the apartment complex on February 13. There is no record evidence that Harmon salted only certain sections of the apartment complex, but left other sections untreated, to create the "illusion" that the sidewalk was safe. Cash admitted that she did not see anyone salting the apartment complex when she arrived there around 2:30 p.m. No evidence supports Cash's claim that a jury could infer that the defendants created an illusion that the sidewalk was safe by clearing all but the one section of the sidewalks on which she fell.

14. Cash also argues that her case falls within the "unusual circumstances" exception to the "continuous storm" doctrine articulated in *Young*.[14] First, she asserts that the February 13 storm was not a major continuous intensive storm, as was the case in *Young*. Second, she contends that Harmon had created the illusion

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[14] *Young v. Saroukos*, 185 A.2d 274, 282 (Del. Super. Ct. 1962) (holding that "a business establishment, landlord, carrier, or other inviter, in the absence of unusual circumstances, is permitted to await the end of the storm and a reasonable time thereafter to remove ice and snow from an outdoor entrance walk, platform, or steps.").

that the sidewalk was safe.[15] Third, she urges that because the defendants' policy was to keep the sidewalk clear of snow and ice, they had a duty to remove the icy condition. For these reasons, she argues, a jury could have found that there were "unusual circumstances" that required the defendants to take action before the storm ended. We disagree. Cash misunderstands the role of the judge and the jury. Whether a defendant has a legal duty is a question of law, not fact, and is for the court to decide.[16] Cash has not pointed to any case law supporting her contention that there were "unusual circumstances" warranting an exception to the "continuous storm" doctrine,[17] or her claim that the rationale for adopting the "continuous storm" doctrine no longer applies.

15. Moreover, this claim repackages arguments that, as we previously concluded, have no merit. As earlier discussed, this Court has already determined

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[15] The *Young* court explained that the rationale behind adopting the continuous storm rule was because "changing conditions due to the pending storm render it inexpedient and impracticable to take earlier effective action, and that ordinary care does not require it." *Id.*

[16] *See Handler Corp. v. Tlapechco*, 901 A.2d 737, 748-49 (Del. 2006); *see also Pipher v. Parsell*, 930 A.2d 890, 892 (Del. 2007) (holding that in a negligence action, "[i]f no duty exists, 'a trial court is authorized to grant judgment as a matter of law.'" quoting *Fritz v. Yeager*, 790 A.2d 469, 471 (Del. 2002)).

[17] There does not appear to be any Delaware case law defining "unusual circumstances." This Court was only able to locate one case, in Rhode Island, where the court found an unusual exception. In that case, the defendant, a car repair shop, had moved the plaintiff's car from its original spot and specifically directed the plaintiff to retrieve her car over the snow and ice-covered terrain. The Rhode Island Supreme Court held that because the defendant had created the risk by moving the plaintiff's car, and had specifically warned the plaintiff of the dangerous conditions, the "unusual circumstances" exception applied. *See Terry v. Central Auto Radiators, Inc.*, 732 A.2d 713, 717-18 (R.I. 1999).

that the severity of the February 13 storm does not make *Young* inapplicable,[18] and there is no evidence to support an inference that Harmon, or any of the defendants, did anything to create the illusion that the sidewalk was safe to walk on. Cash's claim that her case falls under the "unusual circumstances" exception in *Young* fails for lack of record support.

16. Lastly, Cash argues that even if Cheer and East Coast had no legal duty, they assumed a duty because of their snow removal policy and their having removed snow and ice during the February 13 storm.[19] Cash contends that there are material facts in dispute as to whether the defendants exercised reasonable care in carrying out that assumed duty. This claim fails as a matter of law. In *Morris v. Theta Vest,* we held that "in the case of a continuing storm, reasonable conduct *is* to await the storm's end. That is true whether successful or vain efforts to take some earlier action occurred."[20] Thus, even if the defendants' policy was to

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[18] *Morris v. Theta Vest,* 2009 WL 693253, at *1 (Del. Super. Ct. Mar. 10, 2009), *aff'd* 977 A.2d 899 (Table), 2009 WL 2246777 (Del. 2009).

[19] Cash relies on *Handler Corporation v. Tlapechco*, 901 A.2d 737 (Del. 2006), and *Furek v. The University of Delaware*, 594 A.2d 506 (Del. 1991) in support of her position. Neither case, however, is applicable. *Handler* is limited to determining the allocation of responsibilities for workplace safety among general contractors and sub-contractors. *See Handler*, 901 A.2d at 744-50. *Furek* is inapplicable because it deals with a university's liability under Restatement (Second) of Torts § 344 for failure to supervise a fraternity and its members. *Furek*, 594 A.2d at 519-23.

[20] 2009 WL 693253, at *2 (Del. Super. Ct. Mar. 10, 2009), *aff'd* 977 A.2d 899 (Table), 2009 WL 2246777 (Del. 2009) ("[T]he Court . . . has determined that the final judgment of the Superior Court should be affirmed on the basis of and for the reasons assigned . . . in its decision dated March 10, 2009.").

remove snow and ice during a storm, that, without more, does not constitute the voluntary assumption of a legal duty.[21] The absence of a legal duty to remove the icy conditions renders moot the question of whether they exercised reasonable care.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

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[21] *See id.*; *see also Kovach v. Brandywine Innkeepers Ltd.*, 2001 WL 1198944, at *2 (Del. Super. Ct. Oct. 1, 2001) ("[L]andowners who attempt to clear some areas of their property while it is still snowing should not be penalized for doing so, nor should they lose the benefit of being able to wait out the end of the snowstorm before they must take steps to make their entire premises reasonably safe from snow and ice.").