IN THE SUPREME COURT OF THE STATE OF DELAWARE

DIANE POLASKI and THOMAS POLASKI, her husband,	)	
	)	No. 82, 2012
Plaintiffs Below, Appellant,	)	Court Below: Superior Court of the State of Delaware in and for Kent County
v.	)	
DOVER DOWNS, INC.,	)	
	)	C.A. No. K09C-12-029
Defendant Below, Appellee.	)	

Submitted: May 30, 2012
Decided: August 14, 2012

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

O R D E R

This 14th day of August 2012, it appears to the Court that:

(1) A woman fell off a curb and injured herself while walking from Dover Downs Casino to a smoking area. The woman sued Dover Downs, claiming in various ways that a problem with the curb led to her fall. Dover Downs moved for summary judgment, and the trial judge granted the motion. We affirm the Superior Court judge's decision granting summary judgment to Dover Downs on all claims.

(2) On her way to a smoking area outside Dover Downs Casino, Diane Polaski fell off a curb, injuring her arm and leg. Both parties agree that the curb was painted bright yellow, was well lighted, and that Polaski did not trip over any debris. Nevertheless, Polaski sued, focusing attention on the curb's design,

claiming that Dover Downs either installed a defective curb or created a dangerous condition and then failed to warn her about it. Polaski's husband sued for loss of consortium.

(3) Polaski fell off a portion of the curb that fits the normal conception of a curb. That is, the curb possessed a sheer face that descended from a higher sidewalk to a lower street. The problem, alleged Polaski, arose because the sheer face occupied only three inches of the curb's length. On one side of the sheer face, a concrete slope turned the transition from the sidewalk to the road into a gentle one, and on the other side, a handicap ramp offered an even milder slope to the road. Polaski alleged the presence of the sheer face between these two graded transitions created a dangerous situation that Dover Downs either should have warned her about or never built in the first place, because it constituted a defective design.

(4) Dover Downs filed a Motion for Summary Judgment. The trial judge granted the Motion, finding that there were no disputed material facts. Polaski filed a timely appeal in this Court.

(5) This Court reviews the trial judge's grant of a motion for summary judgment *de novo*.[1]

[1] *Talmo v. Union Park Auto.*, 2012 WL 730332, at *2 (Del. Mar. 7, 2012) (citing *Hazel v. Delaware Supermarkets, Inc.*, 953 A.2d 705, 708–09 (Del. 2008)).

(6) To grant summary judgment, a judge must find that there are no disputed material facts when viewed in the light most favorable to the nonmoving party.[2] The moving party must show that it is entitled to judgment as a matter of law.[3] If a reasonable person could only draw one inference from the facts, judges may find a defendant not negligent as a matter of law, even though the existence of negligence is typically an issue for the jury.[4] The moving party is also entitled to judgment as a matter of law if the nonmoving party fails to establish an element of its claim.[5]

(7) Neither party disputes that Polaski was a business invitee when she fell.[6] Polaski was on Dover Downs' property and was en route to a designated smoking area where Dover Downs intended customers to go. Thus, Dover Downs owed Polaski a duty to exercise reasonable care to protect her from foreseeable dangers that she might encounter while on Dover Downs' property.[7] Specific to this case, Delaware recognizes businesses have a duty to keep public walking areas

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[2] Super. Ct. Civ. R. 56(c).

[3] *Id*.

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

[5] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991) (*quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

[6] Op. at 5.

[7] *DiOssi v. Maroney*, 548 A.2d 1361, 1364 (Del. 1988).

in a reasonably safe condition for customers.[8] But a business' duty to properly maintain walking areas does not exempt customers from exercising reasonable care while walking.[9]

(8) Polaski argues on appeal that the judge should have allowed the jury to determine whether the curb constituted a dangerous condition. The judge held that a "change in elevation on this well-lit, defect-free sidewalk leading down to a handicapped ramp is not a dangerous condition."[10] Even if the sidewalk was dangerous, the trial judge held, the sidewalk's elevation change would be obvious to a person of ordinary care and prudence.[11]

(9) The judge justifiably decided this case without requiring a jury to hear it. As the plaintiff, Polaski bears the burden to demonstrate the existence of her claim's elements, including the existence of a dangerous condition.[12] If a plaintiff fails to create a genuine issue of material fact about the existence of an element of her claim, a judge should grant a defendant's motion for summary judgment.[13] Polaski injured herself by falling off a normal curb. Doing so does not cause an

[8] *Walker v. Shoprite Supermarket, Inc.*, 864 A.2d 929, *2 (Del. 2004).

[9] *Id.*

[10] Op. at 7.

[11] *Id*.

[12] *Wilson v. Derrickson*, 175 A.2d 400, 401 (Del. 1961).

[13] *Kanoy v. Crothall Am., Inc.*, 1988 WL 15367, *2-3 (Del. Super. Feb. 8, 1988).

injury capable of redress through a negligence action. In granting summary judgment here, the judge observed that the parties disputed no material facts about the fall. Therefore, he properly ruled that a normal curb does not constitute a dangerous condition, even if it borders atypical portions of curb.

(10) Before granting summary judgment, and after drawing all reasonable inferences in favor of Polaski, the judge found no apparent defect with the curb.[14] He noted that the curb was brightly marked with yellow paint, was in a well lighted area, and was free from damage or debris.[15] While Polaski characterizes the curb as a "precipitous ledge,"[16] the trial judge found the curb's change in grade "conspicuous."[17] From the evidence presented, the judge concluded that no reasonable juror could infer that the curb's change in grade constituted a dangerous condition.[18]

(11) The judge also granted summary judgment to Dover Downs on Polaski's design defect claim. The judge held that Polaski needed to present expert testimony to support a design defect claim.

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[14] Op. at 6.

[15] *Id*.

[16] Opening Br. at 4.

[17] Op. at 6.

[18] *Id*. at 7.

(12) We note that Polaski did not raise her arguments opposing the judge's ruling that she must have expert testimony to support her design defect claims until her reply brief. Supreme Court Rule 14(b)(vi)(A)(3) requires appellants to raise all arguments in the opening brief. Thus, Polaski waived the arguments supporting her design defect claim by omitting those arguments from her opening brief.

(13) Even if Polaski did not waive her arguments, her attempt to separate the requirement of expert testimony from design defect claims fails. Although general negligence claims do not require expert testimony and can be evaluated by a layperson, design defect claims rely on facts beyond a layperson's knowledge.[19] Plaintiffs must therefore establish, via expert testimony, what is "custom"[20] or "very common practice"[21] as an alternative means of determining negligent or defective design. Here, the judge properly granted Dover Downs summary judgment because Polaski failed to produce necessary expert testimony.

(14) Having properly granted summary judgment on both theories of negligence, the judge properly granted summary judgment to Dover Downs for the derivative loss of consortium claim.[22]

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[19] *See Delmarva Power & Light v. Stout*, 380 A.2d 1365, 1367 (Del. 1977) ("expert testimony is only relevant when the matter in issue is not one of common knowledge").

[20] *Slicer v. Hill*, 2012 WL 1435014, * (Del. Super. Apr. 20, 2012).

[21] *Ward v. Shoney's, Inc.*, 817 A.2d 799, 802 (Del. 2003).

[22] Op. at 8.

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

BY THE COURT:

/s/ Myron T. Steele
Chief Justice