NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

MARTIN SKULNIK Appellant v. VERNA TYREMAN v. IVETTE QUINONES AND HECTER ESTEVES	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 805 EDA 2012

Appeal from the Order Entered February 13, 2012
In the Court of Common Pleas of Monroe County
Criminal Division at No(s): 2011-00836

BEFORE: MUNDY, J., OTT, J., and PLATT, J.*

MEMORANDUM BY OTT, J.: **FILED MAY 02, 2013**

Martin Skulnik appeals from the order entered on February 13, 2012, granting summary judgment in favor of all defendants. The trial court determined Skulnik had not produced sufficient evidence to overcome, as a matter of law, the "hills and ridges" doctrine[1] regarding his fall on an icy

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* Retired Senior Judge assigned to the Superior Court.

[1] "[A] long standing and well entrenched legal principle that protects an owner or occupier of land from liability for generally slippery conditions resulting from ice and snow where the owner has not permitted the ice and snow to unreasonably accumulate in ridges or elevations." ***Biernacki v. Presque Isle Condominiums Unit Owners Ass'n, Inc.***, 828 A.2d 1114,
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driveway. Skulnik claims the trial court erred in not viewing the evidence most favorably to him as the non-moving party and in determining there were no open questions of material fact regarding causation, the existence of a dangerous condition or notice of dangerous condition.[2] After a thorough review of the submissions by the parties, relevant law, and the certified record, we affirm, albeit on alternate grounds.

The record reveals that Skulnik and a home inspector, Marc C. Shanley, went to the residence of Ivette Quinones and Hecter Esteves on February 4, 2009 to inspect the home to see if it was suitable for purchase. Deposition of Skulnik, 7/26/11, at 17.[3] Verna Tyreman, was the actual owner of the home; Quinones and Esteves were tenants. The home was

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1116 (Pa. Super. 2003). There are three elements that must be met to prevail under "hills and ridges":

> (1) that snow and ice had accumulated on the sidewalk in ridges or elevations of such size and character as to unreasonably obstruct travel and constitute a danger to pedestrians travelling thereon; (2) that the property owner had notice, either actual or constructive, of the existence of such condition; (3) that it was the dangerous accumulation of snow and ice which caused the plaintiff to fall.

Id. at 1117.

[2] We have restated the questions for brevity and clarity. As presented, all questions are fairly subsumed in the first issue and we will address them together.

[3] We will be citing the deposition of Skulnik and Shanley. After the first citation to each, we will refer to them by the name of the deponent and the page number.

located on North View Road in Stroudsburg, Pennsylvania. ***See*** Amended Complaint.

It was a morning inspection. Generally, Shanley scheduled such inspections to begin at 10:00 a.m. ***Deposition of Shanley***, 9/7/11, at 25. Skulnik arrived first and parked his Smart car, as far onto the driveway as possible. ***Skulnik*** at 19-20, Photograph, Shanley Exhibit 1. The record reflects the car was parked on ice. Exhibit 1. Shanley arrived later and parked behind and to the left of Skulnik's car. ***Shanley*** at 21. Skulnik testified in deposition that he could not recall if he had any problems walking on the ice as he left his car. ***Skulnik*** at 30.

Shanley testified the driveway by the garage had a thick covering of ice. ***Shanley*** at 10. He recalled a series of ice storms and surmised the ice had been building up. ***Id***. He also noted the driveway sloped down from the road to the house, so a freeze-thaw cycle allowed for the collection of ice in the garage area. ***Id***. at 11. Shanley further testified he was accustomed to walking on ice and the footing on the driveway required walking gingerly, taking baby steps. ***Id***. at 12. Both Shanley and Skulnik limited the description of ice to this lower area and indicated the upper area of the driveway, especially that portion that was in the sun, was not icy. ***Skulnik*** at 31, ***Shanley*** at 9-10. Shanley believed the area next to the garage had been salted. ***Shanley*** at 14.

The home inspection took several hours and as it concluded, the two men went back outside to look at the roof and chimney. ***Skulnik*** at 24-27.

They exited from the garage and stood on the ice. ***Id***. They stood behind Skulnik's car and in front of Shanley's truck. ***Id***. at 27. Shanley did not have an explanation why they chose to stand on the ice. ***Shanley*** at 7. After approximately three minutes of looking at the roof, Skulnik fell. ***Skulnik*** at 32, 73.

In describing his fall, Skulnik testified, "When he [Shanley] pointed up to the building and I looked up, that's the last thing I remember because I was laying on the ground right after that." ***Skulnik*** at 27. He repeated the explanation, stating, "I just fell back." ***Id***. at 32.

Shanley testified he did not see Skulnik fall, but was of the impression Skulnik "went down fast." ***Shanley*** at 13. As Shanley helped Skulnik to his feet, Skulnik told him he had not been moving and that he must have simply "lost my balance or whatnot." ***Id***.

Although Skulnik could not say he was standing on uneven ice when he fell, he noticed upon standing that the ice in the area was ridged from being driven over. ***Skulnik*** at 33. Shanley described the icy area as having "craters and valleys and peaks." ***Shanley*** at 41. He also testified the tire tracks in the ice were visible. ***Id***. at 10. He was able to point them out on a photograph of the driveway taken on the day of the accident.[4] ***Id***. On the

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[4] The photograph was taken by Shanley on the day of the inspection. It shows the driveway as well as both Shanley's and Skulnik's vehicles parked on the driveway. Shanley believed he took the picture after the home inspection. Because Skulnik's car is still at the house, the photo would
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photograph, Shanley also marked that portion of the driveway which was icy. Based upon Shanley's markings, the icy portion of the driveway is clearly distinguishable from the non-icy portion. Our review of the photograph confirms Shanley's statement that the tire tracks were plainly visible.

Based on this evidence, the trial court granted summary judgment in favor of all defendants. The trial court determined Skulnik had provided no evidence of hills and ridges in the ice; a condition needed to extend liability to those responsible for the property. Further, the trial court determined neither the tenants nor landlord out of possession had notice of any dangerous condition. Finally, the trial court held that it was "mere speculation" that ice and/or snow was the cause of Skulnik's fall.

> Our review of the trial court's grant of summary judgment is plenary. Summary judgment is proper where the pleadings, depositions, answers to interrogatories, admissions and affidavits and other materials show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. [S]ee Pa.R.C.P. 1035.1-1035.5. We must view the record in the light most favorable to the opposing party and resolve all doubts as to the existence of a genuine issue of material fact in favor of the nonmoving party. We will reverse the trial court's grant of summary judgment only upon an abuse of discretion or error of law.

Cresswell v. End, 831 A.2d 673, 675 (Pa. Super. 2003).

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therefore have been taken before Skulnik fell. There are no people in the picture.

"The standard of care a possessor of land owes to one who enters upon the land depends upon whether the person entering upon it is a trespassor, licensee, or invitee." ***Carrender v. Fitterer***, 469 A.2d 120, 123, (Pa. 1983). It is agreed that Skulnik was an invitee.

The duty of care owed to an invitee is described in the Restatement (Second) of Torts, at §§ 341A, 343 and 343A.

> § 341A. Activities Dangerous To Invitees
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> > A possessor of land is subject to liability to his invitees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety if, but only if, he should expect that they will not discover or realize the danger, or will fail to protect themselves against it.

Restatement (Second) of Torts § 341A.

> § 343. Dangerous Conditions Known To Or Discoverable By Possessor
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> > A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
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> > (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
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> > (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
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> > (c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) Torts § 343.

> § 343A. Known Or Obvious Dangers

> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.
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> (2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

Restatement (Second) Torts § 343A

Based upon the evidence recited and the applicable standards of law, we now address Skulnik's arguments.

In determining Skulnik failed to produce sufficient evidence to overcome the hills and ridges doctrine, the trial court relied on a statement by Skulnik that he could not recall having difficulty walking across the icy driveway when he arrived, his statement that he just fell down, and Quinones' deposition testimony that the driveway was clear of ice, but that her husband, Esteves, had put salt down anyway.

Our review of the certified record leads us to agree with Skulnik that the trial court improperly discounted testimony regarding the existence of ice on the driveway and the unnaturally cratered and ridged nature of the ice. Additionally, Shanley provided testimony indicating that the accumulation of ice was a result of freeze-thaw cycles and the sloped character of the driveway leading down to the garage area. It could be logically inferred from Shanley's testimony that such thick layer of ice did not collect overnight and, therefore, the tenants knew or should have known

of its existence. While a jury would be entitled to discount Shanley's and Skulnik's version of the events, for purposes of summary judgment, the trial court was required to accept the facts in the light most favorable to Skulnik, as the nonmoving party. Therefore, we agree that summary judgment was incorrectly entered on the basis stated by the trial court.

However, once we have accepted Skulnik's argument and the account of the conditions he faced on the driveway on the morning of February 4, 2009, we are faced with an account that details an open and obvious condition.[5] The icy area of the driveway was readily discernible. ***See*** Photo. Despite this, Skulnik parked on the icy portion of the driveway and did not move his car to the non-icy portion, even though there was nothing preventing him from doing so. The tire tracks that Skulnik claimed were covered by a thin layer of snow, and which caused his fall, were, in fact, visible.[6] ***See*** Shanley deposition; photo. Although Skulnik could not remember if walking across the icy portion of the driveway was troublesome,

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[5] "[A]n appellate court may affirm a valid judgment based on any reason appearing as of record, regardless of whether it is raised by the appellee." ***Heim v. Medical Care Availability and Reduction of Error Fund***, 23 A.3d 506, 511 (Pa. 2011) quoting ***Commonwealth v. Moore***, 937 A.2d 1062, 1073 (Pa. 2007).

[6] "It is vain to say one looked but did not see what was obvious." ***Martino v. Adar***, 63 A.2d 12, 13 (Pa. 1949). ***See also***, ***Canery v. SEPTA***, 406 A.2d 1093, 1096 (Pa. Super. 1979) (wrong doer may not avoid liability by saying he did not see what was plainly visible to him).

Shanley affirmatively stated he was required to walk gingerly, taking baby steps. Despite encountering the icy portion of the driveway when they arrived, both Skulnik and Shanley voluntarily stood on the icy section again at the end of the home inspection.

The Restatement (Second) of Torts, §§ 341A, 343 and 343A all support the proposition that a possessor of land is not liable for a dangerous condition that is open and obvious.[7] The testimony and evidence Skulnik argues the trial court improperly discounted, shows, as a matter of law, that the condition was open and obvious, thereby absolving the possessor of land from the duty to protect him.

> When an invitee enters business premises, discovers dangerous conditions which are both obvious and avoidable, and nevertheless proceeds voluntarily to encounter them, the doctrine of assumption of risk operates merely as a counterpart to the possessor's lack of duty to protect the invitee from those risks. By voluntarily proceeding to encounter a known or obvious danger, the invitee is deemed to have agreed to accept the risk and to undertake to look out for himself. It is precisely because the invitee assumes the risk of injury from obvious and avoidable dangers that the possessor owes the invitee no duty to take measures to alleviate those dangers.

Carrender v. Fitterer, 469 A.2d at 125 (internal citations omitted).

Oder granting summary judgment affirmed.

Platt, J., concurs in the result.

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[7] ***See also***, ***e.g.***, ***Carrender v. Fitter***, ***supra***; ***Cresswell v. End***, ***supra***.

Judgment Entered.

Prothonotary

Date: 5/2/2013