

IN THE UTAH COURT OF APPEALS

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Flora Sue Macintosh,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellant,)	
)	Case No. 20080549-CA
v.)	
)	
Staker Paving and Construction)	F I L E D
Company,)	(April 9, 2009)
)	
Defendant and Appellee.)	2009 UT App 96

Third District, Tooele Department, 060300169
The Honorable Mark S. Kouris

Attorneys: M. David Eckersley, Salt Lake City, for Appellant
George W. Burbidge II, Salt Lake City, for Appellee

Before Judges Bench, Orme, and Davis.

DAVIS, Judge:

Plaintiff Flora Sue Macintosh appeals the trial court's grant of summary judgment in favor of Defendant Staker Paving and Construction Company (Staker). "Summary judgment is appropriate only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Schreiter v. Wasatch Manor, Inc., 871 P.2d 570, 573 (Utah Ct. App. 1994). A grant of summary judgment is a question of law reviewed for correctness. See id.

To prevail on a negligence claim, a plaintiff must establish four essential elements: (1) that the defendant owed plaintiff a duty, (2) that the defendant breached that duty, (3) that the breach of duty was the proximate cause of the plaintiff's injury, and (4) that the plaintiff in fact suffered injuries or damages.

Thurston v. Workers Comp. Fund of Utah, 2003 UT App 438, ¶ 12, 83 P.3d 391 (internal quotation marks omitted). In this case, only the first element is at issue: the scope of the legal duty owed by Staker. In the summary judgment context, "[o]nce the moving

party has challenged the nonmoving party's case on [the] basis [that no genuine issue of material fact exists], the burden shifts to the nonmoving party to demonstrate the existence of a genuine issue of material fact." Uintah Basin Med. Ctr. v. Hardy, 2008 UT 15, ¶ 16, 179 P.3d 786. Staker asserted that it met its requisite standard of care because it complied with safety standards outlined in the Manual on Uniform Traffic Control Devices (the Manual). See Federal Highway Admin., U.S. Dept. of Transp., Manual on Uniform Traffic Control Devices for Streets and Highways, Part VI (1993); see also Utah Admin. Code R920-1-1 (adopting by reference the Manual on Uniform Traffic Control Devices, which "was approved by the Federal Highway Administrator as the National standard for all highways open to public travel"). Accordingly, the burden shifted to Macintosh as the nonmoving party to demonstrate that a genuine issue of fact existed regarding the standard of care Staker owed to her. Cf. Kitchen v. Cal Gas Co., 821 P.2d 458, 462 (Utah Ct. App. 1991) (noting that the plaintiff in a negligence action "must establish a prima facie case [on all four elements] to survive summary disposal of the case"). We conclude that Macintosh did not meet her burden of proof on this element and, accordingly, affirm.

Macintosh contends that expert testimony regarding the scope of Staker's duty is unnecessary because a jury is capable of determining whether failure to properly mark a road constitutes negligence. We disagree. When "the matter at issue . . . requires special knowledge not held by the trier of fact," Salt Lake City Sch. Dist. v. Galbraith & Green, Inc., 740 P.2d 284, 289 (Utah Ct. App. 1987), "the standard of care in a trade or profession [generally] must be determined by testimony of witnesses in the same trade or profession." Ortiz v. Geneva Rock Prods., Inc., 939 P.2d 1213, 1217 n.2 (Utah Ct. App. 1997) (alteration in original) (quoting Wessel v. Erickson Landscaping Co., 711 P.2d 250, 253 (Utah 1985)). The standard of care for temporary traffic control during major road construction is technical and involves complexities not within the common knowledge of jurors.¹ Indeed, the Manual, to which traffic controllers are required to adhere, is several hundred pages long and contains numerous arcane subparts.² Further, Fred Lupo, the

¹This is particularly true under the facts here because the road construction project involved completely closing one side of the highway and diverting traffic traveling in both directions into the side that remained open.

²For example, Part VI of the Manual contains a list of tables that are labeled as follows: "1. Guidelines for length of longitudinal buffer space[;] 2. Taper length criteria for
(continued...)"

Staker employee who inspected the intersection shortly before the accident, is trained and certified in traffic control through the Associated General Contractors and the Utah Department of Transportation, and his certification requires renewal every two to three years. Accordingly, we conclude that the degree of skill and knowledge required to perform traffic control under these circumstances cannot be imparted to jurors by lay witnesses. Cf. Young v. Pennsylvania Dep't of Transp., 744 A.2d 1276, 1278 (Pa. 2000) ("[L]ay witnesses are [un]able to impart sufficient knowledge to jurors regarding the many variables which are required to establish the existence of a legal duty to [properly mark a construction zone].").

In this case, Staker attached Lupo's affidavit to its memorandum in support of summary judgment, which stated that Lupo inspected the intersection and concluded that it complied with the Manual. Macintosh failed to controvert this fact as required by Utah Rule of Civil Procedure 7(c)(3)(A), see Utah R. Civ. P. 7(c)(3)(A). In fact, aside from her deposition testimony that the intersection was unmarked, Macintosh failed to provide any evidence regarding the scope of Staker's duty. Contrary to Macintosh's assertion, the scope of Staker's legal duty cannot be established merely through her testimony.³ Without any evidence establishing the scope of Staker's legal duty, Macintosh cannot demonstrate whether Staker breached that duty. Accordingly,

²(...continued)
temporary traffic control zones[;] 3. Suggested advance warning sign spacing[;] 4. Index to typical application diagrams." Federal Highway Admin., U.S. Dept. of Transp., Manual of Uniform Traffic Control Devices for Streets and Highways, Part VI (1993); see also Utah Admin. Code R920-1-1 (adopting by reference the Manual on Uniform Traffic Control Devices).

³Macintosh contends that her testimony that the intersection was unmarked creates a genuine issue of material fact. Although it is true that it only takes one sworn statement to create an issue of fact, see Holbrook Co. v. Adams, 542 P.2d 191, 193 (Utah 1975), Macintosh's testimony in this case does not create a factual issue that precludes summary judgment. "'Naked assertions of negligence, unsupported by any facts whatsoever . . . [fall] far short of raising a material issue of fact on the issue of negligence.'" Kitchen v. Cal Gas Co., 821 P.2d 458, 461 (Utah Ct. App. 1991) (omission and alteration in original) (quoting Massey v. Utah Power & Light, 609 P.2d 937, 938-39 (Utah 1980)). Moreover, her testimony that she was confused by traffic control barrels is contrary to her assertion that Staker completely failed to mark the road closure.

Macintosh did not meet her burden of proof on a prima facie case of negligence, which failure is fatal to her claim.

Affirmed.

James Z. Davis, Judge

I CONCUR:

Russell W. Bench, Judge

I CONCUR IN THE RESULT:

Gregory K. Orme, Judge