Childs v. Valente, Docket No. 503-12-05 Wmcv (Wesley, J., June 28, 2007)

STATE OF VERMONT
WINDHAM COUNTY, SS.

HERBERT CHILDS, and
ISABEL CHILDS,
Plaintiffs,

v.

WINDHAM SUPERIOR COURT
DOCKET NO. 503-12-05 Wmcv

STEVEN VALENTE,
Defendant.

ORDER ON MOTIONS TO INTERVENE AND FOR SUMMARY JUDGMENT

Mr. and Mrs. Childs are owners of a multi-bedroom residence in Dover which they rented to Mr. Valente for the 2004-2005 ski season. A fire broke out on Sunday, March 13, 2005 in the garage where Mr. Childs stored his tenant's garbage. Alleging that Mr. Valente negligently placed fireplace ashes in the trash and that he failed to take reasonable steps to keep the premises safe, the Childs seek to recover damages for personal injuries Mr. Childs suffered, associated loss of consortium, as well as property losses.[1] Two motions are pending, one to intervene and the other for summary

[1] The complaint is primarily focused on personal injury damages, though it appears from Plaintiffs' briefing that also seek recovery for damage to the rental premises and to their home.

judgment.

Motion to Intervene- The proponent of the motion to intervene is Plaintiff's insurer, Allstate Insurance Company. Alleging that it has already made payments to the Childs in excess of $100,000 for losses associated with the fire and that the insurance policy includes a right of subrogation, Allstate contends that its ability to protect its own interest in a potential settlement will be impaired by disposition of the underlying suit unless it is allowed to participate. A proposed complaint offered along with the motion to intervene consists of essentially the same single cause of action for negligence which has been asserted by Plaintiffs.

Rule 24(a) of the Vermont Rules of Civil Procedure sets out the standard for intervention applicable in this matter:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The rules do not impose a strict deadline for motions to intervene and on the issue of timeliness the court must consider the totality of the circumstances including relevant factors such as the power to have sought intervention at an earlier stage, the case's progress, harm to the plaintiffs and availability of other means to join the case. *Ernst v. Rocky Rd.*, 141 Vt. 637,640 (1982).

In this matter, Allstate was advised of the Childs' intent to sue well before the complaint was filed in December 2005 and before Defendant was served in April 2006.

On August 12, 2005, and again on December 8, 2005, Plaintiffs' attorney advised Allstate that he was representing Mr. Childs in an action against Mr. Valente and requested information from the insurer's investigation. Allstate's failure to move for intervention in this time frame is completely unexplained in the record. On January 22, 2007, when Allstate finally did move, discovery in the matter was well advanced and the parties had completed all of their lay depositions.[2] Defendant moved for summary judgment within a month of the motion to intervene. Apparently conceding that discovery was sufficiently developed so as to permit its resolution, Plaintiffs responded to the motion for summary judgment on its merits. In contrast to Defendant's claim that Allstate's request need not involve any substantial delay, Allstate responded to the motion for summary judgment asserting that its resolution is premature until Allstate is given an opportunity to develop the factual record. Yet, Allstate makes no proffer regarding the inadequacy of the summary judgment record, nor any theory for resisting the pending motion for judgment based on the likelihood that additional facts remain to be developed. Rather, the Court concludes that Allstate's insistence on the further development of the record is little more than a fishing expedition. Considering all the factors, the Court concludes that it is not reasonable to permit Allstate's intervention given the unexcused nature of its delay, and because Allstate's claim rests on the same basis as Plaintiffs' which is ripe for summary judgment as further discussed below. Accordingly, the motion to intervene is **DENIED**.

Summary Judgment- Summary judgment is appropriate only if there is no genuine

[2] Directly after Allstate moved to intervene, Defendant opportunistically moved for removal to U.S. District Court on the purported grounds of diversity. That motion was denied, in part, because the motion to intervene had not yet been decided and Allstate was not yet a party. See *Childs v. Valente*, File No 1:07-CV-18(D. Vt. March 19, 2007).

issue as to any material fact and the moving party is entitled to judgment as a matter of law. V.R.C.P. 56(c). In evaluating whether a genuine issue of material fact exists, the court relies only on facts which are "clear, undisputed, or unrefuted," and gives the non-moving party the benefit of all reasonable doubts and inferences. *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44, 48 (1990).

In addition to the summary already provided, the relevant factual background is as follows. In a typed memo furnished at the inception of the lease, the Childs advised Defendant that trash containers had been provided on the residence's porch and that he should be sure to secure the tops of each container with a bungee cord. The memo also advised that firewood was located on the porch breezeway and downstairs patio. Neither the lease nor the memo provided any express instructions about disposal of ashes from the rental unit's fireplace. While Plaintiffs acknowledge that they did not give Defendant any instructions on the topic directly, Mr. Childs alleges that sometime in January he provided some verbal instructions to two of Mr. Valente's guests, left messages for him, and offered an ash container for his tenant's use.

Mr. Valente was at the rental property during the weekend of March 14-16, 2005, along with some friends. Mr. Valente has identified some of the friends that joined him that weekend but does not know the names or identities of others. According to Defendant, it was common for friends of friends to join him in Dover and to share the expenses of the rental. Mr. Valente and his guests arrived on Friday night, skied all day Saturday and left at different times on Sunday. Mr. Valente states that some of his guests were still present when he departed with his friend Erin around 11:00 a.m..

Although it appears undisputed that Mr. Valente and his guests did use the fireplace that weekend, Plaintiff has not produced any evidence to establish that Defendant was the one who started, tended or cleaned up the fireplace, or that Defendant knows who did, and Defendant has denied as much. Although Defendant claims not to know how the fireplace ashes were handled on the specific weekend in question, he believes that his guests generally disposed of ashes by pouring them outside on the snow and, as Plaintiffs never complained about this practice, he believed that was an acceptable method. Plaintiffs do not dispute either that ashes were generally disposed of in this manner, or Mr. Valente's claim that they never told him not to dump ashes in the snow.

Mr. Childs claims that he collected a couple of plastic garbage bags from the rental property's deck, as well as a brown paper bag found on the snow which had been burned through and appeared to have had ashes in it, and placed the bags in the garage attached to his house. At around 7:00 p.m., the garage caught fire in the area where the bags had been placed. After the fire, Mr. Childs observed that the fireplace in the rental was free of ashes. A fire scene analysis performed for Allstate concluded that the fire was more probably than not the result of ashes improperly stored in the plastic trash bags.

The only cause of action advanced by the Plaintiffs is common law negligence based primarily on the theory that Defendant himself placed the ashes in the garbage. However, Defendant denies handling the ashes himself and there are no facts to contradict him. Plaintiffs concede this in their memo in opposition to the motion for summary judgment relying instead on the "logical conclusion" that one of Defendant's

guests must have placed ashes in the garbage. The claim for relief, therefore, depends on the scope of Mr. Valente's duty, if any, to keep his residence free of hazardous conditions created by his guests.

As a general matter, Vermont imposes no legal duty to control the conduct of another in order to protect a third person from harm. *Peck v. Counseling Serv. of Addison County, Inc.*, 146 Vt. 61, 64-65(1985). Exceptions to the general rule arise where a special relation exists between the two persons which gives the one a definite control over the actions of the other, where a special relationship exists which imposes a duty upon the actor to control the actions of another, or where a special relationship gives a third person a right to protection. *Id*. *Peck* recognized that mental health professionals who know or should know that a patient poses a serious risk of danger to an identifiable victim has a duty to exercise reasonable care to protect the potential victim from that danger. *Id*. at 68. In a different factual setting, the Supreme Court has also recognized the duty of an employer to supervise and control off-duty employees who are on the employer's premises if the employer knows it has the ability, the opportunity, and the need to control the employee's actions. *Bradley v. H.A. Manosh Corp.*, 157 Vt. 477, 482(1991)(evidence that employer was aware of employee's predisposition to careless behavior when dealing with automobiles sufficient to make a jury question of the duty to control employee's action); but cf. *Poplaski v. Lamphere*, 152 Vt. 251(1989)(as matter of law, employer has no duty of care to prevent automobile accident which results when employee leaves workplace intoxicated).[3]

[3] Although the parties have not cited it, the Restatement(Second) of Torts describes the

duty of a possessor of land to control the conduct of third persons who use the land or personal property on it. Pursuant to section 318, the possessor of land *who is present* should exercise reasonable care to control the conduct of a licensee to prevent him from creating an unreasonable risk of bodily harm to another *if* the actor knows or has reason to know that he has the ability to control the licensee *and* if the actor knows or should know of the necessity and opportunity for exercising such control. However, in cases where the actor is not present, even if he or she is in the vicinity, the Restatement expressly offers no opinion as to whether the actor has any duty of care to control the conduct of other parties.

Plaintiffs rely on *Prevo v. Evarts*, 146 Vt. 216(1985), to establish the duty owed by Mr. Valente to keep his premises safe. In *Prevo*, the Vermont Supreme Court recognized a tenant's liability for substantial damage in excess of ordinary wear and tear to walls, windows, lights and door caused by the tenants' son and his invitees. *Id* Not strictly a negligence case*, Prevo* distinguished prior cases which found no liability for waste committed on rental premises by strangers and imposed a straightforward responsibility on tenants to return rental premises in reasonably maintained conditions. *Id*. at 145. Lacking any further elaboration of that duty, however, it cannot reasonably be stretched to include liability for the negligent creation of a dangerous condition that results in harm to other property or persons, even if it is the result of actions taken by an invited guest on the rental premises. Plaintiff's citations to cases in other jurisdictions are inapplicable because they are also restricted to damage caused by third parties to the leased premises. Accordingly, the Court concludes that neither *Prevo* nor any of the cases cited by Plaintiffs establish a basis to impose liability on Mr. Valente for the damage alleged to have been caused by an unidentified guest.

That Defendant had no legal duty to protect the Childs from the alleged harm is also supported by holdings in other cases on facts better matched to the present circumstances. For example, in *Allstate Insurance Co. v. Fritz*, 452 F. 3d 316(4th Cir. 2006), the Fourth Circuit considered whether tenants who permitted a guest to use and dispose of linseed soaked rags on the tenants' balcony had been negligent after the rags spontaneously combusted causing damage to the apartment and the rest of the apartment building. As to Allstate's common law claims, the court affirmed summary

judgment for the defendants because there was no evidence to show that the tenants had been personally negligent in permitting their guest to use linseed oil in the apartment and failing to supervise him and inspect his work area. *Id*. at 323(reserving question of liability under lease terms for further consideration based on facts). Likewise, in *Travelers Insurance Co. v. Linn*, 510 S. E. 2d 139(Ct. App. Ga. 1998), a Georgia Court of Appeals considered the negligence of a tenant for an apartment building fire linked to ashes which were removed from her fireplace by a 15 year old co-occupant. Affirming summary judgment for the defendant, the court observed that there was no evidence that Linn had been negligent in failing to supervise the 15 year-old who cleaned out her fireplace because she reasonably relied on the 15 year-old's parents to supervise him. *Id*. at 142. "Nothing in the record indicates that Linn should have foreseen that Lee would not merely extinguish the fire but would place the ashes on the deck." *Id*..; cf. *Weintraub v. Rabin*, 1994 WL 879852(Mass. Super., January 24, 1994)(finding defendant who admitted personally disposing grill ashes into trash liable for fire damages to condominium unit). Both *Fritz* and *Linn* declined to recognize a tenant host's obligation to supervise adult guests even in the exercise of potentially dangerous but essentially routine activities on the leased premises. There was no evidence in either *Fritz* or *Linn* that the hosts were actually aware of the dangerous condition created by their guest nor that they should have foreseen it might occur.

Even according Plaintiffs the benefit of reasonable inferences, the evidence in the current case is similar. Nothing establishes that Mr. Valente was aware of or directly involved with the disposal of live ashes on the day the Childs' fire broke out. No evidence suggests that he had any

reason to suspect one of his guests might dispose of ashes in a patently dangerous fashion. Since he was not personally involved and had no basis to foresee the harm, the imposition of personal liability in this case would effectively amount to strict liability, an extreme cause of action for which no justification has been established . Therefore, even assuming an unidentified guest acted negligently by putting fireplace ashes in a plastic trash bag, Defendant is not liable for the harm which resulted. Accordingly, the motion for summary judgment is **GRANTED**.

Dated at Newfane, Vermont, this ___ day of June, 2007.

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John P. Wesley
Superior Court Judge