

Panoushek v. Olsen, No. 548-8-05 Rdcv (Cohen, J., Nov. 3, 2008)

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**STATE OF VERMONT  
RUTLAND COUNTY**

<b>PAMELA PANOUSHEK</b>	)	<b>Rutland Superior Court</b>
	)	<b>Docket No. 548-8-05 Rdcv</b>
<b>Plaintiff</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>JOHN O. OLSEN, JR., BERNIE WEBSTER</b>	)	
<b>PLUMBING &amp; HEATING, INC., and CLOVIS</b>	)	
<b>B. WEBSTER, JR.</b>	)	
	)	
<b>Defendants</b>	)	

**DECISION ON DEFENANT BERNIE WEBSTER PLUMBING & HEATING,  
INC.'S MOTION FOR SUMMARY JUDGMENT**

This matter is before the Court on Defendant's Motion for Summary Judgment, filed August 4, 2008. Plaintiff Pamela Panoushek is represented by Lars Lundeen, Esq. Defendants Bernie Webster Plumbing & Heating, Inc. and Clovis B. Webster, Jr. are represented by Marc B. Heath, Esq.

**Summary Judgment Standard**

Summary judgment is appropriate where there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3). In response to an appropriate motion, judgment must be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, ... show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). In determining whether a genuine issue

of material fact exists, the Court accepts as true allegations made in opposition to the motion for summary judgment, provided they are supported by evidentiary material. *Robertson v. Mylan Labs, Inc.*, 2004 VT 15, ¶ 15, 176 Vt. 356. The nonmoving party then receives the benefit of all reasonable doubts and inferences arising from those facts. *Woolaver v. State*, 2003 VT 71, ¶ 2, 175 Vt. 397. Furthermore, where, as here, "the moving party does not bear the burden of persuasion at trial, it may satisfy its burden of production by showing the court that there is an absence of evidence in the record to support the nonmoving party's case. The burden then shifts to the nonmoving party to persuade the court that there is a triable issue of fact." *Ross v. Times Mirror, Inc.*, 164 Vt. 13, 18 (1995) (internal citations omitted).

### **Background**

Defendant John Olson, Jr. was the owner of a residential four-unit apartment building located at [address redacted], Center Rutland. Defendant company Bernie Webster Plumbing & Heating, Inc., owned by defendant Clovis Webster, Jr., was employed by co-defendant Olson to replace a hot water tank at the apartment building. Installation of the hot water tank was performed by employees of Bernie Webster Plumbing & Heating, Inc. in July 2001, and the company performed yearly cleanings on the tank from that point forward.

In early March, 2005, the plaintiff, Pamela Panoushek rented an apartment unit at [address redacted], Center Rutland, owned by co-defendant Olson. On March 20, 2005, Ms. Panoushek was scalded by hot water while taking a shower. Ms. Panoushek alleges that she has been hospitalized on a number of occasions as a result of her injuries and that

the scalding was so severe that one of her breasts was amputated in a subsequent mastectomy to remove the damaged tissue.

On August 22, 2005, plaintiff Panoushek filed this action against her landlord, co-defendant Olson, alleging negligence for his failure to keep the apartment in a safe condition.

On March 8, 2007, plaintiff amended her complaint to add defendants Clovis Webster, Jr. and his company Bernie Webster Plumbing & Heating, Inc. Plaintiff alleges that Bernie Webster Plumbing & Heating, Inc. was negligent concerning various aspects of the hot water tank installation, including but not limited to, failure to install a thermostatically controlled mixing valve on the hot water tank. Plaintiff further alleges that defendant company was negligent for failing to recommend installation of the mixing valve upon its yearly servicing of the tank, and failing to advise co-defendant Olson that he secure the aquastat temperature setting on the tank to prevent inadvertent or deliberate movement of the temperature setting.

On May 30, 2007, defendant Olson brought a cross-claim against co-defendant Bernie Webster Plumbing & Heating, Inc. seeking indemnification against all liability and expenses arising from the claims of plaintiff Panoushek to the extent that those claims were based on the conduct of Bernie Webster Plumbing & Heating, Inc.

In September 2007, plaintiff Ms. Panoushek disclosed Daniel Dupras, P.E., as her liability expert. Mr. Dupras holds an associate's degree in Architectural Engineering Technology from Vermont Technical College in Randolph, VT. He is a registered Professional Engineer in the states of Vermont, Massachusetts, Maine, and New Hampshire. He is currently the president of an engineering consulting firm, and he has

served as a project manager on a wide range of building projects, including complex residential buildings, where he has experience with the planning, design, layout, and engineering of plumbing systems. Mr. Dupras is also a member of multiple professional associations, including the American Society of Plumbing Engineers. Mr. Dupras was deposed twice – on April 30, 2008 and June 20, 2008.

Defendants Bernie Webster Plumbing & Heating, Inc. and Clovis B. Webster, Jr. filed a Motion for Summary Judgment pursuant to V.R.C.P. 56 on August 4, 2008. The defendants move the Court to dismiss the claims by plaintiff Panoushek arguing that she has not provided any expert testimony on the standard of care, nor moved to extend the expert disclosure deadline to allow for more expert testimony. Defendants Bernie Webster Plumbing & Heating, Inc. and Clovis B. Webster, Jr. also move the Court to dismiss the cross-claim by co-defendant Olson because the claim by plaintiff Panoushek cannot survive. The plaintiff, Ms. Panoushek, argues that she has offered evidence as to the standard of care, in the form of expert testimony by Mr. Dupras.

### **Discussion**

The substance of defendants Bernie Webster Plumbing & Heating, Inc. and Clovis B. Webster, Jr.'s argument is that the plaintiff's expert, Mr. Dupras, repeatedly conceded at his deposition that he was not qualified to opine on the standard of care among plumbers. Therefore, defendants argue, plaintiff failed to offer any expert testimony, as required by Vermont law, to establish the relevant standard of care among plumbers, and that defendant Bernie Webster Plumbing & Heating, Inc. failed to comply with those standards. Defendants argue that plaintiff failed to provide expert testimony to establish the relevant standard of care in regards to (1) the installation of the water tank,

(2) service of the water tank, and (3) advising co-defendant Olson to secure the water temperature setting.

At the outset the Court notes that defendant does not raise the issue of Mr. Dupras's qualifications to testify as an expert under *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), or any corresponding Vermont case which adopts the test set forth in *Daubert*. See, e.g., *USGen New England, Inc. v. Town of Rockingham*, 2004 VT 90, ¶ 19, 177 Vt. 193 (stating “[i]f the judge finds that the evidence meets both Daubert prongs, the proponent may then present its expert.”).

Rather, defendant argues that Mr. Dupras admitted in his deposition testimony that he was not qualified to opine as to the standard of care among plumbers concerning installation, service, and advising the co-defendant as to proper safety procedures. The issue of Mr. Dupras's credentials, therefore, was not raised, and the Court moves on to a discussion concerning the lack of evidence as to the standard of care for installation, service, and advisement of temperature control security concerning the hot water tank.

Generally, negligence by professionals is demonstrated using expert testimony to: (1) describe the proper standard of skill and care for that profession, (2) show that the defendant's conduct departed from that standard of care, and (3) show that this conduct was the proximate cause of plaintiff's harm. *Estate of Fleming v. Nicholson*, 168 Vt. 495, 497 (1998). The general standard of care that applies in a negligence action is a legal determination to be made by the court. *Coll v. Johnson*, 161 Vt. 163, 164 (1993) (citing W. Keeton, et al., *Prosser and Keeton on the Law of Torts* § 37, at 236 (5th ed. 1984)).

During the depositions of Mr. Dupras, defendant repeatedly asked questions pertaining to the standard of care which would apply to a plumber in Rutland County. However, defendant's reliance upon the "locality rule" is misguided.

The Vermont Supreme Court held that a jury instruction was correct when it set forth the standard of care applicable to a Vermont plumber as that of a "reasonably prudent plumber." *Greenberg v. Giddings*, 127 Vt. 242, 245 (1968).

More recently, the Vermont Supreme Court clarified its position on the "locality rule" when it explicitly rejected the rule in regards to the standard of care among practicing attorneys in Vermont. *Russo v. Griffin*, 147 Vt. 20 (1986). In *Russo*, the Court held that "[t]he fact that a lower degree of care or less able practice may be prevalent in a particular local community should not dictate the standard of care." *Id.* at 23. The rules governing the practice of law were the same throughout the state, and in order to practice law in Vermont, attorneys had to complete the requirements set forth by the Vermont Supreme Court and the Vermont Board of Bar Examiners. *Id.* at 24. Therefore, the relevant geographic area was not the community in which the attorney's office was located, but the jurisdiction in which the attorney was licensed to practice. *Id.*

Plumbers in Vermont are licensed at the state level. 26 V.S.A. §§ 2193-2198. Furthermore, the State Plumber's Examining Board has the power to set forth state-wide rules and adopt the provisions of a *nationally recognized plumbing code*. 26 V.S.A. § 2173(a) (emphasis added). The State Board adopted the provisions of the BOCA National Plumbing Code 1990 into the 1996 State of Vermont Plumbing Rules. 1996 State of Vermont Plumbing Rules, Art. 2, § 2. The standard of care for plumbers, therefore, goes one step beyond the state-wide standard for attorneys in *Russo*, by incorporating

nationally recognized plumbing rules. The Court finds that the standard of care to which a plumber is held in performance of professional services is the degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent plumber, whether or not in the State of Vermont.

The plaintiff, however, bears the burden of establishing the parameters of the defendant's duty to her. *Ball v. Melsur Corp.*, 161 Vt. 35, 43 (1993). The standard of care for professional negligence claims ordinarily must be proven by expert testimony. *Wilkins v. Lamoille County Mental Health Services, Inc.*, 2005 VT 121, ¶ 16, 179 Vt. 107. Expert testimony is not required, however, where the alleged violation is so apparent it may be understood by a lay person. *Coll v. Johnson*, 161 Vt. 163, 165 (1993) (citing *Larson v. Candlish*, 144 Vt. 499, 502 (1984)).

The standard of care which applies in a negligence claim can also be evidenced by statute. *Bacon v. Lascelles*, 165 Vt. 214, 222 (1996) (proof that a defendant violated a safety statute creates a prima facie case, which in turn raises a rebuttable presumption of negligence, shifting the burden of production to the party against whom the presumption operates).

Here, the plaintiff offers specific statutory provisions concerning the standard which is to be applied to installation of the hot water tank, including BOCA National Plumbing Code 1990 § 1503.8.1.

The Court need not address the issue of whether expert testimony is required to establish the standard of care, because Mr. Dupras does in fact offer his expert opinion as to the standard of care in his interpretation of the BOCA National Plumbing Code 1990.

Q: In 2001 when my client's employees installed the water heater in Mr. Olson's apartment building, was there a requirement in the BOCA code to install a mixing valve on that tank?

A: The way I - - in reviewing the code and my practice as an engineer at that time was to install - - was the code required a mixing valve to be installed on that water heater. And, to the best of my knowledge, that was the normal practice.

Q: Before we get to practice and your practices in particular, let's talk about the code. My question is was there a code requirement, you said yes there is. So, can you show me, please, the code requirement for installing a mixing valve on a water heater in 2001?

A: Yeah, in 1990 National BOCA National Plumbing Code section 1503.8.1 refers to mixed water temperature control.

Q: Now, that section refers to multiple or gang showers; correct?

A: It refers to multiple or gang showers, that's correct.

Deposition of Daniel Dupras, April 30, 2008, pp. 67-68.

Q: So, your understanding is that the phrase "multiple showers" refers to living units in which there's more than one shower head?

A: Yes. The code is written for - the code is written for buildings. If you refer to the state plumbing rules 1996, a public building - in this case you have a public building as defined by the State of Vermont at that time. So, my interpretation of the plumbing code is that multiple showers are required to have some kind of thermostatic mixing valve to prevent the hot water from exceeding 110.

Deposition of Daniel Dupras, April 30, 2008, pp. 69-70.

Q: Well, is it your opinion that Mr. Webster had an obligation to put a mixing valve on the tank?

A: I think he had an obligation, because he needed to - he had no control over what the aquastat set point was on the water heater, so I think the only reasonable way to achieve that was to put a mixing valve on the water heater.

Deposition of Daniel Dupras, April 30, 2008, p. 74.



Furthermore, plaintiff proffers expert testimony concerning the standard of care applicable to service of the hot water tank.

Q: Right. So, if he sees something that's unsafe with the boiler?

A: If he's – under your hypothetical, if he was hired to work on that boiler and he came in to change the nozzle and he found an obvious problem that could be detrimental to the safe operation of the building he has a responsibility to fix it.

Deposition of Daniel Dupras, April 30, 2008, pp. 53-54.

The plaintiff has presented expert testimony as to the standard of care regarding installation and service of the hot water tank. It is not the Court's function to *weigh* the evidence when assessing the merits of a motion for summary judgment, but to determine whether a triable issue of fact exists. *Booska v. Hubbard Insurance Agency, Inc.*, 160 Vt. 305, 309 (1993). Taken in the light most favorable to the non-moving party, the deposition testimony of Mr. Dupras offers a reasonable jury multiple grounds or reasons to determine that there was a duty of care owed by the defendants in this case and the defendants breached that duty.

To the extent that the defense points to inconsistent or incomplete testimony, or other modifying evidence, the evidence taken as whole does not persuade the Court that summary judgment is appropriate in this case. In regards to the argument that the plaintiff has presented no evidence as to the standard of care applicable to a plumber for advising the landlord of security for the temperature setting, there is only one claim for negligence, and it will be the jury's duty to judge the credibility of any witness's testimony.

For the above reasons, it is for a jury to decide, after a trial on the merits, whether Bernie Webster Plumbing & Heating, Inc. and Clovis B. Webster, Jr. breached their duty

of care towards the plaintiff, Pamela Panoushek, and whether this breached proximately resulted in her injuries.

**ORDER**

Defendants' Motion for Summary Judgment, filed August 4, 2008, is DENIED.

Dated at Rutland, Vermont this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

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Hon. William Cohen  
Superior Court Judge