SUPERIOR COURT
OF THE STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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WILMINGTON, DELAWARE 19801
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Submitted: October 31, 2005
Decided: January 31, 2006

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Re: *Jackson v. Capano Investment, LLC, et al.,*
C.A. No. 03C-09-015-FSS

Upon Defendants' - Diamond Materials, LLC's and Brandywine Nurseries, Inc.'s - Motions for Summary Judgment – ***GRANTED***

Dear Counsel:

As you know, Plaintiff tripped and fell on September 13, 2002, as he was walking across a recently landscaped strip of ground. It was next to a newly installed sidewalk, alongside the Kirkwood Highway, adjacent to the Midway Shopping Center and near Limestone Road. Despite full discovery, the exact cause of Plaintiff's fall will never be known. Somehow, his foot caught in the landscape fabric and he went down. Everyone agrees that the fall seriously hurt Mr. Jackson.

Defendants, Diamond Materials, LLC, and Brandywine Nurseries, Inc.,

filed motions for summary judgment and the court heard extensive oral argument on October 31, 2005. The court tentatively concluded that Defendants were entitled to summary judgment. In light of Plaintiff's uncontested injuries, the court did not rule from the bench. It wanted to be more deliberate. The court also expressed concern about Plaintiff's failure to produce an expert witness on standard of care and causation. At this point, for the reasons discussed at oral argument and after more consideration, the court is satisfied that Plaintiff cannot prove negligence or proximate cause.

As far as they are known, the facts are almost completely undisputed. It is agreed that Defendants landscaped the area under a contract with the State's Department of Transportation. On September 9 and 10, 2002, Diamond Materials delivered soil, which it graded. Brandywine Nurseries, in turn, seeded and mulched the area, on September 10 and 12, 2002. In the process, Defendants provided and laid a biodegradable erosion control blanket, made of coconut fiber and string, on top of the raked, smoothed, fertilized, and seeded soil. Straw was also put down as part of the mulching process. The installed mulching has a yellowish-brown, straw-like color.

Plaintiff, apparently, would testify that he was aware that he was walking on recently seeded ground, but he did not notice the erosion blanket under the straw and sprouting grass. Defendants insist the erosion blanket was plainly visible. As mentioned, the ground was seeded no earlier than September 10, 2002 and Plaintiff tripped on September 13, 2002. How much grass could have emerged in three days? Moreover, Plaintiff admits that he had taken "maybe eight or ten steps" across the erosion blanket before he fell. It is difficult to believe that, even if he could not see the erosion blanket, he did not sense that he was walking on something besides turf. Nevertheless, the court is giving Plaintiff the benefit of the doubt. It, therefore, assumes Plaintiff was behaving reasonably and paying attention.

Even so, Plaintiff does not know why he tripped. The most Plaintiff can say is that the heel of his shoe got caught in the landscape netting, somehow. That leaves many possibilities, including a tripping defect in the graded soil, the failure to

secure the blanket to the ground, gaps in the erosion blanket's webbing, and so on. If Plaintiff tripped on a gap in the webbing, no one can say whether the gap was associated with the erosion blanket's design, or whether it was produced by a manufacturing or installation error.

What is known, however, is that the materials were provided and installed pursuant to a government contract, and their work was inspected and approved. Defendants are prepared to call DelDOT inspectors and supervisors to testify that Defendants' work measured-up to government standards. Because the work was done at the government's behest and it was inspected, that does not immunize Defendants automatically, as a matter of law or fact. But it does create an evidentiary challenge to Plaintiff.

Plaintiff contends that Defendants were somehow negligent in the way they did the landscaping. Plaintiff also contends that Defendants should have roped-off the area or, at least, provided warnings. Plaintiff's fundamental weakness is that Defendants have experts to testify that not only was Defendants' work up to snuff, the materials they used, including the erosion control blanket, were not known to pose a tripping hazard. Furthermore, installers were not customarily expected to rope-off areas where it was used, nor to warn pedestrians to stay off the newly seeded ground. This is because the government did not consider the erosion blanket to pose an unreasonable threat to pedestrians. Plaintiff, however, has no expert to challenge Defendants' experts.

For summary judgment purposes, the court appreciates that Defendants could have foreseen that someone, like Plaintiff, would cut across the landscaping.[1] The court further appreciates that, viewing the evidence in the light most favorable

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[1] *Compare Ward v. Shoney's, Inc.*, 817 A.2d 799 (Del. 2003) (holding that expert testimony is not required to show that people cut corners).

to Plaintiff,[2] he was looking where he was stepping and the erosion blanket was manufactured or installed in a way that allowed Plaintiff's foot to become entangled in it. Nevertheless, this is not a *res ipsa loquitur* case. The fact that a person trips does not mean someone else is liable. Plaintiff has no evidence that Defendants are to blame for Plaintiff's fall, much less that but for their negligence Plaintiff would not have tripped.[3] Meanwhile, as discussed at oral argument and presented above, Defendants have undisputed evidence to show they were not negligent and they did not cause Plaintiff's injuries.[4] The only way a jury could find for Plaintiff is if it decides that because Plaintiff tripped, Defendants probably are to blame. This, despite Defendants' evidence to the contrary.

The court remains concerned for Plaintiff, who clearly sustained a very painful injury. Nevertheless, Plaintiff has not marshaled evidence, especially expert opinion,[5] from which a reasonable jury could conclude that Defendants are liable. A verdict for Plaintiff could only reflect speculation, prompted by sympathy.[6]

For the reasons discussed during oral argument and in this letter, Diamond Materials' and Brandywine Nurseries' Motions for Summary Judgment are ***GRANTED***.

IT IS SO ORDERED.

Very truly yours,

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[2] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992).

[3] *Collier v. Acme Markets, Inc.*, 670 A.2d 1337 (Del. 1995).

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

[5] *Vandiest v. Santiago*, Del. Super. C.A. No. 02C-06-003, Witham, J. (Dec. 9, 2004) (ORDER).

[6] *Maltman v. A.C. Moore Arts & Crafts, Inc.*, Del. Super. C.A. No. 01C-08-094, Silverman, J. (Sept. 25, 2003) (ORDER).

FSS/lah
oc: Prothonotary (Civil Division)