IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

DIANE POLASKI and THOMAS	:	
POLASKI, her husband,	:	C.A. No. K09C-12-029 WLW
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
DOVER DOWNS, INC.,	:	
	:	
Defendant.	:	

Submitted: December 23, 2011
Decided: January 20, 2012

ORDER

Upon Defendant's Motion for Summary Judgment.
Granted.

Charles E. Whitehurst, Jr., Esquire of Young Malmberg & Howard, P.A., Dover, Delaware; attorney for the Plaintiff.

Daniel L. McKenty, Esquire of Heckler & Frabizzio, Wilmington, Delaware; attorney for the Defendant.

WITHAM, R.J.

FACTS

_____On December 21, 2007, Diane Polaski (hereinafter "Plaintiff") was a customer at the casino of Dover Downs, Inc. (hereinafter "Defendant") in Dover, Delaware. While walking toward a designated smoking area outside the casino, Plaintiff encountered a depression in the sidewalk commonly used for handicapped access. Allegedly, as a result of this depression, she fell, sustaining injuries to her left elbow, left wrist, right knee, and right ankle. Plaintiff alleges that this depression was a dangerous, hazardous, and/or unsafe condition created by and through the negligence of Defendant's agents, servants, and/or employees. Plaintiff asks for compensatory damages, including pain and suffering, special damages, and costs. Her husband, Thomas Polaski, brings a claim for loss of consortium.

PROCEDURAL HISTORY

The first Scheduling Order in this case was issued on September 9, 2010. In that order, Plaintiffs' expert discovery deadline was April 29, 2011. On June 23, 2011, Defendant filed a motion *in limine* to exclude, or limit, the expert testimony of Dr. J. Douglas Patterson, M.D., Dr. Paul Kupcha, M.D., Dr. Kim M. Clabbers, M.D., and Dr. Eric Schwartz, M.D. A pre-trial conference was held on June 28, 2011 in which Plaintiffs moved to continue the trial. This motion was granted and a new scheduling order was entered. On August 1, 2011, the Court granted Defendant's motion *in limine* from June 23. Plaintiffs' counsel wrote a letter to the Court the same day of this ruling taking exception to Defendant's statement that the motion was ripe for adjudication. On August 2, 2011, the Court issued a second order stating, "The

August 1, 2011 Order stands. Either party may move for clarification." No such motion was filed. On September 29, 2011, however, Plaintiffs filed a letter with the Court requesting a two week extension of the expert discovery deadline. According to the new scheduling order, Plaintiffs' expert discovery deadline was September 28, 2011. The Court did not issue a ruling on this matter. On November 30, 2011, Defendant filed the motion for summary judgment at issue here. On December 1, 2011, Defendant filed a motion *in limine* to exclude the expert report and testimony of Dr. Richard DuShuttle. Plaintiff responded late to the motion for summary judgment and responded to the motion *in limine* to exclude DuShuttle.

Standard of Review

Summary judgment should be granted only if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[1] The facts must be viewed in the light most favorable to the non-moving party,[2] and all reasonable inferences must be drawn in favor of the non-moving party.[3] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.[4] However,

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[1]Super. Ct. Civ. R. 56(c).

[2]*Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 780 (Del. Super. 1995).

[3]*Lundeen v. Pricewaterhousecoopers, LLC*, 2006 WL 2559855 (Del. Super. Aug. 31, 2006).

[4]*Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.[5] The movant bears the burden of demonstrating that a genuine issue of material fact does not exist.[6] Should the movant satisfy his burden, then the non-movant must prove that genuine issues of material fact exist.[7] Mere bare assertions or conclusory allegations do not create a genuine issue of material fact for the non-movant.[8] If the non-moving party fails to make a sufficient showing on an essential element of his or her case for which he or she has the burden of proof, the moving party is entitled to judgment as a matter of law.[9]

DISCUSSION

"In order to prevail in a negligence action, a plaintiff must show, by a preponderance of the evidence, that a defendant's negligent act or omission breached a duty of care owed to plaintiff in a way that proximately caused the plaintiff['s] injury."[10] Plaintiff alleges that the depression in the concrete near the smoking area

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[5] *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

[6] *Lundeen*, 2006 WL 2559855, at *5 (*citing Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979)).

[7] *Id.* (*citing Moore* 405 A.2d at 681).

[8] *Id.* (*citing Sterling v. Beneficial Nat'l Bank, N.A.*, 1994 WL 315365, at *3 (Del. Super. Apr. 13, 1994)).

[9] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

[10] *Brown v. F.W. Baird, L.L.C.*, 956 A.2d 642, 2008 WL 324661, at *2 (Del. Feb. 7, 2008) (TABLE).

outside the casino owned by Defendant was a hazardous condition. Plaintiff's argument in opposition to this motion for summary judgment can be broken down into two basic claims: Defendant failed to warn or protect Plaintiff from a dangerous condition, and Defendant's sidewalk design is defective.[11]

Defendant does not dispute that Plaintiff was a business invitee at the time of her alleged injury. Indeed, the area in question was and is owned and operated by Defendant. Since Plaintiff was a business invitee, Defendant owed Plaintiff a duty to exercise reasonable care to protect her from foreseeable dangers that she might encounter while on the premises.[12] As the Supreme Court noted in *DiOssi v. Maroney*,

> 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 (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 (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.[13]

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[11]The Court takes note that Plaintiffs' response to Defendant's motion for summary judgment was late. The Superior Court of Kent County Civil Case Management Plan Rule 4(A)(3)(b) states, "Response [to a motion] is due no later than 4 days prior to the hearing date. If no response is filed by the due date, the motion will be deemed unopposed unless good cause is shown." With oral argument in this motion scheduled for Friday, December 23, 2011, Plaintiffs' response was due on Monday, December 19. It was filed on Wednesday, December 21. As such, the Court allowed Plaintiffs' attorney to speak in opposition of the motion but does not rely on the late paper filing.

[12]*DiOssi v. Maroney*, 548 A.2d 1361, 1364 (Del. 1988).

[13]*Id.* at 1366 (*quoting* RESTATEMENT (SECOND) OF TORTS § 343 (1965)).

Defendant cites to *Macey v. AAA-1 Pool Builders and Service Co.*,[14] for the proposition that under Delaware law, there is no duty to warn of an open and obvious condition. Although *Macey* centered upon a product rather than a condition on the land in reviewing the duty to warn,[15] Defendant's statement of law is correct.[16] As the Court noted in *Niblett v. Pennsylvania Railroad Company*,

> "[T]here is no duty. . . to warn an invitee of a dangerous condition which is obvious to a person of ordinary care and prudence. Thus, if a danger is so apparent that the invitee can reasonably be expected to notice it and protect against it, the condition itself constitutes adequate warning."[17]

Defendant represents to the Court that the curb area was clearly marked in bright yellow paint and the area was well-lit, which are not disputed by Plaintiff. Defendant notes that Plaintiffs have no evidence of damage or debris on the sidewalk on the day of the accident and that Plaintiffs did not bring forth evidence that the sidewalk was not built to specifications and requirements. Plaintiffs dispute Defendant's characterization of the area in which the injury occurred as a "handicapped area." Plaintiff's contend that the area in which the injury occurred was the lead up to the handicap area but not the handicap area itself. Given that the Court has reviewed

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[14]1993 WL 189481 (Del. Super. Apr. 30, 1993).

[15]*Id.* at *3 ("The current motion involves products liability and does not involve landowner liability.").

[16]*Niblett v. Pennsylvania R.R. Co.*, 158 A.2d 580, 582 (Del. Super. 1960).

[17]*Id.* (citations omitted).

photos of the area of the accident, what the area is called is not material to the case. The Court finds the pictures of the accident scene to be unhelpful to Plaintiffs' case as the pictures show an area with no cracks, holes, or irregularities other than a conspicuous change in grade.

Viewing the facts in the light most favorable to the non-moving party, the Court finds there to be no genuine issue of material fact, and the facts permit the reasonable person to draw but one inference. As such, this case is ripe for summary judgment. A change in elevation on this well-lit, defect-free sidewalk leading down to a handicapped ramp is not a dangerous condition. Even if it could be considered dangerous, such a change in elevation should be obvious to a person of ordinary care and prudence. Therefore, summary judgment is granted for Defendant on the failure to warn claim.

In terms of design defect, Plaintiffs have no expert to assist the jury in what is proper or improper sidewalk and curb design in such an area.[18] As Judge Graves noted in a similar case, "Courts regularly allow and encourage the use of experts to testify about . . . unreasonably dangerous conditions in parking lots."[19] When it

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[18]The deadline for retaining an expert has passed. The Court notes that the pre-trial stipulation lists "Gregory Moore of Becker Morgan" as a liability expert. As the Court was unsure whether this individual could testify on sidewalk and/or curb design, a representative of the Court inquired about this individual before writing this opinion. Plaintiffs' office stated that Gregory Moore was a "fact witness." Moreover, at oral argument, Plaintiffs' counsel did not state that he had an expert for such a purpose in response to Defendant counsel's assertion that the law required an expert to opine on a design defect in this case.

[19]*Brown v. Gartside*, 2004 WL 2828061, at *2 (Del. Super. Mar. 5, 2004).

comes to sidewalk and curb design, however, the Court requires more than encouragement. An expert is required because it is not a matter within the common knowledge of laypersons.[20] As no such expert was provided by Plaintiffs, this theory of liability also fails. Because Plaintiff's primary claims fail, so does her husband's derivative claim.[21] As summary judgment is granted for Defendant on other grounds, the Court does not reach the admissibility of the expert report and testimony of Dr. Richard DuShuttle.

CONCLUSION

Defendant's motion for summary judgment is hereby ***granted***.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

[20] *O'Donald v. McConnell*, 858 A.2d 960, 2004 WL 1965034, at *2 (Del. 2004) (TABLE).

[21] *Jones v. Elliott*, 551 A.2d 62, 64 (Del. 1988).