NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

DONNA M. FISHER AND SCOTT FISHER, H/W Appellants v. MALLARD CONTRACTING CO., INC., AND FARRAGUT ANTHRACITE COMPANY Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2249 MDA 2012

Appeal from the Order Entered November 26, 2012
In the Court of Common Pleas of Northumberland County
Civil Division at No(s): CV-10-1024

BEFORE: MUNDY, J., OLSON, J., and STRASSBURGER, J.*

MEMORANDUM BY STRASSBURGER, J.: **FILED NOVEMBER 25, 2013**

Appellants, Donna M. Fisher and Scott Fisher (the Fishers), husband and wife, appeal from the order entered November 26, 2012 in favor of Appellees, Mallard Contracting Co., Inc. and Farragut Anthracite Company. After careful review, we affirm.

The trial court has summarized the relevant factual history as follows.

> On May 26, 2008, [Appellant], Scott Fisher, was operating an ATV with his wife, [Appellant], Donna Fisher, as his passenger. The Fishers were riding the ATV on land owned by [Appellee] Farragut Anthracite Company and leased by [Appellee] Mallard Contracting, Inc., which conducts coal mining operations on the premises. At some point, Scott Fisher drove the ATV over a berm and the Fishers fell

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* Retired Senior Judge assigned to the Superior Court.

> approximately 35 feet into a large pit created by mining operations. Donna Fisher sustained serious injuries in the fall. The Fishers have admitted that they were trespassers on the [Appellees'] land at the time of the accident. ….

Trial Court Opinion, 11/26/12, at 1 (citations omitted).

The instant matter commenced on August 27, 2010, when the Fishers filed a complaint seeking damages from Appellees on the grounds that Appellees' behavior in engaging in "mining activities, without providing warning to known and continual trespassers when each of the [Appellees] knew or should have known the likelihood of the premises being used by trespassers and that injury could result[,] amounted to willful misconduct." Fishers' Complaint, 8/27/10, at 4 ¶ 24. The complaint also asserted a second claim on behalf of Scott Fisher for loss of consortium. ***Id.*** at 6-7 ¶¶ 34-36.

On October 12, 2010, Appellees filed an answer and new matter, denying the Fishers' claims, and asserting that the complaint "fails to state a cause of action … upon which relief may be granted as a matter of law." Appellees' Answer and New Matter, 10/12/10, at 10 ¶37. On October 25, 2010, the Fishers filed a "Response to [Appellees'] New Matter" denying all claims raised by Appellees. [Fishers'] Response to [Appellees'] New Matter, 10/25/10, at 1-2.

On August 29, 2012, Appellees filed a motion for summary judgment asserting (1) the Fishers "cannot prevail under a negligence theory as a

matter of law[;]" (2) the Fishers lack "*prima facie* evidence of any required willful or wanton conduct on [Appellees'] behalf[;]" and (3) the Fishers' expert opinions "proffered by…Mine Safety and Health/Environmental Consultant Expert, Jack Spadaro, are insufficient to defeat [Appellees'] Motion for Summary Judgment[.]" Appellees' Motion for Summary Judgment, 8/29/12, at 1-4. On September 28, 2012, the Fishers filed a response to Appellees' motion for summary judgment.

Thereafter, on November 26, 2012, the trial court granted Appellees' motion for summary judgment. On December 21, 2012, the Fishers filed a timely notice of appeal. Both the Fishers and the trial court complied with Pa.R.A.P. 1925.

On appeal, the Fishers raise the following issues for our review.

> 1. Whether a possessor of land owes a duty of care to a foreseeable trespasser under the negligence standard versus willful and wanton misconduct?
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> 2. Whether willful and wanton misconduct on the part of a possessor of land can be established by an expert report relying on regulations for the mining safety and health act?

Fishers' Brief at 2.

"[O]ur standard of review of an order granting summary judgment requires us to determine whether the trial court abused its discretion or committed an error of law[,] and our scope of review is plenary." ***Petrina v. Allied Glove Corp.***, 46 A.3d 795, 797-798 (Pa. Super. 2012) (citations

omitted). "We view the record in the light most favorable to the nonmoving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." ***Barnes v. Keller***, 62 A.3d 382, 385 (Pa. Super. 2012), *citing* ***Erie Ins. Exch. v. Larrimore****,* 987 A.2d 732, 736 (Pa. Super. 2009) (citation omitted). "Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to a judgment as a matter of law will summary judgment be entered." ***Id.*** The rule governing summary judgment has been codified at Pennsylvania Rule of Civil Procedure 1035.2, which states as follows.

> **Rule 1035.2. Motion**
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> After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law
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> > (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
> >
> > (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. 1035.2.

"Where the non-moving party bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment." ***Babb v. Ctr. Cmty. Hosp.***, 47 A.3d 1214, 1223 (Pa. Super. 2012) (citations omitted)*, appeal denied*, 65 A.3d 412 (Pa. 2013). Further, "failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law." ***Id.***

> Thus, our responsibility as an appellate court is to determine whether the record either establishes that the material facts are undisputed or contains insufficient evidence of facts to make out a *prima facie* cause of action, such that there is no issue to be decided by the fact-finder. If there is evidence that would allow a fact-finder to render a verdict in favor of the non-moving party, then summary judgment should be denied.

Id., *citing* ***Reeser v. NGK N. Am., Inc.,*** 14 A.3d 896, 898 (Pa. Super. 2011), *quoting* ***Jones v. Levin,*** 940 A.2d 451, 452–454 (Pa. Super. 2007) (internal citations omitted).

In their first issue, the Fishers aver that "[t]he trial court erred in granting summary judgment for the Appellees[,]" on the basis "that the standard of care required was the willful and wanton standard as opposed to an ordinary negligence standard." The Fishers' Brief at 5. The Fishers assert that "[t]he appropriate standard is the negligence standard as the [Fishers] were foreseeable trespassers and had produced evidence to

demonstrate that the possessors of land knew or should have known that there was continuous and regular trespass on the premises by riders of ATVs and motorcycles." ***Id.***

"The standard of care a possessor of land owes to one who enters upon the land depends upon whether the person entering is a trespassor [*sic*], licensee, or invitee." ***Carrender v. Fitterer*** 469 A.2d 120, 123 (Pa. 1983), *citing* ***Davies v. McDowell National Bank,*** 180 A.2d 21 (Pa. 1962). Instantly, the Fishers concede they were trespassing on Appellees' property when the incident occurred. "In Pennsylvania, a trespasser may recover for injuries sustained on land only if the possessor of land was guilty of wanton or willful negligence or misconduct." ***Rossino v. Kovacs***, 718 A.2d 755, 756-757 (Pa. 1998), *citing* ***Engel v. Parkway Company,*** 266 A.2d 685 (Pa. 1970). As such, "[t]he legal obligation to trespassers is the avoidance of wilful *or* wanton misconduct[.]" ***Evans v. Philadelphia Transp. Co.***, 212 A.2d 440, 442 (Pa. 1965) (citations omitted).

The Fishers, however, assert that in ***Cheslock v. Pittsburgh RYS Co.***, 69 A.2d 108 (Pa. 1949), our Supreme Court created an exception when it "acknowledged that a foreseeable trespasser is in a position where the landowner owes a duty of reasonable care." Fishers' Brief at 7. Specifically, they argue,

> [t]he ***Cheslock*** decision [,*quoting* ***Frederick v. Philadelphia Rapid Transit Co.***, 10 A.2d 576, 578 (Pa. 1940),] held that the possessor of land who knows[,] or from facts within his knowledge should

> know, that trespassers constantly intrude a part of the limited area is subject to liability for bodily harm that is caused by them by the failure to carry on an activity involving risk of death or serious bodily injury with a reasonable care for safety.

Id.

Cheslock involved a man who fell while crossing railroad tracks and was struck and killed by a train. The main issue was whether the motorman had knowledge that there was a man on the tracks. The ***Cheslock*** Court viewed the issue as a question of negligence based on a dangerous activity. Critical to our inquiry in this matter is the determination of whether the mining pit constituted an "activity" or a "condition" on Appellees' land.

In granting Appellees' summary judgment motion the trial court reasoned as follows.

> [The Fishers] argue that because they were foreseeable trespassers on the [Appellees]' land at the time of the accident, an ordinary negligence standard is applicable to their claims against the [Appellees]. [The Fishers] rely primarily upon ***Cheslock v. Pittsburgh RYS Co.***, 69 A.2d 108 (Pa. 1949) for this proposition. Although the ***Cheslock*** court did invoke a negligence standard in a case involving foreseeable trespassers, the application of this rule has generally been limited to cases involving dangerous *activities* carried out on the land.[2] ***Cheslock***, 69 A.2d at 111 (operation of a trolley). It is well established that an ordinary negligence standard, which requires a property owner to exercise reasonable care, is not applicable when a trespasser is injured due to a dangerous *condition* existing on [Appellees]' land.[3] ***Micromanolis v. The Woods School, Inc.***, 989 F.2d 696, 700 (3d Cir. 1993); ***Dudley v. USX Corp.***, 606 A.2d 916, 921 (Pa. Super. 1992). Rather, in

> such cases the landowner will only be liable for the trespasser's injuries if he is found to have engaged in willful or wanton misconduct. ***Micromanolis***, 989 F.2d at 700; ***Dudley***, 606 A.2d at 921. Here, [the Fishers] have complained primarily about the state of [Appellees]' land and the role it played in their accident rather than any type of "active negligence" by [Appellees]. Accordingly, [Appellants] have the burden of proving that [Appellees] engaged in willful or wanton misconduct, rather than mere negligent conduct.
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> [2] In this regard, an activity may be thought of as a carelessly executed act such as operating a machine, driving a vehicle, or striking another with an instrument.
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> [3] In this regard, a condition may be thought of as the physical state of the premises, such as a defect or obstacle. For example, a dangerous condition is present when there is a slip and fall on ice or on a slick spot on a store floor.

Trial Court Opinion, 11/26/12, at 1-2 (some footnotes omitted).

After thorough review, we agree with the trial court that the applicable standard of care is willful or wanton misconduct, and not mere negligence. We are guided by ***Baran v. Pagnotti Enterprises, Inc.***, 586 A.2d 978 (Pa. Super. 1991), a wrongful death action in which the decedent was killed after driving his car into a strip mining pit. In ***Baran***, the Recreation Use of Land and Water Act, 68 P.S. § 477-1, *et seq.* governed, so the standard applied was that of "wilful [*sic*] or malicious failure to warn or guard against a dangerous condition, use, structure or activity." ***Id.*** at 979. The ***Baran*** Court noted that this standard has been equated by the court of common pleas to "liability for wilful [*sic*] or wanton injury." ***Id.*** at 980.

> We note that at common law, this "willful [*sic*] and wanton" standard applied to landowners in cases where the gratuitous licensee sustains injury from the natural or artificial condition of the land itself, such as "defects, obstacles or pitfalls." On the other hand, where the injury stemmed from the owner's "active" negligence, for example, "negligence in the operation of machinery or of moving vehicles whereby a person lawfully upon the premises is injured," the owner owed the gratuitous licensee a duty of ordinary care. We also note that the "wilful and wanton" standard is also the standard applied in cases involving trespassers.

Id. at 980 n.2.

Finally, we conclude that ***Micromanolis v. The Woods School, Inc.***, 989 F.2d 696, 700 (3d Cir. 1993), as cited by the trial court, provides this Court with useful guidance.[1] The ***Micromanolis*** Court supplied the following reasoning in reaching the conclusion that under Pennsylvania law the standard of willful or wanton misconduct applies, even to foreseeable trespassers.

> In [***Cheslock v. Pittsburgh Rys.***, 69 A.2d 108, 111 (Pa. 1949) and ***Frederick v. Philadelphia Rapid Transit Co.***, 10 A.2d 576, 578 (Pa. 1940)], the Pennsylvania Supreme Court cites Section 334 of the Restatement (Second) of Torts (1965) with apparent approval. ***See Cheslock***, 69 A.2d at 111; ***Frederick***, 10 A.2d at 578. Section 334 is entitled

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[1] We note, "that federal court decisions do not control the determinations of the Superior Court. Our law clearly states that, absent a United States Supreme Court pronouncement, the decisions of federal courts are not binding on Pennsylvania state courts[.]" ***NASDAQ OMX PHLX, Inc. v. PennMont Securities***, 52 A.3d 296, 303 (Pa. Super. 2012).

"Activities Highly Dangerous to Constant Trespassers on Limited Area." It states:

> § 334 Activities Highly Dangerous to Constant Trespassers on Limited Area
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> A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety.

Restatement (Second) of Torts § 334 (1965).

…

In the most recent case on this issue decided by the Supreme Court of Pennsylvania, a trespasser jumped to her death from the roof of an apartment building. ***See Engel v. Friend's Hospital****,* 439 Pa. 559, 266 A.2d 685 (1970). The decedent's husband alleged that the landowner maintained a dangerous condition: 1) by not locking the door to the roof; 2) by not limiting access to the roof to tenants; and 3) by not fencing in the roof. ***Id.****,* 266 A.2d at 686. He also alleged that his wife's trespass was foreseeable because the landowner knew that the roof had been the site of prior suicides and attempted suicides. ***Id.*** The court affirmed the dismissal of the complaint after concluding that the complaint failed to aver wilful or wanton negligence. ***Id.****,* 266 A.2d at 687. It stated: "Plaintiff was a trespasser who could recover only if defendant was guilty of willful or wanton negligence or misconduct." ***Id.****; see also* ***Costanza v. Pittsburgh Coal Co****.,* 276 Pa. 90, 119 A. 819, 820 (1923) (recognizing in dicta that a landowner would owe an adult trespasser "no duty except that of refraining from willfully or wantonly inflicting injury" from an electrical transformer maintained by the landowner).

We recognize that ***Engel*** was decided over twenty years ago. Nevertheless, more recent decisions of the Superior Court of Pennsylvania convince us that ***Engel's*** statement of the duty of care is still good law. Over ten years after ***Engel*** was decided, the Superior Court considered this issue. ***See Antonace v. Ferri Contracting Co.,*** 320 Pa. Super. 519, 467 A.2d 833 (1983). In ***Antonace,*** a trespasser was killed while riding his dirt bike when he struck a steel cable that a landowner had strung across a roadway. The landowner did not dispute that it knew that dirt bikers frequently rode over its property. ***Id.,*** 467 A.2d at 836. The court relied on ***Engel*** in concluding that the duty the landowner owed the trespasser was only to refrain from wilful or wanton misconduct even though "a jury could conclude that [the landowner] knew that dirt bike riders such as the decedent were using the property." ***Id.,*** 467 A.2d at 837.

More recently, the Superior Court expressly rejected the argument that a landowner owes a foreseeable adult trespasser a duty of reasonable care to prevent injuries from artificial conditions. ***See Graham v. Sky Haven Coal, Inc.,*** 386 Pa. Super. 598, 563 A.2d 891, 896 n. 8 (1989), *allocatur granted,* 525 Pa. 600, 603, 575 A.2d 566, 568 (1990), *appeal discontinued,* June 27, 1990. In ***Graham,*** the plaintiff argued that the trial court erred in refusing to instruct the jury that plaintiff was owed a duty of reasonable care as set forth in Section 335 of the Restatement (Second) of Torts (1965).[3] In rejecting plaintiff's argument, the Superior Court stated: "Section 335 [has] not been adopted by [the Supreme Court of Pennsylvania and] it is contrary to the long recognized rule in this Commonwealth, *i.e.*, that a plaintiff who is a trespasser can recover only if the defendant is guilty of wanton or wilful misconduct." ***Graham,*** 563 A.2d at 897 n. 8 (quoting ***Franc v. Pennsylvania R.R.,*** 424 Pa. 99, 225 A.2d 528, 531 (1967) (Jones, J., dissenting)).

> Although it might be expected that a court that arguably recognizes a heightened duty to foreseeable trespassers for activities would also recognize a heightened duty for artificial conditions, such is not always the case. Instead, "[c]ourts are far readier to invoke the duty of care and the concept of negligence where they find active conduct than where they find a mere condition of the premises." Fowler V. Harper, et al., *The Law of Torts* § 27.6, at 188 (1986). Accordingly, Pennsylvania courts have traditionally been much more willing to hold a landowner liable to a trespasser for "activities" than for "artificial conditions."

[3] Section 335 is the Restatement provision encompassing landowner liability to foreseeable trespassers for injuries caused by artificial conditions. It states:

> > § 335 Artificial Conditions Highly Dangerous to Constant Trespassers on Limited Area
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> > A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area of the land, is subject to liability for bodily harm caused to them by an artificial condition on the land, if
> >
> > (a) the condition(i) is one which the possessor has created or maintains and(ii) is, to his knowledge, likely to cause death or serious bodily harm to such trespassers and(iii) is of such a nature that he has reason to believe that such trespassers will not discover it, and(b) the possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved.
>
> Restatement (Second) of Torts § 335 (1965).

Id. at 698-701. Accordingly, we agree that the instant case involves a "condition" rather than an "activity," and conclude, therefore, the trial court did not err in applying the willful or wanton misconduct standard. Therefore, we proceed to review the Fishers' second, alternative issue.

In their second issue, the Fishers aver that the evidence "could lead a reasonable jury to conclude that the conduct of the possessors of land meets the definition of wanton misconduct on the part of the possessors of land." Fishers' Brief at 11. Specifically, the Fishers assert that "[t]he expert witness report produced by Appellants concludes that the possessors have [*sic*] land failed to correct the hazardous conditions created by the lack of guard rails or berms that resulted in serious injuries to Donna Fisher." ***Id.*** at 12.

The trial court concluded that the Fishers offered "no testimony that [Appellees] breached the aforesaid standard of willful or wanton misconduct on their part under the circumstances here. [The Fishers] encountered a mining pit that was generally made inaccessible to the public and an obvious danger to anyone." Trial Court Opinion, 11/26/2012, at 3-4. We agree.

Our Supreme Court has defined wanton misconduct to mean "that the actor has intentionally done an act of an unreasonable character, in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to the

consequences." ***Evans v. Philadelphia Transp. Co.***, 212 A.2d 440, 443 (Pa. Super. 1965).

> Wanton conduct is something different from negligence however gross, different not merely in degree but in kind, and evincing a different state of mind on the part of the tortfeasor. Negligence consists of inattention or inadvertence, whereas wantonness exists where the danger to the plaintiff, though realized, is so recklessly disregarded that, even though there be no actual intent, there is at least a willingness to inflict injury, a conscious indifference to the perpetration of the wrong.

Stubbs v. Frazer, 454 A.2d 119, 120 (Pa. Super. 1982). Instantly, Appellants acknowledge that during the daylight, they "approached a berm and proceeded up the berm" before falling approximately 40 feet. Complaint, 8/27/2010, at ¶ 26. Thus, we cannot see how Appellees "so recklessly disregarded" a risk to trespassers such that there was "a willingness to inflict injury" where they constructed a berm to prevent entry into the mine.

The Fishers also contend the trial court erred "in concluding that the Mine Safety and Health Act regulations are not appropriate to establish liability on the possessor of land as they were not applicable to trespassers." Fishers' Brief at 12. Specifically, the Fishers argue that its expert report establishes a genuine issue of material fact, as the expert concluded that Appellees "engaged in willful and wanton unsafe activity" in the operation of the mine because it "did not provide mandatory safety guards or berms and did not conduct adequate on-shift safety examination or correct the hazardous condition." Expert Report of Jack Spadaro, at 4 ¶ 5. The report

refers specifically to certain Mine Safety and Health Act regulations which require the construction of berms or guards, as well as those that require on-shift inspection. ***Id***. at 2.

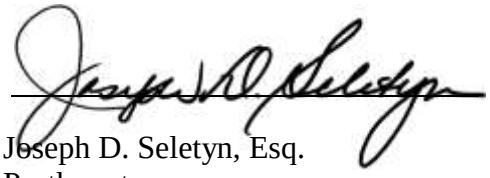
The trial court concluded that these regulations "are clearly inapplicable to trespassers" as they were "promulgated to protect miners." Trial Court Opinion, 11/26/2012, at 5. We agree.

When enacting the Mine Safety and Health Act, Congress declared that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource--the miner." 30 U.S.C.A. § 801(a).[2] Thus, we agree with the trial court that the regulations are inapplicable in the instant case.

Judgment affirmed.

Judge Mundy files a dissenting memorandum.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/25/2013

[2] Although the violation of a regulation or statute can be negligence *per se*, those principles are inapplicable here, as the Fishers were trespassers on Appellees' land. Fishers' Brief at 13.