IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David L. Brown, Individually and as Executor of the Estate of Kathryn A. Brown, Deceased, Appellant	:	
v.	:	No. 337 C.D. 2020
	:	Argued: May 12, 2021
City of Oil City	:	
v.	:	
Fred L. Burns, Inc.	:	
v.	:	
Scott Amsdell, Individually, and Macon, Inc., and Harold Best, Individually, and Struxures, LLC	:	

BEFORE: HONORABLE P. KEVIN BROBSON, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE ELLEN CEISLER, Judge
HONORABLE J. ANDREW CROMPTON, Judge

OPINION
BY JUDGE LEAVITT FILED: September 1, 2021

David L. Brown (Brown), individually and as executor of the estate of his wife, Kathryn A. Brown, Deceased (Decedent), appeals an order of the Court of Common Pleas of Venango County (trial court) granting the motions for summary judgment filed by contractors Fred L. Burns, Inc. (Burns) and Harold Best and Struxures, LLC (collectively, Struxures). The trial court held that Brown could not

make a case for negligence against Burns and Struxures because the owner of the property was aware of the defect on the property that caused Decedent's fatal injury. In this appeal, we consider the liability of a contractor who creates a condition on land that causes physical injury to third parties after the contractor's work has been accepted by the owner of the property. Brown argues that the trial court erred because it did not follow this Court's binding precedent in *Gilbert v. Consolidated Rail Corporation*, 623 A.2d 873 (Pa. Cmwlth. 1993), but, instead, followed the contrary holding of the Pennsylvania Superior Court in *Gresik v. PA Partners, L.P.*, 989 A.2d 344 (Pa. Super. 2009) (*Gresik I*). We reverse the trial court and remand the matter for further proceedings.

Background

On November 23, 2015, Decedent slipped and fell on the steps of the Oil City Library, which resulted in her fatal injuries. On June 6, 2016, Brown filed a trespass complaint against the Oil City and Oil Region Library Association, alleging poor construction or maintenance of the library steps that caused Decedent's fall. Brown amended the complaint to name the persons involved in the construction of the library steps: Burns, the contractor in charge of the concrete work; Struxures, the architectural firm; and Scott Amsdell and Macon, Inc. (collectively, Macon), the subcontractor for Burns.

The amended complaint alleges that in 2011, Oil City, which owned Oil City Library, contracted with Struxures and Burns to rebuild the concrete steps to the library entrance. Amended Complaint ¶11. Struxures was responsible for the design and oversight of the project "through the completion of construction as the owner's representative and agent." *Id*. ¶12. Burns constructed the concrete steps,

and it subcontracted with Macon to install blue stone facing and cheek wall caps on the steps. *Id*. ¶¶14-15.

Soon after completion of the project, the concrete in the library steps began to degrade. Oil City became concerned about the condition of the steps and on February 28, 2012, notified Struxures that it considered the steps defective and dangerous. *Id*. ¶20. As of September 12, 2013, Oil City had also informed Burns of the defects in its work. *Id.* ¶21.

The amended complaint alleges that from February 28, 2012, through November 23, 2015, the library steps continued to deteriorate, thereby increasing the risk of harm to members of the public using the steps. *Id.* ¶23. Neither Oil City nor its contractors made repairs to the steps. Nor did they warn the public about the dangerous condition of the steps. *Id.* ¶26.

On November 23, 2015, as Decedent and Brown walked down the library steps, Decedent fell and sustained a severe head trauma. Amended Complaint ¶30. Six days later, Decedent died from her injuries. *Id*. ¶33. Brown seeks damages against the defendants for negligence, wrongful death and Decedent's pain and suffering.

On July 1, 2019, Struxures filed a motion for summary judgment, asserting that it had no duty to Decedent as a non-possessory contractor. On July 16, 2019, Burns filed a nearly identical motion for summary judgment.

On July 29, 2019, Brown answered the motions. Brown argued that (1) a contractor's liability for injury caused by an artificial condition does not turn on the contractor's continued possession; (2) the moving defendants relied on decisions from the Superior Court instead of the controlling and directly contrary precedent of this Court and the Pennsylvania Supreme Court; (3) there were material facts in

dispute; and (4) Section 383 of the Restatement (Second) of Torts, RESTATEMENT (SECOND) OF TORTS §383 (Am. Law Inst. 1965), afforded another basis upon which Struxures and Burns owed a duty to third parties, including Decedent.

Trial Court Opinion

On October 25, 2019, the trial court granted the motions for summary judgment. In reaching its decision, the trial court construed Section 385 of the Restatement (Second) of Torts to limit the liability of a contractor who no longer has possession of the property that caused the injury. The trial court acknowledged that in *Gilbert*, 623 A.2d at 875, this Court construed Section 385 of the Restatement to expand, not limit, a contractor's liability for a dangerous condition that it has created. However, the trial court agreed with the Superior Court's decisions in *Gresik I*, 989 A.2d 344, and in *Longwell v. Giordano*, 57 A.3d 163 (Pa. Super. 2012). In those decisions, the Superior Court held that after a contractor leaves the property, it can be held liable in negligence to a third party only "*if the contractor created a danger that was unlikely to be discovered* by the possessor." Trial Court Op., 10/25/2019, at 6 (emphasis in original).

The trial court found that the danger created by Burns and Struxures was not latent but well known to the possessor. Indeed, Oil City had brought the defective condition of the library steps to the attention of the contractors well before Decedent's fall. The trial court also reasoned that Burns and Struxures could not have unilaterally repaired their work without Oil City's approval. For these stated reasons, the trial court granted summary judgment to Burns and Struxures.

On November 12, 2019, Brown petitioned the trial court to approve a settlement agreement with Oil City, and it was granted on February 28, 2020.

Thereafter, Brown appealed the trial court's grant of summary judgment to Burns and Struxures.

Appeal

On appeal,[1] Brown contends that the trial court erred. In support, he presents four issues. First, Brown argues that the trial court applied the incorrect legal standard by relying upon *Gresik I* instead of *Gilbert*. Second, Brown argues that, even if the Superior Court's reasoning in *Gresik I* were to be applied, there are material facts in dispute, which preclude the entry of summary judgment. Third, Brown argues that the trial court's holding lacks a foundation because neither Burns nor Struxures presented evidence that they could not have unilaterally repaired the defects in the steps. Fourth, Brown argues that the trial court's holding is inconsistent with *Prost v. Caldwell Store, Inc*., 187 A.2d 273, 277 (Pa. 1963), wherein our Supreme Court held that "regardless of whether the contractor has surrendered possession of the land and his work has been accepted," the one who creates an artificial condition that causes an injury to a person can be held liable in damages for the injury.

Section 385 of the Restatement (Second) of Torts

We begin with a review of Section 385 of the Restatement (Second) of Torts. It states as follows:

> *One who on behalf of the possessor of land* erects a structure or *creates any other condition thereon is subject to liability to others* upon or outside of the land *for physical harm caused to*

[1] When reviewing a grant of summary judgment, this Court's standard of review is *de novo*, and our scope of review is plenary. We apply the same standard for summary judgment as the trial court. *Gior G.P., Inc. v. Waterfront Square Reef, LLC*, 202 A.2d 845, 852 n.10 (Pa. Cmwlth. 2019). "A grant of summary judgment is only appropriate where the record clearly shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law." *Id*. (citation omitted).

> *them* by the dangerous character of the structure or condition after his work has been accepted by the possessor, under the same rules as those determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others.

RESTATEMENT (SECOND) OF TORTS §385 (Am. Law Inst. 1965) (emphasis added). By its express terms, Section 385 imposes liability on one who creates a condition "on behalf of" a possessor of land. "The term 'on behalf of' means that the servant or contractor who makes the alteration does so for the possessor's benefit and by this authority." *Gresik v. PA Partners, L.P.*, 33 A.3d 594, 599 (Pa. 2011) (*Gresik II*) (citing RESTATEMENT (SECOND) OF TORTS §383 cmt. a (Am. Law Inst. 1965) *incorporated by* RESTATEMENT (SECOND) OF TORTS §385 cmt. b (Am. Law Inst. 1965)). Section 385 of the Second Restatement of Torts is applicable in Pennsylvania. *Gresik II*, 33 A.3d at 599.

Comment c to Section 385 of the Second Restatement of Torts states, in relevant part, as follows:

> A manufacturer of a chattel who puts it upon the market knowing it to be dangerous and having no reason to expect that those who use it will realize its actual condition is liable for physical harm caused by its use (see §394). As the liability of a servant or an independent contractor who erects a structure upon land or otherwise changes its physical condition is determined by the same rules as those which determine the liability of a manufacturer of a chattel, it follows that such a servant or contractor who turns over the land with knowledge that his work has made it dangerous in a manner unlikely to be discovered by the possessor is *subject to liability both to the possessor, and to those who come upon the land with the consent of the possessor* or who are likely to be in its vicinity.

RESTATEMENT (SECOND) OF TORTS §385 cmt. c (Am. Law Inst. 1965) (emphasis added). Different constructions of Comment c have led to the contrary holdings in *Gilbert* and *Gresik I*.

The principles of Section 385 of the Restatement were addressed in *Prost*, 187 A.2d 273. There, the plaintiff slipped and fell on a terrazzo tiled entrance to a department store. With her husband, the plaintiff filed a trespass action against the department store, which joined the general contractor and subcontractors who had installed the terrazzo tile. The joinder complaint alleged that the contractor had created a dangerous and slippery floor because of the negligent manner in which it laid the terrazzo tile. The contractor filed preliminary objections, contending that it could not be liable for the plaintiff's negligence claim. At most, it was liable to the department store for breach of contract. The trial court sustained the preliminary objections.

On appeal, the Supreme Court reversed. Referring to Prosser, TORTS §85 (2d ed. 1955), the Supreme Court explained as follows:

> [A] party to a contract by the very nature of his contractual undertaking may place himself in such a position that the law will impose upon him a duty to perform his contractual undertaking in such a manner that third persons—strangers to the contract—will not be injured thereby[.]

Prost, 187 A.2d at 275 (quotation omitted). Simply, "[i]t is not the contract per se which creates the duty; it is the law which imposes the duty because of the nature of the undertaking in the contract." *Id.* (citing *Evans v. Otis Elevator Company*, 168 A.2d 573, 575 (Pa. 1961)). Explaining that these principles were "stated in the Restatement, Torts, §385,"[2] the Supreme Court held that a contractor who

[2] The 1934 version of Section 385 stated:

negligently creates an artificial condition that causes bodily injury can be liable for the injury "regardless of whether the contractor has surrendered possession of the land and his work has been accepted." *Prost*, 187 A.2d at 277. Rejecting the contractor's argument that "his responsibility ceased with the insertion of the last bolt and the driving of the final nail," the Supreme Court held that it was for the jury to determine whether the tiled store entrance was hazardous and whether the contractor was responsible for "its lurking dangers." *Id*.

In *Gilbert*, 623 A.2d 873, the decedent was struck by a train while using a wooden pedestrian walkway to cross railroad tracks to reach a train on another track. The decedent's parents brought a wrongful death and survival action against the station's owner and its former operator. The station's former operator filed a motion for summary judgment, asserting that it could not be held responsible for any defects in design, construction or modification of the station because it was no longer in possession or control of the station. The former operator admitted, *arguendo*, that it knew that the walkway was dangerous and that its employees had designed and built the walkway. The trial court granted summary judgment to the station's former operator, relying on Comment c to Section 385 of the Restatement. It construed the comment to mean that the dangerous condition had to be unlikely to be discovered by the possessor in order for a contractor no longer in possession of the property to have liability.

> One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others within or without the land for bodily harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor under the same rules as those stated in §§394 to 398, 403 and 404 as determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others.

RESTATEMENT (FIRST) OF TORTS §385 (Am. Law Inst. 1934).

This Court reversed, concluding that the trial court misconstrued Comment c. We reasoned that Section 385 of the Restatement expanded the liability of a contractor beyond the limits of its contract with the possessor of land to recognize a social duty to others for physical injuries caused by the contractor's work. Stated otherwise, this social duty includes third persons who are "strangers to the contract." *Prost*, 187 A.2d at 275 (citation omitted). We stated:

> Section 385 limits liability to third persons, while comment (c) provides for potential liability to third persons and *the possessor of property* when the condition may be considered a latent defect.

Gilbert, 623 A.2d at 875 (emphasis added). Stated otherwise, Comment c clarified that the third persons to whom the contractor has liability under Section 385 can include the "possessor" of the property, but only where the defect is latent and not known to the possessor.

Given the admissions by the former operator of the station, this Court concluded that the trial court erred in granting summary judgment. By contrast, the dissent in *Gilbert*, 623 A.2d at 877 (Silvestri, J., dissenting), would have affirmed the trial court, opining that under Section 385, a contractor has liability only where the dangerous condition is latent and not obvious.

Subsequently, in *Gresik I*, 989 A.2d 344, the Superior Court adopted the logic of the *Gilbert* dissent. *Gresik I* concerned a trespass action brought against a steel mill and its former operator for a dangerous condition that caused the death of one steelworker and serious injuries to another. Relying on Section 353 of the Restatement (Second) of Torts, the trial court granted summary judgment to the former operator.[3] On appeal, the plaintiffs argued that, alternatively, the former

[3] Section 353 pertains to undisclosed dangerous conditions known to a vendor. It states:

operator of the mill could be held liable by reason of Section 385 of the Restatement (Second) of Torts. Thus, the trial court erred.

The Superior Court affirmed the trial court. It rejected plaintiffs' assertion that Section 385 of the Restatement applied for the stated reason that the plaintiffs did not show that the danger was one unlikely to be discovered by the possessor. *Gresik I*, 989 A.2d at 350-51. Because the steel mill's dangerous condition was "well known to all the relevant parties," the former operator of the steel mill could not be held liable under Section 385 of the Restatement. *Gresik I*, 989 A.2d at 351. Adopting the dissent's analysis in *Gilbert*, the Superior Court held that to establish "liability under Section 385, a plaintiff must show that the danger was one unlikely to be discovered by the possessor or those who come upon the land with the possessor's consent." *Gresik I*, 989 A.2d at 351.[4]

> (1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others upon the land with the consent of the vendee or his subvendee for physical harm caused by the condition after the vendee has taken possession, if
>
> > (a) the vendee does not know or have reason to know of the condition or the risk involved, and
> >
> > (b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.
>
> (2) If the vendor actively conceals the condition, the liability stated in Subsection (1) continues until the vendee discovers it and has reasonable opportunity to take effective precautions against it. Otherwise the liability continues only until the vendee has had reasonable opportunity to discover the condition and to take such precautions.

RESTATEMENT (SECOND) OF TORTS §353 (Am. Law Inst. 1965).

[4] In its analysis, the Superior Court also addressed the liability of a manufacturer of chattels set forth in Section 388 of the Restatement (Second) of Torts, which relates to chattels known to be dangerous for their intended use and provides that a supplier of such a chattel may only be held liable if the supplier "has no reason to believe that those for whose use the chattel is supplied will

On further appeal, the Supreme Court affirmed, but it rejected the Superior Court's rationale. It held that Section 385 of the Restatement was inapposite because it had no application to the land's possessor, such as the steel mill's former operator. Rather, Section 385 applied to persons other than the possessor, such as the possessor's contractor. *Gresik II*, 33 A.3d at 599. The Supreme Court did not reach the question of whether Section 385 of the Restatement extended the liability of contractors to third persons only where the dangerous condition is latent. However, it acknowledged the split between Pennsylvania's intermediate courts. *Id*. at 600.

In *Longwell*, 57 A.3d 163, a tenant fell off the edge of a driveway in an apartment complex when his shoe caught on the edge of the asphalt. The tenant sued the landlord and paving contractor. Applying *Gresik I*, the Superior Court held that Section 385 of the Restatement did not apply to the contractor because the defect in the paving was obvious, not latent.

With this background, we turn to the instant appeal.

Analysis

Brown argues that the trial court erred. Brown contends that *Gilbert* is controlling, which held that a contractor that creates the dangerous condition on the property remains liable to "others" even after the contractor leaves the premises.[5]

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realize its dangerous condition." *Gresik I*, 989 A.2d at 350 (citing RESTATEMENT (SECOND) OF TORTS §388 (Am. Law Inst. 1965)).

[5] Brown cites to the law of the case doctrine to support his argument that *Gilbert* should apply in this case. "The law of the case 'doctrine refers to a family of rules which embody the concept that a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter.'" *Anter Associates v. Zoning Hearing Board of Concord Township*, 79 A.3d 1230, 1233 (Pa. Cmwlth. 2013) (quoting *Commonwealth v. Starr*, 664 A.2d 1326, 1331 (Pa. 1995)). The law of the case doctrine is irrelevant because this case and *Gilbert* involve different parties. However, *Gilbert* is binding precedent.

Further, it has long been the law that "any person who on behalf of a possessor of land" creates an "artificial condition resulting in injury of others" will have liability to those "others." Brown Brief at 22 (citing *Prost*, 187 A.2d 273). Brown argues that under *Prost* and *Gilbert*, the trial court should have denied the motions for summary judgment.

Struxures and Burns respond that the trial court was free to follow Superior Court precedent over *Gilbert*, and that the holding in *Prost* is irrelevant because it did not consider whether a contractor could be held liable when it no longer has possession of the property. Alternatively, Struxures urges this Court to revisit its decision in *Gilbert*, explaining that we should consider "whether the reasoning spawned from the dissenting opinion deserved closer consideration." Struxures' Brief at 23 (quoting Trial Court Op., 10/25/2019, at 7).

Superior Court precedent provides persuasive authority for this Court, but "we are compelled as an intermediate appellate court to follow our own precedent when it conflicts with the precedent of the Superior Court." *Davis v. City of Philadelphia*, 702 A.2d 624, 626 (Pa. Cmwlth. 1997); *see also County of Armstrong v. Workmen's Compensation Appeal Board*, 473 A.2d 755, 757 (Pa. Cmwlth. 1984) (stating "[w]e are bound by stare decisis to follow decisions of our own court until they are either overruled by the Supreme Court, or compelling reasons persuade us otherwise"). *Gilbert* is the only case decided by this Court relevant to this appeal, and we see no reason to depart from its holding or its logic.

In any case, *Gresik I* is inapposite. It concerned the liability of a possessor of land, and not the liability of a contractor acting on the possessor's behalf. Accordingly, Section 385 of the Restatement (Second) of Torts has no application, as our Supreme Court aptly observed in *Gresik II*, 33 A.3d at 599.

As we explained in *Gilbert*, Section 385 extends a contractor's liability to third persons who are injured by an artificial condition of the land created by the contractor after the possessor has accepted the completed work. Nowhere does Section 385 state that for liability to attach the artificial condition must be latent. Comment c to Section 385 of the Restatement may limit the contractor's liability to the possessor to the situation where the defect is latent. Otherwise, the possessor cannot hold the contractor liable in negligence. However, the fact that Oil City was aware of the defective nature of the library steps is irrelevant to the liability of Burns and Struxures to "others." At most, this fact may relieve them of liability to Oil City, the possessor.

The trial court erred. Section 385 of the Restatement governs Brown's amended complaint against Burns and Struxures. "[O]n behalf of the possessor of land," Burns and Struxures created a "condition thereon and [are] subject to liability to others … for physical harm caused to them by the dangerous character of the structure or condition after [their] work has been accepted by the possessor…." RESTATEMENT (SECOND) OF TORTS §385 (Am. Law Inst. 1965). Decedent was physically harmed. It is for the jury to decide whether the condition of the library steps was of a dangerous character and caused her physical injury and death.

Conclusion

We conclude that the trial court erred in determining that Burns and Struxures, as the moving parties, were entitled to summary judgment as a matter of law. The trial court failed to apply the proper standard of liability for a contractor who, on behalf of a possessor of land, creates a condition that causes harm after his work has been accepted by the possessor, as this Court established in *Gilbert*, 623

A.2d at 875.[6] Accordingly, we reverse the trial court's order and remand this case to the trial court for further proceedings.

MARY HANNAH LEAVITT, President Judge Emerita

[6] Because we decide this appeal by applying *Gilbert*, 623 A.2d 873, and Section 385 of the Restatement (Second) of Torts, we will not address the other arguments and issues raised by Brown.

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O R D E R

AND NOW, this 1st day of September, 2021, the order of the Court of Common Pleas of Venango County dated February 28, 2020, is REVERSED, and the matter is REMANDED to the trial court for further proceedings.

Jurisdiction relinquished.

MARY HANNAH LEAVITT, President Judge Emerita