NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

SANDRA SPEICHER AND ALAN SPEICHER, H/W, Appellants v. KELLY KURCZEWSKI, ONE WELLINGTON CENTER, INDIVIDUALLY AND/OR DOING BUSINESS AS SANTINO'S FAMILY RESTAURANT AND SANTINO'S FAMILY RESTAURANT, Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1581 MDA 2013

Appeal from the Order entered December 28, 2009,
in the Court of Common Pleas of Berks County,
Civil Division, at No(s): 05-16357

BEFORE: DONOHUE, ALLEN, and STABILE, JJ.

MEMORANDUM BY ALLEN, J.: **FILED MAY 13, 2014**

Sandra and Alan Speicher, husband and wife, ("Sandra Speicher" "Mrs. Speicher" or collectively "Appellants"), appeal from the trial court's order granting summary judgment in favor of One Wellington Center, individually and/or doing business as Santino's Family Restaurant, and Santino's Family Restaurant (collectively "the Restaurant"). We affirm, and deny as moot the Restaurant's motion to quash the appeal.

The trial court recited the facts and procedural history as follows:

> This case involves a motor vehicle-pedestrian accident that occurred on January 30, 2004. Sandra Speicher was crossing State Hill Road in Berks County in an attempt to reach [the Restaurant] across the street to meet her family for dinner. Defendant, Kelly Kurczewski, was operating her vehicle

> southbound on State Hill Road and travelling at or under the posted 40mph speed limit. The Defendant was confronted with [Sandra Speicher] crossing the street wearing dark clothing and crossing in a dark area in front of the restaurant. The Defendant applied her brakes but was unable to bring her vehicle to a stop before striking [Sandra Speicher]. Officer Robert Karstien of the Wyomissing Police Department determined the Defendant was not at fault, stating that Defendant had "zero time to react to the Pedestrian crossing the roadway" and that it was dark, [Sandra Speicher] was wearing dark clothing and crossing the street at an angle. [Sandra Speicher] was treated for various injuries at Lehigh Valley Hospital.
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> [Sandra Speicher's] complaint included claims against [the Restaurant], The Borough of Wyomissing, Township of Wyomissing, Township of Spring, County of Berks and Pennsylvania Department of Transportation. All of the claims except the claim against [the Restaurant] were dismissed by Stipulation. [Sandra Speicher] alleges that [the Restaurant] is liable because [she] was forced to cross the street due to inadequate parking at [the Restaurant] and she was forced to jaywalk diagonally across State Hill Road because [the Restaurant] failed to clear the ice and snow from their sidewalk. [The Restaurant] filed a Motion for Summary Judgment that was granted by the Honorable Jeffrey Schmehl in 2009. [Appellants] then attempted to pursue an appeal but their Petition for Review was denied by the Superior Court on April 6, 2010. On August 8, 2013, [Appellants] filed a Praecipe to Settle, Discontinue and End the matter with prejudice as to all Defendants. [Appellants] have now filed an appeal of the 2009 Order granting [the Restaurant's] Motion for Summary Judgment on August 23, 2013. This action was reassigned to the Honorable Timothy J. Rowley and on August 29, 2013 this Court issued an Order directing [Appellants] to file a Concise Statement of Errors Complained of on Appeal. On September 16, 2013, [Appellants] filed this statement[.]

Trial Court Opinion, 10/21/13, at 1-2 (unnumbered).

On appeal, Appellants present the following issue:

> Did the trial court abuse its discretion or commit an error of law when it granted summary judgment in favor of [the Restaurant], as the undisputed facts in the case and applicable Pennsylvania

> law establish that [the Restaurant] was responsible for the dangerous and hazardous conditions that it created and allowed to exist on its property for an unreasonable time for its business invitees such as Sandra Speicher, which conditions were a cause in fact of Mrs. Speicher's damages?

Appellants' Brief at 4.

We recognize:

> Our scope of review…[of summary judgment orders]…is plenary. We apply the same standard as the trial court, reviewing all the evidence of record to determine whether there exists a genuine issue of material fact. We view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law will summary judgment be entered.
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> Motions for summary judgment necessarily and directly implicate the plaintiff's proof of the elements of his cause of action. Summary judgment is proper 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. Thus a record that supports summary judgment will either (1) show the material facts are undisputed or (2) contain insufficient evidence of facts to make out a *prima facie* cause of action or defense and, therefore, there is no issue to be submitted to the jury. Upon appellate review we are not bound by the trial court's conclusions of law, but may reach our own conclusions. The appellate Court may disturb the trial court's order only upon an error of law or an abuse of discretion.

Alexander v. City of Meadville, 61 A.3d 218, 221 (Pa. Super. 2012) (internal citation omitted).

Appellants summarized their arguments concerning the Restaurant's negligence as follows:

> [Appellants] claim that the inadequate number of parking spaces, the high piles of snow, the failure to properly clear the Restaurant property's parking lot and sidewalks of snow, the location of the aforesaid path provided and shoveled by the [Restaurant] for its customers leading from the street south of the corner (instead of directly from the corner into the parking lot), failing to make the Restaurant safely and reasonably accessible for its invitees like Sandra Speicher, and lack of warnings or other reasonable measures for the safety of patrons accessing the Restaurant created the very foreseeable set of circumstances that caused the injuries sustained by Sandra Speicher.

Appellants' Brief at 7-8.

The trial court rejected Appellants' arguments, and reasoned:

> In the instant case, [Appellants] allege a duty was owed by [the Restaurant] to have adequate parking so that the injured [Sandra Speicher] would not be forced to park across the street and cross State Hill Road to enter [the Restaurant]. This argument fails because [the Restaurant] was under a 1952 Wyomissing Hills Ordinance that established there was no requirement for any off-street parking for a commercial establishment such as a restaurant. Furthermore, Sandra Speicher was crossing State Hill Road when she was struck by the Defendant. State Hill Road was not within the possession or control of [the Restaurant] and the condition of the road was not altered or affected in any way by [the Restaurant's] actions.
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> [Appellants] also argue a hazardous condition was created by [the Restaurant] when they shoveled the snow from the sidewalk and only allowed one shoveled point of ingress to the restaurant from State Hill Road, forcing Sandra Speicher to cross the street at an angle to that point of entrance. As counsel for [the Restaurant] cites in their brief, in *Fazio v. Fegley Oil Company,* 714 A.2d 510 (Pa.Commw. 1998), the Court held that landowners whose property abuts public roadways owe no duty to travelers on those thoroughfares. In *Fazio*, a plaintiff slipped

> and fell on ice in a public alleyway adjacent to the Defendant's store. The Plaintiff sought to impose liability on the Defendant because the contours of its land caused unreasonable runoff of water into the alleyway.
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> The same reasoning should be applied in this case. Even accepting [Appellants'] allegations as true, [the Restaurant's] property did not present any risk to the safety of Sandra Speicher while she was crossing State Hill Road. There was nothing about the condition of [the Restaurant's] property that affected the roadway where she was struck. Additionally, Sandra Speicher could have chosen to park on the same side of the street as the restaurant. She made a choice to park across the street and cross State Hill Road to the restaurant. The expert reports submitted by [the Restaurant] also suggest that this accident was not caused by any actions or inactions of [the Restaurant] but rather by the inattentiveness of Sandra Speicher in crossing State Hill Road.
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> Liability cannot be imposed on [the Restaurant] when State Hill Road was not in their possession or control and the street was not rendered unsafe by any action or inaction of [the Restaurant]. If [the Restaurant] did not have any off-street parking and Sandra Speicher was forced to park on a side street anyway, [the Restaurant] would owe no obligation to her under those circumstances. Adding the presence of a parking lot with allegedly limited parking spaces does not change the situation to impose a duty on [the Restaurant] where none previously existed.
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> As counsel for [the Restaurant] states, and this Court agrees, if [Appellants'] expert reports are believed and [the Restaurant] failed to clear the snow from the area surrounding its premises, [the Restaurant] would still have no responsibility to Sandra Speicher because she was struck by a vehicle while crossing the street, even before reaching the alleged pathway. The street, State Hill Road, was not possessed, controlled or affected in any way by [the Restaurant's] actions.

Trial Court Opinion, 10/21/13, at 3-5 (unnumbered). We agree with the trial court.

"To establish a cause of action sounding in negligence, a party must demonstrate they were owed a duty of care by the defendant, the defendant breached this duty, and this breach resulted in injury and actual loss." ***McCandless v. Edwards,*** 908 A.2d 900, 903 (Pa. Super. 2006) (internal citations omitted).

Our Supreme Court has explained:

> 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, licensee, or invitee. *See Davies v. McDowell National Bank, 407 Pa. 209, 180 A.2d 21 (1962); Restatement (Second) of Torts §§ 328-343B (1965).* []
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> Possessors of land owe a duty to protect invitees from foreseeable harm. Restatement, supra, §§ 341A, 343 & 343A. With respect to conditions on the land which are known to or discoverable by the possessor, the possessor is subject to liability only if he,
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> > "(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 invitee, 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."
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> Restatement, supra, § 343. Thus, as is made clear by section 343A of the Restatement,
>
> > "[a] possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness."
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> Restatement, supra, § 343A. *See Atkins v. Urban Redevelopment Auth. of Pittsburgh,* 489 Pa. 344, 352-53, 414 A.2d 100, 104 (1980) ("the law of Pennsylvania does not impose

> liability if it is reasonable for the possessor to believe that the dangerous condition would be obvious to and discovered by his invitee"); *Palenscar v. Michael J. Bobb, Inc.,* 439 Pa. 101, 106-07, 266 A.2d 478, 480, 483 (1970) (same); *Repyneck v. Tarantino,* 415 Pa. 92, 95, 202 A.2d 105, 107 (1964) (same); *Kubacki v. Citizens Water Co.,* 403 Pa. 472, 170 A.2d 349 (1961) (same). A danger is deemed to be "obvious" when "both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising normal perception, intelligence, and judgment." Restatement, supra, § 343A comment b. For a danger to be "known," it must "not only be known to exist, but ... also be recognized that it is dangerous and the probability and gravity of the threatened harm must be appreciated." *Id.* Although the question of whether a danger was known or obvious is usually a question of fact for the jury, the question may be decided by the court where reasonable minds could not differ as to the conclusion. See Restatement, supra, § 328B comments c and d.

Carrender v. Fitterer, 469 A.2d 120, 123-124 (Pa. 1983).

We have further expressed:

> It is unquestionable that a store owner owes a duty of care to the patrons of the store. However, the owner of the store is not an insurer of the safety of its customers. *Moultrey v. Great Atlantic & Pacific Tea Company,* 281 Pa. Super. 525, 529-30, 422 A.2d 593, 596 (1980). Moreover, the mere existence of a harmful condition in a public place of business, or the mere happening of an accident due to such a condition is neither, in and of itself, evidence of a breach of the proprietor's duty of care to his invitees, nor raises a presumption of negligence.

Id., at 530, 422 A.2d at 596.

Myers v. Penn Traffic Co., 606 A.2d 926, 928 (Pa. Super. 1992).

Appellants' reliance on the Restatement Second of Torts § 343 is misplaced because § 343 applies to a landowners' duty vis-á-vis business entrants upon the land. Mrs. Speicher was not on the Restaurant's property when she was injured. Therefore, when Mrs. Speicher was injured, she was

not a business invitee, licensee, or even a trespasser, to whom the Restaurant, as a landowner, owed any duty. ***Carrender, supra,*** at 123-124. We are not persuaded by Appellants' arguments to the contrary. Accordingly, the trial court did not err in granting summary relief to the Restaurant.

Appellants' invocation of the hills and ridges doctrine is equally unavailing. *See* Appellant's Brief at 15-19. As noted by Appellants, "Pennsylvania jurisprudence has historically recognized that snow and ice upon pavements may, under certain circumstances, constitute a basis for negligence…" *Id.* at 15. However, Mrs. Speicher was not injured while attempting to traverse hills and ridges of snow or ice on the Restaurant's pavement or sidewalk.

Our Supreme Court has explained:

> Where a property owner is charged with negligence in permitting the accumulation of snow or ice on his sidewalk, the proof necessary to sustain such a charge has been clearly defined by our decisional law. It is incumbent upon a plaintiff in such situation to prove: (1) that snow and ice had accumulated on the sidewalk in ridges or elevations of such size and character as to unreasonably obstruct travel and constitute a danger to **pedestrians travelling thereon**; (2) that the property owner had notice, either actual or constructive, of the existence of such condition; (3) **that it was the dangerous accumulation of snow and ice which caused the plaintiff to fall**. Absent proof of *all* such facts, plaintiff has no basis for recovery.

Rinaldi v. Levine, 176 A.2d 623, 625-626 (Pa. 1962) (emphasis supplied). Here, according to Mrs. Speicher, it was not "snowing at all" on the night she was injured. *See*, N.T., Deposition, 2/13/07, at 46. Mrs. Speicher denied

encountering "any ice or snow on the highway as [she] was driving to the restaurant." *Id.* Mrs. Speicher testified that when she was crossing State Hill Road that she "believe[d] that street was clear." *Id.* at 90. Therefore, Appellants' invocation of the hills and ridges doctrine to attach liability on the Restaurant fails.

Appellants further contend that "[i]n the alternative, if the hills and ridges doctrine is found not to apply, the Restaurant undertook to remove the snow and ice from its property, and had a duty to use reasonable care in doing so." Appellants' Brief at 18 ***citing Bacsick v. Barnes,*** 234 Pa. Super. 616 (1975). ***Bacsick*** is factually distinguishable. As conceded by Appellants, "in Bacsick, the plaintiff was struck by a car off of the defendant's premises when she was forced to walk in the street because the sidewalk was inaccessible due to a snow bank that had been created by the defendants." Appellants' Brief at 18. Here, it is undisputed that Mrs. Speicher never reached the Restaurant's sidewalk with the snowbank.

Appellants additionally contend that the Restaurant failed to provide sufficient parking spaces to its invitees, such that Mrs. Speicher was required to park across State Hill Road, an act which caused her to be injured while crossing the street. *See* Appellants' Brief at 19-23. Appellants cite Wyomissing Borough's Code of Zoning Ordinance, Chapter 27, §609(20)(b), for the proposition that the Restaurant "owed a duty to Sandra Speicher, as a business invitee, to maintain a sufficient number of parking spaces to accommodate its patrons[.]" *Id*. at 19.

Appellants fail to address the Restaurant's contention that the ordinance was not applicable to the Restaurant because "[the Restaurant] filed a building permit for its restaurant in 1991, and was therefore an existing business at the time of enactment of the Zoning Ordinances of the Borough of Wyomissing Hills in 1995[, including Section 609 which]…applies only to new uses, or expansions or alterations to already existing buildings." Restaurant's Brief at 18-19 (internal footnote omitted noting that "[i]n 2002 the Borough of Wyomissing Hills merged into and became a part of the Borough of Wyomissing"). Appellants had the burden, which they failed to meet, to disprove the Restaurant's contention that Ordinance 609 did not apply to the Restaurant. *See* Pa.R.C.P. 1035.2(2) (non-moving party to summary judgment motion has burden to produce evidence that would require issue to be submitted to jury); ***see also Alexander v. City of Meadville,*** 61 A.3d 218 (Pa. Super. 2012).

Within their argument regarding the Restaurant's failure to have sufficient parking, Appellants invoke "the concept of 'gratuitous undertaking' encompassed within the Restatement (Second) of Torts, § 323a and §324(a)." *See* Appellant's Brief at 21. Appellants posit that when the Restaurant built a parking lot, it undertook the duty to ensure the sufficiency of the parking space, the failure of which breached a duty to Mrs. Speicher. *Id.* at 21-22. Appellants further argue that "Section 323 does not obviate the traditional components of a *prima facie* case sounding in negligence, but

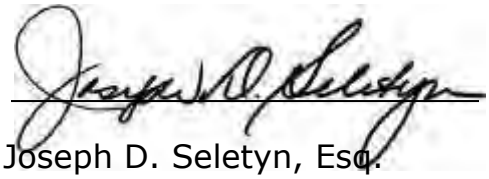
rather substitutes a gratuitous undertaking for the element of duty." *Id.* (internal citation omitted).

Appellants' reliance on Sections 323 and 324 fails for two reasons. First, Appellants do not cite any cases specifically adopting or applying those sections to a fact pattern analogous to this action. ***Korn v. Epstein,*** 727 A.2d 1130, 1135 (Pa. Super. 1999) ("arguments not *appropriately* developed are waived") (emphasis in original) (internal citations omitted). Second, we have expressed "[d]uty, in any given situation, is predicated on the relationship existing between the parties *at the relevant time.*" ***Pittsburgh National Bank v. Perr,*** 637 A.2d 334, 336 (Pa. Super. 1987) (internal citation omitted) (emphasis in original). As we explained above, the relationship existing between the Restaurant and Mrs. Speicher at the time of her injuries did not give rise to any duty owed by the Restaurant to Mrs. Speicher.

Viewing the record in the light most favorable to Appellants, we cannot conclude that the Restaurant owed a duty of care to Mrs. Speicher, the breach of which resulted in her injuries. While Appellants assert that the conditions of the Restaurant's parking lot and sidewalks were hazardous, Mrs. Speicher was not traversing those areas at the time of her injuries.

Order affirmed. Motion to quash denied.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/13/2014