THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS

KIMBERLY THOMPSON	:	**TRIAL DIVISION-CIVIL**
V.	:	**JANUARY TERM, 2010** **NO. 309**
THE CONVENT OF THE SISTERS OF ST. JOSEPH OF CHESTNUT HILL and CHESTNUT HILL COLLEGE	:	**Superior Court Docket No. 246 EDA 2011**

OPINION

PROCEDURAL HISTORY

Plaintiff, Kimberly Thompson appeals from the December 15, 2010 Order granting a Motion for Summary Judgment in favor of Defendants, The Convent of the Sisters of St. Joseph of Chestnut Hill and Chestnut Hill College.

FACTUAL BACKGROUND

On January 11, 2008, Plaintiff, Kimberly Thompson ("Thompson") was visiting Chestnut Hill College with her husband. (Defendants' Motion for Summary Judgment, pg. 7). Chestnut Hill College leases its premises from The Convent of the Sisters of St. Joseph of Chestnut Hill. (Complaint ¶5). Upon entering the public restroom on the premises of Chestnut Hill College, Thompson immediately noticed an accumulation of

water approximately two feet by four feet on the restroom floor outside of the stall directly in front her. (Defendants' Motion for Summary Judgment, pg. 9). The water on the floor was allegedly caused by a malfunctioning bathroom fixture. (Complaint ¶6). In addition, Thompson described the bathroom as being well lit. (Defendants' Motion for Summary Judgment, pg. 8).

Thompson did not call anyone's attention to the water on the ground before using the restroom. (Deposition of Thompson, pg. 90). Additionally, Thompson testified that she assumed that there were other available restrooms in that same building for her to use. (Deposition of Thompson, pg. 101). Despite this fact, she proceeded to walk around the water to use a stall on the opposite end of the restroom. (Defendants' Motion for Summary Judgment, pg. 10). Despite paying close attention to the accumulation of water as she was leaving the restroom, Thompson nonetheless stepped into the water and slipped. (Defendants' Motion for Summary Judgment, pg. 14). Furthermore, the record shows that Thompson could have exited through a door on the far end of the restroom without having to travel back across the dangerous condition. (See picture marked as Ex. 4 attached to Ex. C). As a result of her fall, Thompson suffered injuries to her back. (Complaint ¶9).

On January 5, 2010, Thompson instituted this action asserting that The Convent of the Sisters of St. Joseph of Chestnut Hill and Chestnut Hill College ("Chestnut Hill Defendants") were negligent in failing to maintain the Chestnut Hill College premises in a safe and proper condition. (Complaint ¶8).

On November 1, 2010, Chestnut Hill Defendants filed their Motion for Summary Judgment. In the motion, Chestnut Hill Defendants argued that no duty of care was owed

to Thompson because the accumulation of water on the floor was open and obvious to her, thus she assumed the risk by encountering the dangerous condition. (Defendants' Motion for Summary Judgment, pg. 21). This is illustrated by the fact that she immediately noticed the water on the floor upon her entry, and despite looking out for the water on her way out of the restroom, she nonetheless slipped after stepping directly in the water. (Defendants' Motion for Summary Judgment, pg. 12).

Thompson filed her response to the Motion for Summary Judgment on December 2, 2010. In her response, Thompson argued that while she was aware of the water on the floor, she was unaware of the risk the water on the restroom floor posed. Thus, she contends she did not assume the risk of encountering the water and Chestnut Hill Defendants owed her a duty of care. (Plaintiff's Response In Opposition To Defendants' Motion for Summary Judgment, pg. 8).

This Court granted the Motion for Summary Judgment dismissing the case on December 15, 2010. Plaintiff Thompson appealed from this Order on January 5, 2011 and filed her Statement of Matters accordingly pursuant to Pa.R.A.P. 1925(b).

The issue on appeal is whether the lower court committed an error of law or abused its discretion in granting Chestnut Hill Defendants' Motion for Summary Judgment where the Court found that Thompson assumed the risk by encountering a dangerous condition that was open and obvious to her.

LEGAL ANALYSIS

The standard for Summary Judgment Motions is whether the Trial Court abused its discretion in granting the Motion. *Weber v. Lancaster Newspapers, Inc.*, 2005 Pa. Super. 192, 878 A.2d 63, 71 (2005). The adverse party appealing the grant of summary

judgment "bears a heavy burden" in persuading the appellate court to reverse. *Bartlett v. Bradford Publ'g Inc.*, 885 A.2d 562, 566 (Pa. Super. 2005).

Pennsylvania Rule of Civil Procedure 1035.2 states that Summary Judgment may be granted as follows:

> 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 (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 require the issues to be submitted to a jury.

Pa.R.C.P. 1035.2.

When deciding a Motion for Summary Judgment, the moving party bears the initial burden of proving that there is no genuine issue of material fact and that he is entitled to a judgment as a matter of law based on the facts alleged. *Pennsylvania Gas and Water Co. v. Nenna Farin, Inc.*, 320 Pa. Super. 291, 298 (1983).

It is this Court's legal conclusion that Chestnut Hill Defendants have met their burden by showing that the hazardous condition was open and obvious to the Plaintiff when she slipped, and thus Thompson assumed the risk of injury and has failed to establish the element of duty required for a prima facie case of negligence. Accordingly, summary judgment was proper.

For the purposes of this case, both parties agree that Thompson was an invitee at the time of her accident. Applying the principles set forth in the Restatement (Second) of Torts §§ 343 and 343A, our Supreme Court has held that a possessor of land is not liable

to an injured invitee where the dangerous condition was open and obvious to that party. *Carrender v. Fitterer*, 503 Pa. 178, 185, 469 A.2d 120, 123 (1983). According to the Restatement, a possessor of land is subject to liability 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 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."

Restatement (Second) of Torts § 343.

Further, Restatement section 343A states: "[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." Restatement (Second) of Torts § 343A.

A danger is deemed to be "obvious" when "both the condition and the risk are apparent and would be recognized by a reasonable man, in the position of the visitor, exercising normal perception, intelligence, and judgment." *Carrender*, 503 Pa. at 185 (citing Restatement (Second) of Torts § 343A comment b). Moreover, not only must the risk be perceived, but it must also be faced voluntarily. *Barrett v. Fredavid Builders, Inc.*, 454 Pa. Super. 162, 166, 685 A.2d 129, 131 (1996). The question of whether a danger was known or obvious may be decided by the court where reasonable minds could not differ as to the conclusion. *Carrender*, 503 Pa. at 185-86.

In *Carrender*, the plaintiff parked her car on the defendant's property in a parking space that had ice covering the surface beside her driver's side door. *Id.* at 181-82. In

addition, the plaintiff testified that she was aware of the ice and understood the risk that it posed to her by walking on it. *Id.* at 182. Further, the plaintiff was aware that there were other open spaces in the lot free of ice. *Id.* at 182-83. Instead of moving to a different space, the plaintiff successfully walked across the ice as she emerged from her car. *Id.* at 183. Upon returning to her car, however, she slipped and fell on the ice and was injured. *Id.* The Supreme Court held that the plaintiff failed to establish the element of duty required for a prima facie case of negligence where the uncontradicted testimony showed that both the hazard and the risk were open and obvious to the plaintiff, and where the defendants could have reasonably expected that the danger would be avoided by her. *Id.* at 186-87.

By contrast, in *Barrett*, the plaintiff slipped and fell on a piece of vinyl siding that was on the floor while he was working at a construction site. *Id.* at 164. Prior to his fall, the plaintiff cleaned up his work area but failed to remove all the debris. *Id.* at 165. As he was working, he did not see the piece of vinyl siding that he eventually slipped on. *Id.* at 167. Instead, the plaintiff stated he was looking up at the insulation that he was working on at the time of the accident. *Id.* Accordingly, the court held that the plaintiff did not assume the risk because he did not have actual knowledge of a known risk. *Id.* at 168.

The case before this Court is similar to *Carrender* in that the record shows that Thompson was clearly aware of the dangerous condition and the risk that it posed to her, both when she entered the restroom and also as she walked through the water on her way out. As previously mentioned, Thompson entered the restroom, which she described as well lit, and immediately noticed an accumulation of water approximately two feet by four feet protruding out from the stall directly in front of her. Thompson testified:

> Q. I'm trying to figure out what you noticed when you went in.
> A. I understand.
> Q. So, you noticed about two feet of water going from the stall across the floor closer towards the side that the sinks were on?
> A. I would say that would be a fair description of it. From the outside of the stall not coming from under the back of the stall, but coming from the front side of the stall door, yes.

(Deposition of Thompson, p. 85).

She then proceeded to walk around the accumulation of water on the floor to use a stall on the far side of the restroom. In contrast to *Barrett*, where the plaintiff wasn't looking out for the hazard, the record in this case shows that Thompson was looking directly at the dangerous condition on her way out of the restroom when she stepped into the water and slipped. The plaintiff herself testified as follows:

> Q. Did you know there was water as you proceeded to leave?
> A. I knew there was water on the floor there.
> Q. So, knowing that there was water on the floor, are you looking out for that water?
> A. Yes.
> Q. As you are walking, you actually see the water?
> A. I saw water on the floor, yes.
> Q. So, you are walking to the far left in the area on the side of the sink, I take it?
> A. Yes, That would be fair to say.
> Q. How much of your foot actually stepped into the water then?
> A. I honestly don't recall how much of my feet were in the water when I slipped. I don't know. Enough to make me fall.

(Deposition of Thompson, pp. 97-98).

Thompson argues that she was aware of the water on the floor but not the risk that it posed. This is belied by the fact that she walked around the water when she initially entered the restroom. By walking around the water in the first instance, it is clear that

Thompson acknowledged the risk that stepping into the water posed to her. Further, the record shows that Thompson is a teacher with normal perception and judgment. A similar person with normal perception and judgment would easily understand that the risk of slipping and falling is obvious when walking through a puddle of water on the tile floor of a restroom.

In addition to recognizing the dangerous condition, Thompson also voluntarily faced the obvious risk that the accumulation of water posed in the restroom. This is similar to the plaintiff in *Carrender*, who was aware of the ice beside her car and had the option to park in other spaces that were free of ice, but nonetheless attempted to navigate the parking lot with the dangerous condition. Here, Thompson could have exited through a door on the far end of the restroom without having to travel back across the dangerous condition. Further, Thompson did not call anyone's attention to the water on the ground before proceeding to use the restroom. In addition, Thompson herself testified that she assumed that there were other available restrooms in that same building for her to use. Thus, there were numerous options available to Thompson besides walking by the water on the restroom floor.

Accordingly, Thompson has failed to establish the element of duty required for a prima facie case of negligence because the dangerous condition was open and obvious to her, and she thus assumed the risk by walking through the water. Accordingly, summary judgment was proper.

CONCLUSION

For all the aforementioned reasons the Court did not commit an error of law or abuse its discretion in granting Chestnut Hill Defendants' Motion for Summary

Judgment. Thus, the Court respectfully requests that the December 15, 2010 Order be affirmed.

BY THE COURT:

6-30-2011

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Date **ALLAN L. TERESHKO, J.**

cc:

Ezra Wohlgelernter, Esq., for Appellant
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