IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

LUCINDA K. FLOOK and DANIEL FLOOK, III, Plaintiffs	:	NO. 15 - 02,479
	:	CIVIL ACTION - LAW
vs.	:	
ROGER D. JARRETT, Defendant	:	
vs.	:	
D.A. STRYKER TRUCKING & EXCAVATING, LLC, Additional Defendant	:	Motion for Summary Judgment

OPINION AND ORDER

Before the court is a motion for summary judgment filed on behalf of Defendant Roger Jarrett ("Jarrett") and Additional Defendant D.A. Stryker Trucking & Excavating, LLC ("Stryker"). The parties filed briefs in support of their respective positions and an argument was held before the court on September 21, 2016. This action arises out of an alleged slip and fall that occurred on January 15, 2014 at 2350 East Third Street, Loyalsock Township, Lycoming County, Pennsylvania. This property is known as the "Oaks Plaza." At the time of the incident, Jarrett was the owner of the Oaks Plaza. He had entered into a prior agreement with Stryker to perform snow and ice removal. The removal was left to the discretion of Stryker.

At the time of the alleged fall, Plaintiff Lucinda Flook was employed by Planned Futures, a business with offices located at Oaks Plaza. On the morning of January 15, 2014, while attempting to take a recycling container outside to empty it in a dumpster, Ms. Flook slipped and fell on ice.

Jarrett and Stryker claim that they are entitled to summary judgment as a matter of law based upon two arguments. First, they argue that they owed no duty of care to Lucinda Flook in that the danger was open and obvious. They argue that she fell on a glassy ice area that was an open and obvious area that she would have readily observed if she had not permitted the recycling container to obstruct her view and instead pay attention to the ground ahead of her. (Jarett Motion for Summary Judgment, paragraph 14).

Second, Jarrett and Stryker argue that the loss of consortium claim on behalf of Daniel Flook, III should be dismissed because it is derivative to Lucinda Flook's claim. Thus, if Lucinda Flook's claim is dismissed, Daniel Flook's claim must be dismissed as well. (Jarrett Motion for Summary Judgment, paragraph 18).

Lucinda Flook was deposed on June 9, 2016. She worked for Planned Futures at its office on East Third Street. One of her duties was to take the recyclables out to a recycling dumpster. The incident involved in this case occurred on January 15, 2014. On that date, when she went to work, it was cloudy and there was no snow or rain. She went to take out the recyclables and fell by one of the dumpsters. She identified a photograph marked as Plaintiffs' Exhibit 1 depicting the two dumpsters she was going to when she fell.

She testified that the recycling dumpster they used was the one depicted on the right side of the photograph. She had a plastic container designated for carrying the recyclables which was 20 to 24 inches long and 10 inches high. She carried it with her two hands in front of her and walked out of the door and straight across to the dumpster. There was no precipitation at that time. It was maybe 50 feet from the office door to the dumpster.

As she was walking across the parking lot to the dumpster, she did not observe any ice. Prior to the fall, she did not slip.

She had the container in front of her. All of the sudden, she took a step and her legs went up in the air. She fell backwards on her head. While falling, she dropped the container and everything flew all over. She was four to five feet away from the dumpster when she fell. She was looking ahead prior to falling. She was not able to see the ground in front of her with the container in front of her. She was walking towards the dumpster. She did not look down at her feet because she "wouldn't see them anyway." (Lucinda Flook Deposition, June 9, 2016, at 43).

After falling, she realized that she fell on ice because when she tried to get back up, her feet were sliding. She could actually see the ice and described it as glassy. While she did not observe any patches of ice in other areas of the parking lot, the ice was in front of the dumpsters and was maybe 10 to 12 feet wide.

In further describing the icy area on which she fell, she stated that it was "rounded." (*Id*. at 86). She agreed that it was "like a semicircle on the macadam." (*Id.*). It had a "radius of 10 to 12 feet." (*Id.*).

While she did not see the icy area prior to falling, after she stood up and looked down, the glassiness was obvious to her. Obviously, she knew that ice could be slippery and that if she walked on it, she could fall. She reiterated that there was nothing else in the parking lot, no snow and no ice. If there would have been, she never would have attempted to "walk out there." (*Id*.at 88).

When deciding a motion for summary judgment, the moving party has the burden of proving the non-existence of a genuine issue of fact on any element of a cause of action. Pa. R. Civ. P. 1035.1. A court reviewing a motion for summary judgment must resolve all doubts against the moving party and examine the record in a light most favorable to the non-moving party. Summary judgment may only be granted in cases where it is clear and without doubt that the moving party is entitled to judgment as a matter of law. ***Merriweather v. Philadelphia Newspapers***, 684 A.2d 137, 140 (Pa. Super. 1996).

This court need not detail the numerous elements necessary to sustain a cause of action for negligence. The parties have limited their argument to whether, under the facts of this case, Jarrett and Stryker are entitled to summary judgment because they had no duty to the Lucinda Flook under the circumstances.

During the oral argument in these matters, the parties advanced differing opinions with respect to the legal standards applicable to the case. Jarrett and Stryker argue that it is an objective standard while the Flooks argue that it is a subjective standard.

Section 343A of the Restatement (Second) of Torts is the starting point in any legal analysis. According to the express language 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. ***RESTATEMENT (SECOND) OF TORTS,*** § 343A (1).

For a danger to be "known," the invitee must not only know that the condition exists but he or she must also recognize that it is dangerous and appreciate the probability and

gravity of the threatened harm. ***RESTATEMENT (SECOND) OF TORTS,*** § 343A (1), comment b; ***Carrender v. Fitterer***, 503 Pa. 178, 185, 469 A.2d 120, 124 (1983). This is a subjective test.

For a danger to be "obvious," both the condition and the risk must be apparent to and would be recognized by a reasonable person, in the position of the invitee, exercising ordinary perception, intelligence, and judgment. ***RESTATEMENT (SECOND) OF TORTS,*** § 343A (1), comment b (emphasis added); ***Carrender***, supra. Although this is an objective test, it takes into account the particular circumstances of the invitee.

The question of whether a danger was known or obvious is usually a question for the jury. The court may decide this question only where reasonable minds could not differ as to the conclusion. ***Carrender***, supra.

The court cannot find as a matter of law that the dangerous condition was known to Mrs. Flook. This is not a situation where she was familiar with the "defective condition" or had previously encountered such. It was not until after she slipped that she realized that there was ice on the macadam near the dumpster. Similarly, the court also cannot find that the patch of glassy black ice near the dumpster would be obvious to a reasonable person carrying a recyclable container similar to the one carried by Mrs. Flook.

While there is clearly a duty of a person to look where he or she is walking and to see that which is obvious, ***Lewis v. Duquesne Inclined Plane Company***, 346 Pa. 43, 44, 28 A.2d 925, 926 (1942), this duty does not negate the duty of the possessor. Furthermore, what may be obvious to an unencumbered individual may not be obvious to an individual encumbered by recyclables or trash, which the possessor of the land should expect would be carried by the lessee or its employees to the dumpster area on his property.

The court cannot agree with Jarrett and Stryker that the standard is purely objective. The language of the Restatement and the applicable cases clearly suggest that the injured party must either be subjectively aware of the dangerous condition and appreciate the gravity of the threatened harm or the condition must be obvious to a reasonable person in the injured party's position. Lucinda Flook's comparative negligence is for the jury to decide.

Because this court has determined that a duty does exist under the circumstances, Jarrett's and Styker's motions for summary judgment on both counts will be DENIED.

ORDER

AND NOW, this ____ day of November 2016, following a hearing, argument and review of the record, the court **DENIES** Defendant Jarrett and Additional Defendant Stryker's motions for summary judgment.

BY THE COURT,

Marc F. Lovecchio, Judge

cc: Robert Elion, Esq.
Scott McCarroll, Esq.
305 North Front Street, Harrisburg, PA 17108
Lauren Dobrowalski, Esq., Cipriani & Werner, PC
409 Lackawanna Avenue, Suite 402, Scranton, PA 18503