IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EILEEN CONVERY and PAUL CONVERY	:	CIVIL ACTION
v.	:	
PRUSSIA ASSOCIATES, d/b/a HILTON VALLEY FORGE	:	NO. 99-2469

MEMORANDUM

Dalzell, J. March 1, 2000

Plaintiff Eileen Convery slipped and fell on defendant's[1] property, and has sued for redress. Before us now is defendant's motion for summary judgment.

I. Background

On Friday, March 8, 1996, Eileen Convery, accompanied by her husband, daughter, and granddaughter, came from the family home in New Jersey to the Hilton Valley Forge in order to attend a dance competition in which the granddaughter was a contestant.[2] They checked into the hotel at about 6:00 p.m., went to dinner at a restaurant nearby, and then returned to the Hilton around 9:15 p.m. traveling in the daughter's Ford van. They parked the van in the Hilton's parking lot and walked toward the hotel, down the parking lane in which they had parked. At the point where that parking lane intersects the parking lot's feeder road, which runs

[1]In their initial pleadings, plaintiffs identified a number of defendants, including Field Associates and several John Does. On August 25, 1999, the parties entered into a stipulation identifying the sole defendant as "Prussia Associates, d/b/a Hilton Valley Forge." For convenience, we will refer to defendant throughout as "the Hilton".

[2]The competition took place on March 9, 1996.

along the side of the hotel building, Eileen Convery slipped upon a patch of ice not readily visible[3], and fell forward onto her shoulder and face. The pavement at this particular point in the parking lot slopes down from the parking lane to the feeder road.[4]

After the fall, Mrs. Convery was taken inside the hotel, where the accident was reported to the hotel staff, who wrote up an incident report. Mrs. Convery was subsequently taken to a hospital, where she was diagnosed with, inter alia, a fractured humerus.

The Converys filed suit in New Jersey state court on March 3, 1998, alleging that "[o]n or about March 8, 1996, defendants maintained the parking lot in a negligent, careless and reckless manner, causing plaintiff Eileen Convery to fall down." Compl. ¶ 2. Defendant subsequently removed the case to the United States District Court for the District of New Jersey, which later transferred it to us pursuant to 28 U.S.C. §§ 1404(a) and 1406(a).

The parties in this Court agreed to a court-annexed arbitration without any cap on damages. After the arbitrators

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[3]Plaintiffs concede that the area looked "wet" rather than icy to the naked eye.

[4]Defendant does not dispute plaintiffs' expert's calculations, which show that the slope at this point is a 19-23% grade, translating to between 11 and 15 degrees.

entered their award, the Hilton demanded a trial de novo and simultaneously filed the instant motion for summary judgment.[5]

II. Analysis[6]

The Hilton's motion for summary judgment and the Converys' response present us with contrasting legal bases for the Converys' claim. The Hilton devotes much of its motion to demonstrating that it has no liability to the Converys under the Pennsylvania "hills and ridges" doctrine regarding liability for snow and ice accumulation. In their response, the Converys argue that they do not rely on the "hills and ridges" doctrine, but

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[5]We note parenthetically that this inverts the usual practice before us, where parties file dispositive motions in advance of an arbitration.

[6]A summary judgment motion should only be granted if we conclude that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In a motion for summary judgment, the moving party bears the burden of proving that no genuine issue of material fact is in dispute, see Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585 n.10 (1986), and all evidence must be viewed in the light most favorable to the nonmoving party, see id. at 587. Once the moving party has carried its initial burden, then the nonmoving party "must come forward with 'specific facts showing there is a genuine issue for trial,'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)) (emphasis omitted); see also Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (holding that the nonmoving party must go beyond the pleadings to show that there is a genuine issue for trial).

The mere existence of some evidence in support of the nonmoving party will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). However, we must "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pennsylvania Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995).

instead allege a design defect in the parking lot. We will discuss each of these theories in turn.

A. The "Hills and Ridges" Doctrine

"The 'hills and ridges' doctrine is a long[-]standing and well entrenched legal principle that protects an owner or occupier of land from liability for generally slippery conditions resulting from ice and snow where the owner has not permitted the ice and snow to unreasonably accumulate in ridges or elevations." Morin v. Traveler's Rest Motel, Inc., 704 A.2d 1085, 1087 (Pa. Super. 1997). In order to show liability under such circumstances, the plaintiff must demonstrate:

> (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.

Rinaldi v. Levine, 176 A.2d 623, 625-26 (Pa. 1962). While originally formulated for conditions on sidewalks, the doctrine's application has been extended to cases where a business invitee falls on snow or ice covering a parking lot, see Morin, 704 A.2d at 1088.

Here, there is no dispute that Eileen Convery was a business invitee of the Hilton, nor that the parking lot in

question belonged to the Hilton. Moreover, plaintiffs do not dispute the defendant's proffered evidence regarding the weather conditions on that March day. At least four inches of snow fell between the evening of March 7 and the morning of March 8, 1996[7], and the temperature on March 8, 1996 did not exceed the freezing point. Consequently, there was snow on the ground, and the surface of the parking lot gave at least the appearance of "wetness", see Ex. A to Pls.' Resp. to Def.'s Mot. for Summ. J., Dep. of Eileen Convery at 63 (hereinafter "Dep. of Eileen Convery").

Since the undisputed evidence shows that snow stopped falling only about ten hours before the accident, and that temperatures had not risen to the point where the snow might have melted away, we conclude that there is no disputed issue of material fact over whether "generally slippery conditions" existed in the Hilton's parking lot on that March 8 evening.[8]

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[7]Plaintiffs' expert report states that the snowfall was between six and eight inches, though National Weather Service observations from West Conshohoken state that snow fell between midnight and 11:00 a.m. on March 8, 1996, accumulating to a depth of four inches.

[8]"There is no liability created by a general slippery condition on sidewalks. It must appear that there were dangerous conditions due to ridges or elevations which were allowed to remain for an unreasonable length of time, or were created by defendant's antecedent negligence." Rinaldi, 176 A.2d at 625. We should note that there are no allegations here that the Hilton, through some means, had itself caused the ice to be present. Indeed, plaintiffs' expert goes so far as to say that "it was . . . not the drainage and grading which led to the accident." Ex. B to Pls.' Resp. to Def.'s Mot. for Summ. J., Report of Daniel Banks, P.E., at 3.

Similarly, there is no dispute that the ice that allegedly caused Mrs. Convery's fall had not accumulated in a "hill" or "ridge" but instead was evidently barely perceptible.[9] Thus, if it applies, the "hills and ridges" doctrine prevents the Converys from holding the Hilton liable for the existence of the patch of ice on the parking lot.[10]

B. Design Defect

In response to the Hilton's motion for summary judgment, the Converys argue that they do not rely on the "hills and ridges" doctrine. Instead, they contend that there was a design defect in the parking lot, which "at a minimum, was a concurrent cause of the accident coupled with the inclement weather." Pls.' Resp. to Def.'s Mot. for Summ. J. ¶ 6-7. In

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[9]The initial incident report filled out at the hotel states that Mrs. Convery "slipped on some ice that you could not see." Ex. F to Def.'s Mot. for Summ. J., at 1. The deposition testimony of the Converys shows that the patch of ice was not easily seen. See Dep. of Eileen Convery at 63-68; Ex. G to Def.'s Mot. for Summ. J., Dep. of Paul Convery, at 11-12 (hereinafter "Dep. of Paul Convery").

[10]On the other hand, a defendant may be held liable where there is a "specific, localized, isolated" patch of ice, because "it is comparatively easy for a property owner to take the necessary steps to alleviate the condition, while at the same time considerably more difficult for the pedestrian to avoid it even exercising the utmost care." Williams v. Schultz, 240 A.2d 812, 814 (Pa. 1968). In those circumstances, however, plaintiffs must still demonstrate defendant's negligence. As noted in the text above, plaintiffs do not raise issues of material fact to defeat application of the "hills and ridges" doctrine to the existence of the ice, and in particular make no effort to argue that the ice Mrs. Convery slipped on was specific, localized, or isolated, or that the Hilton was negligent in allowing it to form or remain until 9:15 p.m. on March 8, 1996.

particular, plaintiffs allege, the portion of the parking lot on which Mrs. Convery fell is "too steep a slope for any pedestrian to traverse, and creates a danger in all inclement weather." Id. ¶ 5.

In support of this contention, plaintiffs offer the report of their expert, Daniel Banks, P.E., Ex. B. to Pls.' Resp. to Def.'s Mot. for Summ. J. (hereinafter "Banks Report"). In this report, Banks notes that the slope from the Converys' parking lane to the feeder road was steeper than those of the other two parking lanes that run parallel to it, and that the slope at the point where Mrs. Convery fell is, as mentioned above, a grade of between nineteen and twenty-three percent, translating to between eleven and fifteen degrees of incline.[11] Banks notes that engineering texts state that usual highway grades should not exceed nine percent, and that "commonsense [sic] would dictate reduction of grade and leveling for sharp slopes around entrances and exit ways of driving lanes." Banks Report at 2. In particular, the area in question "could have

[11]As the photographs of the site, Ex. C to Pls.' Resp. to Def.'s Mot. for Summ. J., and a videotape of the site, Ex. J to Def.'s Mot for Summ. J., show, the entire parking lane is not sloped at this angle. Instead, the area with the nineteen to twenty-three percent grade is limited to a short distance, perhaps six feet in length, that occurs between the feeder road and the first parking spot in the parking lane. Moreover, the nineteen to twenty-three percent grade only occurs on one side of the parking lane, in particular the right side of the lane if one is standing in the parking lane facing the hotel.

easily been more gradually graded as was done at the other parking lanes." Id.[12]

Banks also performed an analysis of the forces operating on a one hundred-fifty pound adult attempting to walk down a snow- or ice-covered surface sloped as the one at issue, and concludes both that there would always exist a downhill force causing the pedestrian to lose balance, and that "it would have been impossible for an individual not to have fallen unless one were to walk crosswise across the driveway in such a way as to reduce the local slope." Banks Report at 2-3.[13] Banks further

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[12]We note that while Banks's report was based upon a physical inspection of the area in question, it contains no reference to records pertaining to the construction of the parking lot. Thus, Banks -- and, by extension, this Court -- does not know whether the other parking lanes were in fact graded, or whether they were simply set down with the existing lay of the land. Plaintiffs, on the other hand, claim that Banks "opines" that the slope is not naturally occurring, but "[r]ather . . . is a defect." Pls.' Mem. of Law at [4]. While Banks certainly opines that the slope is a defect, nowhere in his report does he claim that it did not result from the natural topography. In fact, Banks's locution that "commonsense would dictate reduction of grade", Banks Report at 3 (emphasis added), suggests his recognition that the grade was preexisting.

The Rule 30(b)(6) deponent made available by the Hilton was Timothy Solomon, a maintenance engineer who has worked for the Hilton since approximately 1992 or 1993. See Ex. I to Def.'s Mot. for Summ. J., Dep. of Timothy Solomon, at 19 (hereinafter "Dep. of Timothy Solomon"). While he was able to testify as to, for example, the Hilton's practices for snow removal and salt spreading, he was unable to testify regarding any repairs that might have been made to the lot, see id. at 15, and so it would appear that the current record is bereft of specific details on the construction of the parking lot.

[13]While at the summary judgment stage we of course are (continued...)

avers that the slope, steep though it is, "would not be easily determined" despite the presence of halogen lighting in the area. Banks Report at 3.[14] Banks's overall conclusion is that "[t]he excessively sloped, or defective paving caused Ms. Convery to slip and fall." Banks Report at 3.

The Hilton raises several objections to the application of a "design defect" theory, arguing that such a claim fails as a matter of law. First, it argues that we should not consider the "design defect" theory because it was not pleaded before the two-year statute of limitations. The Hilton notes that, as quoted above, the precise language of the Complaint alleges that "defendants maintained the parking lot in a negligent, careless and reckless manner", Compl. ¶ 2. The Hilton then argues that "maintenance" is properly defined in Black's Law Dictionary as

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[13](...continued)
not concerned with the weight of the evidence, some components of this calculation deserve comment. First, the paragraph containing the calculations refers to a slope of "19-degrees to 23-degrees". However, all other references to the slope of the pavement state that it is a nineteen to twenty-three percent grade, and only eleven to fifteen degrees in inclination. If the calculations were performed with the "19-degrees to 23-degrees" slope, the calculated downhill force would naturally be greater than actually existed on the slope in question. Also, while we would of course respect Banks's calculation of the force downhill, it is harder to credit to his training as a professional engineer the conclusion that this force unquestionably would have caused any person to fall down.

[14]It does not appear to be disputed that there is a light post in the immediate vicinity of the accident. On the other hand, Paul Convery states that at the time of the accident "it was dark". Dep. of Paul Convery at 12. To the extent that this may represent a dispute of fact, it is not material to the claims raised by the plaintiffs here.

"making repairs and otherwise keeping premises in good condition", and that a claim of negligent maintenance cannot therefore embrace a design defect, see Def.'s Resp. to Pls.' Opp'n to Def.'s Mot. for Summ. J. at 1 (hereinafter "Def.'s Reply Brief"). Consequently, so the argument goes, since the statute of limitations date passed before the articulation of this theory, we cannot now hear it.[15] In support of this claim, defendants cite many Pennsylvania state court decisions to the effect that, inter alia, the proof in a case must follow the pleadings, and that the defense may be prejudiced if the allegations and proof do not agree.

But the questions of the degree of precision with which the proofs must match the allegations in the Complaint, or, more broadly, the extent to which the plaintiffs may amend their Complaint, are governed here not by Pennsylvania law, but rather by federal law. The Federal Rules of Civil Procedure are quite liberal toward amendment: "leave [to amend] shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Moreover, "[a]n amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original

[15]In making this argument, defendant does not explicitly say when it thinks the statute ran. Assuming that the standard two-year statute of limitations applies here (and there is nothing in the record or pleadings to indicate otherwise), the statute ran on March 8, 1998, two years after the incident and five days after the Complaint was filed.

pleading." Fed. R. Civ. P. 15(c)(2). While the Converys have not sought to amend their Complaint, it is against the backdrop of this pleading liberality that we must consider defendant's argument.

On balance, we cannot agree that the locution of "maintained . . . in a negligent . . . manner" is so restrictive as to exclude application of the "design defect" alleged here. The plaintiffs are not advancing some form of strict liability claim, which the term "design defect" might bring to mind, but instead ground their claim in the familiar language of Section 343 of the Restatement (Second) of Torts, pertaining to the duties owed to business invitees. At root, this is a form of a negligence claim, and the use of the term "maintenance" does not admit of as crabbed a reading as defendant would give it.

The second argument that the Hilton raises[16] is that the plaintiffs' theory is untenable as a matter of law because there simply "is no recognized/reported Pennsylvania case law or statute which requires a landowner to completely level his property as to remove any elevation changes." Def.'s Mem. of Law at [3]. The Hilton points out that Valley Forge is known for its rolling hills, and that it is for "this very reason that Washington hid-out and re-grouped his army there during the

[16]Though comparatively faintly. Most of the Hilton's pleadings are devoted to the "hills and ridges" doctrine and the argument that plaintiffs raised the "design defect" theory too late. One paragraph of the motion for summary judgment is devoted to the argument that the "design defect" is not supported in Pennsylvania law.

Revolutionary War."[17] Id. To hold it liable here, the Hilton argues, would make owners of sloped property insurers of pedestrians' safety.

The Converys respond that there is indeed Pennsylvania law supporting their claim. First, argue plaintiffs, a landowner has a duty to warn invitees as to the existence of a "precipitous decline" under Balla v. Sladek, 112 A.2d 156 (Pa. 1955). Second, Pennsylvania law distinguishes a slope that a defendant created from one naturally occurring, under Houck v. Samuel Geltman & Co., 583 A.2d 1244 (Pa. Super. 1991). The Converys contend that these holdings, in tandem with Restatement (Second) of Torts § 343, show that the Hilton may be held liable for the steep slope of that segment of the parking lot. Section 343 reads:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but 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 invitees, and
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

[17]The suitability of these rolling hills for "hiding out" can of course serve different purposes for different people, see, e.g., United States v. Mather, 902 F. Supp. 560 (E.D. Pa. 1995), aff'd, 91 F.3d 127 (3d Cir. 1996)(unpublished table decision).

> (c) fails to exercise reasonable care to protect them against the danger.[18]

The question before us, then, is whether the slope in the parking lot constitutes an actionable "condition on the land" under Pennsylvania law.[19] As the Converys' case depends on the Houck and Balla cases, we consider them with particular care.[20]

In Balla v. Sladek, the Pennsylvania Supreme Court held that "[i]f a public street is dangerous by reason of its proximity to an embankment or precipitous decline, the city is liable for its failure by the erection of barriers or other devices to guard travelers from injury, in the use of the highway, who exercise reasonable care for their own safety." Balla, 112 A.2d at 159. Here, however, we are not faced with an "embankment" or a "precipitous decline" but rather a small section of a parking lot that has a relatively steep slope. We do not think that Balla can properly be extended to hold the Hilton liable for not erecting "barriers or other devices" to protect pedestrians from such a tiny slope, and indeed we cannot

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[18]Though the Converys seem to take this as a given, we observe that Pennsylvania has in fact adopted section 343, see, e.g., Myers v. Penn Traffic Co., 602 A.2d 926, 928 (Pa. Super. 1992).

[19]That is, there seems little question that if we do find that a cause of action does lie, then there are disputes of material fact, particularly in light of Daniel Banks's report.

[20]We note at the outset that we have not limited ourselves to these two cases. A WESTLAW search of Pennsylvania jurisprudence involving tort liability for, inter alia, parking lots or steep slopes did not reveal any other cases that support plaintiffs' contention.

see how any “barriers or other devices” would even be practical in this spot.

We note that Balla, in support of the passage quoted above, cited to an earlier case, Rasmus v. Pennsylvania R.R. Co., 67 A.2d 660, 662 (Pa. Super. 1949). In Rasmus, the Superior Court analogized the city's duty to erect barriers above a "embankment or precipitous decline" to the liability of a railroad that "cut into the hillside in widening its trackway" as one “who makes an excavation on his premises so near to an existing highway as to render the use of the road unsafe." Id. at 661. We think that this authority makes clear that the scale of "embankment or precipitous slope" contemplated in Balla must greatly exceed that found here, and that the dangerous condition must be artificially created. The record here is bereft of evidence that this slope did anything but follow the land’s natural contours. Balla thus cannot, without extension well beyond its facts,[21] support a cause of action against the Hilton for the condition of its parking lot.

Houck v. Samuel Geltman & Co. confirms our reading of Balla. In Houck, the Superior Court considered a police officer's claim against a landowner. The officer had found trespassers on the defendant's property and had chased them into a wooded area on adjoining land. As he entered this adjoining

[21]In diversity cases such as this, we are to apply pertinent state law, but we do not have the liberty that state courts have to extend it absent clear warrant from the state’s highest court.

wooded area, the policeman tripped and fell down a "sharp incline or slope", injuring himself, and he thereafter sued the defendant, alleging that the defendant should have protected him, as an invitee, from the dangerous condition on the adjoining land. Houck affirmed the trial court's grant of summary judgment to the defendant, not to the plaintiff.

In view of this inconvenient holding, the Converys point to dicta in Houck suggesting that if the condition on the neighboring land was one over which the defendant had exercised control, then liability might have arisen. See Houck, 583 A.2d at 1245. The full text of this language is:

> It is clear in this case that the defendant-appellee did not create the slope or incline which existed on the neighboring land. The condition, rather, was a natural condition over which appellee had no control. Under these circumstances, there was no duty to enclose defendant's land by fencing or to warn persons leaving appellee's land that a slope or incline existed on the adjoining land.

Id.

Not only does Houck consider facts quite distinct from ours,[22] but the sentence upon which the Converys rely is the purest of dicta. It is not clear from the cited passage, for

[22]We appreciate that to the extent a landowner is liable for protecting people from a condition off his land, he is likely liable for a similar condition on his land. There is nothing in this record, however, to show that the Hilton "create[d] the slope" in question or altered the topography, as suggested in Rasmus, in a way that caused a dangerous condition.

example, under what exact circumstances the Superior Court would find liability. All we know from the court's language are the factors that contributed to a finding of no liability. This slender reed therefore will not bear the weight that the Converys want us to place upon it; we cannot infer a cause of action for a relatively steep slope in a hotel parking lot from the fact that a landowner need not fence in a sharp incline on adjacent land.

In sum, nothing we have found in Pennsylvania law compels a landowner to change the existing natural topography. Indeed, such a duty would impose upon landowners a burden to change the physical environment that the Pennsylvania Supreme Court has never to our knowledge mandated for the countless steep slopes of the Commonwealth's hilly and other mountainous terrain. In any event, a federal district court, sitting in diversity, should not take such a significant step in such a barren legal landscape.

Notwithstanding Restatement section 343, then, plaintiffs cannot demonstrate that a landowner's liability extends to the situation presented here, and we will grant summary judgment for defendant.

III. Conclusion

We find, as plaintiffs appear to concede, that under the "hills and ridges" doctrine the Hilton is not liable for the existence of ice on the surface of the parking lot on the night of March 8, 1996. Moreover, there is no basis in Pennsylvania

law for a finding of liability based upon the existence per se of the nineteen to twenty-three percent slope in the area of the parking lot in which Mrs. Convery fell. While we sympathize with Mrs. Convery, who indisputably suffered injuries in her fall, the Hilton cannot be called to account to her for either the patch of ice or this small slope of land.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EILEEN CONVERY and PAUL CONVERY	:	CIVIL ACTION
v.	:	
PRUSSIA ASSOCIATES, d/b/a HILTON VALLEY FORGE	:	NO. 99-2469

ORDER

AND NOW, this 1st day of March, 2000, upon consideration of the defendant's motion for summary judgment, and the plaintiffs' response thereto, and the defendant's reply thereto, and for the reasons stated in the accompanying Memorandum, it is hereby ORDERED that:

1. Defendant's motion for summary judgment is GRANTED;

2. JUDGMENT IS ENTERED in favor of defendant and against plaintiff; and

3. The Clerk shall CLOSE this case statistically.

BY THE COURT:

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Stewart Dalzell, J.