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WAYNE DAVIS and IRENE LAVERNE DAVIS, individually and on behalf of the ESTATES OF COURTNEY DAVIS and MYLES DAVIS, deceased, Plaintiffs-Appellants, v. BRICKMAN LANDSCAPING, LTD., d/b/a BRICKMAN LANDSCAPING, GENERATED MATERIALS, LLC, NORTHERN FIRE AND SAFETY, TOWNSHIP OF FRANKLIN, COUNTY OF SOMERSET, JOHN GOODMAN, DENISE GOODMAN, JANET DEMARY, ANN KINGSTON, CONNIE GORDON, KAY STYLES-TIMMONS, WENDY LAFORTUNE, and TYSHEE STYLES. Defendants, and ATLANTIC FIRE SERVICE, CINTAS CORPORATION AND MASTER PROTECTION LP d/b/a FIREMASTER LP, Defendants-Respondents.

DOCKET NO. A-1945-11T1

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2012 N.J. Super. Unpub. LEXIS 1601

May 22, 2012, Argued
July 5, 2012, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

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SUBSEQUENT HISTORY: Certification granted by *Davis v. Brickman Landscaping, 2012 N.J. LEXIS 1204 (N.J., Nov. 5, 2012)*
Certification granted by *Davis v. Brickman Landscaping, Ltd., 2012 N.J. LEXIS 1208 (N.J., Nov. 5, 2012)*
Certification granted by *Davis v. Brickman Landscaping, 2012 N.J. LEXIS 1215 (N.J., Nov. 5, 2012)*

PRIOR HISTORY: [*1]
On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-0026-07.

COUNSEL: G. Martin Meyers argued the cause for appellants.

Michael L. Trucillo argued the cause for respondent Atlantic Fire Service (Lewis, Brisbois, Bisgaard & Smith, LLP, attorneys; Martin J. Sullivan, of counsel and on the brief; Mr. Trucillo, on the brief).

Michael B. Devins argued the cause for respondent Cintas Corporation (McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys; Mr. Devins, of counsel and on the brief; Joseph G. Fuoco, on the brief).

Charles C. Eblen (Shook, Hardy & Bacon, L.L.P.) argued the cause for respondent Master Protection LP d/b/a FireMaster LP (Mr. Eblen and Karen A. Read (Shook, Hardy & Bacon, L.L.P.) of the Missouri bar, admitted pro hac vice, attorneys; Mr. Eblen and Ms. Read, of counsel and on the brief).

JUDGES: Before Judges Payne, Simonelli and Hayden.

OPINION

PER CURIAM

In this wrongful death matter, plaintiffs Wayne Davis and Irene Davis appeal from three June 21, 2011 Law Division orders, which granted summary judgment to defendants Cintas Corporation (Cintas), Atlantic Fire Service (Atlantic), and Master Protection L.P. (Master), and dismissed the complaint and all cross-claims [*2] with prejudice.[1] We affirm in part, and reverse in part.

1 We shall sometimes refer to Cintas, Atlantic, and Master collectively as defendants.

We derive the following facts from evidence submitted by the parties in support of, and in opposition to, the summary judgment motion, viewed in a light most favorable to plaintiffs. *See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540, 666 A.2d 146 (1995)*.

Irene Davis, and her daughter, age 16, and son, age 11, resided in a second-floor suite at the Staybridge Suites Hotel in Franklin Township. Their primary means of ingress and egress to their suite was via a staircase that had a storage closet located under it, which contained wooden tables, chairs and foam cushions. The storage closet was not part of the hotel's original construction; it was constructed sometime between 1992 and 1995, and contained no sprinkler.

On May 13, 2005, a fire began at the hotel when someone threw a lit cigarette from the balcony of a neighboring suite into the landscaping mulch located directly adjacent to the building. The fire spread to the storage closet and up the staircase to the second floor. Irene and the children were unaware of the fire, and became trapped when [*3] it reached their suite. Both children died and Irene sustained serious injuries from smoke inhalation. Plaintiffs filed a complaint against numerous individuals and entities, including defendants, who had inspected the sprinkler system and/or the fire alarm system.[2]

2 This matter has been settled or dismissed as to all other defendants.

New Jersey has adopted the safety regulations promulgated by the National Fire Protection Association (NFPA). *N.J.S.A. 52:27D-198(a)*; *N.J.A.C. 5:75-2.1(a)*; *N.J.A.C. 5:70-3.2 (a)(9)(xiv)* and -4.13(c)(10)(i). NFPA 13 originally required the installation of sprinklers throughout the premises of residential buildings, including in closets and storage places. However, NFPA 13R, enacted in 1989, did not require such installation. Nevertheless, the appendix to NFPA 13R warned as follows:

> It should be recognized that the omission of sprinklers from certain areas could result in the development of untenable conditions in adjacent spaces. Where evacuation times may be delayed, additional sprinkler protection and other fire protection features such as detection and compartmentation, may be necessary.

NFPA 25 sets forth the requirements for inspecting sprinkler systems. [*4] It only requires a sprinkler inspector to conduct a visual examination of the sprinkler system to verify that it appears to be in operating condition and free of physical damage. The NFPA handbook explains that NFPA 25 only requires an inspector to look for signs of normal wear and tear of the sprinkler system and components, not installation flaws or code compliance violations, for these reasons: (1) in many instances the inspector is not necessarily trained to evaluate a sprinkler system year after year for compliance with installation standards; and (2) it is not cost effective for such an evaluation to take place each year. However, the handbook also explains that inspectors are expected to note certain deficiencies they discover during their visual inspection.

Master inspected the hotel's sprinkler system once in 1994, and noted that the building was "completely" sprinklered. This, however, was inaccurate because for a building to be considered "completely" sprinklered, it had to comply with NFPA 13, requiring sprinklers in closets, which the hotel did not have. Atlantic inspected the sprinkler system on three occasions in 2004, and noted that the system was "limited" in certain [*5] residential areas of the hotel. Cintas inspected the sprinkler system on March 21, 2005, and noted that the system had been extended to all visible areas of the building. None of the defendants noted that the storage closet had no sprinkler.

In addition to the sprinkler system, Master inspected the fire alarm system once in 1992, Atlantic inspected the system on August 26, 2004, and Cintas never inspected it. As of February 21, 2005, the fire alarm system was apparently functioning because a false fire alarm had transmitted a signal to the fire alarm monitoring company. Plaintiffs alleged that the fire alarm system

failed to operate properly on the day of the fire.

Plaintiffs' expert, Jack Mawhinney, opined that NFPA 25 was the minimum standard of care for sprinkler inspectors; inspectors have a higher standard to use reasonable care to note life-safety hazards and report them to the building owner; the reasonable care standard is contained in the appendix to NFPA 13R and the NFPA handbook's commentary on NFPA 25 and is generally accepted in the fire protection community; and defendants violated the reasonable care standard by not reporting the hazardous condition of the storage closet [*6] to the hotel.

Although Mawhinney could not point to any publication or other expert in the fire protection industry that applied the reasonable care standard in New Jersey, he opined that it was common knowledge in the industry that an unsprinklered storage closet under a staircase, which provided the only means of egress from a building, could result in loss of life. In support of this theory, he referenced numerous highly publicized building fires over the last century that resulted in multiple fatalities as a result of storage located underneath a staircase that provided the primary means of ingress and egress to a building.

Defendants' expert, Russell Fleming, admitted that most fire safety professionals would be concerned about a closet under a combustible stairway. He stated that if he had inspected the hotel's sprinkler system as a fire protection engineer, he probably would have alerted the hotel to the absence of a sprinkler in the storage closet.

Defendants filed summary judgment motions, arguing that NFPA 25 established the standard of care for inspecting sprinkler systems, there was no evidence that they violated that standard, and Mawhinney rendered an inadmissible net opinion [*7] that a reasonable care standard applied. Plaintiffs countered that Mawhinney did not render a net opinion; rather, he based his opinion on common knowledge in the fire protection industry, the NFPA handbook's commentary on NFPA 25, and the appendix to NFPA 13R. Plaintiffs also argued that NFPA 25 established only a minimum standard of care, compliance with it did not immunize defendants from liability for negligence, and res ipsa loquitur applied to the fire alarm system.

The trial judge criticized but did not strike Mawhinney's opinion. She concluded that defendants' compliance with NFPA 25 was dispositive on the issue of negligence, and granted summary judgment on that basis. The judge declined to apply res ipsa loquitur, finding that the fire alarm system was not under defendants' exclusive control. This appeal followed.

I.

On appeal, plaintiffs contend that the judge erred in granting summary judgment because defendants' compliance with NFPA 25 is not dispositive on the issue of negligence, and a reasonable standard of care applies in this matter. We agree.

Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court. *Coyne v. New Jersey Dep't of Transp., 182 N.J. 481, 491, 867 A.2d 1159 (2005)*; [*8] *Tymczyszyn v. Columbus Gardens, 422 N.J. Super. 253, 261, 27 A.3d 1253 (App. Div. 2011), certif. denied, 209 N.J. 98, 35 A.3d 681 (2012)*. Thus, we consider, as the trial judge did, "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46, 916 A.2d 440 (2007)* (quoting *Brill, supra, 142 N.J. at 536*). Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." *R. 4:46-2(c)*. If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." *Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494, 935 A.2d 769 (App. Div. 2007), certif. denied, 195 N.J. 419, 949 A.2d 847 (2008)*. We review issues of law de novo and accord no deference to the trial judge's conclusions on issues of law. *Zabilowicz v. Kelsey, 200 N.J. 507, 512-13, 984 A.2d 872 (2009)*. Applying these standards, we conclude that [*9] summary judgment was improvidently granted.

Our Supreme Court has made clear that compliance with a safety regulation is not dispositive on the issue of negligence. *Black v. Pub. Serv. Electric & Gas Co., 56 N.J. 63, 76-79, 265 A.2d 129 (1970)*. Rather, the risk posed by dangerous hazards requires the use of reasonable care. *Id. at 76-77*. Whether a defendant exercised reasonable care is a question of fact for the jury to decide. *Ibid*.

Similarly, the Court concluded that an industry's customs of inspection are evidence of reasonable care but they are not dispositive on the issue of whether a defendant utilized the proper standard of care. *Wellenheider v. Rader, 49 N.J. 1, 7-8, 227 A.2d 329 (1967)*.

> Even an entire industry, by adopting such careless methods to save time, effort or money, cannot be permitted to set its own uncontrolled standard. . . . [W]here common knowledge and ordinary judgment will recognize unreasonable danger, what everyone does may be found to be negligent[.]
>
> *[Ibid*. (internal citations omitted).]

This court determined in *Estate of Elkerson v. North Jersey Blood Ctr., 342 N.J. Super. 219, 230, 776 A.2d 244 (App. Div.), certif. denied, 170 N.J. 390, 788 A.2d 773 (2001)*, that the correct standard of care was not the safety standard [*10] utilized by the average blood bank, because this could permit the blood bank industry to insulate itself from liability by adopting whatever standard it chose. *Ibid*. Instead, we held that the appropriate test was what standard the reasonable member of the blood bank community should have used. *Ibid*. "'[W]hen a risk is obvious and a precautionary measure available, an industry or professional standard or custom that does not call for such precaution is not conclusive, if, regardless of the standard or custom, the exercise of reasonable care would call for a higher standard.'" *Ibid.* (quoting *Klimko v. Rose, 84 N.J. 496, 506 n. 4, 422 A.2d 418 (1980))*. In addition, compliance with a regulation does not prevent a finding of negligence where a reasonable person would take additional precautions. *Kane v. Hartz Mountain Indus. 278 N.J. Super. 129, 142-43, 650 A.2d 808 (App. Div. 1994), aff'd, 143 N.J. 141, 669 A.2d 816 (1996)*.

We conclude that defendants' compliance with NFPA 25 is not dispositive on the issue of negligence; rather, a reasonable care standard applies. There is a genuine issue of material fact relating to whether defendants exercised reasonable care irrespective of their compliance with safety regulations, which the [*11] jury must resolve. *Black, supra, 56 N.J. at 76*; *Elkerson, supra, 342 N.J. Super. at 231*. Accordingly, the order granting summary judgment is reversed.

II.

Plaintiffs contend that the judge erred in failing to apply the res ipsa loquitur doctrine because defendants had shared control of the fire alarm system. We disagree.

Res ipsa loquitur is a legal doctrine that provides an inference of negligence when three conditions are met: (1) the occurrence ordinarily bespeaks negligence; (2) the instrumentality causing the injury was within the defendant's exclusive control; and (3) the injury cannot be attributed to the plaintiff's own negligence. *Brown v. Racquet Club of Bricktown, 95 N.J. 280, 288, 471 A.2d 25 (1984)*; *Gore v. Otis Elevator Co., 335 N.J. Super. 296, 300, 762 A.2d 292 (App. Div. 2000)*; *see also Myrlak v. Port. Auth., 157 N.J. 84, 95, 723 A.2d 45 (1999)* (noting that res ipsa loquitur "is available if it is more probable than not that *the* defendant has been negligent" (emphasis added)).

Plaintiffs conceded at oral argument before the trial judge that the hotel exerted some control over the fire alarm system. Thus, res ipsa loquitur does not apply because defendants did not have exclusive control over the fire alarm system. [*12] Res ipsa loquitur also does not apply as to Cintas because it never inspected the fire alarm system, as to Master because it had only inspected the system once in 1992, long before the fire occurred, or to Atlantic because there was no dispute that the system was working properly in February 2005, which was after Atlantic's last inspection in 2004. Accordingly, the judge properly declined to apply res ipsa loquitur to the fire alarm system.

Affirmed in part; reversed in part.

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