

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

DANIEL H. ROBERTS and	)	
BESS L. ROBERTS	)	
Plaintiffs	)	CIVIL NO. 159/1982
vs.	)	
MEMORIAL MORAVIAN CHURCH,	)	
VIRGIN ISLANDS CONFERENCE,	)	
and LEROY McCLEAN d/b/a	)	
MacLewis Car Wash	)	
Defendants	)	
vs.	)	
LISTON LEWIS	)	
Third-Party	)	
Defendant	)	

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MEMORANDUM OPINION
(April 6, 1983)

FEUERZEIG, J.

Daniel Roberts, on March 4, 1980, stepped into a water-filled pothole on the premises of the MacLewis Car Wash. As a result, he claims he was injured, and he and his wife have

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sued the owner-lessor of the premises, the Memorial Moravian Church, and the lessee, Leroy McClean, the person doing business on the premises as MacLewis Car Wash. McClean has impleaded Liston Lewis, who McClean alleges is a 50 percent shareholder of a corporation known as MacLewis Car Wash, Inc.^{1/}

Two motions for summary judgment are before the Court. The first was filed nearly six months ago by the third party defendant Lewis. The Court has refrained from deciding it until the District Court resolved Lewis v. MacClean and MacLewis Car Wash, Inc., Civil No. 79/103, (D.V.I., Div. St.T. & St. J.), which involves related issues, and this Court will continue to defer action on Lewis' motion until the District Court decides the related case before it. The second motion for summary judgment was filed by the defendant Memorial Moravian Church and may be decided now.

^{1/} Defendant McClean filed what he denominated an answer with "crossclaim and petition for indemnification" against Liston Lewis, which Lewis properly has treated as a third-party complaint. Compare F.R.Civ.P. 13(g) with F.R.Civ.P. 14. McClean argues two theories of liability: (1) that Lewis neglected the business causing deterioration of the premises, and (2) that Lewis is liable on the basis of his agreement with McClean, to share the profits and losses of their corporation equally and, therefore, to indemnify McClean to the extent of his 50 percent ownership. It is undisputed here, though, that the lease for the premises was between McClean, individually, and the church.

In order to grant summary judgment, a Court must determine that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. When considering a motion for summary judgment, a court must resolve all inferences and doubts of disputed issues of material fact against the moving party. Ely v. Hall's Motor Transit Co., 590 F.2d 62 (3d Cir. 1978). Moreover, because the burden is on the movant, evidence presented to the Court on a motion for summary judgment must be construed in favor of the party opposing the motion. Mid-West Paper Products Co. v. Continental Group, Inc., 596 F2d 573, 579, (3d Cir. 1979), citing 10A C. Wright & A. Miller, Federal Practice and Procedure, §2727. In addition, the standards for granting summary judgments in this jurisdiction are among the strictest in the country, with any doubt to be resolved against the movant. Wright & Miller, supra, at 124, n.6.

In this case both the church and the plaintiffs agree that the church leased the property on which the car wash was located "long prior" to March 4, 1980, the time the plaintiff suffered his accident. The church correctly states the general rule of tort liability of a lessor of land:

[A] lessor of land is not subject to liability to his lessee or others upon the land with the consent of the lessee or sublessee for physical harm caused by any dangerous condition which comes into existence after the lessee has taken possession.

Restatement (Second) of Torts, §355 (1965).^{2/} Moreover, even when a dangerous condition exists at the time the lessor transfers possession of the premises to the lessee, the lessor generally is not liable. Restatement (Second) of Torts, §356 (1965). The general rules have their exceptions, however, one of which is provided by the Restatement (Second) of Torts, §358:

(1) A lessor of land who conceals or fails to disclose to his lessee any condition, whether natural or artificial, which involves unreasonable risk of physical harm to persons on the land, is subject to liability to the lessee and others upon the land with the consent of the lessee or his sublessee for physical harm caused by the condition after the lessee has taken possession, if

(a) the lessee does not know or have reason to know of the condition of the risk involved, and

(b) the lessor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to expect that the lessee will not discover the condition or realize the risk.

(2) If the less[or] actively conceals the condition, the liability stated in subsection (1) continues until the lessee discovers it and has reasonable opportunity to take effective precautions against it. Otherwise the liability continues only until the lessee has had reasonable opportunity to discover the condition and to take such precautions.

^{2/} The Restatements of Law approved by the American Law Institute express the rules of common law in the Virgin Islands in the absence of local law to the contrary. 1 V.I.C. §4 (1967).

It is on this theory that plaintiffs rely.^{3/} Although it may seem unlikely that the plaintiffs will be able to establish that a water-filled pothole constituted a dangerous condition, such that the lessee did not know or could not have known of it for the fifteen months that the lessee was in possession of the premises before the accident, the Court cannot say as a matter of law that such prolonged ignorance of that "dangerous condition" is impossible. That is particularly so where, as here, the movant has submitted no affidavits and does not point to any undisputed facts to support the Court concluding otherwise. The Court also notes that nothing has been submitted to enable the Court to find that the condition did not exist at the inception of the lease.

HENRY L. FEUERZEIG
Judge of the Territorial Court of the
Virgin Islands

ATTEST:

VIOLA E. SMITH
Administrator/Clerk of the Court

^{3/} In response to defendant church's interrogatory 5(c), inquiring into theories of liability, the plaintiffs responded, "Breach of duty to warn of concealed, dangerous conditions known to landowner..."

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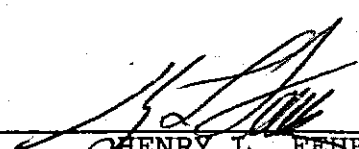
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ORDER

For the reasons stated in the attached Memorandum
Opinion, it is

ORDERED that the motion for summary judgment of the
defendant Memorial Moravian Church is DENIED.

Dated: April 6; 1983


HENRY L. FESERZEIG
Judge of the Territorial Court of the
Virgin Islands

ATTEST:

VIOLA E. SMITH
Administrator/Clerk of the Court