22-CV-975

DISTRICT OF COLUMBIA COURT OF APPEALS

GILBANE BUILDING COMPANY

Appellant,

v.

CHADWICK WITKOWSKI

Mr. Witkowski.

APPEAL FROM THE
DISTRICT OF COLUMBIA SUPERIOR COURT

MR. WITKOWSKI'S BRIEF

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III. STATEMENT OF THE CASE

Appellant Gilbane Building Company (hereinafter "Gilbane") was a general contractor in charge of a construction project at the U.S. Diplomacy Center in Washington, D.C. Compl. ¶ 5. Gilbane hired J.E. Richards Electric ("J.E. Richards") as a subcontractor to do electrical work for the project. *Id.* Mr. Chadwick Witkowski ("Mr. Witkwoski") was an employee of J.E. Richards who was working on Gilbane's project at the U.S. Diplomacy Center on November 19, 2015. *Id.*

On November 19, 2015, Gilbane's superintendent on the project, Mr. Kendall Romwell, placed a tie wire next to a dumpster at the project site. Trial Tr. Day II, 111:9-13 (A406). The tie wire was placed there at the end of the workday. *Id*. The tie wire laid between the dumpster and a wooden security fence. Beyond the location of the tie wire was an on-site port-a-potty for people who were working on the job site. Tr., Day I, 156:21-23 (A275). The only way to access the port-a-potty was to walk the narrow path between the wooden security fence and the dumpster. *Id.* at 152:4-6 (A271).

At the end of the workday on November 19, 2015, Mr. Witkowski was walking on the narrow path towards the port-a-potty when his foot caught on the tie wire causing him to fall. *Id.* He suffered injuries to his left knee, left leg, and chest. Order, 2 (A538). Mr. Witkowski filed his suit asserting claims for negligence, vicarious liability, and negligent hiring, training, and supervision. In response, Gilbane denied liability. *Id*.; Compl. at 7 (A12).

A jury trial began on May 16, 2022. The evidence established that Mr. Witkowski fell at Gilbane's construction site on November 19, 2015. Dep. Tr. 13:7-10 (A83). As a result of the fall, he suffered a fractured left patella and underwent surgery on November 30, 2015. Dep. Tr. 13-14:21-1 (A83-A84). Sometime later, Mr. Witkowski developed a pulmonary embolism due to the knee procedure. Dep. Tr. 15:7-15 (A85). He underwent surgery to address the embolism in May 2017 causing him to miss 46 weeks of work. *Id.* at 16:2-5 (A86). Mr. Witkowski's left thigh is

atrophied and his left knee swells when it rains or when he walks too much. *Id.* at 18:2-6 (A88). These symptoms prevent him from working more than eight hours. Mr. Witkowski can no longer pursue the activities that he enjoys, including playing golf and caving. Trial Tr. Day I, 169:1-6, 19-25 (A288); Trial Tr. Day I, 170:1-3 (A289).

Mr. Witkowski testified that his fall was caused when his foot was caught by tie wire causing him to fall. *Id.* at 152:1-7 (A271). The tie wire created a dangerous defect that was unguarded. No warning of any kind was placed near the tie wire. *Id.* at 108:12-17 (A227). This testimony was corroborated by Nick Sames. Dep. Tr. 40:12-17 (A55). Significantly, Gilbane's investigation of the fall further corroborated Mr. Witkowski's testimony. Gilbane superintendent Kendall Romrell recalled using a tie wire to secure a sump pump at the end of the workday. Dep. Tr. 111:11-17 (A406). Mr. Romrell conceded that he did not place caution tape in the area. *Id.* at 120:14-16 (A415). Based on these facts, Mr. Witkowski contended that Appellant was negligent because there was a dangerous defective condition on the premises which was not guarded and about which no warning was given. Mr. Witkowski established that Gilbane knew of the dangerous defective condition since it was created by Gilbane.

When deliberations concluded, the jury found Gilbane liable for the fall and allowed Mr. Witkowski $1.7 million in damages. Trial Tr. Day III, 73:22-24 (A530). Post-verdict, Gilbane Moved for Judgment as a Matter of Law or, in the Alternative, a New Trial. Gilbane also filed a Motion on the Issue of Remittitur. Order, 2 (A538). On December 2, 2022, the trial judge denied Gilbane's Renewed Motion for Judgment as a Matter of Law or, in the Alternative, a New Trial, and their Motion on the Issue of Remittitur. *Id*. at 10 (A546). Gilbane noted an appeal to the trial Court's denial of its post-trial Motions. On August 14, 2023, Appellant Gilbane filed its Brief.

Mr. Witkowski, by counsel, pursuant to Rule 28(c) of the Rules of the District of Columbia Court of Appeals, hereby files its Reply to Appellant Gilbane's Brief.

IV. ARGUMENT

A. Mr. Witkowski Presented Sufficient Evidence to Support the Verdict

Appellant argues that the jury's conclusion, upheld by the trial judge, must be overturned because no reasonable jury could have reached this conclusion. Appellant advances this argument in the face of the fact that the jury's verdict is based in part in its own incident report. Appellant's incident report established that Mr. Witkowski tripped on the tie wire. Pl. Ex. 10 (A536). At its core, Appellant argues that the jury had to ignore this evidence. In fact, Appellant argues that there was no evidence that Mr. Witkowski tripped over the tie wire. Appellant's argument is simple. Since Mr. Witkowski testified at this deposition that he did not know what caused his fall, no jury could reasonably conclude that the tie wire was, more likely than not, the cause of his fall. Appellant asks this court to ignore: (1) the jury's findings of fact; (2) the trial judge's affirmance of the findings; and (3) all of the circumstantial evidence that establishes that the tie wire, in fact, caused the fall. First, Mr. Witkowski testified as to the location of his fall, which was the precise area where the tie wire was located. Trial Tr. Day I, 152:2-6 (A271). Second, Kendall Romrell, the foreman on the job site for the Appellant, testified that he had just put up the tie wire in the precise area where Mr. Witkowski fell. Dep. Tr. 111:9-17 (A406). Third, the picture of the scene shows the tie wire and no other obvious tripping hazards. Pl. Ex. 1, 2 (A534-A535). Fourth, the incident report ***prepared by the Appellant*** establishes that the tie wire was the cause of the fall. Pl. Ex. 10 (A536).

Fifth, and most importantly, Appellant's representative, Robert Hinderliter, testified that Appellant conducted an independent investigation that involved visiting the site, observing the

area in question, reviewing information provided by J.E. Richards employees, and all other steps that Appellant thought necessary to investigate this incident. Trial Tr. Day I, 109-110:11-1 (A228-A229). Kendall Romrell confirmed this and testified that he had taken measurements of the scene. Trial Tr. Day II, 122:10-19 (A417). Based on this investigation, which goes far beyond Appellant's assertion that it merely relied on the word of Mr. Witkowski's employer, J.E. Richards, Appellant itself concluded that the only possible explanation of this incident was that the tie wire caused Mr. Witkowski's fall. That report is part of evidence on which the jury based its conclusion. *See* Trial Tr. Day I, 111:7-23 (A230).

This evidence unarguably created a factual issue as to whether or not Mt Witkowski's fall was caused by the tie wire. This factual issue was properly submitted to the jury and resolved in favor of Mr. Witkowski.

It was not Mr. Witkowski's burden to prove beyond a reasonable doubt that he fell over the tie wire in question. Rather, Mr. Witkowski had to introduce enough evidence that a reasonable juror could conclude that he was injured due to Appellant's negligence. This case bears striking similarities to *Rich v. D.C.*, 410 A.2d 528 (D.C. 1979). In that matter, the plaintiff tripped and fell on a sidewalk that the District was responsible for maintaining. Though the plaintiff "did not see what caused her to fall," *id.* at 530, the Court of Appeals reversed the trial Court's grant of a Motion Notwithstanding the Verdict. *See generally, id.* It specifically held that:

> The [trial] court granted the motion for a judgment notwithstanding the verdict because appellant had not established conclusively that one of the holes on the corner was the hole into which she stepped. However, such a quantum of proof is not necessary. Appellant need only have adduced evidence from which a jury reasonably could ***infer*** that one of the holes in the brick sidewalk was the cause of her fall.

Id. at 533. The Court of Appeals held that because the *Rich* plaintiff testified she tripped in the approximate location of a tripping hazard in a way that was consistent with tripping over that

hazard, that was sufficient evidence to send the case to the jury. In other words, the area in which the *Rich* plaintiff referred to in her testimony was readily understandable. Further, the plaintiff's evidence, which included testimony from the plaintiff and a witness familiar with the area, was taken in conjunction with photographs admitted into evidence and allowed the jury to answer a question of fact. *Id*. The jury used this evidence, giving it the weight and credibility they deemed appropriate, and concluding that the tripping hazard at issue was the cause of the plaintiff's fall.

In Mr. Witkowski's case, Appellant had the opportunity to test whether the evidence was consistent with Mr. Witkowski tripping over the tie wire in question. Appellant's employees went to the site, examined it, took measurements, and took photos. Trial Tr. Day II, 118:10-18 (A413); 122:10-19 (A417). They nonetheless concluded that Mr. Witkowski's fall was consistent with tripping over the tie wire. Mr. Witkowski testified he tripped in the same approximate location as the tie wire. Appellant confirmed through its investigation that the fall was consistent with the tie wire causing Mr. Witkowski to fall. Trial Tr. Day I, 112 (A231); 113:1-3 (A232). This testimony in conjunction with the testimony of Mr. Witkowski and Mr. Sames and the photos of the area that were in evidence, provided a more than adequate basis, both direct and circumstantial, on which to find in Mr. Witkowski's favor. The verdict shows that after considering the evidence, the jury found that it was more likely than not that Mr. Witkowski's injuries were proximately caused by Appellant's negligence.

Mr. Witkowski's situation is also analogous to that in *District of Columbia v. Cooper*. In *Cooper*, Ms. Cooper ("plaintiff") arrived at the Lorton Reformatory to visit an inmate. There, the plaintiff was walking along a brick walkway when she "left level ground and went to unlevel ground" resulting in a fall on a portion of the walkway where bricks had been removed and replaced with sand. *District of Columbia v. Cooper*, 445 A.2d 652, 653 (1982). Plaintiff saw no

signs warning of the irregularity, nor was she given a verbal warning. Even though the plaintiff was unsure of the exact difference in elevation between the bricks and the sand, she was positive that the sand base was lower than the bricks. *Id.* at 654. At trial, the jail sergeant who processed plaintiff that evening testified that even though he did not see her fall, he noticed that plaintiff walked with a noticeable gait when he saw her again that evening. *Id.* at 654-55.

In Mr. Witkowski's case, the exact same evidence that this Court found was adequate to create a jury question in *Cooper* was presented. Mr. Witkowski fell where there were no warnings of the tie wire's presence of any kind. *Id.*, at 108:12-17 (A227). Mr. Witkowski's fall occurred on the only avenue where the port-a-potty could be accessed. *Id.*, at 152:4-6 (A271). The tie wire was on that avenue. During trial, Mr. Witkowski had the burden of establishing that a breach of duty to use ordinary care in keeping the work site. Mr. Witkowski had the burden of proving that the tie wire was the proximate cause of his fall and resultant injuries. Mr. Witkowski did not and does not contend that the mere happening of his accident satisfied his burden of proof. *Cooper*, 445 A.2d at 655. This burden was successfully met at trial because Mr. Witkowski proved that Appellant's employees and agents knew that the tie wire was a hazard because Kendall Romrell believed caution tape was necessary where the tie wire was located. Since there were no warnings of any kind, the standard of care was violated. This is true since there was only one path to access the port-a-potty. No other hazards were present in the area where Mr. Witkowski fell. The investigation revealed no other hazards at the site of the fall. This is evidence upon which this jury reasonably concluded that the tie wire caused Mr. Witkowski's fall and resulting injuries.

Similarly, in *Cooper* the plaintiff's only avenue to reach the inmate she was visiting was the brick walkway. The sergeant did not notice any gait when he admitted the plaintiff in the visitor's center, but noticed an unusual gait later that evening. The question of whether the

walkway was reasonably safe was one for the jury to answer. *Id.* at 655. Given the condition of the walkway, the jury in *Cooper* reasonably determined that the unlevel walkway was the proximate cause of plaintiff's injuries. *Id.* at 653. Virtually identical evidence exists in Mr. Witkowski's case. The question of whether the pathway to the port-a-potty was reasonably safe was a proper question for the jury to decide. More importantly, there is ample evidence in the record to support the jury's verdict. In denying the appellant in *Cooper*'s motion for judgment notwithstanding the verdict, the Court reasoned that "only in extreme instances where no reasonable person could reach a verdict in favor of the plaintiff on the evidence presented, should a directed verdict be granted." *Cooper*, 445 A.2d at 655 (quoting *Proctor v. District of Columbia*, D.C.App., 273A.2d 656, 659 (1971). The *Cooper* Court further elaborated that "jurors are the triers of fact and where there is evidence upon which reasonable persons might differ as to negligence and other elements of liability, those questions must be decided by the jury." *Id.* (quoting *Shewmaker v. Capital Transit Co.*, 143 F.2d 142, 143 (1944). The circumstances in Mr. Witkowski's case are no different than *Cooper* in ruling that sufficient evidence exists to support the jury's verdict.

Appellant contends that "Plaintiff does not know what caused him to trip and fall. [Mr. Witkowski] testified during his deposition and trial that he does not know what caused him to trip and fall. The sole witness to the accident thus acknowledged that he does not know what caused the fall." Appellant br. 2. Appellant further argues that they "inspected the scene but did not identify any physical evidence identifying where Plaintiff fell or what caused him to fall". *Id.* at 2-3. Appellant thus reaches the conclusion that "[N]either [Mr. Witkowski] nor his supervisor actually knew what caused Plaintiff to fall" and therefore Mr. Witkowski was unable to prove that the tie wire caused the fall. *Id.* at 3. This places the incorrect burden on Mr. Witkowski, arguing

that physical evidence is required in order to satisfy the elements of negligence. In reality, "[w]here there are no eyewitnesses to an accident and the cause thereof cannot be established by direct proof, then the facts which can be established circumstantially may justify an inference by the jury that negligent conditions produced the injury." *Speights v. 800 Water Street, Inc.*, 4 A.3d 471, 475 (2010) (quoting *McCoy v. Quadrangle Development Corp.*; 470 A.2d 1256, 1259 (1983). "[A] plaintiff may meet his burden by offering either direct or circumstantial evidence." *District of Columbia v. Zukerberg*, 880 A.2d 276, 281 (2005). As referenced numerous times above, ample circumstantial evidence exists throughout the record to allow the jury to reach the conclusion that Appellant was negligent on November 19, 2015.

Appellant's further attempts after the fact to contradict its own report to the federal government are meritless. For example, Appellant argues that Mr. Witkowski told Dr. Fechter that he tripped on concrete, and thus must have fallen somewhere else. However, when Mr. Witkowski testified that he fell in the area of the tie wire, but Dr. Fechter testified that Mr. Witkowski's report to him was inconsistent with that account, that created a factual issue for the jury to weigh. Dep. Tr. 39:18-21 (A109). It did not create a basis for a ruling as a matter of law. Likewise, Appellant contends that because Mr. Witkowski says he was soaked after his fall, he must be lying. This contention is based on the fact that photos taken at least a day later by Appellant do not reflect any standing water on the ground. Trial Tr. Day II, 56:21-4 (A351-A352). This ignores any number of reasonable explanations for why water present on one day may be gone the next, such as evaporation or water infiltration into the ground. "If it is possible to derive conflicting inferences from the evidence, the trial judge should allow the case to go to the jury." *King v. Pagliaro Bros. Stone Co*., 703 A.2d 1232 (1997); *see Shannon & Luchs Co. v. Tindal*, 415 A.2d 805, 807 (D.C. 1980). Taking this case law into account, Appellant continues to ignore the fact that it is at the

jury's discretion to credit certain parts of Mr. Witkowski's testimony and not others. In effect, the jury could find that Mr. Witkowski remembered the broad strokes of his fall, but discount his recollection of the details of a fall that occurred six and a half years before trial.

Likewise, Mr. Witkowski admitted that he did not see the tie wire even though he went back the way he came. This is not inconsistent with other evidence adduced at trial which showed that the tie wire was practically invisible and easy to miss. Trail Tr. Day II, 63:8-10 (A358). Mr. Romrell testified that he believed that the tie wire should be flagged with caution tape to make it more visible, but testified that he did not bring any with him when he was tying off the wire. *Id.*, at 113:4-7 (A408). Moreover, if the wire was not present at the time of Mr. Witkowski's fall, that information would have been in Appellant's possession and could have been included in its report. Appellant could have noted in its report to the federal government that Mr. Witkowski's account was not possible because the tie wire was not up at the time of his fall. Appellant did not do so, which is evidence that the tie wire was present at the time of Mr. Witkowski's fall, and that Appellant believed that it was sufficient tripping hazard to not be seen by an average employee going about their business. "A directed verdict is proper only if there is no evidentiary foundation, including all rational inferences from the evidence, by which a reasonable juror could find for the party opposing the motion, considering all the evidence in the light most favorable to that party." *King*, 703 A.2d at 1234; *Pazmino v. WMATA*, 638 A.2d 677, 678 (D.C. 1994).

As a result, the jury's verdict is supported by evidence in the record and must not be disturbed.

V. CONCLUSION

Mr. Witkowski presented substantial circumstantial evidence that he tripped over the tie wire. The Trial Court did not err in denying Gilbane's Motions for Summary Judgment, Directed

Verdict, and Judgment as a Matter of Law because substantial evidence exists in the record to support the jury's conclusion that the tie wire, with no warnings accompanying it, proximately caused Mr. Witkowski's work injuries. Gilbane's repetitive attempts to fault Mr. Witkowski for allegedly "not paying attention to what was on the ground as he approached the dumpster" does not outweigh the circumstantial evidence presented to the jury. Because of Gilbane's numerous attempts to avoid liability and escape the jury's decision, the Final Order of the Superior Court of the District of Columbia should not be reversed.

Respectfully submitted,

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XI. CERTIFICATE OF SERVICE

I, Monique L. Lee, hereby certify that on September 13, 2023, I emailed/mailed a copy of the foregoing Brief to the following individuals:

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Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Monique L. Lee	22-cv-975
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