DOCKET NO.: KNL-CV22-6055542-S **SUPERIOR COURT**

PAMELA CHENEY **J.D. OF NEW LONDON**

V. **AT NEW LONDON**

613 LLC **JUNE 7, 2024**

MEMORANDUM OF DECISION

The plaintiff, Pamela Cheney, claims that while exiting her apartment building, she tripped over a wire, causing her to fall down an exterior wooden set of stairs, thereby causing her injuries. The defendant, 613, LLC, denies liability and asserts several special defenses including statute of limitations, comparative negligence, assumption of risk, and third-party negligence. A court trial was held on July 21, 2023; November 14, 2023; and November 15, 2023. Closing arguments were held on February 23, 2024. At the court trial, both parties submitted exhibits and witness testimony. The court has reviewed the evidence.

Facts

The plaintiff rented an apartment at 282-286 Central Avenue in Norwich in 2019. She moved out in 2020. At all relevant times, the property was owned by the defendant. On February 10, 2020, while it was dark outside, the plaintiff was bringing her dogs outside when she fell down three outdoor steps. The plaintiff had been outside on that day two times before she fell. When the plaintiff lived at the property, she would tie her dogs' leashes up to the outside railing.

The plaintiff reported to the emergency room at 9:39 p.m. where she reported that she tripped falling down three outdoor steps and felt a pop in the left ankle. The plaintiff was

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diagnosed with a left ankle sprain. The hospital provided the plaintiff with a boot and crutches and sent her home.

On October 15, 2019, the plaintiff underwent a spinal fusion. The plaintiff had nerve pain from nerve damage in her feet and numbness in her feet that would come and go. On February 10, 2020, she was in pain from the screws and incision from the surgery. She does not recall if she had numbness in her feet on February 10, 2020.

The plaintiff testified that after the incident on February 10, 2020, she can no longer wear high heels or high-top sneakers. The court observed the plaintiff wearing high-top sneakers during the trial.

Daniel Coley, the Building Official from the City of Norwich, testified at the trial. Coley was periodically at the property over the years. Coley never saw a wire sitting across any of the steps. Coley never received a complaint about a wire. The building inspector from the City of Norwich inspected the plaintiff's unit on February 7, 2020. There was no mention of a wire in the report from February 7, 2020.

The property owner, Gary Faiman, purchased the apartment building in 2014. Faiman is the sole member of the defendant LLC. From September 2019 through February 10, 2020, Faiman never saw a wire detached from the building and never saw a wire lying on the deck or on the ground. Faiman was at the property a couple times a week. The plaintiff never complained to Faiman about a wire.

Shawn Butler was the supervisor for the property at all relevant times. In February 2020, Butler exited the building at least once a day using the outside stairs where the plaintiff

fell. Butler never saw a wire on the deck. The plaintiff never complained to Butler about a wire on the deck. At some point, Faiman contacted Butler after the plaintiff's incident and told Butler something about a wire. At his lunch break, Butler tucked the wire into the crack between the deck and the door. He did not see the wire lying on the deck when he left for work that morning. Butler observed the plaintiff at least two times per week after the incident and he never saw her limping. He only saw her wearing the boot that she was prescribed one time.

After the February 10, 2020 incident, the plaintiff saw Butler at a gas station. The plaintiff made the comment to Butler that she was suing Faiman and that Butler should "fall in line." The plaintiff also said that it would be worth his while for Butler to testify at the trial.

Analysis

It is well established that "[i]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence . . . Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom." (Internal quotation marks omitted.) *State v. Lawrence,* 282 Conn. 141, 155, 920 A.2d 236 (2007); see also *Dadio v. Dadio,* 123 Conn. 88, 92–93, 192 A. 557 (1937). Such observation may include all genuine and spontaneous reactions of the witness in the courtroom, whether or not on the stand, but only to the extent that they bear on the witness's credibility.

See *State v. McLaughlin,* 126 Conn. 257, 264–65, 10 A.2d 758 (1939). It is generally inappropriate for the trier [of fact] to assess the witness's credibility without having watched the witness testify under oath. *Shelton v. Statewide Grievance Committee,* 277 Conn. 99, 111, 890 A.2d 104 (2006).

"It is well established that in cases tried before courts, trial judges are the sole arbiters of the credibility of witnesses and it is they who determine the weight to be given specific testimony . . . It is the quintessential function of the fact finder to reject or accept certain evidence . . . ." (citations omitted; internal quotation marks omitted.) *In re Antonio M.,* 56 Conn. App. 534, 540, 744 A.2d 915 (2000). The trier of fact must evaluate the credibility of both testimonial and documentary evidence. See *Coombs v. Phillips,* 5 Conn. App. 626, 627, 501 A.2d 395 (1985) (per curiam). "The fact-finding function is vested in the trial court with its unique opportunity to view the evidence presented in a totality of the circumstances, i.e., including its observations of the demeanor and conduct of the witnesses and parties." (Internal quotation marks omitted.) *Cavoli v. DeSimone,* 88 Conn. App. 638, 646, 870 A.2d 1147, cert. denied, 274 Conn. 906 (2005). "It is well established that [t]he trier of fact may accept or reject the testimony of any witness . . . The trier can, as well, decide what—all, none, or some—of a witness' testimony to accept or reject." (Citation omitted; internal quotation marks omitted.) *Wilson v. Hryniewicz,* 51 Conn. App. 627, 633, 724 A.2d 531, cert. denied, 248 Conn. 904, 731 A.2d 310 (1999).

The burden of proof is on the plaintiff to prove all of the essential allegations of its complaint and on the defendant to prove all of the essential elements of its affirmative defenses.

See *Lukas v. New Haven,* 184 Conn. 205, 211, 439 A.2d 949 (1981). "The general burden of proof in civil actions is on the plaintiff, who must prove all the essential elements of [its] cause of action by a fair preponderance of the evidence." *Gulyez v. Stop and Shop,* 29 Conn. App. 519, 523, cert. denied, 224 Conn. 923, 618 A.2d 529 (1992). Failure to do so results in judgment for the defendant. *Id.* In Connecticut, "[a] special defense is an affirmative defense that must be proven by the defendant." (Internal quotation marks omitted.) *Caciapoli v. Lebowitz,* Superior Court, judicial district of New Haven, Docket No. CV08-5020658 (March 4, 2010, *Berdon, J.T.R.*). Like the plaintiff, the defendant must prove all of the essential elements of its affirmative defense by a fair preponderance of the evidence.

The ordinary civil standard of proof is the fair preponderance of the evidence standard. *Freeman v. Alamo Management Co.,* 221 Conn. 674, 678, 607 A.2d 370 (1992). "The burden of persuasion in an ordinary civil action is sustained if evidence induces in the mind of the trier a reasonable belief that it is more probable than otherwise that the fact in issue is true." (Internal quotation marks omitted.) *Lopinto v. Haines,* 185 Conn. 527, 533, 441 A.2d 151 (1981). The standard of proof, a fair preponderance of the evidence, is "properly defined as the better evidence, the evidence having the greater weight, the more convincing force in your mind." (Internal quotation marks omitted.) *Cross v. Huttenlocher,* 185 Conn. 390, 394, 440 A.2d 952 (1981).

"The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury." *RK Constructors, Inc. v. Fusco Corp.,* 231 Conn. 381, 384, 650 A.2d 153 (1994). "The existence of a duty is a question of law and only if

such a duty is found to exist does the trier of fact then determine whether the defendant violated that duty in the particular situation at hand . . . We have stated that the test for the existence of a legal duty of care entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case ... The first part of the test invokes the question of foreseeability, and the second part invokes the question of policy." (Internal quotation marks omitted.) *Neuhaus v. DeCholnoky,* 280 Conn. 190, 217–18, 905 A.2d 1135 (2006).

"In premises liability, [t]he law is clear that [a] possessor of land has a duty to an invitee to reasonably inspect and maintain the premises in order to render them reasonably safe . . . In addition, the possessor of land must warn an invitee of dangers that the invitee could not reasonably be expected to discover." (Citations omitted; internal quotation marks omitted.) *Sweeney v. Friends of Hammonasset,* 140 Conn. App. 40, 48, 58 A.3d 293 (2013). Our Supreme Court has made it clear that in a premises liability case, "the dispositive issue in deciding whether a duty exists is whether the [defendant] ... ha[d] any right to possession and control of the property." (Emphasis added.) *LaFlamme v. Dallessio,* 261 Conn. 247, 252, 802 A.2d 63 (2002).

"The word control has no legal or technical meaning distinct from that given in its popular acceptation . . . and refers to the power or authority to manage, superintend, direct or

oversee . . . [T]he question of whether a defendant maintains control over property sufficient to subject [her] to . . . liability normally is a . . . question [of fact] . . . Where the evidence is such that the minds of fair and reasonable persons could reach . . . different conclusions on the question [of control], then the issue should properly go to the [trier of fact] for its determination . . . [I]n order to prevail . . . on the theory of premises liability, the plaintiff [i]s required to plead and to prove that [the defendant] . . . was in possession and control of the premises at the time [the plaintiff was injured] . . . ." (Citations omitted; emphasis added; internal quotation marks omitted.) *Alfano v. Randy's Wooster Street Pizza Shop II, Inc.,* 90 Conn. App. 766, 773–74, 881 A.2d 379 (2005).

Here, there is no dispute that the defendant exercised control over the front exterior steps.

"In the case of a negligence action grounded upon a theory of premises liability, the nature of the duty owed to a plaintiff depends upon the plaintiff's status on the premises at the time of the alleged injury. See *Morin v. Bell Court Condominium Ass'n, Inc.,* 223 Conn. 323, 327, 612 A.2d 1197 (1992)." *Pinto v. King,* Superior Court, judicial district of Fairfield at Bridgeport, Docket No. CV16–6054517–S, (April 25, 2017, *Krumeich, J.*). "The status of an entrant on another's land, be it trespasser, licensee or invitee, determines the duty that is owed to the entrant while he or she is on a landowner's property." *Salaman v. City of Waterbury*, 246 Conn. 298, 304–05, 717 A.2d 161, 164 (1998).

"A possessor of land owes the highest duty to an invitee." *Buttrick v. Wilson,* Superior Court, judicial district of New Haven, Docket No. CV09-5026936 (April 17, 2012, *Wilson, J.*).

"A possessor of land has a duty to an invitee to reasonably inspect and maintain the premises in order to render them reasonably safe . . . In addition, the possessor of land must warn an invitee of dangers that the invitee could not reasonably be expected to discover." (Citations omitted; internal quotation marks omitted.) *McDermott v. Calvary Baptist Church,* 68 Conn. App. 284, 294, 791 A.2d 602 (2002), aff'd, 263 Conn. 378, 819 A.2d 795 (2003).

The plaintiff was an invitee at the time of her fall. The evidence is clear that the plaintiff was legally on the premises as an invitee.

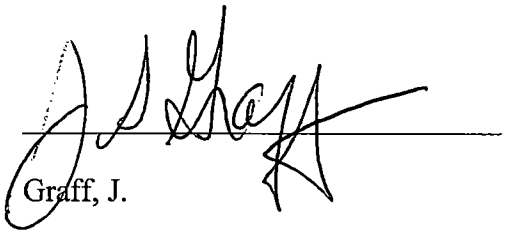
Under the theory of premises liability to an invitee for a defective condition upon the land, "the plaintiff must prove (1) the existence of a defect, (2) that the defendant knew or in the exercise of reasonable care should have known about the defect, and (3) that such defect had existed for such a length of time that the [defendant] should, in the exercise of reasonable care, have discovered it in time to remedy it ." (Internal quotation marks omitted.) *Martin v. Stop & Shop Cos.,* 70 Conn. App. 250, 251, 796 A.2d 1277 (2002). "[F]or the plaintiff to recover for breach of duty owed to him as a business invitee, it is incumbent upon him to allege and prove that the defendant either had actual notice of the presence of the specific unsafe condition which occasioned the injury and not merely of conditions naturally productive of that defect even though subsequently in fact producing it." *Mott v. Wal–Mart Stores, L.P.,* 139 Conn. App. 618, 627, 57 A.3d 391 (2012).

In order to prove that the defendant had actual notice, the plaintiff must establish that the defendant actually knew of the unsafe condition long enough before the plaintiff's injury to have taken steps to correct the condition or to take other suitable precautions. See *Zarembski v.*

Three Lakes, Park, Inc., 177 Conn. 603, 419 A.2d 339 (1979). If the condition is one that was created by the defendant (or one of the defendant's employees), then that constitutes actual notice. See *id.*; *Tuite v. Stop & Shop Cos.*, 45 Conn. App. 305, 308 (1997). "A plaintiff can demonstrate that a defendant had actual notice of an unsafe condition by, for example, demonstrating that the condition was create by the defendant's employee; see *Zarembski v. Three Lakes Park, Inc.*, 177 Conn. 603, 607, 419 A.2d 339 (1979); or by presenting evidence that an employee, operating within the scope of his authority, observed the dangerous condition and either was charged with maintaining the area or was charged with a duty to report the unsafe condition. See *Derby v. Connecticut Light & Power Co.*, 167 Conn. 136, 141–42, 355 A.2d 244 (1974), cert. denied, 421 U.S. 931, 95 S. Ct. 1659, 44 L.Ed.2d 88 (1975)." *Hellamns v. Yale–New Haven Hosp., Inc.*, 147 Conn. App. 405, 412, 82 A.3d 677 (2013). "To establish constructive notice, [t]he controlling question . . . is whether the condition existed for such a length of time that the defendants should, in the exercise of reasonable care, have discovered it in time to remedy it. . . . What constitutes a reasonable length of time is largely a question of fact to be determined in light of the particular circumstances of the case." (Internal quotation marks omitted). Id. While circumstantial evidence can establish constructive notice, a plaintiff's assertion that an employee walked past the defect, absent evidence that the employee actually saw the defect, is insufficient. See *Gulycz v. Stop & Shop Cos.*, 29 Conn. App. 519, 522, 615 A.2d 1087 (1992) (evidence insufficient to establish constructive notice when evidence established that plaintiff saw defect but failed to establish that defendant's employees saw defect prior to plaintiff's injury).

The plaintiff failed to carry her burden of proof and establish that the defendant had notice of the wire. Butler testified credibly that he walked out of the same doorway and down the same stairs at least once a day during the time period leading up to the plaintiff's fall. Butler testified credibly that at no time prior to the plaintiff's fall did he see the wire on the deck or stairs. Likewise, Faiman testified credibly that he never had actual or constructive notice of the wire being on the deck or stairs. The court credits both Butler's and Faiman's testimony. Comparatively, although the plaintiff testified that she complained to Butler and Faiman about the wire prior to her fall, the court does not find the plaintiff to be credible. After weighing the evidence, the court finds that the defendant did not have actual notice or constructive notice of the claimed defect.

Accordingly, the plaintiff has failed to carry her burden of proof on her negligence claim. The court enters judgment in favor of the defendant.



Graff, J.