

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 2013-2934 B

_____)
PLAINTIFF ERICKSON)
)
Plaintiff,)
)
v.)
)
ROSALIE A. CUNIO,)
JASON J. CUNIO,)
AND CHRISTOPHER J. CUNIO)
)
Defendants.)
_____)

JOINT PRE-TRIAL MEMORANDUM

I. AGREED UPON FACTS

1. On February 21, 2013, the Defendants Rosalie A. Cunio, Jason J. Cunio, and Christopher J. Cunio each own an undivided one-third interest as tenants-in-common of the property located at 40-42 Fuller Road, Watertown, Massachusetts.

2. 40-42 Fuller Road is a two-unit rental property owned by the Cunios.

3. On or about September 1, 2007, the Plaintiff, Plaintiff Erickson, rented the second floor unit of 40 Fuller Road, Watertown, Massachusetts from the Defendants.

4. On February 21, 2013, Plaintiff, Plaintiff Erickson was a tenant of 40 Fuller Road, Watertown, Massachusetts.

5. On or about August 26, 2011, Defendant Rosalie Cunio received notice that the drain in the driveway was a problem.

II. STATEMENTS OF THE EVIDENCE

The evidence will show that Defendants, the Cunios (hereafter “Defendants” or “Defendants”), have owned multiple rental properties and were experienced in managing rental properties. Most relevant here, Defendants own a two-family house located at 40-42 Fuller Rd. (“property”) in Watertown, Massachusetts. Defendants knew that the property’s driveway had a long, steep, downward slope from the elevated street. At the bottom of the property’s driveway, there is a drain, the property’s two car garage, and a water faucet attached to the outside of the garage. Defendants knew that the driveway’s pitch directed all water to the drain. Defendants put two (2) sump pumps in the basement because the property had a high water table and the basement took on a lot of water.

At all relevant times, Defendants lease both units of the property. Defendants rent the downstairs unit (42 Fuller) to a single mother (Laurie Phoenix) and her children. Defendants rent the property’s upstairs unit (40 Fuller) to a couple, Plaintiff Erickson (“Plaintiff”) and Leigh Dalton. During the tenancy, Defendants retained responsibility for maintaining the common areas and for paying all the property’s water usage charges.

On or before August, 2011, Defendants learned that the drain at the bottom of the driveway accumulated water and did not drain well. Specifically, Defendants received photos showing water backed up from the drain and onto the driveway. Such back up from the drain occurred regularly. The drain is located in the driveway, a common area, and is positioned at or near the

only means of egress to/from the garage (no internal entrance to building) and the egress to/from the back entrance to the building. Nevertheless, Defendants waited one (1) year to address the defective drain. Defendants admits the drywell needed to be fixed before winter.

In August, 2012, Defendants hired a landscaper and asphalt contractor (“Carbone”) to address the property’s drain problem. When Carbone dug up the old drain, he noticed that there was a broken clay pipe attached to it. Carbone advised Defendants that the safer fix was to run underground piping to direct water away from the driveway drain (lowest point) to an exit point somewhere away from the problem area. Nevertheless, Defendants rejected the safer fix and chose only to remove the pre-existing small drain and replace it with a bigger drain.

Only a few weeks after Carbone changed the drain, on or about September 5, 2012, Defendants received notice from tenant Dalton that the work did not fix the drainage problem. Notwithstanding such notice, Defendants left the drain, as is, and NEVER asked Carbone to re-evaluate the new drain.

Before winter 2012-2013, Defendants also did not fix and/or make safe several conditions in the common areas of the property. For example, Defendants left downspouts unconnected and did not winterize the property.

In early February, 2013, there was a significant snow fall on the property. Weeks after the snow accumulated, the snow started to melt on the sidewalks, on the property’s roof, on the property and on the driveway. During this time, there was also rainfall together with the run off of melting snow that moved toward the drain.

During the day, on February 21, 2013, the outside faucet at 40-42 Fuller Rd. started spraying water. At such time, there was already water backed up at the drain and the defective

drain could not manage the combination of the water from the ground (high water table), from the melting snow, from the downspouts and from the water faucet.

At 6:30 p.m. on February 21, 2013, Plaintiff arrived home and pulled her car into the driveway. Plaintiff noticed that the water faucet appeared to have burst at the connector and was spraying water on the driveway. Plaintiff exited her car near the drain, took several steps and slipped and fell on ice.

Premises safety expert Tiberi will testify that at all relevant times on February 21, 2013 the defective drain contributed to a backup of water that formed a layer of ice, where Plaintiff slipped and fell. When Plaintiff fell, she suffered serious and permanent injuries.

After the fall, neighbor Jason Corsino came to help plaintiff. Amongst other things, Corsino turned off the water supply from inside the property.

The foreseeably dangerous conditions against which Defendant should have made reasonable efforts to protect plaintiff occurred months, if not years before the February 21, 2013 day of the fall. Evidence will show that Defendants chose not to maintain the common areas of 40-42 Fuller Rd. and means of egress for plaintiff in a reasonably safe condition in view of all the circumstances. First, Defendants chose not to fix and make safe before winter a known dangerous condition on her property's common area (i.e. driveway drywell did not drain properly). Significantly, the Defendants chose not to fix a defective drain positioned in the only means of egress to/from the garage and to/from the back entrance to the building. Second, Defendants left the exterior water faucets, pipe and pipe connections in a foreseeably dangerous condition before winter by choosing neither to shut off the water supply nor drain the exterior pipes and pipe connections by the driveway.

These dangerous conditions caused and/or contributed to plaintiff's fall. For example, when the faucet starts spraying water from the connector to the hose, the defective drain contributed to the backup of water that formed a layer of ice, where Plaintiff slipped and fell suffering serious injury. Moreover, but for Defendant's failure to winterize the property, the water trapped in the faucet, connector and hose never would have burst the line and started spraying on the driveway.

Furthermore, evidence will show that Defendants violated the warranty of habitability by leaving the driveway drainage system in such a defective and dangerous condition for three reasons. First, the violation related to the maintenance and repair of the driveway. Second, the driveway was vital to Plaintiff's use of the property; and third, the drainage issues in the driveway posed a significant defect in the property.

The evidence will show that as a result of the fall, Plaintiff suffered serious and permanent injuries to her knee, was scarred, suffered physical and mental pain and suffering, suffered emotional distress and anxiety, incurred significant costs and medical bills, lost time from her usual employ and was otherwise harmed.

The evidence will show that the Cunios violated the consumer protection statute, Massachusetts General Laws, Chapter 93A.

Plaintiff incorporates by reference all facts otherwise included in the motion for summary judgment, the Court's denial of said motion and the M.G.L. Ch. 93A demand letter.

2. Defendants' Statement of the Evidence

The defendants collectively deny that they were negligent in their maintenance, care, and control of the property at issue. The defendants further maintain that the alleged drainage issues at the subject property did not contribute to the occurrence of the plaintiff's accident. More

specifically, a photograph of standing water over the drain at issue was taken after a hurricane, and the plaintiff conceded at her deposition that the condition shown in that photograph never existed during the winter time.

It appears that the cause of the plaintiff's fall has nothing to do with drainage at the subject property. The evidence in this case will be that the plaintiff left her home in the early morning of February 21, 2013. At that time, her car was in the driveway. The plaintiff approached her vehicle by descending the driveway at issue and had no problems of any kind either in her footing or backing her vehicle out of the driveway. The driveway at that time appeared to be clear. The plaintiff had no concerns for her safety at that time as she left the property.

At some point on February 21, 2013, the exterior hose on the property began spraying or misting a fine amount of water. This was a condition observed by neighbor, Jason Corsino, who attempted to alert the plaintiff about the condition, but the plaintiff's roommate, Leigh Dalton, refused to answer the door. When the plaintiff arrived home later that evening, she had no problems entering the driveway at issue. She was able to park her car without any problem. Upon alighting from her car, the plaintiff observed some misting of water coming from the hose. As she approached the hose in order to turn off the water, she slipped and fell, causing injury to her leg.

The first person to help the plaintiff after her fall was the neighbor, Jason Corsino. His testimony is expected to be that the area where the plaintiff fell was not saturated in water, and

his feet did not get wet. On the contrary, the area had, at most, black ice. The defendants maintain that the generation of the black ice was something that happened without notice to the defendants and about which condition the defendants had no knowledge. It appears from the timeline offered by the plaintiff and Jason Corsino that the development of the black ice happened within a matter of hours before the plaintiff fell down.

The suggestion that the accumulation of melting snow, runoff from the house, or any other source played a role in this accident, is misplaced. It is clear from the testimony of both the plaintiff and Jason Corsino as to how the accident happened, and it amounts to a condition for which the defendants had no notice and no liability.

III. AGREED UPON STATEMENT OF THE CASE

Plaintiff alleges that the Defendant property owners, did not maintain 40-42 Fuller Road in Watertown, Massachusetts in a safe and habitable condition. Plaintiff alleges that Defendants were negligent and breached the warranty of habitability and as a result, plaintiff, a tenant of 40-42 Fuller Road suffered damages including, but not limited to, a right medial tibial plateau fracture requiring surgery. Defendants deny that they were negligent and deny that they breached the warranty of habitability. Defendants also dispute the extent of Plaintiff's damages.

IV. STATEMENT OF SIGNIFICANT LEGAL ISSUES

1. Plaintiff

Plaintiff intends to seek the Court's permission to perform attorney conducted panel voir dire of the jury venire, in addition to any and all voir dire conducted by the Court. Plaintiff's

motion for attorney conducted panel voir dire will be served upon all parties pursuant to Superior Court Rule 9A and Standing Order 1-15.

Plaintiff further reserves the right to file Motions in Limine to address various evidentiary issues at a time directed by the Court.

2. Defendants

The defendants adopt the plaintiff's position with respect to the request for attorney conducted voir dire. Similar to the plaintiff's position, the defendants expect to file motions in limine on evidentiary issues, including photographs taken of the property which the plaintiff acknowledges did not fairly represent the condition of the property at the time of her accident.

V. WITNESS LISTS

For plaintiff:

- 1.) Catherine Erickson
- 2.) Leigh Dalton - 911 Station Circle Dedham, MA 02026
- 3.) Rosalie Cunio
- 4.) Jason Cunio
- 5.) Christopher Cunio
- 6.) Richard Carbone
- 7.) Jason Corsino
- 8.) Gary Rizzuto
- 9.) Laurie Phoenix
- 10.) Frank Rizzo
- 11.) Representative or KOR of Pave Tech
- 12.) John "Jack" Brady – Charlottesville, VA (colleague/athlete)
- 13.) Molly Brady – see (12)
- 14.) Tramaine Shaw – 11 Overlook Ridge Dr., #340 Revere (colleague)
- 15.) Matt Lonoga – 22 Robbins Rd. Watertown (colleague)
- 16.) Sandra Menee 33 Grantley St. Hyde Park (colleague)
- 17.) Peter Roby – 573 Centre St. Newton (colleague)
- 18.) Cindy White – 10 Cardinal Dr. Franklin (colleague)
- 19.) Jason Saretsky – 65 N. Harvard Boston (colleague)
- 20.) Kim Visco – 25 Monroe St. Norwood, MA 02062 (friend)

- 21.) Chris Visco (see 20)
- 22.) Mary Visco 155 Adams St. Newton, MA (friend)
- 23.) Leigh Seaman – Knoxville, TX (friend)
- 24.) Karen Shotwell – Knoxville, TN (teammate)
- 25.) Wesley Shotwell - (see 24)
- 26.) Stacie Waters Holiday and Steve Cox, FL (family of Leigh Dalton)
- 27.) Cheryl McKendry - Knoxville, TN (friend)
- 28.) Harlis Meadors - Durham, NC (Coach)
- 29.) Nicole Genard - 61 Paul Bunker Dr. Taunton, MA (athlete)
- 30.) Gary Geissler - 1 Lowell St., Lexington, MA (colleague)
- 31.) Tommy Stewart - Holyoke, MA (official)
- 32.) David Wilbur - 11 Tucker Rd. Charlton, MA (colleague)
- 33.) Leonardo Monterio - Brazil (friend)
- 34.) Sundee Vance - Las Vegas, NV (friend)
- 35.) Bill Walker - Baton Rouge, LA (friend)
- 36.) Jim Mora - Baton Rouge, LA (friend)
- 37.) Brian Fetzer – Virginia (colleague)
- 38.) Jason and Jessica Knowles – Veinna, VA (cousin)
- 39.) Chris Bryce – S. Grafton, MA (athlete)
- 40.) Chris Bullock (trainer)
- 41.) Heidi Zwart (nutritionist)
- 42.) Amy Gozstyla – Wallingford, CT (colleague)
- 43.) Deborah Erickson – Stillwater, MN (mother)
- 44.) David Erickson – Brooklyn Park, MN (father)
- 45.) Melissa Haase – Stillwater, MN (sister)
- 46.) Aaron Haase – Stillwater, MN (brother in law)
- 47.) Jackson Haase – Stillwater, MN (nephew)
- 48.) Treating Providers and/or Keeper of Records of:
 - a. Mount Auburn Hospital, 330 Mt. Auburn St., Cambridge, MA;
 - b. Mount Auburn Radiology, 330 Mt. Auburn St., Cambridge, MA;
 - c. Mount Auburn Prof. Services, 330 Mt. Auburn St., Cambridge, MA; –
 - d. Dr. John Ritter
 - e. Visiting Nurses Association;
 - f. Pros Sports Therapy
 - g. Harvard Vanguard Medical Gropu (Dr. Krieger)
 - h. Dr. Anne Cole, psychologist
 - i. Dr. Blyth, (surgeon) Harvard Vanguard Concord, MA
- 49.) Experts listed below
- 50.) Any witness called by the Defendants not otherwise listed above;
- 51.) Any and all rebuttal witnesses;
- 52.) Plaintiff reserves the right to supplement this list timely.

For Defendants:

The defendants do not anticipate calling any witnesses other than those listed by the plaintiff and the defendant reserves the right to call any witness listed by the plaintiff who does not testify at the plaintiff's request. The defendants also reserve the right to call any rebuttal witnesses, too.

VI. EXPERT WITNESSES

For the plaintiff:

1. Premises Safety Engineering Expert
Ronald Tiberi, PE
FSL Associates
385 Chestnut Hill Ave
Boston, MA 02135
617-232-0001

Please see Exhibit 1 attached hereto and incorporated herein.

Plaintiff reserves the right to supplement this disclosure.

2. Premises Safety Expert
Peter F. DePesa, CBO
P.F. DePesa & Associates
P.O. Box 1606
Andover, MA 01810
781-799-9746

Please see Exhibit 2 attached hereto and incorporated herein.

Plaintiff reserves the right to supplement this disclosure.

3. Orthopedic Surgeon and Medical Expert
John Ritter, M.D.
Boston Orthopaedic & Sports Medicine
33 Lantern Lane
Weston, MA 02493

John S. Ritter, M.D, (hereinafter "Dr. Ritter") is a board certified orthopedic surgeon with hospital appointments at Caritas St. Elizabeth Medical Center of Boston, MA; Edith Nourse Rogers Memorial Veterans Hospital of Bedford, MA; and Mount Auburn Hospital of

Cambridge, MA. Dr. Ritter will testify as to his education, training, and experience evaluating, diagnosing, and providing treatment for complications, conditions, and/or diseases of the musculoskeletal system, including, but not limited to, the injuries, complicating medical conditions, treatment, and prognosis as they relate to the Plaintiff. Dr. Ritter incorporates by reference here his curriculum vitae.

Dr. Ritter is expected to provide expert testimony and/or conclusions regarding (1) relevant medical terminology and/or conditions relating to the Plaintiff, her injuries, treatment, and present and future prognosis; (2) the mechanism of harm, specifically, how Plaintiff's slip and fall resulted in a right medial tibial plateau fracture with depression and comminution; (3) how Plaintiff's injury from the fall resulted in the need for significant surgical intervention; (4) how Plaintiff's injuries from the slip and fall resulted in the need for prolonged rehabilitation; (5) Plaintiff's current and future medical status; and (6) Plaintiff's foreseeable treatment requirements regarding this fall-related injury.

Dr. Ritter is expected to testify regarding the injuries suffered by the Plaintiff on or about February 21, 2013 and subsequent treatment rendered thereto. Dr. Ritter is further expected to testify regarding the course of treatment received following the subject incident. Dr. Ritter will describe the extent and degree of Plaintiff's tibial plateau fracture and further explain the medical significance thereof. Dr. Ritter will testify as to future function/limitations/prognosis.

Dr. Ritter will then describe and explain the medical significance of fractures in the weight-bearing surface of the knee. Dr. Ritter will describe and explain the treatment of the Plaintiff and the requirement for ongoing monitoring of the Plaintiff's symptoms.

Dr. Ritter is expected to testify regarding his own personal evaluation and his treatment of the Plaintiff from the time of her initial evaluation through the present. Dr. Ritter will testify

that he first encountered the Plaintiff on or about February 21, 2013. Dr. Ritter concluded that the fracture was depressed and comminuted, in other words, in multiple pieces. Dr. Ritter will testify that at that time, the fracture that Ms. Erickson sustained was severe and required operative fixation with bone graft and a medial Synthes plate. Dr. Ritter will describe and explain the surgical and medical significance of Plaintiff's subsequent treatment, pain, and lifestyle restrictions. Dr. Ritter will describe and explain the mechanism by which the collision caused the Plaintiff's tibial plateau fracture. Dr. Ritter will describe and explain the treatment options for the Plaintiff's tibial plateau fracture. Dr. Ritter will describe and explain the likelihood of an accelerated progression of arthritis. Dr. Ritter will describe and explain the Plaintiff's likely need for a future knee replacement. Dr. Ritter will describe and explain the Plaintiff's future function/limitations/prognosis with regard to her knee.

Dr. Ritter will testify that he continues to serve as the Plaintiff's treating orthopedic physician.

Dr. Ritter will testify consistent with the Plaintiff's treatment records and narrative reports, including but not limited to his report dated August 13, 2015. All such records and reports are incorporated by reference herein.

Dr. Ritter's testimony will be based upon his education, training and experience as an orthopedic surgeon accustomed to evaluating and treating conditions related to the musculoskeletal system. Dr. Ritter's testimony will be further based upon review of Plaintiff's relevant medical records, including, but not limited to records from Mt. Auburn Hospital, Pro Sports Physical Therapy, Harvard Vanguard, Dr. David Krieger and VNACare Network & Hospice. Moreover, Dr. Ritter's testimony will be based upon her first-hand knowledge and experience as Plaintiff's treating orthopedic surgeon.

Dr. Ritter reserves the right to supplement this opinion because treatment and monitoring remain ongoing. Plaintiff incorporates by reference all Dr. Ritter's treating records regarding Plaintiff.

**4. Meteorology and Weather Expert Robert Gilman
15 Summit Avenue
Hull, MA 02045
781-925-2210**

Robert Gilman, is a meteorologist with 36+ years experience, whose clients include the Town of Watertown for whom he provided weather reports during 2013. Gilman will testify as to his education, training, and experience evaluating, analyzing and predicting weather conditions, including, but not limited to, snow accumulation and snow melting/settling and/or compressing. Gilman incorporates by reference here his curriculum vitae.

Gilman reviewed the Certified Weather Statement and photographs provided during discovery.

Gilman will testify about his education, training and experience as a meteorologist. Further, he will testify regarding weather conditions for the vicinity of Watertown, Massachusetts on February 21, 2013 and relevant days preceding and after the day of the fall including, but not limited to, September 3, 2012 through September 5, 2012, February 8, 2013 through February 24, 2013, March 7, 2013 through March 9, 2013 and March 18, 2013 through March 20, 2013. Moreover, he will testify regarding rain and snow falls during the relevant days; he will testify regarding accumulations of rain and snow, snow depths as well as melting of snow during those relevant times; he will testify regarding the affects that weather patterns have on snow melt and precipitation; he will testify regarding the mechanism of ice formations, freezing of snow, water and/or rain. His testimony will be based on his education, training and

experience, his evaluation of weather data collected from a network of weather observers in the greater Boston area and the Certified Weather Statement attached as an exhibit.

Plaintiff incorporates by reference his signed disclosure, the June, 2015 Affidavit of Robert Gilman and the Certified Weather Statement accumulated by Gilman, which is also attached hereto as Exhibit 4.

Gilman reserves the right to rebut any testimony provided by witnesses for the Defendants.

For the Defendant

The defendant does not anticipate calling any expert witnesses. The defendant reserves the right to do so, however, with respect to rebuttal witnesses.

VII. ESTIMATED LENGTH OF TRIAL

The parties estimate a trial of 10 half days.

VIII. ITEMIZED SPECIAL / LIQUIDATED DAMAGES

Medications (CVS and Harvard Vanguard) TBD

Medical Supplies – Belmont Supply Store (3/23/13 - \$200.71)

Substitute Transportation – Uber (April – June \$1,371)

Laundry Expenses – Watertwon Laundry (May – Dec. \$1,023.75)

Cleaning Expenses (\$160)

Boston Sports Club (Jun – Dec. \$818.12)

Date	Provider	Billed
02/21/13-5/30/13	Mount Auburn Hospital	\$26225.17
02/21/13-02/27/13	Mount Auburn Professional	\$293
02/21/13	Mount Auburn Hospital	
02/21/13	Mount Auburn Hospital	
02/21/13	Macro Inc.	\$33
02/22/13	Mount Auburn Hospital	
02/23/13	Mount Auburn Hospital	\$1412.00
02/23/13	Mount Auburn Hospital	
02/23/13	Anesthesia Associates	\$2520
02/23/13-01/15/15	Boston Orthopaedic & Sports Medicine	\$3337
02/27/13	Mount Auburn Hospital	
02/27/13	Associated Surgeon	\$300
02/27/13-09/27/13	Denmarks Inc.	\$592.43
02/27/13	Mount Auburn Hospital	
02/21/13 – 03/04/13	Mount Auburn Hospital	
03/04/13	Mount Auburn Hospital	
03/16/13	Mt. Auburn	
03/16/2013	Mount Auburn Hospital Radiology	
03/25/13-10/01/13	Harvard Vanguard	\$3134.00
03/25/13	Harvard Vanguard	
03/28/13	Mt Auburn	
03/05/13-05/31/13	VNACare Network & Hospice	\$6474.25
04/12/13	VNA	
04/17/13	VNA	

Date	Provider	Billed
04/23/13	VNA	
4/25/13	Mt. Auburn	
04/25/13	Mt. Auburn	
4/26/13	VNA	
5/30/13	Mt Auburn	
5/30/13	Mt Auburn	
05/31/13	VNA	
06/21/13	Harvard Vanguard	
06/21/13	Harvard Vanguard	
07/11/13	Harvard Vanguard	
07/23/13- 11/20/13	ProSports	Bills from 11/20/13- 5/14/15 = \$2005
07/18/13	Mt. Auburn	
07/23/13	ProSports	
08/12/2013	ProSports	
08/22/13	Mt. Auburn	
09/25/13	Harvard Vanguard	
10/3/13	Mt. Auburn Hospital	
10/07/13	ProSports	
11/07/13		
11/20/13	ProSports	
12/12/13	Mt. Auburn Hospital	
02/27/14	BOSM	
01/15/15	BOSM	
2/17/17	Dr. Blyth (HVMA Concord)	

Treatment remains ongoing. Outstanding bills and records will be supplemented upon receipt. Plaintiff reserves the right to supplement these itemizations.

IX. SETTLEMENT DISCUSSION CERTIFICATION

Counsel and the parties certify that they have discussed settlement and the possibility of alternative dispute resolution, and that counsel has explained such options to their respective client or client's insurer.

By Defendants

By Plaintiff

Thomas W. Beliveau, Esq. (548001)
Fuller Rosenberg, Palmer &
Beliveau
339 Main St.
Worcester, MA 01608
(508)751-5121
tbeliveau@frpb.com

Marc Diller, Esquire (644997)
DILLER LAW, P.C.,
15 Court Sq., Ste. 800
Boston, MA 02108
(617) 523-7771
marc@dillerlaw.com

Richard M. Mucci (662998)
Law Offices of Richard Mucci
63 Shore Rd., Ste. 23
Winchester, MA 01890
(781)729-3999
Rich@Muccilegal.com