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In the Wake of 'Shields': Broader Implications for Decision on Commercial Landlord Liability

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The Supreme Court of New Jersey recently revisited an oft-contested issue in the area of premises liability: whether a commercial landlord owes a duty to its tenant's business invitees to maintain the premises, under a triple net lease, where the tenant is in exclusive possession of the demised premises. *See Shields v. Ramslee Motors* (A-53-18) (081969). The court offered some clarity on this issue, but the decision ultimately leaves many questions unanswered and calls into doubt the continued viability of prior case law.

In *Shields*, the plaintiff was delivering a letter to Ramslee Motors, a used car dealership. This rendered the plaintiff a business invitee of the tenant. He slipped and fell on snow and ice on the driveway of the demised premises, sustaining bodily injuries. Plaintiff settled with the tenant and proceeded with his claims against the commercial landlord.

The court analyzed two key provisions in the lease between Ramslee Motors and the landlord—a "triple net" lease, which is generally defined as a lease in which a commercial tenant is responsible for "maintaining the premises and for paying all utilities, taxes, and other charges associated with the property." *N.J. Indus. Props. v. Y.C. & V.L.*, 100 N.J. 432, 434 (1985). Pursuant to Section 3:04 of the lease, the tenant agreed to accept the premises "AS IS" and was solely responsible for maintenance and repair as if it were the de facto owner. Under Section 11:03, the landlord retained the right to enter the premises in the event of an emergency and to make repairs that were reasonably necessary for the safety and prevention of injury.

Factually, it was undisputed that the tenant was responsible for snow and ice removal at the property. The tenant maintained equipment on the premises to perform this responsibility and cleared the driveway on the evening of the accident. On that basis, the trial court granted summary judgment in favor of the landlord, finding that responsibility for snow and ice removal was not only a delegable duty but unequivocally the tenant's responsibility under the lease. The Appellate Division reversed, holding that the removal of snow and ice is a non-delegable duty that cannot be allocated to a tenant via a lease or contract.

The Supreme Court granted the landlord's petition for certification to address two issues: (1) whether the removal of snow and ice is a non-delegable duty imposed upon commercial landlords, generally; and (2) and whether it was reasonable to impose such a duty under the circumstances presented in this matter. The landlord contended that the lease unequivocally placed this responsibility upon the tenant, and that the non-delegable duty requiring landlords to maintain public sidewalks abutting their property did not extend to the driveway. In response, the injured plaintiff contended that the lease was ambiguous as to who was responsible for snow and ice removal and that the four-factor test set forth in *Hopkins v. Fox & Lazo Relators*, 132 N.J. 426 (1993) warranted the imposition of a duty of care.

The Supreme Court reversed the Appellate Division and declined to impose a duty upon the landlord under the present circumstances. The court first applied the classic "control-based" liability approach in performing its analysis. This approach, which is reflected in the Restatement (Second) of Torts, holds that a landlord is responsible for maintaining those parts of a rental property over which it retains control. This factor militated against imposition of a duty on the landlord, as the tenant exclusively controlled the driveway where the plaintiff fell. (The location of the driveway was of particular importance to the court's analysis, as it was separated by a gate and not readily accessible by the public. Rather, it was in the tenant's exclusive possession.)

Notably, the court disagreed with the Appellate Division's reliance on *Vasquez v. Mansol Realty Associates,* 280 N.J. Super. 234, 238 (App. Div. 1995), for the proposition that the driveway at issue was indistinguishable from a public sidewalk, over which a landlord retains a non-delegable duty. The court also found that the lease unambiguously placed the burden of removing snow and ice on the tenant, refusing to equate the landlord's right to enter with a covenant to make repairs.

The court's application of the so-called "*Hopkins factors*"—the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution—yielded the same conclusion. The court found that: (i) there was no relationship between the plaintiff and the landlord; (ii) the hazard of winter weather was transient, even if foreseeable; (iii) it would be impractical to require the landlord to prevent harm to a tenant's business invitees due to a transient condition of the property without maintaining a presence on the property; and (iv) there was no public policy implication because the plaintiff could still recover from the tenant. In sum, the Supreme Court found that fundamental fairness dictated that only the entity with control over the property should be held liable in these circumstances.

The most obvious unanswered question in the wake of *Shields* is what impact this decision has on existing case law addressing the duty, if any, of a commercial landlord. On the one hand, this decision may be read to shield a landlord from any tort liability to a tenant's business invitee for a dangerous condition where the tenant remains in exclusive possession of the property. There are, unquestionably, passages within the opinion that seem to speak to a broader holding applying to "static" dangerous conditions and focus on the relinquishment of control rather than the condition itself. On the other hand, *Shields* could be interpreted as consistent with the (fact-sensitive) cases that have imposed a duty on a landlord for injures to a tenant's business invitees in spite of a triple net lease and the tenant's exclusive control of the premises.

For example, in *Geringer v. Hartz Mountain Development*, 388 N.J. Super. 392 (App. Div. 2006), the relationship between the commercial tenant and developer/land owner was governed by a triple net lease that required the tenant to repair and maintain the entire demised premises. The plaintiff was injured when she fell on the interior stairway and subsequently filed a personal injury action against the tenant and landlord. However, per the terms of the lease, the developer retained the authority to review and sign-off on the plans to build the new stairway and, in fact, did so. The Appellate Division held that the plaintiff could maintain a claim against the developer for negligently designing the

stairway, because the developer was intimately involved with its construction. *See also Soriano v. 70 Hudson St. Realty*, No. A-0490-17T3, 2019 N.J. Super. Unpub. LEXIS 442, at *21 (App. Div. Feb. 27, 2019) ("As we recognized in *Geringer*, a triple net lease agreement does not relieve the landlord from liability when the provisions of the lease require the landlord's approval in the design and construction process.")

When reviewing the majority opinion, a narrower interpretation seems more likely. The *Shields* court largely focused its analysis on the nature of the condition and its location on the property. As stated by the court, "although hazards posed by winter weather are generally readily foreseeable, they are also transient. It would not be fair to place responsibility for removal of snow and ice on a commercial landlord that lacks control over the property." The majority also noted that the accident occurred in a private driveway that was within a portion of the property in the tenant's exclusive possession. Thus, the most logical interpretation is that *Shields* does not provide an all-encompassing rule providing immunity to absentee landlords under a triple net lease. Instead, *Shields* is a common-sense based ruling reminding lower courts of the need to perform an extensive, fact-sensitive analysis in determining whether to impose a duty on commercial landlords. In other words, a landlord who is heavily involved in the design of a portion of the demised premises that is accessible to the public likely will not avoid a claim arising out of such design.

If there is any ambiguity in this decision, it concerns the proper approach in dealing with static conditions, and particularly those "created" by the landlord prior to the lease. It is unclear whether the majority would have reached the same conclusion if the condition was static, such as uneven concrete on the driveway, which may have existed for years and of which the landlord arguably had notice. Courts have recognized actual or constructive knowledge of a dangerous condition that pre-existed the lease and was "created" by the landlord as one of the situations where a landlord is not absolved from liability. *See, e.g. Winkler v. Motter*, 310 N.J. Super. 393 (1997). Furthermore, most of the cases finding no duty on a commercial landlord for a static condition involved injuries to a tenant's employees, not a business invitee/patron. *See, e.g., Geringer, supra; McBride v. Port Auth. of N.Y. & N.J., 295 N.J.* Super. 521 (App. Div. 1996).

Justice Albin's partial concurrence in *Shields* touched on some of these issues. While Justice Albin agreed that the landlord had no duty under the facts in this case, he refused to agree with "any pronouncement that absolves the landlord of the duty to make reasonable efforts to repair a dangerous condition on the property when the landlord knows or should know of the danger, when the landlord retains authority to remove the danger and when the tenant fails to make the necessary repairs." The opinion actually emphasized the word "transient" in italics. Justice Albin also noted that under the lease the landlord retained the unqualified right to enter the property to make safety repairs, arguing that this provision amounted to the landlord *not* ceding exclusive control of the property to the tenant. On these facts, though, Justice Albin agreed with the majority's conclusion that the landlord should bear no liability for plaintiff's injuries. As new cases present new facts, counsel litigating injury claims against landlords and tenants in exclusive possession of the premises would be well-advised to familiarize themselves with Shields and the appellate precedent that it may or may not have overturned.

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