

<http://www.sclawyersweekly.com>



Store Manager Wins Premises Liability Claim Over Trip, Fall On Sidewalk Metal Rod Protruded Above Pavement Level



Denton



Berry

The manager of a Bluffton outlet store has won a nearly \$3.6 million verdict after she tripped and fell over a metal rod that stuck out more than five inches above the shopping center's sidewalk.

The plaintiff brought a premises liability action against the owner and management company of Hilton Head Factory Stores II for the back, neck and shoulder injuries that she suffered in the fall.

The plaintiff contended that the accident was caused by an electrical grounding rod that protruded 5.5 inches above the sidewalk surface and was located 17 inches out from the center's exterior wall. The plaintiff said she stumbled over the rod while pushing a cartload of cardboard to a Dumpster behind the building at dusk.

"This rod was right in the middle of the sidewalk that the employees used to take trash and boxes from the back of the store to a box-crusher out back," said the plaintiff's lawyer, Daniel R. Denton of Beaufort. Hilton Head Island attorney David H. Berry also represented the plaintiff.

The mall's owners and management company negligently failed to inspect the property and remedy the hazard, the plaintiff contended.

The injuries rendered the then 34-year-old plaintiff permanently and totally disabled, Denton said.

On Nov. 22, a Beaufort county jury awarded the plaintiff \$5,981,690. That amount was cut to \$3,589,014 based on a finding of 40 percent comparative negligence on the plaintiff's part.

The sum is believed to be one of the largest personal injury recoveries ever in Beaufort and perhaps the largest slip-and-fall verdict statewide, according to Denton.

"Defendants shouldn't take premises liability cases for granted in South Carolina," Berry told Lawyers Weekly. "Our law still provides reasonable safeguards for people who are lawfully on property and expecting the property to be made safe for their use."

The defendants' attorney, Thomas C. Cofield of Lexington, said that his clients have filed an appeal.

The case is *Margaret O'Leary-Payne v. R.R. Hilton Head II, Inc. and Charter Oak Group, Ltd.* (Beaufort County Civil Action

No. 01-CP-07-0146). Judge James Lockemy presided at trial.

Facts

The plaintiff was the manager of a Lillian Vernon shop located at Hilton Head Factory Stores II when the accident happened on April 2, 1998. The shopping center had been open for only about eight months.

"There was a grounding rod that was left in the sidewalk after construction was completed," Denton told Lawyers Weekly. "It was supposed to have been made flush with the sidewalk according to the electrical code."

Unlike other grounding rods at the site, the one the plaintiff tripped over was left sticking up above the surface of the sidewalk. "The contractors really just left it the wrong way, but the owner and management company took it over in that condition," Denton said.

The plaintiff testified that she had walked past the rod between 50 and 100 times, but never noticed it. Agents of the center's owner and management company also said they were unaware of the rod, according to the case report.

"They admitted that their duty of inspection was to remove dangers that are hazardous," Denton said. "It was kind of tough for them to blame her for being negligent if they never saw it themselves — and they had the duty."

The plaintiff suffered disc herniations and a rotator cuff tear in the fall. Her injuries triggered chronic neck pain and right arm pain and numbness, according to the report.

She underwent several surgeries, which provided only minimal relief. Ultimately she had an internal morphine pump installed, Denton said. The plaintiff's doctors and a vocational expert opined that she was permanently and totally disabled.

Her pre-trial medical expenses totaled \$429,086 and a life care planner estimated her future medicals at over \$3.5 million. An economist expert calculated the plaintiff's total economic loss, past and future, at nearly \$5.6 million.

Contractors' Liability

The defendants claimed that the general contractor and the subs that built the shopping center were liable because they failed to make the rod flush with the sidewalk. The defendants' third-party indemnity claims were severed from the plaintiff's case and were scheduled for a later trial date.

During discovery, the plaintiff's attorneys filed a motion in limine to exclude evidence about the various contractors' potential liability. The motion also sought to exclude testimony that the county building inspectors told the contractors to leave the rod exposed — a claim the inspectors disputed.



The plaintiff in *O'Leary-Payne v. R.R. Hilton Head II* claimed that her fall was caused by a 5.5-inch electrical grounding rod (bottom left) that was left standing in the sidewalk of the shopping center where she worked.

constitute a defense to the [defendants'] separate liability as far as their duty to inspect and maintain the property and remove hazardous conditions.

"That red herring defense didn't come in," Denton said.

Inexpensive Fix

A key element of the plaintiff's case was the ease and low cost that remedying the hazard would have involved, according to Berry.

"I think the jury clearly understood that it wouldn't have been any difficult at all for the property owner, exercising diligence, to have made it much, much safer if not perfectly safe," he said.

Berry used props in the courtroom to demonstrate how the defendants could have utilized common items — like an orange cone, a "wet floor" sign or an exposed trash can — to draw pedestrians' attention to the exposed rod.

He also argued that the cost to actually fix the problem and remove the excess rod would have been low compared to the risk it posed.

Prior Surgery, Later Accidents

The defendants contended that much of the plaintiff's medical problems could be traced to a prior neck injury and three auto accidents she was involved in after the shopping center fall.

"Obviously, we were concerned that they had all that ammunition to throw at us about the subsequent auto accidents and pre-existing neck problem. But the way the medical evidence came in, it was convincing that those did not create any new injuries," Denton said.

"She had fully recovered from that first problem with her neck in '94 and there wasn't any evidence of any problems after the recovery period. The auto accidents were all minor — there was no medical evidence to suggest that she had any new injuries from those auto accidents," he said.

Said Berry, "What we were able to do was effectively box in the major surgical procedures between the time of the fall-down and before the first car wreck. All of the action really took place between the fall-down and the first car wreck."

According to the case report, the defendants never requested an independent medical exam to dispute the testimony of the plaintiff's physicians.

"We were surprised that if that was their defense, why didn't they get their own medical testimony to support that?" Denton said.

The only defense witness called at trial, according to the case report, was a safety engineer who testified that it was physically impossible for the accident to have occurred the way the plaintiff said it did.

Plaintiff's Status

The issue of the plaintiff's status in the premises liability case — invitee or licensee — was settled through pre-trial admissions, Denton said. There is a higher duty owed to invitees than to licensees.

"There's no specific case law in South Carolina on that, but other cases have ruled that an employee is an invitee just like a customer," he said.

According to Berry, "Under South Carolina law, as an employee of a tenant in a business property, she is granted the status of an invitee as opposed to a licensee. She's there as part of a process which confers a mutual benefit upon both the property owner and the tenant."

The defendants agreed with that position in their admissions, according to the case report.

"It was the relationship between the property owner's duty vis-à-vis the invitee and then the duty to take due regard for one's own personal safety," Berry said.

Store Manager Wins Premises Liability Suit After Tripping On Grounding Rod Metal Pipe Protruded More Than 5 Inches Above Shopping Center's Sidewalk

\$5,981,690 Verdict

Trip/fall; Premises liability.

Principal injuries (in order of severity): Two ruptured discs and shoulder injuries (RCT), requiring surgeries.

Special damages: From date of injury (April 2, 1998) to trial date (Nov. 15, 2004): Medical expenses: \$429,086; lost income: \$285,620. Total economic loss, past and future, was calculated by plaintiff's economic expert at \$5,597,917.

Tried or Settled: Tried

County where tried or settled: Beaufort

Case Name and Number: *O'Leary-Payne v.*

RR Hilton Head, II, Inc. and Charter Oak Group, Ltd., Case No. 01-CP-07-0146

Date Concluded: Nov. 22, 2004

Name of Judge: Hon. James Lockemy

Amount: \$3,589,014 (reduced 40 percent from \$5,981,690)

Insurance Carrier: N/A

Expert Witnesses & Areas of Expertise: Perry Woodside, PhD,

economist, Charleston; Jean Hutchinson, vocational consultant, Charleston; Karen Shelton, life care planner, Mt. Pleasant; George Warner, MD, neurologist, Hilton Head Island; Philip Zitello, MD, pain management.

Attorneys for plaintiff: David H. Berry, Hilton Head Island and Daniel R. Denton, Beaufort.

