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On January 30, 2009 at approximately 12:00 pm, plaintiff, Nancy McNeely, was picking up her children in the parking lot of St. Albert the Great School in Huntingdon Valley, Pennsylvania. There had been a snowfall two days earlier. McNeely, 35 years old at the time of the incident, alleged that she slipped and fell on ice in the parking lot of St. Albert's. She sustained a significant injury to her knee which required a surgical procedure. McNeely filed suit against St. Albert the Great Church, the Archdiocese of Philadelphia and our client, Sutton Landscaping, Inc., in the Court of Common Pleas for Philadelphia County.

Sutton Landscaping, Inc. had a verbal agreement and a proposal, which included services and costs for snow removal with St. Albert the Great. Pursuant to the agreement, Sutton Landscaping, Inc. was called by St. Albert's when needed, to perform specific duties relating to initial snow removal. There was no written contract for snow and ice removal.

Liability was contested by all defendants. We argued that Sutton Landscaping, Inc. was not responsible for any follow-up or subsequent snow or ice treatment after the performance of initial snow removal. Sutton was told specifically by the church's maintenance staff how and where to perform the snow removal. At the time of the alleged fall, St. Albert had its own maintenance staff consisting of a maintenance supervisor

and two employees. The church owned its own snow plow, shovels, and salt spreaders. St. Albert took care of any and all follow-up snow removal after an initial snow removal was performed by Sutton Landscaping, Inc.

Sutton Landscaping, Inc. was on the premises on January 28, 2009, approximately two days prior to the alleged incident. They performed an initial snow clearing which was approved by St. Albert's maintenance staff. Sutton Landscaping, Inc. was never called back to the site between January 28, 2009 and the date of the alleged incident.

Based on all of the foregoing, we argued that St. Albert's retained control of the property at all times and was responsible for maintaining the premises in a safe condition. Sutton Landscaping, Inc. had not been called to the site on the date of the incident and therefore, had no responsibilities on that date.

On cross examination, the principal and a teacher at St. Albert admitted that Sutton Landscaping, Inc., had always performed its work in a reasonable and proper manner and the school had no complaints about the work. On direct examination, Michael Sutton, the owner and operator of Sutton Landscaping, Inc. testified, using blow-up photographs of the scene, how he had plowed the snow away from the area where plaintiff had fallen and salted the entire area in accordance with his verbal agreement with St. Albert's.

Based upon the cross examination of the principal and the teacher and the direct examination of the insured, the jury found in favor of Sutton Landscaping, Inc. and against St. Albert the Great Church and the Archdiocese of Philadelphia. Plaintiff was awarded damages of $160,000.

John H. McCarthy is a partner and member of the Executive Committee of RAWLE & HENDERSON. He serves as the Firm's Recruiting Chairman. John graduated from Pennsylvania State University in 1979. He received his Juris Doctor, *cum laude*, from Villanova University in 1982.

John concentrates his practice in the areas of premises liability, construction litigation and motor vehicle litigation. He has been rated AV by Martindale-Hubbell. He has repeatedly been recognized by the publishers of Philadelphia Magazine as a Pennsylvania Super Lawyer since the program's inception.

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Suzanne Curran Murphy concentrates her practice in the areas of premises liability, construction litigation and school bus/commercial motor vehicle litigation.

Suzanne received her Bachelor of Arts degree from Loyola College in 1989 and a Juris Doctorate from Widener University School of Law in 1993.

She is admitted to practice in the state courts of Pennsylvania and New Jersey as well as the United States District Court for the District of New Jersey and the United States District Court for the Eastern District of Pennsylvania.

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Credibility

Stephen A. Sheinen

On March 12, 2009, at approximately 4:00 p.m., 73-year-old Rita Miller claimed that she fell down a staircase in the Northeast Philadelphia home that her son, James, and daughter-in-law, Robin, rented from defendants, James and Edward Heuser. Mrs. Miller, who had been living in the house since November, 2008, claimed that she lost her balance when the cane she was using to assist her in descending the steps became lodged in an opening in frayed carpeting on the riser above the first step on the staircase. No one other than plaintiff was in the house at the time of the fall.

Plaintiff was treated in the emergency room at Holy Redeemer Hospital. X-rays revealed a fracture of the cervical spine and pelvis. Plaintiff was transferred to Thomas Jefferson University Hospital that day. She was hospitalized at TJUH until March 19, 2009 when she was transferred to Holy Redeemer as a patient in the facility's rehabilitation center. On March 26, 2009, plaintiff was transferred from Holy Redeemer to St. Joseph Manor where she remained until April 9, 2009.

Prior to the March 12th accident, plaintiff had bilateral knee and hip replacements as well as two lumbar surgeries at the same levels of her spine. At the time of the accident, she was also admittedly suffering from fibromyalgia, Sjogren's syndrome (an autoimmune disorder that plaintiff acknowledged caused her to experience nerve pain all over her body) and rheumatoid arthritis. Plaintiff received an injection in her right hip weeks before the accident and 12 injections in her lumbar and cervical spine during the two year period before the March 12th accident. According to the emergency room records, plaintiff was taking Valium, Oxycontin, and Percocet for pain relief at the time of the accident.

Plaintiff filed a lawsuit in the Philadelphia County Court of Common Pleas. Following the completion of discovery, the parties agreed to a "high-low" arbitration with a high of $300,000. Pursuant to the agreement of the parties, plaintiff would be entitled to recover a minimum of $50,000 regardless of the outcome of the arbitration hearing.

Plaintiff had initially demanded $500,000 to settle this case. Plaintiff's theory of liability was that the absence of a handrail on the staircase constituted a violation of the City's Property Maintenance Code and was negligence per se. This was the opinion of plaintiff's liability expert, Julius Perreira, III.

We retained Daniel M. Honig, P.E. as our liability expert. It was his contention that the staircase was "grandfathered" and was not required to be code compliant since the property was constructed in 1942. Honig also stated that given the narrow width of the staircase, it would have been practically impossible to install a handrail. He added that the installation of a

handrail under the circumstances would have actually violated the Philadelphia Building Code.

Plaintiff's medical expert, Randy C. Robinson, M.D., an anesthesiologist, opined that plaintiff's pre-existing musculoskeletal problems involving her hip and low back were aggravated by the March 12, 2009 accident. Dr. Robinson also causally related plaintiff's cervical and pelvic fractures to the accident. Our medical expert, Stuart L. Gordon, M.D., an orthopedic surgeon, opined that plaintiff's hip and low back conditions were not causally related to the accident. Dr. Gordon did not dispute the causal relationship between plaintiff's cervical and pelvic fractures and the March 12, 2009 accident.

The case proceeded to arbitration on December 1, 2010, before Thomas Rutter, Esquire, a well-respected former judge. The arbitration lasted approximately nine and a half hours. Our primary argument was that plaintiff, whose credibility was highly questionable, was the only one who knew how the accident occurred. During the lengthy arbitration hearing, we impeached plaintiff numerous times about misrepresentations of her prior medical history. We also focused on the fact that plaintiff had ascended and descended the staircase on a daily basis for approximately four months without a problem and that the accident would not have occurred had she herself not been negligent.

We noted that plaintiff had never provided defendant with notice of the defective condition that allegedly caused plaintiff's cane to become lodged in the carpeting on the staircase. Furthermore, Honig explained that it would have been practically impossible for plaintiff's cane to have become lodged in the location in which she claimed it was stuck. Finally, we noted that plaintiff told the emergency room personnel at Holy Redeemer Hospital that she had fainted, which was completely inconsistent with her current version of the accident.

The arbitrator found that plaintiff had failed to provide defendant with notice of the allegedly defective condition. He also found that it was highly unlikely for the accident to have occurred in the manner in which plaintiff claimed it did. Accordingly, he issued a defense award.

This proved to be a case where one consideration stood out above all the rest, namely, plaintiff's credibility. The two liability experts testified live. The parties submitted the reports from their medical experts. Plaintiff elicited testimony from three fact witnesses. We presented the testimony of three fact witnesses. Yet the overriding concern of the arbitrator was plaintiff's credibility and, in this case, the lack thereof.

Stephen A. Sheinen concentrates his practice in the areas of general casualty defense litigation, including premises, construction and product liability matters.

Stephen graduated from Temple University with a Bachelor of Arts degree in 1981 and received his Juris Doctor, *magna cum laude*, from Nova Southeastern University Law School in 1991. He is admitted to practice in the state and federal courts of Pennsylvania and New Jersey.

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