

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

KIRK HAMEL,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civ. No. 02-214-P-H
	)	
INTERNATIONAL PAPER	)	
COMPANY,	)	
	)	
Defendant	)	

**RECOMMENDED DECISION AND ORDER**

Kirk Hamel is suing International Paper Company as a result of personal injuries he allegedly sustained when pieces of ice or snow fell from a roof structure on International Paper’s premises in the Town of Jay, Maine. Hamel was on the premises as an employee of BE&K Industrial Services, which had a contract with International Paper to perform certain work on the premises. Hamel alleges that International Paper negligently owned, operated, managed, and maintained its premises by allowing ice to accumulate and then fall into the area where he was working. This matter is before the court on International Paper’s Motion for Summary Judgment on all counts (Docket No. 9) and its Motion to Strike Plaintiff’s Sur-Reply to Statement of Facts (Docket No. 27).<sup>1</sup> Also pending before the court is Kirk Hamel’s Motion to Strike Certain Statements of Fact (Docket No. 14) and Motion to Strike the Affidavit of Kevin Perry (Docket No. 16). I now recommend that the court **DENY** the motion for summary judgment. I also **DENY** the pending motions to strike.

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<sup>1</sup> In a July 2, 2003 Order I granted “so much of Docket Number 27 as relates to [a] motion to exclude experts.” This Order disposes of the remaining issue presented by Docket Number 27.

## Summary Judgment Facts

The following facts are drawn from the parties' Local Rule 56 statements of material facts to the extent that they are material to the legal issues presented in the summary judgment motion. International Paper operates its Androscoggin Paper Mill ("the Mill") in Jay, Maine. (Defendant's Stmt. of Mat. Facts, Docket No.10, ¶ 1.) BE&K Industrial Services contracted with International Paper to provide certain maintenance and repair services at the Mill, including repairs on supports for an overhead sludge conveyor. (Docket No.10, ¶¶ 2, 45; Plaintiff's Stmt. of Mat. Facts, Docket No. 13, ¶ 1.) International Paper supplied BE&K with a pre-bid package that specified International Paper would provide a safe work site. (Docket No. 13, ¶ 12.)<sup>2</sup> The contract between International Paper and BE&K provided that BE&K would perform all work under the contract in a safe manner and that BE&K would follow all applicable rules and regulations for the protection of its workers and the public. (Docket No. 10, ¶¶ 4, 6-8.)<sup>3</sup> The conveyor is located in what International Paper designates as Wood Preparation Area Two. (Docket No. 13, ¶ 3.) The conveyor is constructed with a sloped roof. (Id., ¶ 6.) BE&K's onsite superintendent and safety manager were aware that the elevated, sloped roof presented a potential hazard in the winter, due to falling ice and/or snow. (Docket No. 10, ¶¶ 50, 51.) So, too, was International Paper. (Docket No. 13, ¶¶ 35, 36.) On the evening of January 21, 2002, approximately three to five inches of snow fell in the area of the Mill, including on the conveyor roof. (Docket No. 10, ¶ 56; Docket No. 13, ¶ 5.) In addition to this accumulation, it might also be inferred that a quantity of packed snow or ice already existed on the roof because pieces of

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<sup>2</sup> This statement of fact is objected to by International Paper as, among other things, inadmissible hearsay. The record reflects that BE&K's superintendent received pre-bid packages from International Paper personnel indicating that International Paper would provide a safe worksite for the successful bidder. In my view, the superintendent's assertion is not hearsay because it fits the definition of an "admission by party-opponent" found in Rule 801(d)(2) of the Federal Rules of Evidence.

<sup>3</sup> Hamel has moved to strike this statement on the ground that the supporting affidavit does not authenticate the contract. I deny this motion herein.

debris observed on the ground the next day appeared to conform to the shape of the corrugated roof. (Docket No. 13, ¶¶ 9, 10; Defendant's Reply to Plaintiff's Stmt. of Mat. Facts, Docket No. 20, ¶ 10.) Although International Paper has procedures for the identification and regular removal of overhead hazards, including snow and ice hazards, these procedures are not followed in Wood Preparation Area Two because it is an area that is not open to general pedestrian traffic. (Docket No. 10, ¶¶ 25, 26, 42; Docket No. 20, ¶¶ 26, 30.) International Paper expects that when BE&K conducts work in restricted access areas such as Wood Preparation Area Two that BE&K will independently inspect such areas for safety and either notify International Paper about hazards or else independently address and remove the hazards before conducting work in the area. (Docket No. 10, ¶¶ 28-31.)

Among the workers BE&K employed to perform repair services for International Paper was Plaintiff Kirk Hamel. (Docket No. 13, ¶ 2.) On January 22, 2002, Hamel was assisting with the repairs on the conveyor supports, which work placed him directly beneath the eaves of the conveyor's roof. (Docket No. 10, ¶ 54; Docket No. 13, ¶ 7.) January 22 was a sunny day with temperatures above freezing, which resulted in the melting of snow and ice on the Mill premises. (Docket No. 10, ¶ 57.) Prior to conducting work that morning, BE&K's onsite superintendent and safety manager both surveyed the worksite and concluded that it was safe. (Id., ¶¶ 59, 60.) According to BE&K's onsite superintendent and safety manager, the snow or ice on the conveyor roof was not visible from a ground-level inspection. (Id., ¶¶ 63, 91.) Within a few hours of commencing work on the conveyor supports, at approximately 10:30 a.m., snow and/or ice fell from the conveyor roof and struck a hard hat fastened to Hamel's head. (Id., ¶ 66.) The incident came to the attention of BE&K's worksite superintendent roughly two hours later and the work site was closed down. (Id., ¶ 79.) Although Hamel worked through the remainder of

that day and also worked the following day, Hamel contends that he suffered and continues to suffer from substantial impact-related injuries. (Id., ¶ 74; Docket No. 13, ¶ 11.)

### **Summary Judgment Discussion**

Summary judgment is warranted only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); United States Steel v. M. DeMatteo Constr. Co., 315 F.3d 43, 48 (1st Cir. 2002). In a negligence action a plaintiff must establish “a duty on the part of the defendant toward the plaintiff, a breach of that duty, and an injury suffered by the plaintiff as a result of that breach.” Gayer v. Bath Iron Works Corp., 687 A.2d 617, 621 (Me. 1996). Whether a duty exists is a question of law. Budzko v. One City Ctr. Assocs., 767 A.2d 310, 313-14 (Me. 2001). “Whether a duty was breached and whether a defendant’s conduct was reasonable under the circumstances are questions of fact for the jury.” Id. International Paper’s summary judgment motion presents two alternative arguments: (1) that it owed no common law duty of care to Hamel or (2) that if it owed a duty to Hamel, its conduct was reasonable under the circumstances and therefore satisfied the duty. I address these arguments in turn.

*1. International Paper owed a duty of care to Hamel, its business invitee.*

International Paper first contends that it owed no duty to provide Hamel with a safe work site. (Defendant’s M. S. J. with Inc. Mem. of Law, Docket No. 9, at 6.) Of course, as a Maine business owner, International Paper owed “a positive duty of exercising reasonable care in providing reasonably safe premises” to its business invitees. Budzko, 767 A.2d at 314. In the slip and fall context, the Law Court has recognized that “a business owner ‘who is aware of the existence of a recurrent condition that poses a potential danger to invitees may not ignore that knowledge and fail reasonably to respond to the foreseeable danger of the likelihood of a

recurrence of the condition.” Id. (quoting Dumont v. Shaw’s Supermarkets, Inc., 664 A.2d 846, 848-49 (Me. 1995)). This general legal duty is as applicable to the danger presented by ice or snow falling from rooftops as it was to the danger at issue in Budzko, which involved hazardous walking surfaces caused by ground accumulations of ice and snow. 767 A.2d at 312-13.

Nevertheless, International Paper takes the position that it owed no duty to Hamel because:

- (1) under the BE&K Contract, BE&K alone was responsible for the safety of its workers and the Work Site, and
- (2) given the BE&K Contract and the restricted nature of the Work Site, BE&K was required to alert I[n]ternational P[aper] to the presence of any hazard at the Work Site before any duty on the part of I[n]ternational P[aper] was triggered.

(Docket No. 9 at 7.) In supposed support of these propositions, International Paper relies on those provisions in its contract with BE&K that allocated to BE&K the duty of ensuring public and worker safety at the worksite. (Docket No. 9 at 7.) Although the contract between International Paper and BE&K may allocate duties and obligations as between its signatories, it does nothing to alter the common law duty of care International Paper owed as a matter of law to Hamel, its invitee.

[C]ourts generally agree that the duty of a possessor of land to keep the possessor’s premises in a reasonably safe condition for business invitees is a nondelegable duty. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 71, at 511-12 (5th ed. 1984). *See also* 41 Am. Jur. 2d *Independent Contractors* § 46, at 815 (1968); [add’l citation omitted]. As one court has noted, the term “nondelegable duty” in this context is somewhat of a misnomer because “the owner is free to delegate the duty of performance to another, but he cannot thereby avoid or delegate the risk of nonperformance of the duty.”

Kragel v. Wal-Mart Stores, 537 N.W.2d 699, 703 (Iowa 1995); *see also* Borden v. Consumer Warehouse Foods, Inc., 601 So. 2d 976, 978-79 (Ala. 1992) (rejecting shopkeeper’s contention that by hiring an independent contractor to clean its floors the shopkeeper had delegated its duty to maintain safe floors for the use of its invitees); Louisville Cement Co. v. Mumaw, 448 N.E.2d 1219, 1222 (Ind. Ct. App. 1983) (“When an owner lets a contract to another to perform particular

work, retaining no control thereof except the right to require a particular standard of completed work, the owner is not liable for the negligence of the party to whom the contract is let,” unless, inter alia, the owner is by law charged with the duty at issue); Hafferman v. Westinghouse Electric Corp., 653 F. Supp. 423, 430 (D. D.C. 1986) (presenting an analogous situation involving an independent contractor invitee); Restatement (Second) of Torts, §§ 422, 425 & 426 (1965) (discussing scenarios in which harm is caused by the negligence of a “carefully selected independent contractor”). International Paper fails to cite any authority supportive of a contrary conclusion. Maine law imposed a duty on International Paper to exercise reasonable care in providing a reasonably safe work environment at the Mill for BE&K employees, its business invitees. Because International Paper sought to fulfill that duty by contractually delegating responsibility to BE&K, the reasonableness of its conduct on the day in question is informed in part by the reasonableness of BE&K’s performance; the contract provisions did not negate the duty International Paper owed as the owner and possessor of the premises.

Alternatively, International Paper argues that it owed no duty to BE&K employees because they were working in a restricted area that International Paper “does not normally screen . . . for snow and/or ice hazards.” (Docket No. 9 at 7.) Rather than advancing International Paper’s position, this argument weakens it by supporting an inference that International Paper has screening procedures in place for identifying and eliminating hazards from falling snow and ice. Moreover, International Paper is mistaken that restricting certain areas serves to eliminate its duty to invitees.<sup>4</sup> Restricting areas is simply one approach to fulfilling the existing duty. Although it may well be reasonable for International Paper to ignore ice and snow accumulations in areas that are closed to pedestrian and vehicle traffic, once individuals are invited into those

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<sup>4</sup> As International Paper puts it, there can be no “hazard” in a restricted area so long as there are no people in the area.

areas to perform services for International Paper the circumstances may warrant greater attention to and further measures to ensure invitee safety.

Finally, International Paper argues that it owed no duty to protect Hamel from falling ice or snow at the conveyor belt worksite because it was not on notice that such a hazard existed. (Id. at 7-8.) To succeed with a claim of negligence, the plaintiff must prove that the defendant had notice of the danger.<sup>5</sup> Milliken v. City of Lewiston, 580 A.2d 151, 152 (Me. 1990). The hazard presented by ice and snow accumulations falling from sloped rooftops is a recurrent condition inherent in Maine winters. The facts reveal that three to five inches of snow fell in the area of the worksite the evening before the incident in question. Moreover, there appears to have been a quantity of snow or ice underlying this new-fallen snow. Arguably, these are conditions from which notice might be inferred. In addition to these conditions, International Paper's screening procedures also serve as some evidence of notice. On the other hand, the existence of the hazard was not identified by BE&K's superintendent and safety manager, both of whom testified that they attempted to assess whether such a danger existed, albeit from the ground. Hamel contends that notice of the hazard can be inferred from a common sense understanding of what it means when significant volumes of snow fall on sloped roofs in Maine and argues that reasonable care under the circumstances required International Paper or its agent to inspect the conveyor roof from an elevated position. (Mem. of Law in Sup. of Plaintiff's Obj. to S. J., Docket No. 11 at 4.) On balance, I agree with Hamel that common sense inferences might support a finding that the exercise of reasonable care would have uncovered a hazardous condition and prevented the incident in question.

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<sup>5</sup> Unlike International Paper's other duty-related arguments, the existence of notice presents a question of fact or a "mixed question" of law and fact. Bragg v. Bangor, 51 Me. 532, 538 (1863) ("Notice of a fact implies knowledge of the existence of the fact, brought home to the party to be charged, either by his own observation, or by declarations made to him by those who have seen or known it. . . . Like any other distinct and substantive fact . . . it must be affirmatively proved, by evidence which the law deems sufficient.").

2. *There is a genuine issue of fact whether International Paper breached its duty of care.*

International Paper's secondary argument is that there are no facts capable of supporting a jury finding that International Paper failed to exercise reasonable care under the circumstances. (Docket No. 9 at 6, 8.) This argument primarily rehashes the foregoing arguments, with International Paper this time arguing that the standard of care should be reduced for the reasons already related. (*Id.* at 10.) International Paper's arguments for a reduced standard of care fare no better than its arguments for the non-existence of a duty of care. Once the duty is imposed, the law specifies the standard as reasonable care under the circumstances. The only new ground covered in this portion of International Paper's memorandum involves an argument that it lacked a reasonable opportunity to take corrective action on the morning in question because "the storm had occurred just the night before . . . and . . . rising temperatures that very morning created the hazard." (Docket No. 9 at 13.) Although these facts may support a persuasive argument that International Paper's failure to remove the hazard was not unreasonable under the circumstances, I do not consider them to be so overwhelming that no reasonable jury could possibly return a verdict in favor of Hamel. For instance, this argument fails to consider that BE&K's assessment of the worksite "that very morning" afforded an opportunity for International Paper to identify the hazard and stop work until the hazard might be removed.

Contrary to its lack of notice argument, International Paper next argues that it is insulated from liability because "the potential hazard from snow and/or ice was obvious to Hamel, as well as BE&K and I[n]ternational P[aper]." (Docket No. 9 at 14, heading for Section II.C.) In support of this position, International Paper cites Isaacson v. Husson College, 297 A.2d 98 (1972), in which the Law Court reversed a directed verdict for Husson where the plaintiff student slipped and fell on ice located on a walkway he had traveled for several successive days and which he walked with care due to excessive slipperiness. *Id.* at 101-102. In Isaacson, the Law

Court “decline[d] to adopt . . . a doctrine which automatically relieves the owner or occupier of land from any duty of care to his business invitee by reason of the invitee’s knowledge of the generally dangerous condition of the land.” Id. at 104. The Law Court observed that an owner or possessor of land would have cause to protect an invitee from even an obvious harm under circumstances where “the possessor has reason to expect that the invitee’s attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it [or] where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk.” Id. (quoting Restatement (Second) of Torts § 343A(1) (1965)). In my view, even if the danger is characterized as obvious, it is a matter best addressed in the context of comparative negligence, see id., and that, like the student in Isaacson, Hamel:

had the right to rely to some extent upon the defendant’s discharge of the duty owed to him that he would not be exposed in [the worksite] to an unreasonable risk of harm. He was not bound to anticipate negligent conduct on the part of the defendant in the maintenance of the [worksite], but had the right to assume that the premises were reasonably safe for his use.”

Id. at 103. See also Franklin v. Maine Amusement Co., 175 A. 305, 306, 133 Me. 203, 205 (1934) (indicating that defendant stage owner owed plaintiff performer “the duty to have the stage on which he was to perform free from all hidden defects, which by the exercise of reasonable care could have been discovered and guarded against”).

### **Motions to Strike**

In connection with his summary judgment opposition, Hamel has moved to strike numerous statements of fact offered by International Paper on the ground that the supporting Affidavit of Kevin Perry fails to indicate that Mr. Perry has personal knowledge of the information related therein. (Docket No. 14.) Hamel has also moved to strike the entire

Affidavit for essentially the same reason. (Docket No. 16.) In particular, Hamel seeks to prevent the summary judgment record from referencing any of the safety provisions contained in the International Paper-BE&K service contract. Although my rendition of the facts makes a general reference to such provisions, I have made it clear that I do not consider any of those provisions to absolve International Paper of its common law duty of care to business invitees. At best, those provisions merely indicate that International Paper sought to delegate to BE&K responsibility for carrying out whatever tasks may prove necessary to fulfill International Paper's duty. Finally, with respect to safety procedures, it is apparent that Mr. Perry, as safety manager for the Mill, would have personal knowledge of International Paper's safety procedures. It would also stand to reason that he is knowledgeable of International Paper's contractual arrangements concerning contractor safety matters, although that is not expressed in the affidavit. I also note that certain of the statements Hamel seeks to exclude from the summary judgment record are actually favorable to him, such as the statement that "International Paper has procedures for the identification and correction of overhead hazards, including snow and ice hazards, for areas at the Mill that are normally accessed or used by pedestrians." (Docket No. 10, ¶ 25; see also id., ¶¶ 26, 27.) Because Mr. Perry's personal knowledge is apparent with respect to the safety related concerns and because the inclusion of statements regarding contractual provisions is, in any event, not prejudicial to Hamel,<sup>6</sup> I **DENY** the motions to strike.

For its part, International Paper has moved to strike certain of Hamel's filings that are not authorized by the Local Rules of this District. The first is Hamel's reply statement of material facts. Because International Paper is the summary judgment movant, Local Rule 56 indicates that it must file a statement of material facts and that Hamel is limited to filing an opposing

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<sup>6</sup> See New England Anti-Vivisection Soc., Inc. v. United States Surgical Corp., Inc., 889 F.2d 1198, 1204 (1st Cir. 1989) ("In denying NEAVS' motion to strike, the court stated that it would 'take [the Bremer materials] for what they're worth.' We hold that such denial was within the court's discretion. Moreover, since there is no indication that the court relied on the affidavit, any error, at most, was harmless.").

statement of facts that admits, denies or qualifies International Paper's statement of facts and an additional statement of fact that introduces material facts not already included in International Paper's statement. Thereafter, International Paper may file a reply statement that admits, denies or qualifies the factual assertions made in Hamel's additional statement, which serves to close the summary judgment record. Hamel has ignored this procedure by filing what amounts to a sur-reply statement of facts. The skirmish concerns Hamel's twelfth statement of additional material facts, which offers testimony from BE&K's superintendent that the International Paper "Pre-Bid package" stated that International Paper would provide a safe worksite. In its reply responsive statement of material facts, International Paper neither denies nor qualifies Hamel's twelfth statement, but offers what amounts to an informal evidentiary objection. Technically, International Paper's failure to deny or qualify the statement results in a deemed admission. D. Me. Loc. R. 56(d) & (e). The Rule plainly indicates that a challenged statement must be denied or qualified with a supportive record citation. It does not indicate that exclusionary motions might be substituted for a proper denial or qualification supported by record citation. Nevertheless, we are dealing with a fine point in this District's summary judgment practice. Although such motions often serve only to clutter the Court's docket, as they have in this case, the better alternative for a summary judgment movant is to file a motion to strike, because basic fairness dictates that the proponent of the evidence ought to be afforded an opportunity to respond to an evidentiary objection.<sup>7</sup> Under the circumstances, International Paper's evidentiary objection is **OVERRULED**. International Paper's motion to strike Hamel's inappropriate reply statement of fact is **DENIED** because it was only necessitated as a consequence of International Paper's inappropriate interjection of an evidentiary objection in a responsive statement of

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<sup>7</sup> Note that parties who file unauthorized sur-reply memoranda or statements without a motion for leave to do so are proceeding at their own risk. It is well within the Court's discretion to disregard such a filing out of hand, regardless of whether the opposing party has moved to strike it.

material fact. For what it is worth, I also observe that International Paper's deposition counsel failed to object to the deposition testimony on foundational grounds, the primary basis for International Paper's evidentiary objection.

### **Conclusion**

For the reasons stated herein, I **RECOMMEND** that the Court **DENY** Defendant's Motion for Summary Judgment (Docket No. 9). I also **DENY** *all* pending motions to strike. (Docket Nos. 14, 16 & 27.)

***SO ORDERED.***

### **NOTICE**

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection. Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

July 15, 2003

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Margaret J. Kravchuk  
United States Magistrate Judge

**BANGOR, STANDARD**

**U.S. District Court  
District of Maine (Portland)  
CIVIL DOCKET FOR CASE #: 2:02-cv-00214-DBH**

HAMEL v. INTERNATIONAL PAPER  
Assigned to: JUDGE D. BROCK HORNBY  
Referred to:  
Demand: \$75000  
Lead Docket: None

Date Filed: 10/18/02  
Jury Demand: Plaintiff  
Nature of Suit: 360 P.I.: Other  
Jurisdiction: Diversity

Related Cases: None  
Case in other court: Oxford Cnty SC, CV-02-00061  
Cause: 28:1332 Diversity-Personal Injury

**Plaintiff**

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V.

**Defendant**

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