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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001920-MR

MELISSA BENTLEY — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 08-CI-01077

DENZIL HALL — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; KELLER, JUDGE; LAMBERT,[1] SENIOR JUDGE.

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

LAMBERT, SENIOR JUDGE: Melissa Bentley appeals from the Floyd Circuit Court's entry of summary judgment as to her personal-injury negligence claim against Denzil Hall. For reasons that follow, we affirm.

Appellant was injured in a fall at the Dwale Mobile Home Park in Floyd County, Kentucky, on October 4, 2007. She fell backwards while attempting to ascend the first of three steps attached to a trailer porch after returning from a social event with her boyfriend, Steve Montgomery.[2] Appellee owns the mobile home park, as well as the trailer at which the fall occurred. As a result of the fall, Appellant suffered injuries to her left elbow that have required multiple surgeries and that caused her to miss approximately four months of work.

Appellant subsequently filed a personal-injury negligence action against Appellee in which she alleged that the subject premises were "in an unreasonably defective condition" and that Appellee had failed to provide adequate warning of their state or to take sufficient precautions to address the risk that someone might fall. The parties undertook discovery, and both Appellant and Appellee were deposed.

Appellant testified that at the time of her fall, she was wearing a pair of slip-on shoes. She noted that "[t]here was no snow" and that she was "not sure if the steps [were] wet or not." She also did not know if any ice was on the steps.

[2] Appellant later testified that she had not consumed any alcoholic beverages beforehand.

When asked what had made her fall, Appellant responded, "I don't know." An exchange then occurred concerning the condition of the steps:

> Q. Are you alleging that there was anything defective or wrong with the steps?
>
> A. I feel if there was a strip or something to hang onto, grab ahold of, I may've not have fell.
>
> Q. But as far as the steps go, it doesn't appear there's anything wrong with them. Would you agree?
>
> A. No.
>
> Q. What do you mean, no? What's wrong with them?
>
> A. It's just slick wood. If they had been maybe some stripping on it – you know what I'm talking about.
>
> Q. It's what?
>
> A. Like stripping on it to keep you from falling. I think I just slipped right off the step.
>
> ***
>
> Q. So you think there should've been three more wooden strips on the steps.
>
> A. Not wooden.
>
> Q. What then?
>
> A. I don't know what you call that stuff that keeps you from – like rubber.
>
> Q. Rubber?

A. Yeah, and maybe a handrail.

Appellant also acknowledged that she had used the subject steps on a number of previous occasions, and when asked if she had "ever had any trouble walking those steps before," she responded, "No." She was then asked if she had "ever complained about them to anybody before," to which she similarly responded, "No."

In his deposition, Appellee testified that he had owned the trailer where the fall had occurred for approximately four or five years. The steps were not part of the trailer when it was purchased but were instead built by Appellee with treated wood from a standard pattern purchased from a lumber company. Appellee indicated that he had bought these particular steps because they more closely matched the deck wood on the trailer's porch. He further testified that he did not consider putting a railing on the steps when he built them and that he did not know of any regulations that required railings on mobile home steps or walkways. Appellee also noted that no one had ever complained to him before about these steps or any others in the mobile home park and that no similar falls had ever occurred during his ownership.

Following the taking of the parties' depositions, Appellee moved for summary judgment. He argued that Appellant could not identify what had caused

her to fall; therefore, she would be unable to produce evidence at trial warranting a judgment in her favor because she would not be able to prove causation. Appellee further argued that Appellant could not prove that Appellee had breached any duty that might be owed to her. The trial court agreed with Appellee's contentions and entered summary judgment in his favor. This appeal followed.

On appeal, Appellant argues that summary judgment was entered erroneously because of the existence of genuine issues of material fact that remained to be resolved. She specifically contends that whether Appellee "knew of the dangerous condition of the steps and had reason to believe that the Appellant would not discover such condition or realize risk" was a question of fact that should have precluded entry of summary judgment. The standards for reviewing a trial court's entry of summary judgment are well established and were concisely summarized by this Court in *Lewis v. B & R Corp.*, 56 S.W.3d 432 (Ky. App. 2001):

> The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party

> bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial."

Id. at 436 (internal footnotes and citations omitted). Because summary judgments involve no fact-finding, we review the trial court's decision *de novo*. *3D Enters. Contr. Corp. v. Louisville & Jefferson County Metro. Sewer Dist.*, 174 S.W.3d 440, 445 (Ky. 2005); *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

"To recover under a claim of negligence in Kentucky, a plaintiff must establish that (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached its duty, and (3) the breach proximately caused the plaintiff's damages." *Lee v. Farmer's Rural Elec. Co-op. Corp.*, 245 S.W.3d 209, 211-12 (Ky. App. 2007). For purposes of establishing duty, visitors upon property have traditionally been placed in one of three categories: trespassers, licensees, or invitees. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). The parties agree that Appellant was a social guest at the time of the subject incident; therefore, she is considered a licensee for purposes of determining the duty of care she was owed. *See Shipp v. Johnson*, 452 S.W.2d 828, 829 (Ky. 1969).

A "licensee" enters upon the premises owned by another "by express invitation or implied acquiescence of the owner or occupant solely on the

licensee's own business, pleasure or convenience." *Scuddy Coal Co. v. Couch*, 274 S.W.2d 388, 390 (Ky. 1954). "A possessor of land owes a licensee the duty of reasonable care either to make the land as safe as it appears, or to disclose the fact that it is as dangerous as he knows it to be." *Scifres*, 916 S.W.2d at 781. "There is no duty to warn a licensee of any danger or condition which is open and obvious or which should or could be observed by the licensee in the exercise of ordinary care." *Id.* Ultimately, "the basic distinction between the duties of the possessor is that he owes an invitee the duty of *discovering* a dangerous condition, whereas he owes a licensee only the duty to warn him of a dangerous condition *already known* to the possessor." *Mackey v. Allen*, 396 S.W.2d 55, 58 (Ky. 1965) (emphasis in original); *see also Terry v. Timberlake*, 348 S.W.2d 919, 920 (Ky. 1961) ("No duty was owed to the appellee by appellants other than that of not knowingly letting her come upon a hidden peril or willfully or wantonly causing her harm.").

The question then becomes whether Appellant produced sufficient evidence of a breach of this duty to avoid summary judgment. We do not believe that she did. Appellant states in her brief that "[a]s the constructor of the steps in question," Appellee "knew or should have known of their dangerous and slippery nature." She provides little clarity on the question of how the steps were "dangerous and slippery," but when asked in her deposition what was wrong with

the steps, she replied, "It's just slick wood." However, Appellant acknowledged in her deposition that she had used those same steps on a number of previous occasions and that she had never had any problems with them or made any complaints about them. Therefore, Appellant had ample opportunity to observe and discover the manner in which the steps were built and the state of the wood with which they were built. Moreover, Appellant has cited to nothing in the record that would suggest that the steps were constructed in a faulty manner by Appellee, that Appellee had done anything to the steps prior to Appellant's fall that would have made the steps unreasonably dangerous, or that he otherwise knew of any hidden defect that would have rendered them unreasonably dangerous.

Ultimately, then, the record is devoid of any evidence supporting Appellant's claim that the steps were in a "dangerous condition" or explaining how Appellee breached a duty owed to her. Appellant essentially assumes that a "dangerous condition" existed, *ipso facto*, because of the fact that she fell, but she supports no evidence to support her assumption. Thus, this claim provides no basis to reverse the trial court's entry of summary judgment. "The party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment." *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195, 199 (Ky. 2001). "[S]peculation and supposition"

are not enough to survive a motion for summary judgment. *O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006), quoting *Chesapeake & Ohio Ry. Co. v. Yates*, 239 S.W.2d 953, 955 (Ky. 1951).

Appellant also seems to assume that Appellee's failure to equip the steps with no-slip strips or a railing rendered them inherently dangerous and constituted a breach of a duty. Indeed, in reading Appellant's deposition, this appears to be a principal foundation of her negligence claim. However, Appellant has failed to produce evidence of any state or local regulatory code, ordinance, or statute that could arguably reflect a duty on the part of Appellee to equip the steps with these items. Moreover, given her previous use of the steps, Appellant was obviously aware that they were not equipped with no-slip strips or a railing. Accordingly, since Appellant's slip-and-fall claim is entirely speculative in nature on the question of breach, summary judgment was appropriately entered.

Summary judgment was also appropriate on the basis that Appellant failed to produce any evidence of causation. Although Appellant has made vague claims that the steps were "slippery," when she was asked in her deposition what had caused her fall, Appellant responded, "I don't know."[3] In a similar instance in

[3] Appellant characterizes the steps as "wet" in her brief. However, when asked in her deposition if the steps were wet, Appellant indicated that she did not know. Thus, the record does not support this characterization.

which a party had fallen down steps but could not specify what had caused his fall, the former Court of Appeals held that summary judgment was appropriately entered against that party:

> Appellant was the sole witness concerning the circumstances of his fall. Manifestly, all of his evidence on this phase of the case was before the court on the motion for a summary judgment, and there appeared to be no reasonable possibility of producing more or better evidence on this point.... Considering the undisputed facts and the statements of appellant that he saw nothing and did not know what caused him to fall, the motion for a summary judgment was properly sustained....

Tharp v. Tharp, 346 S.W.2d 44, 46 (Ky. 1961) (internal citations omitted). Because of a similar lack of any evidence regarding the cause of Appellant's fall, we are compelled to reach the same conclusion here.

For the foregoing reasons, we affirm the Floyd Circuit Court's entry of summary judgment against Appellant.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Glenn M. Hammond Pikeville, Kentucky	Randall Scott May Hazard, Kentucky