

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-002040-MR  
AND  
NO. 2010-CA-002073-MR

MATILDA WHEELER AND  
MICHAEL WHEATLEY,  
BANKRUPTCY TRUSTEE

APPELLANTS/CROSS-APPELLEES

v. APPEAL AND CROSS-APPEAL FROM MARION CIRCUIT COURT  
HONORABLE ALLAN RAY BERTRAM, JUDGE  
ACTION NO. 09-CI-00338

BRENDA FIELDS

APPELLEE/CROSS-APPELLANT

OPINION  
AFFIRMING

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BEFORE: ACREE, CAPERTON, VANMETER, JUDGES.

VANMETER, JUDGE: This appeal and cross-appeal are taken from a summary judgment granted by the Marion Circuit Court to Brenda Fields in a slip-and-fall

case. Because there was no genuine issue of material fact raised regarding the cause of the accident, we affirm.

On January 1, 2009, Matilda Wheeler left a New Year's party she had been attending at the residence of Brenda Fields. She descended a short flight of steps leading from the back porch to the driveway. When she reached the ground, she slipped and fell, breaking her ankle. She underwent orthopedic surgery to repair the injury.

On August 28, 2009, she filed a complaint against Brenda Fields, alleging that Fields had been negligent in failing to warn her that the condition of the steps was unsafe. In her responses to interrogatories and deposition questions, Wheeler disclosed that she had filed for bankruptcy after the accident occurred, but had not listed her personal injury claim against Fields as an asset of her estate in the bankruptcy petition and filings. The bankruptcy discharge was granted on September 29, 2009. On December 9, 2009, Fields moved to file an amended answer, and for summary judgment and dismissal of the suit, on the grounds that Wheeler lacked standing to assert the personal injury claim because it should have been made part of the bankruptcy estate. Wheeler filed a response to the motion and also moved the court to add Michael Wheatley, the trustee in bankruptcy, as a party plaintiff. Following a hearing, the trial court entered an order on May 13, 2010, denying the motion for summary judgment and granting the motion to add Wheatley as a party. Fields then moved for summary judgment against Wheatley

on a statute of limitations grounds<sup>1</sup> (because he was named as a plaintiff more than one year after the accident), and separately moved for summary judgment on the substantive issues concerning Wheeler's accident. On October 12, 2010, the trial court granted the motion for summary judgment. This appeal by Wheeler and Wheatley followed. Fields filed a cross-appeal of the earlier order granting the motion to add Wheatley as a plaintiff.

Summary judgment shall be granted only if “the pleadings, depositions, answers to interrogatories, stipulations, 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.” CR<sup>2</sup> 56.03. The trial court must view the record “in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky.1991). Further, “a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Id.* at 482.

On appeal, our standard of review 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.” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky.App. 2001) (citations omitted). When no factual issues are involved

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<sup>1</sup> Kentucky Revised Statutes (KRS) 413.140(1)(a) provides that personal injury actions must be commenced within one year after the cause of action accrues.

<sup>2</sup> Kentucky Rules of Civil Procedure.

and only legal issues are before the court on a motion for summary judgment, we will not defer to the trial court and our review is de novo. *Hallahan v. Courier–Journal*, 138 S.W.3d 699, 705 (Ky.App. 2004) (citations omitted).

Wheeler argues that the trial court erred in granting summary judgment because genuine issues of material fact exist regarding the causation of her accident. On cross-appeal, Fields argues that the bankruptcy trustee Wheatley was the proper and necessary party in interest and that the failure to name Wheatley as a plaintiff deprived Wheeler of standing to file the lawsuit and also rendered the action untimely.

“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). “Whether the defendant owed a duty is a question of law for the court to decide. Whether the defendant breached its duty is generally a question of fact for the jury.” *Id.* at 212 (internal citations omitted). For purposes of determining the duty of care, a social guest is considered a licensee. *See Shipp v. Johnson*, 452 S.W.2d 828, 829 (Ky.1969). A property owner 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).

The following facts were elicited from the deposition testimony of Wheeler and Fields regarding whether Fields breached her duty to warn Wheeler of a

dangerous condition of which she was already aware. According to Wheeler, Fields and her nephew Justin told her that his girlfriend had earlier fallen in the same place, and that Fields had apologized for not telling her. Wheeler also stated that Fields had said that the guttering over the top of the steps sometimes leaked and dripped down on the concrete. In her deposition, Fields testified that she checked the area after the fall, and saw only a small amount of frost on the bottom step.

Even if these statements constituted sufficient evidence to create a genuine issue of material fact regarding a breach of the duty to warn, there was absolutely no evidence of causation. Wheeler testified that she did not slip on the steps, but on the pavement at the bottom of the steps. There was no evidence that there was actually any ice or water on that area. In her deposition testimony, Wheeler stated that she did not know what caused her to fall, merely that her foot slipped. In *Tharp v. Tharp*, 346 S.W.2d 44 (Ky.1961), a summary judgment was affirmed under similar factual circumstances:

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*, 346 S.W.2d at 46 (internal citations omitted).

In Wheeler's case, neither she nor any witnesses could testify as to what caused her to slip, or to testify that there was ice in the area or that the area was slippery at the time the fall occurred.

Because there was no genuine issue of material fact concerning the causation of the accident, we affirm the summary judgment of the Marion Circuit Court. This determination renders moot the issues raised in the cross-appeal.

ALL CONCUR.

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