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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2013-CA-000033-MR

DANIEL COLLINS — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 12-CI-00403

NEWPORT ON THE LEVEE, LLC — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; JONES AND MAZE, JUDGES.

ACREE, CHIEF JUDGE: This is a premises liability case. By order entered November 21, 2012, the Campbell Circuit Court entered summary judgment in favor of Appellee Newport on the Levee, LLC (NOTL), concluding NOTL did not breach the duty of care it owed to Appellant Daniel Collins. The issue before us is

whether genuine issues of material fact exist that preclude summary judgment. We find none and affirm.

## I. Facts and Procedure

NOTL operates the Newport on the Levee Entertainment Complex (the Levee) located in Campbell County, Kentucky. On March 25, 2011, Collins and his young son visited a restaurant on the Levee's premises. During their meal, Collins's son became ill. Collins picked up his child, who weighed approximately 65 pounds, and carried him out of the restaurant. Exiting into the common area, Collins proceeded down the hallway at a brisk pace, still carrying his child, and turned the corner to his right. After Collins rounded the corner, he took four or five strides in the middle of the corridor when he felt something under his feet. Collins fell, dropping his child and injuring his knees, back, and neck.

After the fall, Collins observed two teenagers scurry to their feet. He surmised that he had tripped over them because they were "laying down in the middle of the floor . . . in some type of very relaxed capacity[.]" In his deposition, Collins described the individuals as wearing normal clothing (jeans and jackets). He admitted that the teenagers were not concealed or camouflaged, and nothing was blocking his view of them. Collins further stated he was paying attention to the path in front of him and he was not distracted. Nevertheless, he did not see the teenagers in the hallway.

Collins filed this premises liability action against NOTL and others[1] seeking damages for his injuries. Collins claimed NOTL breached its duty to keep the Levee in a reasonably safe condition by failing to provide adequate seating for patrons, and failed to properly monitor and secure the premises to prevent patrons from loitering or lying in heavily traversed areas creating a tripping hazard.

A period of discovery ensued during which Collins deposed Jim Craycroft, NOTL's Customer Experience Manager. Craycroft handles the Levee's day-to-day operations, including security. Craycroft testified that, at the time of Collins's fall, Valor Security Services was responsible for the Levee's security. Valor's security officers served as the "eyes and ears" of the premises; the officers constantly patrolled the Levee's common areas, including the vicinity where Collins fell. Between two and nine security officers were on patrol at any given time. Craycroft also testified that security personnel monitored for loitering despite the fact that, prior to Collins's incident, no injuries attributable to loitering had occurred at the Levee.

Craycroft further explained there were at least three benches in the area where Collins fell. Thus, when Collins left the restaurant, he would have passed two benches when he exited the restaurant and then a third bench would have been directly in front of him right before he turned the corner. Craycroft testified he had

[1] Collins also named as defendants the Price Group, LLC; the unknown patrons; Unknown Security Company; and Unknown Security Guard. The Price Group was dismissed by agreement of the parties, and the three unknown defendants were never made parties to this action.

never observed patrons sitting on the floor of the Levee and NOTL had received no complaints of inadequate seating at the Levee. No patrons complained to NOTL or the security officers about the teenagers over whom Collins tripped.

Following discovery, NOTL moved for summary judgment, first arguing Collins had failed to present any evidence demonstrating NOTL breached its duty of protecting Collins from harm caused by the accidental, negligent, or intentional acts of third persons. Alternatively, NOTL argued the tripping hazard – the teenagers in the hallway – was an open-and-obvious condition which NOTL owed no duty to minimize or warn against. The circuit court agreed with both arguments and granted NOTL's summary-judgment motion. Collins promptly appealed.

## II. Standard of Review

Summary judgment is appropriate if the record indicates "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[2] 56.03. "The record must be viewed 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 Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

We review the trial court's grant of summary judgment to determine whether the court "correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). Summary judgment involves no fact-finding; it

[2] Kentucky Rules of Civil Procedure.

encompasses only legal queries, and the existence of disputed material facts. *Mitchell v. University of Kentucky*, 366 S.W.3d 895, 898 (Ky. 2012) (citation omitted). Our review is *de novo*. *Id.*

## III. Analysis

Collins argues that the teenagers lounging in the hallway did not constitute an open-and-obvious hazard because he could not see them and NOTL failed in its duty to warn against them. Therefore, summary judgment was improper. Collins also argues that summary judgment was improper because genuine issues of material fact exist concerning whether NOTL provided adequate seating and properly monitored the premises.

Collins's legal theory of NOTL's liability is based on premises liability law, a subcategory of general negligence law. *Lucas v. Gateway Cmty. Servs. Org., Inc.*, 343 S.W.3d 341, 343 (Ky. App. 2011). To sustain a cause of action, Collins must establish that: (1) NOTL owed him a duty of care; (2) NOTL breached that duty; and (3) that the breach caused his injuries. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 88 (Ky. 2003). The existence of a duty is a question of law to be decided by the court. *See id.* at 89. And, when the injury occurs on realty, "premises liability law supplies the nature and scope of that duty[.]" *Lewis v. B&R Corp.*, 56 S.W.3d 432, 437-38 (Ky. App. 2001); *Lucas*, 343 S.W.3d at 343. The particular duty owed depends largely on the status of the person venturing onto the premises. *Miracle v. Wal-Mart Stores East, LP*, 659 F.Supp.2d 821, 825 (E.D. Ky. 2009); *West v. KKI, LLC*, 300 S.W.3d 184, 190 (Ky. App. 2008).

In the matter before us, the parties agree that Collins entered the premises as a restaurant patron, and is therefore an invitee. *Hardin v. Harris*, 507 S.W.2d 172, 174 (Ky. 1974) ("[A]n invitee is generally defined as one who comes upon the land in some capacity connected with the business of the possessor."). Under Kentucky premises liability law, a property owner, such as NOTL, owes a duty to invitees to exercise ordinary care to maintain its premises "in a reasonably safe condition and to warn invitees of dangers that are latent, unknown, or not obvious." *Lucas*, 343 S.W.3d at 343-44.

We begin by agreeing, in substance, with Collins that the open-and-obvious doctrine need not have been the basis of the circuit court's ruling. *See Summy v. City of Des Moines*, 708 N.W.2d 333, 340-41 (Iowa 2006) (when conduct of third person on the defendant's premises is the source of plaintiff's injury, the more directly applicable theory of liability is § 344 of the Restatement (Second) of Torts, not § 343A). There is a more directly applicable rule of Kentucky law.

Collins's injuries were caused by the accidental, negligent, or intentional act of a third person on NOTL's premises. In *Ferrell v. Hellems*, our highest court recognized that Kentucky law was consistent with the Restatement (Second) of Torts § 344, which states that, under certain circumstances, a premises owner is liable to an invitee for the accidental, negligent, or intentional acts of a third person on the premises. 408 S.W.2d 459, 463 (Ky. 1966). Specifically, *Ferrell* says: "[W]hen an unsafe condition of the premises is caused by a third person, the plaintiff must show that the defendant property owner knew, or with

reasonable care could have known, of the unsafe condition in time to prevent the mishap." *Id.*

We can see from the record that there is no evidence that NOTL knew the teenagers were there. Furthermore, just as the circuit court concluded, we also conclude there was "no evidence as to how long the patrons [teenagers] were actually lying there." (Order, R. 88). Therefore, there can be no proof that, with reasonable care, NOTL could have discovered the hazard posed by the teenagers. Collins presented no proof of these facts – proof necessary under *Ferrell* to survive a summary judgment motion.

In *Lanier v. Wal-Mart Stores, Inc*., Justice Cooper embraced the Restatement version of this theory of liability more directly, stating:

> if the possessor of the property holds it open to the public for entry for his business purposes, he is subject to liability to members of the public while they are on the property for business purposes for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons *if the possessor failed to exercise reasonable care to either: a) discover that such acts are being done or are likely to be done, or b) give warning adequate to enable the business visitors to avoid the harm, or otherwise protect them against it.*

99 S.W.3d 431, 433 (Ky. 2003) (citing Restatement (Second) § 344) (emphasis added). We will apply that analysis here.

As for NOTL's failure under § 344(a) to exercise reasonable care to discover the third persons lying on the floor, we have already noted that Collins presented no proof whatsoever as to how long the teenagers were there. The most Collins

has been able to assert is that the teenagers should have been discovered in the time it took them "to lie down, sprawl out, and get comfortable." (Order, R. 87 (quoting Collins's Response to the Motion for Summary Judgment)). The circuit court properly identified this as speculation and not proof. Not only is it impossible to know how long it took the teenagers to "get comfortable," this speculation presumes the teenagers *had gotten* comfortable, a presumption for which there is no proof. In fact, it is speculation even as to whether the teenagers' role in this incident was accidental, negligent, or intentional.

As the circuit court further noted, NOTL contracted with a security firm to provide "fixed and roving patrols throughout the common areas [to] monitor for loitering among other things." (Order, R. 87). The uncontradicted proof was that the security guards were carrying out their duties on the night of the incident. Speculation only, and nothing more, supports the allegation that NOTL should have discovered the danger posed by the reclining teenagers.

Similarly, Collins also presented no evidence that NOTL failed under § 344(b) to warn of the harm that might be caused by third parties sitting on the floor. The duty is to warn of dangers of which the premises owner is aware and those that, with reasonable diligence, he could have discovered. There was no evidence presented that, before Collins's mishap, NOTL knew of, or could have known of, the existence of the hazard Collins tripped over. To the contrary, NOTL presented testimonial evidence by deposition that NOTL personnel had never seen

anyone sitting on the floor and that there had never been an incident involving loitering. Collins presented no evidence to contradict that testimony.

Nevertheless, Collins argues that if NOTL had provided more seating in the common area the teenagers would not have had to lounge on the floor.
In terms of the Restatement standard, this might fall in the category of "otherwise protect[ing invitees] against" the harm of people sitting on the floor. Restatement (Second) of Torts § 344(b). However, the evidence refuted Collins's unsupported assertion that additional seating would have protected him against this hazard. Collins himself could not recall whether the available seating was fully occupied and there is no support for the inference that, had there been additional seating, the teenagers would not still have chosen the floor. An NOTL witness testified that he had never seen people lying on the floor, had never received a complaint about the lack of seating, and had never had any request for additional seating. There is nothing here more than speculation that additional seating would have prevented this harm.

Collins attempted to create a genuine issue of material fact by offering a photograph taken after the fall that indicates that at least one additional bench was added to the common area between the time of Collins's fall and his response to the motion for summary judgment. As did the circuit court, we conclude that the addition of extra seating after the incident does not create a genuine issue of material fact concerning the amount of seating available prior to or at the time of

the incident.[3] The only admissible evidence presented to the circuit court was as previously stated, and all of it supports the grant of summary judgment. In sum, we find Collins has failed to present evidence demonstrating any genuine issue of material fact regarding seating. Summary judgment was proper.

Finally, Collins also faults the trial court for refusing to grant him additional time to conduct further discovery before ruling on NOTL's summary-judgment motion. Collins wanted to depose the security guard who responded to the incident, but was unable to do so because the guard was serving in Afghanistan; the guard returned in September 2012.

We find Collins's argument puzzling because the record reflects the circuit court did afford him extra time to take the security guard's deposition prior to entering summary judgment. CR 56.06[4] permits a party to ask the trial court to refuse or postpone a ruling on a motion for summary judgment pending further discovery. In its response to NOTL's summary-judgment motion, Collins requested additional time to take the security guard's deposition. The circuit court granted Collins's request on October 24, 2012, and afforded him ten days to

[3] Furthermore, this evidence is inadmissible. Kentucky Rules of Evidence (KRE) 407 prohibits the admission of subsequent remedial measures to establish negligence. KRE 407 ("When, after an event, measures are taken which, if taken previously, would have made an injury or harm allegedly caused by the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence[.]"); *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992) (indicating inadmissible evidence is not "suitable to support a motion for summary judgment").

[4] CR 56.06 provides: "Should it appear from the affidavits of a party opposing the motion [for summary judgment] that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

accomplish the deposition. Accordingly, Collins's argument that the circuit court failed to address and grant his request for additional time is meritless.

## IV. Conclusion

Considering all of the record in a light most favorable to Collins, we conclude that there is no genuine issue of material fact and NOTL is entitled to judgment as a matter of law. Accordingly, we affirm the circuit court's November 21, 2012 order.

ALL CONCUR.

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