RENDERED: APRIL 27, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000782-MR

CARRIE BIRCHFIELD;
MICHAEL BIRCHFIELD; AND
HUMANA HEALTH PLAN, INC.[1] APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 13-CI-001671

NORTON HOSPITALS, INC., D/B/A
NORTON AUDOBON[2] HOSPITAL APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, D. LAMBERT, AND NICKELL, JUDGES.

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[1] Although Humana Health Plan, Inc., is listed as an Appellant in the notice of appeal, it has not filed a brief nor participated in any way in this appeal. Thus, no further mention of this party is necessary in this Opinion.

[2] Appellants identified Appellee with this spelling in their Notice of Appeal and heading of their brief. Appellee is registered with the Kentucky Secretary of State under the assumed name "Norton Audubon Hospital." The spelling of the party's name in the action below is "Audubon." As we believe "Audubon" is the correct spelling, we choose to refer to Appellee as such.

NICKELL, JUDGE: Carrie and Michael Birchfield appeal from a Jefferson Circuit Court order granting summary judgment in favor of Norton Hospitals, Inc. d/b/a Norton Audubon Hospital ("Norton"). The Birchfields assert the grant was improper because the issue of causation of Carrie's fall on Norton's premises was a question for a jury to decide. Finding no error, we affirm.

On April 4, 2012, Carrie visited Norton's facility to comfort her grandmother after the passing of Carrie's "only grandfather figure." Carrie was accompanied by her father and sister. It had been raining and the ground was wet. During her walk from the parking structure to the coffee shop entrance, Carrie fell on Norton's sidewalk, which was coated in granulated epoxy sealant.[3] Carrie landed on and injured her left knee. Carrie and her husband, Michael, sued Norton for premises liability.

Discovery was conducted, including taking depositions of Carrie, her father and sister. In her deposition, Carrie admitted she did not see what caused her fall. Likewise, her father and sister testified they did not see or experience anything slippery in the area of Carrie's fall. Norton produced expert testimony from an engineer who tested the area of Carrie's fall.[4] The expert's report[5] showed

[3] The concrete sidewalk was coated with a sealant to prevent water damage called Neogard.

[4] Norton hired Rimkus Consulting Group, Inc., to "evaluate the surface and determine if the walking surface was slip resistant according to industry standards and if there any anomalies that would make the area noncompliant with the applicable building code."

[5] The report, dated December 1, 2014, was authored by Lori L. Cox, P.E., who performed a site visit and slip resistance testing in the area of the reported fall on July 16, 2014.

the area where the fall occurred exceeded applicable industry standards and was slip-resistant when wet or dry.

About two months prior to the scheduled trial, Norton moved for summary judgment contending Carrie could not prove she encountered a dangerous condition which caused her fall. The trial court agreed and granted summary judgment. The Birchfields appealed. We affirm.

Summary judgment is appropriate when no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. CR[6] 56.03. Summary judgment may be granted when "as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (citation omitted). Whether summary judgment is appropriate is a legal question involving no factual findings, so a trial court's grant of summary judgment is reviewed *de novo*. *Coomer v. CSX Transp*., *Inc.*, 319 S.W.3d 366, 370-71 (Ky. 2010).

It is well recognized landowners are not insurers of the safety of individuals invited onto their property, but instead, are required to maintain their premises in a reasonably safe condition. *Shelton v. Kentucky Easter Seals Society, Inc*., 413 S.W.3d 901, 908 (Ky. 2013); *Dick's Sporting Goods, Inc. v. Webb*, 413 S.W.3d 891, 897 (Ky. 2013). "Generally speaking, a possessor of land owes a duty to an invitee to discover unreasonably dangerous conditions on the land and

[6] Kentucky Rules of Civil Procedure.

either eliminate or warn of them." *Shelton* at 909. While Kentucky's premises liability law has undergone some changes, "[t]he basic negligence tort paradigm has never changed: duty, breach, causation, damages." *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288, 298 (Ky. 2015). Thus, for a landowner to be held at fault for a visitor's injury, it must be established: (1) the landowner owed a duty to eliminate or warn of an unreasonable hazard; (2) the landowner breached its duty owed to the specific visitor; (3) such breach caused the slip, trip, fall, or otherwise harmful incident; and (4) the visitor was damaged by said incident. Summary judgment for a landowner is appropriate where "reasonable minds cannot differ or it would be unreasonable for a jury to find breach or causation[.]" *Shelton* at 916.

In the instant case, the Birchfields allege the walkway where Carrie fell was entirely epoxy coated and may have been wet.[7] Norton offered expert proof the area was slip-resistant whether wet or dry. Plaintiffs cannot offer evidence an unreasonably dangerous hazard existed which caused Carrie's fall—mere speculation is insufficient to avoid summary judgment. *Jones v. Abner*, 335 S.W.3d 471, 475 (Ky. App. 2011). Carrie "essentially assumes that something . . . caused her fall without providing any evidence to support her assumption." *Id.* at 476.

[7] Carrie testified she did not observe whether the ground was wet before, during, or after her fall; she also did not recall whether her knee or any part of her pants where she may have landed were wet. Carrie's father and sister testified the area was wet, but they did not inspect or test the area to determine if it was slick.

The Birchfields argue "a rash of falls, related to the wet concrete coated in Neogard around the Emergency Room entrance, nearby where Appellant fell, were evidence of an unknown and unreasonably dangerous condition" and created a genuine issue of material fact for a jury to decide. The trial court correctly found the evidence of other falls was not related to nor probative of Carrie's fall. The seven other incidents occurred during the winter[8] leading up to Carrie's fall and at altogether different locations—near the Emergency Room (ER) entrance rather than the coffee shop entrance. There were several spots near the ER where the sand used to create the gritty surface texture was not present and those spots were slicker than the areas with sand grit. The sidewalk near the coffee shop entrance where Carrie fell had no spots where sand grit was absent. No link was established between Carrie's fall and the previous falls which would otherwise impose liability on Norton.

The Birchfields were required to demonstrate:

> (1) . . . [Carrie] had an encounter with a foreign substance or other dangerous condition on the business premises; (2) the encounter was a substantial factor in causing the accident and the customer's injuries; and (3) by reason of the presence of the substance or condition, the business premises were not in a reasonably safe condition for the use of the business invitees.

Id. at 475 (quoting *Martin v. Mekanhart Corp*., 113 S.W.3d 95, 98 (Ky. 2003)); *see also Lanier v. Wal-Mart Stores, Inc*., 99 S.W.3d 431, 435-36 (Ky. 2003). No

[8] As might be expected, some of those incidents involved the presence of ice, which make them even more distinguishable from the case at bar.

evidence was offered satisfying these prerequisites. As such, the trial court's grant of summary judgment was appropriate.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is AFFIRMED.

ALL CONUR.

BRIEF FOR APPELLANTS:

Joshua D. Farley
Louisville, Kentucky

BRIEF FOR APPELLEE, NORTON HOSPITALS, INC. D/B/A NORTON AUDUBON HOSPITAL:

Patricia C. Le Meur
Joseph M. Effinger
Matthew A. Piekarski
Louisville, Kentucky