RENDERED: SEPTEMBER 8, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001351-MR

EVALINE ALEXANDER — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HON. CHARLES J. CUNNINGHAM, JR., JUDGE
ACTION NO. 13-CI-004371

SUNSHINE BINGO CENTER, LLC; JEFFERSON CENTRE, LLC; OKOLONA FASTPITCH SOFTBALL, INC.; OKOLONA BASEBALL, INC.; SOUTH LOUISVILLE BABE RUTH, INC.; AND EDWIN B. SCOTT, JR. — APPELLEES

AND

NO. 2015-CA-001387-MR

SUNSHINE BINGO CENTER, LLC; AND JEFFERSON CENTRE, LLC — CROSS-APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HON. CHARLES J. CUNNINGHAM, JR., JUDGE

EVALINE ALEXANDER; OKOLONA FASTPITCH SOFTBALL, INC.; OKOLONA BASEBALL, INC.; SOUTH LOUISVILLE BABE RUTH, INC.; AND EDWIN B. SCOTT, JR. CROSS-APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING
APPEAL NOS. 2015-CA-001351-MR AND 2015-CA-001387-MR

** ** ** ** **

BEFORE: J. LAMBERT, STUMBO, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Evaline Alexander brings Appeal No. 2015-CA-001351-MR from an August 20, 2015, summary judgment dismissing her premises liability action against Sunshine Bingo Center, LLC, Jefferson Centre, LLC, Okolona Fastpitch Softball, Inc., Okolona Baseball, Inc., South Louisville Babe Ruth, Inc., and Edwin B. Scott, Jr. Sunshine Bingo Center, LLC, and Jefferson Centre, LLC, bring Cross-Appeal No. 2015-CA-001387-MR from the same summary judgment. We affirm in part, reverse in part, and remand both the appeal and cross-appeal.

On June 3, 2013, Alexander was attending a bingo game at a bingo hall located in Louisville, Kentucky. The hall was owned by Jefferson Centre, LLC (Jefferson Centre) and was leased to Sunshine Bingo Center, LLC (Sunshine Bingo). Sunshine Bingo had then sub-leased the hall to South Louisville Babe

Ruth, Inc.[1] During an intermission in a bingo game, Alexander slipped and fell on water that had accumulated on the floor of the hall. Two witnesses stated that moments before Alexander fell, Edwin B. Scott, Jr., had spilled water from a cup onto the floor. Scott was also attending the bingo game. He denied spilling the water.

On August 30, 2013, Alexander filed a premises liability action in the Jefferson Circuit Court against Jefferson Centre, Sunshine Bingo, Louisville Babe Ruth, Okolona Baseball Inc., and Okolona Fastpitch Softball, Inc. Alexander alleged that defendants failed to keep the bingo hall in a reasonably safe condition and failed to warn Alexander of the hazardous water that defendants knew or should have known existed. Due to appellees' negligence, Alexander claimed that she suffered bodily injury, pain and suffering, mental anguish, as well as past and future medical expenses. Thereafter, Sunshine Bingo and Jefferson Centre filed a third-party complaint against Scott for negligently spilling the water upon the floor at the bingo hall.

Eventually, Jefferson Centre, Sunshine Bingo, Louisville Babe Ruth, Okolona Baseball, and Okolona Softball filed motions for summary judgment. Therein, they argued that the undisputed facts demonstrated that they had not breached any duty of care to Alexander as the water was spilled on the floor by Scott only moments before Alexander fell.

[1] Apparently, Okolona Fast Pitch Softball, Inc., and Okolona Softball, Inc., were using the bingo premises with South Louisville Babe Ruth, Inc., through its lease agreement at the time of the accident.

By an August 20, 2015, summary judgment, the circuit court dismissed the premises liability action against defendants and the third-party complaint against Scott. In so doing, the circuit court reasoned:

> The the [sic] owners and primary lessees of the venue were Jefferson Center, [sic] LLC, and Sunshine Bingo Center, LLC, respectively. Plaintiff has difficulty verbalizing a legal theory of liability against these Defendants - and this is because there really isn't a cognizable cause of action against them given how the discovery has shown the facts to be in this instance. While there was no doubt a good faith basis for bringing a claim against them before the limitations period ran, now that full discovery has established the facts, the day of reckoning has arrived. There was no duty owed by these two Defendants to Ms. Alexander which was violated and contributed substantially to her fall and injuries. Therefore, their motions for summary judgment are GRANTED.
>
> This leaves the Defendant baseball entities who were actually operating the bingo game and who were contractually obligated to clean any spills and to have persons on site to monitor the area and deal with problems. Current Kentucky law requires someone in control of premises to both warn its invitees of known hazards and to take reasonable steps to locate other hazards. It also must remediate those hazards which could be cleared up. Classically, the problem for plaintiffs in such cases was not proving duty, but rather proving that the hazard was either known or discoverable. The Kentucky Supreme Court made their task a little easier in *Lanier vs. Walmart Stores,* 99 S.W.3d 431 (Ky. 2003), when it held that the fact an Icee had been spilled long enough to melt allowed a jury to infer it had been long enough for Walmart to have discovered it and removed it. *Lanier* essentially held that a reasonably prudent business operating a store with liquids in the area had to have an active, rather than passive, effort to protect invitees from the inevitable spills on their property.

The Defendants cite to one patron's sworn deposition testimony that she saw Mr. Scott spill some of his water. Then, before she could even summon someone to clean it, or warn others to avoid it, the Plaintiff walked by and slipped. In such a fact pattern, there can be no liability on the premises owner because the time between the hazard coming into existence and the Plaintiff falling was too short. However, Plaintiff raises a few points which must be addressed.

First, Plaintiff points out that in addition to the water, the floor was littered with pull tabs from a different gambling game and these may have made it difficult for her to appreciate the moisture on the floor. However, precisely because she was aware of these tabs, and in her deposition she did not indicate they contributed to her fall, they cannot be a basis for liability. *See, Johnson vs. Lone Star Steakhouse Saloon* (patron who was aware of peanut shells on the floor could not assert premise owner was liable for creating the hazard).

Second, another patron has apparently testified that Mr. Scott had sufficient time to return to his seat before Ms. Alexander fell. While this arguably creates a better argument that the spill should have been detected and wiped up, it still falls short. The Defendants had a duty of ordinary care. Perhaps with those extra moments, assuming a jury believed they existed, through extraordinary effort, the fall would have been prevented. But the law does not require landowners to provide such an extraordinary level of care absent unusually dangerous or "ultrahazardous" activities such as blasting. While it proved unfortunately harmful for Ms. Alexander on that day, playing bingo is not an ultrahazardous activity.

Third, if there had been a history of persons falling in this spot or as a result of similar spills, the law might impose a duty to take affirmative steps to deal with them in advance (such as by providing warning signs or higher-friction flooring). At least one patron testified that this was not the first time they had observed Mr. Scott spill water. However, it does not appear anyone

> slipped like this before so there is no basis for the Court to impose a duty to prevent in advance what had never been shown to exist.
>
> Finally, Plaintiff points out that while someone saw Mr. Scott spill water and that she appeared to slip in the same location soon afterward, the jury might believe the water she slipped on had been spilled much earlier. In that scenario, she could argue it may have been there long enough that the Defendants should have learned of it in the exercise of ordinary care before she fell. The problem with this argument is that it essentially asks the Court to allow the jury to speculate, something the law frowns upon. Here they would have to speculate both that the water involved was spilled by someone else and that it was spilled a sufficient number of minutes earlier. There is no evidence of either though. This cannot support an award of damages however plausible it might be.

These appeals follow.

APPEAL NO. 2015-CA-001351-MR

Alexander contends that the circuit court erroneously rendered summary judgment dismissing her premises liability action against appellees. She argues that material issues of fact preclude summary judgment and that the circuit court misapplied the law. For the following reasons, we conclude that the circuit court erred by dismissing Alexander's premises liability action against all of the appellees except Jefferson Centre.

Summary judgment is proper where there exists no material issues of fact and movant is entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). All facts and inferences therefrom are to be viewed in a light most favorable to the nonmoving

party. *Steelvest, Inc.*, 807 S.W.2d 476. As in this case, where the circuit court found there were no disputed material facts to support a premises liability claim, our review of the circuit court's decision is *de novo*. *3D Enterprises Contracting Corp. v. Louisville & Jefferson Cnty. Metro Sewer Dist.*, 174 S.W.3d 440 (Ky. 2005).

We begin by addressing the liability of Jefferson Centre and Sunshine Bingo. These appellees assert in their brief that the circuit court granted summary judgment in their favor based on their landlord status and that Alexander waived any claim regarding the landlord duty issue by not specifically addressing the same in her brief on appeal. We agree that no duty existed between Jefferson Centre and Alexander but believe a factual dispute exists as concerns Sunshine Bingo's liability.

The summary judgment rendered in this case did not reference the landlord status of Jefferson Centre and Sunshine Bingo. Rather, the court concluded that Alexander had not stated a "cognizable cause of action" against these parties and there otherwise was "no duty owed by these two Defendants to Ms. Alexander." Summary Judgment at 2. Presumably, the circuit court reached this conclusion based on the parties' landlord status, but failed to articulate the same.

As a general proposition of law in Kentucky, a tenant takes the leased premises as he finds them. *Milby v. Mears*, 580 S.W.2d 724 (Ky. App. 1979). Upon Jefferson Centre leasing the property to Sunshine Bingo and placing

Sunshine Bingo in complete control of the premises, Jefferson Centre's only duty as landlord was to warn the tenant of known latent defects at the time of the lease agreement. *Carver v. Howard*, 280 S.W.2d 708 (Ky. 1955).

In *Carver*, Kentucky's highest court explained the landlord liability rule as follows:

> In determining the liability of a landlord to a tenant and his guests, invitees and others for injuries attributable to defects in the premises, there is in the law a clear distinction existing between a state of facts where the tenant is put in complete and unrestricted possession and control of the premises with no statutory or contractual obligation on the landlord to repair, and a case where the defective condition is located in that portion of the demised premises, or appurtenances, retained by the lessor for the common use and benefit of a number of tenants.

Carver, 280 S.W.2d at 711.

Based on our review of the lease between Jefferson Centre and Sunshine Bingo (Record at 275–87), Sunshine Bingo was placed in complete and total unrestricted control of the leased premises, and there are no allegations being made by Alexander that latent defects in the premises not disclosed by Jefferson Centre resulted in the injuries sustained by Alexander. The circuit court was correct that Jefferson Centre owed no duty to Sunshine Bingo or its sublessees in regard to the operation of these premises by Sunshine Bingo. *See Carney v. Galt*, 517 S.W.3d 507 (Ky. App. 2017). Accordingly, we affirm the summary judgment granted by the circuit court in favor of Jefferson Centre.

However, we cannot reach the same result for Sunshine Bingo as concerns its sublease to South Louisville Babe Ruth. Sunshine Bingo had a manager on duty on the premises during the bingo sessions and operated a concession stand for the bingo patrons. Based on witness testimony, Sunshine Bingo cleaned up any spills on the floors during the sessions. Paragraph III 2. E. of Sunshine Bingo's Sublease reads:

> Lessee shall provide sufficient personnel to "police" the entire floor of the Facility in an effort to maintain a secure and orderly Facility and in order to eliminate spills or other safety problems on the floor or within the Facility. Any problems discovered in the Facility or in the parking amenities shall be reported immediately to the Lessor or Lessor's manager on duty.

Record at 293. This provision clearly reflects that Sunshine Bingo, as a landlord under the sublease, did not relinquish complete control of the premises to its tenants as contemplated under *Carver*, 280 S.W.2d 708. Accordingly, Sunshine Bingo did have a duty to exercise ordinary care to keep the premises utilized by its tenants in a reasonably safe condition. *Id.*

Whether Sunshine Bingo breached its duty of care in this case is factually in dispute based on the record on appeal and this must be resolved by the trier of fact in accordance with applicable law. Thus, the circuit court's granting of summary judgment for Sunshine Bingo was in error and will be reversed.

We further find Sunshine Bingo's waiver argument to be without merit. The amended complaint in this action clearly asserted a claim against Jefferson Centre and Sunshine Bingo in their capacity as a landlord based upon their respective

leases. The circuit court concluded that no duty existed under applicable law in granting summary judgment. Our review, being *de novo* as previously stated, placed no limitation or restriction upon our review of the entire record on appeal, which includes the leases. While Alexander may not have articulated her argument in a concise way, she nonetheless challenges on appeal the granting of summary judgment to the respective landlords. This was sufficiently argued to facilitate our review.

As concerns the claims against Louisville Babe Ruth and other subleasees, for whom summary judgment was also granted, we must examine and apply existing premises liability law. In Kentucky, it is well-established that "a possessor of land owes a duty to an invitee to discover unreasonably dangerous conditions on the land and either eliminate or warn of them." *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901, 909 (Ky. 2013). In particular, our Supreme Court has held that a possessor of land has a duty of ordinary care to maintain the premises in a reasonably safe condition and must reasonably inspect the premises to discover possible dangerous conditions. *Dick's Sporting Goods, Inc. v. Webb*, 413 S.W.3d 891 (Ky. 2013) (citing *Lyle v. Megerle*, 270 Ky. 227, 109 S.W.2d 598 (1937)); *Lanier v. Wal-Mart Stores, Inc.*, 99 S.W.3d 431 (Ky. 2003). And, an invitee is defined as an individual who "enters upon the premises at the express or implied invitation of the owner or occupant on business of mutual interest to them both, or in connection with business of the owner or occupant." *Scuddy v. Coal Co., Inc. v. Couch*, 274 S.W.2d 388, 390 (Ky. 1954).

In *Shelton*, the Kentucky Supreme Court emphasized that a land possessor's duty of care was not eliminated because of the obviousness of the danger. *Shelton*, 413 S.W.3d 901. The Supreme Court went on the explain in *Shelton* the land possessor's duty of care as follows:

> First and foremost, a land possessor is subject to the general duty of reasonable care. "The concept of liability for negligence expresses a universal duty owed by all to all." And "every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury." Of course, possessors of land are not required to ensure the safety of individuals invited onto their land; but possessors of land are required to maintain the premises in a reasonably safe condition.

Shelton, 413 S.W.3d at 908 (citations omitted.)

In this case, we must view the facts and inferences therefrom in a light most favorable to Alexander, given the foreseeability of her accident and injury. It is clear that Alexander was an invitee at the time of her injury. Additionally, the water on the floor of the bingo hall is alleged to be a substantial factor in causing Alexander's fall and subsequent injuries. Because of the water, the floor of the bingo hall was not in a reasonably safe condition. *See Lanier*, 99 S.W.3d 431; *Martin v. Mekanhart Corp.*, 113 S.W.3d 95 (Ky. 2003). However, the circuit court held that there was an insufficient amount of time for appellees to have discovered and remedied or warned of the water on the floor. According to the eyewitness, the time between Scott spilling the water and Alexander's fall was a relatively

short period.[2] Regardless of the amount of time necessary to clean up the spill, based upon the disputed facts set out in the record below, it is the responsibility of the trier of fact to determine whether the time period between the spilling of the water and Alexander's fall was long enough for an ordinary prudent person to have reasonably discovered and warned of the water or remedied the dangerous condition. *See Grubb v. Smith*, ___ S.W.3d ___, 2017 WL 1102860 (Ky. 2017); *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288 (Ky. 2015); *Dick's Sporting Goods, Inc.*, 413 S.W.3d 891. Thus, we conclude that whether appellees breached their duty of ordinary care presents a factual issue that a jury must decide under the facts of this case. As such, we hold that the circuit court erred by rendering summary judgment dismissing Alexander's premises liability action against South Louisville Babe Ruth, Okolona Fast Pitch Softball and Okolona Softball.

CROSS-APPEAL NO. 2015-CA-001387-MR

Jefferson Centre and Sunshine Bingo filed their cross-appeal in this case "in the event this Court determines that the circuit court erred in granting summary judgment . . . as to . . . Alexander's claims, then the circuit court's dismissal of their common law indemnity claim [against Scott] also should be reversed." Cross-Appellants' Brief at 6. In its summary judgment, the circuit court concluded that "[t]he only claims against . . . Scott were for indemnification so all claims made against him are moot." As we have reversed the dismissal of Alexander's premises liability claims, the circuit court's summary judgment

[2] We again note that Edwin B. Scott, Jr., has denied spilling the water and thus indemnity claims against him remain in dispute.

dismissing as moot the claims for indemnification against Scott is, likewise, reversed except as to Jefferson Centre, LLC, who we have held has no liability as a landlord in this case, and thus can assert no claim against Scott.

For the foregoing reasons, the summary judgment of the Jefferson Circuit Court in Appeal No. 2015-CA-001351-MR and Cross-Appeal No. 2015-CA-001387-MR is affirmed as concerns Jefferson Centre and reversed and remanded for proceedings consistent with this opinion as concerns Sunshine Bingo, South Louisville Babe Ruth, Okolona Fast Pitch Softball and Okolona Softball.

ALL CONCUR.

BRIEF FOR APPELLANT, EVALINE ALEXANDER:

Sam Aguiar
Jonathan B. Hollan
Terry Goodspeed
Louisville, Kentucky

ORAL ARGUMENT FOR EVALINE ALEXANDER:

Jonathan B. Hollan
Louisville, Kentucky

BRIEF FOR APPELLEES, SUNSHINE BINGO CENTER, LLC AND JEFFERSON CENTRE, LLC:

Charles H. Cassis
Aaron J. Silletto
Prospect, Kentucky

ORAL ARGUMENT FOR APPELLEES, SUNSHINE BINGO CENTER, LLC AND JEFFERSON CENTRE, LLC:

Aaron J. Silletto
Prospect, Kentucky

BRIEF FOR APPELLEES/CROSS-APPELLEES: SOUTH LOUISVILLE BABE RUTH, INC.; OKOLONA FAST PITCH SOFTBALL, INC.; AND OKOLONA BASEBALL, INC.

Alton D. Priddy
Thomas J. Schultz
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEES/CROSS-APPELLEES: SOUTH LOUISVILLE BABE RUTH, INC.; OKOLONA FAST PITCH SOFTBALL, INC.; AND OKOLONA BASEBALL, INC.

Alton D. Priddy
Louisville, Kentucky

BRIEF FOR APPELLE/CROSS-APPELLE, EDWIN B. SCOTT, JR.:

Jeffrey A. Taylor
Kyle W. Ray
Lexington, Kentucky

ORAL ARGUMENT FOR APPELLE/CROSS-APPELLE, EDWIN B. SCOTT, JR.:

Jeffrey A. Taylor