

RENDERED: FEBRUARY 2, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001272-MR

ALICE DAY

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE WILLIAM ENGLE, III, SPECIAL JUDGE
ACTION NO. 14-CI-00001

APPALACHIAN REGIONAL
HEALTHCARE, INC.

APPELLEE

OPINION
REVERSING AND REMANDING

** **

BEFORE: JONES, STUMBO,¹ AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Alice Day brings this appeal from an April 18, 2016, order granting a motion for summary judgment filed by Appalachian Regional

¹ Judge Janet Stumbo participated on the panel rendering this opinion and voted prior to her retiring from the Kentucky Court of Appeals effective December 31, 2017. Release of this opinion was delayed by administrative handling.

Healthcare, Inc., and dismissing Alice's negligence claims. We reverse and remand.

On January 23, 2013, Alice was admitted as a patient to the Appalachian Regional Healthcare Hospital (hospital) in Whitesburg, Kentucky. On the day of her admission, it was noted that "the patient had altered mental status." Alice suffered from a number of maladies, including dehydration, recurrent diarrhea, anemia, urinary tract infection, pneumonia, low blood pressure, and liver disease. According to an inpatient progress note of Dr. Marlene Bielecki dated January 27, 2013, Alice had gone "out to smoke this morning. While walking outside the hospital, she slipped on the ice and fell striking her face." Alice has no independent memory or recollection of her stay at the hospital, including her fall. Greg Day, Alice's husband, also reported that he visited Alice on January 27, 2013, and that she had mud on her teeth, pajamas, and face. Greg further stated that Alice was not lucid and was unable to tell him what had happened to her. He only learned of the fall after questioning a nurse. Alice was transferred from the hospital due to her deteriorating condition and eventually was admitted into the University of Kentucky Hospital. Greg stated that Alice was ultimately diagnosed with a brain bleed from the fall and suffered considerable neurological deficit.

On January 7, 2014, Alice filed a complaint in the Letcher Circuit Court against Appalachian Regional Healthcare, Inc. (Appalachian Healthcare). In the complaint, Alice claimed:

That on or about the 25th day of January 2013, the plaintiff, Alice Day, was lawfully upon the premises of Whitesburg Appalachian Regional Healthcare (ARH) 240 Hospital Road, Whitesburg, Letcher County, Kentucky, for the business purposes of the defendant, and was, therefore, a business invitee.

On the date and at the place set out above, the defendant, through its actual or ostensible agents, was negligent in failing to provide safety for the patients, including the plaintiff, Alice Day.

On the date and at the place set out above, while admitted to Whitesburg ARH, the plaintiff became disoriented and delusional and wandered outside the hospital facility where she fell, causing the plaintiff to suffer serious bodily injury.

Defendant failed to provide the supervision and protection of the plaintiff, patient in that they failed to protect her from wondering outside the hospital facility.

On the date and at the place set out above, the defendant, through its actual or ostensible agents, knew or should have known that its failure to monitor the patients, created an unreasonable risk of injury to its business invitees, including the plaintiff, Alice Day.

On the date and at the place set out above, the defendant, through its actual or ostensible agents, made no attempt to warn its business invitees, including the plaintiff, Alice Day, of this unreasonable risk of injury.

On the date and at the place set out above, the defendant, through its actual or ostensible agents, made no attempt to monitor the plaintiff, Alice Day.

January 7, 2014, Complaint at 2.

Appalachian Healthcare answered and thereafter filed a motion for summary judgment. By order entered April 18, 2016, the circuit court granted Appalachian Healthcare's motion for summary judgment and dismissed Alice's negligence claims. The order consisted of three paragraphs and included no legal analysis other than there existed no genuine issue of material fact as to hospital's liability.

Alice contends that the circuit court erred by rendering summary judgment dismissing her claims against Appalachian Healthcare. Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure 56; *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. Our review proceeds accordingly.

The Kentucky Supreme Court has pronounced that "[t]he concept of liability for negligence expresses a universal duty owed by all to all." *Shelton v. Ky. Easter Seals Soc'y, Inc.*, 413 S.W.3d 901, 908 (Ky. 2013) (quoting *Gas Serv.*

Co. v. City of London, 687 S.W.2d 144, 148 (Ky. 1985)). This general duty of care requires “every person . . . to exercise ordinary care in his activities to prevent foreseeable injury.” *Shelton*, 413 S.W.3d at 908 (quoting *Grayson Fraternal Order of Eagles, Aerie No. 3738, Inc. v. Claywell*, 736 S.W.2d 328, 332 (Ky. 1987)). In addition to this general duty of care, certain relationships trigger more specific duties of care. At issue in this appeal is the specific duty of care associated with a possessor of land and an invitee. Our Supreme Court has held 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*, 413 S.W.3d at 909; *Dick’s Sporting Goods, Inc. v. Webb*, 413 S.W.3d 891 (Ky. 2013); *Lanier v. Wal-Mart Stores, Inc.*, 99 S.W.3d 431 (Ky. 2003). And, this duty of care is not eliminated because of the open or obvious nature of the dangerous condition. *Shelton*, 413 S.W.3d 901. An invitee is generally 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 Coal Co., Inc. v. Couch*, 274 S.W.2d 388, 390 (Ky. 1954).

In its motion for summary judgment, Appalachian Healthcare maintained:

The Complaint alleges that [Alice] suffered from injuries from a fall on ARH [Appalachian Regional Healthcare,

Inc.] premises that resulted from ARH's failure to protect and warn [Alice], a business invitee, of an unreasonable risk of injury. [Alice] has offered no credible evidence in support of this allegation and cannot do so for several reasons. First, [Alice] has no recollection of the events that transpired at Whitesburg ARH up to and including her fall. Secondly, [Alice's] husband, Greg Day, was not present at Whitesburg ARH when [Alice] fell and has no personal knowledge of the circumstances surrounding the injury. Finally, there are no third party witnesses or direct evidence showing the circumstances leading up to the alleged incident which forms the basis for the subject claim.

Because of the absence of any credible evidence to explain the circumstances of [Alice's] injuries or the existence of a dangerous condition, it is impossible for a jury to find that ARH violated the applicable duty of care owed to business invitees. Accordingly, summary judgment should be entered for ARH because there are no genuine issues of material fact and it is entitled to judgment as a matter of law.

October 13, 2015, Summary Judgment at 1-2.

The deposition of Greg Day was taken prior to entry of the summary judgment. In his deposition, Greg stated that he visited Alice at the hospital on January 27, 2013. Greg recalled that he entered the room and that Alice "was sitting in the bed, and she's got dried blood on her face, . . . a big old scuff on her nose, she's got mud in her teeth." Deposition at 34. He also remembered that Alice's pajamas were wet and muddy. When reviewing a summary judgment, all facts and inferences therefrom are to be viewed in a light most favorable to the nonmoving party. From Greg's testimony alone, it is reasonable to infer that Alice

fell outside of the hospital close in time to Greg's visit, while a patient under the hospital's care.

Additionally, as set forth in an inpatient progress note prepared by Dr. Marlene Bielecki, an attending physician at the hospital, the doctor notes that Alice reported that she left the hospital to go smoke and that "[w]hile walking outside the hospital, she [Alice] slipped on the ice and fell striking her face." This narrative by Alice is found in three other medical records that were regularly maintained by the hospital. While these medical records constitute hearsay, Kentucky Rules of Evidence (KRE) 803(6) contains an exception to the hearsay rule that permits admission of medical records ordinarily maintained by a hospital. *See Baylis v. Lourdes Hosp., Inc.*, 805 S.W.2d 122 (Ky. 1991). And, KRE 803(4) contains another exception to the hearsay rule that permits admission of "[s]tatements [made by a patient] for purposes of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain, sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis." *See also James v. Com.*, 360 S.W.3d 189 (Ky. 2012). When considering the medical records concomitantly with Greg's depositional testimony, we believe that material issues of fact have been presented as to whether Appalachian Healthcare breached its duty to maintain the hospital premises in a reasonably safe condition. Thus, we conclude that the circuit court

erroneously rendered summary judgment dismissing Alice's negligence claims against Appalachian Healthcare.

For the foregoing reasons, the summary judgment of the Letcher Circuit Court is reversed and remanded for proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
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BRIEF AND ORAL ARGUMENT
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