RENDERED: JULY 13, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000793-MR

MICHAEL HAWN — APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE DANIEL BALLOU, JUDGE
ACTION NO. 16-CI-00042

CORBIN NURSING HOME, INC. — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: JONES, KRAMER, AND J. LAMBERT, JUDGES.

KRAMER, JUDGE: Michael Hawn appeals the Whitley Circuit Court's summary dismissal of a premises liability negligence claim he asserted against the appellee, Corbin Nursing Home, Inc. ("Corbin"). In sum, the circuit court determined the condition of Corbin's premises that allegedly caused Hawn to slip, fall, and injure himself was "open and obvious," and aside from that the evidence of record only

demonstrated Corbin fulfilled any duty of care it may have owed him under the circumstances. However, because the "open and obvious" character of a potentially hazardous condition is not dispositive of premises liability negligence cases and because the evidence of record created a genuine issue regarding whether Corbin fulfilled the duty of ordinary care it owed Hawn under the circumstances, we reverse and remand.

FACTUAL AND PROCEDURAL HISTORY

Until around 2:00 a.m. on February 23, 2015, and for two or three days beforehand, the area in which Corbin's nursing facility is located experienced temperatures of approximately eighteen degrees and a snow storm significant enough to produce about eight inches of accumulated snowfall. Later that morning, between 7:00 a.m. and 9:00 a.m., Michael Hawn was an invitee of Corbin,[1] delivering bread to its nursing facility. After making his delivery, Hawn exited through the kitchen door, stepped off the sidewalk and into Corbin's parking lot on his way back to his truck, and injured himself in a fall after slipping on what he claimed was a patch of black ice. He subsequently filed suit against Corbin in Whitley Circuit Court, alleging his injuries had resulted in substantial part from Corbin's negligence in properly maintaining its parking lot.

After a period of discovery, Corbin moved for summary judgment on two alternative bases. First, citing *PNC Bank, Kentucky, Inc. v. Green*, 30 S.W.3d

[1] This point is undisputed. Under Kentucky law, 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).

185, 186 (Ky. 2000), Corbin argued it had no duty to remove or warn Hawn of the black ice he allegedly slipped on because the black ice qualified as an "outdoor natural hazard" that was as obvious to Hawn as it could have been to Corbin.

Second, Corbin argued that even if it had such a duty, the evidence of record undisputedly demonstrated it had committed no breach. In that vein, it noted Hawn had not provided evidence in the form of an affidavit demonstrating it had breached any kind of duty to properly maintain its parking lot. It also pointed to Hawn's discovery deposition testimony, in which Hawn admitted it was daylight at the time of his fall, and that he was familiar with the parking lot, entrances, and layout of Corbin's facility. Furthermore, Corbin pointed to the deposition testimony of Kelly Frazier, its employee responsible for supervising and maintaining its parking lot at all relevant times. Frazier testified he had used a tractor with a snow plow and spreader to scrape and salt the nursing home parking lot -- including the area where Hawn had fallen -- from February 21, 2015, until approximately 5:15 a.m. on February 23. He testified he had ultimately used two and a half tons of deicer in the parking lot during this three-day span to ensure any ice would melt, and that the type of deicer he used was capable of melting ice even at temperatures of negative eighteen degrees Fahrenheit. He testified that Corbin city workers had also salted and scraped the nursing home road and part of the parking lot twice on the night before the morning of Hawn's fall. And, Frazier testified, Hawn was the only person who slipped and fell in the parking lot on February 23, 2015.

Responding to Corbin's first basis for summary judgment, Hawn argued that any open and obvious condition of Corbin's parking lot did not affect whether Corbin had a duty to properly maintain its parking lot and that Corbin had a non-delegable duty to properly maintain its premises. As to Corbin's second basis, Hawn argued the reasonableness of Corbin's efforts to maintain its parking lot was an issue for a jury because there was a dispute in the evidence. Namely, in both his response and a subsequent motion to alter, amend, or vacate, Hawn cited portions of his own deposition which significantly diverged from Frazier's account of the condition of the parking lot at the time of his fall, and what Frazier had done to maintain it.[2] To summarize the relevant particulars of what Hawn cited, he testified where he had fallen was slick enough to cause him to fall despite the fact that he was wearing boots with adequate traction; at the time he fell, it appeared to him that the parking lot had not been maintained *at all*; and, that shortly after he

[2] In its appellee brief, Corbin appears to take issue with the fact that Hawn's subsequent motion to alter, amend, or vacate included more references to Hawn's deposition testimony than did his response (his response only referenced page 25, whereas his motion to alter, amend, or vacate included as an exhibit pages 21 through 28); and the fact that the substance of Hawn's subsequent motion to alter, amend, or vacate was two sentences long and merely indicated, in relevant part, "Attached to this motion are excerpts from the deposition of the Plaintiff, Michael Hawn, that highlight a few of the issues of fact that must be decided by a jury." However, Hawn's motion and additional citations to evidence were not improper. Generally speaking, the rule authorizing motions to alter, amend, or vacate (Kentucky Rule of Civil Procedure (CR) 59.05) prohibits the use of such motions to raise arguments and to introduce evidence that should have been presented during the proceedings before the entry of the judgment. *Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005); *see also Hopkins v. Ratliff*, 957 S.W.2d 300 (Ky. App. 1997). Here, Hawn's motion merely supplemented his pre-judgment arguments with additional citations to evidence that had already been extensively reviewed and cited by both the litigants (in their various pre-judgment memoranda) and the circuit court (in its order of summary judgment). Specifically, Hawn only cited excerpts from his own deposition, a copy of which was filed with the circuit court's record on August 11, 2016 -- fully seven months before the circuit court entered its order.

fell, the "maintenance man" (presumably Frazier, who admitted talking to Hawn shortly after Hawn fell) had informed him that he was preparing to *start* remedying the condition of the parking lot.[3]

After considering Corbin's motion and Hawn's response, the circuit court entered summary judgment in favor of Corbin. Additionally, the circuit

[3] The relevant substance of Hawn's deposition testimony was as follows:

> Q: Had the parking lot been scraped that morning?
> HAWN: I don't think it had, no.
> Q: Okay. When you say you don't think it had, was there snow on it? Is that what you're saying?
> HAWN: Yeah, they was. The parking lot was a mess, yeah.
> Q: Okay. Because it had been snowing?
> HAWN: Because it had been snowing or snowed the day before. I don't think it was snowing that day, I think.
> Q: Okay. Well, was it snow or ice or sludge or what?
> HAWN: I think it was both.
> Q: Okay.
> HAWN: Yeah. I'm pretty sure it was black ice.
> . . .
> Q: Well, was it a solid blanket of snow, if you remember?
> HAWN'S ATTORNEY: And what location are we talking about?
> Q: On the parking lot.
> HAWN: No.
> Q: Okay.
> HAWN: Not that I can -- not that I can remember. I remember, I just remember the snow being on the ground.
> Q: Right.
> HAWN: Honestly, you know.
> Q: When you say the ground, are you talking about out in the yard next to it or on the ground where the parking lot is?
> HAWN: I'm sure it was all, you know. It was everywhere.
> Q: Can you remember how deep it was?
> HAWN: No, I don't remember.
> Q: Okay. Did it look like someone had scraped or shoveled or anything at all?
> HAWN: No, it hadn't been took care of at all that I can remember.
> Q: At all? It had not been taken care of at all?
> HAWN: No.
> Q: They hadn't shoveled at all?
> HAWN: Not that I can remember.
> Q: Well, could it have been?
> HAWN: I don't think it was in the fact that when I got to my truck the maintenance man said he was fixing to start taking care of it.

court's order of summary judgment included findings of fact and conclusions of law adopting the substance and reasoning of Corbin's motion as set forth above. This appeal followed.

STANDARD OF REVIEW

As discussed, the circuit court purported to make findings of fact and conclusions of law in its order of summary judgment. For purposes of summary judgment, however, findings of fact and conclusions of law are unwarranted. *See* CR 52.01. Moreover, if the circuit court arrived at its decision by weighing the evidence of record -- typically the case when circuit courts *do* issue findings of fact and conclusions of law -- the circuit court misunderstood its role.

Rather, the relevant Kentucky rule relating to summary judgment, CR 56.03, only authorizes such a judgment "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." In other words,

---

> Q: Okay. So it's your testimony today that it had not been shoveled or scraped at all?
> HAWN: To the best of my knowledge.
> Q: All right. Do you recall that it had snowed that night before? You do?
> HAWN: I'm thinking it had.
> Q: Okay.
> HAWN: The best I can remember.
> Q: What kind of shoes did you have on that day?
> HAWN: I'm sure they was work boots.
> Q: Okay. Did they have soles that would maybe prevent you from falling or were they slick soles or do you recall?
> HAWN: No, I wore work boots that got grip.

> [t]he trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present at least some affirmative evidence showing that there is a genuine issue of material fact for trial.

Lewis v. B & R Corp., 56 S.W.3d 432, 437 (Ky. App. 2001) (citations and quotations omitted).

As to our own role on appeal, when reviewing the propriety of a circuit court's decision to grant a motion for summary judgment, this Court must determine "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." *Id*. (Citation omitted.) "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Id*. (Citation omitted.)

ANALYSIS

On appeal, Hawn reiterates the arguments he made below; namely, he asserts the circuit court misapplied Kentucky law relating to premises liability, and then proceeded to impermissibly weigh the evidence. We agree.

We begin with the circuit court's conclusion that, for purposes of Hawn's negligence action, Corbin owed Hawn no duty to remove or warn Hawn of

the black ice he allegedly slipped on because the black ice qualified as an "outdoor natural hazard" that was as obvious to Hawn as it could have been to Corbin. As discussed, Corbin possessed the premises where Hawn was injured, and Hawn was Corbin's invitee. Thus, for purposes of Hawn's negligence action, Corbin owed Hawn a general duty of reasonable care. As further explained in *Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 901, 908-09 (Ky. 2013),

> 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.
> . . .
>
> Generally speaking, 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.

(Citations and quotations omitted.)

With that in mind, and contrary to what the circuit court held in this matter,

> an open-and-obvious condition does not eliminate a landowner's duty. Rather, in the event that the defendant is shielded from liability, it is because the defendant fulfilled its duty of care and nothing further is required. The obviousness of the condition is a "circumstance" to be factored under the standard of care. No liability is imposed when the defendant is deemed to have acted reasonably under the given circumstances.

Id. at 911.

In other words, the openness and obviousness of an injury-causing condition is merely a consideration for purposes of comparative fault, not for purposes of determining the existence of a duty. This holds equally true where, as here, the allegedly open-and-obvious condition is a natural outdoor hazard such as snow or ice. *See Carter v. Bullitt Host, LLC*, 471 S.W.3d 288, 297 (Ky. 2015).

Next, we proceed to the circuit court's conclusion that the evidence of record undisputedly demonstrates Corbin breached no duty to Hawn. As indicated, whether Corbin breached the duty of ordinary care that it owed Hawn is a matter of reasonableness: "[I]f a landowner has done everything that is reasonable under the circumstances, he has committed no breach, and cannot be held liable to the plaintiff." *Id*. at 298. Thus, if the evidence of record demonstrated only that the condition of Corbin's parking lot that caused Hawn's condition could not have been corrected by any means; or that Corbin did all that was reasonable under the circumstances; or if the evidence only demonstrates Hawn's conduct in the face of an open-and-obvious hazard was so clearly the only fault of his injury, then summary judgment would have been appropriate. *See id*. at 297. Conversely, if the evidence is capable of demonstrating Corbin knew or should have known of the hazardous condition of its parking lot and failed to take reasonable steps with respect to it, then it may be found liable to the extent that fault is apportioned to it, and summary judgment was inappropriate. *See id*. at 299.

Here, taken in the light most favorable to Hawn, the evidence presents a question of fact about whether Corbin breached its duty of care. Specifically,

while Corbin (and the circuit court) recognized that plowing, scraping, salting, and deicing the parking lot *could* have been reasonable measures to take due to the weather on February 23, 2015, Hawn's deposition testimony, discussed previously, disputes whether those measures *were* taken -- either effectively or at all. There is no compelling reason apparent from the record for disbelieving Hawn, such as pictures of the parking lot from the day in question. Thus, when the circuit court cited the subjective testimony that some of Corbin's employees provided in this matter as evidence that no breach had occurred, the circuit court effectively assessed the credibility of the witnesses and weighed the evidence-- something it was not at liberty to do. "[I]t is the function of the jury to determine questions of credibility and issues of fact where the evidence is conflicting." *Embry v. Turner*, 185 S.W.3d 209, 213 (Ky. App. 2006).

CONCLUSION

In light of the foregoing, we REVERSE the Whitley Circuit Court and REMAND for further proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Barrett G. Freeman
Corbin, Kentucky

BRIEF FOR APPELLEE:

Sarah Tipton Reeves
Corbin, Kentucky