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IN THE
COURT OF APPEALS OF INDIANA

JOHN L. PARKER,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 72A01-0902-CV-49
	)	
LEE MORGAN,	)	
	)	
Appellee-Defendant.	)	
	)	

APPEAL FROM THE SCOTT CIRCUIT COURT
The Honorable Roger L. Duvall, Judge
Cause No. 72C01-0512-CT-41

August 28, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

After visiting his friend Calvin Guy at an apartment that Guy was leasing from landlord Lee Morgan, John Parker fell in the apartment's snow-covered parking lot and injured his ankle. When he returned after the snow had cleared, Parker observed that the parking lot was eroded and uneven in the spot where he had fallen. Parker filed a complaint against Morgan, alleging that he negligently maintained the parking lot, which was used by all the tenants and was under Morgan's control. Morgan filed a motion for summary judgment, which the trial court granted. Parker now appeals, contending that the trial court applied the incorrect standard of care and that there are remaining genuine issues of material fact. Agreeing with Parker, we reverse the trial court's grant of summary judgment and remand for further proceedings.

Facts and Procedural History

The facts most favorable to Parker, the non-movant in these summary judgment proceedings, are as follows. In 2004, Morgan owned a complex consisting of several apartments in Austin, Indiana. Morgan was responsible for performing apartment maintenance, which included maintaining the parking lot used by all the tenants. It was Morgan's responsibility to clear snow from the parking lot, and Morgan usually used a tractor and blade he owned to do this. Additionally, in previous years, Morgan had dug up the sewer lines under the parking lot and then filled the trench with stone that eventually settled, creating a grade difference between the trench and the remainder of the parking lot. This condition was not remedied as of January 2008.

On December 22 and 23, 2004, snow fell on Austin. Morgan paid a friend to clear his own driveway so that he and his wife could travel and receive guests upon their return. Morgan does not recall contacting anyone to check to see if the streets leading to the apartments were clear. Nor does he recall otherwise making arrangements to clear the snow from the parking lot of the apartments, which were about a mile and a half from his own home. Morgan knew that his tenants received visitors.

On December 27, Parker traveled in his Grand Am without difficulty to several places in southern Indiana, including Seymour, Scottsburg, Paoli, Salem, and Orleans, where he watched his son, a member of the Austin High School team, play basketball. The parking lot and sidewalks at the high school in Orleans were in fair condition, and approximately 80% of the normal fans from Austin attended the game. Parker noticed that Guy did not attend the game, which was unusual. Guy's son also played basketball for Austin High School, and Parker and Guy would frequently watch their sons' games together and occasionally carpooled to away games. Parker decided to travel to Guy's apartment in Austin to check on his welfare. Although Parker had never been to Guy's apartment before, Guy had previously explained to him where he lived and which apartment was his.

The Austin street leading to Guy's apartment had not been plowed but appeared to have been well-traveled by vehicles. The apartment parking lot had not been cleared of snow when Parker arrived there. Parker parked his car and then walked across the parking lot through the snow, which almost reached up to his knee, to get to Guy's apartment. Guy was glad to see his friend, and the two men talked about the basketball

game that day. The men agreed that Parker would return the next day to pick up Guy so they could carpool to the game together. Parker then left Guy's apartment to walk back to his car.

On the way back to his car through the snow-covered parking lot, Parker fell and hurt his ankle. He called out for Guy, who came to his aid and drove Parker's car to take him to a hospital. When Parker returned to the location where he fell after the snow was gone, Parker observed that the parking lot was eroded and uneven in the location where he fell. He realized that he had stepped into a hole that was concealed by the snow, causing his foot to roll to the right and leading to his fall.

On December 16, 2005, Parker filed suit against Morgan for negligence, and Morgan then filed an answer. On October 28, 2008, Morgan filed a Motion for Summary Judgment along with a memorandum in support and his designation of evidence. Parker filed a Response to Morgan's Motion for Summary Judgment along with a memorandum in support and his own designation of evidence. After a hearing,[1] the trial court concluded that Parker was a licensee and granted summary judgment in Morgan's favor. Parker now appeals.[2]

Discussion and Decision

[1] On appeal, Morgan asks that we strike references in Parker's brief to Paragraph 4 of Guy's Affidavit, located at Appellant's Appendix page 129. Paragraph 4 reads, "[Parker] was not trespassing on December 27th, 2004, when he fell." This paragraph was stricken at the summary judgment hearing on the basis that it impermissibly stated a legal conclusion, and Parker does not challenge this ruling on appeal. We have not considered this statement as contained in Parker's brief, but we do conclude below as a matter of law that Parker was an invitee, and thus, not a trespasser.

[2] Four days after Parker filed his notice of appeal, the trial court amended its summary judgment order to correct a scrivener's error. The original order stated, "In the case before the Court each party has designated the same evidence for consideration by the Court." Appellant's App. p. 5. The amended order removes the words "the same," *id.* at 3, as the parties' designations of evidence were different.

On appeal, Parker argues that the trial court erred by granting summary judgment in Morgan's favor because the trial court applied an incorrect standard of care and there are remaining genuine issues of material fact. The law of summary judgment is well established. The purpose of summary judgment under Indiana Trial Rule 56 is to terminate litigation about which there can be no factual dispute and which may be determined as a matter of law. *Bushong v. Williamson*, 790 N.E.2d 467, 474 (Ind. 2003). On appeal, our standard of review is the same as that of the trial court: summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Williams v. Riverside Cmty. Corr. Corp*., 846 N.E.2d 738, 743 (Ind. Ct. App. 2006), *trans. denied*. We construe all facts and reasonable inferences drawn from those facts in favor of the non-moving party. *Id*. On appeal, the trial court's order granting or denying a motion for summary judgment is cloaked with a presumption of validity. *Sizemore v. Erie Ins. Exch*., 789 N.E.2d 1037, 1038 (Ind. Ct. App. 2003). A party appealing from an order granting summary judgment has the burden of persuading the appellate tribunal that the decision was erroneous. *Id*. at 1038-39. We will affirm the grant of summary judgment on any legal basis supported by the designated evidence.[3] *Bank One Trust No. 386 v.*

[3] Parker complains Morgan has raised new issues on appeal by arguing that Morgan did not breach his duty of reasonable care and that Parker's injury was not proximately caused by Morgan's acts or omissions. Morgan argued to the trial court that Parker was either a trespasser or licensee and that Parker's fall was not the result of a latent defect.

As a result of our standard of review, we may consider Morgan's arguments *defending* the grant of summary judgment even if they were not presented at trial. *See Havert v. Caldwell*, 452 N.E.2d 154, 157 (Ind. 1983) ("Before turning to the substantive law of negligence as it applies in this case, we call attention to the rule that on appellate review the trial court's [summary] judgment will be affirmed if sustainable on any theory or basis found in the record. This rule applies to the grant of a motion for summary judgment when, even though the grant of the motion is not sustainable on the theory reflected in the trial court's findings of fact and conclusions of law it is sustainable, on the basis of the substantive

Zem, Inc., 809 N.E.2d 873, 878 (Ind. Ct. App. 2004), *trans. denied*. But we carefully review a summary judgment decision to ensure that a party was not improperly denied its day in court. *Poznanski ex rel. Poznanski v. Horvath*, 788 N.E.2d 1255, 1258 (Ind. 2003).

In a negligence suit, the plaintiff must prove three elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty by the defendant, and (3) an injury to the plaintiff as a proximate result of the breach. *Ford Motor Co. v. Rushford*, 868 N.E.2d 806, 810 (Ind. 2007). Summary judgment is rarely appropriate in negligence cases because they are particularly fact sensitive and are governed by an objective reasonable person standard, which is best applied by a jury after hearing all the evidence. *Winchell v. Guy*, 857 N.E.2d 1024, 1026-27 (Ind. Ct. App. 2006).

First, we consider whether the designated evidence demonstrates as a matter of law the existence of a duty owed by Morgan, as a landlord, to Parker, as a tenant's guest. The existence of a duty is generally a legal question for the court. *Kopczynski v. Barger*, 887 N.E.2d 928, 931 (Ind. 2008) (noting that some cases require the determination of a preliminary factual issue before the court can decide whether a duty exists). The particular duty owed is determined by the status of the injured person as an invitee, a licensee, or a trespasser. *Id.* A landowner owes a trespasser—someone who enters the

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law, on another theory. This is particularly true where the parties have addressed themselves to the merits of the theory on which the judgment is ultimately sustained.") (citations omitted). Although it may be preferable that the parties addressed at trial the theory on which a summary judgment is ultimately sustained, it is not required. However, we have previously stated that we will not consider an appellant's argument *challenging* the grant of summary judgment if it was raised for the first time on appeal. *See McGill v. Ling*, 801 N.E.2d 678, 688 (Ind. Ct. App. 2004), *trans. denied*.

To the extent that Parker argues for appellate attorney fees because of the introduction of these "new" arguments, Appellant's Reply Br. p. 4, we find this argument waived for a failure to cite to authority. *See Vagenas v. Vagenas*, 879 N.E.2d 1155, 1162 n.3 (Ind. Ct. App. 2008) (finding request for appellate attorney fees waived under Indiana Appellate Rule 46(A)(8)(a)), *trans. denied*.

premises for his own convenience, curiosity, or entertainment without the owner's or occupier's permission—the duty to refrain from willfully or wantonly injuring him after discovering his presence on the land. *Burrell v. Meads*, 569 N.E.2d 637, 639-40 (Ind. 1991), *reh'g denied*. A landowner owes a licensee—someone who enters the premises for his own convenience, curiosity, or entertainment but is privileged to enter by virtue of the owner's or occupier's permission or sufferance—the duty to refrain from willfully or wantonly injuring him or acting in a way that increases his peril and the duty to warn of any latent danger on the premises of which the landowner has knowledge. *Id.* A landowner owes to invitees the highest duty, the duty to "exercise reasonable care for [their] protection while [they are] on the landowner's premises." *Id.* at 639. Our Supreme Court has explained that three classes of people qualify as invitees: (1) public invitees, those invited to enter or remain on the land as a member of the public for a purpose for which the land is held open to the public; (2) business visitors, those invited to enter or remain on the land for a purpose directly or indirectly connected with business dealings with the possessor of the land; and (3) social guests, those "individuals known to the landowner who c[o]me to the premises upon actual invitation or arguably upon standing invitation." *Id.* at 642-43.

In the landlord/tenant context, Indiana courts have recognized that in the absence of statute, covenant, fraud, or concealment, a landlord who gives a tenant full control and possession over leased premises will not be liable for personal injuries suffered by a tenant or other person lawfully on the property. *See Flott v. Cates*, 528 N.E.2d 847, 848 (Ind. Ct. App. 1988), *reh'g denied*. However, a landlord owes a duty to maintain

common areas used by the tenants, but over which the landlord retains control, in a safe condition. *Id*. This duty extends to a tenant's business visitors and social guests.[4] *Id.* (citing *Town of Kirklin v. Everman*, 217 Ind. 683, 28 N.E.2d 73 (1940), *modified on reh'g on other grounds*, 217 Ind. 683, 29 N.E.2d 206 (1940)).

The trial court concluded that Parker was a licensee and applied the intermediate standard of care. But here the designated evidence shows that Parker and Guy were friends and that Parker had a standing invitation to visit Guy. Guy had previously told Parker the location of his apartment. Although Parker did not have an explicit invitation to come to Guy's residence the day of the injury and had not previously been to the apartment, Guy swore by affidavit that Parker had a standing invitation to come to his home. Appellant's App. p. 129. Parker came to Guy's apartment for a social purpose; namely, to check on his friend's welfare. Guy was happy to see Parker. As a result of these uncontradicted facts,[5] Parker was a tenant's social guest and invitee. *See Risk v. Schilling*, 569 N.E.2d 646, 647 (Ind. 1991), *reh'g denied*. Thus, Morgan owed Parker a duty to maintain the parking lot, a common area under the landlord's control, in a safe condition.

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[4] Although the rule in *Flott* that a landlord owes the duty to both tenants and the guests of tenants to keep common areas safe pre-dates the reclassification of a social guest as an invitee from a licensee in *Burrell*, 569 N.E.2d at 643, the reclassification does not alter the *Flott* rule.

[5] These circumstances also distinguish this case from *Rhoades v. Heritage Investments, LLC*, 839 N.E.2d 788 (Ind. Ct. App. 2005), *reh'g denied*, *trans. denied*. In *Rhoades*, we concluded, affirming the trial court's grant of summary judgment in the defendant's favor, that there were no facts from which a reasonable person could conclude that the injured plaintiff had been invited to enter or had a purpose, other than satisfying his own curiosity, for entering the building in which he was later injured. 839 N.E.2d at 792-93. Here, however, the facts show that a reasonable person could conclude from Guy's conduct that Parker had a standing invitation to visit, not just permission. Further, Parker had a social purpose—to check on his friend's welfare and talk with him about his son's basketball game—and was not merely satisfying his own curiosity.

Having concluded that Parker was an invitee, we must next determine whether the designated evidence demonstrates a question of material fact as to whether Morgan breached his duty to Parker and whether Parker's injury was proximately caused by such a breach. If a duty of care exists, whether a breach of duty occurred is a factual question requiring an evaluation of the landowner's conduct with respect to the applicable standard of care. *Countrymark Coop., Inc. v. Hammes*, 892 N.E.2d 683, 688 (Ind. Ct. App. 2008), *trans. denied*. As stated previously, Morgan owed Parker a duty to maintain the common areas in a reasonably safe condition. Further, "hazards created through a natural accumulation of ice and snow are not beyond the purview of that duty." *Olds v. Noel*, 857 N.E.2d 1041, 1044 (Ind. Ct. App. 2006) (quoting *Rossow v. Jones*, 404 N.E.2d 12, 14 (Ind. Ct. App. 1980)). Whether the defendant's breach was the proximate cause of the plaintiff's injury is also generally a question of fact. *MacDonald v. Maxwell*, 655 N.E.2d 1249, 1251 (Ind. Ct. App. 1995), *reh'g denied*.

Here, Parker designated evidence that, although snow had fallen a few days before, he had traveled in his Grand Am through several towns in Indiana without difficulty. Sidewalks and parking lots were clear in Seymour, Paoli, Orleans, and Salem. Although the street in Austin leading to Guy's apartment was well-traveled, the parking lot at the apartment had not been cleared of snow because Morgan, although it was his responsibility to do so, had not yet made arrangements to clear the snow from the parking lot. But Morgan had made arrangements to clear the snow at his own home so that he and his wife could travel. On his way back to the car after checking on his friend, Parker fell in the snow after his foot was caught in a spot where the parking lot was uneven

because Morgan did not repave the lot after the construction work of years past but instead filled it in with gravel that settled. Parker testified that, without the hole that trapped his foot, he would not have fallen. Appellant's App. p. 144. Applying the standard of reasonable care to these facts, which are viewed most favorably to Parker as the non-movant, genuine issues of material fact exist as to whether Morgan breached his duty of care by failing to correct or warn of the uneven condition of the parking lot, failing to remove the snow within a reasonable time, or by the combination of both. Genuine issues of material fact also exist as to whether Morgan's allegedly negligent maintenance of the parking lot proximately caused Parker's injury or whether Parker's fall was merely an accident.

Nevertheless, Morgan argues that summary judgment was proper because the danger was open and obvious and because Parker only speculated about the cause of his injury. To illuminate the contours of the duty to invitees, our Supreme Court has adopted the following description from the Restatement (Second) of Torts:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> > (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
> >
> > (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> >
> > (c) fails to exercise reasonable care to protect them against the danger.

Douglass v. Irvin, 549 N.E.2d 368, 370 (Ind. 1990) (citing Restatement (Second) of Torts (1965) § 343). Additionally, Section 343A of the Restatement (Second) of Torts (1965),

which governs known or obvious dangers and is meant to be read along with Section 343, provides, in part, as follows: "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." *See Douglass*, 549 N.E.2d at 370. The comparative knowledge of a possessor of land and an invitee regarding known and obvious dangers is a factor to be considered in determining whether the possessor's duty was breached. *Smith v. Baxter*, 796 N.E.2d 242, 244 (Ind. 2003) (reaffirming the analysis in *Douglass*, 549 N.E.2d 368, after the passage of the Comparative Fault Act). For purposes of analysis of breach of duty, a landowner's knowledge is evaluated objectively. *Id.* An invitee's subjective knowledge of risks and conduct may also be considered. *Id.* at 245. Even if there is no external, compelling need for the invitee's conduct, a landowner or possessor may still be liable if an invitee is injured while confronting a known or obvious risk. *See id.*

Morgan contends that the deep snow, which was capable of hiding objects or uneven surfaces, was an open and obvious danger that a reasonable person would have recognized and protected himself from. First, as stated previously, it is a question of fact whether Morgan breached his duty by failing to remove the snow in a reasonable time. But even assuming *arguendo* that the snow presented an open and obvious hazard, the facts here raise the question whether a reasonable landlord would nevertheless have expected invitees to fail to protect themselves from the danger. It is reasonable that a landlord should expect that, even in inclement conditions, his tenants might receive guests or that the tenants themselves might need to leave their apartments. *See Get-N-*

Go, Inc. v. Markins, 544 N.E.2d 484, 487 (Ind. 1987) (discussing whether diabetic plaintiff's decision to cross defendant store's icy parking lot to obtain food constituted incurred risk[6] as a defense and concluding that "[o]ur past decisions do not contemplate that a plaintiff's claim can be barred through such a general awareness of potential harm, nor do they require that people confine themselves to their homes during periods of inclement weather. Necessity often dictates otherwise.") (citation omitted), *reh'g granted on other grounds*, 550 N.E.2d 748 (Ind. 1990). And Morgan himself knew about the parking lot's uneven condition because he was responsible for creating it. As for Parker's subjective knowledge of the danger, Parker came to the apartment to check on the welfare of his friend and walked across the parking lot through snow reaching up to his knee. He had not been to the apartment before, so he did not know the parking lot was uneven. He fell when his foot caught in an uneven place in the parking lot which was concealed beneath the snow.

Whether Morgan should have realized that the dangerous condition of the snow-covered, uneven parking lot posed a risk to invitees, whether the danger was open and obvious, whether Morgan should have realized that invitees would nevertheless fail to protect themselves from that danger, and whether Morgan failed to exercise reasonable care to protect invitees are all questions of material fact. Perhaps Parker was also negligent for the manner in which he traversed the snowy parking lot. But this too is a

[6] As our Supreme Court noted in *Smith*, incurred risk is no longer a defense that supports the conclusion that no duty exists. Under the Comparative Fault Act, a plaintiff's conduct constituting incurred risk may be considered instead in determining whether there was a breach of duty. *Smith*, 796 N.E.2d at 245.

question of fact for the jury. We conclude that there are remaining genuine issues of material fact as to whether Morgan breached his duty to Parker.

Morgan also contends that the trial court correctly granted summary judgment because Parker failed to designate sufficient evidence to raise a question of fact that Morgan's actions were the proximate cause of his injury. "[C]ausation may not be inferred merely from the existence of an allegedly negligent condition." *Midw. Commerce Banking Co. v. Livings*, 608 N.E.2d 1010, 1013 (Ind. Ct. App. 1993) (concluding that summary judgment should be granted in defendant's favor because the designated evidence revealed that plaintiff did not know the cause of her fall). "Inferential speculation" is not enough to show the existence of a genuine issue of material fact as to negligence. *Scott County Family YMCA, Inc. v. Hobbs*, 817 N.E.2d 603, 605 (Ind. Ct. App. 2004). Rather, the plaintiff must present evidence showing that the "resulting injury was foreseen, or reasonably should have been foreseen, as the natural and probable consequences" of the defendant's act or omission. *Funston v. Sch. Town of Munster*, 849 N.E.2d 595, 600 (Ind. 2006).

Parker designated evidence showing that he remembered the spot on the parking lot where he fell. When he went back there after the snow had cleared, he found that the parking lot was eroded in that spot. There was no change in the parking lot between the time of the fall and the time the snow was gone. Parker stated in his deposition that he knew that he would not have fallen without the hole in the washed out area. Appellant's App. p. 144. Parker could not see the unevenness because it was covered by the snow.

He considered himself an athletic, coordinated person who did not have a history of falling and testified that nothing he did played any role in his fall. *Id.* at 149.

This evidence reveals a genuine issue of material fact as to whether Morgan's allegedly negligent failure to repair the eroded parking lot and to clear the snow was the proximate cause of Parker's fall. Although Parker did not know at the time he fell exactly what had happened, Parker went back to the place where he remembered that he fell and realized that he had stepped through the snow into a hole, in an eroded section of the parking lot, where his foot was trapped. His ankle twisted, and he fell. Morgan, as the landlord, was responsible for keeping the parking lot in a reasonably safe condition. These facts distinguish this case from the cases offered by Morgan wherein we concluded that the plaintiff failed to know with the required level of specificity the cause of his or her fall. *See Scott County Family YMCA*, 817 N.E.2d at 605-06 (concluding that designated evidence that, months before plaintiff's fall, flooring that may or may not have been around the area of the fall was in need of repair and was patched by a local contractor and that there was nothing wrong with the floor at the time of the fall did not present genuine issue of material fact as to defendant's negligence); *Hale v. Cmty. Hosp. of Indianapolis, Inc.*, 567 N.E.2d 842, 843 (Ind. Ct. App. 1991) (concluding that designated evidence that plaintiff did not know three years after her fall whether "bad places" in the curb near the crosswalk where she fell were present at the time of her fall and whether they caused her fall did not present genuine issue of material fact as to defendant's negligence); *Wright Corp. v. Quack*, 526 N.E.2d 216, 218 (Ind. Ct. App. 1988) (concluding that no evidence before the jury demonstrated that any defect in or

foreign substance on the defendant's floor caused the plaintiff's fall and reversing the jury's verdict), *trans. denied*. Our conclusion is further bolstered by Morgan's arguments that Parker "revisited the accident scene, saw what he believed to be an alleged defect in the parking lot, and concluded that such a defect must have been the cause of his accident," that the "snow on the ground would have packed, or filled in, any alleged eroded condition," and that "with over two feet of snow on the ground, Parker's feet would not have completely touched the ground because of the packed snow beneath his feet." Appellee's Br. p. 16. Rather than demonstrating based on the designated evidence that Parker's claim is mere speculation, these arguments highlight the credibility and factual determinations, yet to be made, that make summary judgment inappropriate in this case. Because the designated evidence shows genuine issues of material fact as to whether Morgan breached his duty of reasonable care to Parker, an invitee, and whether such a breach was the proximate cause of Parker's injury, we reverse the trial court's grant of summary judgment.

Reversed and remanded.

NAJAM, J., and FRIEDLANDER, J., concur.