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ARKANSAS COURT OF APPEALS

DIVISION I
No. CV-17-398

Opinion Delivered December 6, 2017

MARLA SHOOK APPELLANT	APPEAL FROM THE ST. FRANCIS COUNTY CIRCUIT COURT
V.	[NO. 62CV-14-92]
LOVE'S TRAVEL STOPS & COUNTRY STORES, INC. APPELLEE	HONORABLE CHALK S. MITCHELL, JUDGE
	REVERSED AND REMANDED

N. MARK KLAPPENBACH, Judge

Appellant Marla Shook appeals the entry of summary judgment in favor of appellee Love's Travel Stops & Country Stores, Inc. (Love's). On August 17, 2011, Shook tripped and fell over a folded rug near the store's doorway. In June 2014, Shook filed suit against Love's for injuries she sustained as a consequence of the fall. Shook alleged that Love's owed her, as a business invitee, the duty to use ordinary care; that Love's was required to maintain its premises in a reasonably safe condition; and that Love's failed to use ordinary care to eliminate the dangerous condition or warn Shook of its presence. In the course of

discovery, Shook filed two motions to compel, seeking in part to have Love's produce the incident report created by the store manager immediately after Shook had fallen. The trial court denied those motions. Subsequently, Love's moved for summary judgment, contending that the folded rug was an open and obvious danger. The trial court agreed with Love's and entered summary judgment. On appeal, Shook argues that (1) the trial court erred in entering summary judgment by finding that Love's had no duty to Shook as a matter of law because the open-and-obvious-danger exception applied here; and (2) the trial court abused its discretion in not compelling the production of Love's incident report. We agree that summary judgment was inappropriate at this juncture, and we agree that the trial court abused its discretion in not compelling production of the incident report. Thus, we reverse and remand.

Summary judgment is to be granted by a circuit court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Tillman v. Raytheon Co.*, 2013 Ark. 474, 430 S.W.3d 698. On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material question of fact unanswered. *Id.* We view the evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.* Our review focuses not only on the pleadings, but also on the affidavits and documents filed by the

parties. *Id.* Summary judgment is not proper where the evidence reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable minds might differ. *Flentje v. First Nat'l Bank of Wynne*, 340 Ark. 563, 11 S.W.3d 531 (2000).

Because the underlying cause of action is based in negligence, the existence of a duty of care is crucial. Under Arkansas law, in order to prevail on a claim of negligence, the plaintiff must prove that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the breach was the proximate cause of the plaintiff's injuries. *Yanmar Co. v. Slater*, 2012 Ark. 36, 386 S.W.3d 439. Because the question of what duty is owed is one of law, we review it de novo. *Lloyd v. Pier W. Prop. Owners Ass'n*, 2015 Ark. App. 487, 470 S.W.3d 293. If the court finds that no duty of care is owed, the negligence count is decided as a matter of law. *D.B. Griffin Warehouse, Inc. v. Sanders*, 349 Ark. 94, 76 S.W.3d 254 (2002); *First United Methodist Church of Ozark v. Harness Roofing, Inc.*, 2015 Ark. App. 611, 474 S.W.3d 892.

A business invitee visits "for a purpose connected with the business dealings of the owner." *Young v. Paxton*, 316 Ark. 655, 873 S.W.2d 546, 549 (1994). In Arkansas, a landowner generally does not owe a duty to a business invitee if a danger is known or obvious. *Kuykendall v. Newgent*, 255 Ark. 945, 504 S.W.2d 344 (1974). The duty to warn an invitee of a dangerous condition applies only to defects or conditions that are in the nature of hidden

dangers, traps, snares, pitfalls and the like, in that they are known to the invitor but not known to the invitee and would not be observed by the latter in the exercise of ordinary care. *Ethyl Corp. v. Johnson*, 345 Ark. 476, 49 S.W.3d 644 (2001); *Jenkins v. Hestand's Grocery*, 320 Ark. 485, 898 S.W.2d 30 (1995); *Kroger Co. v. Smith*, 93 Ark. App. 270, 275, 218 S.W.3d 359, 363 (2005).

The evidence before the trial court on this motion for summary judgment included still shots of the store's surveillance camera provided by Love's. These were grainy photographs depicting Shook walking in the door, walking beyond and just past the folded rug in the direction of the restroom, and walking back toward the door and tripping over the rug. The end of the folded rug appears to touch the edge of the doorway. Shook was wearing a cervical collar. The photographs do not clearly demonstrate that Shook looked at or observed the rug. In Shook's response to the motion, she asserted that she did not look down and see the rug so she did not know of the dangerous condition. Shook further asserted that whether this was an "open and obvious" danger was a question of fact. Shook appended her deposition testimony[1] in which she said (1) she walked into the store looking for the restroom

[1]We note that Shook's inclusion of the deposition transcripts in her addendum, in addition to the abstract, violates our briefing rules. If a transcript of a deposition is an exhibit to a motion or related paper, the material parts of the transcript shall be abstracted, not included in the addendum. Ark. Sup. Ct. R. 4-2(a)(5)(A) & 4-2(a)(8)(A)(i). The addendum shall also contain a reference to the abstract pages where the transcript exhibit appears as

sign, (2) she walked to and used the restroom, (3) she tripped on the rug lying in the aisle near the door but never saw the rug before she tripped, and (4) she was wearing a cervical collar due to a recent neck surgery, so she was looking outward and not downward. Shook also appended the deposition testimony of the manager on duty that night, who stated that the person who folded up the rug should have unfolded it as soon as the task calling for it to be folded (mopping) was completed. The manager stated that, according to procedure, the rug was not where it was supposed to be because it could be a tripping hazard.

At the hearing on the motion for summary judgment, the trial court agreed to consider and to look at the actual video-surveillance footage provided by Love's to Shook in discovery. The trial court permitted Shook to show the brief portion in which Shook entered and attempted to exit the store when she fell. The trial court noted that the video was two hours long, and "if I care to watch it for two hours I can." In that video, as asserted by Shook, other people tripped over the rug that night, although they did not fall. Shook's attorney pinpointed the exact time on the video to locate these other instances, and the video was

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abstracted. Ark. Sup. Ct. R. 4-2(a)(8)(A)(i). Shook has abstracted portions of the depositions, and Love's provided a supplemental abstract of those depositions. We could order rebriefing to correct the defects in the addendum. *See Skalla v. Canepari*, 2013 Ark. 249; *GSS, LLC v. Centerpoint Energy Gas Transmission Co.*, 2013 Ark. App. 465. We decline to order rebriefing, but we caution Shook's counsel against such practices in the future. *See Davis v. Schneider Nat'l., Inc.*, 2013 Ark. App. 737, 431 S.W.3d 321.

entered as an exhibit at the hearing. After hearing arguments of counsel, the trial court took the matter under advisement for a few days.

The trial court filed an order granting summary judgment to Love's. In that order, the trial court recited that it considered all the pertinent pleadings, the exhibits, and the surveillance video. The trial court ruled that Love's did not owe a duty to Shook "because the subject rug on which Shook tripped was open and obvious." This appeal followed.

At the outset, we note that, despite Shook's arguments to the contrary, the trial court did not find that Shook "knew" of the danger of the rug or "saw" it. The trial court clearly could not so find because in considering a motion for summary judgment, the evidence and all reasonable inferences deduced therefrom must be viewed in the light most favorable to Shook as the plaintiff. "Known" in this context means "not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves." *Van DeVeer v. RTJ, Inc.*, 81 Ark. App. 379, 386, 101 S.W.3d 881, 884 (2003). "Thus the condition or activity must not only be known to exist, but it must also be recognized that it is dangerous, and the probability and gravity of the threatened harm must be appreciated." *Id.* Shook vehemently denied having seen the rug before she tripped and fell over it, and the video and photographic evidence do not definitively demonstrate that she did see it. Love's appellate brief on this issue focuses solely on its contention that the video definitely shows that Shook

saw the rug and knew it was in her walkway. Viewing all the evidence in the light most favorable to Shook at the summary-judgment stage, a finding that she knew the rug was there would be in error.

The trial court's entry of summary judgment was premised on the conclusion that the folded rug was, as a matter of law, an open and obvious danger. Shook argues that this too is in error, and we agree. A dangerous condition is "obvious" when "both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment." *Van De Veer*, 81 Ark. App. at 386, 101 S.W.3d at 885. In this case, Shook presented evidence that a reasonable person in Shook's position–wearing a cervical collar with limited ability to look down– would not have recognized or appreciated the risk of the folded rug in her path on her way out of the store. Moreover, the video demonstrates other persons with no apparent obstructions to their ability to view the floor walked and tripped over the rug in the hour before Shook's fall. At this stage of the proceedings, the record presents an issue of fact not properly resolved by summary judgment.[2] We cannot say that Love's proved as a matter of law that the danger

[2]Notably, Arkansas Model Jury Instruction 1104 (2017) defines the "Duty Owed to Invitee," and it provides, in addition to the "ordinary care" standard, that the jury may be instructed to consider whether the dangerous condition was "known by or obvious to" the plaintiff. The commentary recites that this portion of the instruction is to be used when there is substantial evidence that the plaintiff had knowledge of the dangerous condition "or where

presented in this case was open and obvious. *See Hergeth, Inc. v. Green*, 293 Ark. 119, 124, 733 S.W.2d 409, 411 (1987).

Our reversal of the entry of summary judgment and remand for further proceedings necessitates that we address Shook's second point on appeal. Shook argues that the trial court abused its discretion in refusing to compel Love's to produce the incident report filled out by the store manager on the night that Shook fell. The trial court found that it was "work product" that was prepared in anticipation of litigation, providing a privilege not to disclose that information. We agree with Shook that the trial court abused its discretion because this was not work product but was rather a document prepared in the ordinary course of business.

The standard of review is well settled. The trial court has wide discretion in matters pertaining to discovery, and a circuit court's decision will not be reversed absent an abuse of discretion. *Parker v. S. Farm Bureau Cas. Ins. Co.*, 326 Ark. 1073, 935 S.W.2d 556 (1996); *Stein v. Lukas*, 308 Ark. 74, 823 S.W.2d 832 (1992). Although we recognize the magnitude of the circuit court's discretion in discovery matters, our supreme court has found an abuse of discretion where there has been an undue limitation of substantial rights of the appellant under the prevailing circumstances. *Rickett v. Hayes*, 251 Ark. 395, 473 S.W.2d 446 (1971). A motion for production of documents must be considered in light of the particular

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there is substantial evidence that such condition was open and obvious."

circumstances which give rise to it, and the need of the movant for the information requested. *Grand Valley Ridge, LLC v. Metro. Nat'l Bank*, 2012 Ark. 121, 388 S.W.3d 24. In cases in which the appellant is relegated to proving his or her claim by documents, papers, and letters kept by the appellee, the scope of discovery should be broader. *Id.* We consider this factor in deciding whether there has been an abuse of discretion in denying a discovery request. *Id.* The goal of discovery is to permit a litigant to obtain whatever information he or she may need to prepare adequately for issues that may develop without imposing an onerous burden on his adversary. *Id.*

The party asserting the privilege to bar discovery bears the initial burden of proving a factual basis establishing the applicability of the work-product privilege. *Rabuska v. Crane Co.*, 122 F.3d 559, 565 (8th Cir. 1997). Ordinary work product includes "raw data collected in the course of litigation and included in an attorney's file." *Baker v. Gen. Motors Corp.*, 209 F.3d 1051, 1054 (8th Cir. 2000). Regardless of the type of work product at issue, the threshold question governing application of the doctrine is whether the contested documents were prepared in anticipation of litigation. *Binks Mfg. Co. v. Nat'l Presto Indus., Inc.*, 709 F.2d 1109 (7th Cir. 1983). The mere possibility that litigation may result is not sufficient to trigger the protection of the work-product doctrine. *See Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 604 (8th Cir. 1977) (holding that more than a remote prospect of future litigation is

required to trigger work-product protection). More than a remote prospect of litigation is required because prudent parties anticipate litigation and begin preparation before the time suit is formally commenced. *In re Advanced Pain Centers Poplar Bluff v. Ware*, 11 F. Supp. 3d 967 (E.D. Mo. 2014). Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. *Id.* There is no work-product immunity for documents prepared in the regular course of business rather than for purposes of the litigation. *Id.*

Here, the undisputed evidence is that this incident report was prepared by the store manager within an hour of Shook's fall. Shook argues that she needed the report to learn who witnessed the event, what procedures or protocols might have been violated, and how the manager may have been critical of any employee who left the folded rug near the entrance. Shook contends that merely alleging that this immediately prepared incident report was made in anticipation of litigation did not make it so.

To explain in more detail, after the first motion to compel had been filed, the trial court entered a protective order in May 2015, protecting Love's privacy interests but commanding Love's to produce the contact and location information of former Love's employees, any of Love's corporate policies and procedures, and the architectural plans or similar documents

with regard to this particular Love's store. It declined to compel production of the incident report "at this time."

In July 2015, Shook's attorney deposed the store manager on duty that night, Justin Siler, who had prepared the incident report. Siler testified that he had prepared the report within an hour after Shook and her husband had left the store. Siler stated that he had never filed such a report before; Siler filled it out in order to make his superiors aware of what happened. Siler had spoken to the Shooks and had watched the store's security video. He stated that the form requested the person's name, what happened, and which employees were on duty when the event happened. He spoke to Angela, a Subway employee inside the Love's store, who told him that she did not see the fall. Siler identified some other Love's employees by name, although he did not remember who had been working that night. Siler said that proper procedure would have been for him to take oral statements from other employee witnesses and put them "verbatim" in the report. Siler did not remember the contents of any statements he received that night. He was unaware of anyone being disciplined in connection with this fall in the store, although he agreed that whoever folded the rug was responsible for unfolding it right after that area had been mopped.

As it argued to the trial court, Love's asserts on appeal that this incident report constitutes work product, like the materials deemed work product in *Schipp v. Gen. Motors*

Corp., 457 F. Supp. 2d 917 (E.D. Ark. 2006). We disagree. In that case, notes taken during witness interviews by *the insurer and provided to the insured's attorney* following a car accident involving a fatality were protected by the work-product doctrine. The federal court went on to hold, however, that any verbatim nonparty-witness statements were neither privileged nor work product and had to be produced. In the present case, this incident report was required by Love's internal practices and procedures, was prepared by a store manager immediately after Shook's fall for the express purpose of informing his superiors of what happened, and was prepared years before any litigation ensued. We hold that the report constituted a document prepared in the regular course of business rather than for purposes of the litigation. The trial court erred in finding that it constituted "work product" as defined under Arkansas law.

Love's argues that, regardless of whether this was properly considered privileged material, Shook suffered no prejudice because she had been provided the store's video and had deposed the store manager. While there were other pieces of evidence provided in discovery, we are not persuaded that the report was cumulative to what had already been provided. The store manager noted that he would have taken down verbatim statements from employees on duty that night, but he could not remember who had been working or what they had said. The scope of discovery is designed to permit a litigant to obtain whatever information he or

she may need to prepare adequately for issues that may develop, and providing this single report would not unduly burden Love's. We hold that the trial court abused its discretion in not compelling production of this document.

For the foregoing reasons, we reverse and remand.

Reversed and remanded.

WHITEAKER and VAUGHT, JJ., agree.

Easley & Houseal, PLLC, by: *B. Michael Easley* and *Austin H. Easley*, for appellant.

Wright, Lindsey & Jennings LLP, by: *Kathryn A. Pryor*, *Antwan D. Phillips*, and *E. Lee Lowther III*, for appellee.