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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-13-78

JONNIE LOCKE APPELLANT V. CONTINENTAL CASUALTY COMPANY APPELLEE	**Opinion Delivered** November 20, 2013 APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT [NO. CV-2007-403-1] HONORABLE JODI RAINES DENNIS, JUDGE AFFIRMED

RITA W. GRUBER, Judge

Jonnie Locke appeals from the circuit court's order granting Continental Casualty Company's motion for summary judgment and dismissing her negligence lawsuit in which she alleged that she suffered injuries from a fall at Jefferson Regional Medical Center, which was insured by Continental. On appeal, Locke contends that the circuit court erred because a genuine issue of material fact exists regarding the hospital's breach of its legal duty. We find no error and affirm the circuit court's order.[1]

Locke alleges in her complaint that on January 20, 2005, she went to the hospital emergency room to check on her daughter, who was being treated there. Locke got out of her car and was walking on the sidewalk to the emergency room when she tripped and fell

[1]This case has been before us several times. *See Locke v. Cont'l Cas. Co.*, 2011 Ark. App. 653 (reversing and remanding on issue of privilege of hospital records); *Locke v. Cont'l Cas. Co.*, 2011 Ark. App. 72 (remanding to settle record).

over four exposed bolts protruding approximately one inch above the sidewalk. The bolts were used to anchor a handicapped-parking sign that had been knocked over and removed sometime before Locke's fall. At the time she fell, there were no warning signs or cones indicating the presence of the exposed bolts.

In its order granting Continental's motion for summary judgment, the court found that Continental had made a prima facie entitlement to summary judgment on the issue of whether the hospital knew or should have known of the defective condition regarding the protruding bolts, shifting the burden to Locke to meet proof with proof. The court found that Locke presented no evidence "to establish the date or time that the bolts in the sidewalk became exposed" and no evidence "that anyone had noticed the exposed bolts and brought it to [the hospital's] attention." The court found that the only evidence Locke attempted to use to establish knowledge on the part of the hospital was an inadmissible hearsay statement made by a hospital employee, John James, that "he heard someone say that a security guard" had placed the broken handicapped-parking sign against the wall outside the emergency room. Finally, the court rejected Locke's argument that the hospital was negligent in using steel signposts that—once broken—exposed bolts presenting a danger, stating that Arkansas law recognizes no duty to guard against mere "possible" harm. Locke appeals from the court's order.

The law is well settled that 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. *Harrisburg Sch. Dist. No. 6 v. Neal*, 2011 Ark. 233,

381 S.W.3d 811. Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* 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 fact unanswered. *Campbell v. Asbury Auto., Inc.*, 2011 Ark. 157, 381 S.W.3d 21. 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. *Hardin v. Bishop*, 2013 Ark. 395, at 7.

An essential element of negligence is that the defendant owed a duty of care to the plaintiff. *Young v. Paxton*, 316 Ark. 655, 660, 873 S.W.2d 546, 549 (1994). The question of whether a duty is owed is always a question of law and never one of fact for the jury. *Van DeVeer v. RTJ, Inc.*, 81 Ark. App. 379, 385, 101 S.W.3d 881, 884 (2003). There is no dispute that Locke was an invitee on the hospital's property. Thus, the hospital had a duty to use ordinary care in maintaining its premises in a reasonably safe condition. *House v. Wal-Mart Stores, Inc.*, 316 Ark. 221, 223, 872 S.W.2d 52, 52 (1994). This duty applies, however, only when the danger is foreseeable. *Benson v. Shuler Drilling Co.*, 316 Ark. 101, 112, 871 S.W.2d 552, 558 (1994). There is no duty to guard against merely possible, as opposed to probable, harm. *Ethyl Corp. v. Johnson*, 345 Ark. 476, 481–82, 49 S.W.3d 644, 648 (2001).

This duty is set forth in Restatement of Torts 2d § 343 as follows:

> A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he

> (a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and
>
> (b) has no reason to believe that they will discover the condition or realize the risk involved therein, and
>
> (c) invites or permits them to remain upon the land without exercising reasonable care
>
> (i) to make the condition reasonably safe, or
>
> (ii) to give a warning adequate to enable them to avoid the harm.

Jenkins v. Hestand's Grocery, Inc., 320 Ark. 485, 487–88, 898 S.W.2d 30, 31 (1995). The basis for a premises owner's liability under this rule is the "superior knowledge" of an unreasonable risk of harm of which the invitee, in the exercise of ordinary care, does not or should not know. *AutoZone v. Horton*, 87 Ark. App. 349, 353, 192 S.W.3d 291, 295 (2004).

The parties in this case were not disputing whether *Locke* knew about or, in the exercise of reasonable care, should have known about the exposed bolts. The disputed issue is the *hospital's* knowledge. Applying the law to the facts presented by the parties in this case, the hospital had a legal duty to Locke if there was proof that it either knew of—or by the exercise of reasonable care could have discovered—the existence of the exposed bolts.

In support of her assertion that the hospital had actual knowledge of the exposed bolts, Locke relied on the deposition testimony of two hospital employees: John James, a grounds keeper, and Stacie Hipp, a nurse who witnessed Locke's fall. Ms. Hipp testified that, after she witnessed Locke fall, she saw the handicapped sign that had apparently been knocked down propped against a column near the emergency room. Regarding the sign, Mr. James testified that he "got told that Security put it there. But I don't know who put it there . . . ." He

heard in conversation that someone in security placed the sign against the pole, but he did not know who in security, and he did not remember who said security put it there. He said, "As far as I know, it was just general conversation. Basically hearsay."

First, Nurse Hipp's testimony did not offer any proof of how long the sign was leaning against the pole before Locke fell. Her testimony was that she saw the sign after Locke fell. Second, Mr. James's testimony is, as the circuit court determined, inadmissible hearsay. Mr. James did not put the sign against the pole. He testified that he was told, by whom he did not remember, that some unidentified person in security put the sign there. This is hearsay. And, as the person who allegedly made the statement that security put the sign there and the person from security who is alleged to have placed the sign there are not identified, this is not the admission of a party opponent as Locke attempts to argue. "A statement that is not based on personal knowledge, but on inadmissible hearsay, will not be accepted as the basis for finding a genuine issue of material fact to deny entry of summary judgment." *Mercy Health Sys. of Nw. Ark., Inc. v. Bicak, M.D.*, 2011 Ark. App. 341, at 7, 383 S.W.3d 869, 873; *see also Holt Bonding Co. v. First Fed. Bank of Ark.*, 82 Ark. App. 8, 110 S.W.3d 298 (2003). Moreover, Mr. James's statement offered no proof of when the sign was placed against the pole nor any proof that the unidentified person "in security" who placed the sign against the pole was actually a hospital employee. Thus, the circuit court did not abuse its discretion in excluding Mr. James's statements from its consideration. Accordingly, the circuit court did not err in finding that Locke presented no admissible evidence that the hospital had actual knowledge of the exposed bolts.

Locke also argues that there was a genuine issue of material fact regarding the forseeability that these handicapped-parking signs would be knocked down and create a danger and, given that foreseeable danger, the adequacy of the hospital's efforts to look for and warn of the danger. First, Locke presented no evidence that these signs had been knocked over before her fall. She did present deposition testimony that the hospital had replaced the rigid signs with a new break-away design three years after her accident. Conversely, Continental produced the deposition testimony of Ronny Gant, the hospital's security department coordinator and safety compliance assistant, who had been employed by the hospital since 1989. He testified that, although he was aware that the signs had occasionally been bent from cars hitting them, he had never heard of an incident in which a handicapped-parking sign had been knocked over, leaving bolts exposed. Evidence that the hospital replaced the signs with a newer, arguably safer, design three years after the incident is not evidence that this particular harm was foreseeable. There is no duty to guard against merely possible, as opposed to probable, harm. *Ethyl Corp.*, 345 Ark. at 481–82, 49 S.W.3d at 648. In light of the fact that Locke presented no evidence that the potential for exposed bolts was foreseeable, the adequacy of the procedures in place to prevent this event is not relevant. However, the undisputed deposition testimony presented by Continental showed that the hospital did patrol the parking lot where Locke's accident occurred to search for unsafe conditions at least thirty times per day.

Based on the evidence presented, and viewing this evidence in the light most favorable to Locke, we cannot say the hospital had a duty to guard against the particular harm

that befell Locke. Therefore, we affirm the circuit court's order granting Continental's motion for summary judgment and dismissing Locke's complaint.

Affirmed.

GLADWIN, C.J., and WALSMSLEY, J., agree.

Crockett Law Firm, by: *Michael A. Crockett*; and *Brian G. Brooks, Attorney at Law, PLLC*, by: *Brian G. Brooks*, for appellant.

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *R.T. Beard, III*, and *Anthony W. Juneau*, for appellee.