MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Janeen L. Walker-Tarver,
Appellant-Plaintiff,

v.

Lake Central Plaza, LLC, Meyers Premier Properties, LLC, and Hungry Hound, Inc.,
Appellees-Defendants.

November 9, 2021

Court of Appeals Case No. 21A-CT-1209

Appeal from the Lake Superior Court

The Honorable Kristina C. Kantar, Judge

Trial Court Cause No. 45D04-1902-CT-232

Altice, Judge.

Case Summary

[1] Janeen L. Walker-Tarver fell and suffered injuries while walking on an outdoor paved path at a strip mall owned by Lake Central Plaza, LLC (Landlord) and managed by Meyers Property Management (Management Company). Hungry Hound, Inc. (Hungry Hound) is a tenant of the strip mall located near where Walker-Tarver fell. As a result of her fall, Walker-Tarver filed a complaint against Landlord, Management Company, and Hungry Hound (collectively, Defendants) based on premises liability. Defendants, jointly, sought summary judgment, which was granted by the trial court.

[2] On appeal, Walker-Tarver argues that the trial court erred by granting summary judgment in favor of Defendants. She contends, specifically, that the cause of her fall – landscaping rocks kicked onto the pathway by dogs coming and going from Hungry Hound – is not speculative and that there is an issue of material fact regarding whether Defendants had knowledge of the dangerous condition.

[3] We reverse and remand.

Facts & Procedural History

[4] The facts most favorable to Walker-Tarver, the non-moving party in this summary judgment action, follow. Around 9:50 a.m. on April 4, 2017, Walker-Tarver's husband dropped her off for work at Green Pediatrics, which was located in the strip mall and adjacent to Hungry Hound, a dog grooming business. As Walker-Tarver walked on the pathway between two areas landscaped with small rocks, she tripped on rocks that were outside of the

landscaped areas and fell about three feet from Green Pediatrics' front entrance. She sustained injuries to her right arm, among other things.

[5] Amber Foreman, the office manager at Green Pediatrics, was at the front desk working when Walker-Tarver fell. Foreman did not observe the fall but did see Walker-Tarver come in the front door with an injured arm. Walker-Tarver indicated that she had fallen on rocks. Another coworker helped bandage the abrasions on her right arm.

[6] Thereafter, Walker-Tarver walked a few doors down to the Management Company and spoke with a property manager. The manager then inspected the area of the fall with Walker-Tarver. According to Walker-Tarver, rocks were "everywhere" and the manager started picking them up. *Appendix Vol. II* at 143. The manager made several statements to Walker-Tarver, including "this dog groomer's got to go" and "the dogs that come here, they keep kicking these rocks." *Id*. at 115. The manager also stated to Walker-Tarver that she had "spoken to them before about these rocks." *Id*. at 143. Walker-Tarver, too, had noticed dogs kicking or moving the landscaping rocks "[a]ll the time" in the past. *Id*. at 105.

[7] In a later deposition, Foreman indicated that she had arrived at the office about a half hour before Walker-Tarver fell and that she did not observe any rocks on the ground at that time. Regarding rocks being kicked out of the landscaping in the past, Foreman testified, "There might be a couple little - - you know, from the side, but there was never ever a problem walking through there." *Id*. at 165.

Foreman was unaware of any past complaints or instances of dogs kicking or moving the rocks.

[8] On February 2, 2019, Walker-Tarver filed the instant complaint against Defendants. She alleged that Defendants violated their duty to use reasonable care to protect Walker-Tarver, an invitee, from hazardous conditions by their failure to, among other things, "establish and carry out regular and frequent inspections for such conditions" and "implement preventative measures designed to eliminate or reduce the danger posed by the stones on their premises." *Id.* at 61.

[9] Defendants filed a joint motion for summary judgment on December 11, 2020, which Walker-Tarver opposed. The parties designated essentially the same evidence on summary judgment, including Walker-Tarver's deposition, Foreman's deposition, the complaint, and photographs of the pathway and landscaping taken by Walker-Tarver after she spoke with the property manager. Defendants presented two bases for summary judgment: 1) Walker-Tarver was merely speculating regarding the cause of her fall and 2) even if she fell on rocks, Defendants had no actual or constructive knowledge of the rocks on the walkway that had been there, at most, for thirty minutes.

[10] Following oral argument, the trial court granted summary judgment in favor of Defendants on April 8, 2021. The trial court rejected Defendants' first proposed basis for summary judgment finding that Walker-Tarver's deposition testimony that she fell on rocks must be believed at this stage of the litigation,

even if highly improbable in light of other evidence. Regarding the second basis, the trial court agreed that summary judgment was proper because the facts, even taken in the light most favorable to Walker-Tarver, establish that Defendants did not have actual or constructive knowledge of the rocks at issue.

[11] On May 7, 2021, Walker-Tarver filed a motion to correct error in which she argued that the trial court ignored designated evidence indicating that Defendants had knowledge of the recurring dangerous condition. Specifically, she pointed to her own deposition testimony that canine patrons of Hungry Hound frequently kicked landscaping rocks onto the sidewalk and that the property manager told Walker-Tarver she was aware of this and had spoken to someone[1] before about the rocks.

[12] The trial court denied the motion to correct error on May 27, 2021. The court explained:

> Walker-Tarver has presented no new evidence or exhibit demonstrating that Defendants possessed any knowledge, on the day of the occurrence, of a defective condition on the walkway, or possessed adequate time to cure any condition which may have occurred in the minutes prior to her arrival at the business. Absent any evidence of actual or constructive knowledge, liability may not be imposed. This Court is unwilling to impose a strict liability standard for landscaping rocks of which Walker-

[1] In context, Walker-Tarver believed the manager was referring to having spoken with Hungry Hound or the maintenance crew about the rocks.

> Tarver was aware from her on-going employment at that location.

Appendix Vol. III at 208 (cleaned up and citation omitted). Walker-Tarver now appeals.

Standard of Review

[13] We review summary judgment de novo, using the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). That is, drawing all reasonable inferences in favor of the non-moving party, we will affirm the grant of summary judgment only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*. A fact is material if its resolution would affect the outcome of the case, and an issue of material fact is genuine if a trier of fact is required to resolve differing accounts of the truth or where undisputed material facts support conflicting reasonable inferences. *Id.*

[14] As our Supreme Court just reiterated, our summary judgment standard is "generous to the non-moving party," with "'Indiana consciously err[ing] on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims.'" *Griffin v. Menard, Inc.*, No. 21S-CT-119, slip op. at 3 (Ind. October 19, 2021) (quoting *Hughley*, 15 N.E.3d at 1004) (modification added).

Discussion & Decision

[15] Initially, we find no merit in Defendants' argument that the cause of Walker-Tarver's fall is speculative. Walker-Tarver unequivocally testified in her deposition that she fell as a result of stepping on landscaping rocks that were on the pathway. Further, Foreman testified that upon speaking with Walker-Tarver within minutes of the fall, Walker-Tarver identified the cause of her fall as rocks.

[16] In support of their assertion that Walker-Tarver is "merely speculating that she slipped on rocks," Defendants direct us to Foreman's testimony that Foreman did not see rocks on the walkway thirty minutes before the fall and to pictures taken later in the day showing only a couple rocks outside the edge of the landscaped area away from where Walker-Tarver fell. *Appellees' Brief* at 10. But Defendants' reliance on contrary evidence is an improper request for us to weigh evidence and judge Walker-Tarver's credibility. The trial court properly rejected this proposed basis for summary judgment because the evidence designated by Walker-Tarver clears the low bar for establishing a genuine issue of material fact regarding whether she fell on rocks that had been displaced from a nearby landscaping bed. At this stage, it is of no moment that Walker-Tarver's deposition testimony may be self-serving or improbable, as it is sufficient to raise a factual issue to be resolved at trial. *See Hughley*, 15 N.E.3d at 1004 (holding that defendant's "perfunctory and self-serving" affidavit was direct evidence "sufficient, though minimally so, to raise a factual issue to be resolved at trial").

[17] We now turn to the issue of knowledge, upon which the trial court granted summary judgment. The parties do not dispute that Walker-Tarver was an invitee on the premises where she fell and that a duty was owed to her at the time. Specifically,

> [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.

Griffin, slip op at 4 (quoting *Burrell v. Meads*, 569 N.E.2d 637, 639-40 (Ind. 1991) (quoting RESTATEMENT (SECOND) OF TORTS § 343 (1965))). While a landowner owes an invitee a duty to exercise reasonable care to protect the invitee from foreseeable dangers on the premises, there is no duty to insure the invitee's safety while on the premises. *Schulz v. Kroger Co.*, 963 N.E.2d 1141, 1144 (Ind. Ct. App. 2012). Rather, "before liability may be imposed on the invitor, it must have actual or constructive knowledge of the danger." *Id.*

[18] At issue here is whether Defendants had actual or constructive knowledge of the dangerous condition. Pursuant to our summary judgment standard, the

initial burden was on Defendants, as movants for summary judgment, to prove an absence of a genuine issue of material fact in this regard. *Griffin*, slip op at 4. Defendants presented little designated evidence to affirmatively negate Walker-Tarver's claim of knowledge. Such evidence boiled down to the fact that Foreman (a nonparty) did not see any rocks on the sidewalk thirty minutes before the fall. Based on this evidence, Defendants essentially want us to infer as a matter of law that they had neither actual knowledge[2] nor constructive knowledge because the condition that day lasted for such a short time. We are unable to make such a leap, especially in light of the other designated evidence.

[19] In opposition to summary judgment, Walker-Tarver designated her own deposition in which she testified that in the past she had observed dogs kicking the landscape rocks "[a]ll the time." *Appendix Vol. II* at 105. Upon seeing rocks "everywhere" after the fall, the property manager, according to Walker-Tarver, exclaimed that "this dog groomer's got to go" and that "the dogs that come here … keep kicking these rocks." *Id*. at 143, 115. Further, the manager told Walker-Tarver that she had "spoken to them before about these rocks." *Id*. at

[2] Unlike defendants in other slip and fall cases seeking summary judgment, Defendants did not designate any affidavits or deposition testimony from their agents or employees. *Cf. Griffin*, slip op at 4 (Menard designated affidavit from general manager stating that "Menard had no prior notice of any problem or defect with the box and, had an employee noticed any issues, they would not have placed the box on the shelf in the first place" and designated evidence that "the store manager was not aware of any defective sink boxes by the company that manufactured the sink at issue"); *Schulz*, 963 N.E.2d at 1145 (Kroger employee specifically averred that she had been in the area of the fall five to ten minutes before and the floor was dry and clean and that Kroger employees "were neither notified nor aware of the presence of any hazardous condition with respect to the floor at any time prior to [the] fall").

143. In her deposition, Foreman also indicated that she had seen rocks out of the landscape beds in the past, though she had never thought of it as a problem.

[20] Even assuming that thirty minutes was not enough time to put Defendants on constructive notice of the misplaced rocks on the morning in question, summary judgment was improper here. Specifically, Defendants, as movants with the initial burden, designated no admissible evidence that they in fact lacked actual knowledge of the condition that morning. Moreover, Walker-Tarver designated evidence that the property manager was aware of the recurring problem with the dogs kicking the rocks onto the pathway and had spoken to someone previously about the issue.[3]

[21] Under the specific circumstances of this case and without weighing the credibility of Walker-Tarver, we conclude that the designated evidence presents a genuine issue of material fact regarding whether Defendants had knowledge of the ongoing problem of dogs coming and going from Hungry Hound kicking rocks onto the pathway and creating a hazard for pedestrians. *See Griffin*, slip op at 6 (finding no issue of fact as to Menard's knowledge of box's defect but noting it would be "a different situation if there was, for example, deposition testimony indicating that this type of box had opened before … or that the staples were known to fail after a certain period of time"). Thus, it is for the

[3] Defendants do not dispute the admissibility of the property manager's statements to Walker-Tarver, as they are statements of an opposing party and, therefore, not hearsay. *See* Ind. Evidence Rule 801(d)(2)(D) (a statement is not hearsay if it is "offered against an opposing party and … was made by the party's agent or employee on a matter within the scope of that relationship and while it existed").

jury to determine whether Defendants had sufficient knowledge of the condition and, if so, whether Defendants exercised reasonable care to protect Walker-Tarver.

[22] Judgment reversed and remanded for further proceedings.

Bradford, C.J. and Robb, J., concur.