IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
July 23, 2014 Session

CANDACE D. WATSON v. THE CITY OF JACKSON

Appeal from the Circuit Court for Madison County
No. C08343 Roy B. Morgan, Jr., Judge

No. W2013-01364-COA-R3-CV - Filed August 26, 2014

Plaintiff in a premises liability action appeals from the trial court's finding that she was more than fifty percent at fault for her injury. Discerning no error, we affirm.

Tenn. R. App. P. 3. Appeal as of Right; Judgment of the Circuit Court Affirmed

J. STEVEN STAFFORD, J., delivered the opinion of the Court, in which DAVID R. FARMER, J., and ROBERT L. CHILDERS, SP. J., joined.

Candace Watson, Jackson, Tennessee, Pro Se.

Lewis L. Cobb and Richard Lowell Finney III, Jackson, Tennessee, for the appellee, City of Jackson.

MEMORANDUM OPINION[1]

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[1]Rule 10 of the Rules of the Court of Appeals of Tennessee provides:

> This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

Background

This is the second appeal in this case. *See* ***Watson v. City of Jackson***, No. W2014-00100-COA-10B-CV, 2014 WL 575915 (Tenn. Ct. App. Feb. 13, 2014), *no app. perm. app. filed* (affirming the trial court's denial of a recusal motion) (hereinafter, "***Watson I***"). The relevant facts and procedure are set forth in our first Opinion:

> On November 17, 2008, Plaintiff/Appellant Candace Watson filed a complaint against the Defendant/Appellee City of Jackson ("the City") for injuries she allegedly sustained while employed by the City. According to her complaint, while working in a City building, Ms. Watson was injured when she slipped and fell on a recently waxed floor. Ms. Watson alleged that the fall caused her neck, back, leg, and arm pain, which continued at the time of the filing of the complaint.
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> The City filed an answer on January 16, 2009, specifically raising the defenses of contributory negligence and comparative fault. . . .
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> On December 27, 2012, the City filed a Motion for Summary Judgment, arguing that the undisputed evidence showed that there was no hazardous condition on the floor, until after Ms. Watson left work on the day of the alleged incident. Specifically, the City argued that Ms. Watson had alleged that a hazardous condition existed because City staff was waxing the floor prior to her departure; however, deposition testimony allegedly undisputedly showed that no waxing took place until after Ms. Watson left for the day. The City also argued that the evidence showed that if there was any negligence on the part of the City, the evidence nevertheless undisputedly showed that the negligence of Ms. Watson made her more than fifty percent responsible for her injuries, precluding recovery. Ms. Watson filed a response to the Motion for Summary Judgment on January 23, 2013. In her response, Ms. Watson denied that the undisputed facts entitled the City to judgment in its favor. On February 15, 2013, the trial court denied the City's Motion for Summary Judgment, finding a dispute as to the material facts in the case.
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> * * *

> A trial was held on March 8, 2013. Ms. Watson testified on her own behalf.

Watson I, 2014 WL 575915, at *1–*2 (footnote omitted). Specifically, Ms. Watson testified that on the day of the incident, she was working at the ticket counter of the City's Civic Center building. Ms. Watson stated that she observed the janitorial staff waxing the floors prior to her departure. However, because there were no posted signs warning of wet or slippery floors when she left for the day, Ms. Watson testified that she believed that the floor was dry. Accordingly, Ms. Watson exited the building through the door where she had previously seen the janitorial staff waxing. Ms. Watson admitted that other doors were available to exit from and that she took no special precautions in crossing the floor. Immediately prior to reaching the door, Ms. Watson testified that she slipped. Ms. Watson did not fall, but instead was able to correct her balance by reaching for the door to the building. According to Ms. Watson, however, that movement caused a significant injury to her back, which continued to cause her pain. Ms. Watson testified that she had seen several doctors regarding her injury and that she was now unable to maintain full-time employment due to her pain.

According to our prior Opinion:

> Two City workers who were alleged to have waxed the floor on the day in question testified on behalf of the City. Both parties agreed that the medical testimony would be submitted through deposition, for the trial court to read after the conclusion of the live proof. However, at the conclusion of trial, the trial court determined that, even taking all of Ms. Watson's testimony regarding her injury and its causation as true, Ms. Watson's own testimony showed that she was more than fifty percent (50%) at fault for her injuries. Thus, the trial court concluded that Ms. Watson could not recover.
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> Before the trial court entered an order on its judgment, the City filed a Motion seeking discretionary costs. In addition, on April 15, 2013, Ms. Watson, acting *pro se*, filed a motion captioned "Emergency Motion to Dismiss Ineffective Assistance of Counsel, Dr. Bede Anyanwu." The Motion asked that the Court allow Ms. Watson to dismiss Dr. Anyanwu as her counsel of record. . . .
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> * * *

On April 16, 2013, Ms. Watson, acting *pro se*, filed a Motion opposing the City's request for discretionary costs. Ms. Watson argued that to assess discretionary costs against her "is basically a slap in the face." On the same day, Ms. Watson filed another Motion to dismiss her trial counsel, citing additional reasons for the dismissal that are not relevant to this appeal. Despite this Motion, Ms. Watson's trial counsel filed his own response to the City's motion for discretionary costs, arguing that because Ms. Watson and the City were found to be equally at fault, there was no prevailing party to whom discretionary costs could be awarded.

On April 29, 2013, Ms. Watson, acting *pro se*, filed a motion captioned: "Motion to Object Defective Verdict," arguing that the trial court did not "apply the law accordingly to Rule 2.1 Code of Judicial Conduct." Specifically, Ms. Watson took issue with the trial court's ruling that she was on notice that the floors were slippery, when testimony showed that no signs were posted warning of the slippery floors. Ms. Watson also raised, for the first time, an issue regarding the Americans with Disabilities Act. On May 7, 2013, Ms. Watson, again acting *pro se*, filed a new motion captioned: "Motion to Open and Amend Judgment and/or Grant New Trial." In this Motion, Ms. Watson argued that the trial court's ruling violated several procedural and substantive rules, including the Americans with Disabilities Act, several rules of evidence and procedure, Rule 2.9 of the Judicial Code of Conduct, and the Fourteenth Amendment of the United States Constitution. Ms. Watson also noted that she had obtained newly discovered evidence of a witness to her departure from the City building on the day in question. . . .

On May 14, 2013, the trial court entered an order dismissing Ms. Watson's Motion to dismiss her trial counsel. The trial court noted that Ms. Watson did "not need permission of the Court to dismiss her privately retained legal counsel in a civil action." The trial court noted, however, that Ms. Watson "acknowledges her responsibility as a Pro Se litigant if she does proceed without legal counsel . . . ." Also on May 14, 2013, the trial entered its final judgment in favor of the City. The trial court also entered an order awarding the City discretionary costs.

On May 29, 2013, the City filed a response to Ms.

> Watson's Motion objecting to the trial court's "verdict." The City denied the allegations contained therein, and noted that Ms. Watson had not raised the Americans with Disabilities Act in her complaint. On the same day, the City also filed a response to Ms. Watson's "Motion to Amend Verdict," denying the allegations contained therein. On June 7, 2013, the trial court denied Ms. Watson's "Motion to Open and Amend Judgment and/or Grant New Trial."
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> On June 10, 2013, Ms. Watson filed a Notice of Appeal of the trial court's ruling.

Watson I, 2014 WL 575915, at *2–*3 (footnotes omitted).[2]

Thereafter, the parties engaged in a number of disputes regarding the record on appeal. Specifically, Mr. Watson submitted a Statement of the Evidence for approval of the trial court pursuant to Rule 24 of the Tennessee Rules of Appellate Procedure. ***Id.*** at *3. Based upon the City's objections, the trial court declined to accept Ms. Watson's statement. ***Id.*** at *4. Thereafter, Ms. Watson filed a motion seeking to force the trial court to recuse from presiding over the preparation of the record on appeal. The trial court declined to recuse and Ms. Watson filed an accelerated appeal to this Court of the trial court's recusal decision. ***Id.*** at *5–*6; *see also* Tenn. Sup. Ct. R. 10B, § 2.01 ("If the trial court judge enters an order denying a motion for the judge's disqualification or recusal, or for determination of constitutional or statutory incompetence, an accelerated interlocutory appeal as of right lies from the order.").This Court affirmed the trial court's decision denying recusal. *See* ***Watson I***, 2014 WL 575915, at *13. Ms. Watson did not file an application for permission to appeal to the Tennessee Supreme Court in ***Watson I***. This appeal concerns the substantive rulings of the trial court with regard to Ms. Watson's personal injury claim.

Issues Presented

Ms. Watson raises several issues on appeal, which are taken from her brief:[3]

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[2] After the trial court's order dismissing Ms. Watson's motion to dismiss her trial counsel, Ms. Watson proceeded *pro se* in the trial court and in her first appeal. *See* ***Watson***, 2014 WL 575915, at *3 n.3. Ms. Watson continues to proceed *pro se* in this appeal.

[3] Ms. Watson also raises a number of sub-issues within each issue in her brief. For clarity, we have omitted these sub-issues, but have fully considered Ms. Watson's arguments regarding these issues in this appeal.

1. Whether the Circuit Court erred in applying the doctrine of comparative negligence where there are material issues of fact unresolved and in dispute. The trial court erroneously concluded that [Ms. Watson] had actual notice, did not act reasonably, and thus was at least 50 % or more at fault.
2. Whether the Circuit Court erred in failing to apply 42 U.S.C. 12111, the Americans with Disability Act.
3. Whether the Circuit Court erred in denying [Ms. Watson's], *Pro Se* Motion to Open and Amend Judgment and/or Grant New Trial.
4. [Ms. Watson] moves to have a jury trial as previously requested.

Analysis

Jury Trial

We begin first with Ms. Watson's assertion that she should have been granted a jury trial. Because this case was filed against the City of Jackson, it is governed by the Tennessee Governmental Tort Liability Act ("GTLA"). According to this Court:

> The doctrine of sovereign immunity "has been part of the common law of Tennessee for more than a century and provides that suit may not be brought against a governmental entity unless that governmental entity has consented to be sued." ***Hawks v. City of Westmoreland***, 960 S.W.2d 10, 14 (Tenn. 1997) (internal citations omitted). The GTLA, codified in 1973, governs claims against cities and other local government agencies, providing for circumstances when sovereign immunity is removed. *See* Tenn. Code Ann. § § 29-20-201 to -408 (2012 & Supp. 2013); ***Lucius v. City of Memphis***, 925 S.W.2d 522, 525 (Tenn.1996). The GTLA specifically provides that proceedings falling under its governance shall be conducted without a jury. Tennessee Code Annotated § 29-20-307 provides in pertinent part:
>
> > The circuit courts shall have exclusive original jurisdiction over any action brought under this chapter and shall hear and decide such suits

> without the intervention of a jury, except as otherwise provided in § 29-20-313(b)[4] . . . .
>
> (Emphasis added).

Young v. City of LaFollette, No. E2013-00441-COA-R9-CV, 2014 WL 545486, at *3 (Tenn. Ct. App. Feb. 10, 2014). Thus, for claims governed by the GTLA, there is no right to a jury trial. Accordingly, the trial court did not err in conducting a bench trial in accordance with Tennessee Code Annotated Section 29-20-307.

Americans with Disabilities Act

Ms. Watson next argues that the trial court erred in failing to consider her arguments with regard to the Americans with Disabilities Act, 42 U.S.C. §12111, *et. seq*. Specifically, Ms. Watson argues that the City committed illegal discrimination by firing Ms. Watson for her alleged disability. We have thoroughly reviewed the record and conclude that the Americans with Disabilities Act was first raised in Ms. Watson's post-trial motion to alter or amend the trial court's judgment. It is well settled that a post-trial motion to alter or amend the trial court's judgment "may not be used to raise issues or legal arguments that previously were not tried or asserted." ***Van Grouw v. Malone***, 358 S.W.3d 232, 236 (Tenn. Ct. App. 2010) (citing ***In re M.L.D.***, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005)).

Ms. Watson argues, however, that her discrimination claim was properly raised in her complaint. Indeed, Count 14 of Ms. Watson's complaint states that: "[T]he [City] fired [Ms. Watson] from her employment due to the injury." However, from our review of the record, nothing indicates that this allegation was related to a discrimination claim pursuant to federal law. First, as previously discussed, the Americans with Disabilities Act was never mentioned prior to trial. In addition, all the pleadings prior to trial indicate that Ms. Watson was proceeding under a theory of premises liability, discussed in detail, *infra*. Finally, in Ms. Watson's complaint, she only seeks damages for medical expenses and pain and suffering. Nothing in the complaint indicates that Ms. Watson is seeking lost wages, or any other type of damages associated with the allegedly illegal termination of her employment. Under these circumstances, we must conclude that Ms. Watson did not raise her discrimination claim until her motion to alter or amend. Because this argument was not timely raised, it is waived.

Motion to Alter or Amend

[4] Tennessee Code Annotated Section 29-20-313(b) outlines the procedure where there are multiple defendants, only one or more of which is a governmental entity. In this case, the City is the only defendant. Accordingly, Tennessee Code Annotated Section 29-20-313(b) is not applicable.

Ms. Watson next argues that the trial court erred in denying her motion to alter or amend the trial court's judgment pursuant to Rule 59.04 of the Tennessee Rules of Civil Procedure.[5] We review a trial court's decision to grant or deny a motion to alter or amend under the more deferential abuse-of-discretion standard. ***Stovall v. Clarke***, 113 S.W.3d 715, 721 (Tenn. 2003). Under this standard, "[a] trial court abuses its discretion only when it 'applie[s] an incorrect legal standard or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.'" ***Eldridge v. Eldridge***, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting ***State v. Shirley***, 6 S.W.3d 243, 247 (Tenn. 1999)). If the trial court's discretionary decision is within the range of acceptable alternatives, we will not substitute our judgment for that of the trial court simply because we may have chosen a different alternative. *See* ***White v. Vanderbilt Univ.,*** 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999).

Ms. Watson raised a number of issues in her motion to alter or amend; however, she only raises three issues in her brief. We will address only those issues argued by Ms. Watson in her appellate brief. *See* Tenn. R. App. P. 13(b) (noting that appellate court will only consider those issues properly presented for review). First, Ms. Watson argues that the trial court allowed counsel for the City to present "impermissible, irrelevant, and highly privileged evidence during trial to gain an advantage and cause prejudice."

The decision to admit or exclude evidence "is within the discretion of the trial court and will not be reversed absent a clear showing of an abuse of discretion." ***State v. McCray***, 922 S.W.2d 511, 515 (Tenn.1996). A party claiming that evidence has erroneously been admitted may not predicate error on the ruling unless "a timely objection or motion to strike appears of record," stating the specific ground. Tenn. R. Evid. 103(a)(1). Further, "[n]othing in [Tennessee Rule of Appellate Procedure 36] shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Tenn. R. App. P. 36(a). "It is well-settled that the failure to raise a contemporaneous objection to the admission of evidence at the time the evidence is introduced at trial results in waiver of the particular issue on appeal." ***McGarity v. Jerrolds***,429 S.W.3d 562, 567 (Tenn. Ct. App. 2013). "A party who invites or waives error, or who fails to take reasonable steps to cure an error, is not entitled to relief on appeal." ***State Dept. of Children's Services v. V.N.***, 279 S.W.3d 306, 319 (Tenn. Ct. App. 2008) (citing ***Grandstaff v. Hawks***, 36 S.W.3d 482, 488 (Tenn. Ct. App.

[5] Although Ms. Watson's motion did not specifically cite Rule 59.04 and it was filed prior to the entry of the trial court's written order of judgment, it is clear that she was requesting to alter or amend the trial court's oral judgment. Accordingly, we treat this motion as a motion to alter or amend the trial court's ruling. *See* ***Pickard v. Ferrell***, 45 Tenn.App. 460, 471, 325 S.W.2d 288, 292–93 (Tenn.1959) (noting that motions should be judged by their content, rather than their caption).

2000) (citations omitted)).

In this case, Ms. Watson fails to include any citation to the record indicating that her counsel made a contemporaneous objection to the admission of this evidence. This Court has previously held that the failure to make appropriate citations to the record results in a waiver of the issue on appeal. *See, e.g.,* ***Bean v. Bean***, 40 S.W.3d 52, 55 (Tenn. Ct. App. 2000). Further, from our review of the record, we conclude that Ms. Watson made no contemporaneous objection to the admission of this evidence at trial. Indeed, the trial court even noted that while no objection was lodged, it was unsure as to whether the evidence at issue would be given any weight in the decision. Nothing in the record indicates that the trial court considered this evidence in its decision; while Ms. Watson contends that these issues diminished her credibility, the trial court's decision notes that it was "[a]ssuming [Ms. Watson's] testimony to be truthful." Consequently, the trial court did not abuse its discretion in denying Ms. Watson's motion to alter or amend with regard to this issue.

Ms. Watson next argues that counsel for the City "objected to clearly admissible evidence[6] and obstructed the discovery process by failing to produce and/or supplement timecards as evidence." Specifically, Ms. Watson contends that the trial court erred in allowing the proceedings to continue after it was brought to the court's attention that Ms. Watson did not receive requested discovery—timecards indicating the time that the janitorial staff who had been waxing the floor began work and left for the evening. This issue is also without merit. At trial, when it was discovered that Ms. Watson had never received the timecards, the trial court specifically asked Ms**.** Watson's counsel whether he wanted to halt the trial so that the timecards could be retrieved and reviewed. Counsel for Ms. Watson expressly chose to continue with the trial in spite of the alleged failure of the City to provide the requested documents. Further, the issue of the timecards was only relevant to the issue of whether the janitorial staff waxed the floor prior to Ms. Watson's departure. As previously discussed, the trial court's ruling assumes that the floors were waxed prior to Ms. Watson leaving for the day. Accordingly, the failure to submit the timecards was harmless. *See* Tenn. R. App. P. 36(b) ("A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial

[6] Ms. Watson does not elaborate as to how counsel for the City's objections were improper or resulted in prejudice to her case. This court has repeatedly held that a party's failure to argue the issues in the body of its brief constitutes a waiver on appeal. ***Newcomb v. Kohler Co.***, 222 S.W.3d 368, 401 (Tenn. Ct. App. 2006). In her brief, Ms. Watson also argues that the City improperly requested an "unnecessary" independent medical examination, which she alleges caused her additional pain. It appears from the record, however, that Ms. Watson entered into an agreed order permitting the independent medical examination. This issue is, accordingly, without merit.

process.").

Finally, Ms. Watson argues that the trial court erred in failing to provide appropriate accommodations for her medical issues, which resulted in a denial of due process. Specifically, Ms. Watson asserts that the trial court failed to give proper notice of the trial date[7] and failed to offer Ms. Watson a "reasonable modification" pursuant to the Americans with Disabilities Act. *See* 42 U.S.C. §§ 12182(b)(2)(A)(ii) (stating that discrimination may occur when a covered person or entity fails "to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary"), 12184(b)(2)(A) (stating that discrimination may occur when a covered entity fails to "make reasonable modifications consistent with those required under section 12182(b)(2)(A)(ii) of this title"). We again respectfully disagree.

First, nothing in the record indicates that Ms. Watson's counsel was not timely notified of the trial date. Indeed, the record contains an amended scheduling order signed by Ms. Watson's counsel on February 12, 2013, indicating that the trial would take place on March 7 and March 8, 2013. "It is well settled that '[k]nowledge of facts learned by an attorney in the course of his [or her] employment will be imputed to his client.'" ***Cardiac Anesthesia Services, PLLC v. Jones***, 385 S.W.3d 530, 538 (Tenn. Ct. App. 2012) (quoting ***Boote v. Shivers***, 198 S.W.3d 732, 742 (Tenn. Ct. App. 2005). "Once it has been established that the attorney obtained the relevant knowledge during the course of representing the client, 'the constructive notice thereof to the client is conclusive, and cannot be rebutted by showing that the attorney did not in fact impart the information so acquired.'" ***Cardiac Anesthesia***, 385 S.W.3d at 538 (quoting ***Boote***, 198 S.W.3d at 742). Because Ms. Watson had constructive notice of the trial date, we conclude that neither the trial court nor the City violated Ms. Watson's due process rights with regard to the scheduled trial date.

Further, nothing in the record indicates that Ms. Watson's due process rights were prejudiced by any alleged refusal by the trial court to accommodate Ms. Watson's disability. As previously noted, Ms. Watson did not raise any issue regarding the Americans with Disabilities Act in the trial court. Again, failure to raise an issue in the trial court results in a waiver of the issue. *See* ***Van Grouw***, 358 S.W.3d at 236. Further, Ms. Watson's brief contains no citations to the record indicating where the trial court refused to permit Ms. Watson a requested modification. *See, e.g.,* ***Bean***, 40 S.W.3d at 55 **(**holding that the failure to include specific citations to the record results in a waiver of the issue on appeal). "It is not incumbent upon this Court to sift through the record in order to find proof to substantiate the

[7] Ms. Watson asserts that the lack of notice caused her to "miss[] out on the March 7, 201[3] trial date." However, from our review of the record, the trial in this cause was heard on one day, March 8, 2013, and Ms. Watson was present for those proceedings.

factual allegations of the parties." ***Mabry v. Mabry***, No. 03A01-9106CH207, 1992 WL 24995, at *1 (Tenn. Ct. App. Feb. 14, 1992) (citing ***Redbud Coop. Corp. v. Clayton***, 700 S.W.2d 551, 557 (Tenn. Ct. App. 1985); ***First American Bank of Nashville v. Woods***, 734 S.W.2d 622, 626 (Tenn. Ct. App. 1987)). Instead, Ms. Watson focuses in her brief on her frequent absences from the courtroom due to her alleged pain. From our review of the record, however, Ms. Watson never requested a recess of the proceedings to ameliorate her discomfort. Under these circumstances, we conclude that any argument that Ms. Watson was denied due process due to the trial court's alleged failure to provide reasonable accommodations is waived.

Comparative Fault

Finally, Ms. Watson asserts that the trial court erred in finding that she was more than fifty percent at fault for her injury.[8] Because this issue was decided by the trial court, sitting without a jury, we review the trial court's findings of fact *de novo* with a presumption of correctness, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d). No presumption of correctness, however, attaches to the trial court's conclusions of law and our review is *de novo*. ***Blair v. Brownson***, 197 S.W.3d 681, 684 (Tenn. 2006) (citing ***Bowden v. Ward***, 27 S.W.3d 913, 916 (Tenn. 2000)).

For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. ***4215 Harding Road Homeowners Ass'n. v. Harris***, 354 S.W.3d 296, 305 (Tenn. Ct. App. 2011); ***Walker v. Sidney Gilreath & Assocs.***, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000). Where the trial court does not make findings of fact, there is no presumption of correctness and we "must conduct our own independent review of the record to determine where the preponderance of the evidence lies." ***Brooks v. Brooks***, 992 S.W.2d 403, 405 (Tenn. 1999).

The alleged liability in this case stems from the City's purported failure to maintain

[8] In her brief, Ms. Watson asserts that the trial court erred in finding her more at fault for her injury because "there are material issues of fact unresolved and in dispute." Ms. Watson misapprehends the standard of review in this case. Unlike a motion for summary judgment, issues decided by bench trial need not be based on undisputed facts. *See generally* ***Stovall v. Clarke***, 113 S.W.3d 715, 721 (Tenn. 2003). Indeed, the trial court here denied a motion for summary judgment on the basis that material facts were disputed. In a bench trial, however, it is the duty of the trial judge to resolve the disputed issues. While Ms. Watson may take issue with how the trial court resolved those issues, it was certainly not error for the trial court to perform that function.

its premises in a safe condition, i.e., premises liability.[9] This Court recently explained the *prima facie* elements of a premises liability action:

> To establish a *prima facie* case for premises liability based upon negligence, the plaintiff must prove (1) a duty of care owed by the defendant to the plaintiff; (2) conduct by the defendant that was below the standard of care, amounting to a breach of a duty; (3) an injury or loss; (4) causation in fact; and (5) proximate causation. *See, e.g.,* ***Coln v. City of Savannah***, 966 S.W.2d 34, 39 (Tenn. 1998), overruled on other grounds by Cross v. City of Memphis, 20 S.W.3d 642, 644 (Tenn. 2000). For the premises owner to be liable for a dangerous and defective condition on his property, the plaintiff must prove each of the elements of negligence and either (1) that the condition was caused or created by the premises owner or his agent, or (2) if the condition was created by someone other than the owner or his agent, that the premises owner had actual or constructive notice of the dangerous or defective condition prior to the accident. ***Blair v. West Town Mall***, 130 S.W.3d [761,] at 764 [(Tenn. 2004)]. A plaintiff can establish constructive notice by showing "a pattern of conduct, a recurring incident, or a general or continuing condition indicating the dangerous condition's existence," making the dangerous condition reasonably foreseeable to the premises owner. ***Id.*** at 765–66. In the alternative, constructive notice can be established by proving that the dangerous condition existed for a sufficient length of time that the premises owner, by exercising due care, should have discovered the dangerous condition. ***Simmons v. Sears, Roebuck & Co.***, 713 S.W.2d 640, 641–42 (Tenn.1986); *see also* ***Blair***, 130 S.W.3d at 764, 766 n.1.

Williams v. Linkscorp Tennessee Six, L.L.C., 212 S.W.3d 293, 296 (Tenn. Ct. App. 2006). At trial, Ms. Watson argued that the City had caused or created a dangerous condition on the property by waxing the floor and that the City, therefore, had actual notice of the dangerous condition. The City argued: (1) it did not create nor was it aware of a dangerous condition

[9] There is no dispute in this case that the City's governmental tort immunity was removed with regard to the allegations in Ms. Watson's complaint. *See* Tenn. Code Ann. § 29-20-204(a) ("Immunity from suit of a governmental entity is removed for any injury caused by the dangerous or defective condition of any public building . . . .").

on the property because the janitorial staff allegedly did not wax the floor until after Ms. Watson had exited the building; and (2) even if the City had created or was aware of a dangerous condition on the property, Ms. Watson was more than fifty percent at fault for her injury because she did not take any action to avoid the waxed floor. The trial court determined that taking Ms. Watson's testimony regarding the floors being waxed prior to her departure as true, she could still not recover because her fault was greater than fifty percent. According to the trial court:

> 1. [Ms. Watson] claims the City [] created a dangerous or unsafe condition when floors were waxed;
> 2. [Ms. Watson] claims the City [] failed to post signs giving notice of the condition of the floors;
> 3. [Ms. Watson] testified on direct and cross-examination that she saw the area being waxed just before she slipped;
> 4. [Ms. Watson] testified that she not only knew the condition of the floor, but that she did not take extra care or precaution as she exited the building;
> 5. Assuming [Ms. Watson's] testimony to be truthful the Court further finds:
>   a. [Ms. Watson] had actual notice of the condition of the floor;
>   b. The law requires [Ms. Watson] to act as a reasonable person would under the circumstances as they know them to be at the time;
>   c. [Ms. Watson] had a duty to take reasonable care to avoid the dangerous condition.
> 6. [Ms. Watson] was at least 50% or more at fault under the facts as presented to the Court and is therefore barred from recovery by the doctrine of comparative fault.

Thus, this issue concerns the doctrine of comparative fault. As explained by this Court:

> Pursuant to the comparative fault doctrine, the court may compare the fault of the tortfeasor to the fault of the plaintiff. ***Lewis v. State***, 73 S.W.3d 88, 94 (Tenn. Ct. App. 2001). "If the plaintiff's own negligence is less [than the tortfeasor's fault], [the plaintiff] may recover, but the damages he can collect are reduced in proportion to the percentage of the total negligence

> that can be attributed to [the plaintiff]." ***Id.*** The degree of fault of each party in producing the injury is a circumstance for the finder of fact to consider and determine. Id. at 94–95 (quoting ***Prince v. St. Thomas Hospital***, 945 S.W.2d 731[,] 736 (Tenn. Ct. App. 1996)). The apportionment of fault by the trier of fact is entitled to a presumption of correctness on appeal. ***Id.*** at 95.

Timmons v. Metropolitan Government of Nashville and Davidson County, 307 S.W.3d 735, 745 (Tenn. Ct. App. 2009). Thus, the plaintiff may only recover if his or her percentage of fault is less than the percentage of fault attributed to the tortfeasor. *See generally* ***McIntyre v. Ballentine***, 833 S.W.2d 52 (Tenn. 1992).

The Supreme Court has provided the following guidance in assessing the percentage of fault attributable to each party:

> [T]he percentage of fault assigned to each party should be dependent upon all the circumstances of the case, including such factors as: (1) the relative closeness of the causal relationship between the conduct of the defendant and the injury to the plaintiff; (2) the reasonableness of the party's conduct in confronting a risk, such as whether the party knew of the risk, or should have known of it; (3) the extent to which the defendant failed to reasonably utilize an existing opportunity to avoid the injury to the plaintiff; (4) the existence of a sudden emergency requiring a hasty decision; (5) the significance of what the party was attempting to accomplish by the conduct, such as an attempt to save another's life; and (6) the party's particular capacities, such as age, maturity, training, education, and so forth.

Eaton v. McLain, 891 S.W.2d 587, 592 (Tenn.1994) (footnotes omitted). These factors, however, are not exclusive, nor are they intended to deprive the factfinder from relying on his or her "common sense and ordinary experience in apportioning fault." ***Id.*** at 593. In addition, the Tennessee Supreme Court recognized that every factor may not be relevant in every case; instead, the above factors are merely intended to provide "general guidance to the bench and bar." ***Id.***

From our review of the record and the applicable factors, we conclude that the evidence does not preponderate against the trial court's finding that Ms. Watson was more at fault for her injury than the City. In her trial testimony, Ms. Watson admitted that she observed the City workers begin waxing the floor in front of the building's door

approximately thirty minutes prior to her departure. Indeed, exhibits in the record indicate that the door that Ms. Watson used to exit the building, and the floor surrounding it, were clearly visible to Ms. Watson at her work station. Although Ms. Watson testified that no wet-floor signs were posted, she did admit that the signs were "stacked off to the side" as if " they'd just been put up" when she left the building. Ms. Watson further testified that she could have taken another exit. However, because the front exit was where she typically departed, she chose to leave *via* that exit, despite the fact that she had recently seen workers waxing the floor. In addition, Ms. Watson admitted that she took no extra precautions in leaving the building the day of the accident.

In a similar case, this Court has previously concluded that a plaintiff was more than fifty percent at fault for her injuries. *See* ***Elrod v. Continental Apartments***, No. M2007-01117-COA-R3-CV, 2008 WL 425947 (Tenn. Ct. App. Feb. 13, 2008). In ***Elrod***, the plaintiff disembarked from her car in an icy parking lot. Although the plaintiff took reasonable precautions in leaving her car, she did not take the same precautions in returning to it, which resulted in her slipping on the icy pavement. ***Id.*** at *3. The trial court granted summary judgment to the defendants, finding that the evidence was undisputed and that "reasonable minds could not differ that the plaintiff's fault was greater than that of the defendants." ***Id.*** at *1. The Court of Appeals likewise concluded held that the plaintiff's fault was greater than that of the property owners, stating:

> In the case at bar, it is indisputable that [the plaintiff] failed to exercise reasonable care in the face of a known hazard. Her car slid in the parking lot, she saw the snow and ice on the ground, and when she walked toward the deposit box she proceeded in a most cautious manner; however, when she walked back to her car along the same path, she abandoned caution by "trotting" over snow and ice. Viewing the facts in a light most favorable to [the plaintiff] we find that reasonable minds could not differ that her fault was greater than any of the defendants and therefore, the defendants are entitled to summary judgment.

Id. at *3. Thus, because the plaintiff knew of the dangerous condition, but took no precautions to avoid injury, her recovery was barred by the doctrine of comparative fault. *See also* ***Easley v. Baker***, No. M2003-02752-COA-R3-CV, 2005 WL 697525, at *8 (Tenn.Ct.App. Mar. 24, 2005) (holding that a plaintiff who "chose to walk directly into the puddle of water," was barred from recovery by the doctrine of comparative fault).

In another case, ***Sanders v. CB Richard Ellis, Inc.***, No. W2007-02805-COA-R3-CV, 2008 WL 4366124 (Tenn. Ct. App. Sept. 22, 2008), this Court also affirmed summary

judgment to a property owner on the basis that the plaintiff "undertook a risk that a reasonable person would have avoided." ***Id.*** at *1. In ***Sanders***, the plaintiff sustained a fall after traversing an icy parking lot to do business inside a bank. ***Id.*** The plaintiff testified at trial that although he could have utilized the bank's drive-through window, he chose not to do so. ***Id.*** at *5. Under those circumstances, the Court concluded that the plaintiff's actions were "not reasonable in light of the surrounding circumstances and the potential risk." ***Id.***

The same is true in this case. Ms. Watson testified that she witnessed City workers begin to wax the floor at approximately 5:10 p.m. She departed at approximately 5:40 p.m. Despite the fact that she had recently observed the floor being waxed, she took no extra precautions to avoid injury, and failed to take any steps to avoid the risk. From the record, we conclude that by failing to take any precautions against slipping, Ms. Watson did not act reasonably in confronting the risk posed by the waxed floor. ***Eaton***, 891 S.W.2d at 592 (Tenn. 1994) (suggesting that courts c5:onsider "the reasonableness of the party's conduct in confronting a risk, such as whether the party knew of the risk, or should have known of it" when apportioning fault). Further, Ms. Watson testified that another exit was available, but admitted that she chose to use the exit that had recently been waxed. Accordingly, Ms. Watson "failed to reasonably utilize an existing opportunity to avoid the injury." ***Id.*** Nothing in the record indicates that leaving by another door would have been a hardship or that any other facts prevented Ms. Watson from exercising ordinary care in this situation.

In her brief, Ms. Watson argues that the trial court was correct in finding that she had notice that the City workers had applied one coat of wax beginning at around 5:10 p.m. However, she argues that she had no notice that the City workers applied a second coat of wax to the floor, which coat she asserts was the true cause of her accident. In addition, Ms. Watson argues that because she was a relatively new employee with the City, she was not aware of how long the wax would take to dry.[10] Even taking Ms. Watson's allegations as true, as did the trial court, we conclude that the evidence does not preponderate against the trial court's ruling. The undisputed testimony shows that Ms. Watson knew that the floors were being waxed on the day of the accident. Workers began to wax the floor at approximately 5:10 p.m. It is unclear in the record when the City workers completed this task; however, a City worker testified that the janitorial staff not only waxed the floor on the day of the incident, but also stripped the floor of its previous coat of wax, a process that takes at least ten to fifteen minutes. Approximately thirty minutes after Ms. Watson observed the work beginning on the floor, Ms. Watson left the building, using the door where she had seen wax applied, and taking no additional precautions to prevent injury. Questions of negligence are based on "the common sense of the community." ***Moorhead v. J.C. Penney Co., Inc.***, 555 S.W.2d 713, 718 (Tenn. 1977). Here, common sense would dictate that an individual who observes wax being

[10] A City worker testified that the wax takes approximately "twenty to thirty minutes to dry."

applied to a floor would use extra precautions or avoid crossing that floor within a reasonable time thereafter. The trial court clearly found that Ms. Watson's actions in this case were not reasonable and assigned her a greater portion of fault than the City. Based on our thorough review of the record, we cannot conclude that the evidence preponderates against the trial court's finding.

Conclusion

The judgment of the Circuit Court of Madison County is affirmed and this case is remanded to the trial court for all further proceedings as are necessary and are consistent with this Opinion. Costs are assessed to Appellant Candace Watson. Because Ms. Watson is proceeding *in forma pauperis* in this appeal, execution may issue for costs if necessary.

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J. STEVEN STAFFORD, JUDGE