Affirmed; Opinion Filed June 27, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00680-CV

JEANNIE NETHERY, Appellant
V.
MARTY VINCENT TURCO AND KELLY LEANNE TURCO, Appellees

On Appeal from the 298th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-13614

MEMORANDUM OPINION

Before Justices Bridges, Myers, and Brown
Opinion by Justice Myers

In this premises liability action, appellant Jeannie Nethery (Nethery) appeals the trial court's order granting traditional summary judgment in favor of appellees Marty Vincent Turco and Kelly Leanne Turco (the Turcos). In one issue, Nethery argues the trial court erred by granting the summary judgment motion. We affirm.

DISCUSSION

Nethery contends the trial court erred by granting the traditional summary judgment motion filed by the Turcos because there was insufficient evidence to establish that the allegedly dangerous condition was open and obvious and that Nethery was aware of the risk.

According to the record, on Thursday, January 8, 2015, at approximately 3:30 pm., Nethery arrived at the former residence of Marty and Kelly Turco in Highland Park, Texas. Nethery came to look at the property in her capacity as a realtor with Briggs Freeman Sotheby's

International Real Estate. Specifically, Nethery received an email invitation from the Turcos' realtor to attend a private tour of their home prior to the property being listed. In her deposition, Nethery said she would not be surprised if somewhere around fifty people came to view the Turcos' home that day, and that this "would be a normal tour for a property like that."

Nethery arrived and parked in front of the home. She walked up the driveway and went inside. After viewing the upstairs and downstairs portions of the home for approximately ten minutes, Nethery exited the home. She walked out of the house, across a landing area, and across a short sidewalk to the driveway. Nethery then began walking down the circular driveway when she noticed ice on the driveway near a black SUV. The ice appeared to be under the vehicle and extending in front of it towards the sidewalk.

She testified in her deposition that she could see the ice did not cover the entire driveway, but she did not know where it stopped. She appreciated the ice's presence enough to be more cautious and attempted to step around it. She testified that she "was trying to step around it, trying to be very careful, and I couldn't tell where it ended. . . ." She "was stepping very carefully" to avoid the ice she knew was present. Nethery also testified that, before trying to walk around the ice, she did not look at the other side of the circular driveway to see if she could turn around and walk the other way without encountering ice. Asked why she did not do this, she testified, "I thought I could get around." Nethery stepped on the ice in front of her and fell, injuring her wrist. Nethery testified that she did not know whether there was any ice on the other side of the driveway.

Nethery filed suit against the Turcos for negligence.[1] After answering, the Turcos moved for traditional summary judgment based on the absence of a legal duty to warn or protect against

[1] Nethery alleged in her petition that the Turcos negligently left their sprinkler system on and that this is what caused the ice to accumulate. Asked about this contention in her deposition, Nethery insisted there had been no precipitation for a week leading up to the event and that it was a very dry period of time. But she also acknowledged that she did not know what caused the ice to form; she just did not believe it was due to precipitation.

conditions that are open and obvious. The trial court granted the summary judgment motion, and this appeal followed.

A party moving for a traditional summary judgment must show no material fact issue exists and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). We review a challenge to a traditional summary judgment de novo. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). We must determine whether the movant met its burden to establish that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002); *City of Houston v. Clear Creek Basin Auth*., 589 S.W.2d 671, 678 (Tex. 1979). We affirm the summary judgment if any of theories presented to the court and preserved for review are meritorious. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 157 (Tex. 2004).

A landowner has a duty to exercise reasonable care to make the premises safe for invitees." *Austin v. Kroger Texas, L.P.*, 465 S.W.3d 193, 202–03 (Tex. 2015). A landowner confronted with a dangerous condition on the property can satisfy the duty to an invitee in one of two ways. *See id*. First, the landowner can eliminate or mitigate the dangerous condition such that it is no longer unreasonably dangerous. *Id*. Second, and subject to certain exceptions, the landowner can also satisfy any duty by providing an adequate warning of the danger to the invitee. *Id*.; *see also Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 216 (Tex. 2008); *Shell Oil Co. v. Khan*, 138 S.W.3d 288, 295 (Tex. 2004). "Ordinarily, the landowner need not do both, and can satisfy its duty by providing an adequate warning even if the unreasonably dangerous condition remains." *Austin*, 465 S.W.3d at 202–03; *see also TXI Operations, L.P. v. Perry*, 278 S.W.3d 763, 765 (Tex. 2009); *State v. Williams*, 940 S.W.2d 583, 584 (Tex. 1996). The *Austin* court described the duty as requiring the landowner "to make safe or warn against any concealed,

unreasonably dangerous conditions of which the landowner is, or reasonably should be, aware but the invitee is not." *Austin*, 465 S.W.3d at 203. This is because the landowner is typically in a better position than the invitee to know the property, and thus rectify or warn about any hidden hazards on the premises. *Id.* At the same time, "[w]hen the condition is open and obvious or known to the invitee, however, the landowner is not in a better position to discover it." *Id.* In such a situation, the condition no longer poses an unreasonable risk "because the law presumes that invitees will take reasonable measures to protect themselves against known risks, which may include a decision not to accept the invitation to enter onto the landowner's premises." *Id.* "A landowner 'is not an insurer of [a] visitor's safety.' " *Id.* (quoting *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 769 (Tex. 2010)). As a result, "a landowner generally has no duty to warn of hazards that are open and obvious or known to the invitee." *Id.* at 204.

The summary judgment evidence in this case establishes that the alleged dangerous condition of which Nethery complains—a patch of ice on the Turcos' driveway—was open and obvious or otherwise known to her. She admitted she was aware of and appreciated the presence of ice on the Turcos' driveway before she slipped and fell on it. Nethery argues the reasonableness of her efforts to avoid the ice presented a fact issue for trial because "she was unaware of the extent of the ice and was taking precautions to avoid the ice." But as we noted above, the Texas Supreme Court in *Austin* stated that when, as in this case, the condition is open and obvious or otherwise known to the invitee, "the law presumes that invitees will take measures to protect themselves against known risks." *Id.* at 203. Under controlling precedent, the Turcos' duty to appellant was negated by Nethery's admission that the ice was open and obvious or otherwise known to her. *See id.* at 204.

Nethery also argues that even if the Turcos owed no duty to protect or warn her against an open and obvious condition, an exception to the no-duty rule applies. The court in *Austin*

specifically noted two exceptions to the general no-duty rule for open and obvious conditions: the "criminal activity" exception and the "necessary use" exception. *Id*. at 204–06. The criminal activity exception has no application here because no one is arguing the allegedly dangerous condition resulted from foreseeable criminal activity of third parties. *See id*. at 205. The necessary use exception, however, may arise when the invitee necessarily must use the unreasonably dangerous premises, and despite the invitee's awareness and appreciation of the dangers, the invitee is incapable of taking precautions that will adequately reduce the risk. *Id*. at 204. This necessary use exception applies when (1) it was necessary for the invitee to use the portion of the premises containing the allegedly unreasonably dangerous condition and (2) the landowner should have anticipated that the invitee was unable to avoid the unreasonable risks despite the invitee's awareness of them. *See id*. at 207 (discussing *Parker v. Highland Park, Inc*., 565 S.W.2d 512, 520 (Tex. 1978)); *see also Lopez v. Ensign U.S. Southern Drilling, LLC*, —S.W.3d—, 2017 WL 1086518, at *9–10 (Tex. App.—Houston [14th Dist.] March 21, 2017, no pet.). When the necessary use exception applies, a landowner's duty to make the premises safe is not relieved by the plaintiff's awareness of the risk. *Austin*, 465 S.W.3d at 208. Rather, the plaintiff's awareness of the risk is relevant to the issue of proportionate responsibility. *Id*.

Nethery asserts that this case falls within the necessary use exception. However, the Turcos argue Nethery waived this argument because she never pleaded application of the necessary use exception in her live pleading—her original petition. She raised it for the first time in her response to the Turcos' summary judgment motion, and she did not amend or supplement her pleading to allege the necessary use exception. Assuming without deciding that Nethery did not waive her argument, it nonetheless fails.

The summary judgment evidence shows it was not necessary that Nethery use the portion of the premises on which she slipped and fell. She testified in her deposition that ice did not

cover the entire driveway and that, before trying to walk around the ice on which she slipped and fell, she did not look at the other side of the circular driveway to see if she could turn around and walk the other way without encountering ice. Nethery stated that "I thought I could get around" it. Moreover, Nethery—who viewed the property at approximately 3:30 p.m. on the afternoon of January 8, 2015—testified that she would not have been surprised if somewhere around fifty people had viewed the Turcos' home that day, and this "would be a normal tour for a property like that." Although Nethery testified that a co-worker, Carla Trussler, "almost fell," there is no evidence of any other slip and fall incidents on the premises that day. Additionally, there is no evidence the Turcos should have anticipated Nethery was unable to take appropriate measures to avoid the risks allegedly posed by the ice on the driveway. Indeed, the evidence shows Nethery was extremely cautious as she attempted to step around the ice. This case is unlike the situation in *Parker v. Highland Park, Inc.*, from which the necessary use exception arises, where the facts demonstrated that the dimly lit staircase was the only means available to the plaintiff to exit the apartment, and that the landowner should have anticipated the plaintiff/invitee would have been unable to take measures to avoid the risks posed by the narrow, unevenly distributed steps. *See Parker*, 565 S.W.2d at 514. Nethery chose to leave the premises the same way she entered it, but she did not present evidence establishing this was the only means of ingress and egress available to her. Finally, we note that, as recognized in *Austin*, criminal activity and necessary use are limited exceptions to the general no-duty rule. *See Austin*, 465 S.W.3d at 198, 204, 213.

Under the applicable standard of review, we conclude the summary judgment evidence establishes as a matter of law that the alleged unreasonably dangerous condition on the premises was open and obvious or otherwise known to Nethery and that the necessary use exception to the general rule of no-duty rule for open and obvious conditions does not apply. *See id*. at 206–08. Accordingly, the trial court did not err by granting summary judgment in the Turcos' favor, and

we overrule Nethery's issue.

We affirm the trial court's judgment.

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/Lana Myers/
LANA MYERS
JUSTICE

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JEANNIE NETHERY, Appellant

No. 05-16-00680-CV V.

MARTY VINCENT TURCO AND KELLY LEANNE TURCO, Appellees

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Opinion delivered by Justice Myers. Justices Bridges and Brown participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**. It is **ORDERED** that appellees MARTY VINCENT TURCO AND KELLY LEANNE TURCO recover their costs of this appeal from appellant JEANNIE NETHERY.

Judgment entered this 27th day of June, 2017.