IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

BARBARA ANN HOWARD,	)	
	)	
Plaintiff/Appellant,	)	Davidson Circuit
	)	No. 96C-2376
VS.	)	
	)	Appeal No.
FMS, INC.,	)	01A01-9709-CV-00479
	)	
Defendant/Appellee.	)	

APPEAL FROM THE CHANCERY COURT FOR DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

THE HONORABLE BARBARA N. HAYNES, JUDGE

For Plaintiff/Appellant:

Gus A. Wood, III
James R. Omer & Associates
Nashville, Tennessee

For Defendant/Appellee:

David J. Pflaum
Watkins, McGugin, McNeilly & Rowan
Nashville, Tennessee

AFFIRMED AND REMANDED

WILLIAM C. KOCH, JR., JUDGE

O P I N I O N

This appeal involves a tenant who was injured when she fell on ice that had accumulated on the sidewalk of a common area in her apartment complex. The tenant filed suit against the manager of the apartments in the Circuit Court for Davidson County asserting that the manager had negligently permitted ice and freezing rain to collect and remain on the sidewalk. The trial court granted the apartment manager's motion for summary judgment, and the tenant has appealed. We affirm the summary judgment because we have determined that under the facts of this case the apartment manager did not have a duty to keep the sidewalks free of frozen precipitation.

I.

Barbara Ann Howard resides at the Twin Oaks Apartments, a large apartment complex near I-24 in Nashville. On January 6 & 7, 1996, Nashville was hit by a snow and ice storm that eventually produced more than five inches of frozen precipitation before it abated. Freezing rain began falling at approximately 7:00 a.m. on January 6, 1996 and, as the temperature fell during the day, the precipitation turned to ice. The temperature had dropped to 24° by 5:00 p.m.

Ms. Howard remained indoors for most of the day cleaning her apartment. She decided to venture out at approximately 5:00 p.m. to go to the grocery store. She knew that it had been raining, but she assumed that the rain had not turned to ice because she saw water splashing on the pavement. As she was walking from her apartment to the parking lot, Ms. Howard slipped on ice that had accumulated in the breezeway and fell injuring her elbow and arm.

On June 24, 1996, Ms. Howard filed suit against FMS, Inc., the manager of the Twin Oaks Apartments. In March, 1997, FMS moved for a summary judgment relying on Ms. Howard's deposition and interrogatory answers and weather data from the Southern Regional Climate Center. Ms. Howard opposed the motion with her own affidavit and the deposition of the apartment manager. On May 27, 1997, the trial court entered an order granting FMS a summary judgment.

II.

Summary judgments do not enjoy a presumption of correctness on appeal. *See City of Tullahoma v. Bedford County*, 938 S.W.2d 408, 412 (Tenn. 1997); *McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d 891, 894 (Tenn. 1996). Accordingly, we must make a fresh determination concerning whether the requirements of Tenn. R. Civ. P. 56 have been satisfied. *See Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997); *Mason v. Seaton*, 942 S.W.2d 470, 472 (Tenn. 1997). Summary judgments are appropriate only when there are no genuine factual disputes with regard to the claim or defense embodied in the motion and when the moving party is entitled to a judgment as a matter of law. *See* Tenn. R. Civ. P. 56.04; *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995).

Courts reviewing summary judgments must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor. *See Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997); *Mike v. Po Group, Inc.*, 937 S.W.2d 790, 792 (Tenn. 1996). Thus, a summary judgment should be granted only when the undisputed facts reasonably support one conclusion -- that the moving party is entitled to a judgment as a matter of law. *See McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995); *Carvell v. Bottoms*, 900 S.W.2d at 26. A party may obtain a summary judgment by demonstrating that the nonmoving party will be unable to prove an essential element of its case, *see Byrd v. Hall*, 847 S.W.2d 208, 212-13 (Tenn. 1993), because the inability to prove an essential element of a claim necessarily renders all other facts immaterial. *See Alexander v. Memphis Individual Practice Ass'n*, 870 S.W.2d 278, 280 (Tenn. 1993); *Strauss v. Wyatt, Tarrant, Combs, Gilbert & Milom*, 911 S.W.2d 727, 729 (Tenn. Ct. App. 1995).

III.

No negligence claim can succeed without proof of (1) a duty of care owed by the defendant to the plaintiff, (2) conduct falling below the standard of care that

amounts to a breach of that duty, (3) an injury or loss, (4) cause in fact, and (5) proximate cause. *See McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d at 894. Duty is the legal obligation a defendant owes to a plaintiff to conform to the reasonable person standard of care in order to protect against unreasonable risks of harm. *See McCall v. Wilder*, 913 S.W.2d at 153 . This duty of reasonable care must be considered in relation to all the relevant circumstances, and the degree of foreseeability needed to establish a duty of care decreases in proportion to increases in the magnitude of the foreseeable harm. *See Pittman v. Upjohn Co.*, 890 S.W.2d 425, 433 (Tenn. 1994); *Doe v. Linder Const. Co., Inc.*, 845 S.W.2d 173, 178 (Tenn. 1992). The nature and scope of a person's duty in a particular situation is a question of law to be decided by the court, *see Blair v. Campbell*, 924 S.W.2d 75, 78 (Tenn. 1996); *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993), and thus, a motion for summary judgment is an appropriate mechanism for determining a defendant's duty when the facts are undisputed. *See Nichols v. Atnip*, 844 S.W.2d 655, 658 (Tenn. Ct. App. 1992).

In the context of premises liability, the person in control of the premises has the duty to exercise reasonable, ordinary care under the circumstances to not cause injury to one lawfully on the premises. *See Hudson v. Gaitan*, 675 S.W.2d 699, 703 (Tenn. 1984); *Johnson v. EMPE, Inc.*, 837 S.W.2d 62, 65 (Tenn. Ct. App. 1992). This duty encompasses maintaining the premises in a reasonably safe condition, including removing or warning of any latent, dangerous conditions that the owner is aware of or should have been aware of through reasonable diligence. *See Blair v. Campbell*, 924 S.W.2d at 76; *Eaton v. McLain*, 891 S.W.2d 587, 593-94 (Tenn. 1994).

Traditionally, the courts of this state did not impose liability on a landlord for injuries caused by defective or dangerous conditions that were "open and obvious". *See Eaton v. McLain*, 891 S.W.2d at 595; *McCormick v. Waters*, 594 S.W.2d 385, 387 (Tenn. 1980). However, the continuing viability of the "open and obvious" principle was called into question in 1992 when the Tennessee Supreme Court adopted the doctrine of comparative fault in *McIntyre v. Balentine*, 833 S.W.2d 52

(Tenn. 1992).[1] The Tennessee Supreme Court recently turned its attention to this question in *Coln v. City of Savannah*, ___ S.W.2d ___ (Tenn. 1998).[2] The court held that a finding that a danger is open and obvious is not an absolute bar to a plaintiff's recovery. Instead, the court determined that the question of duty must be analyzed in light of the foreseeability and gravity of the harm and the feasibility and availability of alternative conduct that would have prevented the harm. Specifically, the court stated: "if the foreseeability and gravity of harm posed from a defendant's conduct, even if 'open and obvious,' outweighed the burden on the defendant to engage in alternative conduct to avoid the harm, there is a duty to act with reasonable care." *Coln v. City of Savannah*, ___ S.W.2d at ___.[3] Thus, the obviousness of the danger of slipping on ice does not, by itself, shield FMS from liability in this case.

Landlords have a duty to remove natural accumulations of ice and snow from common areas within a reasonable amount of time. *See Grizzell v. Foxx*, 48 Tenn. App. 462, 468, 348 S.W.2d 815, 817 (1960). In the *Grizzell* case, the court explicitly rejected cases from other jurisdictions holding that a landlord did not owe a duty to keep common passageways free of snow and ice and held instead that there was a duty to remove the ice and snow after a "reasonable" amount of time. The court quoted with approval language from *Goodman v. Corn Exchange Nat'l Bank & Trust Co.*, 200 A. 642, 643 (Pa. 1938):

> It may be stated as a general rule that there is no absolute duty to keep outside steps free from ice or snow at all times. Where the precipitation is recent or continuous, the duty to remove such obstruction as it forms cannot be imposed, and the dangers arising therefrom are viewed as the normal hazards of life, for which no owner or person in possession of property is held responsible. It is only when the owner or possessor having a duty to remove snow and ice, improperly permits an accumulation thereof to remain

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[1] *See e.g., Bragg v. Metropolitan Gov't*, No. 01A01-9703-CV-00111, 1997 WL 803707 (Tenn. Ct. App. Dec. 30, 1997); *Jones v. Exxon Corp.*, 940 S.W.2d 69 (Tenn. Ct. App. 1996); *Shope v. Radio Shack*, No. 03A01-9508-CV-00288, 1995 WL 733885 (Tenn. Ct. App. Dec. 7, 1995) (No Tenn. R. App. P. 11 app. filed); *Broyles v. City of Knoxville*, No. 03A01-9505-CV-00166, 1995 WL 511904 (Tenn. Ct. App. Aug. 30, 1995) (No Tenn. R. App. P. 11 app. filed); *Cooperwood v. Kroger Food Stores, Inc.*, No. 02A01-9308-CV-00182, 1994 WL 725217 (Tenn. Ct. App. Dec. 30, 1994) (Appeal dismissed) (Tenn. 1995).

[2] *See Coln v. City of Savannah*, No. 02S01-9702-CV-00008, 1998 WL 139096 (Tenn. March 30, 1998) (For Publication).

[3] *Coln v. City of Savannah*, No. 02S01-9702-CV-00008, 1998 WL 139096 at *9 (Tenn. March 30, 1998).

> after a reasonable length of time for removal has elapsed, that liability may arise for the unsafe and dangerous condition thereby created.

Thus, the extent of reasonable care with regard to the removal of an accumulation of snow and ice depends on, among other things, (1) the length of time the accumulation has been present, (2) the amount of the accumulation, (3) whether the accumulation could be, as a practical matter, removed, (4) the cost of removal, and (5) the foreseeability of injury. *See Mumford v. Thomas*, 603 S.W.2d 154, 156 (Tenn. Ct. App. 1980).

Under the circumstances of this case, FMS did not have a duty to remove the ice on its sidewalk. The accident occurred during the first ten hours of a two-day winter storm while the storm was still in progress and worsening. According to weather data from the Southern Regional Climate Center, the storm began with freezing rain at 7:00 a.m., progressed to sleet by 3:00 p.m., and then to snow by 5:00 p.m. The temperature dropped from 31° at 7:00 a.m. to 24° at 5:00 p.m. On the following day, Nashville received an additional 3.3 inches of frozen precipitation.

It is simply neither feasible nor fair to impose a duty on a landlord to continuously remove ice and snow as it accumulates during an ongoing and worsening winter storm. In this case, it is arguable whether FMS even knew of the icy conditions on the sidewalk. Ms. Howard testified that as she left her apartment, the precipitation looked like it was splashing, and she assumed that it had not frozen. It was only after she fell that she discovered ice on the sidewalk. There is also no proof in the record that FMS could have taken any precautions to avoid this accident. Because the accumulation was recent and ongoing, and because there was no proof of any feasible preventive measures that FMS could have taken to avoid the accident, we hold that FMS did not have a duty to remove the frozen precipitation from the sidewalk.

IV.

We affirm the summary judgment and remand the case to the trial court for further proceedings consistent with this opinion. We tax the costs of this appeal to Barbara Ann Howard and her surety for which execution, if necessary, may issue.

_____
WILLIAM C. KOCH, JR., JUDGE

CONCUR:

_____
HENRY F. TODD, PRESIDING JUDGE
MIDDLE SECTION

_____
BEN H. CANTRELL, JUDGE