FILED
01/12/2023
Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 4, 2022 Session

ROBERT L. TRENTHAM v. MID-AMERICA APARTMENTS, LP, ET AL.

Appeal from the Circuit Court for Williamson County
No. 19CV-414 Michael Binkley, Judge

No. M2021-01511-COA-R3-CV

This appeal concerns premises liability. The plaintiff slipped and fell on a pedestrian bridge on the defendants' property. The trial court entered judgment in favor of the plaintiff. The defendants appeal. We affirm.

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

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ANDY D. BENNETT, J., joined.

Rodrequez C. Watson, Memphis, Tennessee, and Karl M. Braun and Kara G. Bidstrup, Nashville, Tennessee, for the appellants, Mid-America Apartments, LP, and Mid-America Apartments, LP, d/b/a Venue at Cool Springs.

Charles I. Malone, Nashville, Tennessee, for the appellee, Robert L. Trentham.

OPINION

I. BACKGROUND

On the morning of September 24, 2018, the plaintiff, Robert Trentham ("Trentham"), fell on a pedestrian bridge owned and maintained by the defendants, Mid-America Apartments, LP, and Mid-America Apartments, LP d/b/a Venue at Cool Springs (collectively, "MAA") in Franklin, Tennessee. Trentham had walked from his apartment in Building 10 to the fitness facility in the clubhouse at the Venue at Cool Springs (the "Venue"). It had been raining the evening before and possibly was still drizzling rain that morning.

Following his workout, Trentham headed back to his apartment via the route that crossed the pedestrian bridge, which sloped downward when traversed in that direction. Trentham claims that as he began to walk across the bridge at his normal gait, his feet flew out from under him. He landed on his back with his right leg straight out in front of him; all of his body weight rested on his left leg, which was bent back and pinned underneath him. Trentham attempted to grasp the guardrails on the bridge to pull himself up with his arms and his right leg, but he could gain no traction on the bridge. He testified later at trial: "[T]he surface was so slick with something that couldn't be seen. . . . I put my hand down, and . . . I felt . . . something that was slimy but clear. I couldn't see what it was, but it was obviously not just water. . . ." Trentham called out to an MAA groundskeeper, Cameron Townsend, approximately 50 yards away, for help.[1] After it became apparent that Townsend was unable to assist him, 911 was called. Paramedics arrived, lifted Trentham onto a wheeled stretcher, and transported him to a medical facility via ambulance. Trentham learned there that he had ruptured his left quadriceps tendon in the fall.

The following day, Trentham was examined by Dr. Christian Anderson of Tennessee Orthopedic Alliance ("TOA"). Dr. Anderson confirmed the diagnosis of a left quadriceps tendon rupture, with the only treatment being surgery to repair the tendon. Trentham decided to undergo the repair surgery in Florida, so that he could recuperate with the assistance of his wife and daughter. Trentham and his wife maintain their primary residence in Florida to be close to their daughter, son-in-law, and grandchildren. Trentham, a full-time practicing lawyer, keeps an apartment at the Venue when working in Tennessee. On October 5, 2018, Trentham underwent surgery in Florida. After approximately four weeks, he returned to Nashville to receive follow-up care from Dr. Anderson and physical therapy from TOA. In 2019, however, Dr. Anderson became concerned with Trentham's lack of recovery. An MRI in August of 2019 revealed that the original surgery to repair the quadriceps tendon rupture had failed. Dr. Anderson explained to Trentham that his options were to undergo a revision surgery to attempt to repair the ruptured tendon or simply live with his injuries and associated disabilities.

On July 1, 2020, Dr. Anderson performed a far more extensive repair and reconstructive surgery than the first one; it entailed Dr. Anderson anchoring the quadriceps tendon to Trentham's kneecap and reinforcing the tendon with an Achilles tissue graft from a cadaver donor. Unfortunately, by February 2021, Dr. Anderson feared the second reconstructive surgery had not been successful, and an MRI revealed that Trentham had re-tearing of his quadriceps tendon. Dr. Anderson outlined two options: (i) undergo a third revision surgery in an attempt to repair the injuries from the fall; or (ii) continue to live with the injuries and associated disabilities. At the time of trial, Trentham had not decided which option he would choose.

[1] Townsend did not testify at trial, live or via deposition. Townsend did purportedly provide a written statement to MAA about the incident.

At trial on June 28 and 29, 2021, Trentham asserted that MAA committed two acts of negligence, each of which created an unsafe and dangerous condition and supported a finding of liability: (i) MAA failed to properly maintain the pedestrian bridge — *i.e.*, negligence; and (ii) MAA's pedestrian bridge failed to comply with applicable building and safety codes — *i.e.*, negligence *per se*. Trentham asserted that each of these negligent acts, standing alone, constituted an actual and proximate cause of his injuries and damages. MAA denied that it had any duty to Trentham or that it breached any duty that might have existed, and alternatively, asserted that Trentham was comparatively at fault for his fall and resulting injuries. MAA argued that Trentham simply neglected to exercise ordinary care for his own safety. According to MAA, no residents had ever complained about the bridge prior to this incident, and Trentham had crossed the bridge many times prior to the fall without reporting issues with it. No inspections of the bridge revealed any issues. MAA further contested the nature and extent of Trentham's injuries and damages resulting from his fall.

In addition to his own trial testimony, Trentham called the following witnesses to testify in person: (a) Hal Deatherage, Ph.D., P.E., Trentham's expert forensic engineer; and (b) Bruce Hutchinson, Ph.D., Trentham's expert economist. Also, Trentham submitted deposition testimony from the following: (c) MAA Regional Vice President Elizabeth Phillips, the individual who verified MAA's Responses to Interrogatories on behalf of MAA; (d) MAA's Regional Service Director, Billy England; (e) Trentham's treating physician, Dr. Anderson of TOA; and (f) St. Thomas Hospital's corporate representative. Finally, Trentham submitted the parties' stipulation concerning certain medical records and medical expenses.

To establish the elements of constructive knowledge and breach in support of his negligence claims, Trentham relied primarily upon the testimony of Phillips. She verified MAA's sworn interrogatory responses, which stated as follows:

> 12. Describe all actions taken by Defendants to safeguard the tenants of the Venue Apartments as to the condition of the wooden bridge, whether prior to or after Robert Trentham's September 24, 2018 fall.
>
> <u>ANSWER</u>: [Objection omitted]. . . Defendants hereby reincorporate its Answer to Interrogatory No. 11. *Defendants affirmatively state that Mid-America Apartments complied with the <u>applicable standard of care at issue in this case</u>*. Defendants also provide Preventative Maintenance Reports for the time period relevant to this case attached hereto. There is no additional responsive information to be provided.

(Emphasis added.). Trentham further introduced into evidence Phillip's deposition testimony in which she expounded as follows regarding the applicable standard of care:

> Q: And then as part your answer for MAA -- on behalf of MAA, you state: "The defendants affirmatively state that Mid-America Apartments complied with the applicable standard of care at issue in this case." I want to ask you -- do you see that?
>
> A: Yes.
>
> Q: I want to ask you some questions about that. What is the standard of care applicable to that bridge as of September 24, 2018?
>
> A: We make sure that it's pressure washed frequently and that the slats on it are -- you know, not warped. And just regular preventative maintenance measures, inspections, and regular upkeep.
>
> Q: How often does the standard of care require that MAA pressure wash that pedestrian bridge? . . . You said "frequently." I just want to pin that down. How frequently?
>
> A: At least once a year. And if there's a need that arises, it's more often than not.
>
> ******
>
> Q: Your testimony is the standard of care required MAA to pressure wash that bridge at least one time a year and potentially additional times if it noticed issues and needed pressure washing. And the standard of care also required MAA to regularly inspect that bridge. Is that fair?
>
> A: Okay. Yes. The standard of care based upon our inspections and routine preventative maintenance.

Phillips related in her deposition that, despite the standard of care requiring — at a minimum — annual pressure washing of the pedestrian bridge to keep it safe, she had no knowledge or information indicating that MAA had pressure washed the pedestrian bridge in 2017 or 2018 before Trentham's fall. When Phillips testified at trial, she claimed for the first time that MAA and she were both referencing an "internal policy" in the prior sworn interrogatory response and deposition testimony. Trentham responded that at no place in the interrogatory response did MAA or Phillips refer to an "internal policy." The trial court ultimately found that Phillips' back-tracking lacked credibility. During her testimony, Phillips admitted that, other than a general obligation of employees to report issues that they see during the workday, MAA had no "inspection, audit, preventative maintenance that has a line item of inspection of that bridge."

Similarly, England testified in his deposition as follows regarding the bridge:

> Q: Was the bridge where Trentham fell ever pressure washed at any time during your tenure as regional service director over the Venue apartments, to your knowledge?
>
> A: Not to my knowledge.
>
> Q: And I just need to ask this for the record. So is it also fair to say that there was no regularly scheduled pressure washing of this pedestrian bridge where Trentham fell?
>
> A: Correct.
>
> Q: Was the bridge where Trentham fell ever cleaned or treated – otherwise treated for algae, mold, or slick conditions in 2018 prior to his fall?
>
> A: I'm uncertain.
>
> Q: Do you have any knowledge that such ever occurred in 2018 prior to Trentham's fall?
>
> A: Not to my knowledge.
>
> Q: Do you have any knowledge that this pedestrian bridge was ever cleaned or otherwise treated for algae, mold, or other slick conditions at any time prior to Trentham's fall that you have - in which you have been regional service director over the Venue apartments.
>
> A: No.

Trentham's construction engineer, Dr. Deatherage Ph.D., P.E., testified that he is a partner in Construction Engineering Consultants ("CEC") in Knoxville, Tennessee, a Professor Emeritus of Civil Engineering and Environmental Engineering at the University of Tennessee, and a licensed professional engineer in Tennessee. His partner at CEC, Tate Geren, also a professional engineer, inspected the bridge in question immediately after CEC was retained and documented the condition of the bridge with photographs and related measurements. Dr. Deatherage opined that, without regular pressure washing, the pressure-treated lumber that comprised the surface of the bridge would invariably develop microbial growth over time and, more likely than not, did so in this instance and was the cause of Trentham's fall. He demonstrated through photographs that non-skid adhesive strips placed on the bridge after Trentham's fall failed to adhere to the surface, allegedly due to the

microbial growth on the bridge.[2]

Dr. Deatherage further testified that: (a) the subject pedestrian bridge was required to have code-compliant handrails on both sides and a slip resistant surface per the 2009 International Building Code ("IBC"), the 2012 NFPA Life Safety Code, ANSI A117.1 and ADA Standards; (b) the pedestrian bridge did not have handrails and did not have a slip-resistant surface as required by codes; and (c) MAA's failure to comply with the foregoing code requirements created a hazardous and unsafe condition, which more likely than not was the cause of Trentham's fall. In his original report, Dr. Deatherage stated that the pedestrian bridge was required to have handrails and a slip-resistant surface because it is part of a "means of egress" and/or "accessible means of egress" as set forth in the IBC. After Richard Rice, P.E., MAA's expert forensic engineer, issued a report disagreeing with the conclusion that the pedestrian bridge was part of any "means of egress," Dr. Deatherage issued a supplemental report opining that such potential disagreement was immaterial because the IBC imposed the same requirements on the bridge as an "accessible route."

In addition to Phillips and England, MAA called the following witnesses to testify in person: (a) Katherine Morrow, the current Property Manager at the Venue; (b) Rice; and (c) Erick Elder, Ph.D., MAA's expert economist. MAA also submitted deposition designations from Trentham; a vocational rehabilitation expert; and a medical billing expert. MAA elected to call no witness with first-hand knowledge of the state of the bridge on the day of the fall, even though its own employee, Townsend, unsuccessfully attempted to help Trentham get up off the slick surface of the bridge after his fall.[3] At trial, Elder repudiated his earlier expert report based upon the information he learned during the trial. Morrow related that she did not start working at the Venue until after Trentham's fall.

Rice testified that he has a Bachelor of Science degree in Civil Engineering from Kennesaw State and is a licensed professional engineer in Georgia. He acknowledged that the pressure-treated lumber that comprised the surface of the bridge can grow algae and mold on the surface when exposed to the elements without regular cleaning. Rice offered no opinion as to whether there was a microbial growth on the bridge at the time of fall.

As to the code issue, Rice admitted that Dr. Deatherage "got it right" that the pedestrian bridge is an accessible route and therefore is subject to the same code requirements regarding handrails and slip-resistant surfaces. He agreed that the bridge did not satisfy the requirements of the code in that regard but opined the City of Franklin must have approved the bridge's deviation from, or noncompliance with, the code because the City issued certificates of occupancy. The court excluded this opinion because MAA failed to disclose it as required by the Tennessee Rules of Civil Procedure. On cross examination,

[2] Evidence of changes made to the bridge after Trentham's fall was not introduced as evidence of subsequent remedial measures to establish liability on the part of MAA.

[3] Neither Phillips nor England inspected or tested the bridge after Trentham's fall.

however, Rice admitted that the plain text of the applicable building code provides in pertinent part as follows: "Approval as a result of an inspection shall not be construed to be an approval of a violation of the provisions of this code or of other ordinances of the jurisdiction. Inspections presuming to give authority to violate or cancel the provisions of this code or of other ordinances of the jurisdiction shall not be valid."

Following the two-day bench trial, the trial court held in favor of Trentham's negligence claim.[4] The court's exhaustive memorandum and order provided, *inter alia*, as follows:

> Trentham proved by a preponderance of the evidence that: (1) a dangerous condition — namely, the existence of a slick, organic growth on the wood planks — existed on the pedestrian bridge; (2) MAA had constructive knowledge of the dangerous condition; and (3) the foreseeable risk of harm caused by the dangerous condition outweighed the burden of mitigation. "Consequently, under Tennessee law, MAA owed Trentham a duty to act reasonably to remove, repair, or warn against the slimy substance."
>
> Trentham proved by a preponderance of the evidence that "MAA fell below the applicable standard of care by failing to regularly inspect, maintain, clean, or treat the footpath of the bridge."
>
> Trentham has proven by a preponderance of the evidence that MAA's breach of the standard of care was the proximate and legal cause of his fall and resulting injuries.
>
> Trentham failed to exercise ordinary care for his own safety and was fifteen percent (15%) at fault for his fall and resulting injuries.
>
> Trentham suffered the following damages:
>
>> Economic damages of $1,572,755.75, comprised of $119,279.75 in past medical expenses and $1,453,476.00 in lost earning capacity, which the court reduced based on the comparative fault allocation to $1,336,842.39.
>>
>> Noneconomic damages of $950,000, which the court reduced based on the comparative fault allocation to $807,500.00 and then reduced again to $750,000.00 pursuant to Tenn. Code

[4] The trial court ruled against Trentham on the alternative theory that MAA was negligent *per se*, holding that it could not determine whether the applicable building codes were mandatory.

Ann. §29-39-102.[5]

Based on MAA's liability for negligence, the trial court awarded Trentham a total judgment of $2,086,842.39. MMA filed a timely notice of appeal.

II. STATEMENT OF THE ISSUES

We restate the issues on appeal as follows:

1. Did Trentham establish facts to create a duty of care on MAA; *i.e.*, an unsafe condition of which MAA had actual or constructive knowledge?

2. Did Trentham establish MAA's breach of duty?

3. Did the trial court err in its comparative fault allocation?

4. Did Trentham establish damages for future lost earning capacity?

Trentham raises an additional issue on appeal: Did the trial court err in holding as a matter of law that MAA could not be found negligent *per se* for any violation of the building codes on the basis that "the Court [was] unable to determine whether compliance [with such codes] was mandatory?"

III. STANDARD OF REVIEW

Our review of the trial court's findings following a non-jury trial is "de novo based upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d); *Rogers v. Louisville Land Co.*, 367 S.W.3d 196, 204 (Tenn. 2012). As previously explained by this court:

> [Rule] 13(d)'s presumption of correctness requires appellate courts to defer to a trial court's findings of fact. *Fell v. Rambo*, 36 S.W.3d 837, 846 (Tenn. Ct. App. 2000); *Taylor v. Trans Aero Corp.*, 924 S.W.2d 109, 112 (Tenn. Ct. App. 1995)). Because of this presumption, an appellate court is bound to leave a trial court's finding of fact undisturbed unless it determines that the aggregate weight of the evidence demonstrates that a finding of fact other than the one found by the trial court is more probably true. *Estate of Haynes v. Braden*, 835 S.W.2d 19, 20 (Tenn. Ct. App. 1992) (holding that an appellate court is bound to respect a trial court's findings if it cannot

[5] The statute limits non-economic compensatory damages suffered by each injured plaintiff to $750,000 except in cases of catastrophic injury.

> determine that the evidence preponderates otherwise). Thus, for the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect.

Rawlings v. John Hancock Mut. Life Ins. Co., 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001). We review the trial court's conclusions of law de novo with no presumption of correctness. *Hughes v. Metro. Gov't of Nashville & Davidson Cnty.*, 340 S.W.3d 352, 360 (Tenn. 2011).

IV. DISCUSSION

DUTY

Property owners must exercise ordinary care and diligence to maintain their premises in a reasonably safe condition. *See McCormick v. Waters*, 594 S.W.2d. 385, 387 (Tenn. 1980). A landlord like MAA is under "a continuing duty to use reasonable care to keep in good repair and safe condition the common area(s) available to those lawfully on the premises" and "has the duty to correct an unsafe condition within a reasonable period of time once the landlord has actual or constructive notice of the condition." T.P.I-Civil 9.21. "The existence or nonexistence of a duty owed to the plaintiff by the defendant is entirely a question of law for the court." *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993). Tennessee law defines an unsafe condition as one that "creates an unreasonable risk of harm." *Id.*; *see also Tedder v. Raskin*, 728 S.W.2d 343, 347-48 (Tenn. Ct. App. 1987). A landlord can be held liable where "the unsafe condition existed long enough that the [landlord], exercising ordinary care, should have discovered and corrected the unsafe condition." T.P.I.-Civil 9.02; *Martin v. Washmaster Auto Ctr., U.S.A.*, 946 S.W.2d 314, 318 (Tenn. Ct. App. 1996). In a premises liability case, the superior knowledge of the condition of the premises possessed by the owner or operator triggers liability. *See Eaton v. McClain*, 891 S.W.2d 587, 593-94 (Tenn. 1994).

To recover for an injury caused by an allegedly dangerous condition on a premises, a plaintiff must establish the elements of negligence and also prove by the preponderance of evidence, that the condition:

> (1) was caused or created by the owner, operator, or his agent, or (2) if the condition was created by someone other than the owner, or his agent, there must be actual or constructive notice on the part of the owner or operator that the condition existed prior to the accident.

Martin, 946 S.W.2d at 318. Under Tennessee law, a duty will not arise in a premises liability case unless the particular injury was reasonably foreseeable to the premises owner. *See Green v. Roberts*, 398 S.W.3d 172, 177 (Tenn. Ct. App. 2012). To establish negligence, a plaintiff must prove: (1) a duty of care owed by the defendant to the plaintiff; (2) conduct falling below the applicable standard of care amounting to a breach of that duty; (3) an

injury or loss; (4) causation in fact; and (5) proximate, or legal, cause. *See Parker v. Holiday Hospitality Franchising, Inc.*, 446 S.W.3d 341, 350 n.7 (Tenn. 2014); *Bradshaw*, 854 S.W.2d at 869.

Trentham argues that MAA caused and/or had notice (both actual and constructive) of more than one unsafe condition on the bridge that they failed to remedy in breach of their duties:

> (1) The pedestrian bridge developed an unsafe condition when it, more likely than not, grew mold and/or algae on its surface over time, which also caused Trentham's fall. MAA admitted that the annual pressure washing required by the standard of care had not been performed.
>
> (2) The wooden pedestrian bridge violated building codes designed to protect the health and safety of the residents. All applicable codes required the bridge to be designed and constructed with handrails and a slip resistant surface. MAA's failure to comply with such standards created a hazardous and dangerous condition, which more likely than not, was a cause of the fall.

MAA maintains that no existence of a dangerous condition has ever been established. The defendants contend that Trentham's testimony on this issue is not credible because he supposedly never mentioned a slick substance on the bridge before his testimony at trial. However, Trentham testified in his 2020 deposition that the surface of the bridge was "slick and slippery;" the substance was "like ice;" and the substance was "not just water." Moreover, Phillips admitted Trentham contacted MAA within days after his fall in 2018 reporting that there was a "foreign substance" on the bridge other than water that caused him to slip:

> Q. Did Mr. Trentham ever report to you or your team that he suspected that there was a foreign substance on the bridge that caused him to slip, other than rain?
>
> A. He did assert that in an email he sent a few days after the fall.

At trial, Trentham testified to the same facts. He described the substance on the bridge as clear, definitely not water, and slick as ice. The trial court determined that Trentham had "ample time to perceive the condition of the bridge" and that "[h]e specifically distinguished the slick and slimy natural growth from water alone." The court found Trentham properly able to make his determination based on "normal life experiences." Trentham further explained at length how he could not get any traction with his right foot when attempting to get up from his fall. As the trial court emphasized in its decision, "Trentham clearly, unequivocally, and consistently testified that his fall resulted from the presence of a slimy, natural growth on the pedestrian bridge." The court

additionally noted that it was "able to carefully observe Trentham's phy[si]cal demeanor and conduct while testifying" and that it found that "throughout Trentham's entire testimony, he was sincere, honest, and worthy of belief in all respects." On appeal, we give great weight to the "trial court's determinations regarding witness credibility." *See McClain v. McClain*, 539 S.W.3d 170, 187 (Tenn. Ct. App. 2017).

The trial court heard Dr. Deatherage's testimony that absent regular pressure washing, the pressure-treated lumber on the bridge would develop microbial growth and that, given MAA's failure to conduct pressure washings, the bridge most likely did so here. As the court observed, Dr. Deatherage stated the lumber would "develop[] a film . . . a microbial growth . . . like a lubricant almost." MAA's forensic engineering expert, Rice, agreed that the pressure-treated lumber could grow algae and mold without regular cleaning. The court found the opinions were given to a reasonable degree of engineering certainty. The trial court properly relied on the evaluation and work of Dr. Deatherage and his colleague, as Tennessee courts permit experts to rely upon both data collected and tests performed by others in reaching their conclusions. *See Brown v. Crown Equip. Corp.*, 181 S.W.3d 268, 278 (Tenn. 2005).

MAA presented no countervailing evidence, electing to not call a single witness with first-hand, personal knowledge of the condition of the bridge at or following Trentham's fall. Despite testifying to the need to regularly wash the bridge, Phillips conceded that she had nothing to show that MAA pressure washed the bridge in the two years preceding Trentham's fall. England, MAA's regional service director since 2015, testified that during his tenure: (1) the bridge was never pressured washed; (2) there was no regularly scheduled pressure washing; and (3) the bridge was never otherwise cleaned or treated for algae, mold, or other slick conditions at any time prior to Trentham's fall.

"Constructive notice" is defined as "information or knowledge of a fact imputed by law to a person (although he may not actually have it) because he could have discovered the fact by proper diligence, and his situation was such as to cause upon him the duty of inquiring into it." *Hawks v. City of Westmoreland*, 960 S.W.2d 10, 15 (Tenn. 1997). The trial court observed that a plaintiff can establish that a premises owner had constructive notice of the presence of a dangerous condition by showing a pattern of conduct indicating the existence of the dangerous condition. *Blair v. West Town Mall*, 130 S.W.3d 761, 765-66 (Tenn. 2004). "Proof that the condition was caused by 'the owner's method of operation . . . or by natural forces' may demonstrate "that its presence was reasonably foreseeable to the premises owner." *Id.* at 766.

Pursuant to Tennessee law, MAA owed a duty to Trentham and its other residents. The trial court reached this conclusion after judging the testimony of Trentham and Dr. Deatherage on this point credible and, conversely, determining that MAA's witnesses had no first-hand, personal knowledge of the condition of the bridge and/or lacked credibility. The trial court further grounded its decision on admissions by MAA's witnesses that the

bridge was required to be a washed on a regular basis in order to prevent microbial growth and that such cleanings had not occurred. The trial court's finding that there was a microbial growth on the bridge creating an unsafe condition and its determination that MAA was on constructive notice of this dangerous condition is supported by a preponderance of the evidence. No grounds exist for us to overturn the trial court's findings of fact based upon the record before us.

CAUSATION

The trial court observed that "[t]o be liable, MAA's conduct must be the factual and legal cause of Trentham's injuries by a preponderance of the evidence." *Kilpatrick v. Bryant*, 868 S.W.2d 594, 598 (Tenn. 1993). As the trial court related, *Kilpatrick* explains:

> Causation, or cause in fact, means that the injury or harm would not have occurred "but for" the defendant's negligent conduct. Once it is established that the defendant's negligent conduct was, in point of fact, the actual cause of the plaintiff's injury or harm, the focus then becomes whether the policy of the law will extend responsibility for that negligent conduct to the consequences that have occurred. As this court stated in *Doe v. Linder Const[ruction] Co.*, "legal responsibility must be limited to those causes which are so closely connected with the result and are of such significance that the law is justified in imposing liability."

Kilpatrick, 868 S.W.2d at 598 (internal citations omitted). The trial court noted that "[l]egal cause consists of three elements: (1) the conduct was a substantial factor in bringing about the harm; (2) no rule or policy relieves the actor from liability as a matter of law; and (3) the harm was reasonably foreseeable. *Cotton v. Wilson*, 576 S.W.3d 626, 638 (Tenn. 2019). The court found:

> Mr. Trentham introduced evidence demonstrating it is more likely than not that he would not have been injured but for MAA's breach of the standard of care—its failure to maintain the bridge free of slimy natural growth. The court further finds the slimy substance present on the bridge was a substantial factor in bringing about Mr. Trentham's fall. As previously noted it was reasonably foreseeable an organic build-up in a sloped pedestrian way would become slippery when wet and cause a pedestrian to fall. MAA presented no intervening cause or public policy restriction which would militate against a finding of legal cause, and the court does not identify one. Accordingly, the court concludes Mr. Trentham has proven by a preponderance of the evidence MAA's breach of the duty of care was the factual and legal cause of his injuries.

We find a preponderance of the evidence supports the determination of the trial

court. No grounds exist to overturn the trial court's holding.

COMPARATIVE FAULT

The trial court found MAA 85% at fault for Trentham's fall and injuries and Trentham 15% at fault. The court followed the relevant factors for consideration of comparative fault, as articulated by the Supreme Court in *Eaton v. McLain*, 891 S.W.2d 587, 592-93 (Tenn. 1994). In *Eaton*, the Supreme Court held that the "percentage of fault assigned to each party should be dependent upon all circumstances of the case," and identified the following factors for consideration:

> 1. the relative closeness of the causal relationship between the conduct of the defendant and 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, 891 S.W.2d at 592-93.

Relevant to the first *Eaton* factor, the trial court determined that "Trentham introduced evidence demonstrating it is more likely than not he would not have been injured but for MAA's breach of the standard of care—its failure to maintain the bridge free of slimy natural growth." The court noted that "the slimy substance present on the bridge was a substantial factor in bringing about Trentham's fall." Relevant to the third factor, the trial court held that "MAA had ample opportunity to discover the substance, simple pressure washing would have removed slime, and MAA had a pressure washer on site for ready use when needed."

As to the second and sixth *Eaton* factors, the trial court found that: (1) Trentham "knew the bridge was sloped and constructed of plain wooden planking;" (2) he "knew it had been raining and he knew the bridge was wet;" (3) Trentham "understood rainfall can create wet surfaces, and wet surfaces can be slick or slippery;" (4) nevertheless, he "did not approach the bridge cautiously, slow his pace, or adjust his carriage;" (5) Trentham "did not utilize the available bridge railing;" and (6) Trentham "approached and crossed the bridge at his normal gait." For these reasons, the trial court concluded that "a

reasonable person of ordinary prudence would have taken these precautions when encountering the bridge, and Trentham's failure to do so more than likely substantially contributed to his fall."

Emphasizing the ease by which MAA could have both discovered and eliminated the microbial growth, the trial court assessed MAA 85% at fault and Trentham 15% at fault. MAA did not present any evidence to overcome the trial court's credibility determinations or otherwise preponderate against the court's finding. Accordingly, we find that there are no legitimate grounds for this court to disturb the trial court's credibility and factual findings by allocating a greater percentage of fault to Trentham.

DAMAGES

The damages issue raised by MAA in the "Statement of Issues Presented" is as follows:

> Whether the Trial Court committed reversible error by applying the incorrect legal standard in its determination of the Appellee's **future lost earning capacity** and therefore issued an improper damages award.

(Emphasis added.). MAA, in its reply brief, argues that it is challenging all damages derived by Trentham's "faulty methodology." Because "all issues related to the Trial Court's damages award" was not "included in the Statement of Issues Presented for Review required by Tennessee Rules of Appellate Procedure 27(a)(4)" in order to properly be before us, we will only address the issue properly presented. *See Gibson v. Bikas*, 556 S.W.3d 796, 810 (Tenn. Ct. App. 2018).

The award of future lost earning capacity was $679,754 (which the court reduced by 15% based on its comparative fault allocation). MAA contends that the trial court based the award of $679,754 solely on actual lost income (rather than diminished earning capacity). MAA argues that the damages should be measured "by the extent of impairment to the plaintiff's ability to earn a living." *See Graves v. Jeter*, No. W2003-02871-COA-R3-CV, 2004 WL 3008871, at *4 (Tenn. Ct. App. Oct. 11, 2004). MAA asserts that evidence of loss of actual earning capacity was required to establish damages. MAA further states that the award erroneously includes lost business profits.

Trentham provided extensive testimony concerning the impact that his injuries had and continue to have on his ability to earn a living as a lawyer. He noted as follows: (a) for the remainder of 2018 after the fall, he was basically unable to do any work as a lawyer; (b) in 2019, he had significant portions of professional time forfeited to doctor appointments and physical therapy; (c) in 2020, he had a repeat of 2018 in terms of a surgery that prevented him from working for months; (d) he can no longer travel for work, which was a large part of his legal practice; (e) because of the injury, he no longer has the

stamina to perform the same number of billable hours as he did prior to the injury; and (f) he expects that such will remain the case going forward. Further, as of May 26, 2020 (before his second surgery), Dr. Anderson had assigned Trentham a disability rating of 12% lower body impairment and 5% whole body impairment. At the time of his second deposition (approximately one year following Trentham's second surgery), Dr. Anderson testified that Trentham's condition had not improved since his prior impairment rating.

Trentham also relied upon the expert opinion of Dr. Hutchinson, who testified that, at the date of injury, Trentham was 70.1 years of age with a work-life expectancy of 4.99 years and a life expectancy of 16.65 years.[6] Dr. Hutchinson calculated Trentham's lost earning capacity using Trentham's entire background, historical earnings, and hours worked since the fall. He did not assume Dr. Anderson's disability ratings to be a proxy for lost earning capacity. To calculate Trentham's total lost earnings, Dr. Hutchinson performed the following:

> • for the approximate final three months of 2018 following Trentham's fall: Dr. Hutchinson averaged Trentham's base annual income for the three preceding years, adjusted that figure to 2018 dollars through a Bureau of Labor Statistics employment cost index, divided the resulting figure by the average number of hours Trentham worked in the fourth quarter of the three preceding years to derive an hourly fourth quarter wage, and concluded by multiplying this figure by the reduction in hours Trentham experienced over those final three months of 2018;
>
> • for 2019, 2020, and the pretrial portion of 2021: Dr. Hutchinson took his previously calculated adjusted annual pre-injury income figure, increased this figure by a projected average annual increase in the employment cost index of 2.5%, and then subtracted this figure by Trentham's actual earnings over this approximate two-and-half year period.
>
> • for the post-trial portion of 2021, 2022, and 2023 (the conclusion of Trentham's work-life expectancy): Dr. Hutchinson took the figure he derived for Trentham's lost earnings in 2020 (the most recent full year of lost earnings prior to trial), projected that figure forward using the same employment cost index, and then reduced that figure to present value to derive an annual lost earning figure for the two-and-half years following trial.

This last portion of the award (lost earning capacity from the date of trial in 2021 through the end of work-life expectancy 2023) is the issue before us.

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[6] Although Trentham desires to continue to work well past his statistical work life expectancy, Dr. Hutchinson did not include such in his analysis and calculations of lost earning capacity.

A plaintiff must prove economic damages "to such a degree that, while perhaps not mathematically precise, will allow the [fact-finder] to make a reasoned assessment of [his] injury and loss." *Meals ex rel. Meals v. Ford Motor Co.*, 417 S.W.3d 414, 419-20 (Tenn. 2013). A damages award is an issue of fact with the trial court's findings afforded a presumption of correctness unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d).

Lost earning capacity "is usually arrived at by comparing what the person would have been capable of earning but for the injury with what the person is capable of earning after the injury." *Overstreet v. Shoney's Inc.*, 4 S.W.3d 694, 703 (Tenn. Ct. App. 1999). If, as here, the injury is permanent, the amount of lost earning capacity should be multiplied by the injured person's work life expectancy and then discounted to its present value. *Id.* at 704. "[C]ourts have found competent and admissible any evidence which tends to prove the injured person's present earning capacity and the probability of its increase or decrease in the future." *Id.* (internal citations omitted). Courts routinely consider numerous factors, including the injured person's age, health, intelligence, capacity and ability to work, experience, training, record of employment, and future avenues of employment. *Id.*

The Tennessee Pattern Jury Instruction for loss of earning capacity states that:

> In deciding what, if any, award should be made for loss of the ability to earn, *you should consider any evidence of plaintiff's earnings capacity*, including, among other things, the plaintiff's health, age, character, occupation, *past earnings*, intelligence, skill, talents, experience and record of employment.

T.P.I—Civil 14.01 (emphasis added); *Overstreet*, 4 S.W.3d at 703; *see also, Johnson v. Nunis*, 383 S.W.3d 122, 136 (Tenn. Ct. App. 2012); *Hampton v. Northwest Tennessee Human Resource Agency*, 2010 WL 2754347, *2 (Tenn. Ct. App. 2010).

Trentham was an equity partner with Butler Snow from 2013-2015,[7] a non-equity partner from 2016-2019, and a senior counsel from 2019-trial. Although his compensation could conceivably vary as an equity partner (but not as a non-equity partner or senior counsel) in the firm based on firm performance, Trentham explained as follows:

> [T]he fact that I was an equity partner in those years [2012-2015] as opposed to a non-equity partner I do not believe had any material impact — effect on the numbers that I — or the compensation I was paid in those years. If I had been a non-equity partner in those years [2012-2015], I believe I would have been paid approximately the same....

Further, Trentham testified that compensation shown on the K-ls was "income for work

[7] Trentham was not required to invest in or purchase any equity interest in the firm.

[he] performed for Butler Snow," and that — whether he was an equity partner, a non-equity partner, or senior counsel — he was "paid for performance."

We find the trial court's award of $694,754 in future lost earning capacity was proper based on the evidence in the case and Tennessee law. It appears that the trial court found Trentham's evidence more credible than that provided by MAA. There is no legitimate basis to disturb the award on appeal.

NEGLIGENCE *PER SE*

The trial court concluded that negligence *per se* could not serve as a basis for holding MAA liable for Trentham's injuries. The court observed in its decision: "Building codes can be used to prove negligence per se in Tennessee." To do so, however, "the alleged statutory standard must be applicable and mandatory." In this case, the trial court held that it could not determine that compliance was mandatory because there was an "absence of evidence demonstrating the bridge was a component of the only means of egress or accessible route...."

Trentham argues on appeal that the trial court erred by conflating the analyses of whether the codes were "applicable" and whether compliance with them was "mandatory." However, he asserts that if this court affirms the trial court's finding of fault against MAA under common law negligence, "any analysis of the codes issue" and negligence *per se* is rendered unnecessary. Because we affirm the trial court's determination against MAA as to negligence, we will not address the issue of negligence *per se*.

VII. CONCLUSION

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellants, Mid-America Apartments, LP, and Mid-America Apartments, LP, d/b/a Venue at Cool Springs. The case is remanded, pursuant to applicable law, for the collection of costs below.

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JOHN W. MCCLARTY, JUDGE