In the Missouri Court of Appeals
Eastern District

DIVISION THREE

COLLEEN O'DONNELL,	)	No. ED108986
	)	
Appellant,	)	Appeal from the Circuit Court of
	)	St. Louis County
vs.	)	18SL-CC02101
	)	
PNK (RIVER CITY), LLC, D/B/A RIVER CITY CASINO & HOTEL, AND TOTAL LOT MAINTENANCE ,	)	Honorable Joseph S. Dueker
	)	
Respondents.	)	Filed: March 9, 2021

Angela T. Quigless, P.J., Kurt S. Odenwald, J., and James M. Dowd, J.

Introduction

Appellant Colleen O'Donnell appeals the trial court's grant of two summary judgments in this case, one in favor of Respondent PNK (River City), LLC d/b/a River City Casino & Hotel and the other in favor of Respondent Total Lot Maintenance (TLM) on her personal injury claims arising from a December 16, 2016 fall due to accumulating ice on River City's premises during a winter storm. We review each summary judgment motion separately and we likewise limit our consideration to the summary judgment record created separately pursuant to Rule 74.04(c) as to each motion.

We affirm the judgment in favor of River City because pursuant to the Massachusetts Rule,[1] the undisputed material facts demonstrate that River City did not owe O'Donnell a duty of care in that the freezing precipitation that caused her fall was a natural accumulation general to the community so River City is entitled to judgment as a matter of law. As to the judgment in favor of TLM, we reverse and remand because the material facts are genuinely disputed whether TLM assumed the duty by agreement to treat or remove the ice pursuant to its contract with River City such that it is not entitled to judgment as a matter of law but those factual issues are for a jury to decide.[2]

Background

The facts giving rise to the underlying action in this case stem from a slip and fall at the River City Casino during a winter ice storm on December 16, 2016. That afternoon, O'Donnell, a River City customer, arrived before any frozen precipitation or accumulation had begun. After 2 or 3 hours at the casino, O'Donnell decided to leave. At approximately 4:13 p.m., she exited the north doors, took a few steps and then slipped and fell on a patch of ice on the sidewalk and sustained injuries. The freezing precipitation had not been shoveled, scraped, salted, or altered in any way.

On May 24, 2018, O'Donnell sued River City alleging it knew or could have known of unreasonably dangerous condition of the premises and negligently failed to exercise ordinary care to remove or treat the ice accumulation, or to warn its invitees on the premises of the dangerous condition. After O'Donnell learned during discovery that River City had a contract with TLM to provide snow removal and surface treatment services for the premises, O'Donnell added TLM as a defendant and alleged that TLM negligently breached its duty to keep the

[1] *Richey v. DP Props., LP*, 252 S.W.3d 249, 251–52 (Mo. App. E.D. 2008).
[2] O'Donnell's motion to file exhibits out of time was taken with this appeal and granted.

premises reasonably safe from ice accumulation or to warn invitees such as O'Donnell of the dangerous conditions on the premises.

1. The summary judgment record as to River City's motion.

On October 4, 2019, River City moved for summary judgment against O'Donnell. Pursuant to Rule 74.04, River City filed with its motion a statement of uncontroverted facts. In addition to the basic facts outlined above, both parties admitted the following facts were undisputed and these constitute the relevant summary judgment record governing our review of River City's motion:

a. River City operates the River City Casino & Hotel, located at 777 River City Casino Boulevard in St. Louis County, Missouri;

b. On December 16, 2016, an ice storm hit the St. Louis area, including the area around River City's premises;

c. The storm brought freezing rain and caused ice to accumulate around River City's premises, including in the area where O'Donnell fell;

d. At the time O'Donnell fell, River City had not put down any salt, ice melt, warning cones, or caution tape or taken any measures to remove, treat, or alter the natural state of the ice that had accumulated as a result of the freezing rain around River City's premises and in the area of O'Donnell's fall;

e. Before O'Donnell fell, River City monitored the falling and accumulating ice and knew that ice was accumulating on the walkways including the walkway where O'Donnell fell;

f. Before O'Donnell fell, River City warned some customers of the slick ice, helped some to their vehicles, and tried to protect others from falling;

g. Before O'Donnell fell, River City twice requested that TLM come to treat and remove the ice from River City's premises.

2. The summary judgment record as to TLM's motion.

On November 25, 2019, TLM filed its own summary judgment motion largely mimicking River City's motion and statement of uncontroverted material facts. The summary judgment record applicable to TLM's motion, which was developed pursuant to Rule 74.04(c) and governs our review as to TLM's motion, consists of the foregoing facts outlined in (a) - (g) above, plus the following additional facts and materials admitted by both O'Donnell and TLM:

h. River City first summoned TLM to the Casino at 4:10 p.m;

i. TLM told River City it would take a TLM crew one hour to arrive on site;

j. At the time of O'Donnell's fall, River City and TLM had a contract in force whereby TLM agreed to provide snow and ice removal and treatment services to River City;

k. The contract provided: (i) that TLM was authorized "to provide snow plowing and/or salting service" at River City, (ii) that the services were categorized as snow removal services, sidewalk services, and salting services, (iii) that "[a]t an accumulation of 1/8 [inch] of sleet, freezing rain and snow, salt trucks will be dispatched. Events will start with chemical application to keep ice and snow from bonding to the pavement," (iv) that "[i]f snow or ice is forecasted for A.M. rush hour, lots will be pre-salted. These same weather conditions will apply to the dispatching of sidewalk crews. This priority service is to protect your employees, clients and customers," and (v) that under the special instructions portion of the contract the phrase "no sidewalk service unless requested" appears.

3. The March 17, 2020 grant of both summary judgment motions.

On January 9, 2020, the trial court heard arguments on both motions for summary judgment, took the motions under advisement pending further discovery, and granted O'Donnell until March 4, 2020 to file a supplemental response to the motions. No supplemental response was filed[3] and on March 17, 2020, the trial court granted both motions for summary judgment. O'Donnell filed a motion to reconsider, which was denied. This appeal follows.

Standard of Review

The Supreme Court has weighed in on the standard of review that should be followed for appeals of summary judgment:

> The trial court makes its decision to grant summary judgment based on the pleadings, record submitted, and the law; therefore, this Court need not defer to the trial court's determination and reviews the grant of summary judgment *de novo*. In reviewing the decision to grant summary judgment, this Court applies the same criteria as the trial court in determining whether summary judgment was proper. Summary judgment is only proper if the moving party establishes that there is no genuine issue as to the material facts and that the movant is entitled to judgment as a matter of law. The facts contained in affidavits or otherwise in support of a party's motion are accepted as true unless contradicted by the non-moving party's response to the summary judgment motion. Only genuine disputes as to material facts preclude summary judgment. A material fact in the context of summary judgment is one from which the right to judgment flows.
>
> . . . .
>
> The record below is reviewed in the light most favorable to the party against whom summary judgment was entered, and that party is entitled to the benefit of all reasonable inferences from the record. However, facts contained in affidavits or otherwise in support of the party's motion are accepted as true unless contradicted by the non-moving party's response to the summary judgment motion.

Goerlitz v. City of Maryville, 333 S.W.3d 450, 452-53 (Mo. banc 2011) (internal quotation marks and citations omitted); *Green v. Fotoohighiam*, 606 S.W.3d 113, 115-16 (Mo. banc 2020).

[3] Respondents consented to O'Donnell receiving two additional weeks to file her supplemental responses, but O'Donnell did not notify the trial court of those communications or otherwise request the extension.

"Facts come into a summary judgment record only via Rule 74.04(c)'s numbered-paragraphs-and-responses framework." *Jones v. Union Pac. R.R. Co.*, 508 S.W.3d 159, 161 (Mo. App. S.D. 2016); see also *Fotoohighiam*, 606 S.W.3d at 118. If the court were to look beyond the facts pled on the Rule 74.04 record to the trial court's full record it would be impermissibly acting as an advocate for a party. *Lackey v. Iberia R-V Sch. Dist.*, 487 S.W.3d 57, 62 (Mo. App. S.D. 2016). "Thus, when reviewing a summary judgment, we may only review the undisputed material facts established by the process set forth in Rule 74.04(c); we do not review the entire trial court record." *Alvis v. Morris*, 520 S.W.3d 509, 512 (Mo. App. S.D. 2017).[4]

Where the defending party is the movant, it may establish a right to judgment by showing: (1) facts negating any one of the non-movant's elements; (2) that the non-movant, after an adequate period of discovery, has not been able and will not be able to produce evidence sufficient to allow the trier of fact to find the existence of any one of the non-movant's elements; or (3) that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly-pleaded affirmative defense. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo. banc 1993).

Discussion

I. Pursuant to the Massachusetts Rule, the undisputed material facts demonstrate that River City did not owe O'Donnell a duty of care to protect invitees from naturally occurring ice accumulation as it fell at the time of her fall, so River City is entitled to judgment as a matter of law.

To establish her claim against either defendant, O'Donnell's burden is to prove that each defendant owed her a duty of care, a breach of that duty, and that her damages were caused by

[4] O'Donnell's briefs reference certain facts which are not part of River City's summary judgment record because they were not made part of that record pursuant to the dictates of Rule 74.04(c), so we have disregarded those facts.

the breach. *Hoffman v. Union Electric Co.*, 176 S.W.3d 706, 708 (Mo. banc 2005) (internal citations omitted). The existence of a duty is a question of law for the court based on the court's determination whether the facts pleaded or proven show "the existence of a relationship between the plaintiff and defendant that the law recognizes as the basis of a duty of care." *Bunker v. Association of Missouri Elec. Cooperatives*, 839 S.W.2d 608, 611 (Mo. App. W.D. 1992).

While premise liability principles typically govern slip and fall claims against owners and possessors of property,[5] Missouri has adopted an exception, commonly known as the Massachusetts Rule, that imposes "no duty to remove snow or ice that accumulates naturally and is a condition general to the community." *Richey v. DP Props., LP*, 252 S.W.3d 249, 251–52 (Mo. App. E.D. 2008); *Willis v. Springfield Gen. Osteopathic Hosp.*, 804 S.W.2d 416, 419 (Mo. App. S.D. 1991). Additionally, Missouri courts have held "a property owner does not have a duty to remove, from its open-air parking lot, freezing rain, sleet, or snow, as it is falling" and "[t]o hold that a duty exists to make a parking lot safe as precipitation falls from the sky would be to create a duty which would be virtually impossible to perform." *Milford v. May Department Stores*, 761 S.W.2d 231, 232-33 (Mo. App. E.D.1988) (quoting Restatement (Second) of Torts § 4, comment a (1965). However, as exceptions to the Massachusetts Rule, our courts have found a duty in cases where the property owner voluntarily assumed the duty to remove snow or ice either by agreement or through a course of conduct over a period of time. *Otterman v. Harold's Supermarkets, Inc.*, 65 S.W.3d 553, 556 (Mo. App. W.D. 2001).

River City argues that the undisputed facts mandate the application of the Massachusetts Rule such that River City owed no duty to O'Donnell as a matter of law to treat or clear the

---

[5] *Steward v. Baywood Villages Condominium Ass'n*, 134 S.W.3d 679, 682 (Mo. App. E.D. 2004); M.A.I. 22.03.

naturally occurring accumulation of ice that was a general condition in the St. Louis area. We agree because the undisputed facts were that O'Donnell slipped and fell on naturally accumulating ice on River City's premises as she was leaving the casino while freezing rain was still falling, that the icy conditions were general throughout the community, and that River City had taken no action to alter the physical condition of the ice, all of which are sufficient facts to warrant imposition of the duty-eliminating Massachusetts Rule.

For her part, O'Donnell argues that based on one or both of the exceptions to the Massachusetts Rule, River City owed her a duty of care because River City either (a) assumed a duty through its course of conduct or (b) assumed a duty by agreement. On the summary judgment record before us, O'Donnell has failed to establish that either exception applies here.

A. Assumption of duty by course of conduct.

O'Donnell claims that River City assumed a duty to her with respect to the dangerous condition caused by the falling and accumulating ice on its premises based on its course of conduct in the hours and minutes before she fell. Specifically, she points to the evidence that River City (1) closely monitored the approaching ice storm and was well-aware of the weather conditions, (2) warned other patrons of the dangerous conditions, (3) assisted some patrons to their vehicles, and (4) twice summoned TLM to treat the ice.

However, for a defendant to be deemed to have assumed a duty in the context of the Massachusetts Rule, our courts have required that the defendant take some willful action to alter the condition of the snow or ice on its premises. *Otterman*, 65 S.W.3d at 555; *Medlock v. St. John's Health Sys., Inc.*, 426 S.W.3d 35, 39 n.5 (Mo. App. S.D. 2014); *Richey*, 252 S.W. at 252 (finding no duty was assumed where defendant "did nothing to alter the condition of the steps where [plaintiff] fell.") In *Otterman*, although the plaintiff slipped on an untreated ramp, the

defendant's removal of snow and ice on the adjacent parking lot was a sufficient course of conduct to trigger the exception. 65 S.W.3d at 555. So, this Court reversed the trial court's summary judgment finding a genuine issue of material fact as to whether the defendant voluntarily assumed a duty to clear the snow and ice. *Id*.

River City did not spread salt or snow melt and did not shovel, scrape, or plow any of its premises before O'Donnell fell. And while it took other actions including warning customers, helping customers to their vehicles, and summoning TLM, no Missouri case has found the course-of-conduct exception to the Massachusetts Rule in the absence of actual alteration of the snow or ice on the part of the defendant. Point denied.

B. Assumption of duty by agreement.

Under the second exception to the Massachusetts Rule, a duty to remove naturally occurring snow or ice that is a general condition of the community exists when the defendant has voluntarily assumed such a duty pursuant to an agreement. *Alexander v. Am. Lodging, Inc.*, 786 S.W.2d 599, 601 (Mo. App. W.D. 1990); *Richey*, 252 S.W.3d at 252. "The existence of a snow removal policy alone does not create a duty to remove snow or ice." *Medlock*, 426 S.W.3d at 39 n. 5.

O'Donnell argues that River City voluntarily assumed a duty to remove the snow and ice by way of its contract with TLM. While it is properly part of the River City summary judgment record that "[p]rior to Plaintiff's fall, Defendant's employees twice contacted co-defendant Total Lot Maintenance and requested Total Lot Maintenance clear the area," the contract itself is not part of the Rule 74.04(c) record. And while it is true that we review the record in the light most favorable to O'Donnell as the non-moving party giving her the benefit of all reasonable inferences, the fact that River City summoned TLM twice to treat and clear the ice is insufficient

to support the inference that there was a contract, much less what the terms of the contract were, and whether River City assumed a duty to O'Donnell with respect to the snow and ice pursuant to those terms. In short, on this summary judgment record, O'Donnell has failed to establish as a matter of disputed fact that River City voluntarily assumed a duty by agreement in order to avoid application of the Massachusetts Rule.[6] Point denied.

II. Since it is a matter of genuinely disputed fact whether TLM assumed the duty by virtue of its contract with River City to remove or otherwise treat the snow and ice on River City's premises, TLM is not entitled to summary judgment on the Rule 74.04(c) record before us.

This Court has previously recognized that in the context of the Massachusetts Rule, a snow-removal company, like TLM here, may voluntarily assume the duty to take action with respect to snow and ice, even naturally occurring snow and ice that constitutes a general condition in the area, by entering into a contract to provide such services. *Richey*, 252 S.W.3d at 252 (citing *Willis*, 804 S.W.2d at 419). In *Richey*, we explained that whether the defendant has assumed the duty "by agreement," is a matter of contractual interpretation to determine whether a duty to perform arose under the terms of the contract. *Id*. Under the *Richey* contract, the defendant's duty to perform snow removal services on the premises was triggered either upon the landowner's request or in the event 2 inches of snow fell. *Id*. At the time of the plaintiff's fall, 2

[6] O'Donnell also argues that this Court should circumvent the Massachusetts Rule based upon River City's status as a hotel operator. Courts in Missouri have applied the Massachusetts Rule to hotel operators and held they too owe no duty to remove naturally occurring snow and ice, general to the community. *Paikowsky v. Davidson Hotel Co. LLC*, No. 4:08CV783 TIA, 2010 WL 2628379 (E.D. Mo. June 25, 2010) (Federal Court interpreting Missouri law holding a hotel operator owed no duty to remove naturally occurring ice from its parking lot). While under some circumstances a hotel operator may owe a heightened duty of care to its guests to warn of dangerous conditions, we are unpersuaded that River City's status as a hotel operator excuses it from the Massachusetts Rule due its already-broad application in Missouri "to landlords, municipal corporations, inviters and employers." See *Richey*, 252 S.W.3d at 251. Point denied.

inches of snow had yet to fall and the landowner had not requested the defendant's snow removal services. *Id.* Therefore, we found that because no triggering event occurred under the contract, the defendant did not assume a duty to remove the snow and ice and the *assumption-of-duty-by-agreement* exception did not apply. *Id.*

The circumstances here are distinct from the *Richey* case in one critical way - the facts on the record before us remain in dispute whether TLM's contractual duty to provide snow and ice removal and treatment services had been triggered in this case. Under the River City-TLM contract, TLM's duty to clear and treat ice at River City was triggered upon the "accumulation of 1/8 inch of sleet, freezing rain and snow…" While whether an eighth inch of freezing precipitation had fallen is not explicit in the record, the reasonable inference[7] from the record appears to make that at a minimum a matter of disputed fact. The amount of freezing precipitation that had fallen before O'Donnell fell, during what the parties agreed was an historic ice storm, was enough for River City to have activated security protocols to warn customers and physically help them to their vehicles and to have summoned TLM twice to treat and remove the ice. In sum, whether TLM's duty had been triggered is a disputed fact the jury should decide.

An additional matter more appropriate for the jury to decide concerns the dispute in the record between certain provisions of the River City - TLM contract and testimony by a TLM representative that the parties orally modified the contract such that TLM was only to dispatch to River City when requested by River City. This testimony is in conflict with the contract language that requires TLM to dispatch to River City irrespective of any request upon the accumulation of an eighth inch of freezing precipitation.

---

[7] *Goerlitz*, 333 S.W.3d at 452-53 (The record below is reviewed in the light most favorable to the party against whom summary judgment was entered, and that party is entitled to the benefit of all reasonable inferences from the record.)

Therefore, TLM has failed to establish as a matter of undisputed fact that its duty to appear at River City and treat or remove the ice had not been triggered such that it has failed to establish its right to judgment as a matter of law and the summary judgment entered in its favor is reversed.

III. Abrogation of the Massachusetts Rule requires Missouri Supreme Court action.

Finally, O'Donnell implores this Court to abrogate the Massachusetts Rule claiming it is outdated. Admittedly, the Massachusetts Rule, in certain circumstances, may incentivize landowners and occupiers not to address dangerous conditions of snow and ice when those are natural accumulations and represent a general condition in the area. To do so, so the argument goes, would assume a duty that otherwise does not exist and open themselves up to liability.

Nevertheless, we decline O'Donnell's request. When Missouri first adopted the Massachusetts Rule in *Woodley v. Bush*, 272 S.W.2d 833 (Mo. App. 1954), a personal injury claim brought by a tenant against a landlord, the court held that "[t]his appears to be reasonable for where the condition is one general to the community it creates a natural hazard to everyone who ventures out at such time. The condition is brought about by no one and no one's efforts can appreciably lessen the danger present… Thus any effort of the landlord would in fact only diminish the natural hazard to a very negligible degree." *Id*. at 835. Since then, Missouri courts have considered but declined to abrogate the Massachusetts Rule:

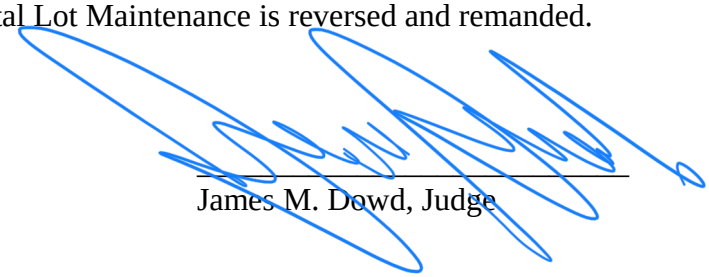
> "[T]he Massachusetts rule, as applied in Missouri, harmonizes the liabilities of landlords, municipalities, inviters, and employers—all of which share the same general duty of care. The passage of time has not made this rationale any less sound today than it was when Woody and Everett were decided in 1954. In our view, if the Massachusetts rule were to be reconsidered as it applies to inviters, as in this case, such reconsideration should also include examination of the municipalities exception upon which the rule's adoption was based. However, this Court has no authority to review the exception for municipalities as laid out in Walsh, 142 S.W.2d at 466, because we are bound by the pronouncements of our Supreme Court. See Mo. Const. art. V, § 2."

Medlock, 426 S.W.3d at 40.

We remain bound by the pronouncements of our Supreme Court. Point denied.

Conclusion

The trial court's grant of summary judgment as to River City is affirmed. The trial court's grant of summary judgment as to Total Lot Maintenance is reversed and remanded.



James M. Dowd, Judge

Angela T. Quigless, P.J., and
Kurt S. Odenwald, J., concur.