Rel: June 26, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1190208

Geraldine Daniels

v.

Tracy Wiley and Hawthorne-Midway Lily Flagg, LLC

Appeal from Madison Circuit Court
(CV-18-901638)

BOLIN, Justice.

In December 2016, Geraldine Daniels was residing at the Hawthorne at Lily-Flagg apartment complex, which was owned by Hawthorne-Midway Lily Flagg, LLC ("Hawthorne-Midway"), and managed by Hawthorne Residential Partners, LLC, and its

community manager, Tracy Wiley. Daniels sued Hawthorne-Midway and Wiley for damages resulting from injuries she suffered when she fell while stepping off a sidewalk at the complex. Daniels appeals from a summary judgment entered in favor of Hawthorne-Midway and Wiley. We affirm.

Facts and Procedural History

On the evening of December 17, 2016, Daniels was walking on the sidewalk from her apartment to the mail kiosk for her building to retrieve her mail. According to Daniels, mud had accumulated on the sidewalk as a result of a rain earlier that day. When she stepped off the sidewalk curb, Daniels slipped and fell and, according to her, broke both of her knees.

On August 28, 2018, Daniels sued Hawthorne-Midway and Wiley, alleging that Hawthorne-Midway and Wiley had breached duties "to ensure that the premises of the apartment complex were reasonably safe for tenants" and "to not create and/or allow dangerous conditions on the premises of the apartment complex." Hawthorne-Midway and Wiley answered the complaint, pleading, among other defenses, the defenses of open and obvious danger, contributory negligence, and assumption of the risk.

On August 1, 2019, after some discovery had been conducted, Hawthorne-Midway and Wiley moved for a summary judgment, arguing that they were not liable for Daniels's injuries because, they argued, the alleged danger created by mud was open and obvious, the presence of mud after a rain is not an unreasonably dangerous condition, Daniels's claims were barred by her own contributory negligence and by her assumption of the risk, Wiley had no personal liability, and no evidence supported the wantonness claim. In support of their motion, they attached testimony from Daniels's deposition; an affidavit from Wiley; deposition testimony from Saundra Ikerd, Daniels's roommate; Daniels's answers to interrogatories; and testimony from Wiley's deposition.

To explain their knowledge of Daniels's accident, the area where Daniels fell, and the methods of mail retrieval provided by the apartment complex, Hawthorne-Midway and Wiley submitted affidavit testimony from Wiley in which she averred that she did not learn of Daniels's fall on the night of the accident but that, when she did learn of the accident in early January, she personally inspected the area where she understood Daniels had fallen. She averred in her affidavit:

> "I personally inspected this area after [Daniels's] accident. There are two large, shady trees in this area. Grass does not easily grow in the areas underneath and around these trees, which is somewhat barren with soil and dirt. I understand from [Daniels's] deposition that this area can become muddy after periods of rain, and that it had rained the day of her accident."

Wiley further averred that a diligent search had been conducted of the records of the apartment complex and that no record was located concerning complaints about mud accumulating on the sidewalk near the area where Daniels fell or other complaints regarding the general condition of the sidewalk before Daniels's fall in December 2016. According to Wiley, neither Daniels nor any other tenant had reported a problem with the condition of the sidewalk to her. Wiley explained that, in addition to walking on the sidewalk to retrieve the mail, Daniels could walk on the street, walk through a breezeway, or drive her car to the mail kiosk and park in front of it in one of the spaces provided for that purpose.

In support of their contention that the danger created by the mud on the sidewalk was open and obvious, Hawthorne-Midway and Wiley submitted deposition testimony from Daniels regarding her knowledge of the condition of the sidewalk, her

navigation of the sidewalk, and the circumstances surrounding her accident. The following exchange occurred during Daniels's deposition:

> "Q.: Had you ever seen mud at that spot before your accident?
>
> "A: Yes.
>
> "Q: And over what period of time had you noticed the mud?
>
> "A.: For ever since we lived in that particular apartment and had to go to, you know, go get the mail.
>
> "Q.: Had you ever had any problems with the mud before?
>
> "A.: Well, I didn't have a problem specifically with it, but I was afraid Saundra might get some wild hair or something and walk down there, even if I told her not to. And she would have a problem with it. I was navigating -- I was pretty agile at that time. I was navigating pretty good. And I would step around, and then where it drops off the curb and it accumulates and --
>
> "Q.: You say the mud drops off of the curb?
>
> "A: Curb, right there where you step off the curb and over to the mail boxes.
>
> "....
>
> "Q: But you've never had any problem navigating the curb? You've always been able to get over the curb with no problem?

> "A: I never had any problem navigating the curb, but -- and I never had a problem navigating that curb, except that mud had piled down in, you know, where you step off the curb, that little area, and it was thick at that time.
>
> "....
>
> "A: ... I went to step off of that curb to go to the mailbox. The sidewalk had ended pretty much, and I stepped down, and instead of stepping over that mud that had drained there -- and I usually did, I could usually do that -- I stepped in it. That's what made me fall.
>
> "Q: And tell us everything that you recall that happened.
>
> "A: Okay. I went out the front door, I walked down the sidewalk?
>
> "....
>
> "A: Then the sidewalk was ending and there was a curb, sort of like that (indicating) going around. I stepped off the curb and I knew the mud was there. And I usually would step over it, kind of a little hop step over it. But I didn't, I misstepped and I stepped in it.
>
> "....
>
> "Q: And the after one foot slipped, what happened to the rest of your body?
>
> "A: It just completely collapsed and fell. ..."

Daniels's roommate, Ikerd, testified in deposition as follows with regard to retrieving mail during periods when it had rained:

> "A: Well, if it rains, it's muddy and you can't hardly -- In fact, I've almost fallen a couple of times. I try to go, but [Daniels and I] just quit going; we just drive up and get the mail.
>
> "....
>
> "A: [Daniels] just drives us around to the mailbox and we just get out, and we don't have to walk in that."

On September 17, 2019, Daniels responded to the motion for a summary judgment. She argued, citing Campbell v. Valley Garden Apartments, 600 So. 2d 240 (Ala. 1992), that, even though she had knowledge of the danger created by the accumulated mud on the sidewalk and curb, that knowledge did not preclude her recovery for negligence and wantonness in that Hawthorne-Midway and Wiley should have anticipated her being injured by the danger because, she said, they did not provide her with a "reasonable and safe alternative" means for retrieving mail on a rainy day. Daniels further argued that Hawthorne-Midway and Wiley were liable for her injuries because, she said, they knew or should have known about the danger created by the mud on the sidewalk, which, she said, was "plainly visible." Daniels submitted her deposition testimony in which she testified that at some point she had telephoned the property management about the mud on the

sidewalk. Additionally, she attached an affidavit from Audra Hampton, another resident in her building, who averred:

> "The area where [Daniels] fell is dangerous especially after it rains. When it rains mud always covers the sidewalk and the area around the curb and roadway. Whenever I have to get my mail, I avoid walking near that part of the roadway and sidewalk because it's so slick."

She further pointed out that Hawthorne-Midway and Wiley should have been aware of the danger created by the mud because the 2017 Safety & Maintenance Manual ("the SAM Manual") of Hawthorne Residential Partners, LLC, requires daily inspections of the complex to identify and to remove debris. She also maintained that Hawthorne-Midway and Wiley should have anticipated that she would be injured by the mud-created danger because, she said, no safe alternative route to retrieve mail existed on the day she fell. She submitted evidence indicating that walking through the breezeway was not safe because of a "makeshift" fix of loose and uneven tiles; that walking on the street was not safe because of drivers speeding through the parking lot; and that driving her car was not an option on the evening she was injured because no vacant parking spaces were available at the mail kiosk.

On September 18, 2019, Hawthorne-Midway and Wiley filed their replies to Daniels's response. They argued that they owed no legal duty to Daniels because the accumulated mud on the sidewalk and curb created an "open and obvious" condition that was known to Daniels. They further argued that, because Daniels knew of the mud and admitted her decision to "hop step" over it that evening, Daniels failed to exercise reasonable care and placed herself in the way of danger and that, consequently, her recovery for negligence was barred by her contributory negligence. They contended that Campbell had been overruled by Ex parte Gold Kist, Inc., 686 So. 2d 260, 261 (Ala. 1996)(declining to adopt Restatement (Second) of Torts § 343A (1965), which was quoted in Campbell, because it was not "a correct statement of the law relating to the liability of a possessor of land"),[1] and that, consequently, Daniels's reliance on Campbell is misplaced.

On September 19, 2019, the trial court conducted a hearing addressing the summary-judgment motion,[2] and on

[1]This Court did not discuss Campbell or other cases citing or quoting Restatement (Second) of Torts § 343A in Ex parte Gold Kist.

[2]A transcript of the hearing is not included in the record.

September 24, 2019, the trial court, without providing its reasons, entered a summary judgment for Hawthorne-Midway and Wiley as to all of Daniels's claims against them. On October 24, 2019, Daniels moved the trial court to alter, amend, or vacate the judgment, arguing that her "knowledge of the hazard [did] not 'de jure' render her decision to traverse said hazard to be an assumed risk or an incident of contributory negligence"; that "[a] defendant landlord's duty to conduct daily inspections of the property to identify and remove debris is not abrogated because certain debris and/or a known hazard is open and obvious";[3] and that "[a] defendant landlord's duty to maintain property in a reasonably clean and safe condition is not abrogated because certain debris and/or a known hazard is open and obvious." The trial court summarily denied Daniels's motion the following day. Daniels appeals.

Standard of Review

> "'"The standard of review applicable to a summary judgment is the same as the standard for granting the motion...." McClendon v. Mountain Top Indoor Flea

[3]This argument was presented for the first time in Daniels's motion to alter, amend, or vacate.

Market, Inc., 601 So. 2d 957, 958 (Ala. 1992).

> "'"A summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c)(3), Ala. R. Civ. P. The burden is on the moving party to make a prima facie showing that there is no genuine issue of material fact and that it is entitled to a judgment as a matter of law. In determining whether the movant has carried that burden, the court is to view the evidence in a light most favorable to the nonmoving party and to draw all reasonable inferences in favor of that party. To defeat a properly supported summary judgment motion, the nonmoving party must present 'substantial evidence' creating a genuine issue of material fact -- 'evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' Ala. Code 1975, § 12-21-12; West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989)."

"'Capital Alliance Ins. Co. v. Thorough-Clean, Inc., 639 So. 2d 1349, 1350 (Ala. 1994).'

> "Pritchett v. ICN Med. Alliance, Inc., 938 So. 2d 933, 935 (Ala. 2006)."

McClurg v. Birmingham Realty Co., [Ms. 1180635, January 31, 2020] ___ So. 3d ___, ___ (Ala. 2019).

Discussion

With regard to the claims against Wiley, Hawthorne-Midway and Wiley made a prima facie showing that there is no genuine issue of material fact. The burden then shifted to Daniels to present substantial evidence creating a genuine issue of material fact with regard to Wiley's liability. By entering a summary judgment in favor of Wiley, the trial court concluded that Daniels did not satisfy her burden.

Although she names Wiley as an appellee in her notice of appeal, Daniels does not contend before this Court that the trial court erred in entering a summary judgment for Wiley. The evidence before us indicates that Wiley is not the premises owner; rather, at the time of the accident she was employed as the community manager. In their motion for a summary judgment, Hawthorne-Midway and Wiley argued that managerial employees "are liable for torts in which they have personally participated." Ex pare Charles Bell Pontiac-Buick-Cadillac-GMC, Inc., 496 So. 2d 774, 775 (Ala. 1986). Daniels

presented no argument or evidence in the trial court indicating that Wiley personally participated in the alleged tortious conduct or that Daniels had informed Wiley of the alleged dangerous condition before the fall. On appeal, Daniels does not address the assertions made in the trial court that Wiley did not owe, and therefore did not breach, any legal duty owed to Daniels. By failing to address this issue, Daniels has waived her right to challenge the trial court's summary judgment in favor of Wiley. Fogarty v. Southworth, 953 So. 2d 1225, 1232 (Ala. 2006)("When an appellant confronts an issue below that the appellee contends warrants a judgment in its favor and the trial court's order does not specify a basis for its ruling, the omission of any argument on appeal as to that issue in the appellant's principal brief constitutes a waiver with respect to the issue."). As to Wiley, therefore, the summary judgment is affirmed.

As to Hawthorne-Midway, Daniels contends in her brief to this Court that, although the danger created by the accumulated mud on the sidewalk and curb was open and obvious, Hawthorne-Midway knew of the danger and owed her a duty to

provide a safe route to retrieve her mail and that, by failing to provide a safe alternate route for her to retrieve her mail, Hawthorne-Midway should have anticipated that she would be harmed by the accumulated mud on the sidewalk and curb and, therefore, is liable for her injuries.

In support of her contention, Daniels cites Campbell v. Valley Garden Apartments, supra, McDonald v. Lighami Development Co., 962 So. 2d 847 (Ala. Civ. App. 2006), and Turner v. Dee Johnson Properties, 201 So. 3d 1197 (Ala. Civ. App. 2016), which, she says, hold that, in a premises-liability case, even if a tenant/invitee knows of the open and obvious danger that causes the injury, the landlord may still be liable for damages if the landlord knows of the danger and should have anticipated the harm created by the danger. She reasons that in situations where the danger is known and the landlord does not provide a safe, reasonable alternative, the tenant cannot avoid the danger and the defenses of contributory negligence and assumption of risk cannot exist, as a matter of law. Rather, she says, in such situations questions of fact are created for the jury to resolve with regard to the landlord's liability.

In Campbell, a resident of an apartment complex, while walking to dispose of her trash in the complex's garbage dumpster, crossed over a steel plate suspended over a drainage ditch that was known to both the resident and the manager of the apartment complex to be at times "slippery" and "slick." The resident slipped on the steel plate, was injured, and sued the owner of the apartment complex, alleging that the owner was negligent and wanton in maintaining the sidewalk. The trial court entered a summary judgment in favor of the owner of the apartment complex. The resident appealed.

On appeal, the owner of the apartment complex maintained that summary judgment was proper because the resident "knew of the allegedly dangerous condition of the sidewalk and was contributorily negligent, as a matter of law, in causing the injury." 600 So. 2d at 241. This Court rejected that argument, opining:

> "A landlord has the duty to maintain common areas in a reasonably safe condition in order to avoid liability for injury to a tenant or a guest. Hancock v. Alabama Home Mortg. Co., 393 So. 2d 969 (Ala. 1981). 'This duty is imposed so that "tenants and their invitees may have egress and ingress without unnecessary danger in the due exercise of the privilege or necessity of going to and from [the tenant's] apartment house or office building."' Hancock, 393 So. 2d at 970, quoting Preston v.

LaSalle Apartments, 241 Ala. 540, 3 So. 2d 411 (1941).

"The Restatement (Second) of Torts § 343A (1965) states:

> "'(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.'

"As quoted in Terry v. Life Ins. Co. of Georgia, 551 So. 2d 385, 386 (Ala. 1989).

"We note that illustration 5 to § 343A, Restatement (Second) of Torts (1965), is analogous to the present case:

> "'A owns an office building, in which he rents an office for business purposes to B. The only approach to the office is over a slippery waxed stairway, whose condition is visible and quite obvious. C, employed by B in the office, uses the stairway on her way to work, slips on it, and is injured. Her only alternative to taking the risk was to forgo her employment. A is subject to liability to C.'

"This Court has written:

> "'[O]nce it has been determined that the duty owed to an invitee has been breached, questions of contributory negligence, assumption of risk, or whether the plaintiff should have been aware of the defect are normally questions for the jury.'

> "Terry, 551 So. 2d at 386-87. A summary judgment is rarely appropriate in a negligence case. Berness v. Regency Square Associates, Ltd., 514 So. 2d 1346 (Ala. 1987).
>
> "There was evidence that before her fall Campbell knew of the slippery condition of the steel plate connected to the sidewalk. However, only by crossing the steel plate could she go to the garbage dumpster, unless she walked through the drainage swale. Therefore, we cannot say that Campbell was contributorily negligent as a matter of law so as to bar her claim. There are factual questions for a jury to answer in this case. She also presented evidence that the apartment complex knew of the slippery condition of the steel plate. It can reasonably be inferred that [the apartment complex] could have anticipated harm from the condition of the steel plate on the sidewalk."

600 So. 2d at 241-42.

In McDonald, the Court of Civil Appeals reversed a summary judgment entered for a landlord on a claim brought by a tenant's guest who fell while walking on concrete stepping stones in the apartment complex's parking area. The tenant's guest argued that she had presented substantial evidence of the landlord's constructive knowledge of the hazard, thus creating a genuine issue of material fact with regard to whether the landlord knew about the alleged dangerous condition. The court held that the tenant guest had met her

burden to overcome the landlord's summary-judgment motion, stating:

> "As our supreme court stated in Campbell v. Valley Garden Apartments[, 600 So. 2d 240 (Ala. 1992)]:
>
> > "'There are factual questions for a jury to answer in this case. [The tenant's guest] ... presented evidence that the apartment complex knew of the slippery condition of the [stepping stones and the ground around them in wet weather]. It can reasonably be inferred that [the landlord] could have anticipated harm from the condition of the [stepping stones and the ground around them in wet weather].'
>
> "600 So. 2d 242."

McDonald, 962 So. 2d at 851.

In Turner, a tenant sued her landlord after she fell and was injured when a panel of the porch flooring of the house she was leasing gave way. The tenant alleged in her complaint that she had informed the landlord of a defect in the front-porch flooring but that the landlord had not remedied the defect at the time of her fall. The landlord moved to dismiss, alleging that the face of the complaint indicated that the alleged hazard was open and obvious and that the tenant was fully aware of the hazard before she fell. The trial court dismissed the complaint, and, after the denial of

her postjudgment motion, the tenant appealed. The Court of Civil Appeals, after quoting the law set forth in Campbell, reversed the trial court's judgment, stating:

> "[W]e cannot conclude that the tenant cannot '"'"prove any set of circumstances that would entitle [her] to relief."'"' Murray [v. Prison Health Servs., Inc.,] 112 So. 3d [1103,] 1106 [(Ala. Civ. App. 2012)] (quoting other cases). Like in Campbell [v. Valley Garden Apartments, 600 So. 2d 240 (Ala. 1992)], the tenant in the present case alleged that the landlord knew of the defect in the porch and that it had failed to repair it. Morever, like in Campbell, '[i]t can reasonably be inferred that the [landlord] could have anticipated harm from the condition on the [porch].' 600 So. 2d at 242. Because the landlord failed to show '"'"beyond doubt that the [tenant] can prove no set of facts in support of the claim that would entitle the [tenant] to relief,"'"' we conclude that the trial court erred in dismissing the tenant's complaint. Murray, 112 So. 3d at 1106."

201 So. 3d at 1200.

Hawthorne-Midway rejects Daniels's contention that Campbell, McDonald, and Turner require the conclusion that Hawthorne-Midway is liable even though the danger created by the mud was open and obvious because, Daniels says, Hawthorne-Midway should have anticipated the harm caused by the accumulated mud in light of its alleged knowledge of the danger and failure to provide an alternate, safe route to retrieve the mail. It maintains that a landlord has no duty to

make safe or to warn of a danger that is open and obvious where the tenant should be aware of the danger in the exercise of reasonable care. See McClurg v. Birmingham Realty Co., [Ms. 1180635, January 31, 2020] ___ So. 3d ___, ___ (Ala. 2020). It directs this Court to Ex parte Gold Kist, Inc., 686 So. 2d 260 (Ala. 1996)(declining to adopt Restatement (Second) of Torts § 343A as a correct statement of law); and Sessions v. Nonnenmann, 842 So. 2d 649 (Ala. 2002), and its progeny.

In Gold Kist, an employee of the United States Department of Agriculture was injured when she slipped on substances that had accumulated on the floor of a poultry-processing plant owned by Gold Kist. She injured her back and sued Gold Kist, alleging that the accident was caused by an unsafe and hazardous condition created at the plant by Gold Kist. At trial, she asked the trial court to give the jury the following two instructions based on Restatement (Second) of Torts § 343(A):

> "'I charge you, ladies and gentlemen of the jury, that the plaintiff has the burden of proving actual and constructive notice of the dangerous condition. However, an exception exists when the hazard was created by the defendant. In such situation, notice of the hazardous condition is imputed to the defendant, and there is no requirement that the plaintiff introduce any additional evidence to

> establish that the defendant had knowledge of the dangerous condition.'

and

> "'I charge you, ladies and gentlemen of the jury, that a possessor of land is not liable to its invitees for physical harm caused to them by any activity or condition on the land whose danger is known to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.'"

686 So. 2d at 261.

On appeal to the Court of Civil Appeals, the employee maintained that this Court had implicitly adopted the Restatement (Second) of Torts § 343A, quoted in Campbell and in Terry v. Life Insurance Co. of Georgia, 551 So. 2d 385 (Ala. 1989)(a premises-liability case involving a landowner and invitee), as the law of Alabama. The Court of Civil Appeals agreed and reversed the judgment, holding that this Court had adopted § 343A as a correct statement of law. On certiorari review, without addressing Campbell, Terry, Sisk v. Heil Co., 639 So. 2d 1363, 1365 (Ala. 1994)(a premises-liability case involving a landowner and invitee), or other cases appearing to apply § 343A, this Court "decline[d] to adopt § 343A as a correct statement of the law relating to the liability of a possessor of land." 686 So. 2d at 261.

In Sessions, this Court addressed a premises-liability case involving a general contractor (invitor) and a subcontractor (invitee) where the danger causing the injury was alleged to be open and obvious. This Court discussed the operation of the affirmative defenses of contributory negligence and assumption of risk and recognized this Court's holding in Gold Kist.[4] We explained:

> "'In [a] premises-liability case, the elements of negligence "'are the same as those in any tort litigation: duty, breach of duty, cause in fact, proximate or legal cause, and damages.'"' Ex parte Harold L. Martin Distrib. Co., 769 So. 2d 313, 314

[4]Although Sessions is a premises-liability case involving a general contractor and subcontractor, because a tenant is an invitee of the landlord just as a subcontractor is an invitee of the general contractor, the principles of law in Sessions are applicable here. In Shelton v. Boston Financial, Inc., 638 So. 2d 824, 825 (Ala. 1994), this Court stated:

> "With respect to the common areas of an apartment complex, a tenant has the same legal rights as an invitee. Coggin v. Starke Brothers Realty Co., 391 So. 2d 111 (Ala. 1980). A landowner owes an invitee the legal duty 'to exercise reasonable care and diligence to keep the premises in a reasonably safe condition for the uses contemplated by the invitation, and to warn the invitee of known dangers, or dangers that ought to have been known, and of which the invitee was ignorant.' Lamson & Sessions Bolt Co. v. McCarty, 234 Ala. 60, at 62, 173 So. 388 (1937)."

(Ala. 2000)(quoting E.R. Squibb & Sons, Inc. v. Cox, 477 So. 2d 963, 969 (Ala. 1985), quoting in turn David G. Epstein, Products Liability: Defenses Based on Plaintiff's Conduct, 1968 Utah L. Rev. 267, 270 (1968)). Breeden v. Hardy Corp., 562 So. 2d 159 (Ala. 1990), states the general duty a general contractor owes a subcontractor on a job site:

> "'"As invitor, ... the general contractor[] was under a duty to have the premises free from danger, or if they were dangerous, to give its invitee[,] ... [the subcontractor], sufficient warning to enable him, through the exercise of reasonable care, to avoid the danger. This duty includes the duty to warn the invitee of danger of which the invitor knows or ought to know, and of which the invitee does not know.
>
> "'"A general contractor is not responsible to a subcontractor for injury from defects or dangers which the subcontractor knows of, or ought to know of. 'If the defect or danger is hidden and known to the owner, and neither known to the [sub]contractor, nor such as he ought to know, it is the duty of the owner [general contractor] to warn the [sub]contractor and if he does not do this, of course, he is liable for resultant injury.'
>
> "'"The duty to keep an area safe for invitees is limited to hidden defects which are not

> known to the invitee and would not be discovered by him in the exercise of ordinary care. All ordinary risks present are assumed by the invitee, and the general contractor or owner is under no duty to alter the premises so as to [alleviate] known and obvious dangers. The general contractor is not liable to an invitee for an injury resulting from a danger that was obvious or that should have been observed in the exercise of reasonable care. The entire basis of an invitor's liability rests upon his superior knowledge of the danger that causes the invitee's injuries. If that superior knowledge is lacking, as when the danger is obvious, the invitor cannot be held liable."
>
> "'... A plaintiff may not recover if the injury he receives is caused by an obvious or known defect in the premises.'

"Breeden, 562 So. 2d at 160. (Emphasis added; first bracketed language added; citations omitted.) See also Ex parte Kraatz, 775 So. 2d 801, 803 (Ala. 2000)(holding '"[t]he premises owner has no duty to warn the invitee of open and obvious defects in the premises, which the invitee is aware of or should be aware of through the exercise of reasonable care"' (emphasis added) (quoting Woodward v. Health Care Auth. of Huntsville, 727 So. 2d 814, 816 (Ala. Civ. App. 1998))).

"Therefore, openness and obviousness of a hazard, if established, negate the general-contractor invitor's duty to eliminate the hazard or to warn the subcontractor invitee of the

hazard; and this negation of duty, in and of itself, defeats the subcontractor's injury claim without the operation of any affirmative defense such as contributory negligence or assumption of risk. In other words, in this context, openness and obviousness, if established, negate the duty, defeat the claim, and pretermit any issue of the effect of openness and obviousness on the affirmative defenses of contributory negligence and assumption of risk. Only if the subcontractor plaintiff can establish some special duty on the general contractor to protect the subcontractor from open and obvious hazards, as distinguished from the general contractor's general duty as stated by Breeden, which does not require such protection, and only if the subcontractor plaintiff can likewise establish a breach of such special duty and proximately resulting damages, might the issue of the effect of the openness and obviousness on the affirmative defenses of contributory negligence and assumption of risk become critical.

"....

"'To establish contributory negligence as a matter of law, a defendant seeking a summary judgment must show that the plaintiff put himself in danger's way and that the plaintiff had a conscious appreciation of the danger at the moment the incident occurred. See H.R.H. Metals, Inc. v. Miller, 833 So. 2d 18 (Ala. 2002); see also Hicks v. Commercial Union Ins. Co., 652 So. 2d 211, 219 (Ala. 1994). The proof required for establishing contributory negligence as a matter of law should be distinguished from an instruction given to a jury when determining whether a plaintiff has been guilty of contributory negligence. A jury determining whether a plaintiff has been guilty of contributory negligence must decide only whether the

> plaintiff failed to exercise reasonable care. We protect against the inappropriate use of a summary judgment to establish contributory negligence as a matter of law by requiring the defendant on such a motion to establish by undisputed evidence a plaintiff's conscious appreciation of danger. See H.R.H. Metals, supra.'
>
> "Hannah v. Gregg, Bland & Berry, Inc., 840 So. 2d 839, 860-61 (Ala. 2002)(emphasis added). In contrast, in order for a defendant-invitor in a premises-liability case to win a summary judgment or a judgment as a matter of law grounded on the absence of a duty on the invitor to eliminate open and obvious hazards or to warn the invitee about them, the record need not contain undisputed evidence that the plaintiff-invitee consciously appreciated the danger at the moment of the mishap. While Breeden, supra, does recite that '[a]ll ordinary risks present are assumed by the invitee,' 562 So. 2d at 160, this recitation cannot mean that the invitor's duty before a mishap is determined by the invitee's subjective state of mind at the moment of the mishap. This Court has expressly rejected the notion that an invitor owes a duty to eliminate open and obvious hazards or to warn the invitee about them if the invitor 'should anticipate the harm despite such knowledge or obviousness.' Ex parte Gold Kist, Inc., 686 So. 2d 260, 261 (Ala. 1996) (emphasis added). Gold Kist apparently overrules sub silentio the contrary language in Sisk v. Heil Co., 639 So. 2d 1363, 1365 (Ala. 1994)."

842 So. 2d 651-54 (some emphasis in original; some emphasis added).

Thus, contrary to Daniels's contention, this Court in Sessions explicitly recognized that the law relied upon by

Daniels holding that a landlord has a duty to eliminate open and obvious dangers or to warn an invitee of such dangers if the invitor "should anticipate the harm" -- is not the law in Alabama. See also McClurg, ___ So. 3d at ___ ("The owner's duty to make safe or warn is obviated ... where the danger is open and obvious -- that is, where 'the invitee ... should be aware of [the danger] in the exercise of reasonable care on the invitee's part.'" (quoting Ex parte Mountain Top Indoor Flea Market, Inc., 699 So. 2d 158, 161 (Ala. 1997))); Barnwell v. CLP Corp., 235 So. 3d 238 (Ala. 2017); and Quillen v. Quillen, 388 So. 2d 985, 989 (Ala. 1980)(recognizing that, when an invitee has suffered injuries from a danger known to the invitee or that should have been observed by the invitee in the exercise of reasonable care, the invitor is not liable for damages). To the extent that Turner, supra; McDonald, supra; Ex parte Howard ex rel. Taylor, 920 So. 2d 553 (Ala. 2005); Campbell, supra; Terry, supra; and other cases citing, quoting, and/or applying the Restatement (Second) of Torts § 343A may hold otherwise, they are overruled.

Applying Sessions to the facts of this case and viewing the evidence in a light most favorable to Daniels, we conclude

that the mud that caused Daniels to fall was an open and obvious danger. "A condition is 'open and obvious' when it is 'known to the [plaintiff] or should have been observed by the [plaintiff] in the exercise of reasonable care.' Quillen v. Quillen, 388 So. 2d 985, 989 (Ala. 1980)." Denmark v. Mercantile Stores Co., 844 So. 2d 1189, 1194 (Ala. 2002). The evidence that the accumulated mud on the sidewalk and curb was an open and obvious danger is undisputed. Daniels agreed that the accumulated mud on the sidewalk and curb created an open and obvious danger, and she admitted that she appreciated the danger created by the mud when she testified that she typically avoided the danger by hopping over the mud. Browder v. Food Giant, Inc., 854 So. 2d 594, 596 (Ala. Civ. App. 2002)(holding danger was open and obvious when invitee admitted that she was not paying attention where she walked). Because of the undisputed evidence that the danger created by the accumulated mud on the sidewalk and curb was open and obvious and that it was known and appreciated by Daniels, Hawthorne-Midway did not owe Daniels any general duty to mark the sidewalk and curb where the mud had accumulated or to warn Daniels of the danger, and her negligence claim fails without

any operation of Hawthorne-Midway's affirmative defenses of contributory negligence or assumption of the risk.

Next, Daniels contends that Hawthorne-Midway breached a special duty, as distinguished from the general duty we have already discussed. Daniels appears to maintain that, because the SAM Manual used at the apartment complex required daily inspections of the property to identify and remove debris, Hawthorne-Midway had "a self-imposed duty to inspect the property for daily debris" and that it breached that duty by failing to identify and remove the danger created by the mud. In her discussion of this issue, Daniels cites general propositions of law regarding a landlord's duty to maintain common areas, see Hancock v. Alabama Mortg. Co., 393 So. 2d 969, 970 (Ala. 1981)(noting that landlord has a duty to maintain the common areas in a reasonably safe condition); Graveman v. Wind Drift Owners' Ass'n, 607 So. 2d 199, 204 (Ala. 1992)(noting that landlord's duty to maintain common areas includes stairways intended for the common use of tenants); and Coggin v. Starke Bros. Realty Co., 391 So. 2d 111, 112 (Ala. 1980)(noting that tenants are invitees of the landlord while using common areas on the landlord's property).

Daniels does not cite any legal authority to support her contention that a landlord's safety manual imposes a special duty of care on the landlord to protect tenants from open and obvious dangers.

Arguments in an appellant's brief must be supported by adequate legal authority. See Rule 28(a)(10), Ala. R. App. P. "[I]t is not the function of this Court to do a party's legal research or to make and address legal arguments for a party based on undelineated general propositions not supported by sufficient authority or argument." Dykes v. Lane Trucking, Inc., 652 So. 2d 248, 251 (Ala. 1994). Because Daniels does not provide this Court with a legal basis for reversing the trial court's judgment in this regard, this unsupported contention does not provide a ground for reversal.

To the extent that Daniels may argue that Hawthorne-Midway breached a special duty by failing to provide a safe, alternative route for Daniels to retrieve the mail, this argument is without merit. In other words, Daniels argues that by failing to provide a safe, alternative route for retrieving the mail, Hawthorne-Midway should have anticipated that Daniels would walk on the mud-covered sidewalk and be

injured. This alleged special duty rests upon the principal of law this Court rejected in Gold Kist and, thus, is unavailing.

Lastly, Daniels has waived her right to challenge the summary judgment in favor of Hawthorne-Midway with regard to her wantonness claim. Before the trial court, in her opposition to the summary-judgment motion, Daniels did not make a specific argument in support of her claim that Hawthorne-Midway acted wantonly. Additionally, she did not identify specific evidence that supported her wantonness claim, i.e., she presented no evidence indicating that Hawthorne-Midway consciously disregarded her safety. Therefore, she did not satisfy her burden of presenting substantial evidence on the existence of a genuine issue of material fact with regard to wantonness. Likewise, she does not raise this specific issue in her brief to this Court. Therefore, she has waived any challenge to the summary judgment in this regard. Frazier v. Core Indus., Inc., 39 So. 3d 140, 158 (Ala. 2009)(holding that, by failing to make a specific argument with regard to wantonness claim, appellant

waived any challenge to the trial court's judgment on that claim).

Conclusion

Daniels has not demonstrated any genuine issue of material fact that prevents Hawthorne-Midway and Wiley from being entitled to a judgment as a matter of law. Rule 56(c)(3), Ala. R. Civ. P. Accordingly, the summary judgment in favor of Hawthorne-Midway and Wiley is affirmed.

AFFIRMED.

Parker, C.J., and Shaw, Wise, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur.