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ARKANSAS COURT OF APPEALS

DIVISIONS II & III
No. CV-22-261

PRESTON GRUMBLES APPELLANT V. CONWAY REGIONAL MEDICAL CENTER, INC.; CONTINENTAL CASUALTY COMPANY; AND NABHOLZ CONSTRUCTION CORPORATION APPELLEES	**Opinion Delivered** May 29, 2024 APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT [NO. 23CV-18-877] HONORABLE SUSAN WEAVER, JUDGE AFFIRMED IN PART; REVERSED AND REMANDED IN PART

KENNETH S. HIXSON, Judge

Appellant Preston Grumbles appeals after the Faulkner County Circuit Court filed an order granting summary judgment on January 5, 2022, in favor of appellees Conway Regional Medical Center, Inc. (Conway Regional), and Continental Casualty Company (Continental) (collectively, the Hospital Appellees). Grumbles additionally appeals from a separate order granting summary judgment filed on January 7, 2022, in favor of appellee Nabholz Construction Corporation (Nabholz). These two orders resolved Grumbles's negligence claims against the Hospital Appellees and Nabholz that stemmed from injuries he sustained on July 6, 2016. On appeal, Grumbles raises four points, generally arguing that the circuit court erred in granting both motions for summary judgment. We affirm the circuit court's January 7, 2022, order granting summary judgment in favor of Nabholz;

however, we reverse the circuit court's January 5, 2022, order granting summary judgment in favor of the Hospital Appellees and remand for further proceedings.

I. *Relevant Facts*

In 2015, Conway Regional entered into a multiphase construction agreement with Nabholz for certain renovations to the hospital facilities. Phase I of the project included renovating the shower stalls and drains in patients' rooms, including patient room 408. All work in patient room 408 was completed by July 21, 2015, and Phase I was certified substantially complete by Conway Regional on the same date. Phase V, the last phase of the entire multiphase project, was certified substantially complete by Conway Regional on April 2, 2016.[1]

On June 27, 2016, forty-two-year-old Grumbles was admitted to room 408 of Conway Regional.[2] When Grumbles was admitted, it was undisputed that the shower in room 408 was not draining properly, and water would escape the shower basin and overflow the outside lip of the shower basin and onto the floor. As a result, when Grumbles was ready to take a shower, a nurse's aide would lay towels down around the two open sides of the shower basin before he showered to dam up the shower basin to contain the water. To exit the shower, Grumbles would then have to step over the towels. This towel-damming retention exercise

[1]Although there is some disparity in the record concerning these dates, this disparity does not affect the disposition of this matter.

[2]The record does not reflect whether Grumbles was the first patient to occupy room 408 after the Phase I renovation.

by various nurses' aides was successful in retaining the water in the shower basin for well over a week until Grumbles's subsequent fall. However, after taking his seventh shower on July 6, 2016, Grumbles slipped and fell after he stepped out of the shower, causing significant personal injuries.

Grumbles filed a complaint for negligence on June 7, 2018, naming Conway Regional and multiple John Does as defendants. He alleged that the shower had a defect that caused water to "pool, stand, or otherwise fail to drain"; that this was known to Conway Regional and created an unreasonable risk of a fall; and that Conway Regional was negligent in failing to protect Grumbles from a known danger, failing to remedy a known danger, and failing to warn him of the danger. Conway Regional filed an answer wherein it generally denied the allegations and asked that the complaint be dismissed with prejudice.

Almost a year later, on May 31, 2019, Grumbles amended his complaint, adding both Nabholz and Continental Casualty Company, Conway Regional's liability insurance provider, as defendants. Grumbles alleged that Conway Regional hired Nabholz to perform construction work to include room 408; the construction work was completed on April 1, 2016;[3] the construction included "installation of flooring in the patient showers and installation of a trap sealer" in the shower drains; the "trap seal caused water to back up in the shower drain, resulting in standing water in the bathroom"; "as a result of" this design or construction defect, the shower did not drain properly and resulted in a hazardous

[3]The dates of completion and occupation alleged in the pleadings and exhibits differ, which is addressed below.

condition of standing water; Grumbles was not aware of the hazardous condition created by the defective construction of the floor and the trap seal in the shower drain; there were no warnings alerting him of this danger; and he was injured. He also alleged that the Hospital Appellees and Nabholz owed him a duty to provide a reasonably safe environment, they breached the duty by creating an unreasonably dangerous condition, they were negligent in failing to clear the drain or maintain the shower such that it would drain properly, they knew or should have known that the trap seal and the construction of the floor created a dangerous condition, and they had a duty to warn him of the dangerous condition. The Hospital Appellees and Nabholz filed answers generally denying these allegations.

On May 11, 2021, Nabholz filed a motion for summary judgment and an accompanying brief arguing that it was entitled to summary judgment on the following bases: (1) the three-year statute of limitations had run; (2) there was a lack of causation; (3) under the accepted-work doctrine, Nabholz could not be held liable; and (4) to the extent Grumbles intended to assert a premises-liability claim against Nabholz, Nabholz did not owe Grumbles a duty because it is not the owner or in possession or control of the property where the incident occurred. Nabholz filed a statement of undisputed material facts in support of its motion.

In its statement of undisputed material facts, Nabholz stated that the work that was conducted in the bathroom of room 408 occurred during Phase I of a multiphase project; the work in room 408 was completed by July 21, 2015; Phase I was certified substantially complete by Conway Regional on July 21, 2015; Nabholz had not been contacted about any

defects in room 408; no trap sealers were installed in any of the patient shower drains at Conway Regional's request; Nabholz inspected the drain on July 23, 2015, after Phase I had been completed, and on December 2, 2019, after the accident; and the drain was free from any blockage, and the floor and drain remained in accordance with the plans and specifications of the project on both of those dates.

Multiple exhibits were attached to the statement of undisputed material facts. Exhibits A and B contained two affidavits from Patrick Rappold, the project superintendent for Nabholz, and David Hess, the superintendent for Nabco Mechanical & Electrical, Inc. (Nabco), who subcontracted with Nabholz to install the drain. Those affidavits supplied the completion dates and other information pertaining to the work performed in room 408.

Exhibit C contained excerpts from Grumbles's deposition testimony. In his deposition, Grumbles admitted that before he was admitted, he knew Nabholz had remodeled Conway Regional. Grumbles did not dispute that he had taken seven showers during his inpatient hospitalization before he fell. Grumbles explained that when he wanted to take a shower, a nurse's aide would lay towels down before he showered. He acknowledged that he was aware that the purpose of the towels was to catch water from the shower and keep it inside the basin. Grumbles did not receive any further assistance while he was showering and explained that he would have to step over the towels to exit the shower. Before his slip and fall on July 6, Grumbles did not remember any water passing through or under the towel barrier that was laid down by the nurses' aides and that he had no knowledge

about the purpose of a trap seal or whether the towels were placed because the drain backed up or because the water would "just roll[ ] out."

Exhibit D contained hospital records indicating the days that Grumbles had taken showers in his bathroom.

In Grumbles's response to Nabholz's motion for summary judgment, he disagreed that Nabholz was entitled to summary judgment. Grumbles argued that the statute of limitations for a "personal injury caused by deficiency in the design, planning, supervision, or observation of construction or the construction and repairing of the improvement to real property is four years after substantial completion of the improvement" pursuant to Arkansas Code Annotated section 16-56-112(b)(1) (Repl. 2005) instead of three years as argued by Nabholz. As such, Grumbles argued that the complaint was timely filed as to Nabholz even if substantial completion occurred on July 21, 2015. He further argued that it was premature to determine if Nabholz's actions were the proximate cause of Grumbles's injuries without further discovery. Grumbles asserted that he had not had the opportunity to depose any of Nabholz's employees or have his expert inspect the drain and shower area. Grumbles further argued that the accepted-work doctrine did not apply because the City of Conway had not accepted the work, and even if the doctrine did apply, further discovery was necessary to determine whether an exception to the doctrine applied. Finally, regarding Nabholz's assertion that it did not owe a duty to Grumbles to the extent he was alleging a premises-liability claim against Nabholz, Grumbles responded that "it is unlikely that [he] will only pursue a premise liability theory of liability against Defendant Nabholz." Grumbles attached

a copy of the certificate of substantial completion of Phase V of the remodeling project that was dated April 2, 2016; a repair invoice from Nabco dated July 23, 2015, for work that was done in rooms 412 and 312; and a document showing that the agreement for remodeling work was between Conway Regional and Nabholz.

Nabholz filed its reply on June 18, 2021. Nabholz argued that Grumbles had failed to meet proof with proof. Specifically, it argued that Grumbles had confused the three-year statute of limitations for negligence claims pursuant to Arkansas Code Annotated section 16-56-105 (Repl. 2005) with the four-year statute of repose pursuant to Arkansas Code Annotated section 16-56-112(b)(1). It explained that the four-year statute of repose does not extend or supplant the three-year statute of limitations. Nabholz denied that summary judgment was premature and explained that Grumbles had failed to establish proximate cause, Grumbles had over two years to conduct discovery, and Grumbles had cited nothing that prevented him from deposing any parties or hiring his own expert. Additionally, Nabholz argued that Grumbles had failed to follow the procedures to request further relief under Arkansas Rule of Civil Procedure 56(f). Nabholz also argued that the accepted-work doctrine applied because an agent is allowed to accept the work on the City of Conway's behalf and that none of the exceptions to the doctrine applied. Finally, Nabholz reiterated that it did not owe Grumbles a duty for any premises-liability claim because Nabholz was not in possession or in control of the area when Grumbles was injured.

Two months later, the Hospital Appellees filed their separate motion for summary judgment on July 12, 2021, along with their accompanying brief claiming that they owed no

duty to invitee Grumbles because the water on the bathroom floor was an open and obvious condition of which Grumbles was aware. The Hospital Appellees attached Grumbles's deposition testimony that included additional excerpts to the ones submitted by Nabholz.

In addition to the deposition testimony already summarized above, Grumbles stated that he remembered someone had told him that the showers in some of the rooms were not draining properly after the remodel and that Conway Regional was trying to get them fixed as quickly as it could. He explained that to the best of his knowledge, the day of his fall was the first time the water had bypassed the towels. Grumbles remembered that he had slipped and fallen to his side after he stepped over the towels as he exited the shower, but he did not remember whether he had looked down when he stepped out of the shower. He did not think he slipped on the towel but surmised that to the best of his memory, "the cause of the fall was just water." He could not remember how much water was on the floor or whether the water was soapy.

Grumbles filed his response on August 12, 2021. He agreed that he was an invitee; however, he disagreed with the Hospital Appellees' assertion that they owed him no duty because the dangerous condition was open and obvious. He explained that the dangerous condition was not open and obvious because the water was not present before his shower, and water had not spilled past the towel barrier during any of his previous showers. As such, Grumbles argued that because the Hospital Appellees owed him a duty to use ordinary care to maintain the bathroom and shower area in a reasonably safe condition, it was up to a jury to determine whether the Hospital Appellees had met their duty. Finally, although

Grumbles acknowledged that the Hospital Appellees had moved for summary judgment on the sole basis that they did not owe a duty under the open-and-obvious rule, Grumbles stated that summary judgment on any of the other elements of negligence was premature since discovery was still ongoing. He explained that he had not had the opportunity to depose the Hospital Appellees' employees or corporate representatives who placed the towels around the shower basin or made the safety decisions regarding how to handle the water spill or not move him to a different room. Grumbles attached excerpts of his deposition testimony and pictures of the bathroom floor from the day of his fall showing that the water had crossed the towel barrier.

The Hospital Appellees filed their reply on August 26, 2021. They argued that the open-and-obvious rule applied because Grumbles "knew of the water on the floor and was aware of the danger of slipping and falling from water getting onto the floor." They further argued that the forced-to-encounter exception did not apply because that exception had been found to apply only to situations in which an invitee is forced to encounter a danger in order to perform his or her job. Finally, the Hospital Appellees argued that additional discovery would not impact the result of their motion because the relevant discovery concerning whether the open-and-obvious rule applied is based on Grumbles's testimony.

A hearing on both motions for summary judgment was held on October 28, 2021, during which the parties orally argued their respective positions. After hearing oral argument, the circuit court took the matter under advisement. Thereafter, the circuit court filed two separate orders granting the pending motions for summary judgment on January

5, 2022, and on January 7, 2022. Neither order provided any specific findings. This timely appeal followed, and Grumbles has "abandon[ed] all pending but unresolved claims pursuant to Rule 3(e)(vi) of the Arkansas Rules of Appellate Procedure–Civil."

II. *Standard of Review*

Summary judgment may be granted only when there are no genuine issues of material fact to be litigated, and the moving party is entitled to judgment as a matter of law. *Greenlee v. J.B. Hunt Transp. Servs.*, 2009 Ark. 506, 342 S.W.3d 274. The burden of sustaining a motion for summary judgment is always the responsibility of the moving party. *McGrew v. Farm Bureau Mut. Ins. Co. of Ark.*, 371 Ark. 567, 268 S.W.3d 890 (2007). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Greenlee*, *supra.* However, if a moving party fails to offer proof on a controverted issue, summary judgment is not appropriate, regardless of whether the nonmoving party presents the court with any countervailing evidence. *Moses v. Bridgeman*, 355 Ark. 460, 139 S.W.3d 503 (2003).

On appellate review, this court determines if summary judgment was appropriate by deciding whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Greenlee*, *supra.* We view the evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.* Our review focuses not only on the pleadings but also on the affidavits and other documents filed by the parties. *Id.* However, when there is

no material dispute as to the facts, we determine on review whether "reasonable minds" could draw "reasonable" inconsistent hypotheses to render summary judgment inappropriate. *Town of Lead Hill v. Ozark Mountain Reg'l Pub. Water Auth.*, 2015 Ark. 360, at 3, 472 S.W.3d 118, 122. In other words, when the facts are not at issue but possible inferences therefrom are, the court will consider whether those inferences can be reasonably drawn from the undisputed facts and whether reasonable minds might differ on those hypotheses. *Flentje v. First Nat'l Bank of Wynne*, 340 Ark. 563, 11 S.W.3d 531 (2000); *Mattox v. Main Entrance, Inc.*, 2021 Ark. App. 382.

III. *Whether the Circuit Court Erred in Granting Summary Judgment in Favor of the Hospital Appellees*

Grumbles generally argues that the circuit court erred in granting summary judgment to the Hospital Appellees. We agree. Under Arkansas law, in order to prevail on a claim of negligence, the plaintiff must prove that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the breach was the proximate cause of the plaintiff's injuries. *Shook v. Love's Travel Stops & Country Stores, Inc.*, 2017 Ark. App. 666, 536 S.W.3d 635. Because the question of what duty is owed is one of law, we review it de novo. *Id.* If the court finds that no duty of care is owed, the negligence count is decided as a matter of law. *Id.*

Neither party disputes that Grumbles was an invitee. A property owner has a duty to exercise ordinary care to maintain his or her premises in a reasonably safe condition for the benefit of his or her invitees. *Hope Med. Park Hosp. v. Varner*, 2019 Ark. App. 82, 568 S.W.3d

818. The basis of a defendant's liability under this rule is superior knowledge of an unreasonable risk of harm of which an invitee, in the exercise of ordinary care, does not know or should not know. *Dollar Gen. Corp. v. Elder*, 2020 Ark. 208, 600 S.W.3d 597. An owner's duty to warn an invitee of a dangerous condition applies only to defects or conditions such as hidden dangers, traps, snares, pitfalls, and the like in that they are known to the owner but not to the invitee and would not be observed by the latter in the exercise of ordinary care. *Ethyl Corp. v. Johnson*, 345 Ark. 476, 49 S.W.3d 644 (2001); *Jenkins v. Hestand's Grocery*, 320 Ark. 485, 898 S.W.2d 30 (1995); *Kroger Co. v. Smith*, 93 Ark. App. 270, 275, 218 S.W.3d 359, 363 (2005).

However, a property owner generally does not owe a duty to an invitee if a danger is known or obvious. *Elder*, *supra*. This is also sometimes referred to as the "open-and-obvious exception" or the "obvious-danger rule." *See Duran v. Sw. Ark. Elec. Coop. Corp.*, 2018 Ark. 33, at 10, 537 S.W.3d 722, 728; *Robinson v. Quail Rivers Props., LLC*, 2022 Ark. App. 409, at 5, 654 S.W.3d 690, 693. "Known" in this context means "not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves." *Van DeVeer v. RTJ, Inc.*, 81 Ark. App. 379, 386, 101 S.W.3d 881, 884 (2003). "Thus, the condition or activity must not only be known to exist, but it must also be recognized that it is dangerous, and the probability and gravity of the threatened harm must be appreciated." *Id.* A dangerous condition is "obvious" when "both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising

ordinary perception, intelligence, and judgment." *Van DeVeer*, 81 Ark. App. at 386, 101 S.W.3d at 885.

Here, the Hospital Appellees argued below as they do on appeal in their response that their duty was satisfied because the danger was known or obvious, and they compare the facts of this case to those in *Varner*, *supra*. In *Varner*, a nurse who worked at a hospital for fifteen years was at the hospital on the day of her accident to sit for a deposition. She fell over a tree root in the median where she had crossed from the front entrance to the parking lot. She testified that she saw the tree roots on the day of her fall, even though there were shadows cast by the tree, and that she thought she could avoid tripping over the tree roots if she was careful and paid attention. We held that because the danger was both known and obvious, according to the nurse's own testimony, the hospital did not owe a duty to warn her of the tree roots in her path.

However, the facts in *Varner* are distinguishable from the facts in this case. Here, Grumbles presented evidence to show that the dangerous condition was neither known nor obvious as those terms are defined in *Van DeVeer*, *supra*. It is undisputed that Conway Regional knew that the shower in room 408 was not draining properly and that water could escape the shower basin onto the floor, causing a patient to slip and fall. Therefore, a nurse's aide would lay towels down along the outside lip of the shower basin. Grumbles admitted he was aware that the purpose of the towels was to catch water from the shower and keep it inside the shower basin. However, before his fall, Grumbles had taken six showers without incident and explained that to the best of his knowledge, the day of his fall was the first time

the water had passed on the other side of towels, as evidenced by the pictures he attached to his response. In other words, the Hospital Appellees had lulled him into a false sense of security. The Hospital Appellees' mitigation attempts had been successful, and there no longer appeared to be a risk of the water escaping from the shower basin. In fact, the nurses' efforts had prevented the water from escaping the basin every other time Grumbles had showered until the day he fell. How could Grumbles appreciate the danger caused by the failure of the nurses' efforts to contain the water on his seventh shower? When Grumbles fell, he did not remember whether he had looked down or whether he saw water on the other side of the towel barrier when he stepped out of the shower. As such, according to his testimony, he presented evidence that he did not recognize or appreciate the risk that the towels would not prevent water from escaping onto the floor outside the shower basin. Because our standard of review requires that the court view the evidence in the light most favorable to Grumbles, we cannot say that the Hospital Appellees proved as a matter of law that the danger presented in this case was known or obvious.[4] Accordingly, we reverse the circuit court's grant of summary judgment in favor of the Hospital Appellees and remand for further proceedings. *See Sherrill v. Rika Props., LLC*, 2020 Ark. App. 420; *Woodruff v. W. Sizzlin of Russellville, Inc.*, 2020 Ark. App. 396, at 9–10, 606 S.W.3d 607, 612.

IV. *Whether the Circuit Court Erred in Granting Summary Judgment in Favor of Nabholz*

[4]Because we reverse and remand on the basis that the danger was not known or obvious, it is unnecessary for us to address Grumbles's alternative arguments for reversal.

Our courts have recognized that when a circuit court grants a summary-judgment motion without expressly stating the basis for its ruling, that ruling encompasses all the issues presented to the circuit court by the briefs and arguments of the parties. *Windsong Enters., Inc. v. Red Apple Enters. Ltd. P'ship*, 2018 Ark. App. 39, 542 S.W.3d 177. Nabholz argued that it was entitled to summary judgment on the following four alternative bases: (1) the three-year statute of limitations had run; (2) there was a lack of causation; (3) under the accepted-work doctrine, Nabholz could not be held liable; and (4) to the extent Grumbles intended to assert a premises-liability claim against Nabholz, Nabholz did not owe Grumbles a duty because it is not the owner or in possession or control of the property where the incident occurred.[5] The court's written order simply provided that the motion was granted but did not state the basis for its ruling. Therefore, we have no alternative but to conclude that the circuit court's grant of the motion for summary judgment constituted a ruling on all the issues raised by the parties. *Id.*

Grumbles first argues that the circuit court erred in granting Nabholz summary judgment on the basis that the three-year statute of limitations had run. Under Arkansas Code Annotated section 16-56-105 (Repl. 2005), the statute of limitations for negligence

[5]Grumbles did not argue in his opening brief on appeal that the circuit court erred in ruling that Nabholz did not owe Grumbles a duty to the extent Grumbles intended to assert a premises-liability claim against Nabholz. That said, we acknowledge that Grumbles did include this argument in his reply brief. However, this argument was presented too late. Our appellate courts have repeatedly held that we will not consider an argument raised for the first time in the reply brief. *Kassees v. Satterfield*, 2009 Ark. 91, 303 S.W.3d 42. Nevertheless, we must address Grumbles's alternative arguments relating to his separate claim that Nabholz was negligent in its construction and design of the drain and shower.

actions is three years. The statute begins to run when there is a complete and full cause of action, which is on the date of the defendant's negligent act and not when it was discovered or when the plaintiff was injured. *See Bank of the Ozarks, Inc. v. Ford Motor Co.*, 2020 Ark. App. 231, at 6, 599 S.W.3d 718, 722 (the supreme court expressly refused to abrogate the occurrence rule and adopt the date-of-injury rule). Although the statute may be tolled if the identity of the tortfeasor is unknown, Grumbles admitted that he knew before he was a patient that Nabholz performed the construction work. *See* Ark. Code Ann. § 16-56-125 (Repl. 2005).

In his brief on appeal, Grumbles states that his "negligence claim allege[d] damages due to defective design or construction." Nevertheless, he argues that the statute did not begin to run until July 6, 2016, the date he was injured, and cites *Martin v. Arthur*, 339 Ark. 149, 3 S.W.3d 684 (1999), as support. In *Martin*, the supreme court held that in products-liability cases, the statute of limitations under Arkansas Code Annotated section 16-116-103 does not commence running until the plaintiff knew or, by the exercise of reasonable diligence, should have discovered the causal connection between the product and the injuries suffered. However, this is not a products-liability case, and no one has ever argued to the circuit court that section 16-116-103 applied to this case.

Grumbles also cites *Carlson v. Kelso Drafting and Design*, 2010 Ark. App. 205, 374 S.W.3d 726, for the proposition that the repair doctrine tolls the statute of limitations during the period the vendor represents that it can repair a defect for the time it attempts to

do so. However, there is no evidence in our record that Conway Regional ever reported any problems to Nabholz or evidence that Nabholz was attempting to make any repair.

Further, although Grumbles cites the four-year statute of repose for construction-defect claims as set forth in Arkansas Code Annotated section 16-56-112(b)(1), subsection (f) of the statute makes it clear that the section does not extend or toll the three-year limitations period. Rather, Grumbles was required to comply with both the applicable statute of limitation for his claim and the statute of repose. *See E. Poinsett Cnty. Sch. Dist. No. 14 of Poinsett Cnty. v. Union Standard Ins. Co.*, 304 Ark. 32, 800 S.W.2d 415 (1990).

Here, it is undisputed that Nabholz substantially completed Phase I, which included the work in room 408, on July 21, 2015, and Nabholz filed a certificate of substantial completion for the entire project on April 2, 2016. However, because Grumbles did not file his claim against Nabholz until May 31, 2019, his claim was filed more than three years after either date. Accordingly, we must affirm the circuit court's finding that Nabholz was entitled to summary judgment on this basis. Because we affirm the circuit court's order granting summary judgment to Nabholz on the basis that Grumbles had failed to timely file his claim against Nabholz within the three-year statute of limitations, it is unnecessary for us to address the circuit court's alternative bases for granting summary judgment. Accordingly, we affirm the circuit court's January 7, 2022, order granting Nabholz summary judgment.

V. *Conclusion*

In conclusion, we affirm the circuit court's January 7, 2022, order granting summary judgment in favor of Nabholz. However, we reverse the circuit court's January 5, 2022, order

granting summary judgment in favor of the Hospital Appellees and remand for further proceedings.

Affirmed in part; reversed and remanded in part.

VIRDEN, BARRETT, and WOOD, JJ., agree.

HARRISON, C.J., and BROWN, J., dissent.

WAYMOND M. BROWN, Judge, dissenting. The majority believes reversal is warranted because "the Hospital Appellees lulled [Grumbles] into the false sense of security" that the nurses' actions of placing a towel barrier around the shower would prevent water from escaping the shower basin. This narrative of "deception" disturbs the reality that Grumbles, in his discretion, recognized the conditions surrounding the defective drain and determined that—with minimal precautionary measures—he could independently maneuver across the wet towels because he believed that the condition of the defective drain posed no unreasonable risk of harm to him.

It is undisputed that Grumbles was aware of the drainage issues. With that knowledge, precautionary measures were readily available to him in addition to the towel barriers, such as utilizing a nurse's assistance to get in and out of the shower, and the availability of hygienic cloths to wash himself in the bed. As stated, Grumbles never requested assistance with showers, and independently succeeded in taking approximately six showers without incident. These actions disclosed in Grumbles's deposition indicate that he anticipated the risk associated with the defective drain and that he elected nominal

safeguards because the danger was known and obvious to him and posed no unreasonable risk.

Thus, because the conditions surrounding the defective drain were both known and obvious according to Grumbles's deposition, it was appropriate for the lower court to grant summary judgment because the Hospital Appellees proved as a matter of law that Grumbles appreciated the danger surrounding the defective drain. For this reason, I respectfully dissent and would affirm.

Harrison, C.J., joins in this dissent.

Rainwater Holt & Sexton, by: *Jake Logan*; and *Walas Law Firm, PLLC*, by: *Breean Walas*, for appellant.

Friday, Eldredge & Clark, LLP, by: *T. Michelle Ator*, for separate appellees Conway Regional Medical Center, Inc.; and Continental Casualty Company.

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