

**STATE OF WEST VIRGINIA  
SUPREME COURT OF APPEALS**

**Paul Simms,  
Plaintiff Below, Petitioner**

**FILED**  
July 6, 2011  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

vs) **No. 11-0108** (Greenbrier County 08-C-02)

**Rhema Christian Center d/b/a Ridgeview Estates,  
Defendant Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Paul Simms, plaintiff below, appeals two summary judgment orders favorable to Respondent Rhema Christian Center d/b/a Ridgeview Estates (“Rhema”), a defendant below. First, he appeals the portion of the circuit court’s November 23, 2009, partial summary judgment order which dismissed his claim of punitive damages. Second, he appeals the circuit court’s September 1, 2010, summary judgment order which dismissed his negligence and premises liability claims against Rhema. Rhema has filed a response brief.

This Court has considered the parties’ briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties’ written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Mr. Simms rented an apartment owned by Rhema. Simms asserts that on September 29, 2007, he stepped on a used roofing nail as he walked to the front door of his apartment. He says that the nail went through his boot, injuring his left foot. He removed and saved the nail. He reports that the wound became infected and, subsequently, his foot was amputated.

Simms filed suit against Rhema and also against a contractor, Tommy L. Mann d/b/a Greenbrier Roofing & Building, LLC, who had performed roofing work on the premises

from April through August of 2005. The suit asserted that the defendants negligently failed to properly maintain and inspect the area and negligently failed to clean up the roofing nails. Simms asserted that negligent and/or reckless conduct proximately caused his injuries, and he sought compensatory and punitive damages. Rhema filed cross-claims against Mann.

By order entered on November 23, 2009, the circuit court granted summary judgment for contractor Mann on all claims of both Simms and Rhema. The circuit court found that, even if there was a connection between the work completed by Mann in August of 2005 and the nail that Simms allegedly stepped on in September of 2007, the evidence clearly indicates that Mann did not breach any duty because Mann acted reasonably with regard to cleaning up the work area. The court noted uncontradicted evidence that Mann acted above and beyond the reasonable standard of care for roofing contractors. Simms asserted that the standard of care required using magnets to pick up roofing nails, and throughout the duration of the work Mann had regularly used two types of magnets to clean up the property. Thus, the circuit court concluded that Simms failed to prove that Mann was negligent. Simms did not appeal the portion of the November 23, 2009, order granting summary judgment to Mann.<sup>1</sup>

Also in the November 23, 2009, order, the circuit court granted partial summary judgment for Rhema on the punitive damages claim, finding that no evidence of intentional or reckless conduct had been presented. The litigation continued on the issue of whether Rhema was liable.

After further discovery, by order entered September 1, 2010, the circuit court granted Rhema's renewed motion for summary judgment on the remaining claims. The circuit court concluded, *inter alia*, that Simms had not presented sufficient evidence to suggest that Rhema knew or should have been aware of the need to clear the premises of errant nails. The court noted evidence that although Rhema had used its own employees to perform roofing work on outbuildings after Mann completed his work, the deposition testimony was that Rhema did not use the type and size of nail that Simms asserts he stepped upon.

Petitioner appeals asserting that the circuit court erred in granting summary judgment for Rhema because there are material questions of fact to be decided by a jury on both

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<sup>1</sup> Petitioner Simms also does not appeal the summary judgment for Mann in the instant petition for appeal. The docketing statement lists only Rhema as a respondent; according to the certificate of service, the petition for appeal was served only upon Rhema's counsel; and all arguments in the petition for appeal pertain to Rhema.

liability and punitive damages. He also argues that the court erroneously required him to establish that Rhema had prior knowledge of the specific nail upon which he stepped.

“A circuit court's entry of summary judgment is reviewed *de novo*.” Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). In conducting a *de novo* review, this Court applies the same standard for granting summary judgment that a circuit court must apply. *United Bank, Inc. v. Blosser*, 218 W.Va. 378, 383, 624 S.E.2d 815, 820 (2005). Further, “[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). “[T]he party opposing summary judgment must satisfy the burden of proof by offering more than a mere ‘scintilla of evidence’” and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor. *Anderson [v. Liberty Lobby, Inc.]*, 477 U.S. [242] at 252, 106 S.Ct. [2505] at 2512, 91 L.E.2d [202] at 214 [1986].” *Williams*, 194 W.Va. at 60, 459 S.E.2d at 337.

Upon a review of the record and the parties’ arguments, we conclude that summary judgment was properly granted for Rhema on all issues. The evidence developed in discovery suggests that the nail originated during the roofing work by Mann two years earlier, but the circuit court concluded that Mann did not breach the standard of care. Simms never appealed the summary judgment order granted in Mann’s favor, thus, that order is final. Simms has failed to “produce more than a mere ‘scintilla’ of evidence” sufficient for a jury to find in his favor on his claims against Rhema.

Moreover, a careful reading of the circuit court’s September 1, 2010, order indicates that the court did not require Simms to prove that Rhema had actual prior knowledge of this particular nail. Rather, the circuit court found that “[p]laintiff has failed to show that Rhema had knowledge of the nail or that the nail had been on the sidewalk for so long that Rhema should have known of it.” The circuit court made this finding when concluding that Simms did not present evidence that Rhema knew or should have known that the harm suffered by Simms was likely to result. Without such knowledge, there is no duty of care. “The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?” Syl. Pt. 3, *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988); Syl. Pt. 2, *Story v. Worden*, 210 W.Va. 218, 557 S.E.2d 272 (2001) (per curiam).

For the foregoing reasons, we affirm.

Affirmed.

**ISSUED:** July 6, 2011

**CONCURRED IN BY:**

Justice Menis E. Ketchum  
Justice Robin Jean Davis  
Justice Brent D. Benjamin  
Justice Thomas E. McHugh

**DISSENTING:**

Chief Justice Margaret L. Workman