MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Sandra Sanford,

Appellant-Plaintiff,

v.

Midway Auction Company a/k/a Gilbert and Associates, LLC, Hiscox Insurance Company, Inc.,

Appellees-Defendants

July 25, 2023

Court of Appeals Case No. 23A-CT-441

Appeal from the Morgan Superior Court

The Honorable Terry E. Iacoli, Special Judge

Trial Court Cause No. 55D03-1802-CT-261

Hiscox Insurance Company, Inc.,
Counter-Claimant/Cross-Claimant,

v.

Sandra Sanford,
Counter-Defendant,

and

Midway Auction Company a/k/a Gilbert and Associates, LLC,
Cross-Defendant

Memorandum Decision by Judge Weissmann
Judges Riley and Bradford concur.

Weissmann, Judge.

[1] Seventy-one-year-old Sandra Sanford fell at Midway Auction Company and was seriously injured. Alleging Midway was negligent, she sued the company and its insurer, Hiscox Insurance Company. In her interrogatory responses, she claimed she had tripped on a rolled-up rug. About 1½ years later—by then, four years after her injury—Sanford testified at a deposition that she did not know why she had fallen. Midway claimed these statements were "conflicting," entitling it to summary judgment. The trial court granted summary judgment to Midway, and Sanford appeals.

[2] We reverse the grant of summary judgment because Sanford explained any deviation in her two statements and established the existence of a genuine issue of material fact as to proximate cause.

Facts

[3] Sanford fell on Midway's premises on January 1, 2018. About 2½ years later, after she had filed the negligence action against Midway and Hiscox, Sanford responded under oath to Midway's interrogatories about the cause of her fall. Her interrogatory answers revealed that when she entered Midway's building, "a rug was rolled up, and I tripped on the rug and fell." Appellant's App. Vol. II, p. 192.

[4] About 1½ years after submitting her interrogatory responses, Sanford testified as follows in a deposition:

> Q. Did you trip?
>
> A. I don't know. I was walking fine, and then all of a sudden, I fall.
>
> Q. Do you have any idea why you fell?
>
> A. No.

Appellee's App. Vol. II, p. 25.

[5] When asked during that same deposition to describe the surface in the area in which she fell, Sanford testified:

Q. And then I know we talked about this before. So the rug or turf that was in the vestibule when you walked in, is it like fake grass? Is it like AstroTurf? . . .

A. It's kind of like a shag that don't lay down. It was up about maybe an inch. And I thought they just had that there to get snow off your shoes when you go in.

Q. And that carpet, that turf, did it feel like your foot was stuck in it?

A. No, not really. It's just I remember my toe rubbing across it when I fell.

Q. Did it feel like any piece of your foot couldn't move?

A. Afterwards?

Q. Before.

A. No, not like somebody was holding onto it. I just fell.

Id. at 26-27.

[6] Sanford also testified in her deposition:

Q. You step with your right foot, you step with your left foot, and then you fall?

A. Uh-huh.

Q. Is that yes or no?

A. Yes.

Q. What did you step your left foot on?

A. The stuff that was on the ground. It was like plastic turf stuff.

Q. Like a mat?

A. Yes.

Q. Your left foot was on top of the mat?

A. Yes.

Q. Where was your right foot?

A. Back behind me.

Q. Was your right foot on top of this mat?

A. As far as I know it was. I walked on it . . .

Q. When you say it's plastic turf, I guess are you saying -- can you describe to me what you mean by that?

A. Kind of like what you would have at your doorway to the outside to go in somebody's house. It was – I can't describe it.

Q. How big was it?

A. It covered the whole room.

Q. How big was the room?

A. I haven't the slightest idea. I'd say maybe 8-by-8 . . .

Q. So you step with your right foot, you step with your left foot, and do you perceive anything before you fall?

A. I just felt my toe touching the floor, and I went down . . .

Q. Before you started to fall, did you feel your right foot dragging?

A. It felt like it was, the tip of my toe . . .

Q. Are you saying that it felt like the tip of your right toe was dragging as you were taking a step?

A. As I was falling down.

Appellant's App. Vol. II, pp. 135-137.

[7] Midway moved for summary judgment. Focusing on the portion of Sanford's deposition testimony in which she denied knowing the cause of her fall, Midway argued that alleging a fall without suggesting the cause is not enough to survive summary judgment. Midway further argued that Sanford could not create a material question of fact through her earlier interrogatory answers that specified a rolled-up carpet caused her to trip and fall. Sanford responded that any conflict between her interrogatory and deposition responses was caused by time and her failing memory and was not grounds for summary judgment. The trial court entered summary judgment for Midway without detailing its reasons. Sanford appeals.

Discussion and Decision

[8] Sanford claims the trial court erroneously granted Midway summary judgment because she explained any variances in her statements. She alternatively argues that the alleged variances generated a genuine issue of material fact for the factfinder to decide at trial. We need not decide whether Sanford's sworn statements conflict because, even if they do, summary judgment would be improper.

[9] When reviewing summary judgment rulings, we apply the same standard as the trial court. *Shawa v. Gillette*, 209 N.E.3d 1196, 1199 (Ind. Ct. App. 2023). As the

moving party, Midway bears the burden of showing there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. See *Fox v. Barker*, 170 N.E.3d 662, 665 (Ind. Ct. App. 2021). Summary judgment is improper if Midway fails to meet this burden, or, if it does, Sanford, as the nonmoving party, establishes a genuine issue of material fact. *Id.* We construe all factual inferences in the nonmoving party's favor and all doubts as to the existence of a material issue against the moving party. Id. at 656-66.

[10] The elements of negligence are: (1) a duty owed to the plaintiff by the defendant; (2) a breach of that duty by the defendant; and (3) injury to the plaintiff proximately caused by that breach. *Id.* In its summary judgment motion, Midway focused solely on the element of proximate cause, alleging no question of material fact existed as to whether Midway proximately caused Sanford's injuries. Although proximate cause is generally a question of fact, it becomes a question of law when only a single conclusion may be drawn from the facts. *Id.*

[11] The debate here is whether Sanford's deposition testimony, which was designated by Midway in its summary judgment filings, and Sanford's interrogatory responses, which were designated by Sanford in her filings in opposition to summary judgment, created a question of material fact as to proximate cause. Proximate cause has two components: causation-in-fact and scope of liability. *Kovach v. Caligor Midwest*, 913 N.E.2d 193, 197 (Ind. Ct. App. 2009). "To establish factual causation, the plaintiff must show that but for the defendant's allegedly tortious act or omission, the injury at issue would not

have occurred." *Id.* at 197-98. As to "scope of liability," the question is whether the injury was a natural and probable consequence of the defendant's conduct that under the circumstances should have been foreseen or anticipated. *Id.* at 198. Causation-in-fact is ordinarily a factual question reserved for the factfinder. *Id.*

[12] Causation cannot be inferred merely from the allegation of a negligent act. *Halterman v. Adams Cnty. Bd. of Comm'rs.*, 991 N.E.2d 987, 990 (Ind. Ct. App. 2013). The parties appear to agree that Sanford needed to link Midway's allegedly negligent conduct to Sanford's fall and injury.

[13] Sanford contends she did that through her interrogatory answers identifying Midway's rolled-up rug as the cause of her fall. She asserts that her later deposition testimony suggesting that she did not know the cause of her fall does not change that circumstance. At most, any discrepancy between the two statements was a credibility issue to be determined by the factfinder at trial, according to Sanford.

[14] In response, Midway and Hiscox[1] separately argue that Sanford cannot rely on her interrogatory answers to create a question of material fact because those

[1] Hiscox denied coverage for Sanford's fall, claiming it cancelled Midway's insurance policy due to non-payment before the incident. The trial court denied Hiscox's motion for summary judgment on the coverage issue, and this Court affirmed in a memorandum decision. *Hiscox Ins. Co., Inc. v. Sanford*, No. 19A-CT-1512, 2020 WL 811604, at *7 (Ind. Ct. App. February 19, 2020). Hiscox did not join Midway's motion for summary judgment in the trial court but files an appellee's brief in this appeal. *See generally* Ind. Appellate Rule 17(A) ("A party of record in the trial court . . . shall be a party on appeal.").

answers conflicted with her later deposition testimony. They rely heavily on earlier decisions in which Indiana's appellate courts applied what is commonly known as the "sham affidavit" rule.

[15] Under the "sham affidavit" rule, "contradictory testimony contained in an affidavit of the nonmovant may not be used by [the nonmovant] to defeat a summary judgment motion where the only issue of fact raised by the affidavit is the credibility of the affiant." *Gaboury v. Ireland Rd. Grace Brethren, Inc.*, 446 N.E.2d 1310, 1314 (Ind. 1983) (quoting *Wachovia Mtg. Co. v. Autry-Barker-Spurrier Real Estate, Inc.*, 39 N.C.App. 1, 8, 249 S.E.2d 727, 732 (1978)). "If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Id.* (quoting *Perma Rsch & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969)). For that reason, "[w]hen an affidavit is impeached by prior sworn testimony without sufficient explanation, the court must view that affidavit with profound skepticism." *Crawfordsville Square LLC, v. Monroe Guar. Ins. Co.*, 906 N.E.2d 934, 939 (Ind. Ct. App. 2009) (finding nonmovant could not defeat summary judgment by submitting affidavit conflicting with that party's earlier deposition testimony).

[16] But this "sham affidavit" rule does not apply to Sanford's case for two reasons. First, the facts do not fit. The essence of the "sham affidavit" rule is that an affidavit offered simply to avoid summary judgment cannot be trusted if it conflicts with that party's earlier sworn testimony. *See id.*; *Gaboury*, 446 N.E.2d

at 1314. The "sham affidavit" rule therefore requires an affidavit filed by the nonmovant in response to a summary judgment motion—a circumstance that is lacking here. *See id.* Midway requested the trial court accept Sanford's deposition testimony but reject her earlier interrogatory answers because they allegedly contradict and because both sworn statements occurred *before* Midway moved for summary judgment. Midway and Hiscox essentially espouse a reverse form of the "sham affidavit" rule, but neither cites any decision in which this modified version of the rule has been applied. They also offer no reason to accept such a rule here.

[17] Second, Sanford provided an adequate excuse for any disparity in her sworn statements. Sanford was 71 years old when she fell, around 73 when she answered the interrogatories, and 75 when she was deposed. When asked during her deposition whether she had "any issues with memory," Sanford responded, "I think the older I get, the worse it gets." Appellant's App. Vol. II, p. 157. Sanford argued that by the time she testified in her deposition, she had simply forgotten some of the details that she remembered when she supplied her interrogatory answers 1½ years earlier.

[18] This evidence reasonably explains any alleged discrepancies between Sanford's deposition and interrogatory answers. The "sham affidavit" rule, even if applied here, thus would not negate any allegedly conflicting statements by Sanford as to the cause of her fall. *See, e.g., Red Lobster Rests. LLC v. Fricke*, No. 22A-CT-2221, 2023 WL 4360310, at *3-4 (Ind. Ct. App. July 6, 2023) (finding trial court did not err in refusing to strike allegedly conflicting affidavit because party

adequately explained any deviations between the affidavit and prior sworn statements of the affiant).

[19] We conclude that by designating her deposition testimony, Sanford met her burden on summary judgment of establishing a genuine issue of material fact as to proximate cause. Any discrepancy in her pre-summary judgment statements requires an assessment of her credibility that is properly made by the factfinder at trial. *See Fox,* 170 N.E.3d at 665-66 (requiring that all factual inferences be construed in favor of the nonmoving party); *Nelson v. Jimison*, 634 N.E.2d 509, 512 (Ind. Ct. App. 1994) ("Summary judgment must be denied if the resolution hinges upon state of mind, credibility of the witnesses, or the weight of the testimony.").

[20] We reverse the trial court's entry of summary judgment for Midway and remand for proceedings consistent with this decision.

Riley, J., and Bradford, J., concur.