SIXTH DIVISION
May 18, 2018

No. 1-17-2537
2018 IL App (1st) 172537-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALEXI BAIKOV,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 16 L 7423
	)	
THE BREAKING POINT, INC.,	)	Honorable
	)	William E. Gomolinski,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not abuse its discretion when it granted defendant's motion to compel plaintiff to answer six interrogatories that were relevant to the subject matter of the pending action.

¶ 2 Plaintiff, Alexi Baikov, appeals from the trial court's order finding him in "friendly contempt" and assessing a $1 fine for plaintiff's failure to comply with an order compelling him to answer interrogatories from defendant, The Breaking Point, Inc. Plaintiff requests we reverse and vacate the discovery and contempt orders because the trial court abused its discretion in ordering him to answer certain interrogatories. For the following reasons, we affirm the discovery order, vacate the contempt order, and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 According to plaintiff's complaint, he was at The Breaking Point Shell, a gas station owned by defendant, on February 16, 2016, when he slipped and fell on ice. Plaintiff claimed in his complaint that "flat roofs covered the outdoor gasoline pumping islands; water collected from the roof was discharged by a down spout to a discharge pipe within the concrete island; and water was discharged onto the parking lot on either side of the island." Plaintiff alleged that after returning to his vehicle from purchasing gas and using the restroom, he slipped and fell by the pumps immediately south of the cashier's station "due to activities of defendants, to wit: permitted the discharge of water from the roof onto the parking lot when they knew it would freeze and present a slipping hazard; and failed to train cashiers that they were to salt areas of the discharge pipes during periods of freezing temperatures." Specifically, plaintiff alleged that defendant committed one or more of the following acts or omissions:

> "a. Permitted and allowed ice to remain on the areas of the discharge island pipes when it knew or should have known that the island discharge pipes caused a slipping hazard;
>
> b. Failed to salt the ice at the island discharge pipes when it knew salt was needed; and
>
> c. Failed to warn by placing a caution sign at the island discharge pipes when it knew or should have known that caution warning signs were needed."

¶ 5 Defendant's answer to plaintiff's complaint included two affirmative defenses alleging that plaintiff was contributorily negligent, and that plaintiff overstated his injuries.

¶ 6 On January 30, 2017, defendant filed its initial written discovery. In its written interrogatories to plaintiff, defendant asked the following questions:

22. When did you first become aware of the defect, object, substance or condition alleged in the Complaint?

23. Was the alleged defect object, substance or condition reported to any Defendant or their agents? If so, state when it was first reported, who reported the defect, to whom was the defect reported, and list every person present when the report was made.

24. State the location of the alleged occurrence, pinpointing such location in feet, inches, and direction from fixed objects or boundaries at the scene of the occurrence.

25. State with particularity the nature of the alleged defect, object, substance or condition that you allege caused the alleged occurrence, giving the exact dimensions and physical description of such including the size, shape, color, height and depth of such defect or object.

26. State whether the defect, object, substance or condition alleged in the complaint existed prior to the date of the accident. If so, state how long it existed prior to the date of the accident. State the name and address of the source or sources of such information.

28. Describe with particularity the path into the store you used on the date of the alleged occurrence and where in relation to the stated path the alleged defect, object, substance or condition existed, using dimensions in feet, inches and direction from fixed objects or boundaries at the scene of the occurrence.

¶ 7 Plaintiff refused to answer the above questions, and instead responded that the questions were not applicable because his complaint was "not grounded on a condition; this is not a premises liability case."

¶ 8 Defendant then filed a motion to compel. Defendant's motion stated that defense counsel sent plaintiff's counsel a letter on May 30, 2017, asking for answers to the above questions, and the letter was attached as an exhibit. Also attached was plaintiff's counsel's response letter, stating that the unanswered interrogatories were "trick" interrogatories and that plaintiff pled an active negligence case, not a premises liability case. In its motion, defendant alleged that defense counsel emailed plaintiff's counsel on July 11, 2017, after a phone conversation in which plaintiff's counsel promised to answer the interrogatories in question by "tomorrow afternoon." No answers to the interrogatories were ever received, and the motion to compel followed.

¶ 9 According to the parties' briefs, it seems that a hearing occurred on the motion to compel, but no transcript appears in the record. After the hearing, the trial court granted the motion to compel, stating, "Plaintiff to answer contested interrogatories as discussed in court by 8/18/17. Defendant's motion to compel granted." Rather than answer the interrogatories, plaintiff filed a motion asking the court to hold plaintiff's counsel in "friendly contempt" for the purpose of appealing the trial court's order compelling plaintiff to answer the interrogatories in question. The trial court granted plaintiff's motion, held plaintiff's counsel in friendly contempt and fined plaintiff's counsel $1. Plaintiff now appeals. The litigation is currently stayed in the trial court pending this interlocutory appeal.

¶ 10 ANALYSIS

¶ 11 On appeal, plaintiff contends that the trial court abused its discretion in granting defendant's motion to compel him to answer the interrogatories in question, as the interrogatories

invoked "an alternative theory of liability than that chosen by [p]laintiff." Specifically, plaintiff contends that he advanced allegations based on defendant's activities – not based on defendant's premises. Plaintiff contends that his theory of negligence would entitle him to ordinary negligence jury instructions, whereas defendant's alternative theory would be entitled to premises liability jury instructions. Plaintiff argues that the premises liability section of jury instructions would require him to prove the additional element of notice. Plaintiff states that he is entitled to choose his theory of liability so long as it can be proven, and that the trial court erred in compelling him to answer the contested interrogatories. Defendant responds that the six contested interrogatories ask for information allowed within the scope of Illinois Supreme Court Rule 201 (eff. July 30, 2014) and material under the claim alleged.

¶ 12 As an initial matter, we note that because discovery orders are not final orders, they are not ordinarily appealable. *Norskog v. Pfiel*, 197 Ill. 2d 60, 69 (2001). However, it is well settled that the correctness of a discovery order may be tested through contempt proceedings. *Id*. When an individual appeals contempt sanctions imposed for violating, or threatening to violate, a pretrial discovery order, the discovery order is subject to review. *Id*. Review of the contempt finding necessarily requires review of the order upon which it is based. *Id*.

¶ 13 Defendant is correct that abuse of discretion is typically the correct standard of review for discovery matters, such as the issue in the instant appeal. However, plaintiff urges us to review this matter *de novo*, citing to the principal discussed in *Norskog* that if the facts are uncontroverted and the issue involves the trial court's application of the law to the facts, a court of review may determine the correctness of the ruling independently of the trial court's judgment. *Norskog*, 197 Ill. 2d at 70-71. In *Norskog*, our supreme court "decid[ed] whether disclosure of mental health information [was] prohibited by a statutory discovery privilege and

whether any exception to the privilege applie[d].” *Id*. at 71. Our supreme court concluded that *de novo* review was appropriate because these issues were questions purely of law. *Id*. By contrast, in the case at bar, we are faced with a question concerning the trial court’s application of well-established law to the facts of this case. Thus, an abuse of discretion standard of review is appropriate. See *Doe v. Township High School Dist. 211*, 2015 IL App (1st) 140857, ¶ 75. A court abuses its discretion when its ruling “is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court.” *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). This standard of review is “highly deferential” to the trial court. *Taylor v. County of Cook*, 2011 IL App (1st) 093085, ¶ 23.

¶ 14 Illinois Supreme Court Rule 201(b)(1) provides that “a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party, including the existence, description, nature, custody, condition, and location of any documents or tangible things, and the identity and location of persons having knowledge of relevant facts.” Ill. S. Ct. R. 201(b)(1) (eff. July 30, 2014). Great latitude is allowed in the scope of discovery, and the concept of relevance for purposes of discovery is broader than the concept of relevance for purposes of admissibility at trial. *Zagorski v. Allstate Ins. Co.*, 2016 IL App (5th) 140056, ¶ 22. Evidence is relevant for trial purposes if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Id*. In contrast, relevance for discovery purposes includes not only that which is admissible at trial, but also that which leads to admissible evidence. *Id*. With these principles in mind, we consider whether the requested discovery is germane to any theory of the case or any defense. *Id*.

¶ 15 Plaintiff asserts one theory of liability in his complaint: ordinary negligence. Plaintiff alleged in his complaint that he was returning to his vehicle after using the bathroom when he "was caused to slip and fall by the south pumps immediately south of the cashier's station due to the activities of defendants, to wit: permitted the discharge of water from the roof onto the parking lot when they knew it would freeze and present a slipping hazard; and failed to train cashiers that they were to salt areas of the discharge pipes during periods of freezing temperatures when water had been discharged." Plaintiff contends that if he presents evidence of this theory of liability, he would be entitled to jury instructions for ordinary negligence. Plaintiff contends that by answering the interrogatories in question, he would be attesting to evidence that supports a different theory of liability: premises liability. For premises liability, a possessor of land is subject to liability for physical harm caused to its invitees by a condition on the land only if it: (a) knew or by exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees; (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect them against the danger. See *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 468 (1976). Plaintiff contends that the jury instructions applicable to premises liability cases require a plaintiff to prove the additional element of either actual or constructive notice of the condition in order to satisfy his burden of proof. However, when a substance has been placed on the land by the landowner, through the defendant's negligence, a trial court will allow a jury to consider the issue of the defendant's negligence without requiring proof of the defendant's actual or constructive notice. Plaintiff therefore contends that by answering the six interrogatories, it could later allow for jury instructions on premises liability.

¶ 16 As previously stated, a hearing was held on defendant's motion to compel plaintiff to answer the six interrogatories in question, but no transcript appears in the record. It is well-settled that in order to support a claim of error on appeal, the appellant has the burden to present a sufficiently complete record. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). "From the very nature of an appeal, it is evident that the court of review must have before it the record to review in order to determine whether there was the error claimed by the appellant." *Id*. at 391. Absent a record, "it [is] presumed that the order entered by the trial court [is] in conformity with the law and had a sufficient factual basis." *Id*. at 392. Here, the trial court stated in its order that plaintiff was to "answer contested interrogatories as discussed in court by 9/18/17." We do not have the benefit of reviewing what was discussed in court without a transcript. Accordingly, we must presume that the trial court's grant of defendant's motion to compel was in conformity with the law and had a sufficient factual basis.

¶ 17 We further find that it was not an abuse of discretion for the trial court to grant defendant's motion to compel where the interrogatories in question are relevant to the subject matter involved in the pending action, "including the existence, description, nature, custody, condition, and location of any documents or tangible things, and the identity and location of persons having knowledge of relevant facts." Ill. S. Ct. R. 201(b)(1) (eff. July 30, 2014). This information may not be admissible at trial but could lead to admissible evidence. See *Zagorski*, 2016 IL App (5th) 140056, ¶ 22. Specifically, defendant's interrogatories asked plaintiff when he first became aware of the substance or condition, if he reported it to anyone, where the location of the alleged occurrence happened, the nature of the substance or condition, a physical description of the condition or substance, whether the substance or condition existed prior to the date in question, and what path plaintiff took on the date in question. Certainly, we cannot find

that the trial court abused its discretion in finding these questions relevant to whether defendant negligently permitted the discharge of water from the roof onto the parking lot when it knew or would freeze and cause a slipping hazard.

¶ 18 Plaintiff nevertheless maintains, relying on *Wind v. Hy-Vee Food Stores, Inc*., 272 Ill. App. 3d 149 (1995) and *Reed v. Wal-Mart Stores, Inc.*, 298 Ill. App. 3d 712 (1998), that he is the master of his complaint and should not be forced to answer interrogatories that are based on premises liability. In *Wind*, a customer brought an action to recover for injuries she sustained when she slipped and fell on a floor mat in a grocery store. At trial, the plaintiff contended that the grocery's store's placement and maintenance of the floor mats were activities conducted in a negligent manner. *Wind*, 272 Ill. App. 3d at 153. On the other hand, Hy-Vee maintained throughout the trial that the mats were a condition on its premises which constituted an open and obvious hazard. *Id*. Therefore, Hy-Vee offered a jury instruction which set forth a higher burden of proof for the plaintiffs. *Id*. The trial court, over the plaintiff's objection, refused the plaintiff's proposed burden of proof instructions and read Hy-Vee's instruction to the jury. *Id*. On appeal, the plaintiff contended that Hy-Vee negligently installed and maintained the floor mats on its premises, and therefore an ordinary negligence analysis was to be applied to the facts of the case. *Id*. at 154. The plaintiff alleged that the trial court erred when it gave Hy-Vee's instruction to the jury. The appellate court agreed. *Id*.

¶ 19 The appellate court in *Wind* noted that litigants are entitled to have the jury instructed on the legal principles of the case, and that the purpose of jury instructions is to convey to the jurors the correct principles of law applicable to the evidence. *Id*. The court stated that the trial court's failure to give correct instructions on applicable legal principles is error. *Id*. The *Wind* court then explained that the plaintiff's complaint contained a cause of action for ordinary negligence,

stating, "We find nothing in the complaint which asserts Hy-Vee's liability for a 'condition on the premises.' " *Id*. at 157. The court found that the plaintiff's jury instructions correctly stated the law which applied to the case at hand, and that the trial court erred when it gave Hy-Vee's jury instruction instead of the plaintiff's jury instruction. *Id*.

¶ 20 Here, on the other hand, we are not in the jury instruction phase of litigation. Rather, this case is still in discovery. Plaintiff's complaint clearly states a claim for ordinary negligence, and not for premises liability. While the interrogatories propounded to plaintiff contain words used in a premises liability claim, answering the questions to the best of plaintiff's knowledge does not convert his claim from ordinary negligence to premises liability.

¶ 21 Similarly in *Reed*, the plaintiffs, after one of them stepped on a rusty nail while shopping, contended that they presented sufficient evidence that the defendant's negligence created the dangerous condition, and thus they should not have been required to prove notice on behalf of the defendant. *Reed*, 298 Ill. App. 3d at 716. The court on appeal agreed with the plaintiffs and stated that the trial court abused its discretion when it required the plaintiffs to prove actual or constructive notice because it presented more than "slight" evidence to show that the board with the nail was placed in the pathway by Wal-Mart. *Id*. Additionally, the court on appeal noted that the plaintiffs' complaint seemed to allege both an ordinary negligence cause of action and a premises liability cause of action, and "[t]herefore, even if jury instructions are to be strictly confined to the theories alleged in plaintiffs' complaint, the plaintiffs' complaint alleged active negligence and did not confine their cause of action to premises liability." *Id*. The court noted that the evidence supported plaintiffs' theory that the object was related to Wal-Mart's business and that it, rather than a customer, placed the object there. *Id*.

¶ 22 Again, the issue in *Reed* was raised after evidence had been presented at trial. Here, no evidence has been presented yet. Rather, the parties are still in the discovery phase, and attempting to gather as much information as possible regarding the incident in question. As the court in *Reed* noted, a plaintiff is "entitled to proceed under whichever theory [he or she] decides, so long as the evidence supports such a theory." *Id*. at 718. "Generally, no instruction need be given the jury concerning issues not raised by the pleadings," and to "instruct a jury on an issue not raised in the pleadings is error." *Blackburn v. Johnson*, 187 Ill. App. 3d 557, 565 (1989).

¶ 23 Here, the pleadings clearly contain the allegations of ordinary negligence claim, not a premises liability claim, and the six interrogatories that plaintiff refused to answer do not change the allegations in his complaint. Rather, the interrogatories are relevant to the subject matter raised in the complaint. Accordingly, we do not find that the trial court abused its discretion in granting defendant's motion to compel plaintiff to answer the six interrogatories in question. The issue regarding jury instructions can be raised at the appropriate time, after evidence is presented in this case. Moreover, we note that plaintiff has not cited to any cases that discuss the claimed error – propounding discovery questions that sound in premises liability despite a plaintiff's claim of ordinary negligence. Accordingly, we have no basis upon which to find that the trial court abused its discretion.

¶ 24 For the foregoing reasons, we affirm the discovery order, vacate the contempt order, and remand for further proceedings.

¶ 25 Affirmed; contempt order vacated.