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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2019

2180429

Sherri Lynn Pittman and John David Pittman, Jr.

v.

Hangout in Gulf Shores, LLC

Appeal from Baldwin Circuit Court
(CV-17-900638)

EDWARDS, Judge.

In June 2017, Sherri Lynn Pittman and John David Pittman, Jr., filed a complaint in the Baldwin Circuit Court ("the trial court"), seeking damages resulting from the alleged negligence and wantonness of the Hangout in Gulf Shores, LLC

("the Hangout"). In their complaint, the Pittmans alleged that Sherri had fallen on a step on the premises owned and operated by the Hangout, which had resulted in injury to Sherri and the loss of Sherri's consortium to John.[1] The Hangout filed a motion for a summary judgment in August 2017, to which the Pittmans filed a response. After hearing oral arguments on the motion, the trial court entered a summary judgment in favor of the Hangout on all of the Pittmans' claims on October 4, 2018. The Pittmans filed a timely notice of appeal to our supreme court, which transferred the appeal to this court, pursuant to Ala. Code 1975, § 12-2-7(6).

The Pittmans' claims against the Hangout are based on the principles of premises liability. In its motion for a summary judgment, the Hangout conceded, for purposes of the motion, that Sherri was an invitee of the Hangout on the date of the accident. Thus, we will begin our analysis of the Pittmans'

[1]The Pittmans included fictitiously named parties in their complaint, but the record does not reflect that the complaint was ever amended to substitute any actual parties for the fictitiously named parties; thus, only the Hangout was served with the complaint, and the existence of the fictitiously named parties in the complaint does not prevent the judgment entered by the trial court from being final. See Rule 4(f), Ala. R. Civ. P.; Griffin v. Prime Healthcare Corp., 3 So. 3d 892 n.1 (Ala. Civ. App. 2008).

appeal by discussing the applicable duties of a premises owner, like the Hangout, to an invitee on its premises.

As we have explained before, a premises owner owes an invitee "the duty to maintain its premises in a reasonably safe condition or, in the case of any hidden defect, to warn [an invitee] of the defect so that [the invitee can] avoid it by the use of ordinary care." Howard v. Andy's Store for Men, 757 So. 2d 1208, 1210 (Ala. Civ. App. 2000) (citing Boudousquie v. Marriott Mgmt. Servs. Corp., 669 So. 2d 998, 1000 (Ala. Civ. App. 1995)). A premises owner does not have a duty to warn an invitee "of any condition that was open and obvious, one that [the invitee is] aware of or should have been aware of through the use of reasonable care." Howard, 757 So. 2d at 1210. "A condition is 'obvious' if the risk is apparent to, and of the kind that would be recognized by, a reasonable person in the position of the invitee." Id. (emphasis added).

In its motion for a summary judgment, the Hangout contended that it was entitled to a summary judgment because, it argued, Sherri's accident had resulted from an open and obvious defect on its premises -- a step that, the Hangout

contended, had been adequately marked with yellow paint. Because the Hangout did not contend that the step was not a dangerous condition upon its premises, we will not address that question. Instead, we will proceed to consider on appeal whether there exists a genuine issue of material fact regarding the open and obvious nature of the step upon which Sherri fell.

According to the deposition excerpts and affidavits submitted in support of and in opposition to the motion for a summary judgment, Sherri; Sherri's daughter, Donna Altentaler; Donna's former husband, Robert McCain; and Donna's children and some of their friends were visiting Orange Beach and Gulf Shores in June 2015. On June 15, 2015, the group decided to visit the establishment operated by the Hangout, which they had never visited before. According to Sherri, as they made their way into the establishment, they climbed up some steps. Once inside the establishment, Sherri testified, they intended to find a place to sit and eat.

Both Sherri and Donna testified that the establishment was very crowded. Donna testified that it was dark and "crowded enough to have to turn sideways to walk," and Sherri

commented that they had had to walk one behind the other on their way through the crowd to find a table. Donna testified that she was leading the group and that she had stumbled on a "step down" that she had not seen; she said that she turned to warn Sherri but that Sherri had already begun falling. Sherri testified that she had not seen the "step down" and that, "[a]ll the sudden, I just fell. I did not see anything. You know, I thought it was a flat surface there. Little did I know. So I just fell. I don't know what happened. I did not ever think I would stop falling. It was horrible."

Sherri explained that she had not been looking down as she walked. Instead, she testified:

> "I was looking right behind my daughter. I mean, you couldn't go but one place because it was crowded. So I was walking behind her and just looking, you know, like you would normally -- you don't look down when you walk. I wasn't looking down, I was just looking forward to go sit at a table."

According to Sherri, the tables and chairs were situated close together on the date of the accident. McCain recalled that the tables in the area of the establishment beyond the step were bar-height or high-top tables. He also testified

that the high-top tables on the lover elevation were located very close to the step on the day of the accident.

McCain stated in an affidavit that the step was painted yellow on the date of the accident. Donna testified in her deposition that she had not seen any yellow paint and said that, if there had been yellow paint on the step, it had been very faint. Sherri testified that she had not seen any yellow paint on the day of the accident; she also commented that the floor had been dark brown or almost black. Moshe Solomon, who was a maintenance supervisor for the Hangout at the time of the accident, testified that the step was painted yellow on that day.

Both the Hangout and the Pittmans presented excerpts of deposition testimony from experts.[2] The Hangout supported its

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[2]In its brief on appeal, the Hangout states:

> "As a threshold, the qualification, or lack thereof, of [the] Pittmans' purported experts are not before the Court, and neither are their reports or deposition testimony. The limited deposition excerpts that are before the Court[] do not support a reversal of the trial court['s summary judgment]. This proffered expert testimony is not based on sufficient factual evidence of the arrangement of tables and chairs in the outdoor bar area on the day of the incident."

motion with an excerpt from the deposition testimony of Jason Legg, a consultant with a degree in architecture. Legg testified that, on the date he observed the step and based on a photograph he understood to have been taken after the accident, the step had been painted yellow and complied with something referred to in the question posed to him as "1024.11.3, tread contrasting marking stripe." However, the excerpt of Legg's deposition testimony also contained the following statement: "I didn't get into the human factor side of it. You know, there's definitely deficiencies there as it pertains to the code and then the known hazards of a single step that were apparent in the design and construction of this."

We note that the Hangout proffered an excerpt from the deposition testimony of Jason Legg and that the Hangout made no objection in the trial court to any of the evidence submitted by the Pittmans in opposition to the motion for a summary judgment. Therefore, the Hangout has waived any objection to our consideration of the deposition excerpts. McMillian v. Wallis, 567 So. 2d 1199, 1205 (Ala. 1990) (concluding that the failure to object to or to move to strike an affidavit and deposition testimony in the trial court waived any objection to the appellate court's consideration of the affidavit and deposition testimony). Furthermore, in violation of Rule 28(a)(10), Ala. R. App. P., the Hangout does not support its brief argument relating to the admissibility of the expert testimony with any supporting authority.

The Pittmans presented an excerpt from the deposition testimony of Dr. Kevin A. Rider. The excerpt of Dr. Rider's deposition included testimony indicating that, in his opinion, the step in question was a dangerous condition, regardless of whether it was painted yellow on the date of the accident. According to Dr. Rider, he had formed his opinion based upon "[w]ell established research on pedestrian gaits, patterns, visual scanning, and pedestrian safety," his view of the area, and information gleaned from the deposition testimony of Sherri, Donna, and Legg. He noted that "someone who is walking from one portion [of a building] to another, believing the ground is flat and stable, ... expect[s] that it will remain flat and stable." Furthermore, he stated that

> "[t]he research is very clear that people do not look at their feet while walking unless there's a reason to do so .... It is unreasonable to expect people to look at their feet while walking. Quite so, ... they would walk into something because they are not paying attention to where they are going."

In fact, he explained, it was consistent with pedestrian behaviors that "people do not notice or recognize unexpected trip hazards that are positioned downward."

Dr. Rider opined that the step was "dangerous by itself in any regard. The ... stairway and walkway safety standards

say to avoid single riser stairs whenever possible unless they are structurally necessary." He then stated that "the presence of the single riser stair in [Sherri's] walking path violated her reasonable expectation of a level and consistent walkway." If use of a single-riser stair could not be avoided, Dr. Rider stated, then a premises owner should make use of adequate warnings, including railings, to make an elevation change more apparent.

As additional support for his opinion, Dr. Rider commented that the Hangout's establishment presented as a "visually complex environment." He noted that the establishment was composed of a "three-sided, open-air pavilion" containing a restaurant, points of service, and a "stage ... visible off to the left." Dr. Rider opined that, based on the distractions inherent in the establishment, the premises owner should not expect a patron to be looking where he or she was walking. Dr. Rider further opined that the crowded environment and the use of high-top tables in the lower elevation of the premises on the date of the accident also contributed to Sherri's inability to perceive a change in elevation and to anticipate the step. Thus, he concluded that

the step was "a dangerous condition that [Sherri] was not reasonably alerted to by the Hangout" and also that the yellow paint, had it been present on the step on the date of the accident, was not an adequate warning of the step.

Our review of a summary judgment is de novo; that is, we apply the same standard as was applied in the trial court. Ex parte Ballew, 771 So. 2d 1040, 1041 (Ala. 2000). Rule 56(c)(3), Ala. R. Civ. P., provides that a motion for a summary judgment is to be granted when no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. Generally, a party moving for a summary judgment must make a prima facie showing "that there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." Rule 56(c)(3); see Lee v. City of Gadsden, 592 So. 2d 1036, 1038 (Ala. 1992). If the movant meets this burden, "the burden then shifts to the nonmovant to rebut the movant's prima facie showing by 'substantial evidence.'" Lee, 592 So. 2d at 1038. "[S]ubstantial evidence is 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." West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989). Furthermore, when considering a motion for a summary judgment, "the court must view the evidence in the light most favorable to the nonmoving party and must resolve all reasonable doubts against the moving party." Waits v. Crown Dodge Chrysler Plymouth, Inc., 770 So. 2d 618, 618 (Ala. Civ. App. 1999).

However, when a party seeking a summary judgment bears the burden of proof at trial, like when a defendant seeks a summary judgment based upon an affirmative defense, that party

> "'"must support his motion with credible evidence, using any of the material specified in Rule 56©), [Ala.] R. Civ. P. ('pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits')."' [Ex parte General Motors Corp.,] 769 So. 2d [903,] 909 [(Ala. 1999) (quoting Berner v. Caldwell, 543 So. 2d 686, 691 (Ala. 1989) (Houston, J., concurring specially))]. '"The movant's proof must be such that he would be entitled to a directed verdict if this evidence was not controverted at trial."' Id. In other words, 'when the movant has the burden [of proof at trial], its own submissions in support of the motion must entitle it to judgment as a matter of law.' Albee Tomato, Inc. v. A.B. Shalom Produce Corp., 155 F.3d 612, 618 (2d Cir. 1998) (emphasis added)."

Denmark v. Mercantile Stores Co., 844 So. 2d 1189, 1195 (Ala. 2002).

The Hangout contends that the yellow painted step is, as a matter of law, open and obvious because of the difference in color between the painted step and the floor. To bolster its argument, the Hangout relies on this court's opinion in Sheikh v. Lakeshore Foundation, 64 So. 3d 1055 (Ala. Civ. App. 2010). According to the Hangout, Sheikh stands for the proposition that, as a matter of law, a defect that "'contrasts distinctively'" with the area in which it is found is open and obvious, regardless of evidence relating to other aspects of the premises. However, a reading of the entirety of our opinion in Sheikh does not result in that conclusion.

At issue in Sheikh was whether the Lakeshore Foundation, which operated a gym at which the plaintiff Muzaffer I. Sheikh regularly exercised, was liable for injuries sustained by Sheikh that resulted from his tripping and falling over some cables that were used to connect a wheelchair and an exercise machine being used by a wheelchair-bound patron utilizing the gym for rehabilitation. Sheikh, 64 So. 3d at 1057. In analyzing the issue before us in Sheikh -- whether the cables were an open and obvious defect -- we relied in part on the statement of a premises owner's duty as set out in Lamson &

Sessions Bolt Co. v. McCarty, 234 Ala. 60, 63, 173 So. 388, 391 (1937):

> "'This court is firmly committed to the proposition that the occupant of premises is bound to use reasonable care and diligence to keep the premises in a safe condition for the access of persons who come thereon by his invitation, expressed or implied, for the transaction of business, or for any other purpose beneficial to him; or, if his premises are in any respect dangerous, he must give such visitors sufficient warning of the danger to enable them, by the use of ordinary care, to avoid it. Geis v. Tennessee Coal, Iron & R.R. Co., 143 Ala. 299, 39 So. 301 [(1905)].
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> "'This rule ... also includes (a) the duty to warn an invitee of danger, of which he knows, or ought to know, and of which the invitee is ignorant; and (b) the duty to use reasonable care to have the premises to which he is invited in a reasonably safe condition for such contemplated uses, and within the contemplated invitation.
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> "'In determining whether such care has been exercised, it is proper to consider the uses and purposes for which the property in question is primarily intended.'"

64 So. 3d at 1058–59 (emphasis added).

Although we did indeed remark on the contrast between the color of the cables and the carpet on the floor of the gym, id. at 1060, we also discussed the reasonable actions expected of a person using a gym for its intended purpose, which included being careful to observe the floor for potential

hazards that would be expected to be found on the floor of a gym, including "dumbbells, loose towels, free weights, gym bags, mats, iron or metal benches, electric-fan cords, water bottles, personal belongings of other invitees, etc." Id. at 1060-61. Thus, one can hardly conclude that the color of the cables was the only basis upon which this court concluded that the cables should have been observed by Sheikh in the exercise of reasonable care. We are therefore not convinced that Sheikh requires affirmance of the summary judgment in the present case.

However, we find Sheikh instructive regarding the duty imposed on the Hangout, especially in light of Dr. Rider's testimony. As we noted above, "[a] condition is 'obvious' if the risk is apparent to, and of the kind that would be recognized by, a reasonable person in the position of the invitee." Howard, 757 So. 2d at 1210. (emphasis added). Thus, the environment in which a particular hazard appears is a factor in determining whether, in fact, a hazard is obvious to an invitee. In Sheikh, the gym provided a place for exercising at which certain hazards could reasonably be expected; however, in the present case, Dr. Rider's testimony

created a genuine issue of material fact regarding whether a restaurant and entertainment venue like the Hangout's establishment would reasonably be expected to have changes in elevation inside of it and whether those elevation changes would be noticeable by patrons exercising reasonable care.

Dr. Rider testified that pedestrians do not usually look at their feet while walking and that they typically expect a flat surface to remain flat. He also opined that the visually complex environment and the crowds inside the establishment had further obscured the step from the view of the average patron. Dr. Rider further explained that, in his opinion, the absence of unobscured visual clues, like a warning sign or railings, to signal a change in elevation rendered the already dangerous step even more dangerous for a patron like Sherri.

Sherri's testimony supported Dr. Rider's opinion. She testified that she had expected a flat surface upon which to walk as she maneuvered in the crowds and between the closely situated tables at the establishment. According to Sherri, she was following Donna closely through the crowded establishment, even turning sideways at times, and was looking in front of her because her party was trying to find a table

at which to sit. She also testified that she did not look down and therefore did not notice the step as she walked.

In addition, the other evidence discussed above contains a genuine issue of material fact regarding whether the use of yellow paint was adequate to apprise patrons of the presence of the step. The Hangout presented evidence from Legg indicating that it was in compliance with some undesignated standard relating to use of contrasting paint on the step. However, Dr. Rider testified that the use of yellow paint on the step, in this instance, would not have been an adequate warning of the change in elevation, especially in light of the other conditions of the establishment on the date of the accident.

As our supreme court explained in Denmark, the premises owner seeking a summary judgment on the affirmative defense that a defect on its premises is open and obvious "must 'establish that [the plaintiff] was [not] ignorant or should [not] have been ignorant of the condition [the plaintiff] alleges to have been dangerous.'" 844 So. 2d at 1195 (brackets around "not" added in Denmark). A premises owner must establish that "a reasonable person in the position of

the invitee" would have recognized the hazard. Howard, 757 So. 2d at 1210. Moreover, "[q]uestions of whether the condition or defect was open and obvious should ordinarily be determined by the fact-finder." Boudousquie, 669 So. 2d at 1000; see also Smith v. Wells Fargo Bank, NA, 233 So. 3d 991, 995 (Ala. Civ. App. 2016) (quoting Ex parte Kraatz, 775 So. 2d 801, 804 (Ala. 2000), quoting in turn Harding v. Pierce Hardy Real Estate, 628 So. 2d 461, 463 (Ala. 1993)) (stating that "[o]ur supreme court had observed" that "'"[q]uestions of openness and obviousness of a defect or danger and of an [invitee's] knowledge are generally not to be resolved on a motion for a summary judgment"'").

Boudousquie is similar to the present case because it, too, involved a fall on a single-riser stair. 669 So. 2d at 1000. The plaintiff in Boudousquie presented expert evidence tending to establish that the single-riser stair was "(1) generally known to be hazardous; (2) outlawed by many building codes; (3) particularly hazardous to one descending it; (4) very easy not to notice; and (5) a dangerous condition." Id. Like Dr. Rider in the present case, the expert in Boudousquie testified that "a warning or handrail could prevent falls of

this kind." Id. Based on that evidence, we concluded in Boudousquie that the summary judgment in favor of the premises owner had been improperly entered. Id.

In compliance with its burden as stated in Denmark, the Hangout presented evidence indicating that the step was painted yellow on the date of the accident and that, therefore, it should have been noticed by Sherri. However, Sherri presented evidence indicating that she did not see and, arguably, in light of the conditions and distractions in the establishment, could not have seen the step, even had it been painted yellow, and indicating that painting the step yellow would not have been, in this particular case, adequate notice of the change in elevation. Thus, the record contains evidence creating a genuine issue of material fact relating to the openness and obviousness of the step, which issue is historically considered to be one for the jury. See Boudousquie, 669 So. 2d at 1000. Therefore, considering, as we must, the evidence in the light most favorable to the Pittmans, see Waits, 770 So. 2d at 718, we cannot agree that the Hangout established, as a matter of law, that it is entitled to a judgment on Sherri's negligence claim and John's

derivative loss-of-consortium claim, insofar as it is based on Sherri's negligence claim. Insofar as the trial court entered a summary judgment in favor of the Hangout on those claims, its judgment is reversed, and the cause is remanded for further proceedings.

We reach the opposite conclusion regarding Sherri's wantonness claim, however.

> "'"Wantonness has been defined as the conscious doing of some act or the omission of some duty [while] under knowledge of existing conditions and while conscious that, from the doing of such act or the omission of such duty, injury will likely or probably result, and before a party can be said to be guilty of wanton conduct it must be shown that with reckless indifference to the consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the result. Griffin Lumber Co. v. Harper, 247 Ala. 616, 25 So. 2d 505 [(1946)]; Taylor v. Thompson, 271 Ala. 18, 122 So. 2d 277 [(1960)]; Johnson v. Sexton, [277 Ala. 627, 173 So. 2d 790 (1965)]."'
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> "Roberts v. Brown, 384 So. 2d 1047, 1048 (Ala. 1980), quoting Lewis v. Zell, 279 Ala. 33, 36, 181 So. 2d 101[, 104] (1965)."

Berness v. Regency Square Assocs., Ltd., 514 So. 2d 1346, 1349-50 (Ala. 1987). Furthermore, "'[t]he "knowledge" of the defendant is "the sine qua non of wantonness."'" McMahon v.

Yamaha Motor Corp., U.S.A., 95 So. 3d 769, 773 (Ala. 2012) (quoting Norris v. City of Montgomery, 821 So. 2d 149, 156 n.9 (Ala. 2001), quoting in turn Ricketts v. Norfolk S. Ry., 686 So. 2d 1100, 1106 (Ala. 1996), quoting in turn Henderson v. Alabama Power Co., 627 So. 2d 878, 882 (Ala. 1993)).

> "'Before one can be convicted of wantonness, the facts must show that he was conscious of his conduct and conscious from his knowledge of existing conditions that injury would likely or probably result from his conduct, that with reckless indifference to consequences, he consciously and intentionally did some wrongful act or omitted some known duty which produced the injury.'"

Lynn Strickland Sales & Serv., Inc. v. Aero-Lane Fabricators, Inc., 510 So. 2d 142, 145 (Ala. 1987), overruled on other grounds, Alfa Mut. Ins. Co. v. Roush, 723 So. 2d 1250 (Ala. 1998) (quoting Smith v. Roland, 243 Ala. 400, 403, 10 So. 2d 367, 369 (1942), quoting in turn 5 Mayfield's Digest, p. 711, § 6). Put another way, "[i]n order to constitute wantonness, a failure to act must be accompanied by knowledge that someone is probably imperiled, and the failure to act must be in reckless disregard of the consequences." Whaley v. Lawing, 352 So. 2d 1090, 1092 (Ala. 1977). "That which constitutes wanton misconduct depends upon the facts presented in each

particular case." American Pamcor, Inc. v. Evans, 288 Ala. 416, 422, 261 So. 2d 739, 745 (1972).

In support of her argument that she presented substantial evidence creating a genuine issue of material fact respecting the Hangout's wantonness, Sherri contends that the Hangout's own assertion that it had painted the step with contrasting yellow paint to make the dangerous condition open and obvious is sufficient to establish that the Hangout was aware of the danger presented by the step. However, the Hangout's attempt to warn of any danger that might be presented by the step does not support a conclusion that it failed to act in reckless disregard of the consequences that might befall a patron of its establishment. Although, based on the testimony of Dr. Rider, painting the step in a contrasting color might not have been sufficient warning of the elevation change, the evidence suggests that the Hangout painted the step to prevent accidents like the one that befell Sherri. We cannot conclude that the Hangout's attempt to make the step more noticeable is a failure to take any action despite perceiving a potential risk of harm to its patrons, even if that action were to have been less than the actions necessary under the conditions

present in the establishment, as posited by Dr. Rider. Accordingly, we affirm the summary judgment in favor of the Hangout on Sherri's wantonness claim.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Thompson, P.J., and Moore, Donaldson, and Hanson, JJ., concur.