RENDERED: March 11, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-002729-MR

DANNY K. CARRIER APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE TOM MCDONALD, JUDGE
ACTION NO. 02-CI-008632

DAIRY QUEEN WHOLLY OWNED STORES,INC. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND KNOPF, JUDGES.

KNOPF, JUDGE: Danny Carrier appeals from a summary judgment of the Jefferson Circuit Court, entered November 21, 2003, dismissing his claim for damages against Dairy Queen Wholly Owned Stores, Inc. Carrier alleges that in January 2002, he was attempting to cross the parking lot of a Dairy Queen restaurant in Louisville when he slipped on a patch of black ice and suffered injuries. The trial court ruled that Dairy Queen bore no duty either to warn Carrier about the ice or to take measures

to render it less hazardous because the dangerous condition was or should have been obvious to Carrier. Carrier contends that the hazard was not obvious and thus that the trial court has misapplied the "open and obvious" rule. We affirm.

Carrier was a business invitee on Dairy Queen's premises, and our Supreme Court has recently described such an invitee's burden of proof in slip-and-fall cases as follows:

> the customer retains the burden of proving that: (1) he or she had an encounter with a foreign substance or other dangerous condition on the business premises; (2) the encounter was a substantial factor in causing the accident and the customer's injuries; and (3) by reason of the presence of the substance or condition, the business premises were not in a reasonably safe condition for the use of business invitees.[1]

The question here is whether the icy condition of the parking lot could be found to have been unreasonably unsafe. As the trial court noted, dangerous conditions that are open and obvious are generally not unreasonably unsafe because an invitee can be expected to discover them and to protect himself.[2] "[T]he term 'obvious' means that 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,

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[1] Martin v. Mekanhart Corporation, 113 S.W.3d 95 (Ky. 2003) (citing Lanier v. Wal-Mart Stores, Inc., 99 S.W.3d 431 (Ky. 2003)).

[2] Bonn v. Sears, Roebuck & Company, 440 S.W.2d 526 (Ky. 1969).

intelligence and judgment."[3] Under the particular facts in several cases, snowy and icy conditions in parking lots or along the approach to a business have been deemed obvious and thus not unreasonably unsafe.[4]

Whether a natural hazard like ice or snow is obvious, however, "depends upon the unique facts of each case."[5] If it is not, such as where apparently thoroughly cleared sidewalks conceal transparent layers of ice, then whether the condition was unreasonably unsafe has been deemed a question for the jury.[6]

In this case Carrier's deposition testimony indicates that he visited Dairy Queen during the partial light of early

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[3] *Id.* at 529 (citing *Restatement of the Law of Torts (Second)* §§ 343 and 343A (1965).)

[4] PNC Bank, Kentucky, Inc. v. Green, 30 S.W.3d 185 (Ky. 2000) (approach to a bank during snow and freezing rain storm); Corbin Motor Lodge v. Combs, 740 S.W.2d 944, 945 (Ky. 1987) (sidewalk leading from restaurant during snow storm); Ashcraft v. Peoples Liberty Bank & Trust Co., Inc., 724 S.W.3d 228, 229 (Ky.App. 1986) (bank parking lot following heavy snow storm); Standard Oil Company v. Manis, 433 S.W.2d 856, 859 (Ky. 1968) (loading platform following snow storm).

[5] Schreiner v. Humana, Inc., 625 S.W.2d 580, 581 (Ky., 1981).

[6] *Id.* at 580 (approach to building following snow storm: "Snow had been removed from the walkway, and the path to the building looked 'perfectly clear' to [the plaintiff]. However, just as [the plaintiff] stepped onto the cleared sidewalk, her foot slid on a transparent layer of ice."); Estep v. B.F. Saul Real Estate Investment Trust, 843 S.W.2d 911, 913 (Ky.App. 1992) (approach to shopping mall the day following snow storm: The plaintiff "was unaware of a transparent layer of ice on the seemingly cleared sidewalk until she stepped upon it, even though she was aware of the generally icy and snowy conditions then existing.")

morning the day following a heavy snow storm. The main traffic lanes and some of the parking spaces in Dairy Queen's parking lot had been plowed. The snow had been pushed to the edge of the lot, but some of the parking spaces remained snowy. The lot had not been sanded or salted. Carrier testified that when he exited his car he had to walk through some snow before reaching the plowed portion of the lot. He had taken only a few steps from his car when he slipped on a large patch of ice.

We agree with the trial court that the hazard in this case, a parking lot plowed to facilitate car traffic but otherwise still wet and snowy the day following a snow storm, is more like the conditions our cases have held to be obvious than those deemed not obvious. A reasonable person exercising ordinary perception would have recognized that, though the lot had been plowed, it had not been thoroughly cleared; patches of snow and ice remained. Although these conditions pose a risk to pedestrians, we agree with the trial court that the risk cannot be deemed an unreasonable one. Accordingly, we affirm the November 21, 2003, summary judgment of the Jefferson Circuit Court.

All CONCUR.

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