RENDERED: APRIL 20, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002553-MR

LESLIE SCHAEFER — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 03-CI-04305

AMERICAN CARPET SYSTEMS, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MOORE AND NICKELL, JUDGES.

MOORE, JUDGE: Leslie Schaefer appeals from a directed verdict entered by the Fayette Circuit Court at the conclusion of her evidence during a jury trial on November 30, 2005. Schaefer had fallen on her apartment tile foyer after American Carpet Systems, Inc. (hereinafter "ACS") had cleaned the carpeting throughout the apartment. Schaefer alleges that the trial court erred in entering the directed verdict because there were issues of material fact that required a jury determination. Having throughly reviewed the record, the video of the trial, and the applicable law, we affirm.

On June 20, 2003, Schaefer knocked over a glass of grape juice onto her carpeted bedroom floor. Not wanting the carpet to stain, Schaefer contacted ACS to clean the carpet. ACS had cleaned Schaefer's carpet on two prior occasions. Because Schaefer had to work that day, ACS did not arrive at her apartment until approximately 6:15 p.m. that evening. ACS sent Jim Bob Justice, who had cleaned Schaefer's carpet on the two prior occasions, to her apartment that evening. Justice cleaned the carpet in the bedroom, the hallway, the dining room, and the living room. Schaefer testified that she sat in the kitchen so as to stay out of Justice's way. She also testified that she kept the front door propped open with a dog crate which contained her dog.

To clean the carpet Justice used a vacuum wand device, attached to hoses that ran out the apartment front door down to the company truck, which puts liquid onto the carpet surface and then sucks it up via the vacuum. Schaefer indicated that ACS told her that virtually all the liquid (98%) is vacuumed off the carpet. She also testified that after the carpet is cleaned, it is somewhat damp from the just "washed" carpet. As Justice cleaned into the living room, Schaefer's dog became excited and began digging at the crate with its paws to try to get out. Schaefer then walked from the kitchen to the living room and sat on a chaise sofa in an effort to calm the dog. Schaefer was wearing flip flops with rubber soles and testified that the flip flops got moisture on them as she walked across the damp carpet. She remained on the sofa until Justice had completed cleaning the carpet.

When Justice finished cleaning the carpet, he carried the wand and hoses outside the apartment to the company truck and shut off the vacuum. He left none of the equipment in the apartment. As he was leaving, Schaefer told him that she would have the check to pay ACS ready when he returned. After Justice left with the equipment, Schaefer slid off the sofa onto the tile foyer which is located at the front door entrance. ACS did not clean the tile foyer, only the carpet. As she stepped onto the tile foyer, Schaefer slipped and fell. Schaefer testified that she slipped on a "substantial" amount of liquid. Unfortunately, the fall resulted in Schaefer fracturing her tibial plateau of her left tibia. Schaefer alleged that Justice never warned her that the tile area was wet or had liquid on it.

Although the trial court denied ACS's motion for summary judgment prior to trial, following Schaefer's presentation of her evidence, the court granted ACS's motion for a directed verdict. The court determined that the liquid upon which Schaefer slipped and fell was open and obvious as a matter of law and that ACS had no duty to warn of it. The trial court concluded that a reasonable person in the same circumstances would have looked down prior to stepping on the tile foyer and exercised reasonable care in walking across the wet floor in flip flops. The court further ruled that reasonable minds could not differ on this issue. In making this decision, the court emphasized that Schaefer had walked across the wet carpet prior to her fall and knew the soles of her flip flops were wet. The trial court also made two separate rulings which Schaefer has appealed but because we are affirming on the directed verdict issue, they need not be

addressed. These issues are: (1) that Schaefer failed to state with sufficient specificity her claimed damages in her answers to ACS's interrogatories. *See Fratzke v. Murphy*, 12 S.W.3d 269 (Ky. 1999) and *LaFleur v. Shoney's Inc.*, 83 S.W.3d 474 (Ky. 2002); and (2) that the trial court erred by not permitting Schaefer to pursue the reason Justice was fired from ACS. Schaefer claimed that Justice was fired several months after her fall for dishonesty which would be relevant as to his credibility. However, Schaefer did not call Justice to testify on her behalf, and he never testified because the court entered the directed verdict judgment.

The standard of review for granting a directed verdict is well established. In *Bierman v. Klapheke II*, 967 S.W.2d 16, 18 (Ky. 1998), the Kentucky Supreme Court held:

> On a motion for directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion. When engaging in appellate review of a ruling on a motion for directed verdict, the reviewing court must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party. *Meyers v. Chapman Printing Co., Inc.*, Ky., 840 S.W.2d 814 (1992). Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous. *Davis v. Graviss*, Ky., 672 S.W.2d 928 (1984).
> In reviewing the sufficiency of the evidence, the appellate court must respect the opinion of the trial judge who heard the evidence.

Thus the question before the Court is whether the trial court's action on granting the direct verdict was clearly erroneous.

Schaefer argues that the trial court erroneously found that reasonable minds could not differ on whether the liquid hazard on her tile foyer was "open and obvious" so that ACS had no duty to warn or remedy it. She further argues that by taking this factual decision away from the jury, the trial court found that there was a complete absence of proof on the issue of "open and obvious." Unlike a jury who resolves conflicting factual issues, Schaefer contends the trial court took all of Schaefer's evidence as true and then held as a matter of law that the hazard was "open and obvious" -- a legal conclusion. Schaefer points to the following evidence on the record which supports her contention: (1) Schaefer slipped and fell on a liquid substance left on her tile foyer by ACS; (2) the tile foyer was not cleaned and she believed it to be dry; (3) the liquid was clear; (4) she did not look down because Mr. Justice did not clean the foyer and 98% of the liquid used was vacuumed off the carpet; and (5) Mr. Justice had cleaned the very same carpets twice before while Ms. Schaefer was present, and she had never encountered liquid on the tile foyer. Based upon these facts, Schaefer concludes that the condition was not open and obvious and that ACS had a duty to warn of it or correct it.

ACS counters that the trial court properly granted a directed verdict because the liquid upon which Schaefer slipped and fell was open and obvious as a matter of law and that reasonable minds could not differ on the issue. It relies on the following facts as presented by Schaefer: (1) she was aware that the cleaning of carpets involved the use of liquid; (2) just prior to the fall she had walked across the freshly cleaned and damp

carpet; (3) she admittedly got water on the soles of her flip flops and; (4) she did not look down at the foyer floor to see what she claimed was a "substantial" amount of water.

The parties also differ as to what relationship existed between them. Schaefer claims that ACS took control of her apartment and that she should be treated as a business invitee. ACS argues that Schaefer cannot be a business invitee since she was at her own home and maintained control over the property the entire time the carpet cleaning took place. The parties cite to the same cases but argue that the cited cases support their position. For example, each party cites the recent case of *Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364 (Ky. 2005). In *Horne* the appellant impaired his wrist when he tripped over a concrete parking barrier on the premises of Precision Cars. ACS alleges that the *Horne* holding, reversing the trial court's grant of summary judgment, was based upon two key factors: (1) that Horne's view of the hazard was obstructed prior to the fall and (2) that his attention was distracted in the moments before his fall by the property owner's salesman. ACS contends neither of these facts was present in this case but rather that Schaefer was in control of her apartment, not distracted and the water was open and obvious. Schaefer on the other hand, argues *Horne* creates a rebuttable presumption that the condition is not "open and obvious" as applied to a business invitee.

Horne defines an invitee as one who enters upon the premises at the express or implied invitation of the owner or occupant on business of mutual interest to them both, or in connection with the business of the owner or occupant. *Id.* at 367; s*ee also*

Scuddy Coal Co. v. Couch, 274 S.W.2d 388, 389 (Ky. 1955); Restatement (Second) of Torts ("Restatement") § 332(1), (3) (1965). Justice Cooper in *Horne* also defines "known" and "obvious" as put forth in the Restatement. "Known" means not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves. Id. § 343A Cmt. b. "Obvious" denotes 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, intelligence, and judgment. Id.; *Horne* at 367; s*ee also Bonn v. Sears Roebuck and Company,* 440 S.W. 2d 526 (Ky. 1969).

Throughout *Horne* the Kentucky Supreme Court equates "invitee" with "visitor." That is one who has been invited onto the premises of another on business of mutual interest to them both. Obviously this is not what occurred in this case. Schaefer is the owner of the premises where the injury occurred. While she contends she gave over control to ACS, there is no evidence to support this proposition. Similarly, in *Winn-Dixie Louisville, Inc. v. Smith*, 372 S.W.2d 789, 791 (Ky. 1963), the Court citing *Young's Adm'r v. Farmers & Depositors Bank*, 267 Ky. 845, 103 S.W.2d 667 (1937) held "the duty owing by an owner or person in possession to those who come on the premises by invitation, express or implied, is not to insure his safety, but it is to use ordinary care to have the premises in a reasonably safe condition." Most of the cases cited by Schaefer deal specifically with the business invitee situation and follow the principle stated in *Horne* that "if the hazard is 'known and obvious' to the invitee, the owner has no duty to warn or protect the invitee against it." However, in *Shipp v. Johnson*, 452 S.W.2d 828

(Ky. 1970), the Court held that Shipp, who fell on a rug at a friend's house and was injured, was not an invitee but a social guest and could not recover for injuries suffered as a result of an open and obvious condition.

Based upon the foregoing decisions and holdings, we believe that Schaefer's argument that she was an invitee in her own home is unfounded. She maintained control over the premises and was acutely aware of the activities performed by ACS. Furthermore, she testified she was aware that ACS used liquid to clean the carpet and that she had accumulated moisture on her flip flops immediately prior to the fall. While she contends she did not observe the liquid on which she slipped, she stated that it was a "substantial" amount of water. This Court could not find any cases that would hold an injured home owner to a higher duty than that owed to a business invitee under similar circumstances; however, we do not believe the duty would be any less. As such we believe that ACS owed no duty to warn Schaefer of a condition that was open and obvious in her own home. Schaefer knew that cleaning carpet involved using liquid and that some of the liquid remained after the cleaning was finished. A reasonable person knowing this would take necessary precautionary measures to avoid the water, especially on a potentially slippery surface such as a tile foyer, while wearing flip flops that she knew were wet. Because the condition was open and obvious, Schaefer, as the home owner or even under her theory of business invitee, cannot recover, and the granting of a directed verdict was proper.

For the foregoing reasons, the judgment of directed verdict entered by the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Scott White
Lexington, Kentucky

BRIEF FOR APPELLEE:

Thomas L. Travis
Lexington, Kentucky