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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000264-MR

TONYA STAPLETON — APPELLANT

v.

APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 08-CI-00185

CITIZENS NATIONAL CORPORATION;
AND UNKNOWN EMPLOYEES, AGENTS
AND/OR CONTRACTORS EMPLOYED BY
CITIZENS NATIONAL CORPORATION FOR
REMOVAL OF SNOW, ICE AND DEBRIS
FROM PARKING AREA — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND WINE, JUDGES; HARRIS, SENIOR JUDGE.

WINE, JUDGE: Tonya Stapleton appeals from the entry of summary judgment in favor of the appellee, Citizens National Corporation ("Citizens"), claiming on appeal that the icy conditions which caused her to slip and fall in Citizens' parking

lot were not "open and obvious" and that the parking lot was not kept in a reasonably safe condition. Upon a review of the record, we affirm.

Background

On January 30, 2008, Stapleton and her mother, Lois Barker, drove to the Citizens National Bank in Paintsville (owned by Citizens National Corporation). The morning was quite cold, the temperature being approximately 30 degrees. It had snowed or sleeted a few days prior, but on this particular morning, it was sunny.

Barker was driving the vehicle. Upon entering the bank parking lot, she pulled into the first available space in front of the building. Both women exited the car. Stapleton walked toward the rear of the vehicle to meet her mother before accompanying her inside the bank.

Having completed their business, Stapleton and Barker left the building and walked back toward the car, using the same route. Stapleton again walked behind the car and along the passenger side toward the front passenger-side door. As she stepped to enter the vehicle, she slipped on ice that was directly under the open door and fell.

At that time, Barker rushed to Stapleton's aid and then went into the bank to notify the employees of Stapleton's fall. A bank employee or employees came out to assist Stapleton and take a report. At least one employee took pictures of the scene. Barker testified in her deposition that she had not noticed any ice on the parking lot before her daughter fell. However, after the fall, she noticed several

icy spots in the parking lot. Stapleton suffered a broken coccyx bone as a result of the fall.

On April 23, 2008, Stapleton filed the present action, alleging that Citizens negligently failed to warn her of the hazardous conditions in the parking lot. On September 16, 2008, Citizens filed a summary judgment motion maintaining that the law imposes no duty upon storeowners to warn of "naturally occurring outdoor hazards." The trial court entered an order on October 20, 2008, stating that the case law in Kentucky makes clear that Citizens would not be liable to Stapleton for failing to warn of a naturally occurring outdoor hazard unless it (1) did anything to make the natural hazard less obvious; or (2) did anything that otherwise increased the likelihood that the customer would fall. The court gave Stapleton forty-five days in which to develop any proof concerning actions taken by Citizens which would tend to do either of these things. Depositions and additional discovery were taken on the matter. On December 31, 2008, Citizens re-filed its motion for summary judgment, this time additionally arguing that it did nothing to obscure the hazard or increase the likelihood of injury. The trial court entered summary judgment in favor of Citizens on January 20, 2009, from which Stapleton now appeals.

Analysis

On review of the grant of a motion for summary judgment, we ask whether the trial court was correct in finding that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law.

Steelvest, Inc v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991). As a summary judgment determination involves no fact-finding, we are not required to give deference to the trial court, but review the trial court's judgment *de novo*. *Combs v. Albert Kahn Associates, Inc*., 183 S.W.3d 190, 194 (Ky. App. 2006); *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

In any action alleging negligence, a plaintiff must prove duty, breach, causation, and damages. *Illinois Central Railroad v. Vincent*, 412 S.W.2d 874, 876 (Ky. 1967). In the present case, summary judgment was awarded based upon Stapleton's failure to establish duty. Specifically, the trial court found that Stapleton had not shown that Citizens had a duty to warn her of a naturally-occurring hazard such as ice or snow.

Stapleton was a business invitee on Citizen's premises. Under the common law, business owners owe invitees a duty to keep the premises in a reasonably safe condition and warn of latent dangers. *See, e.g., Lewis v. B&R Corporation*, 56 S.W.3d 432, 438 (Ky. App. 2001). Over the years, however, premises liability law has developed such that it may be divided into three distinct categories, each with its own jurisprudence: (1) naturally occurring outdoor hazards; (2) encounters with foreign substances; and (3) hazards created by storeowners. *Horne v. Precision Cars of Lexington, Inc*. 170 S.W.3d 364, 368-69 (Ky. 2005). This case clearly involves a naturally occurring outdoor hazard.

The general rule is that business owners have *no duty* to protect invitees from injuries caused by "natural outdoor hazards which are as obvious to

an invitee as to the owner of the premises." *See, e.g., Standard Oil Co. v. Manis*, 433 S.W.2d 856, 858 (Ky. 1968); *see also, Corbin Motor Lodge v. Combs*, 740 S.W.2d 944 (Ky. 1987). This general rule is often couched in the terms, "open and obvious." Business owners typically have no duty to protect invitees from snow and ice where such conditions are open and obvious. *Id*. The exception to this general rule is when the owner undertakes protective measures that *heighten or conceal* the nature of the naturally-occurring condition, thus making it worse. *Estep v. B.F. Saul Real Estate Inv. Trust,* 843 S.W.2d 911, 914 (Ky. App. 1991) ("[A] duty voluntarily assumed cannot be carelessly undertaken without incurring liability therefore.")

However, in *PNC Bank, Kentucky, Inc. v. Green*, 30 S.W.3d 185 (Ky. 2000), the Kentucky Supreme Court upheld a motion for summary judgment on the grounds that the business owner did not *make the natural hazard less obvious or increase the likelihood that the customer would fall* by any measures it took with respect to the ice and snow. *Id*. The trial court felt that *PNC Bank, supra,* slightly changed the Court's previous interpretations of this exception. We agree.

As a premises owner typically has no duty to protect invitees from obvious natural conditions like ice and snow, Stapleton's claim must fail unless the condition was not open and obvious or either of the above exceptions applies. As such, the question is whether there was any genuine issue of material fact with respect to whether the icy patch was open and obvious or whether the Citizens

engaged in any behavior that heightened or concealed the nature of the ice in the parking lot or increased the likelihood that a customer would fall.

The deposition testimony indicated that it was a sunny day, that the weather was below freezing, and that the spot on the pavement where Stapleton slipped was clearly visible. The branch manager for Citizens, Judy Frazier, testified in her deposition that you could see the spot where Stapleton fell, but that she couldn't really tell whether it was "just wet, ice, or a dark spot." Stapleton agreed in her deposition testimony that it was evident there was either a wet or icy spot in the stall where her mother's car was parked. In Barker's deposition, when asked if she could identify a photograph of the scene taken that morning, she responded, "Yeah. That's my car and that's the ice." Barker further agreed that the photograph was a fair and accurate representation of the scene.

The evidence in the record makes clear that the naturally occurring outdoor condition (the icy patch), was not hidden from view, but was readily observable to the individuals who testified. Thus, the condition was clearly open and obvious. As such, Citizens had no duty to protect Stapleton from the condition unless there existed any exceptions to the general rule.

The next question is whether there is any evidence in the record to create a genuine issue of fact as to whether Citizens engaged in any behavior that heightened or concealed the nature of the icy spot or undertook any action that increased the likelihood that the customer would fall. Here, there is no evidence that Citizens did anything which would obscure the icy spot or otherwise make it

more hazardous. The case of *Estep, supra*, where the Kentucky Supreme Court found that actions taken by a premises owner obscured an icy walk, is distinguishable from the present case. In *Estep*, after considerable snow had fallen, a department store attempted to clear the walk in front of the store. After the walk was cleared, a layer of ice was left behind on the walk. A light snow had begun to fall which dusted over the ice. The plaintiff in the case, believing the walk had been cleared, and not being able to observe the ice under the light dusting of snow, made her way across the walk and fell.

The *Estep* Court held that, as the department store had voluntarily assumed the duty of clearing the walk, and because their actions may have actually obscured the layer of ice that was left behind, a genuine issue of material fact existed as to whether the store's actions made the condition more hazardous. In this case, there is no indication in the record that Citizens attempted to clear the icy patch or patches in the parking lot, or that any action taken by Citizens made the hazard less obvious or otherwise increased the likelihood that the customer would fall on it. Under the circumstances presented, Citizens was entitled to summary judgment.

Accordingly, we affirm the January 20, 2009 order of the Johnson Circuit Court.

NICKELL, JUDGE, CONCURS.

HARRIS, SENIOR JUDGE, CONCURS AND FILES SEPARATE OPINION.

HARRIS, SENIOR JUDGE, CONCURRING: I concur in Judge Wine's well written majority opinion because it correctly applies and follows the cited Kentucky Supreme Court precedents, as did the Johnson Circuit Court's order granting summary judgment to the appellee. I write to state my belief that the Supreme Court should revisit its holdings that natural outdoor hazards on business premises which are observable by patrons give rise to no duty upon the premises owner to remedy or warn against the condition.

As I write this concurring opinion on January 13, 2010, I can look out my office window and see a bank parking lot just a few yards away. It is sunny but cold outside today, with intermittent wind, a typical January day in Kentucky. A few remnants of a recent winter storm remain on the parking lot, patches of snow or ice, and some puddles of water. Over the course of a few minutes, patrons of the bank pull onto the parking lot, exit their vehicles, enter the bank, transact their business, and return to their vehicles. They are bundled in heavy coats, scarves, caps, hats, hoods, and other bulky clothing. Many are wearing boots. Invariably, they move quickly between their vehicles and the bank's doors, bent slightly against the chill breeze, scurrying toward warmer conditions. Those with purses, bundles, or other possessions are clutching them tightly to their bodies, doubtlessly affecting their balance.

What I am seeing today in this real world setting contrasts starkly with the notion that because a hazardous outdoor natural condition is (theoretically, at least) visible to a business patron, his or her opportunity and ability to observe the

condition should be equated with that of a business owner seeking to profit from the patron's use of the premises and having employees paid to maintain its outside premises.

It has been twenty-two years since *Corbin Motor Lodge v. Combs*, 740 S.W.2d 944 (Ky. 1987), was rendered. *PNC Bank, Kentucky, Inc. v. Green*, 30 S.W.3d 185 (Ky. 2000), is nine years old. Patrons of banks and retail stores continue to suffer falls and injuries occasioned by ice, snow, water, and other natural hazards on businesses' outdoor premises. The wisdom of the sentiments expressed by then-Chief Justice Lambert in his dissents in *Corbin Motor Lodge* and *PNC Bank, Kentucky, Inc.*, continues to be borne out by the passage of time.

If the appellant makes a proper motion, it is my belief that the Kentucky Supreme Court should, and my hope that it will, grant discretionary review and revisit the issue of the duty of business premises owners to remedy or warn their patrons of outdoor natural hazards, regardless of the patrons' ability to observe the condition.

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