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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000945-MR

WILMA SHELTON — APPELLANT

v. ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2010-SC-0566-D

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 08-CI-01094

KENTUCKY EASTER SEALS SOCIETY, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, VANMETER, AND WINE, JUDGES.

WINE, JUDGE: Wilma Shelton appeals from an order of the Fayette Circuit Court granting summary judgment in favor of Kentucky Easter Seals Society, Inc. This Court rendered an opinion on July 30, 2010. Mrs. Shelton filed a motion for

discretionary review with the Kentucky Supreme Court. The motion for discretionary review was granted, and this case was remanded for further consideration in light of the recent case of *Kentucky River Med. Ctr. v. McIntosh*, 319 S.W.3d 385 (Ky. 2010). For the reasons stated below, we again affirm the trial court's summary judgment in favor of the appellees.

Factual and Procedural Background

On March 9, 2007, Wilma Shelton was visiting her husband at Cardinal Hill Rehabilitation Hospital ("Cardinal Hill"), which was owned and operated by Kentucky Easter Seals Society, Inc. ("Easter Seals"). Mrs. Shelton had visited her husband every day for five weeks since his admittance to Cardinal Hill. Before her husband was admitted to Cardinal Hill, Mrs. Shelton had been warned by a neighbor of the danger of numerous wires beside the beds at Cardinal Hill. After a visit with her father, the Sheltons' daughter complained to staff at Cardinal Hill about the danger of these wires. Mrs. Shelton admits she always attempted to avoid the wires whenever she approached her husband's bed. Because the left side of the bed was not accessible to her, Mrs. Shelton approached the right side of the bed, where the wires were located, each time she kissed her husband goodbye.

On March 9, 2007, as Mrs. Shelton approached her husband's bed to kiss him, her foot became entangled in a wire, and she fell to the floor and onto her hands and knees. Both her husband and her daughter witnessed the fall. Mrs. Shelton experienced immediate pain in her left knee. She was later diagnosed with

a non-displaced transverse fracture of the lower third of the patella. Mrs. Shelton filed suit against Easter Seals in March of 2008. Following discovery depositions of both Mrs. Shelton and her daughter, Easter Seals filed a motion for summary judgment pursuant to Kentucky Rule of Civil Procedure ("CR") 56.03. Oral arguments were held on March 20, 2009, at which time the trial court granted summary judgment in favor of Easter Seals, stating its reasons therefore as well as its conclusions of law, on the record. A written order was entered April 22, 2009, and this timely appeal followed.

Analysis

An appellate court reviews a summary judgment *de novo*. *Baker v. Weinberg*, 266 S.W.3d 827, 831 (Ky. App. 2008). The standard of review, therefore, is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). The record should be viewed in a way in which "all doubts are . . . resolved in [Appellant's] favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment should only be used to terminate litigation when, as a matter of law, it appears that it would be impossible for the nonmoving party to produce evidence at the trial warranting a judgment in that party's favor and against the movant. *Id.*, at 483.

It is well established in Kentucky, as a general rule, that if a hazardous condition is "open and obvious", a landowner owes no duty of care to an invitee

regarding the hazardous condition. *See, e.g., Corbin Motor Lodge v. Combs*, 740 S.W.2d 944, 946 (Ky. 1987). Mrs. Shelton acknowledges generally the open and obvious rule in Kentucky case law. She also concedes that she knew of the wires on the right side of her husband's bed, establishing that the hazard was open and obvious. Mrs. Shelton instead argues that the circumstances surrounding her accident cause the hazard to fit within two separate exceptions to the open and obvious rule.

Mrs. Shelton asserts two separate arguments for reversal of summary judgment, the first of which is an exception to the open and obvious rule as described in *Bonn v. Sears, Roebuck & Co.*, 440 S.W.2d 526 (Ky. 1969). The *Bonn* Court derives this exception directly from *Restatement (Second) of Torts* §343A (1965). The Restatement specifically states that a landowner has no liability for physical harm to invitees caused by "activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." *Id.* Circumstances in which a landowner should expect the harm are "where the possessor has reason to expect that the invitee's attention may be distracted, so that he will . . . forget what he has discovered, or fail to protect himself against it . . ." *Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364, 367 (Ky. 2005), *citing Restatement (Second) of Torts* §343A (1965).

Very recently, the Kentucky Supreme Court modified the open and obvious doctrine in *McIntosh*, whereby it adopted the modern trend as expressed in

the *Restatement (Second) of Torts* §343A (1965) regarding open and obvious conditions:

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness*.

McIntosh, 319 S.W.3d at 389.

Contrary to Mrs. Shelton's position, we do not find the opinion in *McIntosh* abrogates the open and obvious doctrine in Kentucky. The Court in *McIntosh* explained,

> While "open and obvious danger" is no longer a complete defense under the Restatement, it is nonetheless a heightened type of danger which places a higher duty on the plaintiff to look out for his own safety. Such a condition, being open and obvious, should usually be noticed by a plaintiff who is paying reasonable attention. Yet the plaintiff is not completely without a defense to this: there could be foreseeable distraction, or the intervention of a third party pushing the plaintiff into the danger, for example. Even in such situations, a jury could still reasonably find some degree of fault by the plaintiff, depending on the facts.

Id. at 392.

Mrs. Shelton argues that a hospital should foresee that visitors will be distracted by tending to their loved ones admitted to the facility. She asserts that Cardinal Hill should have reasonably anticipated that her husband's condition would have distracted her from the hazard of the wires.

The activities and circumstances surrounding McIntosh's fall clearly distinguish themselves from those in the case *sub judice*. McIntosh, a paramedic, tripped and fell while escorting a patient into the emergency room. Although McIntosh had entered the emergency room several hundred times before, the Court held that "the Hospital had good reason to expect that a paramedic, such as McIntosh, would be distracted as she approached the emergency room entrance." *Id.* at 393. Obviously a paramedic's primary responsibility, caring for a critically ill patient, would create a stressful or time-sensitive environment.

Mrs. Shelton failed to give evidence that she was acting under any stress or time constraints when she tripped and fell. Mrs. Shelton testified that she had routinely approached her husband's bedside, at least fifteen to twenty times, for five weeks prior to her fall. In her deposition, she explains that she "tried to always avoid, you know, the wires." Mrs. Shelton does not allege that anything was different on the day she fell. To the contrary, she states that immediately prior to her fall, she approached her husband's bed to give him a kiss, just as she had done nearly every day of the previous five weeks. Further, she admits all the wires were in their usual position. Mrs. Shelton claims that she was "preoccupied with the *normal* activities" of visiting her husband. (Emphasis added). Mrs. Shelton failed to produce evidence that she was distracted, or made to forget the hazard, as she approached her husband's bed and fell. Thus, she has demonstrated no genuine issue of material fact.

Secondly, Mrs. Shelton argues that she was unable to approach her husband's bed on the left side because of its close proximity to the wall. In addition to the reasons discussed previously for which a possessor should expect harm, "[s]uch reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because . . . the advantages of doing so would outweigh the apparent risk." *Restatment (Second) of Torts* §343A, comment f (1965). The examples given by both the Restatement and case law are situations in which a party was forced to encounter the hazard because of a necessity such as retaining their means of livelihood. *Fuhs v. Ryan*, 571 S.W.2d 627, 629 (Ky. App. 1978). "[T]he plaintiff cannot recover if there was 'no substantial necessity or urgency for the plaintiff's subjecting himself to the risk . . .'" *Houchin v. Willow Ave. Realty Co.*, 453 S.W.2d 560, 562-63 (Ky. 1970).

Mrs. Shelton has not shown that there was any urgent need for her to approach her husband's bed that day. Approaching his bed to kiss him goodbye simply does not meet the necessary and urgent requirement given by the courts of Kentucky. "[I]nconvenience [or convenience] under these circumstances was not a substantial necessity or urgency . . . ." *Dade Park Jockey Club v. Minton*, 550 S.W.2d 188, 191 (Ky. App. 1977). While Mrs. Shelton may have wished to kiss her husband goodbye on March 9, 2007, it was not urgent to do so. She has failed to substantially demonstrate this fact in order to create a question for the jury.

Conclusion

Mrs. Shelton had an unfortunate accident due to a known hazard at her husband's bedside. Both parties agree that the wires beside the patient's bed were open and obvious, and that the general rule remains that a landowner is not liable for such open and obvious hazards. Mrs. Shelton has failed to offer substantial evidence in support of her theory that she was distracted or had no alternate route to approach the bed. Without that evidence, there is no genuine issue of material fact to put before a jury. We affirm the trial court's order granting summary judgment in favor of Kentucky Easter Seals Society, Inc.

ALL CONCUR.

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