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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001706-MR

JANICE WARD — APPELLANT

ON REMAND FROM THE KENTUCKY SUPREME COURT
APPEAL NO. 2015-SC-000099-DG

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 12-CI-004617

JKP INVESTMENTS, LLC;
AND JAMES KEVIN PORTER — APPELLEES

OPINION
REVERSING, VACATING
AND REMANDING
** ** ** ** **

BEFORE: KRAMER, MAZE, AND VANMETER, JUDGES.

VANMETER, JUDGE: Janice Ward appeals from the Jefferson Circuit Court's order dismissing via summary judgment her personal injury action against JKP Investments, LLC. Upon review of the record and applicable law, we reverse, vacate and remand this matter for further proceedings.

This premises liability case concerns a property owner's maintenance of outdoor steps on certain rental property where a tenant's guest fell and injured herself. On May 5, 2012, while attending the tenant's Derby party at the location in question, Janice fell on the steps leading up from the sidewalk to the front lawn and injured her wrist. Thereafter, Janice filed suit against the tenant's landlord and the owner of the property, JKP Investments, LLC, and James Kevin Porter, sole owner of the company (hereinafter collectively referred to as "JKP"). Janice alleged the step was defective and the negligent maintenance/repair of the property on the part of JKP caused her to fall. She sought to recover for medical expenses and for pain and suffering incurred as a result of her injury. After conducting some discovery, JKP moved for summary judgment, arguing the condition of the steps was open and obvious, for which it had no duty to guard against. The trial court agreed and entered summary judgment in JKP's favor. Janice now appeals.

Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is therefore entitled to judgment as a matter of law. CR[1] 56.03. In other words, summary judgment may be granted when "as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (internal quotations omitted). Whether summary judgment is appropriate is a legal question involving no factual findings, so the trial court's grant of summary

[1] Kentucky Rules of Civil Procedure.

judgment is reviewed *de novo*. *Coomer v. CSX Transp., Inc*., 319 S.W.3d 366, 370–71 (Ky. 2010).

After entry of the trial court's order granting summary judgment to JKP, the Supreme Court of Kentucky issued two opinions that substantially alter the approach to premises liability law in the Commonwealth. *See Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901 (Ky. 2013) and *Dick's Sporting Goods, Inc. v. Webb*, 413 S.W.3d 891 (Ky. 2013). In these cases, the Supreme Court modified the application of the "open and obvious" defense in the context of a summary judgment motion. These cases were rendered before the parties filed their appellate briefs in this case, and thus both parties have addressed the propriety of summary judgment in light of the redefined approach.

Prior to *Shelton*, under previous open-and-obvious cases, "a defendant's liability would be excused because the court would determine the defendant did not owe a duty to the plaintiff because of the obviousness condition." *Shelton*, 413 S.W.3d at 910. In other words, a defendant would be absolved from liability due to a plaintiff's failure to take notice of and avoid an open and obvious danger. *Id*. However, the court in *Shelton* found this duty analysis to be flawed since it overlooks the applicable standard of care, and decided to "shift the focus away from duty to the question of whether the defendant has fulfilled the relevant standard of care." *Id*.

In *Shelton*, the court stated that in an appropriate case, summary judgment was still viable in premise liability cases. *Id*. at 916. However, in the

recently rendered *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288 (Ky. 2015), the court further explained the analysis to be made in premises liability cases.[2] The court stated, at length:

> our Court has already, very recently, addressed whether the openness and obviousness of a danger can be a complete defense in the face of modern tort law in *Shelton v. Kentucky Easter Seals Society, Inc.,* 413 S.W.3d 901 (Ky. 2013). *Shelton* specifically answered questions about duty and breach, and held that while considerations of the obviousness of a hazard often were traditionally deemed to go to the existence of a duty, such considerations were better addressed in deciding whether the defendant breached the almost universally accepted general duty of ordinary care owed by every person to all other persons. Instead of killing a case prematurely because of the obvious nature of a hazard, most non-frivolous cases will now be allowed to mature fully and go before a jury to determine whether there has been tortious conduct at all and, if so, to apportion fault among the parties.
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> Although *Shelton* involved an indoor, man-made hazard, its rule is generally applicable to all negligence cases. That some cases, such as this one, might involve naturally occurring outdoor hazards is a distinction without a difference. The hazardous condition in *Shelton* was as obvious to Mrs. Shelton as it was to the hospital. Mrs. Shelton's daughter had complained to the hospital about various wires, cables or cords used for the medical equipment around, or that was part of, her father's bed. Obviously, the hospital already knew about its own equipment as well. Mrs. Shelton assisted daily in her husband's care, and had to cross the wires to get to his side. She had "tried to avoid" and "be careful" around the cords. Her ankle became entangled in the cords as she was turning to leave after rubbing cream on her

[2] In a previously rendered opinion, a majority of this panel determined that the facts of this case constituted the "appropriate case" noted in *Shelton*. On Ward's motion for discretionary review, the Supreme Court of Kentucky vacated our opinion and remanded this matter for consideration in light of *Carter*. *Ward v. JKP Investments, LLC*, 2015-SC-000099-D (Ky., Dec. 10, 2015).

husband's back and kissing him goodnight. She fell forward, and fractured the patella on her left knee.

In reversing the Court of Appeals, which had affirmed the lower court's grant of summary judgment under the open-and-obvious rule, this Court held that a land possessor's general duty of ordinary care is not eliminated simply because a hazard is obvious. The question is rather whether the landowner could reasonably foresee a land entrant proceeding in the face of the danger, which goes to the question whether the universal duty of reasonable care was breached. In Mrs. Shelton's case, it was obvious that she was going to continue to care for her very sick husband, wires or no wires. After *Shelton,* if such events are foreseeable and the landowner has not made reasonable efforts to correct the problem which causes harm to a plaintiff, then the landowner has *breached* his general duty of reasonable care. Additionally, the Court gave guidance about going forward with an "open and obvious" tort claim in the same manner that any tort claim would be tried. *Id.* at 917–18.

The open-and-obvious nature of a hazard is, under comparative fault, no more than a circumstance that the trier of fact can consider in assessing the fault of any party, plaintiff or defendant. *Id.* at 911–12. Under the right circumstances, the plaintiff[']s conduct in the face of an open-and-obvious hazard may be so clearly the only fault of his injury that summary judgment could be warranted against him, for example when a situation cannot be corrected by any means or when it is beyond dispute that the landowner had done all that was reasonable. *Id.* at 918. Applying comparative fault to open-and-obvious cases does not restrict the ability of the court to exercise sound judgment in these cases any more than in any other kind of tort case.

We did not get to this point in stating the law without considerable confusion since *Corbin Motor Lodge* [*v. Combs*, 740 S.W.2d 944 (Ky. 1987)] about how to reconcile duty pronouncements made under contributory-negligence law and common-sense

recognition that just because a plaintiff may have been negligent to some degree, that need not be the *whole cause* of her resulting injury. And we have struggled for years with articulating the legal reasoning to support completely excusing a landowner in open-and-obvious premises-liability cases. On their face, these cases create situations that fly in the face of fundamental fairness, which is the basis of comparative fault. And, simply declaring that there is, or is not a duty without analyzing the effect of comparative fault, which is our current law, does nothing to alleviate confusion over the policy and doctrinal anomaly created by the open-and-obvious hazard rule.

This confusion is reflected in this Court's evolution in its opinions from *Kentucky River Medical Center v. McIntosh,* 319 S.W.3d 385 (Ky. 2010), where we blurred the line about foreseeability between duty and breach, to *Shelton,* where we established that foreseeability applies to breach of the general duty of ordinary care applicable to both plaintiffs and defendants, and finally to this case, where we establish that liability—responsibility—under Kentucky law must be determined based on the principles of comparative fault.

In light of all other tort law, this is not a radical departure. When compared to the benefits defendants have been receiving from having their duty defined by a remnant of contributory negligence, this is admittedly unwelcome. But despite the language in *Manis,*[3] what its holding really meant was that when courts say the defendant owed no duty, they usually mean only that the defendant owed no duty *that was breached* or that he owed no duty *that was relevant on the facts.* "And without breach, there can be no negligence as a matter of law." *Shelton,* 413 S.W.3d at 912. Because a plaintiff's negligence prevented any liability against a defendant under contributory negligence, the defendant had no duty that was relevant under that doctrine, and the question of breach was never reached.

[3] *Standard Oil v. Manis*, 433 S.W.2d 856 (Ky. 1968).

But under comparative fault, every person has a duty of ordinary care in light of the situation, and that duty applies equally to plaintiffs and defendants. For fault to be placed on either party, a party must have *breached* his duty; and if there is a breach, fault must be apportioned based on the extent a party's breach caused or helped cause harm to the plaintiff.

But it is just as true under comparative fault as it has always been that if a landowner has done everything that is reasonable under the circumstances, he has committed no breach, and cannot be held liable to the plaintiff. The difference under comparative fault is that a landowner is not excused from his own reasonable obligations just because a plaintiff has failed to a degree, however slight, in looking out for his own safety. The *Manis* rule, at least as articulated in later cases like *Corbin Motor Lodge,* is the antithesis of this.

The basic negligence tort paradigm has never changed: duty, breach, causation, damages. But under contributory negligence principles, tort analysis never got to the breach question if it was determined that the plaintiff had any fault. While it is just that a plaintiff be responsible for harm that he causes himself, it is not just for him to bear all the liability if another negligently contributed to his injury. (Obviously, "contributed" is used here in its ordinary meaning, not as a legal doctrine.)

Manis was technically correct when it was written, because its holding was the inevitable result under contributory-negligence principles. But it is not correct under the law of comparative fault. *Manis* is out of step with our comparative fault law, and thus it cannot apply under the law and facts of this case.

Applying this understanding to the facts of the present case, there are questions of fact about whether, and to what degree, the hotel acted reasonably with respect to the icy hazard under its carport. If the hotel knew or should have known of the hazard and failed to take reasonable steps with respect to it, then the hotel

> may be found liable to the extent that fault is apportioned to it. At the same time, there are questions about whether Carter acted with ordinary care for his own safety. What constitutes reasonable conduct will always be dictated by the circumstances a person encounters.

Carter, 471 S.W.3d at 296-99.

In this case, the record seems sufficiently clear that the step in question, although not a crumbling ruin, was not in pristine condition and that a pre-existing handrail had been removed. Thus, under the authority of *McIntosh*, *Shelton*, and *Carter*, sufficient questions of fact exist which preclude summary judgment. The trial court therefore erred in granting JKP's motion for summary judgment. This matter is therefore remanded to the Jefferson Circuit Court for further proceedings consistent with the directive of the Supreme Court of Kentucky in *Carter*.

ALL CONCUR.

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