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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000184-MR

MARK ADDISON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 14-CI-00381

"TRAXX COMPANIES"; TRAXX COMPANIES, INC.; TRAXX MANAGEMENT COMPANY; BLUEGRASS CASH, LLC; THOROUGHBRED ENERGY, LLC; TRAXX ENERGY COMPANY; AND TRAXX OIL COMPANY — APPELLEES

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: COMBS, J. LAMBERT AND VANMETER, JUDGES.

COMBS, JUDGE: Appellant, Mark Addison (Addison) appeals from an order of the Fayette Circuit Court granting summary judgment for the defendants in this

premises liability case. For the reasons set forth below, we affirm in part, vacate in part, and remand.

On February 10, 2013, Addison fractured his right fibula after he slipped on a wet floor and fell at a gas station/convenience store (the store) in Lexington, Kentucky. Addison was employed there, but he was not on duty at the time of the injury.

On January 31, 2014, Addison filed a Complaint in Fayette Circuit Court against "Traxx Companies"; Bluegrass Cash, LLC; Carefree Holdings, LLC; Thoroughbred Energy, LLC; JDN Realty Corporation; Traxx Energy Company; Traxx Oil Company; Traxx Management Company; and an Unknown Defendant. Addison later filed an Amended Complaint to include a claim for Intentional Infliction of Emotional Distress (IIED), which listed Traxx Companies, Inc., as a defendant, and also referred to "Traxx Companies" within the body of the pleading.

The affidavit of Jay Hall, President of Traxx Management Company (Traxx), which was filed with Traxx's Motion for Summary Judgment, reflects that the premises are owned by Carefree Holding, Inc., and leased to Thoroughbred Energy, LLC. However, Traxx operates and staffs the store. Its personnel are considered to be Traxx employees. According to Mr. Hall, neither Carefree nor Thoroughbred exercises control or direction over the management or operation of the store; the other defendants have no role in operating the store. Carefree Holding, Inc., and JDN Realty Corporation were subsequently dismissed by the

trial court. They were also dismissed as parties to this appeal by Order of this Court entered on October 7, 2015.

On July 1, 2014, Addison testified by deposition. He usually worked second shift at the store. His days off were Sunday and Monday. The injury occurred on a Sunday evening. It was raining. Addison's manager, Eric Martin, had asked to borrow a Playstation game, and Addison was taking it to him at the store. Addison testified that his step-daughter, Tiffany Alcorn, was driving. When they arrived at the store, Addison described the scene as follows:

> I seen Eric's daughter was behind the counter. … I had went in, I was gonna say what are you doing behind there, you know, just kidding around. And before I could do anything, I went down. I mean it was only like two steps into the store and I fell. I think that's why I didn't see the [wet floor] signs, because I was focused on, you know, scaring her or whatever I was doing. I remember I was gonna do a little joke on her.

Addison testified that he did not see any substance or water on the floor before he fell, but when he got up his shorts and thighs were wet. He further testified:

> I was focused on the register at the – Eric's little girl, I was gonna, you know, ask her what she was doing behind the counter. And I only took two steps into the store. I mean, I didn't walk around the store or nothing. It was just in and then, boom, I was down. So, I mean, I don't think no sign or no – if somebody was even standing there saying, the floor is wet, I still don't think that would have saved me from falling.

With respect to his IIED claim, Addison testified that when he went to the store to pick up his check on February 14th, Louis Black, a cashier, came out

laughing, which Addison felt was outrageous. Black said, "I seen the video, I seen the video. . . . [H]e goes, Eric showed us the video. So the second shift got to see the video of me falling. And it just … pissed me off, excuse me [sic] language." Addison thought "that was very unprofessional." He further testified that "when Louis came out what I got from him was that [the video] was showed to make fun of a fat guy falling down and breaking his leg. That's what made me so mad." Addison testified that he did not seek mental health treatment; he did not have health insurance, and no doctor indicated that he needed such treatment or had prescribed medication for it.

On October 14, 2014, Traxx filed a Motion for Summary Judgment on grounds that Addison had failed to demonstrate either negligence as a matter of law or outrageous conduct within the meaning of IIED. In its supporting memorandum, Traxx explained that it was not seeking summary judgment based on the open-and-obvious rule, stating as follows: "Rather it may be assumed *arguendo* that a condition existed on the premises due to the tracking in of natural accumulations by patrons, and that it was foreseeable that a patron might not be aware of the moisture."

Traxx argued that it exercised ordinary care by warning patrons of that condition. Included in Traxx's memorandum is a surveillance camera photo which shows a small, yellow A-frame shaped warning sign partially visible near the counter. The sign appears to be facing sideways. Traxx also filed a video segment showing the area immediately in front of the counter (Exhibit 1 to Appellee's

brief). The video shows Addison's left foot sliding on the tile floor into the base of the front counter as he approached it, then his landing on his right knee on the mat in front of the counter and falling toward the right. The yellow warning sign is visible to Addison's left in the video, facing sideways, so that the triangular "opening" of the sign would have been facing Addison as he approached the counter from the entrance.

Traxx also acknowledged that it was the entity in control of the store and that it employed the personnel staffing the door, that the other defendants had no such control, and that they should be dismissed from the lawsuit.

On December 8, 2014, Addison filed a Response and Objection to Traxx's Motion for Summary Judgment. He explained that the store has a sliding glass door at the entrance and a counter approximately ten feet beyond and to the right. Between the entrance and the counter is "a mixture of bare tile and floor mats with large spaces between the mats." Addison contended that Traxx had allowed water to accumulate immediately past the entrance and that the wet-floor sign was to the left of the mat in front of the counter "far past the spot where the water had accumulated." Because the sign was turned sideways, the warning on the front of the sign was not visible to anyone entering the store. Addison asserted that Traxx's insinuation that he had slipped close to and in front of the counter was "completely false." According to Addison, "[w]hat is seen in the video is [his] falling forward after his feet gave way far back from that spot." Addison claimed that he slipped only after taking one or two steps into the store and that he landed

close to the counter. He contended that the video failed to depict the spot where he slipped or any liquid on the floor. Addison also included several frames from the store's camera in his response.

Submitted with Addison's response is a portion of Traxx's Safety Manual, setting forth the duties of the employed as requiring them to:

> [c]lean up spills and wet areas right away. Once the area has been cleaned, make sure the wet floor is clearly marked. If you can't clean up the spill right away, clearly mark the area to call attention to it. This can be done with signs, boxes or merchandise.

Addison contended that Traxx did not follow its own policies and procedures.

Addison also submitted the affidavit of Tiffany Alcorn. She stated that she was parked directly in front of the entrance when she witnessed Addison slip and fall after taking only one or two steps inside. Upon seeing Addison fall, Alcorn immediately got out of the vehicle, took one step inside, and observed water on the floor where Addison had slipped. She identified the area by an "X" on a photo attached to her affidavit. Alcorn also testified that there was no wet-floor sign or any other warning either at or near the entrance, that the sign was located far past the spot where Addison slipped, and that it was turned so the wording was not visible from the front of the store. According to Alcorn, the water on the floor had not been mopped up and the wet area was not blocked off.

Addison submitted his own affidavit in which he stated that when he worked at the store, there were incidents when he had to place wet floor signs. Addison stated that he always placed them right in front of the entrance, facing forward so

patrons would see them immediately. That procedure reflected his understanding of the store policy. Addison explained that he did not see the sign, but that even if he had seen it, the sign would not have alerted him to the presence of water on the floor because it was not placed in the area where he fell.

In addition, Addison submitted the affidavit of his spouse, Margaret Addison, who stated that he became "severely depressed, outraged and demoralized by the store manager's showing of the video of the accident to [Addison's] fellow employees." She had encouraged him to seek help, but he was unable to afford it.

On December 17, 2014, Traxx filed a reply to Addison's response, including an exhibit showing the incident frame-by-frame. Traxx explained that the surveillance system takes still images at regular intervals and that Addison is shown on both cameras (at the front door and the front counter) at 7:58:55 p.m. The front-door camera frame shows Addison's upper torso; he appears to be walking, but neither his feet, nor the floor directly beneath him can be seen in that particular frame; the open sliding-glass entrance door is just behind Addison; the edge of a floor mat is visible in front of the entrance. There are two front-counter camera frames at 7:58:55 -- one showing Addison as he nears the counter and the other showing him after he has fallen with his right knee on the mat in front of the counter.

On December 31, 2014, Addison filed a sur-reply to Traxx's response, contending that Traxx had failed to cite any authority suggesting that "placing a

single, sideways floor sign eliminates all questions of fact as to breach of duty." Addison argued that summary judgment was inappropriate because Traxx's sign was tiny and too far from the hazardous condition and that Traxx did **nothing** to clean up the liquid that caused the fall.

The trial court heard arguments of counsel on January 5, 2015. It granted Traxx's motion for summary judgment and recited as follows:

> I find they met their duty to warn, I can't imagine what else they could have done. I mean don't think this is a factual issue. The sign was there, even if there were no words on the sign, those signs are a clear indication that there's a warning of something going on . . . had someone been looking. He wasn't looking. . . . The problem is he wasn't looking, he didn't see it, he'd also just come in from outside and it was raining. . . . I think we have to take some responsibility for our actions as we're walking into a store . . . .

On January 12, 2015, the trial court entered its written order granting Defendants' Motion for Summary Judgment, finding that there was no genuine issue of material fact, dismissing all claims and all parties, and reciting the requisite CR[1] 54.02(1) finality language. On February 2, 2015, Addison filed his Notice of Appeal to this Court.

On appeal, Addison contends that: (1) the trial court erroneously determined that Traxx owed no duty of care by making a factual determination as to the location of the hazard and adequacy of the warning; (2) placement of a warning does not always satisfy a proprietor's duty of care as a matter of law; and (3) the trial court erroneously rejected Addison's claim for IIED.

[1] Kentucky Rules of Civil Procedure.

At page 3 of his statement of the case, Addison notes that the trial court's written order of summary judgment contains no findings of fact or conclusions of law. However, a trial court "is not required to make findings of fact when granting or denying a motion for summary judgment. CR 52.01." *Jones v. Dougherty*, 412 S.W.3d 188, 194 (Ky. App. 2012).

"Because summary judgments involve no fact finding, this Court reviews them *de novo,* in the sense that we owe no deference to the conclusions of the trial court." *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000). Our task is to determine 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". . . . S*cifres v. Kraft,* 916 S.W.2d 779, 781 (Ky. App. 1996).

Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991) (citations omitted), sets forth the proper procedure for compliance with CR 56.03 as follows:

> The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. . . . It clearly is not the purpose of the summary judgment rule . . . to cut litigants off from their right of trial if they have issues to try.

In *Shelton v. Kentucky Easter Seals Soc., Inc.,* 413 S.W.3d 901, 911 (Ky. 2013), our Supreme Court explained that:

> [A]n open-and-obvious condition does not eliminate a landowner's duty. Rather, in the event that the defendant is shielded from liability, it is because the defendant fulfilled its duty of care and nothing further is required. The obviousness of the condition is a "circumstance" to be factored under the standard of care. No liability is imposed when the defendant is deemed to have acted reasonably under the given circumstances.

Shelton then sets forth the relevant analysis as follows:

> 1) Along with the defendant's general duty of care, the defendant's duty is outlined by the relationship between the parties. E.g., an invitor has a duty to maintain the premises in a reasonably safe condition in anticipation of the invitee's arrival.
>
> 2) Was the duty breached?
>
> AND
>
> 3) Is the defendant's liability limited to some degree by the plaintiff[']s comparative negligence?
>
> Practically speaking, this analysis will almost always begin with the breach question, given the broad sweep of the general duty of reasonable care.

Id. at 908 (uppercase original).

Addison claims that he slipped in water accumulated at the store's entrance and that the wet floor sign placed some distance away from the hazard was inadequate to serve as a proper warning. Traxx would persuade us that Addison confuses "the issues by now claiming that the wet condition was in a different location than the location of the warning sign and the fall." Traxx also attacks Alcorn's affidavit. "Where questions exist regarding the credibility of

witnesses and the weight of evidence, such matters must await trial and not be determined on motion for summary judgment." *Amos v. Clubb*, 268 S.W.3d 378, 382 (Ky. App. 2008).

Addison cites *Dick's Sporting Goods, Inc. v. Webb,* 413 S.W.3d 891, 899–900 (Ky. 2013), for its factual similarity to the case before us. In that case, our Supreme Court held as follows:

> [w]hether or not the simple use of [floor] mats—without maintaining watch over them or making sure they continued to perform their intended function adequately —was sufficient to satisfy the duty of reasonable care, is a question for the jury.

Addison also cites *Lanier v. Wal-Mart Stores, Inc.,* 99 S.W.3d 431, 437 (Ky. 2003), which imposes "a rebuttable presumption that shifts the burden of proving the absence of negligence, *i.e.,* the exercise of reasonable care, to the party who invited the injured customer to its business premises."

Traxx contends that warning signs like the one in the video are common and that since their use is so widespread, their very use complies with the standard of care.

In this case, the location of the hazard was in dispute. The issue is whether Traxx "acted reasonably *under the given circumstances*." *Shelton,* at 908 (emphasis added). We agree with Addison that the "[c]onflicting photographs, witness credibility, [and] the camera angles of video footage and photographs"

present a "classic factual dispute" for a jury. Therefore, we vacate the order granting summary judgment and remand on this issue.

Next, Addison contends that the trial court erred in granting summary judgment on his IIED claim. We disagree. The elements of proof for IIED are:

> 1. The wrongdoer's conduct must be intentional or reckless;
> 2. The conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality;
> 3. There must be a causal connection between the wrongdoer's conduct and the emotional distress; and
> 4. The emotional distress must be severe.

Kroger Co. v. Willgruber, 920 S.W.2d 61, 65 (Ky. 1996). Although the conduct alleged may be insensitive and even inhumane, it is difficult to meet the high threshold for an IIED claim.

> Citizens in our society are expected to withstand petty insults, unkind words and minor indignities. Such irritations are a part of normal, everyday life and constitute no legal cause of action. It is only outrageous and intolerable conduct which is covered by this tort. *Id.*

In summary, the Order of the Fayette Circuit Court entered on January 12, 2015, granting Summary Judgment for Defendants is affirmed in part, vacated in part, and remanded. We affirm the dismissal of Addison's IIED claim by summary judgment. We vacate the dismissal of Addison's negligence claim by

summary judgment and remand this case to the trial court for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Kevin B. Sciantarelli Louisville, Kentucky	Ronald Green Lexington, Kentucky