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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000362-MR

THOMAS SHIRRELL APPELLANT

v.

APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 11-CI-00245

THE KROGER COMPANY; KROGER LIMITED PARTNERSHIP I; WESTERN KENTUCKY COCA-COLA BOTTLING COMPANY, INC.; AND THE COCA-COLA COMPANY APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, JONES, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Thomas Shirrell brings this appeal from a February 10, 2015, summary judgment of the Taylor County Circuit Court dismissing Shirrell's claims of negligence in their entirety. We reverse and remand.

On May 26, 2010, Shirrell was shopping with his granddaughter at the Kroger store in Campbellsville, Kentucky. While shopping in the store, Shirrell allegedly slipped on posters lying on the floor in a store aisle, causing him to suffer physical injury. The posters were originally assembled as part of a Powerade display and were placed in the store aisle by Western Kentucky Coca-Cola Bottling Company, Inc.

Consequently, Shirrell filed a negligence action in the Taylor Circuit Court against, *inter alios*, The Kroger Co., Western Kentucky Coca-Cola Bottling Company, Inc., and the Coca-Cola Company (collectively referred to as appellees). Shirrell alleged that appellees "knowing that customers were likely to transverse the area, failed to properly maintain and/or inspect and/or warn of any hazards in the area in which . . . [Shirrell] fell." First Amended Complaint at 1. Kroger answered the Complaint and filed a cross-claim against Western Kentucky Bottling Company seeking indemnification. Western Kentucky Bottling Company answered the complaint and also the cross-claim.

Eventually, Kroger Company and Western Kentucky Bottling Co. filed motions for summary judgment. Both parties argued that Shirrell was an invitee at the time of his injury and that the posters on the floor constituted an open and obvious hazard. As an open and obvious hazard, Kroger Co. and Western

Kentucky Bottling Co. asserted that they breached no duty of care to Shirrell, thus entitling them to summary judgment.

The circuit court agreed and granted the motions for summary judgment. By summary judgment entered February 10, 2015, the circuit court held that Sherrill was an invitee at the time of the injury and that the posters lying upon the floor of the Kroger store were open and obvious hazards:

> 20. It is not controverted that Kroger had exercised its duty of care by conducting a sweep of the aisle approximately 30 minutes prior [to] the incident.
>
> 21. The photograph Kroger Exhibit 1 shows that it would be impossible for a customer "exercising ordinary perception" to not visualize the posters on the floor.
>
> 22. There is no evidence that Shirrell's attention was distracted, such as to create an issue of fact as to whether he should have perceived the posters, or would forget what was obvious and fail to protect himself.
>
> . . . .
>
> 23. There is no evidence that Kroger or Coca-Cola breached a duty owed to Shirrell.
>
> 24. Shirrell had a duty to act reasonably to ensure his own safety and did not do so.
>
> 25. There is no genuine issue of material fact.
>
> 26. The Defendants Kroger and Coca-Cola are entitled to judgment as a matter of law.

Summary Judgment at 4-5. This appeal follows.

Shirrell contends that the circuit court erroneously rendered summary judgment dismissing his negligence claims against appellees. Shirrell believes that the circuit court misstated the law as to open and obvious hazards in relation to invitees. Even if the posters were an open and obvious hazard, Shirrell maintains that the open and obvious nature of the posters merely constitutes an issue of fact for the jury to consider when allocating fault between him and appellees.

Summary judgment is proper where there exists no material issues of fact and movant is entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). When considering a motion for summary judgment, all facts and inferences therefrom are to be considered in a light most favorable to the nonmoving party. *Id.* Our review proceeds accordingly.

After the circuit court rendered summary judgment on February 10, 2015, dismissing Shirrell's negligence claims based upon the posters being an open and obvious hazard, the Kentucky Supreme Court rendered *Carter v. Bullit Host, LLC*, 471 S.W.3d 288 (Ky. 2015) on September 24, 2015. Although *Carter* involved an outdoor natural hazard, the Supreme Court clarified the law concerning the open and obvious rule in premises liability cases involving invitees. In particular, the Supreme Court held:

> 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. Under the right circumstances, the plaintiffs 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.

Carter, 471 S.W.3d at 297 (citations omitted). The Supreme Court emphasized that the open and obvious nature of a hazard is generally a question of fact for the jury to consider in allocating fault rather than a question of duty of care for the court to decide. Thus, according to the Supreme Court, an open and obvious hazard is now to be considered by the jury in allocating fault between the landowner and the invitee unless it is "beyond dispute that the landowner had done all that was reasonable" or the hazard "cannot be corrected by any means." *Id.* at 297.

In this case, we must view the facts and inferences in a light most favorable to Shirrell. It is clear that Shirrell was an invitee at the time of his injury at the Kroger store. *See Shelton v. Kentucky Easter Seals Soc'y, Inc.*, 413 S.W.3d 901 (Ky. 2013). The posters were an open and obvious hazard, but it is not beyond dispute that appellees did all that was reasonable to fulfill their duty of care to Shirrell. As in *Carter*, 471 S.W.3d 288, the open and obvious nature of the posters is an issue to be considered by the jury in allocating fault between the parties. Accordingly, we are duty bound to reverse the summary judgment entered

February 10, 2015, and remand for proceedings consistent with the Supreme Court's holding in *Carter*, 471 S.W.3d 288.

For the forgoing reasons the summary judgment of the Taylor Circuit Court is therefore reversed and remanded for proceedings consistent with this opinion.

ALL CONCUR.

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