RENDERED: October 31, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-00341-MR

DOROTHY STONE AND
JOHN STONE — APPELLANTS

v.

APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 02-CI-00160

EDNA CUMMINS,
D/B/A B&E RESTAURANT;
AND MARY FRANKS, D/B/A
B&E RESTAURANT — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: DYCHE, GUIDUGLI AND McANULTY, JUDGES.

GUIDUGLI, JUDGE. In this personal injury action, Dorothy Stone (hereinafter "Dorothy") and John Stone (hereinafter "John" or collectively "the Stones") have appealed from the Grant Circuit Court's January 14, 2003, summary judgment dismissing their claims against Edna Cummins, d/b/a B&E Restaurant (hereinafter "Cummins"), B&E Restaurant (hereinafter "B&E"), and Mary Franks,

d/b/a B&E Restaurant (hereinafter “Franks” or collectively “appellees”). The sole issue on appeal, as framed by the Stones, is whether there was a genuine issue of material fact as to whether the concrete humps in B&E’s parking lot were open and obvious. Because we agree with the appellees that no duty was owed as Dorothy actually saw the concrete humps, we must affirm.

On April 8, 2002, the Stones filed a complaint in Grant Circuit Court alleging that Dorothy sustained bodily injury when she tripped over one of several concrete humps used to divert water in B&E’s parking lot. John claimed damages for loss of consortium. Cummins owned and operated B&E, and she originally rented the building from Robert Franks until his death, and then from his widow, Franks. While he was alive, Robert Franks installed the concrete humps and apparently maintained the parking lot. On April 19, 2001, Dorothy, a resident of Ohio, was traveling southbound on I-75 on her way to Lexington, Kentucky. At approximately 10:45 a.m., she exited the interstate at the Crittenden exit and proceeded to B&E, a restaurant she had visited approximately four times over an eight-year period. The weather on that April morning was clear, and it was not too sunny according to Dorothy’s deposition testimony. Upon entering B&E’s parking lot in her automobile, Dorothy drove over two concrete humps that diagonally traversed the parking lot, and parked her vehicle in a parking place

through which one of the concrete humps ran. Dorothy was aware of the concrete humps because she crossed over them in her vehicle and walked over the one running underneath her automobile as she made her way from the driver's side door to B&E's entrance. Once inside, she used B&E's facilities and refreshed her coffee. She then returned to her car, but did not see the concrete hump as she was looking straight ahead, and therefore she tripped, fell, and broke her hip.

The only depositions taken in this action were of the parties themselves. On November 23, 2002, Cummins and B&E filed a motion for summary judgment, arguing that Dorothy admitted in her deposition testimony that she was aware of the concrete hump prior to her fall. Because the concrete hump was open and obvious, they asserted, no duty was owed as a matter of law. The Stones argued that the hump was not open and obvious when she tripped on it as it was blocked by the shadow cast by her automobile. The circuit court, in an order entered January 14, 2003, granted the motion for summary judgment and dismissed the Stones' claims as follows:

> This matter has come before the Court on Motion of Defendants for Summary Judgment. The parties have filed memoranda with the Court and the Court having reviewed the memoranda,
>
> IT IS ORDERED as follows:

This case involves a trip and fall case in which the Plaintiff fell over a speed bump or drainage bump that crossed the parking lot of the restaurant owned by Defendants. The accident occurred after she had been in the restaurant and was leaving. The incident happened in mid-morning on an April day when the conditions were clear and, whether sunny or overcast, visibility was normal.

The argument of the Defendants is that the bump in the pavement was an open and obvious condition that should have been visible to this Plaintiff and they are therefore not liable to this Plaintiff. Interestingly, the Plaintiff admitted in her deposition that she was aware of the bump when she drove over it as she parked her car and that she saw the speed bump as she entered the restaurant. She had parked her car straddling the speed bump and had then crossed it on her way into the restaurant on foot.

It is the Plaintiff's position that the bump was a dangerous condition that should have been marked in some way by the Defendants and that the combination of sun angle, shadows from utility poles and shadows from the Plaintiff's automobile made the condition one that creates a fact issue for the jury.

The Court has reviewed the cases cited by the parties and finds the dispositive fact in this case to be that the Plaintiff stated that she was aware of and saw the speed bump as she crossed over it going into the restaurant. Plaintiff relies on the fact that she testified that *she did not see it as she came out* because of the various conditions mentioned above and the fact that she was not looking down as she approached [the] bump to create a fact issue herein. However, this Court's review of the cases cited by the parties indicates that even if

> this condition was a dangerous one under the circumstances, the open and obvious cases dictate that the fact that Plaintiff should have seen the condition removes any liability on the part of the Defendants.
>
> In other words, we never get to the question of open and obvious because Plaintiff testified, quite candidly, that she saw the speed bump as she entered the restaurant. Having therefore been on notice of its presence in the area, it was beyond open and obvious in this particular case and the case law of the Commonwealth mandates a judgment in favor of the Defendants. The Court therefore finds that there is no genuine issue as to any material fact relating to the liability of the Defendants and that the Defendants are entitled to judgment as a matter of law.
>
> It is therefore Ordered that the Motion for Summary Judgment of Defendants is GRANTED and the Plaintiff's claims herein are DISMISSED.
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> There being no reason for delay in the entry of this Order, it shall be entered by the clerk immediately and distributed to the parties pursuant to CR 77.04. This is a final and appealable Order.

By stipulation of the parties, on February 27, 2003, the circuit court entered an order *nunc pro tunc* as of January 14, 2003, to the effect that the term "defendants" as used in its previous order referred to all of the defendants rather than just to Franks and B&E, and that the judgment dismissed all of the Stones' claims against each of the defendants. This appeal followed.

On appeal, the Stones argue that they presented an issue of material fact that the construction, placement and maintenance of unmarked concrete humps in the pedestrian area of a parking lot could be tripped over by a person walking normally. On the other hand, the appellees[1] argue that they did not owe any duty to Dorothy because she admitted that she was aware of and saw the concrete humps as she crossed the parking lot to enter B&E. Furthermore, they argue that the case law upon which the Stones relied is for the most part inapplicable. As a result, the circuit court properly entered a summary judgment as there were no issues of material fact to be decided. We agree that the circuit court properly entered a summary judgment.

The law regarding the review of a summary judgment is well settled in this Commonwealth:

> The standard of review on appeal when a trial court grants a motion for summary judgment 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." The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and

[1] In her brief, Franks adopted the arguments advanced by Cummins and B&E in their brief filed July 11, 2003.

> then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." While the Court in Steelvest used the word "impossible" in describing the strict standard for summary judgment, the Supreme Court later stated that that word was "used in a practical sense, not in an absolute sense." Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo. (citations in footnotes omitted)

Lewis v. B&R Corporation, Ky.App., 56 S.W.3d 432, 436 (2001). With this standard in mind, we shall review the circuit court's decision below.

In Rogers v. Professional Golfers Association of America, Ky.App., 28 S.W.3d 869, 872 (2000), this Court recently revisited the area of premises liability as to invitees.

> Generally, the owner of premises to which the public is invited has a general duty to exercise ordinary care to keep the premises in a reasonably safe condition. McDonald v. Talbott, Ky., 447 S.W.2d 84, 86 (1969). However, "reasonable care on the part of the possessor of business premises does not ordinarily require precaution or even warning against dangers that are known to the visitor or so obvious to him that he may be expected to discover them." Johnson v. Lone Star Steakhouse & Saloon of Kentucky, Inc., Ky.App., 997 S.W.2d 490, 492 (1999), quoting Bonn v. Sears, Roebuck & Co., Ky., 440 S.W.2d 526, 528 (1969). . . .

> Further, the court in Smith v. Smith, Ky., 441 S.W.2d 165 (1969), held that
>
> > An invitee has a right to assume that the premises he has been invited to use are reasonably safe, but this does not relieve him of the duty to exercise ordinary care for his own safety, nor does it license him to walk blindly into dangers that are obvious, known to him, or would be anticipated by one of ordinary prudence.
>
> Id. at 166.

See also Standard Oil Company v. Manis, Ky., 433 S.W.2d 856 (1968); Winn-Dixie Louisville, Inc. v. Smith, Ky., 372 S.W.2d 789 (1963).

In most of the cases the Stones cited, the plaintiff either did not see or notice the substance or item that caused him or her to fall, or a natural condition, such as snow and ice, or a spilled substance or object in an aisle caused the fall. The line of cases that includes the Kentucky Supreme Court's recent opinion of Lanier v. Wal-Mart Stores, Inc., Ky., 99 S.W.3d 431 (2003), is inapplicable here as the present case does not involve a foreign substance or object on the floor or the length of time the substance or object was on the floor. Furthermore, in those cases dealing with manmade curbing or abutments, the issue of adequate lighting was of importance. In Downing v. Drybrought, Ky., 249 S.W.2d 711 (1952), the plaintiff tripped over a concrete coping in a parking lot at 8:00 p.m. in

November. She testified that it was dark, but there was no evidence introduced regarding the lighting conditions that actually existed. In Jones v. Winn-Dixie of Louisville, Inc., Ky., 458 S.W.2d 767 (1970), the plaintiff tripped over a concrete abutment in a parking lot after dark in a location where she had never walked before. Again, the former Court of Appeals emphasized the time of day and lighting conditions. Lastly, in Cantrell v. Hardin Hospital Management Corp., Ky., 459 S.W.2d 164 (1970), the plaintiff arrived at the hospital parking lot during daylight hours, but left hours later after dark and tripped over curbing in front of her automobile. Evidence established the lack of lighting in the parking lot that night.

In the present matter, it is undisputed that Dorothy actually saw the concrete hump in the parking lot and crossed over it on her way to B&E's entrance. It is also undisputed that Dorothy spent very little time in B&E prior to exiting the building. She testified that she used the facilities and then proceeded to the counter to purchase coffee. She was not required to wait in line in order to make her purchase. Furthermore, she arrived at and left B&E in the late morning during daylight hours, and testified that the weather conditions and visibility were clear, although it was "not real sunny". Based upon the hour of day and the weather conditions, we can

only conclude that there was sufficient sunlight for her to see in the parking lot.

As a result, we must hold that Dorothy did not exercise ordinary care for her own safety, and that as a result, none of the appellees owed her any type of duty. In Humbert v. Audubon Country Club, Ky., 313 S.W.2d 405, 407 (1958), the former Court of Appeals stated that although a person does not have to look at his feet for each step, "in the exercise of ordinary care for his own safety, one must observe generally the surface upon which he is about to walk." It is undisputed that Dorothy knew about the concrete humps when she exited her car and entered B&E. She cannot be permitted to then "turn off her knowledge of the humps," as argued by the appellees, and claim that she failed to notice the concrete hump protruding from underneath her car when she both drove and walked over the hump a short time earlier. Therefore, the circuit court properly entered a summary judgment as no issues of material fact remained and as the defendants were entitled to a judgment as a matter of law.

For the foregoing reasons, the Grant Circuit Court's summary judgment dismissing the Stones' claim is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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