RENDERED: DECEMBER 24, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-000246-MR

KIMBERLY EDWARDS AND
RODNEY EDWARDS APPELLANTS

v.

APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 01-CI-00080

CAPITOL CINEMAS, INC. APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND KNOPF, JUDGES.

KNOPF, JUDGE: On February 18, 2001, Kimberly Edwards slipped and fell on the terrazzo pavement outside the Capitol Cinemas in Princeton. In May 2001, she and her husband brought suit against the Cinemas' owner, Capitol Cinemas, Inc. They alleged that the terrazzo pavement was unreasonably slick and dangerous and sought damages allegedly incurred as a result of Kimberly's fall. The Caldwell Circuit Court entered summary judgment dismissing the Edwardses' complaint on January 16, 2003. The court ruled that the Edwardses had failed to allege facts from

which a jury could conclude that Capitol had breached its duty to maintain reasonably safe premises. It is from that ruling that the Edwardses appeal. They contend that whether the terrazzo pavement was unreasonably dangerous is a question of fact that should be submitted to a jury. We disagree.

Our Supreme Court has recently summarized the elements of a premises liability claim such as the one the Edwardses advance:

> [t]he customer [plaintiff] retains the burden of proving that: (1) he or she had an encounter with a foreign substance or other dangerous condition on the business premises; (2) the encounter was a substantial factor in causing the accident and the customer's injuries; and (3) by reason of the presence of the substance or condition, the business premises were not in a reasonably safe condition for the use of business invitees. . . . Such proof creates a rebuttable presumption sufficient to avoid a summary judgment or directed verdict, . . . and 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.[1]

If their claim is to survive the motion for summary judgment, the Edwardses must offer to prove facts that would permit a finding that Kimberly encountered a condition on the premises that rendered them unreasonably dangerous. We agree

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[1] Martin v. Mekanhart Corporation, Ky., 113 S.W.3d 95, 98 (2003) (citing Lanier v. Wal-Mart Stores, Inc., Ky., 99 S.W.3d 431 (2003), internal quotation marks omitted).

with the trial court that they have failed to do so. They concede that the weather at the time of Kimberly's mishap was clear and that the pavement was clean, dry, level, and well lit. They have alleged only that Kimberly slipped, that the pavement where she slipped was terrazzo, and that the theater may in the past have placed a rug along the terrazzo portion of the pavement. These allegations do not meet the Edwardses' *prima facie* burden of proof.

As a general rule, of course, the mere fact of a slip is not sufficient to prove the existence of a dangerous condition.[2] Several courts, moreover, including this state's highest court, have held that terrazzo flooring or pavement is not inherently dangerous.[3] In light of this precedent as well as the undisputed fact that Capitol's terrazzo pavement has been in service since the 1930s, we agree with the trial court that the

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[2] *See* Bowers v. Schenley Distillers, Inc., Ky., 469 S.W.2d 565 (1971) (discussing doctrine of *res ipsa loquitor*); Hoskins v. Hoskins, Ky., 316 S.W.2d 368 (1958) (noting that generally negligence is not to be inferred from mere fact of accident or injury); Murphy v. Conner, 622 N.Y.S.2d 494 (N.Y. 1994) (slip on tiles at shopping mall did not, by itself, prove that the tiles were dangerous).

[3] Weathers v. Estate of Morris, Ky., 397 S.W.2d 770 (1965); Jones v. Parish of Jefferson, 665 So. 2d 570 (La. App., 1995); Coral Park, Inc. v. Guy, 202 S.E.2d 548 (Ga. App., 1973); Berman v. H. J. Enterprises, Inc., 214 N.Y.S.2d 945 (N.Y. App., 1961); Vogrin v. Forum Cafeterias of America, Inc., 308 S.W.2d 617 (Mo. 1957).

Edwardses were obliged to allege more than the mere fact of a slip on the terrazzo.

They had to allege that there was something about this particular pavement, improper maintenance, for example, that rendered it unsafe. They have made no such allegation. Their assertion that the theater may once have placed a rug on the terrazzo is not enough. There are many reasons for using rugs. Theaters commonly use them during or on account of inclement weather. The weather at the time of Kimberly's accident, however, was clear. We agree with the trial court that the inference the Edwardses would draw from the alleged rug—that Capitol believed the terrazzo to be slick and dangerous—is, without more, merely speculative and thus would not support a jury verdict in their favor.[4]

Because the Edwardses failed to allege facts that would permit a finding that the pavement where Kimberly slipped was unreasonably dangerous, Capitol was entitled to summary judgment as a matter of law.[5] Accordingly, we affirm the January 16, 2003, judgment of the Caldwell Circuit Court.

ALL CONCUR.

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[4] Hollon v. Greyhound Corporation, Ky., 272 S.W.2d 329 (1954); Porter v. Cornett, 306 Ky. 25, 206 S.W.2d 83 (1947).

[5] Steelvest v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991).

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