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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2005-CA-001493-MR

MELANIE MOORE — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA GOODWINE, JUDGE
ACTION NO. 04-CI-04018

WILLIAM LINCKS
AND JOANN LINCKS — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: BARBER, KNOPF, AND MINTON, JUDGES.

KNOPF, JUDGE: Melanie Moore appeals from a July 12, 2005, summary judgment of the Fayette Circuit Court dismissing her claim for damages against William and Joann Lincks. Moore tripped and broke her wrist in the driveway of the Linckses' Lexington home during a yard sale; she alleges that the Linckses were negligent in failing to warn her of or to protect her

against the ridge formed where two of the driveway's concrete slabs come together unevenly. The trial court ruled (1) that Moore had failed to sustain her burden of coming forward with significant evidence that the driveway defect caused her fall and injury; (2) that the alleged defect was an open and obvious hazard thus imposing no duty on the Linckses to say or do anything about it; and (3) that the ridge, which Moore's evidence suggests was about an inch high, was de minimis, or not unreasonably dangerous, as a matter of law. Because we disagree with all of these conclusions, we reverse and remand for additional proceedings.

The well established rule in this state, of course, is that summary judgment is proper if, but only if, there are no issues of material fact and the moving party is entitled to judgment as a matter of law.[1] As the trial court correctly noted, the plaintiff opposing a properly supported summary judgment motion must come forward with significant evidence in support of her claim.[2] That evidence and the rest of the record, however, are to be construed in a light most favorable to the plaintiff/opponent, and summary judgment is not proper unless it

[1] CR 56.03.

[2] Wymer v. JH Properties, Inc., 50 S.W.3d 195 (Ky. 2001).

appears impossible for the plaintiff to produce evidence at trial warranting a judgment in her favor.[3]

Construed favorably to Moore, the record indicates that Moore's accident occurred on October 11, 2003, when the Linckses participated in a community wide yard sale organized by their neighborhood association. They had arranged sale items on either side of their three-car driveway and down the center so that shoppers could proceed up the aisle on one side, into the garage, then out and back toward the street down the aisle on the other side. Moore arrived at the Lincks's sale at about 8:00 a.m. She began browsing on the right-hand side, selected a few items in the garage, and paid for them as she exited the garage on the left-hand side. She was leaving down the left hand aisle and looking ahead at another sale across the street when something seemed to grab her toe and she tripped and fell. Moore told the Linckses' insurance adjuster and later testified at her deposition that she was at first dazed by her fall and did not even wonder what had caused it. She assumed that she had just been clumsy. She had not been looking at her feet at the time, and so, even at her interviews, could not say with absolute certainty what the cause had been. Mrs. Lincks had brought a lawn chair to her, however, so that she might compose

[3] Horne v. Precision Cars of Lexington, Inc., 170 S.W.3d 364 (Ky. 2005) (citing Steelvest, Inc. v. Scansteel Service Center, 807 S.W.2d 476 (Ky. 1991)).

herself, and sitting in the chair she had noticed the ridge running across the driveway at about the place where her feet had been. While she was sitting there, she claims, two other people stumbled, though they did not fall, at the same place. She then inferred that she had tripped on the ridge, and because it was apparent that she had seriously injured her wrist she asked Mrs. Lincks for information about her insurer. The insurance company's eventual denial of her claim led to this action.

The trial court ruled that Moore's claim must fail because of her admission that she did not see and could not with certainty say what caused her fall. Moore's burden at trial, however, would not be proof beyond all doubt, but merely proof by a preponderance of the evidence; *i.e.,* proof on the basis of which a rational juror could conclude that the elements of Moore's claim were more likely than not.[4] She would be entitled, furthermore, to establish those elements, including causation, by circumstantial evidence.[5] Construed favorably to her and notwithstanding her admission of incertitude, the sensation that something grabbed her toe, the fact that her feet landed near the ridge, the fact that others appeared to stumble on the ridge, and the fact that no other reason for her fall appeared,

[4] Huffman v. SS. Mary and Elizabeth Hospital, 475 S.W.2d 631 (Ky. 1972).

[5] *Id.*

was circumstantial evidence sufficient to permit a rational juror to infer that the ridge caused Moore's fall. The trial court erred, therefore, by ruling that Moore's claim failed for a lack of significant evidence on that issue.

Even if Moore can prove that she tripped on the ridge, however, she must also be able to establish that the Linckses were responsible. As our Supreme Court recently summarized in Horne v. Precision Cars of Lexington, Inc.,[6] the possessor of land is subject to liability for physical harm caused to his or her invitees by a condition on the land if, but only if, he or she

> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger. . . . A possessor of land is not liable to his [or her] invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.[7]

The trial court ruled that Moore's claim failed elements (a) and (b) as a matter of law.

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[6] 170 S.W.3d 364 (Ky. 2005).

[7] Horne v. Precision Cars of Lexington, Inc., 170 S.W.3d at 367 (quoting *Restatement (Second) of Torts* §§ 343 and 343A (1965); internal quotation marks and emphasis omitted).

First, relying on Ohio cases applying that state's two-inch de minimis rule, the court held that the approximately one-inch ridge in this case did not pose an unreasonable risk of harm to Moore. In Ohio, apparently, sidewalk and other exterior walkway irregularities amounting to less than two inches are generally deemed de minimis as a matter of law and will not support a negligence action.[8] The Illinois courts have adopted a similar *per se* rule, but have distinguished public from private walkways and apply the rule only to the former.[9] Municipalities, those courts reason, would incur an intolerable economic burden if required to repair or warn against every slight defect in their miles of sidewalks.[10] The burden on the possessors of private walkways is generally much less, however, so that a presumption with respect to the risk posed by defects in private walkways is not warranted.

At the opposite end of the spectrum, the New York courts apply no presumption even with respect to public walks:

> Whether a particular height difference between sidewalk slabs constitutes a dangerous or defective condition depends on the particular facts and circumstances of each case, including the width, depth, elevation, irregularity, and appearance of

[8] Cash v. City of Cincinnati, 421 N.E.2d 1275 (Ohio 1981). *See* Annotation, "Degree of Inequality in Sidewalk which Makes Question for Jury or for Court, as to Municipality's Liability," 37 ALR2d 1187 (1954).

[9] Putman v. Village of Bensenville, 786 N.E.2d 203 (Ill.App. 2003).

[10] *Id.*

> the defect as well as the time, place, and circumstances of the injury. . . . There is no "minimal dimension test" or per se rule that a defect must be of a certain minimum height or depth in order to be actionable. . . . Whether a particular condition gives rise to liability for negligent maintenance is generally an issue of fact for the jury. . . . In some cases, however, the []trivial nature of the defect may loom larger[] than any other element, thus justifying a court's refusal to submit the issue to a jury. . . . In such cases, a small difference in elevation between slabs of pavement will be considered too trivial to be actionable unless the defect has the characteristics of a "trap", "snare", or nuisance.[11]

In City of Nicholasville v. Scott,[12] this state's highest court "refused to set a limit in respect to a defect in a sidewalk beyond which the question of negligence would be one for the jury and under which it would be held as a matter of law that the City was not negligent."[13] The Court applied what was essentially New York's totality of the circumstances approach to walkway-defect cases. Although Scott is not recent, it appears still to be good law. It's insistence that all the circumstances be considered is consistent with this state's conservative summary judgment standard[14] and with recent

[11] Tesak v. Marine Midland Bank, N.A., 678 N.Y.S.2d 226, 226-27 (N.Y.App. 1998) (citations and internal quotation marks omitted). Thomas v. City of New York, 753 N.Y.S.2d 468 (N.Y.App. 2003).

[12] 388 S.W.2d 612 (Ky. 1965).

[13] City of Nicholasville v. Scott, 388 S.W.2d at 613.

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

decisions by our Supreme Court requiring or upholding jury determinations of negligence.[15] The trial court erred, therefore, by presuming, without considering the surrounding circumstances, that the one-inch ridge across the Linckses' private walkway was not unreasonably dangerous as a matter of law.

The circumstances in this case include the fact that invitees such as Moore were apt to be distracted by sale items, by other shoppers, and by the unusual commotion in the neighborhood. Our Supreme Court has recently noted that foreseeable distractions such as these may render an otherwise obvious hazard unreasonably dangerous and thus impose a duty on the possessor to the property to warn or to take other precautions.[16] Whether the Linckses breached such a duty in these circumstances is a question for the jury.

For the same reason, the trial court erred by deeming the walkway defect so open and obvious as to relieve the Linckses as a matter of law of all responsibility to protect their yard-sale invitees against it. The trial court relied on contributory negligence cases holding that while an invitee may

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[15] Horne v. Precision Cars of Lexington, Inc., *supra;* Bartley v. Educational Training Systems, Inc., 134 S.W.3d 612 (Ky. 2004); Martin v. Mekanhart Corpration, 113 S.W.3d 95 (Ky. 2003); Lanier v. Wal-Mart Stores, Inc., 99 S.W.3d 431 (Ky. 2003).

[16] Horne v. Precision Cars of Lexington, Inc., *supra.*

assume that the premises she has been invited to use are reasonably safe, that "does not relieve [her] of the duty to exercise ordinary care for [her] own safety nor license [her] to walk blindly into dangers which are obvious, known to [her], or that would be anticipated by one of ordinary prudence."[17] Although these cases have been superceded somewhat by the adoption of comparative fault, it remains true that open hazards that are known or should be obvious to the invitee give rise to no duty on the part of the owner to warn or to protect the invitee against them.[18] As noted above, however, our Supreme Court has recently explained that otherwise obvious hazards may give rise to a duty of reasonable care if the circumstances are such that the owner "has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it."[19] In such a case under our current comparative negligence regime, even if the invitee breached her

[17] Humbert v. Audubon Country Club, 313 S.W.2d 405, 408 (Ky. 1958).

[18] Horne v. Precision Cars of Lexington, Inc., *supra* (citing Bonn v. Sears, Roebuck & Co., 440 S.W.2d 526 (Ky. 1969) and Johnson v. Lone Star Steakhouse, 997 S.W.2d 490 (Ky.App. 1999)).

[19] Horne v. Precision Cars of Lexington, Inc., 170 S.W.3d at 367 (quoting from *Restatement (Second) of Torts* § 343A comment f (1965); internal quotation marks omitted).

own duty of care, her recovery could be limited, but her claim would not be barred.[20]

Moore testified that she did not see the ridge across her path because she was watching the crowd and looking ahead to the next sale. She also testified that after her fall as she sat regaining her composure she saw two other people stumble at the same place. Because the hazard was thus not known to her and because in these distracting circumstances it was not so obvious as to eliminate the Linckses' duty of care as a matter of law, Moore is entitled to present her claim to a jury.

In sum, although property owners are not required to maintain perfect walkways, even relatively minor defects may give rise to a duty of care in circumstances, such as those presented in this case, where a large number of invitees will encounter the defect amid distractions and obstacles apt to render them oblivious to it. The trial court erred by ruling that the defect in the Linckses' walkway was, as a matter of law, too minor and too obvious to require precautions, and by ruling that Moore had failed to present significant evidence that the defect caused her fall. Accordingly, we reverse the July 12, 2005, summary judgment of the Fayette Circuit Court and remand the matter for trial.

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[20] Regenstreif v. Phelps, 142 S.W.3d 1 (Ky. 2004) (citing Hilen v. Hays, 673 S.W.2d 713 (Ky. 1984)). *See also* Reece v. Dixie Warehouse and Cartage Company, _S.W.3d_ (Ky.App. 2006) 2006 WL 57281 (holding that the obviousness of a hazard may become a jury issue if the material evidence is conflicting).

ALL CONCUR.

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