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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2007-CA-001127-MR

RICHARD CRAWFORD — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 05-CI-05411

EXTENDED STAY AMERICA, LLC — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: FORMTEXT ACREE, DIXON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Richard Crawford brings this appeal from an April 10, 2007, Order of the Fayette Circuit Court granting summary judgment in favor of Extended Stay America, LLC (Extended Stay) and dismissing Crawford's complaint. We affirm.

The facts in this case are not in dispute. In December 2004, Crawford, his wife, and two grandchildren were guests at the Extended Stay hotel

in Lexington, Kentucky. On the evening of December 22, 2004, an ice storm hit Lexington. The storm continued into the next day and the ice did not melt due to below freezing temperatures. During the day of December 23, Crawford safely made several trips from his room to his automobile in Extended Stay's parking lot. However, at approximately 3:00 p.m., he made another attempt to get to his automobile when he slipped and fell on ice in the parking lot and suffered a serious injury. Crawford subsequently brought a negligence action against Extended Stay for its failure to adequately remove ice from the parking lot, thus causing his injury. The circuit court granted summary judgment dismissing Crawford's claim presumably under the precepts of *Standard Oil Co. v. Manis*, 433 S.W.2d 856 (Ky. 1968). This appeal follows.

We begin our analysis by determining the appropriate standard of review. In this case, the circuit court granted summary judgment to Extended Stay and dismissed Crawford's complaint pursuant to Kentucky Rules of Civil Procedure (CR) 56. Summary judgment is proper where there exists no genuine issue of material fact and movant is entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476 (Ky. 1991). In reviewing the circuit court's judgment we must determine whether the circuit judge correctly found that there were no issues as to any material fact and that Extended Stay was entitled to a judgment as a matter of law. *Pearson ex rel. Trent v. Nat'l Feeding Sys. Inc.*, 90 S.W.3d 46 (Ky. 2002). Summary judgment is only proper where it would be impossible for Crawford to produce any evidence at trial

warranting a judgment in his favor. *Steelvest*, 807 S.W.2d 476. Of course, in ruling on the motion for summary judgment, the court is required to construe the record in a light most favorable to the party opposing the motion. *Id.*

This case looks to the duties and liabilities of the owner of a business premises to an invitee on the premises. There is no dispute that Crawford was an invitee on Extended Stay's premises at the time of his injury in December 2004. "An invitee enters upon the premises at the express or implied invitation of the owner or occupant on business of mutual interest to them both, or in connection with business of the owner or occupant." *Scuddy Coal Co. v. Couch*, 274 S.W.2d 388, 390 (Ky. 1955).

The case law in Kentucky regarding liability of owners of business premises to invitees has developed within three distinct categories. These specific categories of liability were recently discussed in detail by the Kentucky Supreme Court in *Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364 (Ky. 2005). We need only address the first category discussed by Justice Cooper in *Horne* which is applicable and controlling as to the facts of this case. Therein, Justice Cooper stated the following:

> The first category holds that the owner of a business premises has *no duty* to protect invitees from injuries caused by " *natural* outdoor hazards which are as obvious to an invitee as to an owner of the premises." *Standard Oil Co. v. Manis,* 433 S.W.2d 856, 858 (Ky.1968) (snow and ice) (emphasis added). *See also PNC Bank, Ky., Inc. v. Green,* 30 S.W.3d 185, 186 (Ky.2000) (same); *Corbin Motor Lodge v. Combs,* 740 S.W.2d 944, 946 (Ky.1987) (same) (holding that

> adoption of comparative negligence and abrogation of assumption of risk defense did not mandate a different result, because negligence is immaterial if there is no duty); *Rogers v. Prof'l Golfers Ass'n of Am.,* 28 S.W.3d 869, 872 (Ky.App.2000) (wet grassy hillside). An exception to this rule occurs when the owner undertakes protective measures that, in fact, heighten or conceal the nature of the hazardous condition, thus making it worse. *Estep v. B.F. Saul Real Estate Inv. Trust,* 843 S.W.2d 911, 914 (Ky.App.1991), *as explained by PNC Bank,* 30 S.W.3d at 187.

Horne, 170 S.W.3d at 368.

Both parties acknowledge in their arguments to this Court that the controlling precedent is set forth in *Standard Oil* as noted by the Kentucky Supreme Court in *Horne*.

However, Crawford argues that the common-law rule enunciated in *Standard Oil* and reaffirmed in *PNC Bank, Kentucky, Inc. v. Green*, 30 S.W.3d 185 (Ky. 2000) should be abrogated in favor of the duty of reasonable care as found in Restatement (Second) of Torts, § 343A (2008). Our review of applicable law provides that *Horne* is the most recent pronouncement by the Kentucky Supreme Court on this issue. Under Supreme Court Rule 1.030, this Court is bound to follow established Supreme Court precedent. We have no authority to "overturn" a prior Supreme Court decision such as *Standard Oil* nor has Crawford suggested any authority in its argument to this Court.

Crawford presents a compelling case for the adoption of § 343A of the Restatement, and the application of the duty of reasonable care by business owners to invitees in response to naturally occurring hazards. Unfortunately, the Kentucky

Supreme Court disagrees, and in *Horne*, specifically limited the application of § 343A of the Restatement to the category involving hazards caused by the owner of the business premises which may be "known or obvious to" the invitee. *Horne*, 170 S.W.3d at 368. Until the Supreme Court revisits this issue, we simply have no authority to ignore or overturn *Standard Oil* and its progeny.

Crawford also contends that the circuit court erred by not imposing the duty of reasonable care, similar to that owed by a landlord to a tenant, upon Extended Stay as an innkeeper. Crawford correctly notes that a landlord owes a duty to exercise reasonable diligence in keeping common areas in a safe condition for its tenants. *See Whatley v. Blue Lick Apts., Ltd.*, 200 S.W.3d 497 (Ky.App. 2006). Crawford asserts that the hotel-guest relationship is "closely akin" to the landlord-tenant relationship; thus, the same duty should apply. However, Crawford again fails to cite this Court to any authority supporting such an extension of this duty. In fact, the common law in Kentucky at this time recognizes a distinction between the duty of care owed by a landlord to a tenant and the duty owed to a business invitee. *Id.* Without any authority to set aside existing precedent, we must again reject Crawford's claim of error.

For the foregoing reasons, the Order of the Fayette Circuit Court granting summary judgment to Extended Stay is affirmed.

DIXON, JUDGE, CONCURS.

ACREE, JUDGE, CONCURS AND FILES SEPARATE OPINION.

ACREE, JUDGE, CONCURRING: While I concur with the majority opinion that we are bound to follow the "no duty" rule of *Standard Oil Co. v. Manis*, 433 S.W.2d 856 (Ky. 1968), I write separately to bring attention to two related points raised indirectly in Crawford's brief.

First, in an introductory section of his brief entitled "Kentucky's General Duty of Care," Crawford posits a "universal duty owed by all to all." *Citing, Gas Service Co., Inc. v. City of London*, 687 S.W.2d 144, 148 (Ky. 1985). If by "universal duty" Crawford means "a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone[,]" he is expressing a view consistent with the dissent in the landmark tort case, *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928). *Palsgraf,* 162 N.E. at 102 (Andrews, J., dissenting). If *this* view had prevailed in our jurisprudence, the analytical starting point of all tort claims would be the presumption that a duty always exists. But this view did not prevail.

Kentucky jurisprudence has followed *Palsfraf*'s majority view requiring some relational context between tortfeasor and claimant, *see Jenkins v. Best,* 250 S.W.3d 680 (Ky.App. 2007), before a finding of any duty "*commensurate with the circumstances*[.]" *Kirschner by Kirschner v. Louisville Gas & Elec. Co.*, 743 S.W.2d 840, 848 (Ky. 1988)(emphasis supplied). Consequently, contrary to Crawford's suggestion, it would be both unwise and improper to eliminate from consideration any circumstance, including the location and source of the hazard. However, this raises the second point.

The majority opinion in which I join holds that *Standard Oil* represents a bright line rule that the owner of a business premises has "no duty" to protect invitees from injuries caused by hazards that are natural in their origin, located outside, and as obvious to an invitee as to an owner of the premises. *Id.* at 857. I cannot disagree. Furthermore, our opinion notes that *Horne v. Precision Cars of Lexington, Inc.,* 170 S.W.3d 364 (Ky. 2005) seems to re-affirm *Standard Oil*, albeit in *dicta.* But what is troubling about *Horne* is its schizophrenic view of Restatement (Second) of Torts §§ 343 and 343A. After summarizing, and even highlighting, § 343A's exception to the "known and obvious danger" exclusion from liability, the Supreme Court reiterated the "no duty" language of *Standard Oil*. One cannot be sure whether the Supreme Court in *Horne* intended § 343A to factor into a court's determination of duty, *Horne* at 367, or whether the reiteration of the *Standard Oil* "no duty" rule remains subject only to one exception – where the owner heightens or conceals the nature of the hazardous condition. *Horne* at 368, *citing Estep v. B. F. Saul Real Estate Inv. Trust,* 843 S.W.2d 911, 914 (Ky.App. 1991). Because all of this language in *Horne* was *dicta*, the continued viability of the "no duty" approach seems to me left open to question.

I agree with Crawford that Kentucky's embrace of the "no duty" rule appears to put us in the minority among the states. However, whether there is a trend away from or toward the "no duty" approach to premises liability under these circumstances is less certain than Crawford suggests. *See, e.g.,* Jeffrey H. Powell, "*Marshall v. Burger King Corp.*: Making a Mess of 'Duty' For Businesses in

Illinois," 28 N. Ill. U. L. Rev. 95, 95 fn.1 (Fall 2007); David Owen, "Duty Rules," 54 Vand. L. Rev. 767, 774-80 (April 2001)(Section I.B. entitled, "The Ebb and Flow of Duty"). And so, while "[t]he Court of Appeals is compelled to follow precedent established by the decisions of the Supreme Court[,]" I accept the late Chief Justice Stephens' invitation to criticize precedent that this Court lacks the authority to reverse. *Special Fund v. Francis,* 708 S.W.2d 641, 642 (Ky. 1986)(Requiring adherence to precedent "is not to say, however, that disagreement is prohibited or constructive criticism banned.").

"No-duty rules are appropriate only when a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases." Restatement (Third) of Torts: Liability for Physical Harm § 7 cmt. a, at 91 (Proposed Final Draft No. 1, 2005). This is because no-duty rules cut off entire groups of claims in a relatively draconian manner. My criticism of *Standard Oil* and *Horne*, then, is that the former represents a forty-year-old view of tort law and the latter, in *dicta*, appears to simultaneously embrace contradictory tort liability theories.

I believe Kentucky's Supreme Court must consciously guide our jurisprudence in one of the two directions to which *Horne* refers. Until it does so, we have no choice but to follow the precedent in *Standard Oil*.

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