

RENDERED: DECEMBER 12, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002256-MR

LUCY GORDON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 06-CI-006336

NORTON HOSPITALS, INC., D/B/A
NORTON AUDUBON HOSPITAL

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: MOORE, TAYLOR, AND VANMETER, JUDGES.

MOORE, JUDGE: Lucy Gordon (Gordon) appeals from the Jefferson Circuit Court's order denying her motion to reconsider that court's prior order granting the motion for summary judgment filed by Norton Hospitals, Inc., d/b/a Norton Audubon Hospital (Norton). After a careful review of the record, we reverse and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

Gordon's daughter was an emergency room patient at Norton in July 2005, and, while visiting her daughter at the hospital, Gordon went outside multiple times to speak on her cellular telephone. At the time of the incident in question, Gordon was outside the hospital for the purpose of returning a telephone call when she leaned against a pole¹ that she believed was concrete, but it was in fact made of molded plastic. When Gordon leaned against it, the pole collapsed. Gordon fell onto the asphalt and onto her right shoulder, injuring herself.

Gordon filed the present lawsuit in circuit court, seeking damages for the injuries she sustained on Norton's premises. Norton moved for summary judgment, and the circuit court granted that motion. Gordon moved the circuit court to reconsider, but the circuit court denied Gordon's motion to reconsider. Gordon now appeals, contending that the circuit court improperly granted summary judgment.

II. STANDARD OF REVIEW

"The standard of review on appeal of a 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."

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment should be "cautiously applied . . . in actions involving allegations of negligence."

Poe v. Rice, 706 S.W.2d 5, 6 (Ky. App. 1986) (citations omitted). "The record

¹ Gordon testified during her deposition that the pole was approximately waist-high, and that the injury in question was sustained during the daylight hours.

must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Serv. Ctr.*, 807 S.W.2d 476, 480 (Ky. 1991). “Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact.” *Id.* Further, “the movant must convince the court, by the evidence of record, of the nonexistence of an issue of material fact.” *Id.* at 482.

III. ANALYSIS

Gordon argues that the circuit court improperly granted Norton’s motion for summary judgment. Gordon was an “invitee” of Norton at the time of the incident. “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.” *Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364, 367 (Ky. 2005) (internal quotation marks omitted).

In *Horne*, the Kentucky Supreme Court quoted the Restatement (Second) of Torts, Sections 343 and 343A, concerning the liability of property owners to invitees, as follows:

§ 343. Dangerous Conditions Known to or Discoverable
by Possessor

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(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.

§ 343A. Known or Obvious Dangers

(1) A possessor of land is not liable to his 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.*

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

Id.

The Court in *Horne* continued, noting that “‘Known’ means ‘not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves.’” *Id.* (citing Restatement (Second) of Torts § 343A cmt.

b). “‘Obvious’ denotes that ‘both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment.’” *Id.* (citing Restatement (Second) of Torts § 343A cmt. b).

One category of premises liability cases that has developed through case law is the category involving “hazards caused by the owner. If the hazard is ‘known or obvious to’ the invitee, the owner has no duty to warn or protect the invitee against it.” *Id.* at 368. In *Horne*, an invitee was walking through a parking lot when he tripped on a parking barrier that he had not seen and fell. The Court found that “the parking barrier on which Appellant tripped and fell was not ‘known or obvious to’ Appellant.” *Id.* at 370. Therefore, the Supreme Court held that summary judgment should not have been granted in favor of the parking lot’s owner, and the case was reversed and remanded with instructions for the circuit court to allow the case to proceed to a jury trial. *See id.*

In *Bartley v. Educational Training Sys., Inc.*, 134 S.W.3d 612 (Ky. 2004), the Supreme Court noted that “[u]nder common law principles of negligence, a possessor of land may be subject to liability for failing to protect his or her invitees against dangerous conditions involving unreasonable risks of harm.”

Bartley, 134 S.W.3d at 614. The Court continued, noting that

[t]he occupier is not an insurer of the safety of invitees, and his duty is only to exercise reasonable care for their protection. But the obligation of reasonable care is a full one, applicable in all respects, and extending to everything that threatens the invitee with an unreasonable risk of harm.

Id. at 615 (internal quotation marks omitted).

Thus, in the present case, if a reasonable inference can be made that the pole constituted an unsafe condition on the premises, then summary judgment should not have been granted. *See id.* In premises liability actions, the invitee

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 [invitee'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.

Id. at 616 (internal quotation marks omitted).

In her deposition, Gordon testified that the pole “looked like concrete to” her, rather than plastic. Such testimonial evidence and the nature of the pole were sufficient to create a factual issue concerning the obviousness of the pole as a danger and Gordon’s knowledge thereof. Consequently, this issue should have been presented to the jury. *See Reece v. Dixie Warehouse & Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App. 2006).

Accordingly, the order of the Jefferson Circuit Court is reversed and remanded with instructions to allow the case to proceed to trial.

ALL CONCUR.

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