RENDERED: DECEMBER 19, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002097-MR

MARY BELLE DIXON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 07-CI-00238

MCGLONE CONSTRUCTION, LLC;
AND 2375 NICHOLASVILLE, LLC — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO AND THOMPSON, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Mary Belle Dixon appeals from a summary judgment granted against her on claims of negligence arising from a trip and fall incident in a public parking lot. We affirm.

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Dixon went to the Regency Center Shopping area in Lexington, Kentucky, for the purpose of picking up a carry-out order at a Panera's restaurant. When she exited her vehicle, she took three or four steps and tripped over an unmarked manhole cover that protruded from the pavement. Dixon fell and sustained injuries to her hand as a result.

Dixon filed suit against 2375 Nicolasville, LLC, the owner of the property where she was injured. 2375 Nicolasville filed a third-party complaint against McGlone Construction, the paving contractor. Following the taking of Dixon's deposition, both 2375 Nicolasville and McGlone filed motions for summary judgment. The trial court granted summary judgment finding that the manhole cover constituted an open and obvious hazard. This appeal followed.

Dixon argues that the trial court erred by granting summary judgment because it misapplied the law regarding premises liability and did not properly apply the facts according to the proper standard of summary judgment.

The standard of summary judgment is well-established:

> 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. Kentucky Rules of Civil Procedure (CR) 56.03. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. *Goldsmith v. Allied Building Components, Inc.*, Ky., 833 S.W.2d 378, 381 (1992). "The record 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 Service Center, Inc*., Ky., 807 S.W.2d 476, 480 (1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest*, 807 S.W.2d at 480, citing *Paintsville Hospital Co. v. Rose*, Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor. . . ." *Huddleston v. Hughes*, Ky.App., 843 S.W.2d 901, 903 (1992), citing *Steelvest*, supra (citations omitted).

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App.1996).

In cases involving hazards created by property owners, the owners owe no duty to warn or protect an invitee if the hazard is known or obvious to the invitee. *Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364, 368 (Ky. 2005). A hazard is obvious when "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.* at 367 (quoting Restatement (Second) of Torts § 343A cmt. b (1965)). Additionally, "[i]n pedestrian fall-down cases arising out of defects in or obstructions on the walking surface the visibility factor is vital." *Id.* at 369 (quoting *Jones v. Winn-Dixie of Louisville, Inc.*, 458 S.W.2d 767, 769 (Ky.1970)).

The incident in the present case occurred during daylight. Dixon testified that she did not see the manhole cover until she fell. However, she also testified that the manhole cover was not obstructed by anything, vehicles or otherwise. Dixon stated that she was not distracted at the time and that there was nothing that would have prevented her from seeing the manhole cover. Further,

Dixon stated that nothing would have prevented her from taking an alternate course through the parking lot. Based on this evidence, we agree with the trial court that the manhole cover was an obvious hazard that should have been recognized by an ordinary person exercising reasonable care. Therefore, summary judgment was appropriate.

Accordingly, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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