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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001224-MR

PHILLIP LEWIS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 08-CI-006216

FAULKNER REAL ESTATE CORPORATION;
CENTRAL RETAIL, LLC; AND
CENTRAL RETAIL OUTLOT, LLC — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; CLAYTON AND THOMPSON, JUDGES.

CLAYTON, JUDGE: While walking his dog, Phillip Lewis was injured when he stepped into a hole on the retail property of Faulkner Real Estate Corporation, Central Retail, LLC, and Central Retail Outlot, LLC (hereinafter "Faulkner"). Lewis appeals from the grant of Faulkner's summary judgment motion wherein the

trial court determined, as a matter of law that he would be unable to prove that Faulkner breached a duty of care owed to him. After careful consideration, we affirm the decision of the trial court.

On the date of the accident, which Lewis is unable to specifically recall, in the early afternoon, Lewis and his roommate were each walking a dog. They were engaged in conversation. The area was familiar to Lewis because it was his neighborhood, and he often walked down this particular street. On that day, during the walk, Lewis stepped off the sidewalk and into a hole, which caused injury to his foot. Lewis does not know what caused him to step off the sidewalk and into the hole, but when he put his left foot into the hole, he fell forward and landed in the grass on his hands and knees. After a few seconds, he got up and returned home. He did not seek medical attention until the following day. Lewis provided additional information that the weather was clear and that he was wearing slide-on sandals. Furthermore, he indicated that nothing on the sidewalk obstructed him nor were any other pedestrians who caused him to move off of the sidewalk.

On June 10, 2008, Lewis filed a complaint in Jefferson Circuit Court alleging negligence on the part of Faulkner. After both written discovery and depositions were conducted, on March 27, 2009, Faulkner filed a motion for summary judgment alleging that because the condition of the hole where Lewis caught his foot was an "open and obvious" condition, there were no genuine issues of material fact. Lewis filed a response and Faulkner a reply to this response. On

June 3, 2009, the trial court granted the summary judgment on the basis that the condition was open and obvious. Thereafter, Lewis appealed the trial court's grant of the summary judgment motion.

The standard of review on appeal of summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact, and hence, the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03; *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). Moreover, a summary judgment is reviewed de novo because factual findings are not at issue. *Pinkston v. Audubon Area Community Services, Inc.*, 210 S.W.3d 188 (Ky. App. 2006), *citing Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000). In reviewing a grant of summary judgment, we, like the trial court, must consider the facts in the light most favorable to the non-moving party, in this case, Lewis. *Steelvest, Inc. v. Scansteel Service Center., Inc.*, 807 S.W.2d 476 (Ky. 1991). Keeping this in mind, we consider the salient facts giving rise to Lewis's complaint to determine whether Faulkner has established its right to judgment "with such clarity that there is no room left for controversy." *Id*. at 482.

The issue herein is whether the grant of summary judgment was proper. In particular, we must discern whether any material fact exists precluding the court's assessment that the condition on the premises was "open and obvious." On appeal, Lewis argues that the condition of the hole, from his perspective, was not open and obvious, and therefore, Faulkner owed him a duty. Faulkner counters

that the condition of the hole was noticeable, and thus, under the "open and obvious" doctrine, it did not owe a duty to warn an invitee.

This case involves a negligence-based premises liability action. The parties do not dispute that Lewis's status on the premises was that of an invitee. In Kentucky, the possessor of land has a duty to an invitee to maintain property in a reasonably safe condition. *City of Madisonville v. Poole*, 249 S.W.2d 133, 135 (Ky. 1952). The landowner, however, does not have a duty to warn an invitee of any conditions that are open and obvious to a reasonable person. *Bonn v. Sears, Roebuck & Co.,* 440 S.W.2d 526, 528 (Ky. 1969); *Johnson v. Lone Star Steakhouse & Saloon of Kentucky, Inc.*, 997 S.W.2d 490, 492 (Ky. App. 1999). The term "obvious" has been explained to mean "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." *Bonn*, 440 S.W.2d 529. Thus, the Court has described the invitee's responsibilities as a visitor in the following manner:

> An invitee has a right to assume that the premises he has been invited to use are reasonably safe, but this does not relieve him of the duty to exercise ordinary care for his own safety, nor does it license him to walk blindly into dangers that are obvious, known to him, or would be anticipated by one of ordinary prudence.

Smith v. Smith, 441 S.W.2d 165, 166 (Ky. App. 1969). *See Restatement 2d of Torts* § 343A. To summarize then, typically no recovery may be expected by the invitee for conditions known to him or so obvious that the invitee may reasonably

be expected to discover and appreciate the danger *Sales v. Bradley*, 356 S.W.2d 588 (Ky. 1962).

To counter Faulkner's argument that the condition of the hole was "open and obvious," Lewis contends that it is necessary to address the issue of his vantage point as he approached the hole to ascertain whether the hole was "open and obvious". In support of this contention, appellant cites *Layman v. Ben Snyder, Inc.*, 305 S.W.2d 319 (Ky. 1957), wherein the Supreme Court affirmed the trial court in directing a verdict for defendant.

In the *Layman* case the plaintiff, a customer in defendant's store, while examining merchandise, stepped backward two or three feet and fell down the stairs. There was no defect in the stairs, or top step, or in the areaway at the head of the stairs. The Court stated:

> We cannot escape the conclusion that from the vantage point of appellant, had she watched where she was going, she would have seen the stairway either before she got to it or at the very least as she crossed in front of the head of it.
>
> . . . .
>
> We believe the accident was solely caused by appellant's own inattention and heedlessness of her surroundings. In the light of the evidence presented the court properly took the case from the jury and directed a verdict for appellee.

Id. at 321-322. Notwithstanding the above statements of the Court, Lewis maintains that *Layman's* discussion of vantage point is relevant to his case. According to Lewis, the case demonstrates that the invitee's vantage point may be

a reason to find that the condition of the hole herein is not an "open and obvious" condition. Additionally, Lewis proffered photographs that he says show that, given his vantage point, he could not have seen the hole. But Faulkner also provided a photograph, which it maintains shows that, if Lewis had been looking, the condition of the hole would have been within his sight, and also, "open and obvious." We, however, we do not read *Layman* as rendering the "open and obvious" condition" of the hole as dependent on Lewis's vantage point in approaching the hold. Although *Layman* does say that the vantage point of a party may be a factor to consider, ultimately it reinforces that persons are required to watch where they go. *Id*.

During his deposition, Lewis said several times that the hole was large and not obstructed. On page 42 of his deposition the following exchange is found:

> Q. How big was the hole?
> A. A little bigger than a laptop.
> Q. When you went back to look for it, did you have any problems finding it?
> A. No.
> Q. Was it a big enough hole that if you'd been looking for it you could have seen it?
> A. Oh yeah, if you were looking.
> Q. Had the grass grown up around it in a way that –
> A. It was well-manicured.

So that, Lewis admits that, if he had been watching where he was going, he would have seen the hole. Furthermore, he noted that the area was well manicured and the hole was larger than the size of the laptop. Bolstering these statements is

Lewis's statement that no reason (another person or obstruction) existed for him to veer off the sidewalk.

A similar situation was found in *Humbert v. Audubon Country Club*, 313 S.W.2d 405 (Ky. 1958). In that case, the Court upheld the lower court's grant of summary judgment and said:

> He admits that he wasn't looking at the floor. He admits that he could have seen the condition that caused his injury if he had been looking. Yet he contends that the question of his contributory negligence should have been submitted to the jury. We cannot agree. His failure to look where he was walking would not alone preclude his recovery but, when his own evidence positively discloses that he could have seen the offending conditions by looking, then recovery is so precluded.

Id. at 407. Lewis disclosed that he "wasn't looking down" (Lewis Deposition, page 38) and that, as highlighted above in his deposition, that if he had been looking for it, he would have seen it. (Lewis Deposition, page 42). So, Lewis, by his own statements, is precluded from recovery because he admitted not watching where he was going and acknowledging that, had he looked, he would have seen it.

Even given our strict summary judgment standard, we are persuaded that the trial court did not err by refusing to submit this case to a jury. Lewis concedes that had he been looking he would have seen the "laptop" size hole, which he described as not obscured. Therefore, the lower court was correct in granting Faulkner's summary judgment motion as Lewis failed to present any evidence of genuine issues of material fact. The judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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