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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002143-MR

DEBORAH GREENE — APPELLANT

v.

APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 08-CI-00510

CHAD MEADE and ARNOLD WELLS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS AND CLAYTON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

COMBS, JUDGE: Deborah Greene appeals from an order of the Johnson Circuit Court granting summary judgment in favor of the appellees, Chad Meade and Arnold Wells, in a premises liability proceeding. After our review, we affirm.

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

A limited amount of discovery was conducted in this matter. Greene was deposed; her employer provided payroll information relevant to her attendance and earnings; written interrogatories and a request for the production of documents were served upon her. From the record, it appears that Greene worked as a billing clerk for the dental offices of Dr. Connelley and Dr. Higgins in Paintsville. The appellees, Chad Meade and Arnold Wells, were the owners of the property that was leased to the dentists for their practice.

On the morning of December 20, 2007, Greene arrived at work several minutes before 8:00 a.m. She had noticed "some moisture" that morning, but school was in session and she had not observed any salt trucks or evidence that surfaces were slippery. She parked her car and unlocked the offices. Inside the door, she noticed a small bag of trash ready to be taken to the outside garbage bin. Since all employees were expected to take part in taking out the trash, Greene collected the bag and exited the building. Headed away from her parked car and in the direction of the bin, she walked along a protected concrete sidewalk to the end of the building. The sidewalk led to a wooden ramp. Greene slipped and fell on a spot of "black ice" that covered the wooden ramp. An employee of the nearby Kirby Sweeper store helped Greene back inside and called for help. She suffered serious injuries and underwent surgery to her right knee.

Greene filed a lawsuit against Meade and Wells on November 5, 2008, alleging that Meade and Wells had failed to exercise ordinary care in maintaining the premises so as to prevent an unreasonable risk of harm to its

lessees (the dentists). She also alleged that they had negligently failed to make the area safe for the patients and employees of the dentists.

Meade and Wells filed a motion for summary judgment on July 23, 2009. Citing the seminal case of *Standard Oil Co. v. Manis,* 433 S.W.2d 856 (Ky.1968), Meade and Wells contended that they were entitled to judgment as a matter of law since the natural outdoor hazard of the black ice was as obvious to the plaintiff as it was to them and that, consequently, they had no duty to remove or warn against it. In her written response, Greene contended that the icy spot was not open and obvious to her.

Following a brief hearing, the trial court granted summary judgment and dismissed the action against Meade and Wells. After examining the record, the court concluded that Greene could not refute the assertion that the icy walkway was an open and obvious natural condition not created or made more dangerous by the landowners. This appeal followed.

Summary judgment should be cautiously applied and not used as a substitute for trial. *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476 (Ky.1991). It shall be rendered only where "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rule(s) of Civil Procedure (CR) 56. In considering a motion for summary judgment, a court is required to construe the record "in a light most favorable to the party opposing

the motion . . . and all doubts are to be resolved in his favor." *Steelvest,* 807 S.W.2d at 480.

On appeal, we must consider whether the trial court correctly determined that Greene could not have presented evidence at trial warranting a judgment in her favor. Since summary judgment involves only questions of law and not the resolution of disputed material facts, we need not defer to the trial court's decision. *Goldsmith v. Allied Building Components. Inc.,* 833 S.W.2d 378 (Ky. 1992). Our review is *de novo.*

In their appellate briefs, the parties focused entirely on whether the naturally occurring outdoor hazard was as obvious to Greene as it was to Meade and Wells. Relying on the Supreme Court of Kentucky's decision in *Schreiner v. Humana, Inc.,* 625 S.W.2d 581 (Ky.1982), Greene argued that the trial court erred by concluding that the landowners were entitled to judgment as a matter of law since the icy walkway constituted a dangerous condition that was not obvious to her.

Meade and Wells argued that the icy patch on the walkway was a hazard as obvious to Greene as to them – a fact that absolved them of liability as a matter of law. They emphasized that Greene had admitted in her deposition that she was aware that it was cold and wet; that it was daylight; that she was familiar with the walkway; that she could see where she was going; and that her path was unobstructed.

In the several cases relied upon by the parties, the injured plaintiff was a business invitee and the alleged tortfeasor was the owner of the premises. These cases held that the owner had no duty to warn against or to remove naturally occurring hazards that were as obvious to an invitee as to the owner of the premises. However, in this case, the legal relationship between the parties is that of landlord-tenant. This relationship often requires a different analysis and means that even if Greene had knowledge of the conditions, that knowledge would not necessarily bar the landlord's liability.[2]

The general rule is that a landlord owes its tenants a duty of care to maintain all common areas under the landlord's control in a safe condition. In *Davis v. Coleman Management Co.,* 765 S.W.2d 37 (Ky.App. 1989), we emphasized that a landlord owes a heightened duty of care to his tenants exceeding the duty that a landowner owes to a business invitee. We held as follows:

> the determination of a landlord's liability for injuries attributable to natural accumulations of ice and snow is encompassed by the general duty of a landlord to exercise reasonable care to keep common areas reasonably safe. The landlord is the only person who has control over the common areas, and if the landlord does not take reasonable steps to make such areas reasonably safe, then no one will.

Id. at 39. Consequently, the lessee's knowledge of a dangerous condition does not in itself relieve the landlord of liability. *Id.*

[2] "[T]he duties and liability of a landlord to persons on the leased premises by the consent of the tenant are the same as those owed to the tenant himself. For this purpose they stand in his shoes." C*lary v. Hayes,* 190 S.W.2d 657, 659 (Ky.1945).

We went on to consider the factors relevant to analyzing the conduct of the parties:

> This does not impose an undue burden on the landlord. The landlord's actions should be evaluated according to what is reasonable under all the circumstances. The landlord is not a guarantor of the tenants' safety. The landlord's actual or constructive notice of the hazardous conditions is, of course, a significant factor. Other factors include, for example, the length of time the snow or ice had remained on the walkway and the landlord's opportunity to take steps to remedy the condition. The tenant's actions also need to be evaluated for their reasonableness. Considerations include, for example, the necessity of travelling at that particular time and the availability of other means of ingress and egress [citations omitted].

Id. Where the tenant is put in complete and unrestricted control of the premises, however, the landlord is liable only for the failure to disclose known latent defects at the time the tenant leases the premises. *Carver v. Howard,* 280 S.W.2d 708 (Ky. 1955).

Again, the standard for summary judgment requires that there be no genuine issues of material fact entitling the movant to judgment as a matter of law. CR 56. Greene was obligated to present at least *some evidence* to show that there were material issues of fact for a jury to consider. *Hibbitts v. Cumberland Valley Nat'l. Bank & Trust Co.,* 977 S.W.2d 252 (Ky.1998).

In the matter before us, Meade and Wells were not entitled to summary judgment because the condition of the premises was open and obvious. Instead, they were entitled to summary judgment because Greene failed to show

that they retained control over a common area, that they had knowledge (either actual or constructive) of the conditions at the premises, or that they might have made the condition safer for its lessees and others lawfully upon the land. Greene had the burden of proof to show these material elements of her case. She had an adequate opportunity to conduct discovery on the relevant issues and to make her arguments before the trial court.

Without any evidence that there were genuine issues of material fact to be determined by a fact-finder, summary judgment in favor of the appellees was appropriate. Therefore, the order of the Johnson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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