RENDERED: AUGUST 10, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001657-MR

ROBERT RESNICK AND
DEBORAH RESNICK — APPELLANTS

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 08-CI-01667

CHARLES OMER PATTERSON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND MOORE, JUDGES.

LAMBERT, JUDGE: Robert Resnick appeals from the August 15, 2011, order of the Bullitt Circuit Court entering summary judgment in favor of Charles Patterson. After careful review, we affirm.

On January 29, 2008, the appellant, Robert Resnick, received a phone call from his mother, Marilyn McQuillen, asking him to help her move out of the

residence she shared with her boyfriend, Charles Patterson. McQuillen had been living with Patterson for approximately four years at that time, but their relationship and living situation appears to have been somewhat tumultuous. Just prior to January 28, 2008, McQuillen and Patterson had a quarrel, and McQuillen stayed with a friend for a few days to give Patterson time to cool off.

On January 29, 2008, McQuillen came to get some of her possessions from the house, including a change of clothes. Upon her arrival, she realized the locks had been changed and she was unable to get into the residence. McQuillen then climbed through a window in the house, triggering an alarm. Police officers responded to the home, and McQuillen discussed whether she had a lawful right to be on the premises with the responding officers. McQuillen was informed she had a right to get her belongings and be at the residence.

While in the house, McQuillen found a note from Patterson stating that if she did not get her possessions out of a shed in the backyard by the time he got home, he was going to have a bonfire with her belongings that night. Patterson also left a threatening note about the couple's dog, Fred, and left a bullet laying on top of the Post-It note which said, "This is for Fred." Patterson admitted to writing both notes, but testified at his deposition that he did not expect that McQuillen would be on the premises of his home after he changed the locks and that he thought she would call him to request permission to get her things.

In response to the notes, McQuillen asked her son and his wife, Deborah Resnick, to help her pack up her things as quickly as possible. Upon their

arrival, the Resnicks began packing and moving boxes from a storage shed in the backyard onto a trailer in the driveway adjacent to the yard. Resnick testified that prior to that day, he had never been in the backyard of Patterson's home.

As Resnick was carrying a box across the backyard, he stepped into a hole located next to some tree roots. This caused him to fall, and he landed directly on his right shoulder, which caused him serious injury. Approximately a month after the accident, Resnick went back to take photographs of the hole. He testified that it was hard for him to find the hole, and that he had to push the grass around with his feet to make it visible for the picture in the record. Resnick testified that at the time of his fall, he did not think the hole was a new hole because it did not have fresh dirt around it. He believed the hole had been dug previously by a dog.

McQuillen had lived in the home for several years when the accident occurred, and she testified that the yard looks flat, but it is deceptively "tilty" and has holes in it where the grass has grown up. She stated that the holes are not apparent until stepped into. At his deposition, Patterson testified that he had experience in lawn care and had worked for a landscaping company for approximately fourteen years. He testified that he was aware from mowing his own yard that there were some holes and protruding tree limbs in the yard, and he had filled some of the holes previously. At his deposition, he admitted that there were some holes he had not filled.

On December 19, 2008, Resnick filed suit against Patterson, alleging negligence and failure to warn. Subsequently, Patterson wrote a letter to McQuillen "begging" her to return home, and in fact McQuillen was again living with Patterson when his deposition was taken on January 6, 2011. Since the accident, Patterson has removed the tree, ground the stump, and leveled the area where Resnick tripped and fell.

On August 15, 2011, the Bullitt Circuit Court entered summary judgment in favor of Patterson, finding that the hole and/or tree stump Resnick tripped on was an open and obvious natural hazard, and as such, Patterson had no duty to warn Resnick of its existence. This appeal now follows.

> The proper standard of review in appeals from summary judgments has frequently been recited and is concisely set forth in *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001) as follows:
>
> > The standard of review on appeal when a trial court grants a motion for 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." The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial."

Suter v. Mazyck, 226 S.W.3d 837, 841 (Ky. App. 2007).

The landscape of premises liability cases in Kentucky has changed substantially with the Kentucky Supreme Court's decision in *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010). There, the Kentucky Supreme Court held that the primary focus in determining whether a duty exists is on foreseeability. *Id*. at 390. The Court adopted the modern approach as embodied in the Restatement (Second) of Torts:

> The modern approach is consistent with Kentucky's focus on foreseeability in its analysis of whether or not a defendant has a duty. This Court has previously stated that "[t]he most important factor in determining whether a duty exists is foreseeability." *Pathways v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003) (*citing* David J. Leibson, Kentucky Practice, Tort Law § 10.3 (1995)). That harm from an open and obvious danger can sometimes be foreseeable suggests that there should be some remaining duty on the land possessor:
>
> The principles stated in the Restatement (Second) of Torts § 343A relate directly to foreseeability and facilitate consideration of the duty issue. Whether the danger was known and appreciated by the plaintiff, whether the risk was obvious to a person exercising reasonable perception, intelligence, and judgment, and whether there was some other reason for the defendant to foresee the harm, are all relevant considerations that provide more balance and insight to the analysis than merely labeling a particular risk "open and obvious." In sum, the analysis recognizes that a risk of harm may be foreseeable and unreasonable, thereby imposing a duty on the defendant, despite its potentially open and obvious nature. *Coln v. City of Savannah*, 966 S.W.2d 34, 42 (Tenn. 1998).

Id. at 390-91.

Resnick first argues that he was an invitee and that the trial court improperly determined that Patterson did not breach any duty owed to him as an invitee. We note that the trial court's order is somewhat unclear as to whether it determined that Resnick was in fact an invitee. The order states that the object over which Resnick tripped was a "naturally occurring condition whether it was a tree root or a hole. As such the property owner is responsible to invitees for physical harm caused by them which is known or obvious to them." The trial court held that Patterson had no knowledge that Resnick would be present on his property and therefore could not anticipate the harm. In addition, the trial court again reiterated that the matter causing Resnick's fall was naturally occurring and therefore Patterson had no duty to warn of an obvious natural hazard. Instead, Resnick had the duty to exercise ordinary care in watching where he was traveling.

In response, Patterson argues that Resnick was most likely a trespasser, and that regardless of whether he was a trespasser, licensee, or invitee, Patterson could not anticipate the harm that Resnick suffered and therefore had no duty to prevent such harm. Patterson argues that he did not invite Resnick upon his property, and instead McQuillen, Resnick's mother, invited Resnick onto the property to help her move.

We agree with the trial court and with Patterson that under *Kentucky River Medical Center*, *supra*, Resnick's status as a trespasser, invitee, or licensee is not the determinative factor in determining Patterson's duty to warn of an open and obvious hazard. Instead, the primary concern is whether Patterson could foresee

that Resnick would be on his property and would fail to notice the open and obvious danger of uneven ground in a backyard. Under the circumstances, Patterson had no reason to believe that Resnick would be in his backyard at the time in question. Patterson had locked his house and changed the locks. While we certainly are not promoting Patterson's behaviors in changing the locks and writing threatening notes, the evidence indicates that Patterson believed McQuillen would be by later that evening when he was home to remove her belongings. Furthermore, any alleged holes or unevenness in Patterson's backyard was an open and obvious hazard. As such, a person exercising "reasonable perception, intelligence, and judgment" would anticipate naturally occurring holes and unevenness in yards where trees and other naturally occurring hazards exist and would take precautions accordingly. *Id*. Because Resnick's particular injury was not foreseeable to Patterson, the trial court correctly determined there was no material issue of fact and granted summary judgment as a matter of law.

Based on the foregoing, we affirm the August 15, 2011, order of the Bullitt Circuit Court.

CAPERTON, JUDGE, CONCURS.

MOORE, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Christopher W. Goode
Stacy Hullett Ivey
Lexington, Kentucky

BRIEF FOR APPELLEES:

W. Douglas Kemper
Louisville, Kentucky