RENDERED: OCTOBER 26, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001964-MR

TRENTON BENTLEY — APPELLANT

v.

APPEAL FROM WASHINGTON CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 09-CI-00108

CHALMER BENTLEY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, STUMBO, AND THOMPSON, JUDGES.

CAPERTON, JUDGE: The Appellant, Trenton Bentley, appeals the October 7, 2011, order of summary judgment entered by the Washington Circuit Court, holding that a hazardous condition was "open and obvious" as a matter of law, and finding that to be a complete bar to Bentley's claim. Trenton argues that there are material issues of fact requiring this Court to reverse the summary judgment, in

light of the holding of the Kentucky Supreme Court in *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010). The Appellee, Chalmer Bentley, argues that the order of summary judgment was appropriate, and that *McIntosh* does not apply under the facts of this claim. Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

The Appellee, Chalmer Bentley, is Trenton Bentley's father. Chalmer was in the process of working on an outbuilding located on his property which needed to have additional plywood nailed to it. At around noon on October 26, 2008, Chalmer hired Trenton and another individual by the name of Chris Staten to nail additional plywood onto the outbuilding, and explained how to do so. The shed that Trenton and Chris were working on had scaffolding comprised of one walk board which was supported by a couple of studs. Chalmer asserts that photographs of the scaffolding plainly indicate a sizeable gap between the walk board and the stud at the back left corner of the building, where Trenton ultimately placed his ladder.

In order to nail the plywood to the back of the building, Trenton and Chris had to stand on the walk board, which was located alongside of the building, and which stood approximately 12 feet from the ground. Trenton asserts that an individual other than himself or Chris had erected scaffolding in the form of walk boards placed across 2 x 4 braces along side of the building. Trenton asserts that Chalmer knew that the boards were not nailed to the braces, but did not inform Trenton of this fact. Trenton states that the boards were located too high for him to

be able to determine whether they were fastened to the braces or not. Trenton concedes that Chalmer never requested or instructed that he use the scaffolding. Trenton also conceded that he has an extensive background in construction, and has worked as a roofer and framer, in which he has used scaffolding. Moreover, Trenton conceded that he had previously constructed his own scaffolding for other jobs and was familiar with the type of scaffolding which was in place on Chalmer's building.

Trenton climbed a ladder in order to work on the building. Chalmer asserts that at the spot where Trenton placed the ladder at the back of the shed, the walk board extended well beyond the stud, and that there was a visible, sizeable gap between the walk board and the stud. He stated that he looked at the stud on the wall, and that they looked fairly steady such that he assumed someone had nailed the walk board in place. After a period of time, the walk board slid out from the braces, and Trenton fell straight down. He now asserts that at the time of the fall he was walking toward the ladder when the board shifted and fell out from underneath him. This is in contrast to the report he provided to medical personnel on the day of the fall. At that time, he stated that he lost his footing and fell from the scaffolding. At that time, Trenton did not mention the walk board falling.

Upon impact, Trenton broke a bone in his left leg, and dislocated his foot. He asserts that as a result of his injuries, he was forced to give up a job at which he earned $15.00 per hour plus overtime, and that he incurred medical bills in excess of $30,000.00. Trenton asserts that he can no longer perform his normal

line of work as a result of the injuries. Chalmer asserts that to the contrary, five months after the accident, his physician, Dr. Moghadamian, advised that the ankle was healed.

The court below found that Trenton had been drinking at the time that this incident occurred, a finding which was contradicted by the testimony of Trenton himself and by that of Chris Staten. Trenton also notes that the medical records from the first hospital he visited after the incident did not indicate that he was drinking. Chalmer disputes this and asserts that Trenton did advise the physician that he had been drinking prior to the fall.[1]

Upon filing suit, Trenton asserted that the board "fell out from under [him]." However, Chalmer asserts that the photograph of the walk board shows that it remained on the horizontal supports. Furthermore, Chalmer notes that according to the testimony of Staten, the walk board had not fallen because it was not on the ground when he examined the area afterwards. During discovery in this matter, Trenton conceded that he did not look to see whether the walk board was nailed down, although he could have determined this by looking and that he should have done so.

Discovery was conducted and following discovery a motion for summary judgment was filed by Chalmer on June 2, 2010. The motion asserted that the hazard which Trenton complained of was open and obvious and that, accordingly, Chalmer had no duty to warn Trenton about it. It further argued that

[1] Our review of the record indicates that Trenton presented to Dr. Moghadamian of UK Health Care on the day of his fall, and reported having one beer earlier that day.

Trenton was an independent contractor and that, accordingly, he only had a duty to warn Trenton if he had actual knowledge that the walk board was not properly nailed down. Oral argument on the motion was held on July 8, 2010.

As noted, the court below ultimately granted the motion for summary judgment in an order entered on October 7, 2011. In so doing, the court found that the hazard of the unsupported walk boards was open and obvious and that, accordingly, Chalmer had no duty to warn Trenton of same. It is from this order that Trenton now appeals to this Court.

As his sole basis for appeal, Trenton argues that pursuant to *Kentucky Medical Center v. McIntosh*, 319 S.W.3d 385, a possessor of land is liable to his invitees for physical harm caused to them by conditions on his property whose danger is known or obvious to his invitees if the possessor should anticipate the harm despite such knowledge or obviousness. First, Trenton argues that in this case, the harm was not open and obvious, or in the least that there was a jury question on this issue. Trenton argues that *sub judice*, the court erred in labeling the danger as "obvious," but failing to ask whether the land possessor could reasonably foresee that an invitee could be injured by the danger. Trenton argues that *McIntosh* eliminates the complete defense of "open and obvious danger," and instead merely heightens the duty of an invitee to look out for his own safety.

In response to the arguments made by Trenton, Chalmer argues that *McIntosh* cannot be used as a basis to overturn the order of summary judgment. He asserts that the issues considered by the *McIntosh* court were never before the

trial court and cannot be raised for the first time on appeal. Chalmer argues that since fourteen months elapsed between the rendering of *McIntosh* and the time the order of summary judgment was entered, Trenton could and should have raised the issue of its applicability at that time. Alternatively, Chalmer argues that Trenton could have raised this issue retrospectively by way of a motion to alter, amend, or vacate pursuant to Kentucky Rules of Civil Procedure (CR) 59.05, after the order of summary judgment was entered, but did not do so. Further, Chalmer asserts that as post-*McIntosh* decisions have made clear, the *McIntosh* decision did not and was not meant to eliminate a court's ability to grant dispositive motions premised on the open and obvious doctrine.[2]

Finally, Chalmer asserts that the facts of the matter *sub judice* are distinguishable from *McIntosh*, and that it is not applicable. *McIntosh* addressed a situation involving a paramedic who was injured following a trip and fall over an unmarked curb in the entryway of a hospital emergency department as she was rushing in with a patient who was in critical condition. The court held that in light of the foreseeability of injury, particularly in an emergency situation where a paramedic would be distracted, summary judgment was not appropriate and comparative fault should apply.

Chalmer asserts that by contrast, this case involved an individual who fell from narrow scaffolding not fully attached to the studs supporting it, and that there was no emergency situation or evidence that Trenton was distracted in any

[2] *See True v. Faith Bluegrass Manor Apt.*, 358 S.W.3d 23 (Ky. App. 2011), and *Lucas v. Gateway Community Services Organization, Inc.*, 343 S.W.3d 341 (Ky. App. 2011).

way. Chalmer further notes that nothing was blocking Trenton's view in any way and that he had been using the scaffolding in question for thirty minutes prior to losing his footing and falling. Thus, he asserts that the matter *sub judice* is much more in line with the holdings of *True* and *Lucas*, discussed herein, *infra*. Finally, because he asserts that *McIntosh* should not apply, Chalmer argues that the court correctly decided this case in accordance with pre-*McIntosh* law. We address these arguments in turn.

At the outset, we note that 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); CR 56.03. Moreover, we note that 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,* 683 S.W.2d 255 (Ky. 1985). Consequently, summary judgment must be granted "only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor...." *Huddleston v. Hughes,* 843 S.W.2d 901, 903 (Ky. App. 1992), citing *Steelvest, supra* (citations omitted). Because summary judgment

involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo.* *Lewis v. B & R Corp.,* 56 S.W.3d 432, 436 (Ky. App. 2001). We review this matter with these standards in mind.

As a general rule, land possessors owe a duty to invitees to discover unreasonably dangerous conditions on the land and to either correct them or warn of them. *Perry v. Williamson,* 824 S.W.2d 869, 875 (Ky. 1992). Certainly, our courts have long held that reasonable care does not ordinarily require a precaution or even a warning against dangers which are known to the visitor, or which are so obvious that the visitor may be expected to discover them. *Keown v. Keown*, 394 S.W.2d 915, 917 (Ky. App. 1965). Further, our courts have historically recognized an open and obvious danger as one that would be recognized by a person exercising ordinary perception, intelligence, and judgment. *Bonn v. Sears Roebuck & Co.*, 440 S.W.2d 526 (Ky. 1969). However, as the parties concede, *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385, has modified Kentucky doctrine on the issue of open and obvious dangers.

The *McIntosh* Court clearly indicated its intent to adopt the reasoning set forth in the Restatement (Second) of Torts with respect to open and obvious conditions, which states: "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." Restatement (Second) of Torts § 343A(1) (1965) (emphasis added).

As further noted by the *McIntosh* Court, the commentary to this section elaborates on the emphasized clause:

> There are ... cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger….
>
> Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact that the danger is known, or is obvious ... is not ... conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances.

McIntosh at 390-391.

Thus, "Under the Restatement (Second) view, in such cases the land possessor may still owe a duty of reasonable care, which may require him to 'take other reasonable steps to protect [the invitee] against the known or obvious condition.'" *McIntosh* at 390, citing Restatement (Second) of Torts § 343A(1) (1965). The *McIntosh* Court nevertheless made clear that invitees still have a duty of their own, stating that:

> While "open and obvious danger" is no longer a complete defense under the Restatement, it is nonetheless a heightened type of danger which places a higher duty on the plaintiff to look out for his own safety. Such a condition, being open and obvious, should usually be noticed by a plaintiff who is paying reasonable attention. Yet the plaintiff is not completely without a defense to this: there could be foreseeable distraction, or the intervention of a third party pushing the plaintiff into the danger, for example. Even in such situations, a jury could still reasonably find some degree of fault by the plaintiff, depending on the facts.

McIntosh at 392.

Following the Court's decision in *McIntosh*, this Court had the opportunity to review and apply its holding in *Lucas v. Gateway Community Services Organization, Inc.*, 343 S.W.3d 341. Therein, the plaintiff fell as a result of crumbling asphalt in the defendant's parking lot. Lucas testified that nothing was blocking her vision of the parking lot on the day of her fall. In rendering our decision in *Lucas*, this Court reiterated the definition of an open and obvious condition, which has not changed as a result of *McIntosh*:

> The term obvious has been defined to mean, "both the condition and the risk are apparent to and would be reasonable by a reasonable man in the position of the visitor exercising ordinary perception, intelligence, and judgment."

Lucas at 345, citing *Bonn v. Sears Roebuck & Co.*, 440 S.W.2d at 529.

This Court held that in *Lucas*, the condition was sufficiently obvious because Lucas had testified that she was familiar with the parking lot in which she fell. Although Lucas claimed she did not see the crumbling asphalt, this Court

held that she failed to present any affirmative evidence raising a genuine issue of material fact regarding the open and obvious nature of the crumbling asphalt at issue. In so finding, this Court recognized that the holding of *McIntosh* altered our traditional application of the open and obvious doctrine. Nevertheless, it held that the position set forth in both *McIntosh* and the *Restatement of Torts* was intended to apply to situations where a possessor of land would anticipate potential harm despite the fact that a danger is both known and obvious, such as in a case where an invitee's attention is distracted. *Lucas* at 345.

In *True v. Faith Bluegrass Manor Apt.,* 358 S.W.3d 23, the plaintiff fell from the balcony of his second-story apartment and brought a negligent repair claim against the landlord. The railing along the balcony was loose, a fact that True was aware of and had acknowledged by completing a move-in checklist noting that the rails were "very loose." True and his wife moved into the apartment, and True remained aware of the loose railing and at times placed a grill in front of the railing to block access. One evening, after True had consumed some alcohol, the amount of which was disputed, he leaned on the railing, fell, and injured himself. Following discovery, the landlord filed a motion for summary judgment alleging that as a matter of law, he had no duty to repair the railing. The court agreed, and granted the summary judgment. On appeal, True argued that the *McIntosh* decision required reversal. This Court disagreed, relying on the holding in *Lucas*, and stating:

> In *Lucas v. Gateway Cmty. Servs. Org. Inc.,* 343 S.W.3d 341 (Ky. App. 2011), it was stressed that there must be a reasonably foreseeable distraction that caused the plaintiff to fail to discover an obvious condition, forget its existence, or fail to protect against the danger. *Id.* at 346.
>
> There is no evidence that True was distracted from his "duty to act reasonably to ensure [his] own safety, heightened by [his] familiarity with the location and the arguably open and obvious nature of the danger." *McIntosh*, 319 S.W.3d at 395. He was aware of the loose railing and the obvious danger it presented. His focus should have remained on the potential danger, and consequently, the exceptional circumstances described in *McIntosh* do not apply.

True at 28.

Sub judice, the circuit court properly held that no disputed issues of material fact existed concerning the open and obvious nature of the walk board and the scaffolding upon which Trenton was working. As previously noted herein, the term "obvious" has been defined 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 v. Sears, Roebuck & Co.,* 440 S.W.2d 526 at 529. Here, we must agree with Chalmer that there are no disputed facts on this issue that would prevent the entry of a summary judgment.

Having reviewed the record, we simply cannot conclude that the circuit court committed error in finding that there were no disputed issues of material fact regarding the open and obvious nature of the scaffolding. As in *Lucas*, wherein the court held that the crumbling asphalt was readily visible despite

Lucas's assertion that she did not see it, *sub judice*, the condition of the scaffolding would have been easily ascertainable by Trenton had he decided to examine it. Indeed, the photographs of the scaffolding clearly show that its condition was openly apparent and obvious to the eye of the prudent observer. Trenton could have quickly examined the scaffolding before using it but did not. Thus, we believe that the court's conclusion that no issue of material fact existed as to whether the hazard was open and obvious was correct. But this holding does not conclude our analysis.

We must next look to whether an issue of fact remains concerning the foreseeability of the injury pursuant to *McIntosh*. Trenton contends that the jury should consider whether the loose scaffolding constituted an open and obvious danger when allocating fault and that the jury could reasonably conclude that it was foreseeable that he would be injured on same. Chalmer, however, asserts that *McIntosh* is distinguishable from the matter at hand because there was no distraction so as to make Trenton's injury foreseeable. Having reviewed the record and applicable law, we conclude that *McIntosh* does not apply to alter the result in this case.

The testimony below indicated that Trenton had knowledge of his surroundings, both through his extensive past experience in the construction industry and through his direct use of the scaffolding for thirty minutes prior to the injury. Moreover, there was nothing blocking his view of the scaffolding either before or during his work on it that day, and he openly admitted that he could have

seen any alleged problem with the walk board had he taken the time to examine it. Unlike the plaintiff in *McIntosh*, Trenton was not distracted by some outside force, such as rushing an ill patient into the hospital. Indeed, the evidence is clear that he had been working on the scaffolding at issue for quite some time prior to falling. There was no evidence that the scaffolding presented any danger beyond that which one would expect from scaffolding constructed in this manner. Based upon the foregoing analysis, we conclude that summary judgment was properly granted by the trial court. While it might ordinarily be appropriate to remand a case such as this to the circuit court to consider *McIntosh's* application, we need not do so here because of the evidence that is already in the record.

Having determined that *McIntosh* does not require reversal of the summary judgment, we turn to whether Trenton has demonstrated any other issue of material fact to overcome summary judgment. Ultimately, we find no evidence in the record of any genuine issue of material fact concerning the condition of the scaffolding, and believe that the court below properly determined, as a matter of law, that that hazard was open and obvious and recognizable to a reasonable person in Trenton's position.[3]

[3] In so finding, we briefly address the affidavit which Trenton submitted to the court after Chalmer's motion for summary judgment was filed. Therein, Trenton asserted that he was "neither aware that there was a risk of falling, [and] was not aware that the walk board was unsupported." However, we note that previously, in his answers to interrogatories, Trenton stated that, "One end of the board that the ladder was on was not attached to any support under it. I believe the other end may have been but I am not sure." Clearly, these two statements are contradictory. As this court has previously held, "An affidavit which merely contradicts earlier testimony cannot be submitted for the purpose of attempting to create a genuine issue of material fact to avoid summary judgment." *Gilliam v. Pikeville United Methodist Hospital of Kentucky, Inc.*, 215 S.W.3d 56, 62-63 (Ky. App. 2006). Thus, we do not find this affidavit sufficient to overcome the summary judgment.

In holding that the court below correctly found that the scaffolding was an open and obvious hazard, and finding that *McIntosh* does not apply, we find that the court correctly held that Chalmer had no duty to warn Trenton of same. The relevant inquiry in this case was whether the hazard would have been open and obvious to a reasonable person in Trenton's position. *See Bonn v. Sears Roebuck & Co.*, 440 S.W.2d at 529. This is a standard based on the "position of the visitor."[4] *Id.*

Sub judice, Trenton was an individual with extensive construction experience, which included experience using various types of scaffolding. Trenton admitted that he could and should have looked, but did not take time to do so. Indeed a quick inspection of the photographs submitted in this matter reveal that the dangerous condition of the scaffolding was apparent. We find that a reasonable person in this situation would have been aware of the risk of falling and, indeed, Trenton conceded that he had some fear of sub scaffolding, which is certainly a recognition of risk.[5] Accordingly, we find that because *McIntosh* is inapplicable, Chalmer had no further duty to warn. The court below correctly entered an order of summary judgment based upon the evidence submitted, and we affirm.

Wherefore, for the foregoing reasons, we hereby affirm the October 7, 2011, order of summary judgment entered by the Washington Circuit Court.

---

[4] As discussed *supra*, Trenton is an experienced individual in the construction business, familiar with scaffolding, and knowledgeable of the area where he was working.

[5] Trenton Bentley Deposition, p. 101, l. 25, p. 102, ll. 1-4.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lawrence R. Webster
Pikeville, Kentucky

BRIEF FOR APPELLEE:

John W. Walters
Melissa M. Thompson
Lexington, Kentucky