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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000065-MR

AMANDA SPEARS — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, V., JUDGE
ACTION NO. 10-CI-01558

ROBERT A. SCHNEIDER, D/B/A
SWEET TOOTH CANDIES;
AND CINCINNATI INSURANCE
COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; DIXON AND MOORE, JUDGES.

ACREE, CHIEF JUDGE: Amanda Spears appeals the Campbell Circuit Court's December 22, 2011 order dismissing her premises liability claim against Appellees Robert A. Schneider, Jr., d/b/a Sweet Tooth Candies and Cincinnati Insurance

Company (collectively, "Sweet Tooth") for lack of a duty owed. The question before us is whether the circuit court erred in classifying the danger at issue, *i.e.*, a step of unequal height, as an open and obvious hazard and, as a result, concluding the open and obvious doctrine barred Spears' negligence suit as a matter of law. Finding no error, we affirm

I. Facts and Procedure

The following facts are not in dispute.

Schneider owns and operates Sweet Tooth Candies, a candy, ice cream, and sweet treat shop at the corner of Eleventh and Ann Streets in Newport, Kentucky. The store's front door and only entrance is positioned at the corner where the two streets intersect. Four steps lead from the sidewalk up to the front door. The steps wrap around the front door in a semi-circle arc; they are level, and have not changed since 1958. The sidewalk immediately adjacent to the shop on the Eleventh Street side is also level. However, the sidewalk on the Ann Street side slopes downward. Because of this, the height of the bottom step gradually increases from left to right.

Spears was a semi-frequent Sweet Tooth patron, having visited the store on at least twenty occasions since childhood. She had previously negotiated the steps, without issue, during both daylight and evening hours. She had noticed no change in the configuration of the steps, or the orientation of the sidewalk to the steps, during her preceding visits to the shop. The steps are in good repair. There is a

handrail along one side of the steps; Spears had used the handrail to enter or exit the store on prior occasions.

On January 3, 2010, Spears and friends visited Sweet Tooth. She ascended the steps without issue, entered the store, enjoyed a dish of ice cream, and then left. Spears descended the middle of the steps; she was not holding the handrail.[1] As Spears stepped from the bottom step to the sidewalk, she rolled her ankle and fell, severely injuring her right ankle and leg.[2] Spears expected the distance between each step to be the same. Spears claims the change in height from the final step to the sidewalk caused her to lose her footing and fall. When the accident occurred, the steps were free of foreign substances, not covered in snow or ice, and lit by both natural and artificial light.

Spears filed a premises liability action against Sweet Tooth seeking damages because of the injuries she suffered in the fall on the steps. Spears claimed the steps were in a state of disrepair and/or poorly constructed, and Sweet Tooth breached its duty to keep the steps in a reasonably safe condition. Following discovery, Sweet Tooth moved for summary judgment. The circuit court granted that motion on December 22, 2011. The circuit court concluded the nature of the steps was open and obvious to all, Spears was intimately familiar with the steps before she fell, Spears had a duty to look out for her own safety due to the open

[1] According to Spears' deposition, she left the shop with her partner. They descended the steps together. Spears' partner came down the steps on the left side holding the handrail. Spears was one step behind, descending the middle of the steps and not holding the handrail.

[2] Spears also injured her left ankle, the severity of which is disputed, but that dispute is not material to the resolution of the case.

and obvious condition of the steps, and Spears was not distracted by any outside force or emergency when her fall occurred. From this order, Spears appealed.

II. Standard of Review

"The standard of review on appeal of summary judgment is whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). Summary judgment involves no fact-finding; it encompasses only legal queries, and the existence of disputed material facts. *Mitchell v. University of Kentucky*, 366 S.W.3d 895, 898 (Ky. 2012) (citation omitted). Our review is *de novo*. *Id.*

III. Analysis

Spears' position on appeal is that summary judgment was improper because there were genuine issues of material fact regarding whether the steps constituted an open and obvious danger. If this Court finds otherwise, Spears argues, Sweet Tooth should have anticipated than an invitee would be harmed by the steps' dangerous configuration because the steps themselves constitute a "distraction" as contemplated by *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010). We are not persuaded.

A negligence action, such as this, comprises four elements: duty, breach, causation, and damages. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 88 (Ky. 2003). The existence of a duty is a question of law to be decided by the court. *See id.* at 89. While common negligence law necessitates the existence of a duty,

"premises liability law supplies the nature and scope of that duty when dealing with . . . injuries on realty." *Lewis v. B&R Corp.*, 56 S.W.3d 432, 437-38 (Ky. App. 2001); *Lucas v. Gateway Cmty. Servs. Org., Inc.*, 343 S.W.3d 341, 343 (Ky. App. 2011). To that end, "[t]he status of the person coming onto the land determines the degree of care required by the land possessor" and, in turn, the duty owed. *Miracle v. Wal-Mart Stores East, LP*, 659 F.Supp.2d 821, 825 (E.D. Ky. 2009); *West v. KKI, LLC*, 300 S.W.3d 184, 190 (Ky. App. 2008).

Here, as a store patron, Spears was indisputably an invitee. "An invitee enters upon the premises at the express or implied invitation of the owner or occupant on business of mutual interest to them both, or in connection with business of the owner or occupant." *Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364, 367 (Ky. 2005); *West*, 300 S.W.3d at 190. Spears was invited to enter the store, her entry was connected with Sweet Tooth's business, and her presence was mutually beneficial to Spears and Sweet Tooth.

A premises owner or occupant, such as Sweet Tooth, owes a duty to an invitee to exercise ordinary care to maintain "the premises in a reasonably safe condition and to warn invitees of dangers that are latent, unknown, or not obvious." *West*, 300 S.W.3d at 191. An exception to this general rule, the "open and obvious danger" doctrine, limits a business owner's or occupant's liability. Under that rule, a possessor of land "cannot be held liable to invitees who are injured by open and obvious dangers." *McIntosh*, 319 S.W.3d at 388 (quoting Restatement (Second) of Torts § 343 (1965)).

The open and obvious doctrine's underlying premise is this: an invitee cannot "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. 1969); *Rogers v. Professional Golfers Ass'n of America*, 28 S.W.3d 869, 872 (Ky. App. 2000). The owner or occupier of realty "is not an insurer against all accidents on the premises." *Lanier v. Wal-Mart Stores, Inc.*, 99 S.W.3d 431, 437 (Ky. 2003) (citation omitted).

Of course, "to allow known or obvious conditions to always absolve land possessors from any liability 'would be to resurrect contributory negligence'" in the comparative fault era. *McIntosh*, 319 S.W.3d at 391 (citation omitted). With this in mind, our Supreme Court refashioned the open and obvious doctrine in *Kentucky River Medical Center v. McIntosh*, *supra.* Perhaps most importantly, the Supreme Court declared that the open and obvious doctrine no longer operates as an absolute bar to recovery. Instead, with "[t]he focus on foreseeability[,]" our Supreme Court embraced the reasoning underlying the Restatement (Second) of Torts § 343A(1) cmt. f (1965) that "sometimes '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.'" *Id.* (quoting Restatement (Second) of Torts § 343A(1) cmt. f). The Supreme Court recognized what it calls a plaintiff's "defense of foreseeable distraction" that undermines the formerly determinative open and obvious principle. *Id.* at 394.

> The lower courts should not merely label a danger as 'obvious' and then deny recovery. Rather, they must ask whether the land possessor could reasonably foresee that an invitee would be injured by the danger. If the land possessor can foresee the injury, but nevertheless fails to take reasonable precautions to prevent the injury, he can be held liable.

Id. at 392. In sum, *McIntosh* necessitates a two-part inquiry: First, whether the hazard is indeed open and obvious; and second, despite the danger's obvious nature, whether the premises owner or occupier could reasonably foresee that an invitee would be injured by the hazard. *Id.*; *see also Lucas*, 343 S.W.3d at 345-46.

Turning to the matter at hand, we find the circuit court properly concluded that no disputed issues of material fact existed concerning the open and obvious nature of the steps. A danger is "obvious" if "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." *Horne*, 170 S.W.3d at 367 (citation omitted).

Spears asserts that "[r]ecent Kentucky precedent unequivocally shows that a stairway whose risers vary in height presents a condition which absolutely cannot be considered open and obvious." (Appellant's Brief at 6). In support, Spears relies upon this Court's decision in *Boland-Maloney Lumber Company, Inc. v. Burnett*, 302 S.W.3d 680 (Ky. App. 2009). At issue in *Burnett* was whether the plaintiff had to present expert testimony to establish the defendant's duty of care. In *Burnett*, the plaintiff fell descending a stairway. Instead of constructing seven steps, as dictated by the blueprints, the defendant contractor framed the stairway

with six steps. This resulted in a stair riser for one step which was twice as high as the other stair risers, causing the plaintiff to fall. At trial, plaintiff's expert(s) failed to testify concerning the defendant's professional standard of care. This Court concluded this was not fatal to plaintiff's claim because "expert testimony is not always required in cases involving professional negligence." *Id.* at 686. Instead, this Court found:

> that the uniformity of stair risers on a stairway is an abundantly apparent standard, even among laypersons. Here, where there was a "double-riser"—that is, a stair riser in a stairway that was not uniform with the height of all of the other stairs in the stairway—it seems clear that most anyone could interpret the exceptional foreseeability of risk therefrom. As such, we cannot say that the trial court abused its discretion in allowing the matter to proceed to the jury absent expert testimony on [the defendant's] duty.

Id. at 686-87.

Burnett neither involved nor discussed the open and obvious doctrine. Despite this, Spears interprets *Burnett* as holding that a reasonable person would not recognize or appreciate the danger posed by risers of an unequal height, and therefore steps that are not uniform in height can never be deemed an open and obvious danger. We caution that *Burnett* should not be construed as meaning that a disparity in stair risers constitutes *per se* negligence. Instead, whether a hazard, such as a discrepancy in step height, constitutes an open and obvious danger is a fact specific, case-by-case determination. The staircase in *Burnett* (connecting two level landings within a structure) materially differed from the stairs in this case

which facilitated the transition between a level structure and an unlevel sidewalk. Spears' application of *Burnett* is overly broad.

The crux of Spears' argument is that the jury, not the court, should be the determiner of whether a hazard constitutes an open and obvious danger. However, when the material facts are not in dispute, whether a danger is open and obvious is a legal, not a factual, determination. *See Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364, 367 (Ky.2005). Spears frankly concedes, "[t]he facts relative to [Spears'] trip and fall are undisputed." (Appellant's Brief at 1).

In light of those undisputed facts, we find the nature of the steps here was readily apparent to invitees visiting the store, and the risk created thereby would be obvious to a reasonable person in Spears' position utilizing practical faculties of observation. The record demonstrates the bottom step's relation to the sidewalk was not concealed or otherwise hidden from view, and the area was well lighted. Spears admitted the light allowed her – and conceivably other invitees in her position – to see and visualize the steps, and the relevant portion of the sidewalk. Moreover, Spears was familiar with the shop, including the steps, having visited the shop on at least twenty occasions since childhood and having ascended the steps upon entering the store, mere minutes before she fell. *See Horne*, 170 S.W.3d at 369 (emphasizing "the plaintiff's admission that the hazard was both known and obvious to him or her pertains . . . to whether the hazard was so known and obvious as to obviate any duty on the part of the owner to warn or protect the invitee against the hazard").

Spears argues the "risk" was not obvious because the human psyche focuses on what seems normal; when one descends a stairway, Spears continues, a rhythm develops and our subconscious brain tells our legs and feet to function from one step to the next. However, it has been observed that while an invitee does not have to "look directly down at [her] feet with each step taken[,] . . . in the exercise of ordinary care for [her] own safety, one must observe generally the surface upon which [she] is about to walk." *Humbert v. Audubon Country Club*, 313 S.W.2d 405, 407 (Ky.1958). We find that a prudent person, having observed the bottom step's obvious height difference on numerous occasions, would also recognize the obvious risk of tripping and, therefore, exercise suitable caution. In sum, Spears has failed to pinpoint any disputed facts she believes could compromise this rationale and justify precluding summary judgment. Based on the specific facts of this case, we conclude that the steps at issue constitute an open and obvious danger.

McIntosh directs us to next consider the foreseeability of the invitee's injury. *McIntosh*, 319 S.W.3d at 390-91. As explained, if "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," then the injury is foreseeable and the premises owner may not escape liability. *McIntosh*, 319 S.W.3d at 391. Instead, the business owner or occupant owes its invitees a heightened duty of reasonable care "which may require him to

'take other reasonable steps to protect [the invitee] against the known or obvious condition.'" *Id.* at 390 (citation omitted).

In *McIntosh*, the record demonstrated that the plaintiff (an emergency medical technician transporting a patient from an emergency vehicle to the hospital's emergency room) was foreseeably distracted from the open and obvious hazard of an uneven curb between the ambulance dock and the emergency room doors. 319 S.W.3d at 394. Cautioning that it was "important to stress the context in which McIntosh sustained her injury[,]" the Court emphasized that her "dire need to rush critically ill patients through the emergency room entrance should be self-evident"; such a distraction was unquestionably foreseeable by the hospital which had every "reason to expect that the invitee will proceed to encounter the known or obvious danger because . . . the advantages of doing so [preserving health and saving lives] would outweigh the apparent risk." *Id.* (internal quotation marks and citation omitted).

Unlike the hospital in *McIntosh*, we cannot find that Sweet Tooth had good reason to expect that a store patron would be distracted as he or she entered or exited its store such that the patron would forget or fail to observe the obvious danger presented by the steps. In *McIntosh*, "the plaintiff had the defense of foreseeable distraction" because her focus was properly and foreseeably on something other than the hazard – her patient. Here, Spears' focus, necessarily, should have been on the hazard itself. It was not. Unlike McIntosh, Spears was not acting under time-sensitive or stressful circumstances. She was enjoying a

leisurely outing with friends. Spears' presents no evidence whatsoever that she was distracted from her "duty to act reasonably to ensure her own safety, heightened by her familiarity with the location and the arguably open and obvious nature of the danger." *Id.* at 395. She is not entitled to the "defense of foreseeable distraction." *Id.* at 394.

IV. Conclusion

The Campbell Circuit Court's December 22, 2011 order is affirmed.

ALL CONCUR.

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