RENDERED: DECEMBER 20, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000012-MR

ANDREA SEARCY — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JAY A. WETHINGTON, JUDGE
ACTION NO. 08-CI-01683

DOUBLE D ENTERTAINMENT GROUP, LLC;
BLIND PARROT CATERING, LLC; AND
BLIND PARROT PUB & GRUB, LLC — APPELLEES

OPINION
VACATING AND
REMANDING

** ** ** ** **

BEFORE: DIXON, MOORE, AND THOMPSON, JUDGES.

DIXON, JUDGE: In this premises liability action, Andrea Searcy appeals an order of the Daviess Circuit Court granting summary judgment in favor of Double D Entertainment Group, LLC and its associated business entities, Blind Parrot Catering, LLC, and Blind Parrot Pub & Grub, LLC (collectively "Appellees").

Because summary judgment was improper, we vacate the court's order and remand for further proceedings.

On November 9, 2007, Searcy and a female friend drove from Nashville, Tennessee to Owensboro, Kentucky. They planned to join a group of friends that evening to watch Searcy's son perform with his band at The Blind Parrot restaurant, located on Frederica Street in Owensboro. At approximately 9:00 p.m., Searcy and two friends parked on a side street and walked along a public sidewalk on Eighth Street toward Frederica Street. Before reaching the corner of Eighth and Frederica, they made a left-hand turn onto a concrete sidewalk that led to the main entrance of the Blind Parrot. This sidewalk was adjacent to an eight foot high wooden privacy fence which enclosed the restaurant's outdoor patio area. The sidewalk also served as a ramp to access the main entrance; accordingly, the incline of the sidewalk gradually increased to a height of five inches. According to Searcy, once they turned left and began walking toward the front entrance, it was "pitch black" because there were no lights illuminating that corner of the property. After taking a few steps on the sidewalk, Searcy's left foot hit "something," and she fell forward onto the concrete, fracturing her left hip.

Searcy filed a complaint in Daviess Circuit Court alleging Appellees were negligent by failing to properly illuminate the sidewalk so the incline would be visible to patrons. Appellees moved for summary judgment, arguing that Searcy was unable to establish any breach by Appellees because the condition of

the sidewalk was open and obvious as a matter of law. Appellees also contended that Searcy failed to establish what caused her to fall. At the conclusion of the hearing, the trial judge ruled that summary judgment was proper because there was insufficient evidence to establish causation. This appeal followed.

It is well-settled that summary judgment is not a substitute for trial, and the circuit court must resolve all doubts in favor of the non-moving party. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). The court should not grant the motion "unless a right to judgment is shown with such clarity that there is no room left for controversy, and it is established that the adverse party cannot prevail under any circumstances." *City of Florence v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001).

The elements of a negligence claim include the existence of a duty, a breach of that duty, causation, and damages. *Boland-Maloney Lumber Co., Inc. v. Burnett*, 302 S.W.3d 680, 686 (Ky. App. 2009). Viewing the record in a light most favorable to Searcy, she was not aware that the sidewalk leading to the entrance of the restaurant gradually inclined to a height of five inches. Searcy's expert witness, an engineer, opined that the wooden privacy fence would have blocked the security light in the patio from casting light onto the sidewalk. Further, Searcy deposed David Schrecker, the co-owner of the Blind Parrot. Schrecker admitted the security light in the patio faced toward Eighth Street, and he was "not sure" if the privacy fence could have blocked the light from shining on the front sidewalk. Schrecker also acknowledged that there were no warnings posted to advise patrons

of the sidewalk ramp. In her deposition, Searcy was repeatedly questioned about the circumstances surrounding her fall. She explained that she safely traversed the Eighth Street sidewalk; however, upon turning the corner toward the entrance to the Blind Parrot, it was "dark" and there was "nothing shining on that corner." Searcy further testified that the front of her left foot hit against "something," and she fell to the concrete. Searcy repeatedly opined that, at the time of the accident, she could not see what caused her to fall because it was dark. Searcy introduced photographs of the sidewalk taken in the daylight, and the incline is visible. Searcy pointed out in the photograph where she thought her foot "went" along the incline and caused her to fall. Searcy reiterated, on the night she fell, she could not see the incline, and she did not know the incline was there.

The duty of care owed to a business invitee has been explained as follows:

> Generally, the owner of premises to which the public is invited has a general duty to exercise ordinary care to keep the premises in a reasonably safe condition. However, reasonable care on the part of the possessor of business premises does not ordinarily require precaution or even warning against dangers that are known to the visitor or so obvious to him that he may be expected to discover them.

Rogers v. Professional Golfers Ass'n of America, 28 S.W.3d 869, 872 (Ky. App. 2000) (internal quotation marks and citations omitted). In *Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364 (Ky. 2005), our Supreme Court explained,

> 'Known' means 'not only knowledge of the existence of the condition or activity itself, but also appreciation of

> the danger it involves.' 'Obvious' denotes 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.'

Id. at 367, *quoting* Restatement (Second) of Torts § 343A cmt. b (1965) (internal citations omitted). In the case at bar, Searcy had never been to the Blind Parrot prior to the night she fell; consequently, it is reasonable to conclude that the sidewalk incline could not have been a condition that was "known" to her. As to the obviousness of the sidewalk incline, we are mindful that the inquiry turns on whether the incline would have been apparent to a reasonable person in Searcy's position, *i.e.,* when it was dark outside. *Id*.

Searcy directs our attention to *Jones v. Winn-Dixie of Louisville, Inc.*, 458 S.W.2d 767 (Ky. 1970), wherein the Court explained,

> In pedestrian fall-down cases arising out of defects in or obstructions on the walking surface the visibility factor is vital. At night and under poor lighting conditions it is quite possible for an ordinarily prudent person exercising reasonable care for his own safety not to notice something that would be obvious in broad daylight.

Jones was cited by our Supreme Court in *Horne*, *supra*. In *Horne*, the plaintiff tripped over a parking barrier obscured by an automobile at the defendant's car dealership. *Horne*, 170 S.W.3d at 366. The Court concluded the barrier was not an open and obvious hazard, specifically stating:

> While parking barriers, curbing, division strips, and other such obstructions commonly used in parking areas to protect automobiles from property damage (and buildings from automobile damage) are not *per se* dangerous or

> unsafe, they can become so when their presence is hidden or otherwise not readily apparent to invitees using the premises.

Id. at 369.

We believe *Horne* is applicable to the facts of this case. Viewing the evidence in a light most favorable to Searcy, there is a factual dispute regarding whether the sidewalk incline was an unreasonably dangerous condition because it was essentially "hidden" in the darkness and caused Searcy to fall. *See id*. Because disputed issues of fact exist, summary judgment was improper.

For the reasons stated herein, we vacate the Daviess Circuit Court's order of summary judgment and remand this case for further proceedings.

MOORE, JUDGE, CONCURS IN RESULT ONLY.

THOMPSON, JUDGE, DISSENTS.

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