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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-002030-MR

DOUGLAS REED — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 13-CI-00122

THOMAS WEBER — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: NICKELL, STUMBO AND VANMETER, JUDGES.

STUMBO, JUDGE: Douglas Reed appeals from an order granting summary judgment in favor of Thomas Weber. Summary judgment in this case must be reversed due to *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288 (Ky. 2015).

Weber owns a two-family home in Covington, Kentucky, which has been converted into two apartments. Barbie Woods, a friend of Reed's, occupied

the second floor apartment. Reed spent the night of January 19, 2012, with Woods. During the night, a large amount of snow and ice accumulated in the area. On the morning of January 20, 2012, Reed was exiting the building when he slipped on ice and fell, injuring himself. Reed brought suit against Weber claiming he was negligent in maintaining the premises.

After some discovery, Weber moved for summary judgment. The trial court granted summary judgment in his favor relying on the cases of *Standard Oil Co. v. Manis*, 433 S.W.2d 856 (Ky. 1968), and *PNC Bank, Kentucky, Inc. v. Green*, 30 S.W.3d 185 (Ky. 2000). Those cases state that "natural outdoor hazards which are as obvious to an invitee as to the owner of the premises do not constitute unreasonable risks to the former which the landowner has a duty to remove or warn against." *Manis* at 858. The trial court held that Weber had no duty to warn against the ice or make the way safe. This appeal followed.

On appeal, Reed argues that summary judgment was inappropriate. We agree.

The recent Kentucky Supreme Court case of *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288 (Ky. 2015), has changed the law as it concerns natural hazards like snow and ice. Cases like *Manis* and *Green* relied on contributory negligence principles which would preclude recovery if a person was injured due to an open and obvious hazard, like snow and ice. Kentucky law has moved from contributory negligence to comparative fault; however, the open and obvious doctrine continued to bar recovery for plaintiffs who were at least somewhat

responsible for their injuries. The case of *Shelton v. Kentucky Easter Seals Society, Inc.,* 413 S.W.3d 901 (Ky. 2013), moved away from a complete bar to recovery due to an open and obvious hazard and made the open and obvious nature of the hazard only one factor to consider when determining if a person has breached a duty.

> The open-and-obvious nature of a hazard is, under comparative fault, no more than a circumstance that the trier of fact can consider in assessing the fault of any party, plaintiff or defendant. Under the right circumstances, the plaintiff's conduct in the face of an open-and-obvious hazard may be so clearly the only fault of his injury that summary judgment could be warranted against him, for example when a situation cannot be corrected by any means or when it is beyond dispute that the landowner had done all that was reasonable. Applying comparative fault to open-and-obvious cases does not restrict the ability of the court to exercise sound judgment in these cases any more than in any other kind of tort case.

Carter at 297.

> But under comparative fault, every person has a duty of ordinary care in light of the situation, and that duty applies equally to plaintiffs and defendants. For fault to be placed on either party, a party must have *breached* his duty; and if there is a breach, fault must be apportioned based on the extent a party's breach caused or helped cause harm to the plaintiff.
>
> But it is just as true under comparative fault as it has always been that if a landowner has done everything that is reasonable under the circumstances, he has committed no breach, and cannot be held liable to the plaintiff. The difference under comparative fault is that a landowner is not excused from his own reasonable obligations just because a plaintiff has failed to a degree, however slight, in looking out for his own safety. . . .

> The basic negligence tort paradigm has never changed: duty, breach, causation, damages. But under contributory negligence principles, tort analysis never got to the breach question if it was determined that the plaintiff had any fault. While it is just that a plaintiff be responsible for harm that he causes himself, it is not just for him to bear all the liability if another negligently contributed to his injury.

Carter at 298.

Shelton, however, only concerned man-made hazards. After *Shelton* was rendered, the *Manis* rule for naturally occurring hazards, such as snow and ice, remained. *Carter v. Bullitt Host* abrogated *Manis* and put naturally occurring hazards on the same footing as man-made hazards. Because the trial court relied on the old *Manis* rule, summary judgment must be reversed.

Because we are reversing and remanding for further proceedings, we must also point out an error made by the trial court in its previous analysis. An issue was raised below regarding whether or not Weber was negligent in not having a handrail alongside of some steps. There are two sets of steps relevant to the facts of this case. One set is located outside and is at the entrance and exit of the building itself. The other set of steps is located inside the building in a common vestibule area which leads to the second floor. Neither set of steps had an accompanying handrail. In his suit, Reed claimed Weber should have had a handrail for the steps inside the vestibule and was negligent in not doing so.[1]

[1] Reed claims that when he slipped and fell, he fell partly inside and partly outside the building. His argument is that had there been a handrail inside the vestibule, he could have reached out and caught himself on it.

In its order granting summary judgment, the trial court discussed the handrail issue, but mistakenly referred to the lack of a handrail at the outside steps. Reed's arguments on this issue were about the lack of a handrail for the inside steps. On remand, the trial court must revisit this issue.

Based on the foregoing, we reverse and remand for additional proceedings.

NICKELL, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

VANMETER, J., DISSENTING: I respectfully dissent. In *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288 (Ky. 2015), the Kentucky Supreme Court's most recent decision addressing premise liability, the court stated:

> The open-and-obvious nature of a hazard is, under comparative fault, no more than a circumstance that the trier of fact can consider in assessing the fault of any party, plaintiff or defendant. [*Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901, 911-12 (Ky. 2013)]. **Under the right circumstances, the plaintiff[']s conduct in the face of an open-and-obvious hazard may be so clearly the only fault of his injury that summary judgment could be warranted against him, for example when a situation cannot be corrected by any means or when it is beyond dispute that the landowner had done all that was reasonable**. *Id.* at 918. Applying comparative fault to open-and-obvious cases does not restrict the ability of the court to exercise sound judgment in these cases any more than in any other kind of tort case.

471 S.W.3d at 297 (emphasis added).

From the record, Reed observed a solid sheet of ice, covering steps, driveway and street early in the morning following an ice storm. Notwithstanding the hazard, Reed proceeded, slip and fell. The record contains no testimony that Weber, the landlord, was aware of the hazard, or could have reasonably been able to get anyone to the property to address the situation, due to the early time of day and the conditions of the roads. While the majority opinion points to the lack of an inside handrail, the record is clear that Reed slipped and fell outside. In my view, these are circumstances that warrant summary judgment. I would affirm the Kenton Circuit Court's judgment.

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