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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000377-MR

BRENDA RODGERS — APPELLANT

v.

APPEAL FROM GRANT CIRCUIT COURT
HONORABLE REBECCA LESLIE KNIGHT, JUDGE
ACTION NO. 15-CI-00054

GRANT COUNTY FOOTBALL BOOSTERS — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON, JOHNSON, AND MAZE, JUDGES.

DIXON, JUDGE: Appellant, Brenda Rodgers, appeals from an order of the Grant Circuit Court granting summary judgment in favor of Appellee, Grant County Football Boosters, and dismissing her personal injury action. For the reasons set forth herein, we reverse the trial court and remand this matter for further proceedings.

On February 15, 2014, Rodgers attended Bingo games hosted by the Boosters at the Ridge Banquet Center in Dry Ridge, Kentucky. Rodgers had frequented the Boosters' weekly Bingo games for nearly twenty years, including those that had been hosted at the Ridge Banquet Center location for the previous five years. On the evening in question, Rodgers was leaving the building around 10:00 p.m. As she was exiting, she stated that she held the front door open for a disabled woman using a cane. After several other people also walked through the door, Rodgers turned to walk out herself, took one step and tripped over a large concrete flower pot that had been placed near the doorway. As a result, Rodgers suffered injuries, including a shattered elbow that required surgery.

On February 11, 2015, Rodgers filed an action in the Grant Circuit Court against the Boosters[1] alleging that her injuries were the direct and proximate result of the Boosters negligence and failure to keep the banquet center premises safe for invitees. Rodgers sought damages for medical expenses, pain and suffering and impaired earning capacity.

Following discovery, the Boosters filed a motion for summary judgment on November 16, 2015. Therein, the Boosters argued that it did not breach any duty it owed to Rodgers as an invitee, because it was only required to either warn or eliminate any unreasonably dangerous conditions. The Boosters

[1] Rodgers also named Sousa Realty Company, the owner/operator of the Ridge Banquet center. It was dismissed as a party by an agreed order entered on June 9, 2015.

pointed out that Rodgers admitted in her deposition that she was aware that the flower pots were sometimes moved over to the doorways so that smokers could drop their cigarette butts in them before entering the building. Rodgers further described the sidewalk in the area as wide and of a nice size and conceded that had she looked down, she would have seen the flower pot and could have stepped around it. Rodgers responded that the flower pot clearly created an unreasonably dangerous condition and that it was foreseeable that she would be distracted by other people in the doorway and would not notice the flowerpot below eye level.

On February 23, 2016, the trial court entered an order granting summary judgment in favor of the Boosters. The trial court's order stated, in its entirety:

> This matter having been opened to the Court by the Defendant, Grant County Football Boosters, through counsel, by way of Motion for Summary Judgment, and the Court having considered the submissions of the parties, and the oral arguments of the parties, if any;
>
> IT IS HEREBY ORDERED as follows: The moving Defendant's Motion for Summary Judgment is GRANTED.

Rodgers thereafter appealed to this Court as a matter of right.

"The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson*

ex rel. Trent v. Nat'l Feeding Systems, Inc., 90 S.W.3d 46, 49 (Ky. 2002). Summary judgment is only proper when "it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In ruling on a motion for summary judgment, the Court is required to construe the record "in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor." *Id.* at 480. However, courts must be mindful that "summary judgment is not to be used as a defense mechanism. Instead, summary judgment is to be cautiously employed for cases where there is no legitimate claim under the law and it would be impossible to assert one given the facts." *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901, 916 (Ky. 2013). *See also Goodwin v. A.J. Schneider Company*, 501 S.W.3d 894 (Ky. 2016).

On appeal, Rodgers argues that summary judgment was improper because there remained material issues of fact as to whether the flower pot was an open and obvious condition and, even if it was, whether the Boosters fulfilled its duty of care to warn or eliminate the risks created by the condition. The Boosters, on the other hand, contend that "the trial court correctly found that only one reasonable conclusion could be reached; namely, that the 18-inch concrete flower

pot which was moved near the BINGO hall door by attendees, which Appellant saw and was aware of, did not constitute an unreasonably dangerous condition."

In premises liability cases, land possessors generally owe invitees a duty to "discover unreasonably dangerous conditions on the land and to either correct them or warn of them." *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385, 388 (Ky. 2010). Traditionally, if the unreasonably dangerous condition was open and obvious, the landowner's duty of care owed to invitees was eliminated, and the landowner could not be held liable in negligence. *Shelton*, 413 S.W.3d at 910; *see also Standard Oil v. Manis*, 433 S.W.2d 856, 858 (Ky. 1968).

In recent years, however, the Kentucky Supreme Court has modified the open and obvious doctrine. In *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010), the Court explained that the state's adoption of a comparative fault tort scheme in *Hilen v. Hays*, 673 S.W.2d 713, 720 (Ky. 1984), compelled modification of the open and obvious doctrine of premises liability. Accordingly, the Court adopted Restatement (Second) of Torts § 343A, holding a defendant liable for harm resulting from an open-and-obvious condition if the harm could be anticipated, the plaintiff's knowledge of the condition or the obviousness of the condition notwithstanding. *Id.* at 389. The Court noted,

> [L]ower 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.

Subsequently, in *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901, 916 (Ky. 2013), the Court acknowledged that the *McIntosh* decision had created some confusion, observing that

> [t]oday's case presents us with an opportunity to clarify *McIntosh* and emphasize that the existence of an open and obvious danger does not pertain to the existence of duty. Instead, Section 343A involves a factual determination relating to causation, fault, or breach but simply does not relate to duty. Certainly, at the very least, a land possessor's general duty of care is not eliminated because of the obviousness of the danger.

The *Shelton* Court concluded that a landowner "owes a duty to an invitee to discover unreasonably dangerous conditions on the land and either eliminate or warn of them[,]" and that such duty exists regardless of the obviousness of the dangerous condition or "the invitee's knowledge of the condition." *Shelton*, 413 S.W.3d at 909-11. The Court explained,

> [A]n open-and-obvious condition does not eliminate a landowner's duty. Rather, in the event that the defendant is shielded from liability, it is because the defendant fulfilled its duty of care and nothing further is required. The obviousness of the condition is a "circumstance" to be factored under the standard of care. No liability is imposed when the defendant is deemed to have acted

> reasonably under the given circumstances. So a more precise statement of the law would be that a landowner's duty to exercise reasonable care or warn of or eliminate unreasonable dangers is not breached. "When courts say the defendant owed no duty, they usually mean only that the defendant owed no duty that was breached or that he owed no duty that was relevant on the facts." And without breach, there can be no negligence as a matter of law.

Id. at 911-12 (footnotes omitted).

The *Shelton* Court further discussed "the extent of foreseeable risk" question, labeling this as a question of fact:

> "The extent of foreseeable risk" at the time of the defendant's alleged negligence "depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small changes in the facts may make a dramatic change in how much risk is foreseeable. Thus, courts should leave such determinations to the trier of fact unless no reasonable person could differ on the matter." . . . Accordingly, the foreseeability of the risk of harm should be a question normally left to the jury under the breach analysis. In doing so, the foreseeability of harm becomes a factor for the jury to determine what was required by the defendant in fulfilling the applicable standard of care.

Id. at 913-14 (citations omitted). Finally, the *Shelton* Court addressed the effect of its holding on the summary judgment process:

> It is important to emphasize that summary judgment remains a viable concept under this approach. The court's basic analysis remains the same because, on a motion for summary judgment, a court must still examine each element of negligence in order to determine the legitimacy of the claim. But the question of

> foreseeability and its relation to the unreasonableness of the risk of harm is properly categorized as a factual one, rather than a legal one. This correctly "examines the defendant's conduct, not in terms of whether it had a 'duty' to take particular actions, but instead in terms of whether its conduct breached its duty to exercise the care" required as a possessor of land. If reasonable minds cannot differ or it would be unreasonable for a jury to find breach or causation, summary judgment is still available to a landowner. And when no questions of material fact exist or when only one reasonable conclusion can be reached, the litigation may still be terminated.

Id. at 916 (footnotes omitted).

In *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288 (Ky. 2015), the Court again tweaked the concept of premises liability. Citing to its decision in *Shelton*, the Court noted:

> [A] land possessor's general duty of ordinary care is not eliminated simply because a hazard is obvious. The question is rather whether the landowner could reasonably foresee a land entrant proceeding in the face of the danger, which goes to the question whether the universal duty of reasonable care was breached. . . . After *Shelton*, if such events are foreseeable and the landowner has not made reasonable efforts to correct the problem which causes harm to a plaintiff, then the landowner has breached his general duty of reasonable care.

Id. at 297. The *Bullitt Host* Court also firmly established that liability—responsibility—under Kentucky law must be determined based on the principles of comparative fault:

> 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 plaintiffs 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.

Id. (citations omitted).

As it did in *Shelton*, the *Bullitt Host* Court further observed that although summary judgment might be warranted when it is beyond dispute that the landowner had done all that was reasonable, "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." *Id.* at 298.

In *Goodwin v. Al J. Schneider Company*, 501 S.W.3d 894 (Ky. 2016), our Supreme Court again reviewed the evolution of the law since *McIntosh*, and thereafter stated,

> In summary, a landowner has a duty to take reasonable steps to eliminate unreasonably dangerous conditions on its land. *Shelton*, 413 S.W.3d at 909. The question for the court on summary judgment is whether the landowner breached that duty, a duty that exists whether the conditions are open and obvious or hidden. Thus, in determining whether the landowner has breached that

> duty, the court does not look to whether the conditions were open and obvious but to whether the landowner took reasonable steps to eliminate the risks created by the conditions. If there is a genuine issue of material fact regarding the reasonableness of the steps the landlord took, then summary judgment is not appropriate.
> . . .
>
> . . . However, as we noted in *McIntosh*, *Shelton*, and *Bullitt Host*, under comparative negligence an invitee's negligence does not foreclose recovery, it merely reduces it.
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> . . . On remand the court may again consider summary judgment. However, if it does so, the court must keep in mind our caveat from *Bullitt Host* that summary judgment may only be warranted "when a situation cannot be corrected by any means or when it is beyond dispute that the landowner had done all that was reasonable." 471 S.W.3d at 297.

Goodwin, 501 S.W.3d at 898-900.

Most recently, in *Grubb v. Smith*, 523 S.W.3d 409 (Ky. 2017) modified on denial of rehearing (Aug. 24, 2017), our Supreme Court emphasized,

> Our *McIntosh* line of cases, including *Dick's Sporting Goods*, *Shelton*, and now *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288 (Ky. 2015), reflect our determined effort to effect that restoration and to limit holdings, at trial or on appeal, that an obvious, risk-posing condition on the property is "not unreasonable as a matter of law," to those rare instances where they are justified. For example, public policy may require that a frequently recurring type of risk-creating condition be deemed not unreasonable and thus excepted from a land possessor's general duty of care. Similarly, in some, albeit rare, instances summary judgment or a directed verdict is appropriate because "the plaintiff's conduct in the face of

> an open and obvious hazard [was] . . . clearly the only fault [sic] of his injury . . . [as] for example when a situation [a risk-creating condition on the property] cannot be corrected by any means or when it is beyond dispute that the landowner had done all that was reasonable." *Carter*; 471 S.W.3d at 297 (citing generally *Shelton*, 413 S.W.3d at 911-918).
>
> If *McIntosh* and its earlier progeny left any doubt about our intention to return most open and obvious cases to jury consideration, the majority's Opinion in *Carter* should lay all such doubts to rest. As the *Carter* Court held, "all open and obvious hazard cases, including obvious natural outdoor hazard cases, are subject to the comparative fault doctrine." 471 S.W.3d at 289-90.

(footnotes omitted).

Turning to the matter herein, there can be no dispute that the Boosters owed Rodgers, a business invitee, a duty of care to maintain its premises in a safe condition. *Shelton*, 413 S.W.3d at 909; *see also Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364, 367 (Ky. 2005). As such, the next question becomes whether reasonable minds could differ as to whether the Boosters breached its duty of care. Whether a standard of care is met, generally, is a fact-intensive inquiry and is "grounded in common sense and conduct acceptable to the particular community." *Shelton*, at 913-14. As such, a jury should typically decide the question. However, as we previously noted, "[i]f reasonable minds cannot differ or it would be unreasonable for a jury to find breach or causation, summary judgment is still available to the landowner." *Id.* at 916 (footnote omitted).

The Boosters argue that the trial court correctly found that flower pot did not constitute an unreasonably dangerous condition. To the contrary, the trial court's order is completely devoid of any findings or conclusions and we are without the benefit of knowing why the trial court believed summary judgment was proper. Nevertheless, there is no real dispute that the flower pot was in plain view in a well-lit area, even Rodgers admitted as much. However, while there can be no serious dispute that the flower pot was "obvious," neither can there be any dispute that it was placed in the doorway of the banquet center where people were entering and exiting. In *Shelton*, our Supreme Court emphasized that under the comparative-fault approach to "open and obvious" conditions, "summary judgment remains a viable concept[.]" Under that approach, however, the question of "the unreasonableness of the risk of harm" of such a condition, will almost always be "properly categorized as a factual one," i.e., that summary judgment (or directed verdict) will be appropriate only when, under all the circumstances of the given case, "reasonable minds cannot differ" on the unreasonable-risk question, or "when only one reasonable conclusion [as to that question] can be reached." *Id.*

Under the facts presented herein, and in conformity with what we interpret from the *Grubb* decision as our Supreme Court's intent to return any questionable open and obvious case to jury consideration, we conclude that there clearly remain questions of fact as to whether the flower pot constituted an

unreasonable risk, the foreseeability of harm created by the flower pot, and whether the Boosters breached its duty of care to maintain the premises in a safe condition for its patrons. Furthermore, even if Rodgers was negligent in some respect, under comparative fault she has the right to determine if there was any negligence on the part of the Boosters that contributed to her injuries, and then to have a jury apportion that fault. Accordingly, summary judgment was improper.

For the reasons set forth herein, the order of the Grant Circuit Court is reversed and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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