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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001727-MR

PEGGY HILTON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 15-CI-005468

W&M OF KENTUCKY, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Peggy Hilton brings this appeal from a June 6, 2017, Opinion and Order of the Jefferson Circuit Court dismissing her premises liability action against W&M of Kentucky, Inc. We affirm.

On December 13, 2012, Hilton was leaving her workplace at the Watterson Tower in Louisville, Kentucky. She and Cassie Duvall, a co-worker, exited an elevator on the ground floor of the Watterson Tower and were walking

when Hilton slipped and fell forward to the floor. As a result of the fall, Hilton injured her shoulder. W&M of Kentucky, Inc., owned the Watterson Tower.

On October 26, 2015, Hilton filed a complaint in the Jefferson Circuit Court against W&M.[1] Therein, Hilton alleged that on December 13, 2012, "[s]he was walking with a co-worker and slipped on a foreign object/liquid which caused serious physical injury to her body." Complaint at 2. Hilton claimed that W&M negligently failed to maintain the premises free of unreasonably dangerous conditions and that such negligence caused her to suffer substantial injuries.

W&M filed an answer, and after taking Hilton's deposition, W&M filed a motion for summary judgment on February 27, 2017. W&M argued that Hilton could not identify any dangerous condition at Watterson Tower that caused her fall on December 13, 2012. Rather, W&M argued that Hilton merely assumed that a dangerous condition upon the floor caused her fall. Consequently, W&M maintained that Hilton failed to raise a genuine issue of material fact as to whether a dangerous condition existed on the floor at the Watterson Tower on December 13, 2012.

In her response, Hilton submitted the affidavit of her co-worker, Cassie Duvall. Duvall was walking with Hilton on the day of the fall. According

[1] Peggy Hilton filed her complaint over three years after the alleged fall in 2012, presumably due to her bankruptcy. The issue was not raised below and, we will not address whether the claim was precluded by the statute of limitations.

to Hilton, "[i]t is clear from the Affidavit that . . . Hilton slipped on something in the hallway and it is most likely that it is the bright metal cap." Summary Judgment Response at 2. Hilton also pointed to the expert testimony of Michael A. Mulheirn, who opined that the "cleanout cover [metal cap]" situated in the floor of the hallway "more likely than not contributed to Mrs. Hilton's slip and fall." Hilton maintained that she created a genuine issue of material fact upon whether a dangerous condition existed on the floor at the Watterson Tower on the day of her fall.

By Opinion and Order entered June 6, 2017, the circuit court granted W&M's motion for summary judgment. The court concluded that Hilton offered mere speculation and could not identify an unreasonably dangerous condition at Watterson Tower that caused her fall:

> Ms. Hilton cannot establish the requisite facts to survive summary judgment. At best, the record demonstrates there was a cleanout cover in the proximity of her fall that could have been its cause and that it was possible a waxy residue contributed. Ms. Hilton did not know what caused her to slip; she could only say that she would not have slipped had there not been something on the floor to cause her to fall. Similarly, Ms. Duvall could not identify the cleanout cover as the object that caused Ms. Hilton's fall, only that it was in close proximity to the area in question. For his part, Mr. Mulheirn bases his opinion on hearsay testimony regarding the last time the floor had been waxed and upon general building design best practices (i.e. that cleanout covers should not be built into high foot traffic areas). His opinion as to the causes of Ms. Hilton's slip and fall is based upon the

> unfounded assumptions that Ms. Hilton encountered the cleanout cover and maintenance was somehow deficient. There is simply no evidence that either occurred, aside from Ms. Hilton's mere proximity to the cleanout cover
>
> . . . .
>
> Additionally, no one has offered any evidence that the floor had a waxy residue which could have caused the fall, only that the floor was regularly waxed. Again, this invites speculation and conjecture about the cause of Ms. Hilton's fall. . . .

Opinion and Order at 7. This appeal follows.

To begin, summary judgment is proper where there exists no genuine issue as to any material fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure 56.03; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). All facts and inferences therefrom are viewed in a light most favorable to the nonmoving party. *Id.* Our review proceeds accordingly.

Hilton contends that the circuit court erroneously rendered summary judgment dismissing her premises liability action against W&M. Specifically, Hilton maintains that she raised a material issue of fact demonstrating that a dangerous condition existed on the floor at the Watterson Tower causing her fall on December 13, 2012. She points to Duvall's affidavit that she was walking with Hilton at the time of her fall and believed that perhaps Hilton fell on the cleanout cover in the floor. Additionally, Hilton references her own testimony that after the

fall, an unknown man wearing a shirt with "PARK" on it, told her that the floors at Watterson Tower had been waxed the night before her fall. Hilton also cites to the affidavit of her expert, Mulheirn. In the affidavit, Mulheirn states that he believes that the cleanout cover in the floor contributed to her fall. Taking these circumstantial facts together, Hilton argues that she raised an issue of material fact that a dangerous condition existed in the floor on December 13, 2012, causing her to fall.

We begin our analysis by noting that it is undisputed that Hilton was an invitee on W&M's premises at the time of the fall. In recent years, premises liability law has undergone major substantive changes in Kentucky. The Kentucky Supreme Court has effectively abolished the open and obvious doctrine and has adopted a general duty of reasonable care as to possessors of land. *Carney v. Galt*, 517 S.W.3d 507, 510-11 (Ky. App. 2017). Particularly relevant herein, the Supreme Court has clearly defined the duty a possessor of land owes an invitee:

> [A] possessor of land owes a duty to an invitee to discover unreasonably dangerous conditions on the land and either eliminate or warn of them.

Shelton v. Ky. Easter Seals Soc'y Inc., 413 S.W.3d 901, 909 (Ky. 2013) (footnote omitted); *see also Hayes v. D.C.I. Properties-DKY, LLC*, 563 S.W.3d 619 (Ky. 2018); *Goodwin v. Al J. Schneider Co.*, 501 S.W.3d 894, 898-99 (Ky. 2016); *Dick's Sporting Goods, Inc. v. Webb*, 413 S.W.3d 891, 897 (Ky. 2013). And, as

with any negligence action, the plaintiff bears the burden of proof. *See Shelton,* 413 S.W.3d at 906. Thus, an invitee must first and foremost demonstrate that an unreasonably dangerous condition existed upon the land. *See Shelton*, 413 S.W.3d 901.

As set forth in her deposition testimony, Hilton merely assumed that something on the floor caused her fall:

> Q. Okay. Did you ever see water on the floor?
>
> A. No, I didn't see it.
>
> Q. Did you ever see any foreign substance on the floor?
>
> A. No.
>
> Q. Did Cassie ever tell you that she saw something on the floor?
>
> A. No, she didn't say anything.
>
> Q. Did anybody that was around at that point identify something on the floor that was out of the way?
>
> A. No, because there was so many people around there that if there had been anything they would have cleaned it up with their feet.
>
> Q. Okay. So what do you have to - - what do you have to - - you said it was just an assumption that there was something on the floor - -
>
> A. Uh-huh, because my foot slipped.
>
> MR. KROKOSKY: Is that a - - is that a yes?

THE WITNESS: Yes, yes.

. . . .

Q. Could it be possible that there wasn't anything on the floor and that your foot just slipped?

A. But I don't know what would cause my foot to slide, though.

Q. And that's fine. I'm just saying as far as there's - - part of this is I get to ask you what you know.

A. Right.

Q. And as you sit here today, you don't know what you slipped on?

A. No. I just know my foot slid out from under me and I went down flat on my face.

. . . .

Q. Okay. Could it be possible since your body fell forward that your - - that your foot didn't actually slide, but that it actually stuck on something?

A. I don't know.

Q. Okay. Do you remember specifically if your - - if one of your feet slid or stuck or anything like that?

A. I don't know that.

Q. So as far as - - what you can remember then is you're walking then at some point you fell in a manner that your body fell forward?

A. Yes.

. . . .

Q. If I read - - if I understand that correctly, as far as you are concerned the only person who may have any sort of fault for your accident is W & M and that assumes that there was something wrong with the floors, correct?

A. True.

Q. And you have no knowledge whether there was actually something wrong with the floors on the day of your accident, correct?

A. No. Correct, correct. I'm sorry.

Q. So I just want to make certain I get that correctly.

A. Okay.

Q. On the day of your accident at the Watterson Tower, you have no idea whether there was something wrong with the floors, correct?

A. Correct.

Hilton's Deposition at 99-101, and 210.

From the above deposition testimony, it is clear that Hilton does not know why she fell, merely assuming there was something on the floor. Importantly, Hilton could not testify that anything was "wrong with the floors" at the Watterson Tower on the date of her accident. As for Ms. Duvall's affidavit, she stated that her first thought at the time of the fall was that Hilton possibly could have fallen on a cleanout cover as it was located in the area of her fall. However, Duvall does not state that she believed Hilton fell on the cleanout cover or that the

cleanout cover in some way was dangerous. And, we agree with the circuit court that Mulheirn's expert opinion was based totally upon conjecture and speculation as to how the cleanout cover could have caused the fall, and thus lacked probative value.

In the end, Hilton simply failed to put forth probative facts demonstrating that an unreasonably dangerous condition existed on the floor of the Watterson Tower on the day she fell. In the ordinary course of daily life, individuals fall for a variety of reasons. It was incumbent upon Hilton to set forth probative facts evidencing that an unreasonably dangerous condition existed at Watterson Tower. She failed to do so. Therefore, we conclude that the circuit court properly rendered summary judgment dismissing her premises liability action against W&M.

Hilton next maintains that "the trial court erred by ignoring the assumed name violation – KRS 365.015 and KRS 446.070" committed by W&M. Hilton's brief at 23. Hilton specifically asserts:

> W&M continues to use an Assumed name, which is *not registered*. Not being registered, the community as a whole does not know who they are dealing with.
>
> For example, if somebody falls and is injured in the newly constructed Fitness Center with a door that includes the names "YMCA and Norton, as well as WATTERSON PARK" she does know that she can sue Norton Hospital and she can sue the YMCA, but she has no idea how to find WATTERSON PARK. She will

> have no idea that on the fourth floor of that same building there is a company with the name W&M of Kentucky, Inc[.,] connection [sic] with WATTERSON PARK. If she looks up Watterson Park on the internet she might feel that their lawsuit should be against the incorporated *City of Watterson Park, Kentucky*, which is on the other side of Newburg Road.
>
> No corporation should benefit by its violation of Kentucky law, which is in place to notify Plaintiffs. So, what we do know is that Appellee, **W&M**, intentionally or negligently, but at least without caring, has put up a smoke-screen to not only and likely delay litigation against the proper entity, but also as to cover up and stone wall the important facts.
>
> Even if the correct entities are sued one way or the other, the relevant information with respect to any possible connection with the name PARK on the shirt or the witness is relevant, and his deposition needs to be taken. . . .
>
> . . . .
>
> Appellee in the case at bar is estopped. Result, if the action or inaction of a party [A] puts party B at a disadvantage Party A is estopped from gaining that advantage, for sure if a Circuit or District Court case would otherwise be dismissed.

Hilton's brief at 23-25.

Presumably, this argument looks to the unknown identity of a purported eyewitness, who may have worked for W&M. However, we can find no legal nexus between W&M's purported violations of corporation statutes regarding an assumed name for a business and the injuries suffered by Hilton in this case.

Again, Hilton failed to raise a genuine issue of material fact that an unreasonably dangerous condition existed at Watterson Tower on the day of her fall. The connection between the unknown man wearing a shirt with the word PARK on it and W&M is purely conjecture. And, it must be pointed out that the actual testimony of the unknown man is *a fortiori* unknown. Hilton had some eighteen months to conduct discovery and probe the relationship, if any, between the unknown man and W&M. And, the alleged violation of KRS 365.015 and KRS 446.070 by W&M does not alter the conclusion that no genuine issue of material fact was raised by Hilton as to the existence of an unreasonably dangerous condition at Watterson Tower on the day she fell.

Hilton also asserts the circuit court erred by not vacating the summary judgment as she discovered "new evidence." Hilton's Brief at 19. Hilton particularly argues:

> Lo and behold! [W]e found at some point at the end of May or in June that the renovation going on in the building as mentioned in the May 2, 2017[,] oral argument was complete and inside the building and on the first floor was a large poster with the name Waterson [sic] Park which also mentioned the YMCA in Norton [H]ealthcare as owners or sponsors of the health room or exercise room. . . . So now we have this information to mention to the trial court as we did at the September 29 hearing.
>
> The discussion of this information and my request at least three times in the May 2 and three or four times in September 29, 2017[,] oral arguments indicated that I

> needed to now take the deposition of the Defendant and *others* with respect to the proof that they used the name Waterson [sic] Park was critical then and remains critical to justice for Peggy. After a period of time while renovation was going on we lost time but did indeed finally find proof of the connection between Appellee and the man with the shirt.
>
> . . . .
>
> We argued for the trial judge that we needed to take the depositions now knowing there was a direct relationship between the defendant and the name "Park". But now we have photographs in the record to prove the relationship. . . .
>
> . . . .
>
> Appellee does not want the court to have this information. Important questions of the man with the shirt may lead to further evidence of negligence – we won't know until a deposition is taken, as in all cases. Appellee obviously does not want us to follow the obvious chain of logic.
>
> At the very least there is sufficient evidence to vacate the judgment and allow Plaintiff to depose Defendant regarding the designations on their own poster and doors and determine the *identity* of the individual (with the PARK shirt – with part of the shirt blocked behind his jacket) who offered his comment as to how Peggy fell. With this discovery by definition we can determine not only his identity, but we can determine his relationship with Appellee, employee, contractor . . . . ?

Hilton's Brief at 7, 8, 10 (citations omitted). We do not believe that the "new evidence" set forth above sets forth any legal basis that would justify vacating the

summary judgment; thus, we conclude the circuit court did not abuse its discretion by declining to do so.

In sum, we hold that the circuit court properly rendered summary judgment dismissing Hilton's premises liability action.

For the foregoing reasons, the Opinion and Order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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