RENDERED: DECEMBER 20, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000290-MR

ROBBIN K. NELSON — APPELLANT

v.

APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE G. SIDNOR BRODERSON, JUDGE
ACTION NO. 17-CI-00439

HOLLINGSWORTH OIL CO., INC.
D/B/A SUDDEN SERVICE #62 — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

COMBS, JUDGE: This is a slip-and-fall case in which Robbin Nelson appeals from a summary judgment granted to Hollingsworth Oil Co., Inc., d/b/a Sudden Service #62 ("Sudden Service"), by the Simpson Circuit Court. The trial court granted summary judgment on the basis that Nelson's only proof of Sudden Service's failure to maintain safe premises was her own speculative testimony. It

concluded that Nelson was unable to meet her burden of proof with respect to Sudden Service's breach of duty and causation. After our review, we vacate and remand for further proceedings.

We summarize the events leading to this action as explained by Nelson in her deposition. Near noon on December 27, 2016, Nelson exited Interstate 65 at Franklin to refuel her vehicle at the Sudden Service station. She had done business at this station before and recalled seeing oil spills and gasoline spots in front of the fuel pumps. She noticed the spills and spots again on this day, but they did not appear slippery. As she pumped gasoline into her SUV, Nelson heard the squeal of tires. She turned to look toward the road and took a step with her left foot. She suddenly began to slip. While Nelson tried to maintain her balance, she spun around twice and fell hard to the ground. Nelson admitted that she did not see what precipitated her fall, but she was certain that she stepped in something slick that caused her to lose her footing.

Nelson said that her clothing smelled strongly of oil, gasoline, and/or grease when she got up. She had a black substance on the sleeve of her blouse and a stain on her vest. She remembered that it had been a dry, sunny day. This testimony is supported (at least in part) by a video recording captured by Sudden Service's surveillance camera.

On November 7, 2017, Nelson filed a personal injury action against Sudden Service seeking damages suffered as a result of her fall. Sudden Service answered the complaint and denied Nelson's allegations. Following a period of discovery, Sudden Service filed a motion for summary judgment on September 25, 2018.

Sudden Service argued that it was entitled to judgment as a matter of law because Nelson could produce no evidence to support her allegation that it had breached a duty or that the alleged breach caused her injuries. Sudden Service pointed to Nelson's repeated testimony indicating that she never saw anything on the surface that could have caused her to fall. Sudden Service contended that the only reason that Nelson believed something was there was the fact that she slipped.

After a hearing, the trial court granted the motion in an order entered on January 25, 2019. The court concluded that "[a]side from [Nelson's] own speculation as to the presence of a slick substance, there is no evidence supporting her claim." This appeal followed.

In reviewing a grant of summary judgment by the trial court, we must decide whether the court correctly determined that there are no genuine issues as to any material facts and that the moving party is entitled to judgment as a matter of law. CR[1] 56.03. "The record must be viewed in a light most favorable to the party

[1] Kentucky Rules of Civil Procedure.

opposing the motion for summary judgment and all doubts are to be resolved in [her] favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

In order to recover under a claim of negligence, a plaintiff must prove: (1) that the defendant owed her a duty of care; (2) that the defendant breached that duty; and (3) that the breach was the legal cause of the plaintiff's damages. *Lee v. Farmer's Rural Elec. Co-op. Corp.*, 245 S.W.3d 209 (Ky. App. 2007). It is well established that an owner of a business must exercise ordinary care to protect its customers from injury. *Sidebottom v. Aubrey*, 267 Ky. 45, 101 S.W.2d 212 (1937). However, a proprietor is never the insurer of the safety of his guests. *Napper v. Kenwood Drive-in Theatre Co.*, 310 S.W.2d 270 (Ky. 1958).

Nelson argues that the trial court erred by concluding that her deposition testimony was insufficient to show a breach of duty and causation. Viewing the testimony most favorably to Nelson as we must, we are compelled to agree.

To survive a motion for summary judgment under these circumstances, a plaintiff need only show that:

> (1) he or she had an encounter with a foreign substance or other dangerous condition on the business premises; (2) the encounter was a substantial factor in causing the accident and the customer's injuries; and (3) by reason of the presence of the substance or condition, the business

> premises were not in a reasonably safe condition for the use of business invitees.

Martin v. Mekanhart Corp., 113 S.W.3d 95, 98 (Ky. 2003). Nelson contends that her deposition testimony was sufficient to withstand summary judgment, but Sudden Services argues that the evidence was fatally lacking because she cannot provide any evidence of what caused her fall.

Sudden Services contends that Nelson's testimony was based on nothing more than unsupported speculation. It relies upon our analysis both in *Jones v. Abner*, 335 S.W.3d 471 (Ky. App. 2011), and in *Klinglesmith v. Estate of Pottinger*, 445 S.W.3d 565 (Ky. App. 2014). These cases are distinguishable, however.

In *Jones*, the plaintiff slipped while stepping into the bathtub to take a shower in her motel room. She alleged that the condition of the tub was unreasonably dangerous. In her deposition, plaintiff claimed that the tub was slicker than when she had showered before, but "she had 'no idea' why . . . ." 335 S.W.3d at 474. We explained that plaintiff's "speculative hypothesis that a 'slick residue' was left in the bathtub after it was cleaned . . . does not satisfy our standards for summary judgment." *Id.* at 476 (footnote omitted).

In *Klinglesmith*, the plaintiff fell after attempting to return a baking pan to the homeowner. Klinglesmith indicated that when no one answered the door, she bent down to place the baking pan on the porch. When she stood up, she

felt that she was going to fall over backwards. Photographs of the porch showed a crack in the concrete and an uneven surface.

We affirmed the entry of summary judgment based upon Klinglesmith's inability to articulate how or why she fell. We observed that Klinglesmith had repeatedly stated in her deposition that she did not know what caused her to fall. Instead, Klinglesmith merely suggested that because she fell, and because the homeowner had previously asked her to use the garage door, something must have been wrong with the porch. Under these circumstances, we held that Klinglesmith was unable to establish the essential element of causation.

By contrast, in the case before us, Nelson did not merely hypothesize that something must have caused her to fall. Her testimony tended to indicate that she encountered a slippery, foreign substance on the business premises. She *felt* the slick surface, slipped like "an ice skater," and spun around before she fell. She indicated that stains of other slick, foreign substances on the surface abounded and that her clothing was similarly stained after the fall. The surveillance video recording tends to show that Nelson fell exactly where she described.

Amanda Thomerson, manager of the Sudden Service store, testified in her deposition that spills of gasoline, soda, or other substances upon the property quickly evaporate or soak into the surface. She indicated that she and other employees monitor the premises, and that although spills are uncommon, they

clean them up. Weighing evidence, however, is the jury's task, not that of the court. Nelson's competent and consistent testimony explaining her slip on the property satisfied her burden to show a breach of duty and causation. Genuine issues of material fact remain. Consequently, Sudden Service is not entitled to judgment as a matter of law.

Consequently, we VACATE the order of the circuit court granting the motion for summary judgment and we REMAND this case for further proceedings.

MAZE, JUDGE CONCURS.

ACREE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ACREE, JUDGE, DISSENTING: Respectfully, I dissent because Nelson presented no evidence of a material and essential fact – the presence of any foreign substance where Nelson stood before and when she fell.

No slip-and-fall case can proceed in the absence of evidence that "the plaintiff . . . was injured as a result of slipping on a transitory foreign substance on the premises." *Lanier v. Wal-Mart Stores, Inc.*, 99 S.W.3d 431, 436 (Ky. 2003). "Under *Lanier*, the customer retains the burden of proving that: (1) he or she had *an encounter with a foreign substance* or other dangerous condition on the business premises . . . ." *Bartley v. Educational Training Systems, Inc.*, 134 S.W.3d 612, 616 (Ky. 2004) (emphasis added) (citations omitted). The evidence

Nelson presented regarding such an encounter makes a finding in her favor a practical impossibility. That evidence comes from her own lips.

Under oath, Nelson testified, "I did not see anything there[,]" either before or after the fall. True, she said she saw discoloration, even oil spots *elsewhere*, "but," she said, "where I was standing at that time I don't recall seeing anything. . . ." That evidence defeats her argument. She cannot even posit the false logic of a *post hoc ergo propter hoc* argument because there is no "*hoc*" – *i.e.*, there is no "this" (spill of a foreign substance) that occurred before her fall and, therefore, caused it.

Nelson's argument for causation is circular, beginning and ending with her fall and working backward, illogically, from there. When asked whether "the only reason you know there was something there is because you slipped?" she answered, "Yes." She apparently speculates that her fall must have been caused by what the defendant sells – gas and oil – with no proof any spill ever occurred there. In fact, Nelson's proof was that nothing was spilled there. This testimony defeats her causation argument. To survive summary judgment, Nelson was required to present more than she did; she must present evidence of a spill and not bald speculation.

In *Lanier v. Wal-Mart Stores, Inc.*, as Nelson herself points out, there was evidence of "a 'spot of [clear] liquid' that was on the floor." 99 S.W.3d at

433. Similarly, in *Jones v. Abner*, the plaintiff alleged and testified "that cleaning residue was left on the bottom of the tub when it was cleaned the day before her fall." 335 S.W.3d 471, 475 (Ky. App. 2011). Nelson identifies no such foreign or slippery substance where she fell, and she expressly says she saw none.

Her only evidence is that her fall was preceded by a startling squeal of car tires and her subsequent uncontrolled movement like that of an ice skater. After she fell, she crawled away from where she said she saw no oil or other spilled substance, moved around her car to the passenger side door, and pulled herself to her feet. She then discovered her clothes and shoes were soiled and, so, disposed of them. From these facts she urged the circuit court, and now urges this Court, to infer that she must have been on a slick surface when she fell. Such an inference requires suspending knowledge of her direct evidence – her own testimony she saw no foreign substance where she stood before the fall.

"[T]he claimant must introduce sufficient proof to tilt the balance from possibility to probability. An inference is simply nothing more than a probable or natural explanation of facts . . . (which) arises from the commonly accepted experiences of mankind. . . ." *Bartley v. Childers*, 433 S.W.2d 130, 132 (Ky. 1968) (citation and internal quotation marks omitted). The inference Nelson urges cannot tilt that balance in her favor because her testimony, direct evidence that needs no inference, destroys it.

An inference favoring the plaintiff cannot be reasonably drawn if it contradicts the plaintiff's direct proof. That concept is illustrated in *Klinglesmith v. Estate of Pottinger*, 445 S.W.3d 565 (Ky. App. 2014). Klinglesmith fell on her neighbor's front porch when returning a baking pan. The analysis is slightly different because Klinglesmith was a licensee rather than an invitee. However, the case demonstrates the broader principle that an inference contradicting the plaintiff's own testimony is not an inference reasonably drawn in her favor.

Analogous to Nelson's testimony, the plaintiff in *Klinglesmith* "testified in her deposition that she did not observe any defect in the porch . . . either before or after falling[.]" *Id.* at 566, 568. However, like Nelson, Klinglesmith argued there was evidence from which an inference could be drawn to prove causation. More than a year after the fall, "Klinglesmith produced photographs of the porch allegedly showing a crack in the concrete and an uneven surface" from which one might infer the defect was there when she fell. *Id.* at 566. This evidence was not enough to create a genuine issue of material fact regarding causation.

The defendant in *Klinglesmith* moved for summary judgment and "it was upon the element of causation that the [Jefferson Circuit] Court sustained the . . . motion"; on that same basis this Court affirmed the summary judgment. *Id.* at 569 ("We find no error in the Jefferson Circuit Court's conclusion that

Klinglesmith could not prove the essential element of causation if the matter proceeded to trial; therefore, we find no basis for reversing the Order on appeal."). The plaintiff's testimony that she observed nothing at the time to cause her fall was paramount in analyzing whether it was possible for her to prove her case. It was so in *Klinglesmith* and it should be so in this case.

If an inference must be drawn based on commonly accepted experiences of mankind, and accounting for all the evidence, including Nelson's proof there was no foreign substance where she fell, it must be this: Nelson was startled by squealing tires, lost her balance and fell where she said there was no foreign substance, crawled away from that area and across another where her clothes and shoes were soiled.

Nelson's honest testimony that there was no visible transitory foreign substance on the premises where she fell justified, even compelled, the circuit court's grant of summary judgment. It is worth repeating here that "a business is not an insurer of its patrons' safety and is not strictly liable for injuries suffered by a customer on its premises." *Lanier*, 99 S.W.3d at 436. With no evidence of a transitory foreign substance at the specific site of Nelson's accident, it would have been, and now will be, a practical impossibility to prove to any reasonable juror that the defendant's negligence caused her fall.

For the foregoing reasons, I respectfully dissent.

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