RENDERED: January 31, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 95-CA-002125-MR

JAMES S. LONG, Executor of the
Will of GENEVA T. LONG, Deceased — APPELLANT

V.

APPEAL FROM TRIMBLE CIRCUIT COURT
HONORABLE DENNIS A. FRITZ, JUDGE
CIVIL ACTION NO. 92-CI-000073

MARY ALICE MITCHELL — APPELLEE

OPINION

AFFIRMING

** ** ** ** ** ** **

BEFORE: COMBS, GUIDUGLI and HUDDLESTON, Judges.

HUDDLESTON, JUDGE. James S. Long, Executor of the Will[1] of Geneva T. Long, deceased, appeals from a judgment based on a jury verdict that awarded Mary Alice Mitchell damages for personal injuries she sustained when she slipped and fell in the upstairs hallway of Geneva Long's home. On appeal, Long argues that the circuit court erred when it refused to direct a verdict in his favor. In the alternative, Long argues that the instructions given to the jury were faulty.

[1] James S. Long is incorrectly referred to in the pleadings as Executor of the "Estate" of Geneva T. Long.

Mitchell was employed by Geneva Long to provide domestic help in her home. Mitchell's responsibilities encompassed light cleaning, including dust mopping the upstairs hallway, cooking, and companionship to the elder Long three days each week. On those days that Mitchell worked in Long's home she stayed the night. Originally, she utilized a first-floor bedroom, but, eventually, she slept in an upstairs bedroom because Long preferred to have Mitchell close by in the event she was needed during the night.

Long's bedroom was positioned at one end of the upstairs hallway. The few feet of hallway leading to Long's bedroom had been carpeted because of a previous fall Long had taken in that area. The carpeted portion of the hallway ended short of entrances to other rooms. Mitchell's bedroom was close in proximity to Long's bedroom. Directly across the hall from Mitchell's bedroom was a bathroom. The flooring of the hallway was hardwood, and a throw rug was placed on the floor immediately in front of the entrance to Mitchell's bedroom. This had been the condition of the hallway during the entirety of Mitchell's employment.

Early on November 9, 1991, Mitchell awoke and proceeded from her bedroom toward the bathroom. When she stepped on the throw rug, she slipped and fell, resulting in a broken hip. After Geneva Long's death, Mitchell sued the executor of her will alleging a failure to maintain the premises in a reasonably safe condition. Long defended on the basis that the hallway had been maintained in a reasonably safe condition and, even if not, that

Mitchell knew of or should have known of and appreciated the obvious danger presented by the throw rug.

At trial, Long moved for a directed verdict, both at the close of Mitchell's case and at the conclusion of all evidence, citing Shipp v. Johnson, Ky., 452 S.W.2d 828 (1969). Both motions were denied. Long also objected to the instructions given by the court. The case was submitted to a jury which returned a verdict finding that Long had not maintained the hallway in a reasonably safe condition and that Mitchell had exercised an appropriate degree of care for her own safety. Mitchell was awarded hospital and medical expenses and lost wages totaling $42,283.34, but received no award for pain and suffering. Long has appealed; Mitchell has not cross-appealed.

The standard for reviewing the denial of a motion for a directed verdict is set forth in Lewis v. Bledsoe Surface Mining Co., Ky., 798 S.W.2d 459, 461 (1990):

> Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact.

Both Long and Mitchell agree that Mitchell qualifies as an invitee in Long's home. See Cozine v. Shuff, Ky., 378 S.W.2d 635, 637 (1964).

> The duty owed by the person in possession of land [Long] to others whose presence might reasonably be anticipated [Mitchell], is the duty to exercise reason-

> able care in the circumstances. The traditional classifications, "trespasser," "licensee" and "invitee," are simply convenient classifications for defining certain basic assumptions appropriate to the duty of the party in possession in the circumstances. These classifications help to define the real issue, which is what is reasonable care under the circumstances?

Perry v. Williamson, Ky., 824 S.W.2d 869, 875 (1992). In other words, the classification of trespasser, licensee or invitee imposed by virtue of a particular set of circumstances serves to define the scope of the duty owed by the owner or occupier of the premises.

Long was required to maintain her home in a reasonably safe condition. She was under a duty to exercise reasonable care to discover artificial or natural conditions which involved an unreasonable risk to Mitchell. If such conditions existed, Long was obliged to either correct them or to warn of the peril. City of Madisonville v. Poole, Ky., 249 S.W.2d 133, 135 (1952). See also 62 Am. Jur. 2d Premises Liability § 136 (1990) ("[A] property owner owes to an invitee the duty of prevision, preparation, and lookout.")

Mitchell also had a duty in these circumstances to exercise ordinary care for her own safety. Wilkinson v. Family Fair, Inc., Ky., 381 S.W.2d 626, 628 (1964). If Mitchell failed to recognize or appreciate the danger of an open or obvious[2] condition

[2] "Obvious" has been defined as meaning, "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." Bonn v. Sears, Roebuck & Co., Ky., 440 S.W.2d 526, 529 (1969) (Emphasis supplied).

on the property, then Long is relieved of liability for injuries that resulted from the condition; that is, Long had no duty to warn in such a situation. Standard Oil Co. v. Manis, Ky., 433 S.W.2d 856, 857 (1968); Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996); Ashcraft v. Peoples Liberty Bank & Trust Co., Inc., Ky.App., 724 S.W.2d 228, 229 (1986).

Long's argument that a directed verdict should have been granted as a matter of law based upon her interpretation of Shipp v. Johnson, supra, misconstrues the effect of the holding of that case. In Shipp, the plaintiff, a social guest in the home of the Johnsons, slipped and fell after stepping on a small throw rug. On appeal, Kentucky's highest court determined that the throw rug was an open and obvious condition which did not require a warning in the circumstances presented by the facts of the case. Shipp, 452 S.W.2d at 830.

The Shipp court, as well as Long here, points to another case, Rademaker v. Williamson, Ky., 355 S.W.2d 154 (1962), which involved a plaintiff who tripped on the corner of a large area rug and fell. 355 S.W.2d at 154. There the court distinguished small throw rugs from larger area rugs stating, "In those cases the rugs involved have been small throw rugs, and it is generally held that the use of such rugs on waxed hardwood floors is not inherently dangerous." 355 S.W.2d at 155 (Emphasis supplied).

In both Shipp and Rademaker, the Court held that the danger from a rug should have been known or appreciated by the plaintiff. Therefore, the plaintiffs' failure to exercise ordinary

care for their own safety relieved the owner or occupier of the premises of any responsibility for the injuries sustained by the plaintiffs. Contrary to Long's contention, these cases did not decide that, as a matter of law, throw rugs are open and obvious dangers in every instance.

Whether a plaintiff has exercised ordinary care for her own safety is generally a question of fact for the jury. Silverman v. Bowman, Ky., 411 S.W.2d 906, 908 (1967) (quoting Winn-Dixie Louisville, Inc. v. Smith, Ky., 372 S.W.2d 789, 792 (1963)); Majestic Theater Co. v. Lutz, 210 Ky. 92, 275 S.W. 16, 20 (1925). As applied to the facts of this case, there was a jury question as to whether the throw rug in the hallway presented an open and obvious dangerous condition. To reach an answer to that question, the negligence, or lack thereof of Long, as well as Mitchell, must be judged. Thus, the trial court appropriately declined to grant Long's motions for a directed verdict.

The second contention by Long, that the jury instruction regarding the duty and standard of care owed to Mitchell is erroneous and requires reversal, is likewise unavailing. Long's argument is that the instruction misstates the law because Shipp, supra, decided that throw rugs are open and obvious dangers as a matter of law and, therefore, Long owed no duty to Mitchell. We have answered this contention adversely to Long.

Moreover, this argument is not properly preserved for appellate review. Ky. R. Civ. Proc. (CR) 51(3). The references to the record where Long insists she preserved this argument reveal

that the tendered instructions on behalf of Long contain no alternative instruction to the one given by the court. In addition, when the court considered objections to the instruction, Long's main complaint was that it "emphasizes facts too much." A second objection -- that the instruction did not contain language requiring the jury to find that Long's failure in her duty toward Mitchell was a substantial factor in causing Mitchell's injuries -- was sustained by the court and the instruction revised accordingly.

The judgment is affirmed.

ALL CONCUR.

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