

RENDERED: March 20, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 97-CA-2538-MR

HILLS DEPARTMENT STORE COMPANY

APPELLANT

V.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 95-CI-79

THRIFT DRUG, INC.

APPELLEE

OPINION AFFIRMING

* * * * *

BEFORE: GUDGEL, Chief Judge; KNOPF and SCHRODER, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal from a summary judgment entered by the Greenup Circuit Court in a tort action. The court determined that the claim asserted against the third-party defendant, appellee Thrift Drug, Inc. (Thrift), by the third-party plaintiff, appellant Hills Department Store Company (Hills), is barred by limitations. On appeal, Hills contends the court erred by finding (1) that its claim is barred by limitations, (2) that it is not entitled to an apportionment instruction against Thrift, and (3) that it is not entitled to recover against Thrift by way of common law indemnity. We are of the opinion that the court did not err by dismissing Hills' third-party complaint, although we reach this conclusion for

reasons other than those relied upon by the trial court. Hence, we affirm.

On March 19, 1994, Marilyn Ann Broughton slipped and fell on a sidewalk located in front of Thrift's leased premises in a strip shopping center. The offending sidewalk, like the center, the parking lot, and other common areas, was owned by Glimcher Realty Trust (Glimcher). However, Glimcher had contractually agreed with Hills, another tenant in the center, that Hills would undertake the duty and obligation to maintain and keep the common areas of the center, including the offending sidewalk, clean and free of debris. Moreover, Glimcher had contractually agreed with Thrift to indemnify and hold Thrift harmless from any liability it might incur stemming from the use, operation, or maintenance of the common areas of the center, including the parking lot and sidewalks.

On February 10, 1995, Broughton filed a tort action seeking damages from both Glimcher and Hills for injuries she sustained in the fall. After answers were filed Hills filed a third-party complaint against Thrift, alleging that Broughton's claimed fall occurred as she prepared to enter Thrift's premises, and that as an occupier of the center, Thrift was responsible for maintaining and keeping the sidewalk immediately in front of its store free of debris. Hills alleged that Broughton's injury resulted from Thrift's breach of duty. By way of relief, Hills sought either a judgment for common law indemnity against Thrift for any monetary judgment against Hills in favor of Broughton or,

alternatively, an instruction to the jury permitting it to apportion against Thrift any finding of fault against Hills in favor of Broughton. In its answer, Thrift denied that it had any legal duty to maintain or clean the sidewalk in front of its leased premises.

In due course, Thrift made a motion for summary judgment on the ground that limitations barred the third-party claim asserted against it. The court granted the motion, and this appeal followed.

We agree with Hills' contention that a common law indemnity claim asserted in a multidefendant tort action, such as the one now before us, is not barred by the one-year statute of limitations applicable to the plaintiff's claim. Nevertheless, we are of the opinion that the court's summary judgment must be affirmed on the ground that Thrift owed no legal duty to Broughton, Glimcher, or Hills to maintain the sidewalk in front of its leased premises or to keep it free of debris. That being so, it follows that Thrift cannot be adjudged liable to any of the parties herein, and that Thrift was entitled to a summary judgment.

It is clear from a review of the limited record adduced below, that Thrift did not lease or retain control of the sidewalks or other common areas of Glimcher's strip shopping center. Moreover, it is clear that unlike Hills, Thrift did not contractually assume a duty to maintain or clean the common areas, including the offending sidewalk in front of its leased

premises. In fact, Thrift extracted from Glimcher an indemnity agreement which protected Thrift from any such liability. Thus, unless Thrift owed Broughton a legal duty to maintain the offending sidewalk and to keep it clean of debris, Thrift cannot be adjudged liable for negligence in these circumstances and, as a matter of law, it cannot be adjudged liable to Hills for indemnity. Hence, at a trial of this action there would be no legal basis for a jury's apportionment of fault against Thrift.

There is no Kentucky decision which expressly deals with the liability of a tenant in a strip shopping center or mall for injuries sustained by a third person who falls in a common area of the center while accessing the tenant's store premises. However, it is well settled that in the case of a landlord who leases office or residential property to multiple tenants but retains control of the common areas thereof, including sidewalks, steps, and parking areas, the landlord is liable for negligence to a tenant or a third party who is injured using such a common area. Wright & Taylor, Inc. v. Smith, Ky., 315 S.W.2d 624 (1958). See also Davis v. Coleman Management Co., Ky. App., 765 S.W.2d 37 (1989). Moreover, most jurisdictions which have addressed the issue now before us have held that where a landlord has a duty to maintain the common areas of a shopping center, a tenant of that center is not liable to a customer who falls in a common area which the landlord is obligated to maintain. See, e.g., Raspilair v. Bruno's Food Stores, Inc., 514 So.2d 1022 (Ala. 1987); Morris v. Scottsdale Mall Partners, Ltd., 523 N.E.2d

457 (Ind. App. 1988); Hall v. Quivira Square Development Co., 9 Kan.App.2d 243, 675 P.2d 931 (1984); Garcia v. Arbern Realty Co., 89 A.D.2d 616, 452 N.Y.S.2d 665 (1982); Howe v. Kroger Co., 598 S.W.2d 929 (Tex. Civ. App. 1980); Durm v. Heck's, Inc., 184 W.Va. 562, 401 S.E.2d 908 (1991). The basis for this rule lies in the fact that if a landlord contractually agrees and undertakes to maintain common areas and retains control thereof, it would be unfair to impose upon the tenant any legal liability for maintaining those areas.

We fail to perceive that a different rule should apply herein. Indeed, while Glimcher may have secured Hills' agreement to maintain the center's common areas, the fact remains that Thrift did not agree, either contractually or voluntarily, to maintain any of those areas. It follows, therefore, that Thrift did not owe Broughton, Glimcher or Hills a legal duty to maintain or clean the sidewalk in front of its leased premises, especially since Glimcher agreed to indemnify and hold Thrift harmless from any such liability. We conclude, therefore, that the court did not err by granting Thrift a summary judgment dismissing Hills' third-party complaint.

In light of our conclusion to this point in the opinion, we need not address appellant's remaining contentions.

The court's judgment is affirmed.

SCHRODER, J., CONCURS.

KNOFF, J., DISSENTS BY SEPARATE OPINION.

KNOFF, JUDGE, DISSENTING BY SEPARATE OPINION. I respectfully dissent from the majority opinion. I do not believe that we should decide this case on an issue that has not been raised by the parties without first giving the parties an opportunity to at least file supplemental briefs on the issue.

Thrift's motion for summary judgment relied exclusively on Kevin Tucker & Associates, Inc. v. Scott & Ritter, Ky. App., 842 S.W.2d 873 (1992) for the proposition that Hills cannot bring a third party claim against Thrift because the plaintiff did not sue Thrift, the plaintiff's one-year statute of limitations had run, and Hills can not assert either contractual indemnity or vicariously liability. The trial court's reasoning in its order granting the summary judgment begins with the following sentence: "Thrift Drug cited the Court the case of Kevin Tucker & Assoc., Inc. v. Scott & Ritter, Inc., 842 S.W.2d 873 (1992), which the Court finds controlling." On appeal the only issues that were raised related to the statute of limitations of third party complaints, entitlement to an apportionment instruction, and viability of common law indemnity based on Brown Hotel Co. v. Pittsburgh Fuel Co., 311 Ky. 396, 224 S.W.2d 165 (1949).

The parties raised absolutely no issue or argument regarding the existence of a legal duty by Thrift to the plaintiff. Yet, the majority has embarked on its own course of raising an argument about legal duties, researching the issue, and then deciding the issue to hold that the summary judgment was appropriate. Where is the adversary process in this kind of

decision making? Where is the opportunity for the parties to rebut and defend against new issues and theories? Because the record at the time of the summary judgment was limited, we do not know all the possible facts. For instance, what if an employee of Thrift had actually begun cleaning the debris but failed to do so properly before the plaintiff fell? Could the majority opinion be overlooking other possibilities that could establish a legal duty? Why did Thrift not make the argument? Thrift even claims in its appellate brief that Hills should be able to obtain an apportionment instruction against Thrift if evidence at trial shows Thrift caused plaintiff's damages.

Certainly, this Court has the authority to decide a case for reasons other than those used by the trial court. However, it is dangerous to do so when those reasons have not been briefed and particularly when the reasons have nothing to do with the issues on appeal. I believe that parties should be given an opportunity to address issues that the Court believes are dispositive but the parties have not briefed. The majority could have easily asked the parties to file supplemental briefs addressing the issue of Thrift's legal duty. However, the majority did not ask for additional briefs. Our Court will likely be the Court of last resort in this case and Hills has not had even one opportunity to respond to an issue that eliminates its claims.

Although the majority might be ultimately correct, I cannot agree to the majority opinion without giving the parties

an opportunity to address whether Thrift could under certain circumstances owe a legal duty to the plaintiff.

For these reasons, I dissent.

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