RENDERED: MARCH 21, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000721-MR

AUDREY PRESTON — APPELLANT

v.

APPEAL FROM HENRY CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 05-CI-00214

PLEASUREVILLE CHEVRON, LLC — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DIXON, JUDGE; KNOPF,[1] SENIOR JUDGE.

DIXON, JUDGE: In this premises liability action, Audrey Preston appeals from an order of Henry Circuit Court granting summary judgment in favor of Pleasureville Chevron, LLC ("Chevron"). We affirm.

Summary judgment is proper only if "there is no genuine issue as to any material fact and [] the moving party is

[1] Senior Judge William L. Knopf, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

entitled to a judgment as a matter of law." CR 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citation omitted). Furthermore, "summary judgment is not a substitute for trial," and the motion should be granted only where "the movant shows that the adverse party could not prevail under any circumstances." *Id.*, *citing Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985).

Construed most favorably to Preston, the record indicates that on October 3, 2004, she walked from her home in Pleasureville, Kentucky, to the Chevron gas station, a distance of approximately one block. The gas station is located on a highway with a wide gravel shoulder. A concrete curb borders the perimeter of the parking lot beside the gravel shoulder. The gravel area is several feet wide, with space for vehicles to park and an area for Chevron's garbage Dumpster. Fuel islands are located in the center of the parking lot. A pay telephone is attached to a pole in the front corner of the parking lot near the highway. A "Food Mart" convenience store is at the rear of the lot with parking spaces along the front of the building. A concrete sidewalk borders the front of the store, separating it from the parking lot. The front sidewalk extends to the edge of the building and ends at a ramp. The ramp intersects the front sidewalk and then flattens out, bordering

the left side of the building. The ramp is located on the side of the building closest to the highway. The far left edge of the ramp merges with the curb separating the parking lot from the gravel shoulder.

It is undisputed that Preston walked to the gas station to use the pay telephone located in the parking lot. When Preston arrived, the telephone was occupied. Preston walked across the parking lot into the convenience store. She asked to use the business telephone, and she was denied. She exited the building and turned right to walk along the front sidewalk. Preston was looking toward the highway as she crossed the ramp at the end of the sidewalk. Preston tripped on the curb closest to the gravel shoulder. She fell forward into a parked car, fracturing her left arm.

Preston filed a complaint against Chevron, alleging the curb and sidewalk were negligently maintained and hazardous. Following discovery, Chevron moved for summary judgment. The circuit court granted the motion, finding that Preston was a licensee on the premises and that the curb was open and obvious as a matter of law. This appeal followed.

Preston argues that summary judgment was improper because material issues of fact exist warranting a jury trial.[2] Preston contends she was a business invitee and Chevron breached the duty of care it owed her. On the other hand, Chevron

[2] In her appellate brief, Preston first presents an argument relating to the constitutionality of this Commonwealth's premises liability jurisprudence. We will address this argument at the end of this opinion.

contends that Preston was merely a licensee on the premises and that the curb was not dangerous.

> An invitee enters upon the premises at the express or implied invitation of the owner or occupant on business of mutual interest to them both, or in connection with business of the owner or occupant. A licensee enters by express invitation or implied acquiescence of the owner or occupant solely on the licensee's own business, pleasure or convenience.

Scuddy Coal Co. v. Couch, 274 S.W.2d 388, 390 (Ky. 1955).

Preston contends that she was an invitee because she had purchased items from Chevron on prior occasions. However, it is undisputed that, on October 3, 2004, Preston went inside the convenience store solely to use Chevron's business telephone. Further, we infer from Preston's deposition testimony that she would not have entered the store if the pay phone had been unoccupied. According to her testimony, Preston entered the store, inquired about using the telephone, and immediately exited the store. It is apparent that Chevron derived no benefit from Preston's presence on the premises. *Cf. Johnson v. Lone Star Steakhouse & Saloon of Kentucky, Inc.*, 997 S.W.2d 490 (Ky. App. 1999) (restaurant patron who purchased a meal was an invitee). Accordingly, we conclude Preston was a licensee who entered Chevron's premises solely for her own benefit – using the telephone.

Preston asserts that, even if she was a licensee, Chevron remains liable for her injury. As Preston points out, "the basic distinction between the duties of the possessor is

that he owes an invitee the duty of discovering a dangerous condition, whereas he owes a licensee only the duty to warn him of a dangerous condition already known to the possessor." *Mackey v. Allen*, 396 S.W.2d 55, 58 (Ky. 1965). Accordingly, Preston contends the curb was a clearly dangerous condition.

Preston also relies on *Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364 (Ky. 2005). In *Horne*, the plaintiff was a business invitee at Precision Cars of Lexington. *Id.* at 367. While listening to the salesperson, plaintiff tripped over a parking barrier obscured by an automobile. *Id.* at 366. The Court specifically stated:

> While parking barriers, curbing, division strips, and other such obstructions commonly used in parking areas to protect automobiles from property damage (and buildings from automobile damage) are not *per se* dangerous or unsafe, they can become so when their presence is hidden or otherwise not readily apparent to invitees using the premises.

Id. at 369. Here, Preston contends the curb was dangerous because it blended in with the sidewalk, becoming lost in a "sea of gray color." Preston further speculates that if the curb had been painted yellow, she would not have tripped.

Despite Preston's arguments, after reviewing the record, we conclude that the curb was not a dangerous condition. Photographs of the sidewalk, both color and black and white, clearly show the raised edge of the curb on the far side of the ramp where Preston tripped. Preston acknowledged that she was

looking ahead at the highway and failed to look toward the area immediately in front of her.

Here, unlike in the *Horne* case, the curb was not obscured by any object and Preston was not carrying anything that blocked her view. Furthermore, it was twelve o'clock in the afternoon on a sunny autumn day. In her deposition, Preston testified that she would have seen the curb if she had looked down at the sidewalk. We are mindful that Preston was not obligated to "look directly down at [her] feet with each step taken." *Humbert v. Audubon Country Club*, 313 S.W.2d 405, 407 (Ky. 1958). However, "in the exercise of ordinary care for [her] own safety, one must observe generally the surface upon which [she] is about to walk." *Id.*

We conclude that Chevron was not obligated to warn Preston because the curb was not a dangerous condition on the property. Consequently, summary judgment for Chevron was proper. Since we have determined Chevron had no duty to warn Preston, we need not address Preston's remaining arguments to the contrary.

Finally, Preston contends that case law allowing summary judgment in premises liability cases is unconstitutional because it infringes an injured party's right to seek civil redress. We decline to address this argument. This Court "is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court." *Tucker v. Tri-State Lawn & Garden, Inc.*, 708 S.W.2d 116, 118

(Ky. App. 1986); Rules of the Supreme Court (SCR), Rule 1.030(8)(a).

For the reasons stated herein, the judgment of the Henry Circuit Court is affirmed.

ALL CONCUR.

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