

RENDERED: AUGUST 26, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000846-MR

SHIRLEY COMBS

APPELLANT

v. APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 08-CI-00240

GEORGETOWN COLLEGE;
AND HAPPY OSBORNE
D/B/A OSBORNE BASKETBALL
CAMP

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: TAYLOR, CHIEF JUDGE; CAPERTON AND WINE, JUDGES.

TAYLOR, JUDGE: Shirley Combs brings this appeal from an April 12, 2010, summary judgment of the Scott Circuit Court dismissing her premises liability action against Georgetown College and Happy Osborne, d/b/a Osborne Basketball Camp (collectively referred to as appellees). We affirm.

Combs was injured when she fell while descending from a platform on the second floor of the Scott County High School gymnasium. Apparently, Combs tripped on a “lip” that surrounded the edge of the platform. Combs’ grandson was attending a basketball camp conducted by appellees at the gym, and she was present at the gym for the sole purpose of watching her grandson play basketball. Numerous high school basketball teams paid a fee to participate in the camp.

When Combs was injured, there were approximately fifty people in the gym. The bleachers were not pulled out, and the only available seating was folding chairs. It is undisputed that no entrance fee was charged to the gym and that concessions were not sold. And, appellees neither advertised to the public nor directly invited the public to attend the basketball camp’s activities.

Combs filed a premises liability action against appellees seeking damages as a result of injuries she suffered in the fall at the gym. She claimed to be an invitee and that appellees breached their duty to keep the gym in a reasonably safe condition and to warn of obvious dangers. Appellees moved for summary judgment. They argued that Combs was a mere licensee and that they breached no duty of care to her.

The circuit court granted appellees’ motion for summary judgment. The circuit court agreed that Combs was a licensee at the time of her injury and that appellees breached no duty of care. This appeal follows.

Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). In this case, the relevant facts are uncontroverted; thus, our review proceeds *de novo*.

The disposition of this appeal depends upon whether Combs was an invitee or licensee at the time of her injury. Thus, the distinction between an invitee and licensee is pivotal.

Under the law of this Commonwealth:

A person is an invitee if: “(1) he enters by invitation, express or implied, (2) his entry is connected with the owner's business or with an activity the owner conducts or permits to be conducted on his land and (3) there is mutuality of benefit or benefit to the owner.” [*Johnson v. Lone Star Steakhouse & Saloon of Kentucky, Inc.*, 997 S.W.2d 490, 491-492 \(Ky. App. 1999\)](#) (quoting *Black's Law Dictionary*, 827 (6th ed. 1990)).

West v. KKI, LLC, 300 S.W.3d 184, 190-191 (Ky. App. 2008). A premises owner or occupant owes a duty to an invitee to exercise ordinary care to maintain the premises in a reasonably safe condition and to warn of latent, unknown, or obvious dangers. *West*, 300 S.W.3d 184. By contrast, a licensee:

[I]s one whose presence upon land is solely for his own purpose, in which the possessor has no interest, either business or social, and to whom the privilege of entering the premises is extended as mere favor by express consent or by general or local custom.

Collins v. Rocky Knob Assocs., Inc., 911 S.W.2d 608, 612 (Ky. App. 1995). A premises owner or occupant owes a duty to a licensee not to willfully or wantonly injure the licensee and to warn of dangerous conditions known by the owner/occupant.

In concluding that Combs was a licensee and that appellees' breached no duty of care to her, the circuit court reasoned:

No person who came to watch practice [was] charged a fee nor [was] any concession available. There was no organized seating for participants to watch the practice and everyone was required [to] find a seat where ever they could. [Combs] found a seat on the second floor in a folding chair on top of a small platform approximately one foot high. She stepped upon the platform and took a seat in the folding chair. After watching her grandson play [a] basketball game she got up to leave and as she did she tripped over a lip approximately an inch tall on the edge of the platform. There is no evidence that [appellees] knew of the platform or anything about the platform because it is on the second floor and [appellees] used only the basketball courts on the first floor during the four day camp.

Combs believes that the circuit court erred by deciding that she was a licensee at the time of her injury. Instead, Combs maintains that she was clearly an invitee and particularly argues:

In this situation, it is also apparent that [appellees] solicited high school basketball players for a basketball camp held at Scott County High School and that, as part of this camp, [appellees] knew or should have known that said camp attracted spectators, such as family and friends of the participants. In fact, Defendant Happy Osborne admits that spectators did enter the gym during the camp, showing actual knowledge. Youth playing organized basketball and unlocked doors of the gymnasium together

create an implied invitation for spectators, especially family members of the youth, such as Shirley Combs, to enter the gymnasium to watch games. (Citations omitted.)

Therefore, the implied invitation to Shirley Combs to attend her grandson's basketball games at the gymnasium, coupled with her attendance being in connection with the business interests of [appellees], make [Combs] an invitee as a matter of law.

Combs' Brief at 5-6. Essentially, Combs maintains that appellees impliedly invited her to enter the gym, that her entry was connected with appellees' business, and her attendance was beneficial to appellees. Upon review of the record, we do not think that appellees impliedly invited Combs to enter the gym or that Combs was an invitee of appellees.

The *Restatement (Second) of Torts* § 332 (1965) provides a definition of "invitee." More important to our case is "Comment b and c." Comment b and c discuss the fine distinction between an "invitation," which is necessary for an invitee, and "permission," which is given to a licensee, to enter a premises:

An invitation differs from mere permission in this: an invitation is conduct which justifies others in believing that the possessor desires them to enter the land; permission is conduct justifying others in believing that the possessor is willing that they shall enter if they desire to do so. Any words or conduct of the possessor which lead or encourage the visitor to believe that his entry is desired may be sufficient for the invitation. A common form of invitation is preparation of the land for the obvious purpose of receiving the visitor, and holding it open for that purpose. . . .

.....

In determining whether a particular person is an invitee, the important thing is the desire or willingness to receive that person which a reasonable man would understand as expressed by the words or other conduct of the possessor. It is immaterial that the person is one whom the possessor is not willing to receive as an invitee if the possessor's words or other conduct are understood, and would be understood by a reasonable man, as indicating the possessor's willingness. The nature of the use to which the possessor puts his land is often sufficient to express to the reasonable understanding of the public, or classes or members of it, a willingness or unwillingness to receive them.

Restatement (Second) of Torts § 332 cmt. b, c (1965).¹

The undisputed facts of this case lead to the inescapable conclusion that Combs was a licensee at the time of her injury. As recited by the circuit court, the facts failed to demonstrate that appellees impliedly invited Combs' attendance or that Combs' attendance benefited appellees. Rather, the facts demonstrated that her attendance was merely by permission of appellees. In support thereof, the record reveals that the bleachers at the gym were not prepared for spectators, no advertising was undertaken, and Combs did not pay an entrance fee. As a licensee, appellees only owed Combs the duty to warn her of dangers known to them and to not willfully cause her injury. The uncontroverted facts reveal that appellees breached neither duty to Combs.

In sum, we conclude that the circuit court properly rendered summary judgment dismissing Combs' premises liability action against appellees.

¹ We observe that the Supreme Court has cited the *Restatement (Second) of Torts* approving in a premises liability action. *Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364 (Ky. 2005).

For the foregoing reasons, the summary judgment of the Scott Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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