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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001194-MR

BETTY WEBB APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 08-CI-04183

DICK'S SPORTING GOODS APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON, KELLER, AND VANMETER, JUDGES.

KELLER, JUDGE: Betty C. Webb (Webb) fell when she entered a Dick's Sporting Goods store (Dick's) in Lexington, Kentucky. The trial court granted Dick's motion for summary judgment based on Dick's "open and obvious" defense. On appeal, Webb argues that she raised material issues of fact and that the trial court inappropriately applied the open and obvious defense. Dick's argues that Webb knew of any danger, that she proceeded despite her knowledge, and that she failed

to show what Dick's could have or should have done to remedy the alleged danger. For the following reasons, we reverse and remand.

FACTS

On December 8, 2007, Webb went with her nephew to Dick's in Lexington to purchase hunting clothes for him. It had been "pouring" rain that day and Webb noticed puddles as she walked through Dick's parking lot. When she entered the store, Webb noticed that the floor mats were in a "V" configuration and that water had accumulated between the mats. Because she knew the floor was wet, Webb stepped from one of the mats onto a tile in the center of the "V" that she thought was dry. However, the tile was wet and, when she stepped on it, Webb slipped and fell forward, injuring her knees, arms, and shoulders. Webb testified that a "door greeter" witnessed her fall.

During her deposition, Webb admitted that she knows that wet tile can be slippery; that her shoes were wet; and that she could have stepped in another direction if she had waited for other customers to pass. When asked what Dick's could have done to prevent her fall, Webb stated that it could have put the mats together, extended the mats further into the store, or put a heater or fan near the entrance to help dry the water. Webb also stated that she thought "wet floor" signs should have been placed at the entrance because they would have helped her "think about" the wet floor. However, Webb admitted that the signs "would not have made much of a difference."

Following Webb's fall, the store manager completed an incident report. In that report he stated that he recommended placement of wet floor signs to prevent similar occurrences.

Webb filed a complaint in Fayette Circuit Court, and Dick's sought removal to federal court. For reasons that are unclear from the record, the parties agreed to remand to Fayette Circuit Court. Dick's then propounded interrogatories and requests for production of documents and took Webb's deposition. After taking Webb's deposition, Dick's filed a motion for summary judgment, which the trial court granted without explanation.[1]

STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002).

ANALYSIS

Having reviewed the record and recent relevant caselaw, we hold that the trial court's summary judgment was inappropriate. As noted by the parties, the Supreme Court of Kentucky recently discussed the open and obvious doctrine at

[1] We note that we have obtained two copies of the hearing on Dick's motion from the circuit court clerk, both of which appear to be blank. A notation from the clerk's office indicates that the hearing took only four minutes and neither party refers to the hearing in their briefs; therefore, we presume that little of substance took place.

length. *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010). In *McIntosh*, a paramedic who was tending to a patient tripped over a curb at the entrance to the medical center's emergency room. She filed suit and, during discovery, the paramedic admitted that she had previously been through that emergency room entrance a number of times without incident. The medical center asserted that any danger associated with the entrance was not only open and obvious but known to the paramedic. Therefore, it moved for summary judgment, which the trial court denied. Following a jury verdict in favor of the paramedic, the medical center moved for judgment notwithstanding the verdict, a motion the trial court also denied. On appeal, the medical center argued that the trial court should have barred the paramedic's claim under the open and obvious doctrine. *Id.* at 387-88.

The Supreme Court undertook a lengthy and comprehensive review of the open and obvious doctrine and affirmed the trial court. In its review, the Court noted that the doctrine, which had its roots in contributory negligence, is at odds with the concept of comparative negligence. *Id.* at 391. The Court stated that there is a growing trend among states to apply a comparative fault analysis to facts that previously resulted in landowners being automatically absolved from liability for open and obvious conditions. *Id.* at 389. This trend is supported by the Restatement (Second) of Torts § 343A(1)(1965), and that section's accompanying commentaries, which state that:

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness*. . . . (emphasis added).
>
> There are . . . cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger . . . . .
>
> Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact that the danger is known, or is obvious . . . is not . . . conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances.

Id. at 389-90 (emphasis in original).

If an invitee falls victim to an open and obvious danger, she will have some, perhaps a significant amount of, fault. However, "this does not necessarily mean that the land possessor was not also negligent for failing to fix an unreasonable danger in the first place. Under our rule of comparative fault, the defendant should be held responsible for his own negligence, if any." *Id.* at 391.

The Court noted that the open and obvious doctrine infers that, absent a duty to warn of a known danger, the land possessor has no duty. However, that is not

the case. A land possessor has a duty to "*eliminate or reduce* the risk posed by unreasonable dangers. In short, '[e]ven where the condition is open and obvious, a landowner's duty to maintain property in a reasonably safe condition is not obviated; it merely negates the requirement to warn of such condition.'" *Id.* at 393 (citing *Phalen v. State,* 11 Misc.3d 151, 804 N.Y.S. 2d 886, 898 (N.Y. Ct. Claims 2005) (emphasis in original). Thus, the duty of the landowner is separate from that of the invitee, and trial courts must "ask whether the land possessor could reasonably foresee that an invitee would be injured by the danger. If the land possessor can foresee the injury, but nevertheless fails to take reasonable precautions to prevent the injury, he can be held liable." *Id.* at 392.

In this case, Dick's premised its motion for summary judgment on the argument that it had no duty to warn Webb or otherwise protect her from the open and obvious danger. However, that is not the law. As noted by the Supreme Court in *McIntosh,* a landowner's duty is twofold: to warn of dangers and to take steps to eliminate them. Under *McIntosh*, Dick's may not have had a duty to warn Webb of the open and obvious danger created by the wet floor; however, that did not relieve Dick's of its duty to take reasonable steps to eliminate or reduce the danger. Whether Dick's fulfilled that duty is a question of fact for the jury, not a question of law for the court. *Boland-Maloney Lumber Co., Inc. v. Burnett*, 302 S.W.3d 680 (Ky. App. 2009).

We note that Dick's argues that *McIntosh* should be narrowly applied to its facts, i.e., when an invitee is engaged in some sort of lifesaving activity. We do

not read *McIntosh* that narrowly. Based on our reading of *McIntosh*, a trial court is required to determine whether the landowner met its duty to protect the invitee in all circumstances where it is foreseeable that the invitee might: be distracted; realize there is a danger but forget about the danger; or choose to ignore the danger because the benefit outweighs the risk.

It is foreseeable that invitees to Dick's during the Christmas shopping season would be distracted and that they would appreciate a potential risk but proceed despite that risk. As Webb admitted, she saw the water and appreciated the potential risk. However, she proceeded despite that risk, believing that she would be stepping onto a portion of the floor that was dry.

We also note Dick's argument that Webb did not state what it could have or should have done, short of providing signage, to eliminate or reduce the danger. However, that argument is not supported by the record. Webb offered several remedies that Dick's could or should have undertaken: moving the mats together to prevent pooling of water; extending the mats further into the store; and putting fans or heaters near the entrance. Whether any of these solutions would have been reasonable under the circumstances is a question of fact that must be resolved by the jury.

CONCLUSION

Based on the record before us, Webb has raised issues of material fact regarding Dick's failure to meet its duty to take reasonable steps to eliminate or

reduce the danger she encountered. Therefore, under these circumstances, summary judgment is inappropriate and we reverse and remand for trial.

ALL CONCUR.

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