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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000223-MR

ROXANNE SMITH AND
SPEEDWAY SUPERAMERICA, LLC — APPELLANTS

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2012-SC-000573-DG

APPEAL FROM CLAY CIRCUIT COURT
v. HONORABLE OSCAR G. HOUSE, JUDGE
ACTION NO. 08-CI-00033

TERESA GRUBB AND
RANDY GRUBB — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: LAMBERT, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: The matter before us is on remand from the Kentucky Supreme Court. Our Supreme Court vacated this Court's to be published opinion rendered on June 15, 2012, and directed we consider the issue relating to the open

and obvious doctrine in light of its decisions in *Dick's Sporting Goods, Inc. v. Webb,* 413 S.W.3d 891 (Ky. 2013), and *Shelton v. Kentucky Easter Seals Soc., Inc.,* 413 S.W.3d 901 (Ky. 2013). Because our prior opinion was vacated and the parties present issues other than that pertaining to the open and obvious doctrine, it is necessary to address those issues in this opinion.

Speedway SuperAmerica, LLC, and its local store manager, Roxanne Smith, appeal from the Clay Circuit Court's findings of fact, conclusions of law and judgment awarding Teresa Grubb $5,762.45 for past medical expenses, $175,000 for pain and suffering, and awarding her husband, Randy Grubb, $20,000 for loss of consortium. The issues presented are: (1) whether the trial court erred when it found Smith individually liable; (2) whether the open and obvious doctrine applied and precluded recovery; (3) whether the trial court properly considered Teresa's comparative fault; and (4) whether Judge House, the trial judge, was required to recuse after he and the plaintiffs' attorney were identified by a federal court as participants in a vote-buying scheme. After a review of the record and contemplation of the applicable law, we conclude Smith cannot be individually liable. We further conclude the condition on Speedway's premises was open and obvious, it did not create an unreasonable risk of injury, and was not a condition Speedway could anticipate an invitee would not observe because of a foreseeable distraction.

TERESA'S FALL ON SPEEDWAY'S PREMISES

At approximately 8:30 p.m., on February 1, 2007, Teresa and an acquaintance, Robbie Gregory, visited the Speedway store in Manchester, Kentucky to purchase gasoline. Teresa exited the vehicle from the passenger's side and followed a path into the store taking her away from the area where she would later fall. After the couple paid for gas and Teresa purchased a cappuccino, the two exited the store and engaged in conversation. As Teresa approached the vehicle, she fell and suffered a fracture in her left ankle, a knee injury, and burns to her face and shoulder caused by spilling hot cappuccino.

To understand our discussion below, it is necessary to describe the area where Teresa fell. The evidence indicated that there was an eroded area located in close proximity to a drain covered by a grate. The parties have interchangeably used the terms "hole," "pothole" and "depression" to describe the area. Teresa describes the area in her brief as a "hole in the parking lot in the area of a drain between the gas pumps that had been caused by erosion (the blacktop had not been broken up) over an extended period of time." The photographic images introduced at trial do not show a hole, but an erosion depression. Because the parties agree that the blacktop's condition was caused by gradual erosion, it is accurately described as a depression of minimal depth caused by erosion.

THE COMPLAINT AND ATTEMPTS TO REMOVE THE CASE TO FEDERAL COURT

We turn to the procedural and substantive facts that developed after Teresa's fall.

Kentucky residents, Teresa and Randy, filed an action in the Clay Circuit Court against Speedway, a foreign corporation, and Smith, a Kentucky resident, alleging they failed to maintain the premises in a reasonably safe condition for Teresa's use as an invitee causing her to fall and sustain injury. Speedway and Smith attempted to invoke the federal court's diversity jurisdiction by filing a notice of removal in the federal court alleging Smith was fraudulently joined to defeat diversity.

The federal court remanded the action to the Clay Circuit Court based on this Court's unpublished opinion in *Bradford v. Lexington-Fayette Urban County Government*, 2004-CA-000536, 2005 WL 327177 (Ky.App. 2005), the only Kentucky case addressing whether a property manager had assumed the duties of a premises owner. Relying on *Bradford*, the federal court concluded that there "was a 'colorable basis' for predicting that the Grubbs *may* recover against Smith" and, therefore, she was not fraudulently joined. *See Alexander v. Electronic Data Systems Corp*., 13 F.3d 940, 949 (6th Cir. 1994) (holding that to establish fraudulent joinder and allow the federal court to disregard the citizenship of a party, there must be a reasonable basis for predicting that a plaintiff may recover against non-diverse defendants. If so, remand to state court is required). Following discovery, Speedway and Smith again unsuccessfully sought to invoke the federal court's jurisdiction.

MOTIONS FOR SUMMARY JUDGMENT

After their efforts to remove the case to federal court failed, Speedway and Smith filed motions for summary judgment. Speedway argued it did not owe a duty to Teresa because the depression caused by erosion around the drainage grate was open and obvious to the public. Smith argued that as a local manager of a convenience store that she did not own or control, as a matter of law, she had no duty to Teresa and, therefore, could not be liable. The trial court denied both motions.

THE TRIAL

Speedway and Smith waived their right to a jury trial, and a bench trial was conducted on January 25, 2010. Teresa and Gregory testified that neither noticed the eroded area prior to Teresa's fall and, when she fell, they were engaged in conversation. Teresa testified that she was not looking at the ground when she fell.

Smith testified that since 2006, she had managed the Speedway store and inspected and swept the parking lot daily. Because she did not believe the eroded area was a hazard, Smith did not request that it be repaired. She further described her duties as manager: She was responsible for mentoring employees through monthly meetings and for preparing employees' schedules. However, routine maintenance and submitting maintenance requests to Speedway were performed by all employees. If a request was submitted, Speedway coordinated the repair process and sent regional maintenance personnel to the local store to

either correct the problem or contract with a third-party to make the necessary repair. She further testified that neither she nor any other of the employees were trained to repair the parking lot. Although Smith had a budget of under $100 to buy necessities such as light bulbs, she had no authority to spend any amount to perform repairs requiring an expert's skills.

Carolyn King and Lauren Sizemore, Speedway cashiers, testified and confirmed Smith's testimony. Additionally, King testified that although she swept the parking lot daily and poured water down the drain located near the eroded area prior to Teresa's fall, she did not observe anything that she believed posed a danger to customers.

Teresa described the events preceding her fall and her injuries. She testified that she had significant pain for an extended time and continues to have pain, swelling, and discomfort in her left ankle. Further, she testified that she was immobile for two months after the fall and wore a walking boot for a significant time after her cast was removed. During that time, she slept on the couch and Randy assisted her in performing personal tasks and household chores. She testified that after the fall, she was no longer able to wear high heel shoes, enjoy dancing, or four-wheeling. She further testified that her sexual relationship with Randy was adversely affected.

Randy testified that for two to three months following the fall, he assisted Teresa in her daily activities and that she continues to suffer pain. He testified that she was "grinchy" and that their marital relationship had suffered.

The only medical evidence was presented by Teresa's treating orthopedic surgeon, Dr. Wallace Huff. He testified that immediately after her fall, Teresa underwent medical treatment for a fractured left ankle and placed in a short leg case. From March 21, 2007 until June 26, 2007, she was treated with physical therapy. Dr. Huff continues to treat Teresa and opined that she continues to suffer chronic soft tissue pain as a result of the fracture. He testified that her past medical expenses of $5,762.45 were reasonable and necessary.

At the close of the Grubbs' proof, Speedway and Smith moved for directed verdicts arguing that Smith did not owe a duty to Teresa, and that the eroded area was an open and obvious condition. The trial court denied the motions.

EVENTS BEFORE JUDGMENT

The trial court did not immediately issue its judgment and would not do so until August 9, 2010. While this action remained pending, events occurred in the United States District Court for the Eastern District of Kentucky, which Speedway and Smith allege required that Judge House recuse. Our discussion of the facts is limited to resolution of the legal issue regarding Judge House's duty to recuse. We caution that we do not have access to the record in the federal case and, therefore, make no conclusions regarding the factual accuracy of the federal court's statement regarding Judge House and the Grubbs' counsel, Yancey White.

On March 19, 2009, agents of the Federal Bureau of Investigation arrested eight prominent Clay County citizens on allegations of vote-buying and alleged fraudulent acts. Included in those charged were former Clay Circuit Judge, R. Cletus Maricle, and former school superintendant, Douglas Adams. The arrest followed guilty pleas by several other former prominent officials for similar behavior. According to the federal indictment, Judge Maricle and Adams participated in a conspiracy with prominent members of the community who pooled money to purchase votes.

On March 10, 2010, during the federal trial, the Court made a ruling regarding the admissibility of certain out-of-court statements attributable to the various co-defendants. In doing so, the Court mentioned members of the conspiracy other than those charged who it stated were "identified" and "established by a preponderance of the evidence," including Oscar Gayle House (now Judge House) and Yancey White.

THE CLAY CIRCUIT COURT'S JUDGMENT

Because a bench trial was held, no individual interrogatories were submitted to the court. Thus, the court issued its findings of fact, conclusions of law, and judgment. It found:

> (1) the hole in question in the parking area between the gas pumps constituted an unreasonably dangerous condition on the business premises of the Defendant, Speedway SuperAmerica, LLC;

(2) that the Plaintiff's encounter with the hole in question was a substantial factor in causing the Plaintiff, Teresa Grubb, to fall and the resulting injuries therefrom;

(3) that by reason of the presence of the unreasonably dangerous condition (i.e. the hole) the business premises of the Defendant, Speedway SuperAmerica LLC, was not in a reasonably safe condition for the use of business invitees in general and specifically for the use of the Plaintiff, Teresa Grubb;

(4) that the defendant, Speedway SuperAmerica, LLC, by and through its employees, either knew or should have reasonably known by the exercise of reasonable care that the dangerous condition (i.e. the hole) existed and that said condition posed an unreasonable risk of harm to its business invitees, including the Plaintiff, Teresa Grubb;

(5) that the Defendant, Speedway SuperAmerica LLC, should have expected by reason of the nature and location of the hole in question that its business invitees, including the Plaintiff, would not discover or realize the danger posed by the hole and/or would fail to protect themselves against it;

(6) that the defendant, Speedway SuperAmerica, LLC, by and through its employees, failed to exercise reasonable care to protect the Plaintiff from the unreasonably dangerous condition and/or to warn the Plaintiff that said condition existed;

(7) that at the time the Plaintiff, Teresa Grubb, was injured she was married to the Plaintiff, Randy Grubb, and they continued to be married throughout these proceedings;

(8) that as a direct result of the injury sustained by the Plaintiff, Teresa Grubb, has been unable and continues to be unable to provide her husband, the Plaintiff, Randy Grubb, with the same level of services, assistance, aid, affection, care, society, support, companionship, and conjugal relationship as she did prior to the date of the accident.

The trial court concluded that under the doctrine of respondent superior, Speedway was responsible for the negligence of its employee, Smith, and dismissed the action against her.

SPEEDWAY'S AND SMITH'S POST-JUDGMENT MOTIONS

On August 19, 2010, Speedway and Smith filed motions requesting Judge House recuse and a new trial. As grounds for recusal, they referred to the federal court's statements that Judge House and White were involved in the vote-buying conspiracy. Judge House refused the request. He emphasized that there was no evidence in the federal court case record to support the federal judge's statements. He denied any communication, connection or conduct with White that created a conflict of interest or bias in favor of White. Further, Judge House pointed out that the motion for recusal was made after judgment and five months after the federal court's ruling and, therefore, waived.

On the same date, Speedway and Smith filed a motion to alter, amend or vacate the judgment requesting clarification regarding Smith's liability. In its subsequent order and contrary to its initial conclusion that Smith could not be liable, the trial court found that Smith had a sufficient level of control and supervision of the premises to have a legal duty to Teresa, that she breached that duty, and that the breach was a proximate cause of Teresa's injuries.

OUR STANDARD OF REVIEW

Because the trial court denied Smith's and Speedway's motions for summary judgment, our focus is on the denial of their motions for directed verdicts. Once a trial is commenced, "all matters of fact and law procedurally merge into the trial phase, subject to in-trial motions for directed verdict or dismissal and post-judgment motions for new trial and/or judgment notwithstanding the verdict." *Transportation Cabinet, Bureau of Highways, Commonwealth of Kentucky v. Leneave*, 751 S.W.2d 36, 38 (Ky.App. 1988). The standard of review is set forth in *Gibbs v. Wickersham*, 133 S.W.3d 494, 495-96 (Ky.App. 2004).

> The standard of review for an appeal of a directed verdict is firmly entrenched in our law. A trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or there are no disputed issues of fact upon which reasonable minds could differ. Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts. A motion for directed verdict admits the truth of all evidence favorable to the party against whom the motion is made. Upon such motion, the court may not consider the credibility of evidence or the weight it should be given, this being a function reserved for the trier of fact. The trial court must favor the party against whom the motion is made, complete with all inferences reasonably drawn from the evidence. The trial court then must determine whether the evidence favorable to the party against whom the motion is made is of such substance that a verdict rendered thereon would be "palpably or flagrantly" against the evidence so as "to indicate that it was reached as a result of passion or prejudice." In such a case, a directed verdict should be given. Otherwise, the motion should be denied.

(internal citations omitted). Although a jury trial was waived and a bench trial held, our standard of review is the same.

WAS LIABILITY AGAINST SMITH PRECLUDED AS A MATTER OF LAW BECAUSE SHE DID NOT HAVE SUFFICIENT CONTROL OR SUPERVISION OVER SPEEDWAY'S PREMISES?

It is apparent from the federal court's orders and the trial court's judgment that this Court's unpublished opinion in *Bradford* requires clarification. We address whether Smith owed the same duties as Speedway to invitees on Speedway's premises.

Smith contends the trial court erred when it denied her motion for a directed verdict because she lacked sufficient control and supervision over the premises to have a duty to maintain the premises in a reasonably safe condition.

A negligence action requires: "(1) a duty on the part of the defendant; (2) a breach of the duty; and (3) consequent injury." *Mullins v. Commonwealth Life Ins. Co.,* 839 S.W.2d 245, 247 (Ky. 1992). "The question of duty presents an issue of law. When a court resolves a question of duty it is essentially making a policy determination." *Id*. at 248 (citation omitted).

A property owner owes a duty to business invitees to exercise ordinary care to keep the premises in a reasonably safe condition. In *Lanier v. Wal-Mart Stores Inc*., 99 S.W.3d 431, 432-33 (Ky. 2003), quoting the Restatement (Second) of Torts § 343 (1965), the Court explained the duty owed by the premises owner to his customers:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he:
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees; and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and
>
> (c) fails to exercise reasonable care to protect them against the danger.

The question presented is whether Speedway's duty extended to Smith, who did not own the premises.

Case law on the subject is scant. As a practical matter, a plaintiff would be hesitant to name a manager/employee that presumably would have "shallow pockets" as compared to an employer. Speedway and Smith argued in federal court that Smith was a party only for the purpose of destroying diversity and, therefore, to avoid the transfer of the case from the Clay Circuit Court to federal court.[1] However, we do not question the Grubbs' motives. Our concern is a proper application of the law which, both parties agree, is set forth in *Bradford*, 2005 WL 327177. Because of the lack of published authority, we agree *Bradford* is persuasive.[2]

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[1] In numerous federal cases, it has been alleged that employees were joined only to destroy diversity. *See e.g. Benjamin v. Wal-Mart Stores, Inc*. 413 F.Supp.2d 652 (D.S.C. 2006); *Edmond v. Food Lion, Inc*., 895 F.Supp. 103 (E.D. Va. 1994).

[2] CR 76.28(4) provides that unpublished opinions rendered after January 1, 2003, may be cited if there is no published opinion that adequately addresses the issue before the court.

In *Bradford*, this Court discussed whether a property owner's duty to invitees in a premises liability case extends to a property manager. Bradford was injured when she slipped and fell on crumbling pavement at the bottom of stairs in a government-owned parking garage. Although the Lexington-Fayette Urban County Government (LFUCG) owned the garage, Central Parking Systems managed and operated the property through a contract with LFUCG.[3] *Id*. at 1. The terms of the contract were crucial to its decision.

Although the details of the contract are set forth in the *Bradford* opinion, for our purposes, a summation is sufficient. Central Parking agreed to provide a full-time manager to manage all LFUCG garages; perform any and all maintenance on the garages; collect and deposit gross receipts; keep the garages clean, presentable, and sanitary; provide independent insurance coverage; and consult with LFUCG regarding management, operation, maintenance and promotion of the parking garages. *Id.*

Citing 62 Am. Jur.2d Premises Liability §10 (1990), the Court stated the general authority:

> A person put in control of premises or a part thereof by the owner is under the same duty as the owner to keep the premises under his control in safe condition. To similar effect, it has been said that one who does an act or carries on an activity on land on behalf of the possessor is subject to the same liability ... for physical harm caused thereby to others on or outside of the land as though he were the possessor of the land. In such cases, the

[3] LFUCG was dismissed based on governmental immunity leaving Central Parking as the only possible defendant.

> decisive test of liability is control of the work, and not the actual transfer of possession by contract. . . .
>
> An agent who has the complete and sole management, control, and supervision of his principal's premises and the repair and maintenance thereof is liable for injuries caused by the agent's failure to exercise ordinary care in keeping the premises free from defects or dangerous conditions. However, if an agent does not have complete control over the premises, and it is not sought to fasten on him the liability of an owner or possessor, the test of his liability is whether he has breached his legal duty or been negligent with respect to something over which he did not have control.

Id. at 3-4. This Court was further persuaded by the reasoning expressed in *Smith v. Henger,* 148 Tex. 456, 226 S.W.2d 425 (1950):

> The law places upon the owner occupant of land the duty to use reasonable care to make and keep the premises safe for the use of person invited to use the premises for business purposes.... When the owner puts some other person in control of the premises or a part of them, such person likewise has the duty to keep the premises under his control in safe condition.... Where the duty to keep premises in a safe condition is imposed on a person in control of them, this duty may include the duty to inspect the premises to discover dangerous conditions.

Id. at 4.

Focusing on the level of "control and supervision," this Court held that pursuant to the contract between Central Parking and LFUCG, Central Parking had sufficient control and supervision over the premises to have the legal duties of a premises owner to invitees in the garage.[4] *Id*. We further explain that holding.

[4] The Court added that factual issues remained, including whether Central Park breached its duties and whether the condition was open and obvious.

Liability based on the "control and supervision" theory should be only applied after scrutiny of the facts and when there is actual control and supervision, either by contract or otherwise an assumption of the premises owner's duties to maintain the premises in a reasonably safe condition. The undisputed facts established Smith did not have the control and supervision of Speedway's premises necessary to impose liability.

There was minimal difference between Smith's duties as manager and other employees associated with maintenance of the premises. All employees were required to sweep and inspect the premises. Any employee who recognized a maintenance problem was required to submit a request to Speedway and Speedway would then arrange to remedy the problem. Local Speedway employees, including Smith, were not required to make repairs.

Smith testified that she could purchase and replace light bulbs if needed and had a budget for routine purchases not to exceed $100. Although the Grubbs introduced evidence that blacktop patch could be purchased for less than $100, it is illogical to conclude that Smith was required to repair the parking lot. Smith was not an expert in parking lot repairs and had no training in patching blacktop. Smith was hired to conduct the daily operation of the store, not to perform maintenance.

There are legitimate public policy reasons for not imposing a duty on a local convenient store manager to maintain the employer's premises. The local store manager is often an hourly employee and, as a non-owner of the premises, does not have premises liability coverage. Moreover, to avoid potential liability,

virtually every employee would have to be trained and develop the expertise to remedy any conceivable defect on the employer's premises, a duty not assumed nor contemplated by their employment.

Unlike the situation in *Bradford* where Central Parking's assumption of the duty to maintain and control the premises was imposed by contract and was the very basis for its compensation, Smith did not assume such duties. Under the undisputed facts, as a matter of law, Smith cannot be individually liable.

WAS IT ERROR TO DENY SPEEDWAY'S DIRECTED VERDICT MOTION BASED ON THE OPEN AND OBVIOUS DOCTRINE?

Unlike Smith, Speedway, as the premises owner, had a general duty to exercise ordinary care to keep the premises in a reasonably safe condition for its invitees. Speedway's duties included a duty to discover unreasonable risks of harm on the land and either eliminate or warn of them. *Shelton*, 413 S.W.3d at 914. However, under traditional premises liability law, if a condition is '"known or obvious to' the invitee, the owner has no duty to warn or protect the invitee against it." *Horne v. Precision Cars of Lexington, Inc*., 170 S.W.3d 364, 368 (Ky. 2005). A condition is obvious when "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." *Shelton*, 413 S.W.3d at 906 (quoting Restatement (Second) of Torts § 343(A) (1) cmt. b (1965)).

As applied to pedestrians on business premises, the law developed that an invitee could not simply walk blindly into dangers that are obvious, known to him,

or would be anticipated by one of ordinary prudence. *Smith v. Smith*, 441 S.W.2d 165, 166 (Ky. 1969). Although stated in the context of a defect in a public sidewalk, the reasoning expressed in *City of Mayfield v. Hamlet*, 227 Ky. 758, 13 S.W.2d 1051, 1052-53 (1928) (quoting *Lerner v. City of Philadelphia*, 221 Pa. 294, 70 A. 755 (1908)), nevertheless describes an invitee's duty to observe defects in the pavement on which she travels:

> When one abandons the use of his natural senses for the time being, and chooses to walk over a pavement by faith exclusively, and is injured because of some defect in the pavement, he has only himself to blame.... It is impracticable, if not impossible, to maintain these pavements in such condition as to make them entirely free at all times from possibility of accident to those using them. Irregularities in grade, unevenness in surface, sharp depressions at crossings, accidental displacement of brick or stone, and many other things which may or may not be defects, but yet sufficient in themselves to cause accident to the unwary, are so common and usual that it is the duty of the pedestrian to be observant of such fact, and not to walk blindly.

Under traditional premises liability law, a premises owner had a complete defense to any asserted liability by a plaintiff injured by an open and obvious hazard. *Shelton*, 413 S.W.3d at 906.

In *Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984), Kentucky adopted the doctrine of comparative fault. However, the open and obvious doctrine continued to operate as a complete defense in premises liability cases until our Supreme Court rendered its opinion in *Kentucky River Medical Center v. McIntosh*, 319

S.W.3d 385 (Ky. 2010). In *McIntosh*, although the Court did not abolish the open and obvious doctrine, it took an historical step in softening its consequences.

McIntosh was a paramedic injured while transporting a patient into the hospital when he tripped and fell over an unmarked curb outside the emergency room entrance. The trial court denied the hospital's motion for summary judgment and a jury found the hospital liable. The hospital's post-judgment motions based on the open and obvious doctrine were denied.

The hospital contended the open and obvious doctrine was based on the premises owner's duty to the invitee and, therefore, presented a question of law. *Id*. at 388. The Court rejected the argument and, instead, adopted the modern trend expressed in the Restatement (Second) of Torts § 343A (1) (1965), and instructed as follows:

> The lower courts should not merely label a danger as "obvious" and then deny recovery. Rather, they 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. Thus, this Court rejects the minority position, which absolves, *ipso facto,* land possessors from liability when a court labels the danger open and obvious.
>
> However, this view also alters the position of the person injured by an open and obvious danger to the extent that only under extremely rare circumstances could a plaintiff avoid some share of the fault under comparative negligence. While "open and obvious danger" is no longer a complete defense under the Restatement, it is nonetheless a heightened type of danger which places a higher duty on the plaintiff to look

> out for his own safety. Such a condition, being open and obvious, should usually be noticed by a plaintiff who is paying reasonable attention. Yet the plaintiff is not completely without a defense to this: there could be foreseeable distraction, or the intervention of a third party pushing the plaintiff into the danger, for example. Even in such situations, a jury could still reasonably find some degree of fault by the plaintiff, depending on the facts.

Id. at 392.

McIntosh was a notable deviation from existing case law and, at the time this Court rendered its first opinion in this case, the controlling authority. In our original opinion, this Court focused on the forseeability aspect of Teresa's injury and concluded that the trial court erroneously denied Speedway's motion for directed verdict. The Supreme Court has since rendered *Dick's Sporting Goods* and *Shelton* and directed this Court to reconsider our prior opinion based on those two cases. We now do so and conclude that Speedway was entitled to a directed verdict on liability.

In *Dick's Sporting Goods,* our Supreme Court engaged in a threshold analysis to determine whether a condition is open and obvious. A Dick's patron entered the store and stepped on floor mats placed at the entrance to soak up water tracked in by customers. As she entered, she noticed the floor mats had shifted into a "V" shape and a visible puddle of water had formed in the center of the "V." To avoid the puddle, the patron stepped off a mat and stepped onto a tile that appeared dry but was actually wet. The patron slipped and fell and sustained injury. *Dick's Sporting Goods*, 413 S.W.3d at 893-94.

Under the facts, the Court concluded the tile, which appeared dry, was not an open and obvious hazard. In doing so, it noted that "*McIntosh* did not alter what actually constitutes an open-and-obvious hazard. Post-*McIntosh*, an open-and-obvious danger is what it was pre-*McIntosh*…. An open-and-obvious condition is found when the danger is known or obvious." *Id*. at 895.

> The condition is *known* to a plaintiff when, subjectively, she is aware not only ... of the existence of the condition or activity itself, but also appreciate[s] ... the danger it involves. And the condition is *obvious* when, objectively, 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. It is important to note that Restatement (Second) § 343A does not require both elements to be found.

Id. at 895-96 (internal quotations footnotes and quotations omitted). The Court concluded the condition was not open and obvious and, therefore, proceeded to analyze the case under general negligence principles. *Id*. at 897.

In this case, although Teresa testified she did not notice the eroded pavement in the area of a drainage grate between the gas pumps, the photographs of the area clearly depict erosion typically found in parking lots. The area was under a well-lit canopy and visible by simple observation. It was a condition that was obvious to a reasonable person observant of the pavement. *Id*. Therefore, *Shelton*, which analyzed the law applicable to an open and obvious condition, is more relevant to the present case.

Rendered the same day as *Dick's Sporting Goods*, in *Shelton*, our Supreme Court candidly admitted the uncertainty in the wake of *McIntosh*:

> Unfortunately, we did not speak clearly enough in *McIntosh*; and we now face squarely the confusion it produced. *McIntosh* was undeniably a step forward in the development of our tort law, but our holding regrettably allowed the obtuse no-duty determination to survive. The issue we attempted to address in *McIntosh* was whether the existence of an open and obvious danger was a legal question of duty or a factual question of fault. A close reading of *McIntosh* indicates that we decided the existence of an open-and-obvious danger went to the issue of duty. Today's case presents us with an opportunity to clarify *McIntosh* and emphasize that the existence of an open and obvious danger does not pertain to the existence of duty. Instead, Section 343A involves a factual determination relating to causation, fault, or breach but simply does not relate to duty. Certainly, at the very least, a land possessor's general duty of care is not eliminated because of the obviousness of the danger.

Shelton, 413 S.W.3d at 907.

In *Shelton*, a hospital's patient's wife became entangled in cords beside her husband's hospital bed. The Court held the condition was open and obvious and, therefore, applied an analysis different than required in simple negligence cases. *Id*. at 906. It repeatedly emphasized that the open and obvious doctrine does not involve an inquiry into the premises owner's duty to an invitee and sought to eliminate any doubt as to its holding in *McIntosh*:

> Restatement (Second) of Torts Section 343A does not shield a possessor of land from liability because a duty does not extend to the plaintiff but, rather, because the possessor acted reasonably under the circumstances or the open-and-obvious condition did not cause the resultant harm. Essentially, the existence of the element

> of duty is clear because of the landowner-invitee relationship and the general duty of reasonable care applicable to landowners; but there are certain circumstances where liability can be limited, not because a duty does not exist but because there is no negligence —no breach—as a matter of law.

Id. at 908.

Having established that the landowner has a duty to an invitee to eliminate or warn of obvious unreasonable risks of harm, the Court then addressed what constitutes an unreasonable risk. Again, it turned to its prior opinion in *McIntosh*.

> In *McIntosh*, we adopted the factors listed in Section 343A of the Restatement (Second) where a defendant may be found liable despite the obviousness of the danger. To recap, those factors are: when a defendant 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; and when a defendant 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. These factors dovetail with what constitutes an unreasonable risk.
>
> An unreasonable risk is one that is recognized by a reasonable person in similar circumstances as a risk that should be avoided or minimized or one that is in fact recognized as such by the particular defendant. Put another way, a risk is not unreasonable if a reasonable person in the defendant's shoes would not take action to minimize or avoid the risk.

Id. at 914. (internal footnotes, quotations, and brackets omitted). The Court then gave examples of conditions that do not create an unreasonable risk: "Normally, an open-and-obvious danger may not create an unreasonable risk. **Examples of this**

may include a small pothole in the parking lot of a shopping mall; steep stairs leading to a place of business; or perhaps even a simple curb." *Id*. (emphasis added).

The Court emphasized that simply because the open and obvious doctrine does not depend upon the legal question of duty and is a factual inquiry, disposition by way of summary judgment is not precluded. "If reasonable minds cannot differ or it would be unreasonable for a jury to find breach or causation, summary judgment is still available to a landowner. And when no questions of material fact exist or when only one reasonable conclusion can be reached, the litigation may still be terminated." *Id*. at 916 (internal footnotes omitted). The same reasoning applies to a directed verdict motion. Here, based on the facts developed at trial, the only reasonable conclusion that can be reached is the imperfection in Speedway's parking lot did not create an unreasonable risk of injury.

The photographs and testimony indicate the area where Teresa fell was several feet from any parked car, under a well-lit canopy, and the depression was not uncommonly deep or shielded from view, and was located near a drainage grate. The eroded area had no special aspects that would pose an unreasonable danger to an observant invitee. Erosion is a common condition in parking lots.

Teresa admitted that the depression in the pavement was not concealed. She simply failed to observe the condition of the parking lot. We are

persuaded by the logic expressed by the Michigan Court when presented with similar facts:

> [P]otholes in pavement are an "everyday occurrence" that ordinarily should be observed by a reasonably prudent person. Accordingly, in light of plaintiff's failure to show special aspects of the pothole at issue, it did not pose an unreasonable risk to her.

Lugo v. Ameritech Corp., Inc., 464 Mich. 512, 523, 629 N.W.2d 384, 389 (2001). Erosion of the surface around a drainage grate is certainly as common as a pothole and, like a small pothole, does not pose an unreasonable risk of injury. *Shelton*, 413 S.W.3d at 914.

The Grubbs argue that because Smith and other Speedway employees did not notice the eroded area prior to Teresa's fall, it could not have been open and obvious. We disagree. The standard is an objective one and not dependent on whether the employees noticed the erosion.

There is no evidence Speedway knew or should have known an invitee on its premises would blindly walk through its parking lot oblivious to common imperfections. The erosion was only a danger to the unwary. *Hamlet*, 13 S.W.2d at 1052-53. Therefore, the trial court erred as a matter of law when it denied Speedway's motion for a directed verdict.

COMPARATIVE FAULT AND RECUSAL

Speedway's and Smith's argument the trial court committed error when it failed to consider Teresa's comparative fault is moot. Likewise, Speedway's and Smith's contention Judge House was required to recuse is moot.

CONCLUSION

We hold Smith did not have sufficient control and supervision of the Speedway premises to be individually liable and, therefore, the action against her must be dismissed. Likewise, the claim against Speedway must be dismissed because the condition of the parking lot was open and obvious and was not a condition that created an unreasonable risk of harm.

Based on the foregoing, we reverse the findings of fact, conclusions of law, and judgment of the Clay Circuit Court and remand for proceedings consistent with this opinion.

ALL CONCUR.

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