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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000616-MR

ELGAN BRUNER AND
DEANNA BRUNER — APPELLANTS

v.

APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 09-CI-00907

MIAMI MANAGEMENT COMPANY, INC., AND
WENDY'S INTERNATIONAL, INC. — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, KELLER, AND THOMPSON, JUDGES.

KELLER, JUDGE: Elgan and Deanna Bruner appeal from the circuit court's summary judgment in favor of Miami Management Company, Inc. and Wendy's International, Inc. (collectively hereinafter Wendy's). The Bruners argue that material issues of fact exist regarding the extent of liability Wendy's has for

Elgan's slip and fall injuries. Wendy's argues that the circuit court appropriately granted summary judgment because the danger Elgan confronted was open, obvious, and the result of "naturally occurring outdoor hazards." Having reviewed the record and relevant law, we reverse and remand.

FACTS

The facts are not in dispute. Early on the morning of January 27, 2009, Jessamine and surrounding central Kentucky counties were hit by a winter storm that blanketed the area with ice, sleet, and snow. Despite the weather, and warnings to remain off the roads except for emergencies, Wendy's opened for business as usual. Before Wendy's opened, a contractor plowed and salted the parking lot.

At approximately 2:00 p.m. that day, Elgan, who also ignored the weather and warnings, drove to Wendy's to meet Deanna for lunch. Elgan arrived at Wendy's approximately five minutes before Deanna, where he waited for her in his truck. When he pulled into the parking lot, Elgan noted that snow had been plowed from the lot; however, he did not see any evidence that the lot had been salted. After Deanna pulled into the parking spot next to his, Elgan got out of his truck, slipped on ice that he had not seen, and fell. Elgan then reported the accident to the assistant manager, who told him that another man had fallen earlier. After providing the assistant manager with information for an accident report, the Bruners went to the emergency room. As a result of the accident, Elgan suffered a torn right rotator cuff, which he has not had repaired, because he is uninsured.

Wendy's assistant manager testified that he had walked the parking lot approximately every half hour and had not seen ice. He also testified that, after completing the accident report, he looked where Elgan had parked and saw slush but no ice.

On September 4, 2009, Elgan and Deanna filed suit against Wendy's alleging that it had failed to: keep the property safe; prevent and/or correct unsafe conditions; and warn of the danger. Wendy's responded, denied any liability, and, after undertaking some discovery, filed a motion for summary judgment. In its motion, Wendy's argued that any dangerous condition was open and obvious to Elgan; therefore, it had no liability. The Bruners argued, in pertinent part, that summary judgment was not appropriate in light of the Supreme Court of Kentucky's holding in *McIntosh v. Kentucky River Medical Center,* 319 S.W.3d 385 (Ky. 2010). The circuit court summarily granted Wendy's motion and the Bruners appealed.

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). Summary judgment is only proper when "it would be impossible for the respondent to produce any evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). In ruling

on a motion for summary judgment, the Court is required to construe the record "in a light most favorable to the party opposing the motion. . . and all doubts are to be resolved in his favor." *Id.* at 480. With this standard in mind, we address the issue raised on appeal.

ANALYSIS

Having reviewed the record and recent relevant case law,[1] we hold that the trial court's summary judgment was inappropriate. As noted by the parties, the Supreme Court recently discussed the open and obvious doctrine at length in *McIntosh.* 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

[1] We note Wendy's citation to *Stapleton v. Citizens National Corporation,* 2009-CA-000264-MR, 2010 WL 323284 (Ky. App. Jan. 29, 2010), an unreported opinion from a different panel of this Court. We are not persuaded by that opinion for three reasons. First, it was rendered seven months before *McIntosh*. Second, although the Supreme Court of Kentucky did take the case on discretionary review, the Court dismissed the case as settled before rendering a decision. Third, this Court rendered a decision in *Webb v. Dick's Sporting Goods*, 2010-CA-001194-MR, 2011 WL 3362217 (Ky. App. Aug. 5, 2011), review granted, (Dec. 14, 2011), which applied *McIntosh* to naturally occurring conditions.

should have barred the paramedic's claim under the open and obvious doctrine. *McIntosh,* 319 S.W.3d 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 commentary, 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, he 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 implies that, absent a duty to warn of a known danger, the land possessor has no duty. However, under comparative fault, that cannot be the case. A land possessor has a duty to "*eliminate or reduce* the risk posed by unreasonable dangers. In short, '[e]ven when 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 land owner 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, Wendy's premised its motion for summary judgment on the argument that it had no duty to warn Elgan or otherwise protect him 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*, Wendy's may not have had a duty to warn Elgan of the open and obvious danger; however, that did not relieve Wendy's of its duty to take reasonable steps to eliminate or reduce the danger. Whether Wendy'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 Wendy's argues that *McIntosh* should be narrowly applied to its facts, i.e. when the danger is manmade, not when the danger is the result of a natural hazard. 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 Wendy's would appreciate a potential risk but proceed despite that risk. As Elgan admitted, he knew that there had been a snowfall, because he saw where the snow had been plowed off the parking lot. However, he proceeded despite that risk, believing that he would be stepping onto a parking lot that had been cleared.

Finally, we note Wendy's argument that: local officials had warned people only to "venture out if faced with an emergency;" the federal government declared central Kentucky "a major disaster area" several days after the storm; and "despite reports of extreme weather and even a fallen tree on the road where [Elgan] resides, [Elgan] decided to meet his wife at Wendy's for lunch." That argument is a double-edged sword. Certainly, the factors cited by Wendy's could weigh in favor of a finding by the trier of fact that Elgan is significantly, if not completely, liable for his injuries. However, those same factors could weigh in favor of a finding by the trier of fact that Wendy's, when it decided to open for business, should have taken extra precautions to protect its customers. In any event, the choice of allocating fault is within the purview of the trier of fact and the trial court's summary judgment was not appropriate.

CONCLUSION

Based on the record before us, the Bruners have raised issues of material fact regarding Wendy's failure to meet its duty to take reasonable steps to eliminate or reduce the danger Elgan encountered. Therefore, under these circumstances, summary judgment was inappropriate, and we reverse and remand for trial.

CAPERTON, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: I respectfully dissent because the majority has misinterpreted *Kentucky River Medical Center v. McIntosh*, 319

S.W.3d 385 (Ky. 2010). To fully understand *McIntosh*, I reiterate the facts involved.

McIntosh was a paramedic injured while transporting a patient into the hospital and 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. Under the unique facts presented, our Supreme Court concluded that the open and obvious doctrine was no longer an absolute bar to recovery.

The hospital contended that 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 its focus on foreseeability. The Court explained the limited exception:

> 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.

In *Lucas v. Gateway Community Services Organization, Inc*., 343 S.W.3d 341 (Ky.App. 2011), the Court applied the law as modified in *McIntosh*. Similar to the present case, the plaintiff stepped on crumbling gravel in a parking lot and fell. The trial court granted summary judgment to the premises owner on the basis of the open and obvious doctrine and this Court affirmed. The plaintiff's contention that *McIntosh* required that the issue of her carelessness be submitted to the jury was rejected. In doing so, this Court emphasized that there was no evidence that the plaintiff was distracted by some outside force or her view obstructed. Unlike *McIntosh*, she was not under time-sensitive or stressful circumstances but simply failed to exercise care for her own safety. Under the circumstances, summary judgment was appropriate. *Id*. at 346.

Contrary to the majority's holding in this case, *Lucas* established that *McIntosh* does not preclude summary judgment based on the open and obvious doctrine in all cases: It modified the doctrine to the extent that trial courts must

analyze the facts on a case-by-case basis. Therefore, the open and obvious doctrine has not been eliminated in this Commonwealth, rather, it is an exception that is simply stated: Even if a condition on a premises owners' property is open and obvious, the owner will not be absolved from liability if it was foreseeable that the plaintiff would be distracted or otherwise did or should have anticipated that the plaintiff would not observe or appreciate the danger.

When a motion for summary judgment or directed verdict is made by the owner, the question becomes whether there is a material issue of fact regarding the foreseeability of the plaintiff's injury. Absent a material issue of fact upon which a fact finder could reasonably find that the injury was foreseeable, the open and obvious doctrine precludes recovery. Otherwise, it is a question for the jury and the application of comparative fault.

In this case, there is no evidence that there was any reason for Wendy's to foresee that Elgan would be distracted from exercising reasonable care to avoid the open and obvious danger. Therefore, summary judgment was appropriate and I would affirm.

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