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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000065-MR

AMANDA SPEARS — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE. V, JUDGE
ACTION NO. 10-CI-01558

ROBERT A. SCHNEIDER, D/B/A
SWEET TOOTH CANDIES;
AND CINCINNATI INSURANCE
COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE, DIXON AND MAZE, JUDGES.

ACREE, CHIEF JUDGE: This case is before us on remand from the Kentucky Supreme Court to reconsider our previous opinion in light of the Supreme Court's recent decisions in *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901

(Ky. 2013), and *Dick's Sporting Goods, Inc. v. Webb*, 413 S.W.3d 891 (Ky. 2013). Upon further consideration and applying these cases, we again affirm.

In our original opinion, we held that the trial court's grant of summary judgment in favor of the appellees Robert A. Schneider, Jr., d/b/a Sweet Tooth Candies and Cincinnati Insurance Company (collectively, "Sweet Tooth") for lack of a duty owed. We found that the danger at issue, *i.e.*, a level step onto a sloping municipal sidewalk, was an open and obvious hazard and, under Kentucky's jurisprudence as it stood at the time we rendered our decision, concluded Sweet Tooth owed no duty to appellant Amanda Spears.

We adequately recited the pertinent facts in our previous opinion. A full recount of those facts here is unwarranted. Suffice it to say that Spears, a semi-frequent Sweet Tooth patron who was familiar with the four steps leading from the shop's front door to the sidewalk,[1] rolled her ankle and fell when she stepped from the bottom step to the sidewalk upon exiting the eatery. Because the sidewalk on one side of the steps slopes downward, the height of the bottom step gradually increases from left to right. This causes the distance between the bottom step and the sidewalk to be further than the distance between the other steps, or closer, depending on where the measurement is taken.

Spears had previously negotiated the steps, without problem, during both daylight and evening hours. She had noticed no change in the configuration of the steps, or the orientation of the sidewalk to the steps, during her prior visits to the

[1] The steps wrap around the front door in a semi-circle arc; they are level, and have not changed since 1958. The sidewalk varies in elevation due to the topography.

shop. The steps are in good repair. There is a handrail along one side of the steps. Spears had used the handrail to enter or exit the store on prior occasions.

Spears asserts that, on the day of her injury, she expected the distance between each step to be the same. Spears claims the change in height from the final step to the sidewalk caused her to lose her footing and fall. When the accident occurred, the steps were free of foreign substances, not covered in snow or ice, and lit by both natural and artificial light.

Our previous treatment of this case applied *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010). Embracing Restatement (Second) of Torts § 343A, *McIntosh* altered the treatment of plaintiffs bringing claims involving open-and-obvious dangers. *Webb*, 413 S.W.3d at 895. *McIntosh* was not as clear to all; therefore, in *Shelton*, the Supreme Court

> endeavor[ed] to illuminate what we intended with our decision in *McIntosh* and how 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.

Shelton, 413 S.W.3d at 907-08.

The Supreme Court provided clear steps to take in analyzing a premises liability claim involving an open-and-obvious hazard. Under *Shelton*, the analysis we now apply proceeds this way:

> 1) Along with the defendant's general duty of care, the defendant's duty is outlined by the relationship between the parties. *E.g.*, an invitor has a duty to

maintain the premises in a reasonably safe condition in anticipation of the invitee's arrival.

2) Was the duty breached?

AND

3) Is the defendant's liability limited to some degree by the plaintiffs [sic] comparative negligence?

Id. at 908. Accordingly, an open-and-obvious condition no longer eliminates a landowner's duty. The focus now is on breach and in that analysis the obviousness of the condition is a "circumstance" to be factored under the standard of care. No liability is imposed when the defendant is deemed to have acted reasonably under the given circumstances.

Consequently, as the Court said, "summary judgment remains a viable concept under this approach. . . . But the question of foreseeability and its relation to the unreasonableness of the risk of harm is properly categorized as a factual one, rather than a legal one." *Id.* at 916.

What is an unreasonable risk? The Supreme Court has also given us some direction.

> 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." 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. But

> when a condition creates an unreasonable risk, that is when a defendant "should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger[,]" liability may be imposed on the defendant as a breach of the requisite duty to the invitee depending on the circumstances.

Id. at 914 (footnotes omitted).

On a motion for summary judgment, the trial court must "examine[ ] the defendant's conduct, not in terms of whether it had a duty to take particular actions, but instead in terms of whether its conduct breached its duty to exercise the care required as a possessor of land." *Id.* at 916 (internal quotations and citation omitted). If reasonable minds cannot differ as to whether the defendant's conduct breached its duty to exercise the requisite care, summary judgment is still available to the land possessor. *Id*. The propriety of summary judgment must still be assessed on a case by case basis, taking into account the circumstances surrounding Spears's misstep.

Turning to the matter under review, our analysis begins with the first inquiry posed in every negligence case: did the landowner or occupier, Sweet Tooth, owe the injured patron, Spears, a duty of care? The answer in this case is certainly yes. Because there was an undisputed economic benefit to Sweet Tooth from Spears's presence on the premises, she was an invitee. *See Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364, 367 (Ky. 2005). "Generally speaking, a possessor of land owes a duty to an invitee to discover unreasonably dangerous

conditions on the land and either eliminate or warn of them." *Shelton*, 413 S.W.3d at 909 (footnote omitted).

We next determine whether reasonable minds could differ as to whether Sweet Tooth breached its duty of care. If not, we will affirm. *Webb*, 413 S.W.3d 891, 895 fn5 (Ky. 2013) (citing *Emberton v. GMRI, Inc.*, 299 S.W.3d 565 (Ky. 2009)) (appellate court may affirm a judgment on a ground other than that relied on by the trial court, provided that the alternative ground is supported by the record).

Whether a standard of care is met, generally, is a fact-intensive inquiry and is "grounded in common sense and conduct acceptable to the particular community." *Id.* at 913-14. This typically means a jury should decide the question. However, "[i]f reasonable minds cannot differ or it would be unreasonable for a jury to find breach or causation, summary judgment is still available to the landowner." *Id.* at 916 (footnote omitted)). This is such a case.

We first consider this hazard – a level step from a business onto an unlevel city sidewalk – and note that it is hardly uncommon. Unless we are able to eliminate hills in our towns and cities, it will be a hazard business patrons must forever negotiate. This step to the city sidewalk is not unlike the examples given in *Shelton* of an open-an-obvious hazard that does not create an unreasonable risk – "a small pothole . . . steep stairs leading to a place of business; or perhaps even a simple curb." *Id.* at 914. The steps were well-maintained, well-lit, and a handrail

was available. We cannot imagine what more Sweet Tooth could have done to eliminate the hazard.

Spears concedes, "[t]he facts relative to [her] trip and fall are . . . undisputed[,]" (Appellant's Brief at 1), and she admits the light at that place and time allowed her to see and visualize the steps, and the relevant portion of the sidewalk. In light of those undisputed facts, we find the nature of the steps here was readily apparent to invitees visiting the store; to the extent it presented a danger, it was an open-and-obvious danger.[2]

But did this open-and-obvious condition nevertheless present an unreasonable risk to patrons of Sweet Tooth? As *Shelton* would have us ask: would a reasonable person in Sweet Tooth's shoes deem it necessary to further minimize or warn of the risk? Spears says yes.

Spears suggests that the "risk" was not reasonable because the human psyche focuses on what seems normal; when one descends a stairway, Spears argues, a rhythm develops and our subconscious mind tells our legs and feet how

[2] We need not analyze more thoroughly the question whether this was an open-and-obvious hazard. If there had been such a need, we would have followed *Webb* wherein the Supreme Court said:

> An open-and-obvious condition is found when the danger is known or obvious. 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. The defendant will not be subject to liability if the condition is either known or obvious.

Webb, 413 S.W.3d at 895-96 (footnotes omitted).

to function from one step to the next. This open-and-obvious condition disrupted that rhythm. A reasonable landowner or occupier would recognize this, so the argument goes, and therefore must take action to minimize the risk of tripping or falling. We are not persuaded.

We have very little problem concluding that no reasonable person would regard these steps as an unreasonable risk to invitees. The risk created by the steps would be obvious to a reasonable person in Spears's position and the steps themselves, including the last step, would be safely descended by anyone who was minimally attentive and utilizing practical faculties of observation and simple powers of ambulation. Because we find that the danger at issue did not amount to an unreasonable risk, we likewise conclude that Sweet Tooth did not breach its duty of care. Again, that duty was to warn against or minimize *unreasonable* risks. Absent an unreasonable risk, there is no breach.

In sum, we conclude that no reasonable jury could find that Sweet Tooth breached its duty of care to Spears. Accordingly, we affirm the circuit court order dismissing Spears's premises-liability claim, *albeit* on different grounds.

IV. Conclusion

The Campbell Circuit Court's December 22, 2011 order is affirmed.

DIXON, JUDGE, CONCURS.

MAZE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MAZE, JUDGE, DISSENTING: I respectfully dissent for the reasons that I recently expressed in *Ward v. JKP Investments, LLC*, No. 2013-CA-001706-MR,

2015 WL 293332 (Ky. App. 2015). As I noted in my dissent in that case, the Kentucky Supreme Court's decision in *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901 (Ky. 2013), expressly eliminated much of the emphasis on a condition's "open and obvious" nature, instead focusing primarily on the factual issue of foreseeability. Summary judgment is still appropriate in such cases only when reasonable minds could not differ as to breach and causation. *Id.* at 914. While the majority makes such a finding, they do so based upon Spears's inattention to the condition of the step and where she was stepping, and the open-and-obvious nature of the step. Under *Shelton*, I am compelled to conclude that these are factual questions for the jury to decide. Consequently, I reluctantly conclude that summary judgment was not appropriate in this case.

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