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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000134-MR

TERESA HAYDEN, ADMINISTRATRIX OF
THE ESTATE OF JOSEPH RAWLINGS — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 11-CI-00328

UP, INC. — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, CLAYTON, AND NICKELL, JUDGES.

NICKELL, JUDGE: Teresa Hayden,[1] the administratrix of her son Joseph Rawlings's estate, appeals from a summary judgment granted to UP, Inc., by the Hardin Circuit Court. Rawlings suffered injuries to his head and knee when he slipped and fell on a chunk of ice in the parking lot of a McDonald's restaurant operated by UP. Under the new standard for premises liability recently clarified in

[1] By order entered June 6, 2012, this Court substituted Hayden in her capacity as administratrix.

Shelton v. Kentucky Easter Seals Soc'y, Inc., 413 S.W.3d 901 (Ky. 2013), we hold that material issues of fact remain regarding whether UP breached its duty of care to Rawlings; hence, we reverse and remand for further proceedings.

Rawlings was employed as a technician for Safelite Auto Glass. On the morning of the accident, February 16, 2012, he drove from Taylorsville to his employer's office in Louisville. He loaded the van with glass and then drove to Hardin County, Kentucky. He described the weather conditions as "overcast," "just an ugly winter day," and the snow accumulation as "a little more than normal." He commented, "it just seemed like there was a lot of snow around."

Rawlings worked until 11:30 a.m., when he drove to McDonald's to take his lunch break. There was snow on the ground and the curb areas of the road. He drove cautiously. When he arrived at the restaurant, there was a long line at the drive-thru window, so he decided to park and go inside.

He chose a parking space close to the entrance. The parking lot had been cleared of snow, and Rawlings noted a large mound of snow had been deposited beside his chosen parking spot. Rawlings described the pile as being "in disarray"; thought it "strange that they had put the snow that they plowed from the parking lot right there in customer parking, instead of pushing it all the way back here, out of customer parking." He also observed chunks of ice and snow had been scattered everywhere. The snow from the pile had bled over into his parking spot, and when he stepped out of the van, he saw "slushy stuff," and the blacktop was barely visible. Rawlings testified, "You know, none of the parking lot was totally clean,

as far as totally clean none of it, none of it. I mean some of it had this, some of it had pieces of ice that had fallen off of cars, you know what I'm talking about?"

To reach the door of the restaurant, Rawlings had to cross the drive-thru lane. He described his progress as follows:

> [I got] out of my car, went to walk, got approximately right here and, you know, by that time, you know, I had done gotten away from the big pile of snow and my vision and head went straight in front of me to either look of, you know, cars coming through the drive-through, making sure nothing was coming, and to see the door where I was going to go in. And about that time, I stepped on a chunk of ice, and that's when I went up in the air.

He described the chunk of ice on which he slipped as six inches in diameter and an inch and one-half to two inches thick. He stated the chunk was observable from approximately twenty or thirty feet away, and the chunks of ice in the parking lot were so large they "should have been obvious to the managers of McDonald's or to anyone else." Rawlings fell directly onto his back, striking and cutting the back of his head. He also required surgery on his right knee because the fall aggravated a pre-existing condition.

On February 14, 2011, Rawlings filed a personal injury suit against UP, alleging negligence. UP moved for summary judgment, which the trial court granted, on the grounds that a property owner has no duty to warn of open and obvious hazards. Rawlings appealed. Upon his death, his mother, was appointed

administratrix of his estate, and substituted as the appellant by order of this Court entered June 6, 2012.[2]

In reviewing a grant of summary judgment, we focus on "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); CR 56.03.[3] "The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Further, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id*. at 482. "An appellate court need not defer to the trial court's decision on summary judgment and will review the issue *de novo* because only legal questions and no factual findings are involved." *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 705-706 (Ky. App. 2004).

It is well-established "[t]o recover under a claim of negligence in Kentucky, a plaintiff must establish that (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached its duty, and (3) the breach proximately caused the

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[2] On February 28, 2013, this Court ordered the appeal held in abeyance until two opinions of the Kentucky Supreme Court became final: *Shelton* and *Dick's Sporting Goods, Inc. v. Webb*, 413 S.W.3d 891 (Ky. 2013). These opinions became final December 12, 2013, and this appeal was returned to the active docket.

[3] Kentucky Rules of Civil Procedure.

plaintiff's damages." *Lee v. Farmer's Rural Elec. Co-op. Corp*., 245 S.W.3d 209, 211–12 (Ky. App. 2007). "An invitee enters upon the premises at the express or implied invitation of the owner or occupant on business of mutual interest to them both, or in connection with business of the owner or occupant." *Scuddy Coal Co. v. Couch*, 274 S.W.2d 388, 390 (Ky. 1954). It is undisputed the relationship between UP and Rawlings was that of landlord and invitee.

Landowners owe a duty to invitees "to discover unreasonably dangerous conditions on the land and to either correct them or warn of them." *Kentucky River Med. Ctr. v. McIntosh*, 319 S.W.3d 385, 388 (Ky. 2010). Under the traditional rule of premises liability law, however, a landowner's duty to invitees was obviated if a hazardous condition on the property was open and obvious. "As a result, if a plaintiff was injured by an open and obvious hazard, the landowner, regardless of any negligent conduct on its part, had a complete defense to any asserted liability." *Shelton*, 413 S.W.3d at 906.

The Kentucky Supreme Court recently rejected this traditional rule to adopt a more modern approach which comports with Kentucky's adoption of comparative fault. Under the Court's holdings in *McIntosh,* and *Shelton*, existence of an open and obvious danger no longer absolves a landlord of his or her general duty of care towards an invitee, but relates instead to the second element of a negligence claim: the factual question of whether the landowner breached that duty. *Id.* at 907. Thus, the fact that the lumps of ice in the McDonald's parking lot were, according to Rawlings's own testimony, open and obvious, does not as a

matter of law eliminate UP's duty to Rawlings, as it would have under the traditional rule. Instead, the question becomes whether UP breached its duty by failing to remove the ice. Our Supreme Court has emphasized existence of a breach is a factual matter regarding foreseeability of the risk of harm which is normally left to the jury, and not appropriate for resolution by summary judgment. *Id.* at 913-14.

Thus, even if a hazard is open and obvious, as it was in this case, a landowner defendant may still be found liable

> 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.

Id. at 914. The Supreme Court acknowledged, "[n]ormally, an open-and-obvious danger may not create an unreasonable risk[,]" and provided the following examples: a small pothole in the parking lot of a shopping mall; steep stairs leading to a place of business; or 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. Summary judgment remains available to a landowner when "reasonable minds cannot differ or it would be unreasonable for a jury to find breach or causation." *Id*. at 916.

When we apply this new framework for analyzing premises liability to the facts of this case, we conclude reasonable minds could differ as to whether UP acted reasonably in allowing the lumps of ice to remain scattered in the McDonald's parking lot, particularly in an area customers would have to cross to get to the door. A jury could find it was foreseeable that a McDonald's customer would slip and fall, even though the ice lumps were open and obvious, because an invitee could be distracted while trying to cross the drive-thru lane to gain access to the restaurant. Under these circumstances, the judgment of the circuit court must be reversed.

The summary judgment is reversed, and this matter is remanded to the Hardin Circuit Court for further proceedings in accordance with this opinion.

ALL CONCUR.

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