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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000192-MR

JAMES CARTER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 09-CI-000925

BULLITT HOST, LLC — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: James Carter was allegedly injured when he slipped and fell on ice under a canopy at a Holiday Inn (the hotel) owned and operated by Bullitt Host, LLC. Carter appeals the dismissal of his case by summary judgment. We determine that Bullitt Host did not owe Carter a duty to protect him from an open and obvious natural hazard and affirm.

On February 11, 2008, Carter and his family were driving from Texas through Kentucky on their way to Ohio when they encountered heavy snow. To avoid hazardous driving conditions, they stopped for the night in Hillview, Kentucky, and checked into the hotel.

At approximately 6:50 a.m., Carter left the hotel through the lobby doors intending to warm up the car before checking out. Immediately in front of the lobby doors was a large permanent canopy supported by pillars. The canopy was open on three sides and its roof covered the drop-off driveway immediately in front of the hotel. Anyone leaving from the lobby doors would pass under the canopy and over the driveway before reaching the parking lot.

Carter testified that when he left the canopy area, which was not well lit, he saw no snow under the canopy but could see snow beyond the canopy. Carter saw water under the canopy near the lobby doors and knew that water can turn into ice under cold conditions. Carter proceeded cautiously because he did not want to slip. He was nearing one of the canopy's open sides after walking about six to eight feet when he slipped and fell on ice. Carter sued for injuries, including a broken leg, which resulted from his fall.

Bullitt Host on other occasions hired snow removal companies, but on this occasion had not done so. The hotel employees had not made any attempt to clear the parking lot or entranceway and were unaware of ice under the canopy until after Carter fell.

Bullitt Host filed a motion for summary judgment, claiming that it did not owe Carter a duty because the danger was open and obvious, and the result of natural weather conditions. On April 29, 2011, the circuit court denied the motion based upon *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010). Bullitt Host brought a second motion for summary judgment in light of further decisions clarifying *McIntosh*. On November 22, 2011, the circuit court granted the motion for summary judgment, and on January 12, 2012, denied the motion for reconsideration.

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. "The standard of review on appeal of a summary judgment is 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. Granting of a summary judgment motion "should only be used 'to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.'" *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc*., 807 S.W.2d 476, 483 (Ky. 1991) (quoting *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)).

Carter argues that factual issues remain as to whether (1) snow or ice under the canopy was a naturally occurring condition; (2) the hotel voluntarily assumed a duty of removing the snow and ice; (3) the danger was open and obvious; (4) his injury was foreseeable; and (5) the hotel's lack of action forced him to encounter the hazard.

In order to state a cause of action for premises liability, a subcategory of negligence, the invitee must establish that the landowner owed him a duty, breached that duty and there is a causal connection between the breach and the injury. *Lucas v. Gateway Community Services Organization, Inc*., 343 S.W.3d 341, 343 (Ky.App. 2011). Generally, a landowner does not owe an invitee a duty to protect him from natural outdoor hazards, such as snow and ice, which are equally obvious to the invitee and to the landowner; natural hazards do not constitute an unreasonable risk which the landowner has a duty to remove or warn against. *Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364, 368 (Ky. 2005); *Standard Oil v. Manis*, 433 S.W.2d 856, 858 (Ky.App. 1968).

Carter argues that any snow or ice which accumulated under the canopy was a foreign substance because it was not the result of the weather but the result of cars and people traversing the canopy area. Carter failed to produce any evidence to support this theory. The evidence suggests that the presence of precipitation under the canopy was the result of the weather. Even if snow or ice were somehow brought under the canopy in the manner Carter suggests, that does not make it a foreign substance under these circumstances.

Carter also argues that because Bullitt Host had previously undertaken a duty to clean up snow and ice on other occasions, it was obligated to do so on this occasion. There is no affirmative duty for a landowner to take any action to clear his property of a natural weather condition. *Standard Oil*, 433 S.W.2d at 859; *PNC Bank, Kentucky, Inc. v. Green*, 30 S.W.3d 185, 186, 188 (Ky. 2000). We will not impose an affirmative duty on a landowner to clear its land of snow and ice simply because the landowner has voluntarily done so on previous occasions.

Carter argues that the danger from the snow and ice was not open and obvious under the canopy, because he did not see snow or ice and did not expect to encounter any until he left the shelter of the canopy. We disagree.

Based on the undisputed facts, the danger was open and obvious as a matter of law. Carter was fully aware that there was snow and ice outside, that there was water under the canopy and there could be ice in his path. Under similar circumstances, the Court in *Standard Oil* determined that a landowner could not reasonably foresee that a person would proceed forward on a wet walkway, knowing there could be unmelted ice or refreezing water, without exercising commensurate caution. *Standard Oil*, 433 S.W.2d at 859. Therefore, the landowner had no duty to stay the elements, make walkways safe, or warn of obvious natural conditions because "[i]f a 'glare of ice' existed on the platform, whatever hazard it constituted was as apparent to appellee as it was to appellant." *Id*.

Our determination that the danger was open and obvious as a matter of law does not end our inquiry. Once a danger is established to be open and obvious, "[t]he inquiry then shifts to whether the invitee was foreseeably distracted[.]"[1] *Faller v. Endicott-Mayflower, LLC*, 359 S.W.3d 10, 14 (Ky.App. 2011). *See Lucas*, 343 S.W.3d at 345-346 (no duty because invitee was not distracted and was not acting under time-sensitive or stressful circumstances; instead she was well aware of the condition of the parking lot and was proceeding with caution).

McIntosh illustrates when an invitee is foreseeably distracted. The Court ruled it was foreseeable to expect that a paramedic focusing on caring for a patient while rushing to the emergency room entrance would be distracted and not notice the open and obvious danger of a raised curb, or would ignore or forget this known risk, and be injured. *McIntosh*, 319 S.W.3d at 393-394.

Carter argues that the potential for injury was foreseeable to Bullitt Host and the icy condition should have been corrected because it was one of the nighttime manager's duties to check and correct hazards. Carter argues that because he had not seen any ice the night before when he entered the hotel, he reasonably believed that the area under the canopy was free of snow and ice when he left in the morning. However, the test established by *Faller* and *Lucas* in light of *McIntosh* is not whether injury from a hazard was foreseeable, but whether an invitee's

[1] There is no indication that Carter was pushed into encountering the danger by a third party, which is an alternative ground for recovery. *See e.g. Wallingford v. Kroger Co.*, 761 S.W.2d 621 (Ky.App. 1988).

distraction, which prevented him from exercising normal caution to avoid a hazard, was foreseeable. Carter does not argue that he was distracted. Carter's testimony indicated that he was focused on his safety and observant about his planned path.

Carter also argues that he was forced to encounter the hazard. We disagree. Although it was reasonable for Carter to leave the hotel and proceed on his trip, Carter had no urgent need to leave at that particular time via that route. Carter had other options. He could have waited for the conditions to improve, consulted with hotel employees about the safety of leaving and the best route to take given the weather, or requested that steps be taken to clear the exit of potential snow and ice. Instead, he proceeded at his own peril, trusting that walking carefully would be sufficient. Bullitt Host could not anticipate that Carter would proceed to encounter an obvious danger under these circumstances. Therefore, Carter's injuries, while unfortunate, were not caused by Bullitt Host's breach of a duty toward him.

Accordingly, we affirm the Jefferson Circuit Court's grant of summary judgment to Bullitt Host and dismissal of Carter's case.

ALL CONCUR.

BRIEF FOR APPELLANT:

Marc K. Crahan
A. Neal Herrington
Louisville, Kentucky

BRIEF FOR APPELLEE:

R. Hite Nally
Russell H. Saunders
Louisville, Kentucky