

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2012-CA-000333-MR

DANNY L. EMBRY

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE AUDRA J. ECKERLE, JUDGE  
ACTION NO. 06-CI-007627

MAC'S CONVENIENCE STORES, LLC,  
D/B/A CIRCLE K AND CIRCLE K MIDWEST;  
CONSTITUTION STATE SERVICES, LLC;  
ST. PAUL FIRE AND MARINE INSURANCE  
COMPANY; AND SYLVIA FIERROS

APPELLEES

OPINION  
REVERSING AND REMANDING

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BEFORE: MOORE, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: The matter before us is on Remand from the Kentucky Supreme Court for consideration of the issues presented in light of *Dick's Sporting Goods, Inc. v. Webb*, 413 S.W.3d 891 (Ky. 2013), and *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901 (Ky. 2013). Danny L. Embry appeals from an

Opinion and Order of the Jefferson Circuit Court denying his Motion to Alter, Amend or Vacate an Opinion and Order granting the renewed Motion for Summary Judgment of Mac's Convenience Stores, LLC, d/b/a Circle K & Circle K Midwest. In his action seeking damages from a slip and fall injury, Embry argues that the trial court erred by not permitting him to fully conduct discovery, and by granting summary judgment based on a misapplication of the "open and obvious" doctrine. Embry contends that even if the open and obvious doctrine was properly applied, Mac's can still be held liable if the injury was foreseeable. Because *Shelton, supra*, now holds that the presence of an open and obvious condition does not eliminate a landowner's general duty of care but rather is a factor in making that determination, we conclude that a general issue of material fact exists as to whether Mac's Convenience Stores fulfilled its duty of care to Embry. Accordingly, we Reverse the Summary Judgment and Remand the matter for further proceedings.

This action has an extensive procedural history spanning approximately six years. As this matter was previously on appeal before this Court which resulted in an unpublished Opinion rendered on March 18, 2011, and in the interest of judicial economy, we adopt the recitation of facts and procedural history set forth in that Opinion. The panel of this Court stated as follows:

On June 23, 2006, Danny Embry injured his ankle as he stepped from his trailer onto uneven pavement at a Circle K gas station and convenience store. He brought suit in Jefferson Circuit Court against Circle K Midwest. Embry was initially granted a default judgment which

was later set aside on the grounds of excusable neglect. The circuit court thereafter granted summary judgment to the defendants and this appeal by Embry followed.

Embry visited the Circle K to buy gasoline. He was driving a pickup truck which hauled a trailer carrying two commercial lawn mowers, weed eaters and a backpack blower. Embry parked next to a gas pump, opened the gas caps on the lawn mowers and then stepped into the trailer to check the gas levels of the mowers. He then stepped backwards from the trailer to the ground and fell, injuring his ankle. According to Embry, his fall was caused by stepping onto an area of uneven pavement. Embry alleges that as a result of the fall, he developed reflex sympathetic dystrophy, a chronic and debilitating neurological condition.

The manager of the Circle K notified the company's insurance administrator, Karen Frazer, of Embry's accident. Frazer in turn reported the incident to Sylvia Fierros, of Constitution State Services, LLC (CSS). CSS is the third-party administrator for liability claims for Mac's Convenience Stores, LLC. CSS handles claims for Circle K and Circle K's liability carrier, St. Paul Fire and Marine Insurance Company.

Embry filed suit against Circle K Midwest on August 29, 2006, alleging negligence on the part of Circle K in maintaining its property. He was later granted leave to amend his complaint to name Mac's Convenience Stores, LLC, as the appropriate defendant. Prior to the filing of the complaint, Embry's counsel had already made contact with Fierros, who wrote him a letter on August 17, 2006, informing him that Embry's claim was being denied. In a letter of August 28, 2006, she refused counsel's request for a copy of video surveillance tape of the gas station from the day Embry's injury occurred. Embry's counsel tendered a courtesy copy of the complaint and discovery requests to Fierros the day before he filed the complaint.

When Frazer received Embry's complaint from Circle K's registered agent, she forwarded it to Fierros, who

confirmed receipt of the complaint and advised Frazer that legal counsel would be retained to take over handling of the claim. Fierros and plaintiff's counsel agreed to an extension of time for Mac's Stores to file an answer to the complaint. According to Embry's counsel, he agreed to the extension in order to give Fierros time to "clear up the picture" on the video surveillance tape. He also states that when Fierros forwarded the tape, the portion showing Embry's fall was missing.

After receiving the extension of time to file an answer, CSS claims handler John McCarthy instructed attorney Michael S. Maloney of the law firm Schiller, Osbourne and Barnes, to file an answer. As evidence for this, CSS produced a facsimile cover sheet, dated September 29, 2006, which was allegedly sent by McCarthy to Maloney. The cover sheet states, "We have extension until October 4th. Sylvia [Fierros] would like you to file Answer ASAP. File to follow next week." At Maloney's law firm, incoming facsimiles are initially transmitted to a telecommunications provider who in turn forwards the facsimile to the attorney's e-mail inbox. According to Maloney, he never received the e-mail facsimile. Consequently, no answer or responsive pleading was filed.

Five days after the expiration of the extended time to file an answer, Embry filed a motion for entry of default and a default judgment certificate. The trial court entered an order on October 16, 2006, granting the motion. A bench trial on damages was held on February 26, 2007. Embry requested damages of slightly over \$3.9 million, which included items such as past and future medical expenses, lost wages and pain and suffering. The trial court entered judgment in the amount of \$2.29 million. During the course of the hearing, the trial court commented to Embry's counsel that the court assumed Circle K Midwest had no defenses to Embry's claims. Counsel responded by stating, "We tried, we really tried."

On April 2, 2007, Maloney received a package from CSS containing a letter from Fierros and the Embry

claims file. The letter stated that the claims file had previously been sent to Maloney and requested a current status on the case. Maloney had no idea what the letter was about. He contacted Embry's counsel and an employee of CSS, who sent over a copy of the fax cover sheet. Maloney immediately filed a notice of appeal on behalf of Circle K as well as a motion to set aside the default judgment and a motion to file a late answer.

The trial court granted the motion to set aside the default judgment based upon a finding of excusable neglect. In setting aside the judgment, the court acknowledged that Fierros had been negligent in failing to make certain that Maloney received the facsimile transmission requesting that he file an answer in the lawsuit. The court also found a valid excuse for that negligence, however, in that Fierros apparently sent the facsimile, obtained a confirmation sheet for it, and earnestly believed that the transmission had gone through. The court concluded that "some indeterminate error in cyberspace" caused the disappearance of the facsimile. The court found that the evidence of the confirmation sheet and Fierros's confidence in Maloney excused her neglect in failing to follow up on the facsimile.

Embry filed a motion for reconsideration and requested that he be allowed to conduct discovery regarding Circle K's excuse for its failure to file an answer. Although the court had originally granted the request for limited discovery from the bench, the court ultimately entered a written order denying it.

On July 18, 2007, Embry successfully moved for leave to file an amended complaint and named Mac's Convenience Stores, LLC, as the appropriate party defendant. The complaint also added CSS, St. Paul Insurance and Sylvia Fierros as defendants. The complaint added allegations of falsifying business records, civil conspiracy, common law bad faith and violation of the Unfair Claims Settlement Practices Act. These latter claims were based on the allegations that the video surveillance tape had been altered.

On June 4, 2009, Mac's Stores moved for summary judgment arguing that it had no duty to Embry because the uneven pavement was an open and obvious condition. The trial court granted partial summary judgment dismissing Embry's personal injury claims on August 25, 2009, and then dismissed the remaining claims on November 13, 2009.

The panel of this Court went on to affirm the Order setting aside the Default Judgment. It also reversed the Order granting Summary Judgment in favor of Mac's to allow the trial court to consider the then newly rendered Kentucky Supreme Court opinion in *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010). That Opinion, which was rendered during the pendency of the first appeal before this Court, modified the "open and obvious" doctrine of premise liability by holding 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.*" *Kentucky River*, 319 S.W.3d at 389, quoting Restatement (Second) of Torts § 343A(1) (1965) (emphasis added). The matter was then remanded to the trial court for reconsideration under the revised open and obvious doctrine.

After the matter was remanded to the Jefferson Circuit Court, Mac's Convenience Stores again moved for Summary Judgment. Oral arguments on the motion were conducted on September 30, 2011, after which the circuit court rendered an Opinion and Order on October 27, 2011, granting Summary Judgment. As a basis for the Opinion and Order, the court determined that the defect in the

pavement was open and notorious, that it was readily apparent, and that Mac's could not have foreseen that Embry would trip over a readily visible condition. In so doing, the court noted that Embry admitted that he would have seen the uneven pavement if he had looked before stepping backward off his trailer. Embry moved to alter, amend or vacate the court's October 25, 2011 Order. The motion was denied.

Embry prosecuted a second appeal to this Court, which resulted in an Opinion rendered on May 3, 2013, Affirming the Jefferson Circuit Court's entry of Summary Judgment. Embry was then granted discretionary review by the Kentucky Supreme Court. During the intervening period, *Dick's Sporting Goods* and *Shelton* were rendered. Thereafter, the Kentucky Supreme Court vacated the May 3, 2013 Opinion of this Court and Remanded the matter for consideration of the issues presented in light of *Dick's Sporting Goods* and *Shelton*. We will now consider Embry's appeal in light of *Dick's Sporting Goods* and *Shelton*.

Embry first argues that the circuit court erred by not permitting him to fully conduct discovery. On remand from this Court's first Opinion, and in response to Embry's discovery request, Mac's moved on May 24, 2011, to hold discovery in abeyance claiming that no other discovery was necessary for the circuit court to consider the application of *Kentucky River*. That motion was denied by way of an Order rendered on June 9, 2011, and Embry was permitted to conduct additional discovery. Prior to any discovery taking place, Mac's renewed

its Motion for Summary Judgment and filed a Motion for Protective Order regarding the depositions of Image Vault, LLC.

On September 30, 2011, a hearing was conducted on Mac's Motion for Summary Judgment. At this hearing, Embry requested the opportunity to testify in order to "clarify" his prior deposition testimony. Specifically, Embry sought to alter his prior deposition statement that he would have seen the pavement defect if he had looked. After Summary Judgment was granted, Embry attached an affidavit to his Motion to Alter, Amend or Vacate, said affidavit "clarifying" his deposition testimony. Embry now argues that the circuit court erred in granting Mac's Motion for Summary Judgment without allowing him to clarify his prior deposition testimony or conduct other discovery. He also maintains that the court misapplied the open and obvious doctrine in concluding that Mac's was entitled to Summary Judgment.

On the first issue raised by Embry, we find no basis for concluding that the Jefferson Circuit Court was required to hold Mac's Motion for Summary Judgment in abeyance until Embry had completed additional discovery or had been granted leave to "clarify" his deposition testimony. The matter was on remand from a panel of this Court for reconsideration in light of *Kentucky River*. The issue before the circuit court on remand was whether the defect was obvious, and if so, whether Mac's should have anticipated the harm "despite such knowledge or obviousness." *Kentucky River*, 319 S.W.3d at 389. In addressing this question, the circuit court noted that the record was sufficient to resolve this issue. Embry



acknowledged - both directly and indirectly - that the defect was readily apparent. The unevenness in the asphalt upon which Embry tripped was demarked by dark gray asphalt and lighter concrete. Additionally, Embry acknowledged via deposition that if he had looked before stepping backward off his trailer he would have noticed the unevenness. As such, the circuit court's conclusion that the defect was open and obvious is supported by the record, and additional discovery was not required as to the resolution of this limited issue.

Having determined that the defect was open and obvious, the related question arising from *Kentucky River* was whether Mac's could have foreseen that Embry would trip over a readily visible condition. In answering this question in the negative, the court again relied on Embry's deposition testimony to conclude that Embry would have noticed the defect if he had looked where he was stepping. Citing *Rucinski v. Cinemark U.S.A., Inc.*, 2011 WL 765817 (Ky. App. 2011), the court concluded that nothing required Embry to step backward off the trailer without looking or to take the path he had chosen to disembark from the trailer. Ultimately, the circuit court concluded that "[a]dditional discovery into the matter, including video evidence, will not change the fact that Plaintiff could have and should have observed the open and obvious condition." This conclusion is supported by the record and the law, and as such we find no error in the circuit court's resolution of Mac's Motion for Summary Judgment prior to additional discovery having been conducted.

The next and related issue - and the one implicated by *Dick's Sporting Goods* and *Shelton* - is whether Mac's Convenience Stores is entitled to Summary Judgment under the instant facts. In *Dick's Sporting Goods*, the plaintiff slipped and fell on a wet floor after entering a store and avoiding a floor mat covered with rain water. In determining that Summary Judgment in favor of the store owner was not warranted, the Kentucky Supreme Court held in relevant part that 1) a wet floor is not an open and obvious condition, 2) the store owner had a duty to maintain a safe condition for invitees or to warn of an unsafe condition, and 3) triable issues existed as to whether the store owner breached that duty by failing to discover, warn of or remedy the alleged unsafe condition. Though *Dick's Sporting Goods* clearly restates the duty owed by Mac's Convenience Stores to its invitee Embry, it is factually distinguishable from the matter before us. Whereas in *Dick's Sporting Goods* the alleged hazard was found not to be open and obvious, in the matter at bar it is uncontroverted that Embry would have seen the uneven pavement had he looked behind him before stepping off the trailer. Because the alleged hazard was not seen by direct observation in *Dick's Sporting Goods*, but could have been seen under the facts before us, we conclude that *Dick's Sporting Goods* is distinguishable.

The facts of *Shelton*, however, more closely parallel those before us. In *Shelton*, a hospital patient's wife was injured in a fall after her foot became tangled in a mass of bedside cords attached to medical equipment. Unlike the hazard in *Dick's Sporting Goods*, the medical equipment cords were found to be

easily seen by direct observation. In disposing of whether the hospital was entitled to Summary Judgment, the Kentucky Supreme Court determined an open and obvious hazard does not eliminate the landowner's general duty to maintain the premises in a reasonably safe condition, or the duty to eliminate or warn of unreasonably dangerous conditions; rather, this is merely one factor in determining whether the landowner fulfilled its duty of care. *Shelton*, 413 S.W.3d at 911. The Court concluded that a genuine issue of material fact existed as to whether the hospital fulfilled its duty of care to the patient's wife, as its invitee, thus precluding Summary Judgment.

In applying *Shelton* to the matter before us, we conclude that the open and obvious nature of the uneven pavement does not eliminate the general duty of Mac's Convenient Stores to maintain the premises in a reasonably safe condition, or the duty to eliminate or warn of unreasonably dangerous conditions. As such, the open and visible nature of the uneven pavement is merely a factor in determining whether Mac's Convenience Stores fulfilled its duty of care.

Similarly, and as in *Shelton*, we also conclude that a genuine issue of material fact exists as to whether Mac's Convenience Stores fulfilled its duty of care to Embry.

Embry also argues that the circuit court erred in not considering all relevant evidence in rendering its Opinion and Order. Specifically, he maintains that the circuit court failed to properly consider Embry's expert report, the deposition testimony of Mac's former store manager Sherry Vincent, and his "clarifications" to his deposition testimony. We find no error. Embry

acknowledges that the timing of the expert's report made it impossible for him to rely on this expert report in his briefing on Mac's Motion for Summary Judgment, and the effect, if any, of Vincent's deposition testimony is purely speculative. The record upon which the circuit court relied in adjudicating Mac's Motion for Summary Judgment, including Embry's deposition, was sufficient to address the issues raised by *Kentucky River* on remand. Additionally, the circuit court determined that Embry's deposition testimony was clear and unambiguous, and required no clarification.

Summary judgment "shall be rendered forthwith 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 record must be viewed 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, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Id.* "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id.* Finally, "[t]he 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).

Having determined from *Shelton* that the open and obvious nature of the uneven pavement is but one factor in determining if Mac's Convenience Stores met its duty of care, and when viewing the record in a light most favorable to Embry and resolving all doubts in his favor, we conclude that there exists a genuine issue of material fact as to whether Mac's Convenience Stores met its duty of care to Embry. Accordingly, Summary Judgment was not warranted.

For the foregoing reasons, we Reverse the Jefferson Circuit Court's entry of Summary Judgment, and Remand the matter for further proceedings.

MOORE, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS.

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