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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001076-MR

NEITHA COLEMAN — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 10-CI-05476

LOWE'S HOME IMPROVEMENT, TONY TIPTON, AND MICK KABALEN — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, DIXON AND STUMBO, JUDGES.

DIXON, JUDGE: Appellant, Neitha Coleman, appeals from an order of the Fayette Circuit Court granting summary judgment in favor of Appellees, Lowe's Home Improvement and two of its employees, Tony Tipton and Mick Kabalen, in this premises liability case. Finding no error, we affirm.

In March 2010, Coleman suffered a hip fracture after tripping on a ladder at a Lowe's store in Lexington, Kentucky. The rolling ladder, which was three feet wide and eight to ten feet tall, was one of approximately twenty-five in the store that are left in the aisles for use by sales associates. Coleman acknowledged that she noticed the ladder while she was looking at items on the left-hand-side shelves. Nevertheless, when she turned to the right her foot caught in a metal bar at the base of the ladder causing her to fall.

In September 2010, Coleman filed an action in the Fayette Circuit Court against Lowe's as well as the store manager, Tony Tipton,[1] claiming she was injured as a direct and proximate result of a negligent and dangerous condition caused by or allowed to exist by Lowe's. Subsequently, Coleman filed an amended complaint naming Mick Kabalen, the zone manager on duty at the time of the incident, as an additional defendant. Following discovery, Lowe's, Tipton and Kabalen filed a motion for summary judgment arguing that Coleman's claims were barred by the open and obvious doctrine. Further, they argued that Coleman failed to allege any independent acts of negligence that would render Tipton and Kabalen individually liable.

On May 23, 2012, the trial court entered summary judgment[2] in favor of Lowe's, Tipton and Kabalen. In so doing, the trial court found that the ladder was an open and obvious danger. Further, the court considered the decision in

[1] There is no dispute that Tipton was not present at the store at the time of the incident.
[2] We would note that the trial court's order summarily grants judgment in favor of Appellees without any findings or reasoning. However, during the hearing on the motion, the trial court ruled from the bench and provided detailed grounds for her judgment.

Kentucky River Medical Center v. McIntosh, 319 S.W.3d 385, 389 (Ky. 2010), as well as the subsequent cases interpreting such, and concluded that Lowe's merchandise did not create a distraction that Lowe's should have foreseen and that would have precluded Coleman from protecting herself from the open and obvious danger. Finally, the trial court determined that Coleman failed to present any evidence that Tipton or Kabalen were personally negligent. Coleman thereafter appealed to this Court.

Our 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). Summary judgment shall 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 judgment as a matter of law." CR 56.03. 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 Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id.*

As a general rule, an owner or possessor of land has a duty to protect an invitee from physical injuries caused by dangerous conditions on the property,

whether known or unknown to the invitee. *See* Restatement (Second) of Torts § 343 (1965). As a store patron, Coleman was clearly an invitee since as she was a person who was "invited to enter or remain on the land for a purpose directly or indirectly connected with business dealings with the possessor of the land." *Id.* § 332(3). *See also Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364, 367 (Ky. 2005). Nevertheless, certain exceptions narrow the coverage of this rule, including the "open and obvious danger" doctrine, which provides 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." *Id.* § 343A(1).

Prior to our Supreme Court's recent decision in *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385, 389 (Ky. 2010), Kentucky followed the position of the previous Restatement that land possessors cannot be held liable to invitees who are injured by open and obvious dangers. Restatement (First) of Torts § 340 (1934). *See also Johnson v. Lone Star Steakhouse & Saloon of Kentucky, Inc.* 997 S.W.2d 490, 492 (Ky. App. 1999); *Corbin Motor Lodge v. Combs*, 740 S.W.2d 944 (Ky. 1987). In *McIntosh*, however, the Court modified Kentucky's "open and obvious" doctrine of premises liability and adopted the modern trend as expressed in Restatement (Second) of Torts §343A (1965). 319 S.W.3d at 390. As a result, the open and obvious danger doctrine is no longer a complete defense for the landowner but is now limited by the language of the

Restatement that "unless the possessor should anticipate the harm despite such knowledge or obviousness." As the court explained:

> 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.

Id. at 392.

Thus, *McIntosh* requires a two-part inquiry: First, whether the danger is, in fact, open and obvious; and second, despite the danger's obvious nature, whether the premises owner could reasonably foresee that the invitee would be injured by such danger. *Id. See also Lucas v. Gateway Community Service Organization, Inc.,* 343 S.W.3d 341, 345-46 (Ky. App. 2011). In essence, the Court recognized that under the modern comparative fault doctrine, which has been adopted in Kentucky, a jury should evaluate the comparative fault of the parties in such cases. *McIntosh*, 319 S.W.3d at 392. However, the *McIntosh* Court emphasized:

> [T]his 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.

Id.

In this case, there is no question that the ladder was an open and obvious danger. For a condition to be "open and obvious" it must be both known and obvious. A danger becomes "obvious" when "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." *Bonn v. Sears, Roebuck & Co.*, 440 S.W.2d 526, 529 (Ky. App. 1969). *Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364, 367 (Ky. 2005). Based on this definition and under the particular facts of this case, the existence of the ladder in the aisle was readily apparent to invitees visiting Lowe's. Moreover, we are of the opinion that the risk created by the ladder would be obvious to a reasonable person in Coleman's position. As such, the trial court properly found that, as a matter of law, the ladder was an open and obvious danger.

Under *McIntosh* then, the question necessarily becomes whether 'the possessor ha[d] 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." *McIntosh*, 319 S.W.3d at 391. If so, then the injury is foreseeable and the premises owner may not escape liability. In *McIntosh*, the Kentucky Supreme Court ruled that the plaintiff, an emergency medical technician transporting a patient from an ambulance into the hospital's emergency room, was

foreseeably distracted from the open and obvious hazard of an uneven curb between the ambulance dock and the emergency room doors. Nevertheless, the Court observed:

> It is important to stress the context in which McIntosh sustained her injury: she was rushing a critically ill patient into a hospital, in an effort to save his life. Even if we assume that she was neither distracted nor forgetful about the curb, we would still have to conclude that the benefits of her rushing to the door (at the risk of tripping over the curb) outweighed the costs of her failing to do so (at the risk of the patient's condition worsening, perhaps to the point of death, on the Hospital doorstep). The dire need to rush critically ill patients through the emergency room entrance should be self-evident, and as such, "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." Restatement (Second) § 343A cmt. f. This is another reason this injury is foreseeable and that a duty existed in this case.

Id. at 394.

Several cases since the advent of *McIntosh* have further clarified the circumstances under which the exception should apply. In *Jones v. Abner*, 335 S.W.3d 471 (Ky. App. 2011), a panel of this Court affirmed a summary judgment in favor of a hotel after a guest slipped and fell while taking a shower. The panel held that "while an invitee has a right to assume that the premises . . . are reasonably safe . . . this does not relieve him of the duty to exercise ordinary care for his own safety, nor does it license him to walk blindly into dangers that are obvious, known to him, or would be anticipated by one of ordinary prudence." *Id.*

at 477 (*Quoting Rogers v. Professional Golfers Ass'n of America*, 28 S.W.3d 869, 872 (Ky. App. 2000)). Similarly, the Court in *Lucas v. Gateway Community Service Organization, Inc.,* 343 S.W.3d 341 (Ky. App. 2011), a panel of this Court affirmed the trial court's summary judgment on the grounds that a change in a parking lot surface from blacktop to gravel was an open and obvious condition and further that *McIntosh* did not apply because the plaintiff walking to her car "was not distracted by some outside force . . . [or] acting under time-sensitive or stressful circumstances." *Id.* at 346.

Coleman argues herein that Lowe's should have anticipated that store patrons' may become distracted by the merchandise and not discover or appreciate the danger of a ladder located in the aisle. As such, Coleman contends that her tripping on the ladder was a foreseeable injury and Lowe's cannot escape liability. We must disagree.

Under the case law since *McIntosh*, a plaintiff is not "distracted" in the sense that *McIntosh* requires unless there are foreseeable stressful or time-sensitive distractions. As the *Lucas* and *Jones* decisions indicate, people can be distracted by any number of circumstances when performing normal daily activities. We readily concede that shoppers in modern stores are often distracted by displays and merchandise. But we must agree with the trial court that the mere distraction of shopping is not sufficient to prevent application of the open and obvious danger doctrine. Coleman's argument effectively asks this Court to conclude that all shoppers, as a matter of course, are distracted by store displays and merchandise.

However, we decline to create such a broad rule, especially in light of the fact that public policy requires individuals to take some degree of reasonable care for their own safety. *See Kennedy v. Great Atlantic & Pacific Tea Co.*, 737 N.W.2d 179 (Mich. App. 2007).

We are of the opinion that there is simply no evidence that Coleman was distracted from her "duty to act reasonably to ensure her own safety, heightened by her familiarity with the location and the arguably open and obvious nature of the danger." *McIntosh*, 319 S.W.3d at 395. She was admittedly aware that the ladder was in aisle and should have recognized the obvious danger it presented. Her focus should have remained on the potential danger, and consequently, the exceptional circumstances described in *McIntosh* do not apply.

Because we have determined that the open and obvious doctrine bars Coleman's claims, we necessarily do not reach the issue of Tipton's and Kabalen's personal liability for Coleman's injuries. Clearly, if Lowe's did not have a duty to either warn of the ladder's existence or take measures to protect her from its danger, then neither Tipton nor Kabalen, as store employees, had any such duty.

For the reasons set forth herein, the order of the Fayette Circuit Court granting summary judgment in favor of Lowe's, Tipton and Kabalen is affirmed.

ALL CONCUR.

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