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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001107-MR

BONITA COBB — APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2014-SC-000191-D

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 11-CI-02785

JOSEPH KAMER AND
MAURITIA KAMER — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: STUMBO, TAYLOR, AND THOMPSON, JUDGES.

TAYLOR, JUDGE: This matter is before the Court of Appeals on remand from the Kentucky Supreme Court by Opinion and Order entered October 21, 2015, in Appeal No. 2014-SC-000191-D. The Supreme Court vacated and remanded the Court of Appeals Opinion affirming, for further consideration in light of the recent

Supreme Court decision rendered in *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288 (Ky. 2015).[1]

This case looks to the application of the open and obvious doctrine to negligence cases involving obvious natural outdoor hazards. Prior to *Carter v. Bullitt Host*, 471 S.W.3d 288, the general rule in Kentucky was that natural outdoor hazards which were as obvious to an invitee as to the owner of a premises, did not constitute an unreasonable risk which the owner owed a duty to warn or remove. *Standard Oil v. Manis*, 433 S.W.2d 856 (Ky. 1968). This rule was buttressed by the Supreme Court in *Corbin Motor Lodge v. Combs*, 740 S.W.2d 944 (Ky. 1987), holding that a defendant owed no duty to a plaintiff to warn of outdoor natural hazards. This effectively established a special category for outdoor natural hazards in the legal analysis of the open and obvious doctrine. This limited exception survived the adoption of comparative fault in Kentucky tort law in *Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984), and *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010) and its progeny. *Kentucky River* effectively held that the open and obvious rule was a vestige of contributory negligence and was no longer the law in Kentucky, subject to a few exceptions, including outdoor natural hazards, as set forth in *Manis*, 433 S.W.2d 856.

However, in *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288, the Kentucky Supreme Court has expressly overruled *Standard Oil v. Manis*, 433 S.W.2d 856, which now mandates judicial review of outdoor natural hazards under

[1] The Court of Appeals decision affirming was rendered on March 14, 2014, before *Carter v. Bullitt Host, LLC,* 471 S.W.3d 288 (Ky. 2015) was rendered on September 24, 2015.

comparative fault principles. Having stated the premise for our reconsideration of this case based upon the Supreme Court mandate, we will again restate the relevant facts in this case.

Bonita Cobb was injured when she slipped and fell on ice in the driveway of Joseph and Mauritia Kamer's house. The Fayette Circuit Court granted summary judgment to the Kamers on the basis that the hazard was open and obvious. On Friday night, December 3, 2010, two to four inches of snow fell at the Kamer residence in Lexington, Kentucky. Joseph Kamer cleared the concrete driveway and adjoining brick walkway of snow the next morning using a standard snow shovel. Cobb, who was employed by the Kamers to clean their house, arrived at the residence on the following Tuesday, December 7, 2010, at around nine o'clock in the morning. The weather was clear and the sun was shining, although it was very cold. Cobb parked on the driveway, about fifteen feet from the end of the brick walkway leading to the front door. She had no difficulty in exiting her car and accessing the brick walkway. After cleaning for about two to two-and-one-half hours, she told Joseph Kamer that she was leaving. He gave her a Christmas present, and she left through the front door. This was the same door through which she had entered the premises. She exited carrying her duster, her keys, and possibly a water bottle. As she stepped with her right foot from the brick walkway onto the concrete driveway, her right foot slid immediately to her right, causing her to fall hard on her left ankle. After she fell, she placed her hand on the driveway and felt ice. She had not observed any ice on the driveway

when she entered the house, nor when she was leaving. She was able to get into her car and drive herself to the emergency room. When her ankle was x-rayed, it was found to be broken in three places. She underwent surgery two days later. Three weeks later, she returned to the hospital with blood clots in her leg and lungs.

Cobb filed suit against the Kamers on May 31, 2011. She alleged that her injuries were caused by the Kamers' negligence in failing to use reasonable care to protect her from hazardous conditions, failing to maintain their premises in a safe condition, failing to warn her of an existing hazard and danger, failing to make a reasonable inspection of the premises for possible hazards and failing to remedy a dangerous condition that the Kamers knew or should have known existed on their premises. The Kamers filed an answer, and discovery was conducted, which included taking the depositions of Cobb and the Kamers. The Kamers thereafter filed a motion for summary judgment, asserting that their driveway constituted an open and obvious condition. Cobb disputed that the ice was an open and obvious condition, and further argued that, because Joseph Kamer undertook to clear the driveway and walk, he was required to do so in a manner that did not heighten or conceal the nature of the dangerous condition. Following a hearing, the circuit court granted summary judgment to the Kamers, ruling that the ice was open and obvious, and that there was no evidence that Joseph Kamer had concealed the ice. This appeal follows.

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) (citing Kentucky Rules of Civil Procedure 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 Serv. Ctr, Inc*., 807 S.W.2d 476, 480 (Ky. 1991).

Cobb argues that the trial court erred in granting summary judgment because a jury should have been allowed to decide, first, whether the ice hazard was open and obvious, and second, whether Kamer's actions in clearing the driveway heightened or concealed the hazardous condition.

"To 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 plaintiff's damages." *Lee v. Farmer's Rural Elec. Co-op. Corp*., 245 S.W.3d 209, 211–12 (Ky. App. 2007).

The parties agree that Cobb's status in relation to the Kamers was that of an invitee. "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." *Horne v. Precision Cars of*

Lexington, Inc., 170 S.W.3d 364, 367 (Ky. 2005) (quoting *Scuddy Coal Co. v. Couch*, 274 S.W.2d 388, 389 (Ky. 1955)).

As previously noted, in determining whether a landowner owes a duty to an invitee, the general rule had been for many years in Kentucky that the owner does not have a duty to remove or warn against naturally-occurring outdoor hazards that are open and obvious. "[N]atural outdoor hazards which are as obvious to an invitee as to the owner of the premises do not constitute unreasonable risks to the former which the landowner has a duty to remove or warn against." *Standard Oil Co. v. Manis*, 433 S.W.2d at 858.

However, in *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288, the Supreme Court has overruled *Manis*, holding that under comparative fault, every person has a duty of ordinary care in light of the circumstances, even in cases involving outdoor natural hazards. This duty applies equally to plaintiffs and defendants, whereupon for fault to be assessed, a party must have breached his duty. *Id.* at 298.

In *Carter*, the court stated:

> The open-and-obvious nature of a hazard is, under comparative fault, no more than a circumstance that the trier of fact can consider in assessing the fault of any party, plaintiff or defendant. . . . [citing *Shelton v. Kentucky Eastern Seals Society, Inc.*, 413 S.W.3d 901, 911-12 (Ky. 2013).] Under the right circumstances, the plaintiffs conduct in the face of an open-and-obvious hazard may be so clearly the only fault of his injury that summary judgment could be warranted against him, for example when a situation cannot be corrected by any means or when it is beyond dispute that the landowner

> had done all that was reasonable. *Id.* at 918. Applying comparative fault to open-and-obvious cases does not restrict the ability of the court to exercise sound judgment in these cases any more than in any other kind of tort case.

Id. at 297.

While the Supreme Court has not closed the door to granting summary judgments in open and obvious danger cases involving outdoor natural hazards, it will be substantially limited going forward under the comparative fault analysis referenced above. Given the Supreme Court's mandate, we have no alternative based on the record before this Court on appeal but to vacate the summary judgment entered below in this case and remand for further proceedings consistent with *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288 (Ky. 2015).

For the foregoing reasons, the summary judgment of the Fayette Circuit Court is vacated and remanded for further proceedings consistent with this opinion.

STUMBO, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS.

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