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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001182-MR

DONNA ROBERTS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 10-CI-006424

JEWISH HOSPITAL, INC.,
(D/B/A JEWISH HOSPITAL) — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, NICKELL, STUMBO, JUDGES.

NICKELL, JUDGE: Donna Roberts appeals from an opinion and order entered by the Jefferson Circuit Court granting summary judgment to Jewish Hospital, Inc. ("JHI") in a slip and fall case. Upon review of the record, the briefs and the law, we affirm.

On July 18, 2009, Roberts drove to Louisville, Kentucky, to visit a friend recovering from bypass surgery at JHI. This was her first and only visit to

JHI. At the conclusion of their visit, Roberts spoke to her friend's daughter and then took the elevator to the lobby to exit the hospital, walk to her car, and drive home to Tell City, Indiana. Upon exiting the elevator, Roberts stopped, "fumbled" in her purse for her keys, found them, "and then I just kept on walking; and just felt something hit my foot and, you know, like, catch it or whatever."

As captured by a video surveillance camera,[1] Roberts fell onto the floor as she neared a large safety mat placed just inside the revolving door that exits the hospital onto the street. From our viewing of the footage, as Roberts approached the mat, she began falling and her momentum appeared to carry her forward into the continuously revolving door. As a result of the fall, Roberts fractured her left humerus in three places[2] and suffered a concussion and scalpel hematoma. Both before and after Roberts's fall, numerous people are seen traveling the same path as Roberts without incident. Roberts had entered the hospital a few hours earlier through the same revolving door and had traversed the same safety mat without falling.

The safety mat appears to have been designed for commercial use. It was dark in color with a black edge; the floor beneath the mat was light in color, providing good contrast between the mat and the floor. There were no visible

[1] The surveillance footage is not continuous, rather it is a freeze frame video showing slices of action separated by milliseconds. The pertinent portion of the footage begins at 18:52:42, just before Roberts comes into view at 18:52:57, and continues until 19:00:26 when Roberts is transported to the JHI emergency room by wheelchair.

[2] An orthopedic surgeon performed a closed reduction manipulation of Roberts's shoulder on July 30, 2009. Following a review of x-rays, the surgeon told Roberts her injury had healed, but Roberts reports persistent shoulder pain.

bulges, wrinkles or puckers in the mat. Roberts has not alleged the mat was flawed in any way. The video shows it was daylight and the lobby appears to be bright and well-lit by both sunlight and overhead lighting. The distance Roberts walked between the elevator and the revolving door is between twenty and thirty feet.

After the fall, Roberts filed a complaint against JHI alleging the hospital had negligently failed to provide a safe business premises for its invitees by placing a dangerous floor mat near the revolving door. The cause of her fall is disputed, but she characterizes the mat as a dangerous condition. For purposes of the complaint, JHI assumed Roberts tripped over the mat as she claimed, but responded that a safety mat is not a dangerous condition; Roberts had failed to allege the existence of any dangerous condition on JHI's premises; and furthermore, because the mat was clearly visible, and Roberts had previously walked across the mat successfully, it had no duty to warn Roberts of the presence of the mat.

During a deposition, Roberts testified she was uncertain what had caused her to fall, but she was confident she had not tripped "over my feet or anything." She also stated she had walked out of the elevator at a normal pace; was "[j]ust regular walking[;]" "was in no hurry to go anywhere[;]" her view of the mat and the revolving door was unobstructed; and the hospital lobby was not busy. Roberts further testified she was wearing Keds slip-on tennis shoes and remembered "my foot hitting something" and "I felt my foot catch." She admitted that had she lifted her foot higher, she would not have tripped.

JHI moved for summary judgment. On June 28, 2012, the trial court granted JHI's motion upon finding Roberts was a hospital invitee but she had not demonstrated the existence of any dangerous condition at the time and place of her fall making the JHI premises unsafe. This appeal followed.

ANALYSIS

That Roberts fell is undisputed. Why she fell is the question. Was it simply an occurrence, or did some act or omission by JHI *cause* her to fall? We will not presume JHI was negligent merely because Roberts fell and suffered an injury. *Hoskins v. Hoskins,* 316 S.W.2d 368, 370 (Ky. App. 1958).

> An invitee has a right to assume that the premises he has been invited to use are reasonably safe, but 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. *J. C. Penney Co. v. Mayes*, Ky., 255 S.W.2d 639 (1952); *Morton v. Allen Construction Company*, Ky., 416 S.W.2d 733 (1967).

Smith v. Smith, 441 S.W.2d 165, 166 (Ky. 1969).

When a grant of summary judgment is challenged, we apply the standard of review recited in *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky. App. 1996). We consider

> 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. Kentucky Rules of Civil Procedure (CR) 56.03. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. *Goldsmith v. Allied Building Components, Inc.*, Ky., 833 S.W.2d 378,

> 381 (1992). "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.*, Ky., 807 S.W.2d 476, 480 (1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest*, 807 S.W.2d at 480, *citing Paintsville Hospital Co. v. Rose*, Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor. . . [.]" *Huddleston v. Hughes*, Ky. App., 843 S.W.2d 901, 903 (1992), citing *Steelvest, supra* (citations omitted).

With the foregoing standards in mind, we address the arguments raised by the parties.

First, Roberts argues the trial court erred in granting summary judgment because she satisfied her burden of proving: the mat over which she claims she tripped was a dangerous substance; the mat was a substantial factor in causing her to fall and injure herself; and, under the *res ipsa loquitur* doctrine,[3]

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[3] According to *Sadr v. Hager Beauty School, Inc.*, 723 S.W.2d 886, 887 (Ky. App. 1987), *res ipsa loquitur*

> is an evidentiary doctrine which allows a jury to infer negligence on the part of the defendant. If the inference is forceful enough it can create a rebuttable presumption of negligence, possibly resulting in a directed verdict. *Bowers v. Schenley Distillers, Inc.*, Ky., 469 S.W.2d 565 (1971); *Bell & Koch, Inc. v. Stanley*, Ky., 375 S.W.2d 696 (1964).
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> Reliance upon the doctrine of *res ipsa loquitur* is predicated upon a showing that (1) the defendant had full control of the instrumentality which caused the injury; (2) the accident could not have happened if those having control had not been negligent; and (3) the plaintiff's injury resulted from the accident. *Bowers, supra*, at 568. The doctrine does not apply if it is shown that the injury may have been due to some voluntary action on the plaintiff's part. *See Schmidt v. Fontaine Ferry Enterprises*, Ky., 319 S.W.2d 468 (1959).

JHI's lobby was not reasonably safe. JHI counters that neither a safety mat, nor anything else at the site of Roberts's fall, constituted a dangerous condition; JHI did not seek, nor did the Jefferson Circuit Court grant, summary judgment on a theory that Roberts fell before reaching the mat; and, existence of a dangerous condition does not trigger application of the *res ipsa loquitur* doctrine.

When summary judgment is sought, the initial burden is borne by the movant to show "no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Lucas v. Gateway Community Services Organization, Inc.*, 343 S.W.3d 341, 346 (Ky. App. 2011) (quoting *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001)). To put the burden of proof in the context of this case, Roberts, an injured invitee, alleging JHI created a dangerous condition by placing a safety mat

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Furthermore, as expressed in *Cox v. Wilson*, 267 S.W.2d 83, 84 (Ky. 1954),

> [t]he fact that some mystery accompanies an accident does not justify the application of the doctrine of *res ipsa loquitur*. The fact that we cannot pinpoint an act of omission or commission wherein one fails to respect the rights of others does not summon its use. A lack of knowledge as to the cause of the accident does not call for the application of the doctrine. The separate circumstances of each case must be considered and from them it must be first decided whether according to common knowledge and experience of mankind, this accident could not have happened if there had not been negligence.

In light of our ultimate holding, that Roberts failed to establish the safety mat in the JHI lobby constituted a dangerous condition, any further discussion of this doctrine would be superfluous.

in its lobby, had to prove three things to survive the summary judgment motion, that:

> (1) he or she had an encounter with a foreign substance or other dangerous condition on the business premises; (2) the encounter was a substantial factor in causing the accident and the customer's injuries; and (3) by reason of the presence of the substance or condition, the business premises were not in a reasonably safe condition for the use of business invitees.

Martin v. Meckenhart Corp., 113 S.W.3d 95, 98 (Ky. 2003) (*citing Lanier v. Wal–Mart Stores, Inc.,* 99 S.W.3d 431, 435-36 (Ky. 2003)). If Roberts showed *all three* items, the burden of proof would then shift to JHI to establish that even in the face of a dangerous condition, it still exercised reasonable care and was not negligent in maintaining its premises.

However, the burden never shifted in this case because Roberts did not clear the first hurdle—proof that a dangerous condition existed. All Roberts alleged was that JHI placed a safety mat in front of a revolving door in the hospital lobby. She did not establish the mat was frayed, askew, concealed, inappropriate or inadequate for its intended purpose. While no Kentucky court has stated that a commercial grade safety mat properly placed on a floor, in and of itself, is not a dangerous condition, we do so today. Our holding is based upon *Bartley v. Educational Training Systems, Inc.*, 134 S.W.3d 612 (Ky. 2004) and *Robinson v. Southwestern Bell Telephone Company*, 26 Ill.App.2d 139, 167 N.E.2d 793, 796 (1960).

In *Bartley,* a student sought damages for injuries incurred after she tripped on a carpet remnant used as a carpet runner. The trial court found "merely using carpet runners does not, by itself, create an unsafe condition." *Bartley,* 134 S.W.3d at 614. A panel of this Court agreed and affirmed, but our Supreme Court saw the case differently and reversed, concluding summary judgment had been erroneously granted because the carpet remnant over which the student had fallen "was not a specially designed and produced carpet runner for commercial use," it was "only a carpet remnant left over from the wall-to-wall carpeting," and because it "lacked proper edging and backing material," jurors could have reasonably found the makeshift "carpet runner constituted an unsafe condition." *Id.* at 614-15. In contrast, the safety mat used by JHI appears to be a flawless commercial grade safety mat and Roberts has not alleged or proved anything to the contrary. Thus, *Bartley* was reversed for reasons not present in this case.

In its *Bartley* analysis, our Supreme Court discussed *Robinson*, an Illinois case in which a woman fell when her heel was gripped by a rubber safety mat specifically designed to keep floors from becoming slippery during inclement weather. The *Robinson* court held "the use of ordinary floor mats to assist pedestrians is perfectly reasonable, and the fact that a person trips on one of them is no evidence of negligence." 167 N.E.2d at 146. In reaching its conclusion, *Robinson* quoted an earlier slip and fall case, *Leach v. Sibley, Lindsay & Curr Co.*, 15 N.Y.S.2d 287, 288 (N.Y.City Ct. 1939), which held:

> The evidence before the Court is wholly barren as to the condition of this so-called rubber rug or mat at the time and place where the plaintiff fell. There is no evidence whatsoever showing any defect in the rug, any overlapping of rugs, or anything more than the mere fact there was a rug or mat on the floor. Without some evidence of imperfection, defect or dangerous condition, the Court may not construct a faulty condition of the floor causing the plaintiff to fall, and then charge the defendant with being responsible therefor. Tripping or slipping of itself is not enough to establish an unsafe condition. The plaintiff having failed to establish the alleged cause of negligence against the defendant, the complaint must be dismissed.

While not binding, we find the analysis in *Robinson* and *Leach* persuasive and instructive, and hereby adopt its sound reasoning. Since Roberts established only that there was a safety mat on the floor, but not that it was imperfect, defective or dangerous, she did not show the existence of a dangerous condition as required by *Martin*, and therefore could not have prevailed under any circumstances. This appears to be a case in which Roberts fell, but not as the result of anything JHI did or failed to do. Thus, the award of summary judgment in favor of JHI was entirely appropriate.

We comment briefly upon another argument raised by Roberts. She claims this case is controlled by *Kentucky River Medical Center v. McIntosh,* 319 S.W.3d 385 (Ky. 2010), and that the "open and obvious" doctrine no longer exists as a defense for land possessors in slip and fall cases. In *McIntosh,* our Supreme Court held a hospital owed a duty to a paramedic who injured herself while transporting a critically ill patient to the emergency room entrance when she

tripped over a curb and fell despite the curb being an open and obvious danger. As explained in the opinion,

> [i]t 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.

We disagree with Roberts's claim that *McIntosh* "completely abrogated" the open and obvious doctrine. While "no longer a *complete* defense under the Restatement," *McIntosh,* 319 S.W.3d at 392, the fact that a danger is open and obvious remains a defense for land possessors, unless "the invitee was foreseeably distracted or a third party pushed him into the danger. *Faller v. Endicott-Mayflower, LLC,* 359 S.W.3d 10, 14 (Ky. App. 2011). Absent some evidence of Roberts being distracted, forgetful or having been pushed and stumbling over the mat, *McIntosh* does not require a different result, especially since there was no proof of the safety mat being a dangerous condition.

Furthermore, Roberts's fall has none of the hallmarks of the one described in *McIntosh.* Roberts was not rushing anywhere; she had just completed a pleasant visit with a friend whom she described as having "had a really good day, and I got to spend time with her. And she . . . she was doing a lot better." Roberts was not hurriedly responding to or distracted by an emergency; she was casually heading home. She indicated she was not distracted by concern for her friend or anything else, nor did she say she had forgotten about the safety mat she had successfully crossed a few hours earlier. In light of the facts of this case, JHI could not have foreseen Roberts would trip while exiting the hospital.

Wherefore, the Jefferson Circuit Court's grant of summary judgment is affirmed as there were no genuine issues as to any material fact and JHI was entitled to judgment as a matter of law. CR 56.03.

ALL CONCUR.

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