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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001629-MR

OLLIE BARKER APPELLANT

APPEAL FROM ROWN CIRCUIT COURT
v. HONORABLE WILIAM EVANS LANE, JUDGE
ACTION NO. 11-CI-90009

JOHN D. NORTHCUTT, AND
NORTHCUTT & SON HOME FOR
FUNERALS, INC. APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, CLAYTON, AND JONES, JUDGES.

CAPERTON, JUDGE: Ollie Barker appeals from the grant of summary judgment in favor of John D. Northcutt and Northcutt & Son Home For Funerals, Inc. (hereinafter "Northcutt"). After our review of the parties' arguments, the record, and the applicable law, we agree with Barker that a genuine issue as to a material

fact exists precluding summary judgment. Thus, we reverse and remand this matter for further proceedings.

The facts of this case revolve around a slip and fall outside of Northcutt's Home for Funerals. On January 11, 2010, Barker attended a visitation. The evening was cold and snowy. Barker was aware of these conditions. When he arrived at the funeral home the parking lot was full so he drove around the back and parked parallel to a hillside behind the building where the road dead ends on the hill. There were no designated parking spaces where Barker parked, unlike the main lot with designated spaces for 120 cars. Barker was not directed there by a funeral home employee; however, Barker had previously parked behind the building when the main lot was full. On January 11, 2010, the funeral home was hosting two visitations. As many as 500 people would attend a visitation at one time.

Northcutt stated that on winter nights such as that in question, he inspected the perimeter of the building every 10-15 minutes and his employees were spreading calcium to melt ice every 15 minutes. Barker noted that the main lot was scraped and clean.

Barker left the visitation after an hour. He left early due to his concerns about the weather. When he exited from the rear of the building, Barker slipped and fell on ice before sliding roughly six feet. After he fell, Barker could see that ice was present. Barker then noted that the ice had mounded and that it

was plainly visible. There was no evidence that Barker saw the ice prior to the slip and fall.

After presenting the facts and the arguments to the court, Northcutt moved for summary judgment. The court granted summary judgment. It is from this order and judgment that Barker now appeals.

On appeal, Barker argues that the trial court erred in granting summary judgment. Northcutt argues: (1) based on longstanding Kentucky law regarding naturally occurring outdoor hazards, the grant of summary judgment was correct; and (2) Barker's interpretation of *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010) is misplaced.[1] With these arguments in mind we turn to our jurisprudence.

At the outset we note that the applicable 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 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 judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. The trial court must view the

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[1] We believe *PNC Bank, Kentucky, Inc. v. Green*, 30 S.W.3d 185, 187-188 (Ky. 2000), as discussed *infra* resolves the legal issue regarding the open and obvious doctrine and a naturally occurring ice hazard. We agree with the trial court that *McIntosh* is not dispositive of this issue.

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.* However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson,* 841 S.W.2d 169, 171 (Ky. 1992), citing *Steelvest, supra*. *See also O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006); *Hallahan v. The Courier Journal,* 138 S.W.3d 699, 705 (Ky. App. 2004). Since summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001). With this in mind we now turn to the issues raised by the parties.

In Kentucky, a danger is "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. 1969) (citations omitted). "Whether a natural hazard like ice or snow is obvious depends upon the unique facts of each case." *Schreiner v. Humana, Inc*., 625 S.W.2d 580, 581 (Ky. 1981).

Our Kentucky Supreme Court discussed the open and obvious doctrine in relation to ice and our prior case law and its application in *PNC Bank, Kentucky, Inc. v. Green*, 30 S.W.3d 185, 187 (Ky. 2000):

> In reversing the trial court's granting of summary judgment in favor of the defendants, the Court of Appeals in *Estep* held that *Standard Oil Company, supra*, was distinguishable in that Plaintiff Estep was "unaware of the transparent layer of ice on the seemingly cleared sidewalk until she stepped upon it, even though she was aware of the generally icy and snowy conditions then existing." *Estep, supra,* at 913. As such, there was an issue regarding the obviousness of the hazard which precluded summary judgment.
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> ....
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> Green's deposition testimony unquestionably confirms that her visit to the bank was during daylight hours; that she was aware of the inclement weather conditions; that she had earlier in the day been forced to walk like she was "walking on eggs" to avoid falling; that she clearly noticed the sidewalk at the PNC Bank was icy; and that there was no indication that any measures had been taken to clear the sidewalk. Green's own testimony dispels any issue as to whether the risk was open and obvious. Accordingly, PNC Bank was entitled to summary judgment.
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> We acknowledge that the *Estep, supra*, decision reiterates the well-known rule that a duty voluntarily assumed cannot be carelessly undertaken without incurring liability therefore. *Id*. at 914; *see Louisville Cooperage Co. v. Lawrence*, 313 Ky. 75, 230 S.W.2d 103 (1950). However, with regard to outdoor natural hazards, we perceive a distinction where a business owner undertakes reasonably prudent measures to increase the safety of the premises, such as was done in this case, and a business owner who undertakes measures which, in fact, heighten or conceal the nature of the dangerous condition such as occurred in Estep.

> PNC Bank attempted to clear its sidewalk of ice and snow for the safety of its customers. Yet, given the fact that it was intermittently snowing and sleeting that day, it would have been virtually impossible for bank employees to have maintained a constant watch over the condition of the sidewalk. More importantly, nothing that PNC Bank did made the natural hazard any less obvious or increased the likelihood that Green would slip and fall. We are of the opinion that it is against public policy, and even common sense, to impose liability on those who take reasonable precautions if such does not escalate or conceal the nature of the hazard, while absolving those who take no action whatsoever.

PNC Bank, Kentucky, Inc. v. Green, 30 S.W.3d 185, 187-188 (Ky. 2000).

Sub judice Barker was aware of the inclement weather. Contrary to the arguments of Northcutt this awareness by itself does not mandate summary judgment. Unlike the plaintiff in *Green,* it was not until *after* he fell that Barker could see that ice was present, that it had mounded[2] up and that it was plainly visible. We believe that under these facts summary judgment was premature because there is an issue regarding the obviousness of the hazard prior to Barker's falling. As such, we reverse and remand this matter for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEES:
Michael B. Fox Olive Hill, Kentucky	Bradley C. Hooks Lexington, Kentucky

[2] We are slightly perplexed at this description given by the parties and are unclear if Northcutt's actions to melt the ice resulted in this mounding up or if this was a naturally occurring event.