RENDERED: JANUARY 10, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001941-MR

LISA HELTON — APPELLANT

v.

APPEAL FROM MENIFEE CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 10-CI-90011

JERRY'S DISCOUNT, INC. — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, CLAYTON, AND JONES, JUDGES.

CAPERTON, JUDGE: The Appellant, Lisa Helton, brought a negligence action against the Appellee, Jerry's Discount, Inc., after she slipped and fell in its parking lot on an icy buildup caused by water flowing from what she asserts was a negligently placed drainpipe. The trial court granted summary judgment to Jerry's, based upon Kentucky's open and obvious doctrine. On appeal, Helton argues that

the court erred in granting the motion for summary judgment asserting that there were genuine issues of material fact for trial. Jerry's disagrees, and urges this Court to affirm. Upon review of the record, the arguments of the parties, and the applicable law, we vacate the court's order of summary judgment and remand this matter for further proceedings.

As noted, this case arises from a slip and fall on ice at Jerry's in Frenchburg, Kentucky, on or around January 19, 2009. Below, Helton testified that it had snowed the day before the fall, and that it had been particularly snowy that year, though there was no snow falling or accumulated on the parking lot at the time of her fall. Helton testified that she had not noticed any salt on the ground prior to her fall, and did not believe that Jerry's had salted that day.

Helton testified that she parked in the parking space nearest the front door of Jerry's, a store which she frequented at least every other day, exited from the driver's side of the vehicle, and took several steps toward the front door, when she allegedly slipped on ice and fell, crashing into a parking barrier and breaking her shoulder. No one observed Helton's fall.

Helton testified that after she fell, she noticed that the pavement was icy and wet. After the fall, the store manager came outside and noticed Helton struggling to get up off of the pavement, and began pouring salt around her to assist her. Rachel Johnson, a Jerry's employee, also exited the store to assist Helton. In her deposition, Johnson stated that on January 19, 2009, it was not

snowing and had not snowed for approximately two or three days. Johnson testified that she noticed ice in the area where Helton fell.

Directly across from the parking space where Helton fell was a drainpipe from the store's roof that directed water across the front of the store and into the parking lot. Johnson testified that when the drainpipe emptied into the parking lot there was often a good deal of ice. Following the fall, Helton was taken by ambulance to a hospital in Morehead, Kentucky, where she was diagnosed with a dislocated and broken right shoulder.

Discovery was conducted below, and on July 30, 2012, Jerry's filed a motion for summary judgment based upon the open and obvious doctrine asserting that there was no genuine issue of material fact, as well as a motion for protective order to prevent Helton from deposing its corporate representative. The court denied the motion for a protective order and allowed Helton to take the deposition of corporate representative Jodi Lawson. The court then allowed Jerry's fifteen days following the receipt of the deposition transcript to supplement its motion for summary judgment and gave Helton thirty days to file her brief in opposition to the motion. Jerry's acknowledged receipt of the deposition transcript on September 25, 2012, via a letter from counsel, but did not file a supplemental motion which it would have been able to do until October 10, 2012, per the court's order.

Helton asserts that though the order was silent as to when her brief in opposition would be due in the event that Jerry's chose not to supplement its motion for summary judgment, she presumed that she would not have been

expected to file a brief in opposition until she knew on or shortly after October 10, 2012, that Jerry's would not be supplementing its motion. Thus, Helton asserts that she would have had until October 25, 2012, to file her brief in opposition, or thirty days after receipt of the Lawson deposition transcript. However, Helton states that the court nevertheless prematurely granted Jerry's motion for summary judgment on October 4, 2012.[1]

After the motion was granted, Helton filed a motion to vacate the judgment on October 12, 2012, and filed her brief in opposition to Jerry's motion for summary judgment. Helton asserts that in order to preserve her appeal within 30 days of the court's order granting summary judgment on October 4, 2012, she filed her notice of appeal on November 1, 2012,[2] even though the circuit court would not hear her motion to vacate until November 8, 2012, four days after the notice of appeal was due. As noted, Helton's motion to vacate was denied and she now appeals to this Court.

As her first basis for appeal, Helton argues that summary judgment was granted prematurely, prior to the closing of a briefing schedule and prior to the filing of Helton's motion in response, thus denying her due process and an opportunity to be heard.

[1] Helton asserts that this case was previously heard on appeal, as case number 2010-CA-000658, in which this Court reversed and remanded the decision of the trial court granting Appellee's motion to dismiss. In the prior appeal, the trial court granted Jerry's motion to dismiss on March 29, 2010, following a motion filed on March 26, 2010, and in advance of Helton's response in opposition filed on March 30, 2010.

[2] Helton states that although she filed the appeal an November 1, 2012, the Menifee County Circuit Clerk mistakenly marked it as being filed on October 31, 2012.

In response, Jerry's argues that Helton was given adequate time to respond to the motion for summary judgment, and that the record before the court was fully developed and supportive of the court's order. Jerry's cites in support of its argument that on April 18, 2012, Helton took the deposition of Jerry's employee Rachel Johnson, who was present on the date of the accident and helped Helton afterwards. Jerry's further notes that Helton's extensive deposition was also taken on that date. Jerry's asserts that though Helton subsequently took Lawson's deposition approximately three months later, the testimony did nothing to impact the basis for Jerry's motion for summary judgment nor Helton's position.

In reviewing this issue, we note that:

> According to CR [Kentucky Rules of Civil Procedure] 56.02, a defendant "may, at any time, move with or without supporting affidavits for a summary judgment in his favor...." Although a defendant is permitted to move for a summary judgment at any time, this Court has cautioned trial courts not to take up these motions prematurely and to consider summary judgment motions "only after the opposing party has been given ample opportunity to complete discovery." *Pendleton Bros. Vending, Inc. v. Commonwealth Finance and Admin. Cabinet,* 758 S.W.2d 24, 29 (Ky.1988). Thus, even though an appellate court always reviews the substance of a trial court's summary judgment ruling *de novo, i.e.,* to determine whether the record reflects a genuine issue of material fact, a reviewing court must also consider whether the trial court gave the party opposing the motion an ample opportunity to respond and complete discovery before the court entered its ruling . . . . The trial court's determination that a sufficient amount of time has passed and that it can properly take up the summary judgment motion for a ruling is reviewed for an abuse of discretion.

Blankenship v. Collier, 302 S.W.3d 665, 668 (Ky. 2010).

Upon review of the record and applicable law, we are in agreement with Helton that the trial court prematurely granted Jerry's motion for summary judgment prior to receiving and taking into consideration Helton's brief in opposition. A review of the court's September 12, 2012, order indicates that it provided, in pertinent part, as follows:

> (2) The Plaintiff shall have up to and including September 13, 2012 within which to depose a corporate representative of the Defendant herein.
> (3) The Defendant is hereby granted fifteen (15) days from the date of receipt of the transcript of the corporate representative within which to supplement its Motion for Summary Judgment filed herein, and the Plaintiff shall have thirty (30) days thereafter to answer said supplemented Motion ….

Sub judice, Jerry's filed its motion for summary judgment on July 30, 2012, and its motion to prevent Helton from deposing Lawson shortly thereafter. Our review of the court's September 12, 2012, order indicates that the court allotted Helton 30 days to respond to any supplemental motion filed by Jerry's.

Though Jerry's ultimately chose not to file a supplemental motion, the earliest that Helton could have been aware that Jerry's did not plan to do so was 15 days from the date of Jerry's receipt of the transcript of Lawson's deposition on September 25, 2012. Accordingly, Helton could

certainly not have known that Jerry's did not intend to file a supplemental motion by October 4, 2012, the date that the court issued its order granting the motion for summary judgment. Accordingly, we are ultimately in agreement with Helton that she was not given an adequate time to respond to the motion for summary judgment before it was prematurely granted.

While Jerry's asserts that Lawson's deposition did not change its basis for summary judgment, Helton nevertheless should have been afforded the opportunity to rely on evidence adduced through the deposition if she chose, and to respond to the grounds asserted by Jerry's in its motion. The order of summary judgment was entered prior to the time that she had the chance to do so. Accordingly, we believe that it is necessary to vacate the court's order of summary judgment below.

In so finding, we make no commentary as to the merits of the motion for summary judgment, or concerning the evidence submitted below, and we decline to address the remaining issues raised by the parties in that regard. We believe that is a matter to be decided by the trial court following its consideration of the briefs of both parties, and the evidence of record.

Wherefore, for the foregoing reasons, we hereby vacate the court's October 4, 2012, order of summary judgment, and remand this matter for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Scott H, Kaminski
Charleston, West Virginia

BRIEF FOR APPELLEE:

John W. Walters
Langdon Stites Ryan
Lexington, Kentucky