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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000422-MR

TYLER CALHOUN APPELLANT

v. APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 12-CI-00102

FRUIT OF THE LOOM, INC. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND NICKELL, JUDGES.

NICKELL, JUDGE: Tyler Calhoun has appealed from the Russell Circuit Court's January 28, 2013, entry of summary judgment in favor of Fruit of the Loom, Inc., and the subsequent denial of his motion to alter, amend or vacate the judgment. We affirm.

Calhoun was employed by a company that provided janitorial services to Fruit of the Loom at its Jamestown, Kentucky, factory. He had been so

employed for five or six days before being terminated on January 16, 2011. After leaving the facility and reaching the guard stand where he had parked his motorized scooter, Calhoun remembered he had left his lunchbox inside. He requested and received permission from the guard to re-enter the factory to retrieve his property. Rather than walking the several hundred foot distance from the guard shack to the factory—as he had done on all but one prior occasion since he began working there—Calhoun decided to ride his scooter. According to his own testimony, Calhoun chose to ride across the parking lot instead of following the marked roadway in order to avoid a set of speed bumps.

The parking lot had different areas for passenger car parking and semi-truck parking demarcated by the use of bright yellow poles set in the ground with cables or ropes strung between them. As he was traveling across the lot, Calhoun encountered one of the barriers, apparently seeing it only when he was mere feet away. Upon realizing a collision was imminent, Calhoun braked hard, laying the scooter on its side and landing face-first on the ground. Calhoun sustained injuries and his scooter was damaged. He later stated the accident occurred at 8:00 a.m. on a clear, sunny day, the sun was not in his eyes, he was not distracted, and no snow or ice was on the ground. He also claimed that although he had walked through the area multiple times prior to his accident he had never before observed the poles and cables.

On January 4, 2012, Calhoun filed suit against Fruit of the Loom seeking damages for his personal injuries and property damage. In his complaint,

Calhoun averred he was an invitee on Fruit of the Loom's premises at the time "he struck a cable stretched through a portion of [the] parking lot by [Fruit of the Loom]." He contended Fruit of the Loom had negligently installed and maintained the cable and "knew or should have known of the imminent danger it posed to people passing through their parking lot."

Following a period of discovery, Fruit of the Loom moved the trial court for summary judgment pursuant to CR[1] 56. Therein, it claimed the pole and cable barrier was an open and obvious hazard and the harm suffered by Calhoun was not foreseeable. Thus, on the strength of *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010), Fruit of the Loom asserted it was relieved of any duty to warn Calhoun of the open and obvious danger or condition and any basis for liability was eliminated. It contended Calhoun was solely responsible for observing risks and any injuries he may have suffered were due to his own negligence or failure to maintain an appropriate lookout. Fruit of the Loom asserted no genuine issues of material fact existed and it was entitled to judgment as a matter of law.

In response, Calhoun contended the open and obvious doctrine was inapplicable to motor vehicle accidents such as the one at issue in the case at bar. He argued Fruit of the Loom misstated the holding in *McIntosh* and its reliance on this erroneous interpretation was misplaced. Calhoun alleged the question of whether Fruit of the Loom had negligently maintained and permitted the obstacle

[1] Kentucky Rules of Civil Procedure.

to remain on its parking lot constituted a genuine issue of material fact precluding entry of summary judgment.

On January 28, 2013, the trial court entered an order granting summary judgment to Fruit of the Loom. Calhoun subsequently moved to alter, amend or vacate the summary judgment, again alleging existence of material facts. The trial court denied Calhoun's motion by order entered on February 18, 2013. This appeal followed.

Before this Court, Calhoun contends the trial court erred in concluding no genuine issues of material fact existed and subsequently granting summary judgment in favor of Fruit of the Loom. He alleges the holding in *McIntosh* abolished the open and obvious doctrine, supplanting that theory of law with a new requirement to conduct an analysis regarding "the foreseeablity of the danger created by the Defendant, which remains as a (sic) issue for a jury to decide." Calhoun further argues the trial court abused its discretion in failing to set forth any findings of fact in its order. We disagree and affirm.

On appeal from the grant of summary judgment, our standard of review 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). Furthermore, because summary judgments do not involve fact-finding, our review is *de novo*. *Pinkston v. Audubon Area Community Services, Inc.,* 210 S.W.3d 188, 189 (Ky. App. 2006). We review a trial court's denial of a motion to alter, amend

or vacate for abuse of discretion. *See Batts v. Illinois Central Railroad Co.*, 217 S.W.3d 881, 883 (Ky. App. 2007). With these standards in mind, we turn to the allegations of error presented.

First, Calhoun contends genuine issues of material fact existed which rendered the trial court's grant of summary judgment infirm. Specifically, Calhoun argues the trial court's reliance on the open and obvious doctrine was in error because *McIntosh* now requires a jury to determine whether an injured party's damages were foreseeable and the mere fact that a danger is open and obvious no longer acts to absolve a landowner from liability to an injured party. We agree *McIntosh* represented a shift in Kentucky's jurisprudence in relation to the open and obvious doctrine such that forseeability is now central to the analysis, and that such determinations are properly left to a jury. *See Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 901, 914 (Ky. 2013) ("the foreseeability of the risk of harm should be a question normally left to the jury under the breach analysis"). However, under the facts presented, and in light of the guidance set forth by *Shelton*, we believe Fruit of the Loom satisfied the appropriate standard of care and did not breach any duty owed to Calhoun.

In *Shelton*, our Supreme Court undertook a thorough analysis and clarification of its earlier holding in *McIntosh*. Most pertinent to the case *sub judice*, the *Shelton* court stated:

> an open-and-obvious condition does not eliminate a landowner's duty. Rather, in the event that the defendant is shielded from liability, it is because the defendant

fulfilled its duty of care and nothing further is required. The obviousness of the condition is a "circumstance" to be factored under the standard of care. No liability is imposed when the defendant is deemed to have acted reasonably under the given circumstances. So a more precise statement of the law would be that a landowner's duty to exercise reasonable care or warn of or eliminate unreasonable dangers is not breached. "When courts say the defendant owed no duty, they usually mean only that the defendant owed no duty *that was breached* or that he owed no duty *that was relevant on the facts*." And without breach, there can be no negligence as a matter of law.

* * *

As discussed above, a landowner has a duty to an invitee to eliminate or warn of unreasonable risks of harm. In *McIntosh*, we adopted the factors listed in Section 343A of the Restatement (Second) where a defendant may be found liable despite the obviousness of the danger. To recap, those factors are: when a defendant has 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 against it; and when a defendant 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. These factors dovetail with what constitutes an unreasonable risk.

An unreasonable risk is one that is "recognized by a reasonable person in similar circumstances as a risk that should be avoided or minimized" or one that is "in fact recognized as such by the particular defendant." Put another way, "[a] risk is not unreasonable if a reasonable person in the defendant's shoes would not take action to minimize or avoid the risk." Normally, an open-and-obvious danger may not create an unreasonable risk. Examples of this may include a small pothole in the parking lot of a shopping mall; steep stairs leading to a place of business; or perhaps even a simple curb. But

> when a condition creates an unreasonable risk, that is when a defendant "should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger[,]" liability may be imposed on the defendant as a breach of the requisite duty to the invitee depending on the circumstances.
>
> A certain amount of residual risk that may require more than a simple warning is created when a risk is unreasonable. Remember, the open-and-obvious doctrine only eliminates a defendant's duty to *warn* because the condition is a warning in itself and places the plaintiff on the same level of knowledge about the premises as the land-possessor defendant. But if the circumstances are such that the risk remains despite the warning provided by the condition itself, *i.e.,* it is foreseeable that the invitee will forget about the danger, the situation is akin to a latent danger. And latent dangers, those that are unknown to the invitee, enable the landowner to be subjected to liability if reasonable care is not exercised. The doctrine does not completely negate a defendant's duty such that if a warning was inadequate because the risk is so great, breach could not be found.

Id. at 911-15 (emphasis in original; internal footnotes omitted).

Shelton went on to discuss the continued viability of summary judgments in premises liability actions, even under the newly-announced changes in the law. "If reasonable minds cannot differ or it would be unreasonable for a jury to find breach or causation, summary judgment is still available to a landowner. And when no questions of material fact exist or when only one reasonable conclusion can be reached, the litigation may still be terminated." *Id.* at 916.

Here, the record reveals the bright yellow poles and cables had been in place for more than fifteen years prior to January 16, 2011. No complaints had been registered concerning their presence, nor had any claims for injuries or damages been levied. Calhoun admitted he had intentionally left the marked roadway to avoid a set of speed bumps and failed to observe the rope or cable strung between the posts until he was very close to striking it. Nothing in the record indicates the barrier's location, construction or maintenance created an unreasonable risk of harm apart from Calhoun's unsupported and self-serving allegations in his complaint. We cannot say a reasonable mind could conclude Fruit of the Loom should have anticipated the brightly painted poles and cables would "cause physical harm to the invitee notwithstanding its known or obvious danger." Thus, it would be wholly unreasonable to conclude Fruit of the Loom breached any duty it owed Calhoun or that any such breach—if any were to somehow be inferred—caused Calhoun's damages. Under these circumstances, entry of summary judgment was appropriate as it would have been impossible for Calhoun to prevail at trial as he would be unable to prove the necessary elements of negligence.

Next, Calhoun contends the trial court abused its discretion in failing to include findings of fact in its order granting summary judgment. However, under the plain language of CR 52.01, it is clear that Calhoun's argument is not meritorious. Specifically, CR 52.01 plainly states "[f]indings of fact and conclusions of law are unnecessary on motions under Rules 12 or 56 or any other

motion except as provided in Rule 41.02." Thus, although we believe the better practice is to include factual findings to facilitate appellate review, the trial court was under no obligation to do so in this instance.

Finally, although Calhoun appealed from the trial court's denial of his motion to alter, amend or vacate the summary judgment, no argument on this matter has been advanced. Accordingly, we consider any potential issues waived and decline to address that denial further herein.

Therefore, for the foregoing reasons, the judgment of the Russell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Derrick G. Helm Jamestown, Kentucky	Michael S. Vitale Bowling Green, Kentucky