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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001921-MR

RALPH M. GOODWIN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 11-CI-004983

AL J. SCHNEIDER COMPANY,
D/B/A GALT HOUSE AND GALT HOUSE EAST

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, J. LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Ralph M. Goodwin appeals from a grant of summary judgment dismissing his negligence claim.

Goodwin was a guest at the Galt House hotel when he slipped in the bathtub/shower and was injured. The facts surrounding Goodwin's fall are not disputed.

Goodwin's deposition testimony was that he showered once previously during his stay. On the occasion when he fell, Goodwin turned on the water and entered from the back of the tub. The bathtub did not contain a bathmat. Goodwin was not distracted as he entered the tub and did not use the tub grab bar, which was mounted to the back wall. Goodwin stepped in with his left leg, slipped and fell. Goodwin testified the tub was slippery.

After he reported his fall the following day, hotel personnel brought Goodwin a bathmat. He later learned from other hotel guests that their rooms contained bathmats. As a result of the fall, Goodwin alleges he tore the meniscus to his knee, resulting in total knee replacement surgery.

Goodwin filed suit against Al J. Schneider Co., D/B/A Galt House and Galt House East (Galt House), alleging the bathtub was a dangerous condition and the Galt House failed to exercise reasonable care to remove the condition or warn patrons of its existence. The Galt House moved for summary judgment arguing the bathtub was not a dangerous condition, its condition was open and obvious, and it had no duty to equip the bathtub with a safety device such as a bathmat.

The circuit court granted summary judgment determining *Jones v. Abner*, 335 S.W.3d 471 (Ky.App. 2011), controlled and Goodwin failed to produce any evidence that the Galt House created an unreasonably dangerous condition. The circuit court determined that the Galt House providing bathmats to other rooms did not create a duty by the Galt House to provide bathmats to all rooms. Goodwin appealed.

Summary judgment should be granted “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 a judgment as a matter of law.” Kentucky Rules of Civil Procedure 56.03. “The movant bears the initial burden of convincing the court by evidence of record that no genuine issue of fact is in dispute, 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.’” *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 705 (Ky.App. 2004) (quoting *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991)).

“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). Summary judgment “should only be used ‘to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.’” *Steelvest*, 807 S.W.2d at 483 (quoting *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)).

Goodwin argues summary judgment was inappropriate under *Jones*, because it is no longer controlling following *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901 (Ky. 2013). Goodwin argues even though a bathtub

may be slippery and, therefore, open and obvious, this does not eliminate the Galt House's duty to exercise reasonable care and whether or not it acted reasonably in meeting this duty is a jury question. He argues the Galt House providing bathmats in other hotel rooms shows awareness of an unreasonable risk that guests could slip and fall in their tubs and was an attempt to reduce such a risk. He argues the Galt House assumed a duty to protect guests from this risk by providing bathmats and the failure to provide him with a bathmat was a substantial factor in his slip and fall.

In *Jones*, 335 S.W.3d at 476, our Court upheld the grant of summary judgment to a hotel after a guest slipped and fell in a bathtub, determining that if safety strips placed in the tub were worn and frayed, the guest used the bathtub previously without incident and must be assumed to have been fully aware of the condition of the tub. Additionally, our Court explained liability was not appropriate as follows:

[T]he risks inherent in bathing or showering are open, apparent and obvious to anyone who has ever taken a bath or shower. Because of this, we decline to assume, as a matter of law, that motels or hotels have an automatic duty to provide precautions against such conditions. Appellant seems to assume that a bathtub that is not equipped with safety strips or hand-holds is an inherently dangerous condition, but she failed to produce evidence of any type of industry standard, statutory law, or common-law rule that could arguably reflect a duty on the part of Appellee to equip motel bathtubs with safety devices. The owner of a motel or hotel has the duty to exercise that degree of care generally used by ordinary careful, prudent hotel operators in circumstances similar to those proven in the case, to provide reasonably safe

accommodations, but he is not an insurer of a guest's safety. . . .

We finally note that while an invitee has a right to assume that the premises he has been invited to use are reasonably safe 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.

Id. at 476-77 (internal citations, parenthetical and quotations omitted). *Jones* was decided after our Supreme Court adopted section 343A of the Restatement (Second) of Torts in *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010), but before *Shelton*, 413 S.W.3d at 910-11, clarified that the open-and-obvious doctrine only relieves a defendant from liability when it has satisfied the requisite standard of care.

We disagree that *Shelton* precludes granting summary judgment to the Galt House under these circumstances. The Galt House owed a duty to Goodwin, as an invitee, “to discover unreasonably dangerous conditions in the hotel and either eliminate or warn of them.” *Id.* at 909. However, there was no breach of this duty, as a matter of law, because while a bathtub can present a danger of falling when being used for showering, it is not unreasonably dangerous and its potential hazard is obvious.

Goodwin had previously used the shower and was aware of its condition. A grab bar was available to assist his entrance into the tub, but he did not use it. While Goodwin claimed the tub was slippery, there was no evidence

that it was more slippery than a typical wet tub or its slickness was the result of any foreign substance. Under these circumstances, a wet tub is akin to other open-and-obvious dangers that do not create an unreasonable risk such as a small pothole, steep stairs or a simple curb. *Id.* at 914.

We reject Goodwin's argument that the Galt House had a specific duty to provide bathmats to guests. There is no requirement, either through industry standards, statutory law or common law, for innkeepers to provide bathmats to their guests. We also disagree that the Galt House's voluntary provision of bathmats to some guests could create such a duty. Therefore, summary judgment was properly granted because it would be unreasonable for a jury to find a breach of the Galt House's duty of reasonable care under the circumstances. *Id.* at 916.

Accordingly, we affirm the Jefferson Circuit Court's grant of summary judgment to the Galt House and dismissal of Goodwin's negligence claim.

LAMBERT, J., JUDGE, CONCURS.

CLAYTON, JUDGE, DISSENTS.

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