RENDERED: JULY 1, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001851-MR

MADISON I. PHILLIPS — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 12-CI-05572

TOUCHSTONE PROPERTIES, LLC;
JASON ORR; AND GABRIEL DENT — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; JONES AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Madison I. Phillips brings this appeal from an October 29, 2014, Order of the Fayette Circuit Court granting summary judgment and dismissing her premises liability action against Touchstone Properties, LLC, Jason Orr, and Gabriel Dent. We affirm.

Orr and Dant leased an apartment in an older house owned by Touchstone. The home was comprised of three stories with a basement, and Orr and Dant rented the apartment on the second and third floors of the home. A fire escape was built onto the home and was only accessible through a window on the third floor. The kitchen and living room were located on the third floor of the apartment.

On the evening of December 28, 2011, Orr hosted a party to celebrate his birthday. Dent was present at the party and previously knew that Orr was hosting it. Although neither Orr nor Dent directly invited Phillips to the party, she received an invitation from a friend who knew Orr and Dent. Phillips attended the party on the third floor of the apartment.

Sometime during the evening of December 28, and unknown to either Orr or Dent, the window accessing the fire escape had been broken. Shortly after arriving at the party, Phillips accompanied a friend, Sara Prader, through the broken window and out onto a fire escape so Prader could smoke a cigarette. Once upon the fire escape, Phillips was holding her cell phone and a can of beer when she stepped backward and fell through the ladder opening of the fire escape. Phillips fell and landed on her back on a porch roof, suffering significant injuries.

On December 21, 2012, Phillips, and her parents David Phillips, and Maria Quisenberry Phillips, filed a complaint in the Fayette Circuit Court against, *inter alios*, Touchstone, Orr, and Dent.[1] Therein, it was alleged that Touchstone,

[1] David Phillips and Maria Quisenberry Phillips are Madison I. Phillips' parents. Neither David nor Maria filed a notice of appeal and are not parties in this appeal.

Orr and Dent negligently failed to keep the premises in a reasonably safe condition. In particular, Phillips claimed:

> 15. There were no warnings posted by Defendants in the premises as to the safety of the fire escape and its permitted uses, and Defendants otherwise took no steps to preclude or stop Phillips or others from accessing and using the fire escape.
>
> 16. The inadequate lighting prevented Ms. Phillips from perceiving any dangers the fire escape might present.
>
> 17. Due to the dangerous condition of the fire escape, including without limitation the lack of lighting, inadequate warning, and otherwise unsafe conditions, Ms. Phillips fell from the fire escape and landed on her back on a porch roof several floors below.

Touchstone, Orr and Dent answered, and eventually filed motions for summary judgment. They argued that Phillips was not an invitee at the party, but rather her status was either a licensee or trespasser. As a licensee or trespasser, Touchstone, Orr, and Dent maintained that they breached no duty to Phillips. Conversely, Phillips maintained that she was an invitee; however, if she were classified as a licensee, she still maintained that Touchstone, Orr, and Dent breached their respective duties of care to her.

By Order entered October 29, 2014, the circuit court granted Touchstone, Orr, and Dent's motions for summary judgment and dismissed Phillips' action in its entirety. This appeal follows.

To begin, summary judgment is proper where there exist no material issues of fact and movant is entitled to judgment as a matter of law. *Steelvest, Inc.*

v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991). All facts and inferences therefrom are to be viewed in a light most favorable to the nonmoving party. *Id.* Our review proceeds accordingly.

Phillips contends that the circuit court committed error by rendering summary judgment dismissing her premises liability action against Touchstone, Orr, and Dent. Phillips maintains that she was an invitee and that under *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901 (Ky. 2013), granting defendant's summary judgment was improper. Alternatively, Phillips argues that even if she were classified as a licensee, the precepts of *Shelton*, 413 S.W.3d 901, nonetheless are still applicable and preclude the granting of a summary judgment. Accordingly, whether being an invitee or as a licensee, Phillips argues that Touchstone, Orr, and Dent owed Phillips a duty of reasonable care to prevent foreseeable harm in this premises liability action based upon *Shelton*, 413 S.W.3d 901. Under *Shelton*, Phillips maintains that any issues of foreseeability are to be left to fact-finder for resolution and that summary judgment was thus improper.

Based upon our review of applicable Kentucky law, we disagree with Phillips' interpretation of *Shelton*, 413 S.W.3d 901, and its application to this case. Contrary to Phillips' argument, *Shelton* did not eliminate the distinctions between an invitee and licensee as concerns their respective duty owed in a premises liability action. Another panel of this Court recently observed that *Shelton* only "address[es] the somewhat evolving duty owed by possessors of land to invitees rather than licensees." *Klinglesmith v. Pottinger*, 445 S.W.3d 565, 567 (Ky. App.

2014). And, a Kentucky treatise has recently noted that "the analysis in . . . *Shelton* has not been extended to licensees." David J. Leibson, 13 *Kentucky Practice - Tort Law* § 10:75 (2015). Therefore, we must determine whether Phillips was an invitee, licensee, or trespasser on the evening of December 28, 2011, to determine what duty, if any, was owed to her by appellees in this case.

In Kentucky, it is well-settled that a social guest is not an invitee but rather is considered a licensee. *Shipp v. Johnson*, 452 S.W.2d 828 (Ky. 1969); Restatement (Second) of Torts, § 330 cmt. h.3 (1965) (recognizing that "decisions thus far have been all but unanimous to the effect that the social guest is no more than a licensee"). Viewing the facts most favorable to Phillips, she was invited as a social guest to the party on the evening of December 28, 2011, and thus, qualifies as a licensee.

Our Courts have held that "a premises owner or occupant owes a duty to a licensee not to willfully or wantonly injure the licensee and to warn of dangerous conditions known by the owner/occupant." *Klinglesmith*, 445 S.W.3d at 568. Generally, a premises owner or occupant possesses "a duty to warn a licensee of hidden dangers which she knows, or should know of, and which she reasonably believes the licensee will not discover." David J. Leibson, 13 *Kentucky Practice – Tort Law* § 10:74 (2015); *see Terry v. Timberlake*, 348 S.W.2d 919 (Ky. 1961).

In this case, we view the facts and inferences in a light most favorable to Phillips. The uncontroverted facts were that neither Orr nor Dent saw any guest on the fire escape or knew prior to the accident that guests were using the fire

escape on the night of the party. Additionally, the window leading to the fire escape had been painted shut and was only accessible after a guest had broken it. Neither Orr nor Dant had ever used the fire escape or knew of anyone previously using the fire escape. Phillips admitted that she had to transverse the broken glass of the window to access the fire escape. Once out on the fire escape, Phillips testified that she simply stepped backward and fell through the ladder opening. From these facts, it is clear that neither Touchstone, Orr, nor Dent failed to warn Phillips of an unreasonably dangerous condition known to them. The fire escape was not an unreasonably dangerous artificial condition, the hazards of which were unknown to the general public or to Phillips. *See Grimes v. Hettinger*, 566 S.W.2d 769 (Ky. App. 1978). Simply stated, Phillips' fall was not caused by an unreasonably dangerous "hidden peril" known to Touchstone, Orr, or Dent and not to Phillips. *See Terry v. Timberlake*, 348 S.W.2d 919 (Ky. 1961).

In viewing the facts most favorable to Phillips, we hold that she was a social guest and legally can only be classified as a licensee at the time of her injury. We additionally conclude that neither Touchstone, Orr, nor Dent breached any duty to Phillips on the night of her fall from the fire escape. Consequently, we agree with the circuit court that no material issues of fact exist and that summary judgment was properly rendered dismissing Phillips' complaint.

We view any remaining contentions of error as moot or without merit.

For the foregoing reasons, the Order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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