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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000207-MR

GEORGE VELOUDIS — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 14-CI-03316

WAL-MART STORES EAST, LIMITED PARTNERSHIP — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON, J. LAMBERT, AND STUMBO, JUDGES.

DIXON, JUDGE: Appellant, George Veloudis, appeals from an order of the Fayette Circuit Court granting summary judgment in favor of Appellee, Wal-Mart Stores East, and dismissing his personal injury action. For the reasons set forth herein, we reverse and remand to the trial court for further proceedings.

On the morning of September 26, 2013, Veloudis was grocery shopping at the Wal-Mart store on Nicholasville Road in Lexington, Kentucky. He

was carrying a handheld basket in which he had just placed a bunch of bananas when he attempted to walk past a large octagonal display of pumpkins located in the middle of the produce area. Although Veloudis clearly observed the display, he was unaware that the octagonal container was sitting on a square pallet, resulting in the four exposed corners of the pallet protruding from the display. As Veloudis attempted to pass by the display, his foot caught on one of the corners causing him to trip and fall. As a result, he suffered extensive injuries to his shoulder and knee that required multiple surgeries.

On August 29, 2014, Veloudis filed an action in the Fayette Circuit Court against Wal-Mart alleging that his injuries were the direct and proximate result of Wal-Mart's negligence and failure to keep the store premises safe for business invitees. Veloudis sought damages for medical expenses, lost wages, pain and suffering and impaired earning capacity.

Following discovery, Wal-Mart filed a motion for summary judgment on November 4, 2015. Therein, Wal-Mart argued that the pumpkin display was not an unreasonably dangerous condition and did not present an unreasonable risk of harm because any danger inherent in the display was open and obvious as a matter of law. Wal-Mart contended that even if the display and pallet were found to be an unreasonable risk, Wal-Mart satisfied any duty that it had by placing arrows on the sides of the display with the words "watch step." Wal-Mart further argued that it was Veloudis's own negligence that caused the accident because the store video showed that he did not make contact with the pallet but rather tripped

over his own feet. Veloudis responded that the decision in *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288 (Ky. 2015) modified the law concerning open and obvious hazards, and that such cases are now subject to the comparative fault doctrine.

A hearing on Wal-Mart's summary judgment motion was held on December 4, 2015, after which the trial court entered an order granting Wal-Mart's motion. Therein, the trial court stated, "[t]o the extent that a hazard was presented by the display of the pumpkins, Wal-Mart sufficiently warned of its presence. Wal-Mart complied with all duties under the law and, therefore, breached no duty owed to Plaintiff."

Veloudis thereafter filed a motion to vacate the summary judgment. Therein, Veloudis argued:

> [T]he Court's judgment made factual findings on an issue that was not originally raised as a basis for judgment and therefore was not fully developed at the time of the hearing. Specifically, this Court found that Wal-Mart did not breach its duty to the Plaintiff because writing on the side of the display bin sufficiently warned the Plaintiff about the hazard created by the pallet extruding from beneath the bin. While this warning was referenced in the Defendant's original motion, it was raised only to substantiate the Defendant's claim that the hazard was obvious and therefore Defendant had no duty to the Plaintiff. Because the motion only raised the writing on the bin in the context of duty, the Plaintiff's response on the matter was similarly limited to duty, which is legal issue. It was only in the Reply filed just before the hearing and at the hearing itself that Defendant first asserted that the writing constituted a warning sufficient to discharge the duty such that there was no breach. This altered the argument from a legal duty to a factual issue of breach, but deprived the Plaintiff of a complete opportunity to set forth the full factual record as to the

> issue of breach and ultimately resulted in an erroneous summary judgment on this factual issue.

Veloudis further pointed out in his motion that the trial court could not have properly ruled on the sufficiency of the warning because the record was devoid of any evidence regarding the size, color, or visibility of the alleged warning, and Veloudis himself testified in his deposition that he never saw any type of warning on the display.

Interestingly, during the hearing on Veloudis's motion to vacate, the trial court acknowledged that during the summary judgment hearing it was focused on the open and obvious nature of the display, failing to recognize that the issue was whether what was tripped over, namely the pallet underneath the octagonal container, was open and obvious. The trial court also questioned if the pallet was not a hazard then why did Wal-Mart have a written policy specifically warning employees about the hazards of exposed corners of pallets in store displays. Finally, the trial court noted that there had been no discussion in the original summary judgment hearing as to the adequacy of the warning, and questioned whether such was a factual issue. Nevertheless, at the conclusion of the hearing, the trial court ruled that Veloudis had not met the requirements under CR 59.05 to warrant vacating the summary judgment. This appeal ensued. Additional facts are set forth as necessary.

"The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact

and that the moving party was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). Summary judgment is only proper when "it would be impossible for the respondent to produce any evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In ruling on a motion for summary judgment, the Court is required to construe the record "in a light most favorable to the party opposing the motion ... and all doubts are to be resolved in his favor." *Id.* at 480. However, courts must be mindful that "summary judgment is not to be used as a defense mechanism. Instead, summary judgment is to be cautiously employed for cases where there is no legitimate claim under the law and it would be impossible to assert one given the facts." *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901, 916 (Ky. 2013). *See also Goodwin v. A.J. Schneider Company*, 501 S.W.3d 894 (Ky. 2016).

On appeal, Veloudis argues that Wal-Mart owed him a duty to discover the hazard created by the exposed corners of the pallet and to either eliminate the hazard or adequately warn of such. Veloudis contends that, contrary to the trial court's ruling, there exists a substantial and material dispute regarding whether Wal-Mart breached its duty because there was either no warning at all, or any attempted warning was insufficient.

In premises liability cases, land possessors generally owe invitees a duty to "discover unreasonably dangerous conditions on the land and to either

correct them or warn of them." *Ky. River Medical Center v. McIntosh*, 319 S.W.3d 385, 388 (Ky. 2010). Traditionally, if the unreasonably dangerous condition was open and obvious, the landowner's duty of care owed to invitees was eliminated, and the landowner could not be held liable in negligence. *Shelton,* 413 S.W.3d at 910; *see also Standard Oil v. Manis*, 433 S.W.2d 856, 858 (Ky. 1968).

In 2010, however, the Kentucky Supreme Court explained in *Kentucky River Medical Center v. McIntosh,* 319 S.W.3d 385 (Ky. 2010), that the state's adoption of a comparative fault tort scheme in *Hilen v. Hays*, 673 S.W.2d 713, 720 (Ky. 1984), compelled modification of the open and obvious doctrine of premises liability. In *McIntosh*, an EMT who tripped over a curb while transporting a patient into a hospital's emergency room brought suit against the hospital seeking damages for her injuries. The hospital moved for summary judgment, arguing that it had no liability because the curb was an open and obvious condition. The *McIntosh* Court, in affirming the trial court's denial of summary judgment, adopted Restatement (Second) of Torts § 343A, holding a defendant liable for harm resulting from an open-and-obvious condition if the harm could be anticipated, the plaintiff's knowledge of the condition or the obviousness of the condition notwithstanding. *Id.* at 389. The Court noted,

> [L]ower courts should not merely label a danger as 'obvious' and then deny recovery. Rather, they must ask whether the land possessor could reasonably foresee that an invitee would be injured by the danger. If the land possessor can foresee the injury, but nevertheless fails to take reasonable precautions to prevent the injury, he can be held liable.

Id. at 392. The *McIntosh* Court then concluded that the defendant hospital could have reasonably foreseen that an EMT, focused on saving a patient's life, would proceed in the face of a known risk and, thus, the EMT's knowledge of the risk did not negate the hospital's duty of care. *Id.* at 394.

Subsequently, in *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901, 916 (Ky. 2013), the plaintiff tripped and fell when her feet became entangled in wires that ran along the floor from her husband's hospital bed to the wall. The trial court granted the hospital's motion for summary judgment, finding that the hospital owed no duty of care to the plaintiff because the wires were an open and obvious condition. On discretionary review, our Supreme Court acknowledged that the *McIntosh* decision had created some confusion, observing that "[t]oday's case presents us with an opportunity to clarify *McIntosh* and emphasize that the existence of an open and obvious danger does not pertain to the existence of duty. Instead, Section 343A involves a factual determination relating to causation, fault, or breach but simply does not relate to duty. Certainly, at the very least, a land possessor's general duty of care is not eliminated because of the obviousness of the danger."

The *Shelton* Court concluded that a landowner "owes a duty to an invitee to discover unreasonably dangerous conditions on the land and either eliminate or warn of them[,]" and that such duty exists regardless of the

obviousness of the dangerous condition or "the invitee's knowledge of the condition." *Shelton*, 413 S.W.3d at 909-11. The Court explained,

> [A]n 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. (Footnotes omitted).

Id. at 911-12.

The *Shelton* Court further discussed "the extent of foreseeable risk" question, labeling this as a question of fact:

> 'The extent of foreseeable risk' at the time of the defendant's alleged negligence 'depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small changes in the facts may make a dramatic change in how much risk is foreseeable. Thus, courts should leave such determinations to the trier of fact unless no reasonable person could differ on the matter.' . . . Accordingly, the foreseeability of the risk of harm should be a question normally left to the jury under the breach analysis. In doing so, the foreseeability of harm becomes a factor for the jury to determine what was required by the defendant in fulfilling the applicable standard of care. (Citations omitted).

Id. at 913-14. Finally, the *Shelton* Court addressed the effect of its holding on the summary judgment process:

> It is important to emphasize that summary judgment remains a viable concept under this approach. The court's basic analysis remains the same because, on a motion for summary judgment, a court must still examine each element of negligence in order to determine the legitimacy of the claim. But the question of foreseeability and its relation to the unreasonableness of the risk of harm is properly categorized as a factual one, rather than a legal one. This correctly "examines the defendant's conduct, not in terms of whether it had a 'duty' to take particular actions, but instead in terms of whether its conduct breached its duty to exercise the care" required as a possessor of land. 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 (footnotes omitted). The *Shelton* Court determined that a reasonable juror could have determined that the hospital should have foreseen "that Shelton would proceed to encounter the wires because the advantage of doing so outweighed the risk." *Id.* at 917. The Court concluded that because the record had not been adequately developed regarding whether the hospital had taken reasonable steps to eliminate the risk or if elimination of the risk would have been overly burdensome on the hospital, there remained a question of material fact regarding whether it properly fulfilled its duty of reasonable care. *Id.* The Court remanded the case for a factual determination of whether the property owner breached its duty to Shelton.

In *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288 (Ky. 2015), our Supreme Court again tweaked the concept of premises liability. The plaintiff

therein filed suit against a hotel after slipping and falling on ice in the parking lot. The trial court granted summary judgment in favor of the hotel, finding that the ice was an open and obvious hazard and that the plaintiff's injury was not foreseeable because he had safely walked through the parking lot the evening before his fall. *Id.* at 291.

On discretionary review, the Kentucky Supreme Court reversed. Citing to its decision in *Shelton*, the Court noted:

> [A] land possessor's general duty of ordinary care is not eliminated simply because a hazard is obvious. The question is rather whether the landowner could reasonably foresee a land entrant proceeding in the face of the danger, which goes to the question whether the universal duty of reasonable care was breached. . . . After *Shelton*, if such events are foreseeable and the landowner has not made reasonable efforts to correct the problem which causes harm to a plaintiff, then the landowner has breached his general duty of reasonable care.

Id. at 297. The *Bullitt Host* Court also firmly established that liability—responsibility—under Kentucky law must be determined based on the principles of comparative fault:

> The open-and-obvious nature of a hazard is, under comparative fault, no more than a circumstance that the trier of fact can consider in assessing the fault of any party, plaintiff or defendant. Under the right circumstances, the plaintiffs conduct in the face of an open-and-obvious hazard may be so clearly the only fault of his injury that summary judgment could be warranted against him, for example when a situation cannot be corrected by any means or when it is beyond dispute that the landowner had done all that was reasonable. Applying comparative fault to open-and-obvious cases does not restrict the ability of the court to exercise sound

> judgment in these cases any more than in any other kind of tort case.

Id.

As it did in *Shelton*, the *Bullitt Host* Court further observed that although summary judgment might be warranted when it is beyond dispute that the landowner had done all that was reasonable, "a landowner is not excused from his own reasonable obligations just because a plaintiff has failed to a degree, however slight, in looking out for his own safety." *Id.* at 298.

Most recently, in *Goodwin v. Al J. Schneider Company*, 501 S.W.3d 894 (Ky. 2016), our Supreme Court again reviewed the evolution of the law since *McIntosh*, and thereafter stated,

> In summary, a landowner has a duty to take reasonable steps to eliminate unreasonably dangerous conditions on its land. *Shelton*, 413 S.W.3d at 909. The question for the court on summary judgment is whether the landowner breached that duty, a duty that exists whether the conditions are open and obvious or hidden. Thus, in determining whether the landowner has breached that duty, the court does not look to whether the conditions were open and obvious but to whether the landowner took reasonable steps to eliminate the risks created by the conditions. If there is a genuine issue of material fact regarding the reasonableness of the steps the landlord took, then summary judgment is not appropriate.
> . . .
>
> However, as we noted in *McIntosh, Shelton,* and *Bullitt Host*, under comparative negligence an invitee's negligence does not foreclose recovery, it merely reduces it.
> . . .

> On remand the court may again consider summary judgment. However, if it does so, the court must keep in mind our caveat from *Bullitt Host* that summary judgment may only be warranted "when a situation cannot be corrected by any means or when it is beyond dispute that the landowner had done all that was reasonable." 471 S.W.3d at 297.

Goodwin, 501 S.W.3d at 898-900.

Turning to the matter herein, there can be no dispute that Wal-Mart owed Veloudis, a business invitee, a duty of care to maintain its premises in a safe condition. *Shelton*, 413 S.W.3d at 909; *see also Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364, 367 (Ky. 2005). As such, the next question becomes whether reasonable minds could differ as to whether Wal-Mart breached its duty of care. Whether a standard of care is met, generally, is a fact-intensive inquiry and is "grounded in common sense and conduct acceptable to the particular community." *Shelton,* at 913–14. As such, a jury should typically decide the question. However, as we previously noted, "[i]f reasonable minds cannot differ or it would be unreasonable for a jury to find breach or causation, summary judgment is still available to the landowner." *Id.* at 916 (footnote omitted).

Contrary to how this case has been practiced and analyzed in the trial court, we do not believe that this matter concerns an open and obvious hazard. On the same day the *Shelton* decision was rendered, the Kentucky Supreme Court also rendered its decision in *Dick's Sporting Goods, Inc. v. Webb*, 413 S.W.3d 891 (Ky. 2013), wherein the Court observed,

> Despite the groundbreaking nature of our decision in *McIntosh*, we did not alter what is actually required to find an open-and-obvious condition. That is to say, *McIntosh* altered the treatment of plaintiffs bringing claims involving open-and-obvious dangers; but it did not alter what actually constitutes an open-and-obvious hazard. Post-*McIntosh*, an open-and-obvious danger is what it was pre-*McIntosh*.
>
> An open-and-obvious condition is found when the danger is known or obvious. The condition is known to a plaintiff when, subjectively, she is aware "not only ... of the existence of the condition or activity itself, but also appreciate[s] ... the danger it involves." And the condition is obvious when, objectively, "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." It is important to note that Restatement (Second) § 343A does not require both elements to be found. (Footnotes and citations omitted).

Id. at 895-96.

Wal-Mart argues, and the trial court so found, that the pumpkin display was an open and obvious condition, with the trial court even commenting during the summary judgment hearing that it "was a huge thing sitting out on the floor." We believe that finding misses the mark and, as the trial court even later acknowledged, fails to take into consideration what the actual hazard was that caused Veloudis to trip. Indeed, no one could reasonably contend that the large octagonal container was not an open and obvious condition. But the pallet upon which it was sitting was certainly not.

We find the scenario herein similar to that presented in *Webb*, wherein the Court found that the water that had pooled on the store floor between the floor

mats was an open and obvious hazard, but that the nearby wet tile upon which the plaintiff stepped and fell was not because it did not appear wet. "[B]ecause of the appearance of the tile and the water, the condition was not easily perceptible without closer inspection beyond the exercise of reasonable care. Webb testified that she looked at the tile and in the instant before taking action was unable accurately to perceive the condition of the tile. Reasonable care does not require more of an invitee. As a result, the wet tile was not *known* or *obvious*." *Id.* at 896 (emphasis in original). Herein, we believe that the pallet corners beneath the large display were not known or obvious "without closer inspection beyond the exercise of reasonable care."

Wal-Mart further points out that *Shelton* only requires the landowner to eliminate or warn only of "unreasonable risks."

> 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.

Shelton, 413 S.W.3d at 914. Wal-Mart repeatedly asserts that the pallet was not an unreasonable risk and that Veloudis observed it underneath the pumpkin display and simply tripped as he tried to walk around it. Quoting the unpublished decision of this Court in *Spears v. Schneider,* 2012-CA-000065 (May 8, 2015),[1] Wal-Mart posits that "had Appellant been 'minimally attentive' while using his 'practical faculties of observation' and 'simple powers of ambulation' when walking around the display, the accident would not have happened. We must disagree.

A review of the record establishes that Wal-Mart has grossly mischaracterized Veloudis's deposition testimony. Although Veloudis acknowledged that he observed the pumpkin display and attempted to walk around it in an effort to get to another area of the produce section, he never admitted that he was aware that the pumpkin container was sitting on the pallet or that he saw the exposed pallet corners. Similar to the scenario in *Webb*, Veloudis did not have "knowledge of the existence of the condition" or "appreciation of the danger" associated with it. *Webb*, 413 S.W.3d at 896. Furthermore, we find Wal-Mart's statement that Veloudis would have and should have observed the pallet had he been paying more attention to where he was walking is disingenuous at best. It is absurd to expect a grocery patron to focus his or her attention on the floor while shopping for groceries. We do not believe that any reasonable person in Veloudis's position, exercising ordinary care, would have noticed the pallet corners protruding from the pumpkin display. If anything, the open and obvious

[1] 2015 WL 2153310.

nature of the large octagonal container made the existence of the small corners of the pallet less perceptible.

Having concluded that the pallet was an unreasonable risk that Veloudis could not have been expected to recognize, the question becomes whether Wal-Mart breached its duty to either correct the unreasonably dangerous condition or to warn store patrons of the risk.

> [W]hen the condition is neither known nor obvious to the invitee, as previously determined, the full weight of the duty to maintain reasonably safe premises remains. Accordingly, with no known or obvious danger present, a landowner owes a duty of reasonable care to those individuals invited onto the landowner's property, and the landowner must inform invitees of or eliminate any unreasonable dangers that would otherwise be undetected.

Webb, 413 S.W.3d at 898.

Wal-Mart maintains that it placed warning arrows and "watch step" signs on the corners of the display pointing downward to the exposed pallet corners. Perhaps if the available evidence had indeed shown that the warnings were of sufficient size and placement such that there was no genuine dispute of fact that they were a reasonable precaution to prevent injury, summary judgment may have been appropriate. But other than Wal-Mart's response to interrogatories stating that the warnings were located on the display, the record is completely devoid of any evidence depicting said warnings. The arrows and "watch step" language are not visible in the video or still photos taken of Veloudis's fall, and Wal-Mart has provided no evidence establishing the size or placement of such. If

the warnings were present on the display, which is disputed in that Veloudis testified he never saw them, their mere placement on the display might not necessarily make them a reasonable precaution. As in *Shelton,* we are of the opinion that there remains a question of material fact regarding whether Wal-Mart properly fulfilled its duty of reasonable care.

We would finally note that Wal-Mart alleges, as it did in the trial court, that even if the display presented an unreasonable risk, summary judgment was still proper because Veloudis's accident was caused by his own negligence. As previously noted, Wal-Mart asserts that the store video and still photos clearly show that Veloudis simply tripped over his own feet, making no contact with the pallet corner. The trial court found that neither the video nor the photos were conclusive of whether Veloudis's foot made contact with the pallet. We have reviewed both and, while it appears to us that he tripped over the pallet corner, we agree with the trial court that such cannot conclusively be established one way or the other.

In order for summary judgment to be granted on the breach-of-duty question, we must view all of the evidence in a light most favorable to Veloudis and determine whether reasonable minds could not differ or whether it would be unreasonable for a jury to find a breach of duty. Under the facts presented herein, we conclude that there clearly remains questions of fact about whether Wal-Mart breached its duty of care. Furthermore, even if Veloudis was negligent in some respect, under comparative fault he has the right to determine if there was any

negligence on the part of Wal-Mart that contributed to his injuries, and then to have a jury apportion that fault. Accordingly, summary judgment was improper.

For the reasons set forth herein, the order of the Fayette Circuit Court is reversed and this matter is remanded for further proceedings in accordance with this opinion.

ALL CONCUR.

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