RENDERED: JANUARY 23, 2015; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001706-MR

JANICE WARD — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 12-CI-004617

JKP INVESTMENTS, LLC;
AND JAMES KEVIN PORTER — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, MAZE, AND VANMETER, JUDGES.

VANMETER, JUDGE: Janice Ward appeals from the Jefferson Circuit Court's order dismissing via summary judgment her personal injury action against JKP Investments, LLC. Upon review of the record and applicable law, we affirm.

This premises liability case concerns a property owner's maintenance of outdoor steps on certain rental property where a tenant's guest fell and injured herself. On May 5, 2012, while attending the tenant's Derby party at the location in question, Janice fell on the steps leading up from the sidewalk to the front lawn and injured her wrist. Thereafter, Janice filed suit against the tenant's landlord and the owner of the property, JKP Investments, LLC, and James Kevin Porter, sole owner of the company (hereinafter collectively referred to as "JKP"). Janice alleged the step was defective and the negligent maintenance/repair of the property on the part of JKP caused her to fall. She sought to recover for medical expenses and for pain and suffering incurred as a result of her injury. After conducting some discovery, JKP moved for summary judgment, arguing the condition of the steps was open and obvious, for which it had no duty to guard against. The trial court agreed and entered summary judgment in JKP's favor. Janice now appeals.

Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is therefore entitled to judgment as a matter of law. CR[1] 56.03. In other words, summary judgment may be granted 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, Inc. v. Scansteel Serv. Ctr., Inc.,* 807 S.W.2d 476, 483 (Ky. 1991) (internal quotations omitted). Whether summary judgment is appropriate is a legal question involving no factual findings, so the trial court's grant of summary

[1] Kentucky Rules of Civil Procedure.

judgment is reviewed *de novo*. *Coomer v. CSX Transp., Inc.*, 319 S.W.3d 366, 370-71 (Ky. 2010).

After entry of the trial court's order granting summary judgment to JKP, the Kentucky Supreme Court issued two opinions that substantially alter the approach to premises liability law in the Commonwealth. *See Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901 (Ky. 2013), and *Dick's Sporting Goods, Inc. v. Webb*, 413 S.W.3d 891 (Ky. 2013). In these cases, the Supreme Court modified the application of the "open and obvious" defense in the context of a summary judgment motion. These cases were rendered before the parties filed their appellate briefs in this case, and thus both parties have addressed the propriety of summary judgment in light of the redefined approach.

Prior to *Shelton*, under previous open-and-obvious cases, "a defendant's liability would be excused because the court would determine the defendant did not owe a duty to the plaintiff because of the obviousness condition." *Shelton*, 413 S.W.3d at 910. In other words, a defendant would be absolved from liability due to a plaintiff's failure to take notice of and avoid an open and obvious danger. *Id.* However, the Court in *Shelton* found this duty analysis to be flawed since it overlooks the applicable standard of care, and decided to "shift the focus away from duty to the question of whether the defendant has fulfilled the relevant standard of care." *Id.*

Under *Shelton*, the duty analysis is simply to determine the specific duty owed by the land possessor, besides the general duty of reasonable care. *Id.* at 908.

A land possessor has a duty to an invitee (in this case, Janice) to discover and eliminate or warn of obvious unreasonable risks of harm. *Id.* at 909.

> 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. The defendant will not be subject to liability if the condition is either known *or* obvious.

Webb, 413 S.W.3d at 895-96 (footnotes omitted).

The next question is whether the land possessor fulfilled the relevant standard of care owed to its invitee, which the *Shelton* court found to be a question of breach, not duty. *Shelton*, 413 S.W.3d at 910. "A possessor of land is subject to liability when he fails to protect his invitees from harm, despite the condition's open and obvious nature, because he should have anticipated that harm would result." Restatement (Second) of Torts, §343 (1965).

> Accordingly, 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.

Shelton, 413 S.W.3d at 911.

In determining what constitutes an unreasonable risk, which the land possessor is charged with anticipating despite the obviousness of the condition, the *Shelton* court set forth the following factors to consider:

> [W]hen 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.

Id. at 914 (internal citations omitted). Examples of conditions that do not create an unreasonable risk 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." *Id.*

The fact that the open and obvious doctrine no longer depends on the legal question of duty, and instead involves a factual inquiry concerning breach, does not necessarily preclude summary judgment. *Id.* at 916. "[S]ummary judgment remains a viable concept under this approach. . . . 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." *Id.* On a motion for summary judgment, the trial court must "examine[] 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." *Id.* (internal quotations and citation omitted). If reasonable minds cannot differ as to whether

the defendant's conduct breached its duty to exercise the requisite care, summary judgment is still available to the land possessor. *Id.* at 916. Thus, the propriety of summary judgment must still be assessed *on a case by case basis*, taking into account the circumstances surrounding the slip and fall.

In this case, the deteriorating condition of the step was objectively obvious, but the obviousness of the condition is only one factor to consider under the *Shelton* analysis. To survive summary judgment, Janice needed to come forward with affirmative evidence, viewed in a light favorable to her, showing that JKP should have reasonably foreseen that visitors would be distracted, would be engaging in some activity while traveling on the deteriorating step, or would otherwise not proceed with caution given the surrounding area. Janice failed to make this showing. While the record shows the Derby party was a lawn party and party-goers walked throughout the yard that day, Janice's deposition testimony is devoid of any allegations of circumstances which would have reasonably distracted her while traversing the deteriorating step, or which would have made the condition of the step an unreasonable risk.

Rather, Janice's deposition reveals that she was at the Derby party for approximately six hours; she had traversed the staircase in question three times that day without difficulty before falling; it was daylight when she fell; she was not looking or paying attention to where she was stepping; she placed her foot in the far corner of the step where cement was crumbling rather than walking up the middle of the relatively wide step; and she was not sharing the step with anyone.

Nothing in the record indicates that under the circumstances, JKP had reason to expect visitors' attention might be distracted or that visitors would proceed to encounter an obvious danger. JKP's duty of care is limited to foreseeable harm. *Cf. Kentucky Med. Ctr. v. McIntosh*, 319 S.W.3d 385, 393-94 (Ky. 2010) (hospital owed duty to paramedic who tripped and fell over curb located between ambulance dock and emergency room doors as she was helping transport a critically ill patient, despite open and obvious nature of the curb, as it was foreseeable that paramedic would be tending to the patient, not to each step she was taking, and also that paramedic might forget that the particular hospital in question had a unique danger that she needed to avoid.).

We believe this case presents the scenario contemplated in *Shelton* in which summary judgment is viable and appropriate and therefore uphold the decision of the trial court granting summary judgment in favor of JKP.

The Jefferson Circuit Court's order is affirmed.

KRAMER, JUDGE, CONCURS.

MAZE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MAZE, JUDGE, DISSENTING: I respectfully dissent. Though I find no fault with my colleagues' summation of current premises liability law in Kentucky, I nevertheless believe that law compels a different result in the present case.

Following an initial attempt in *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010), our Supreme Court recently continued its

efforts to square Kentucky's premises liability law with the Commonwealth's adherence to the doctrine of comparative negligence. Most notably, in *Shelton v. Kentucky Easter Seals Society, Inc*., 413 S.W.3d 901, 904 (Ky. 2013), the Supreme Court stated its intention to "alter the analysis performed in this and future cases of this sort such that a court no longer makes a no-duty determination but, rather, makes a no-breach determination" and to place "the reasonable-foreseeability analysis where it belongs-in the hands of the fact-finders, the jury." The impact of the Court's reasoning in *Shelton*, and even *Dicks Sporting Goods, Inc. v. Webb*, 413 S.W.3d 891 (Ky. 2013), on summary judgment in premises liability cases could hardly have been greater.

In its opinion in the present appeal, the majority contends that because the condition of the stair was not concealed, and because the plaintiff failed to observe its condition throughout her previous trips up and down the stairs, the risk posed by the crumbling step was not unreasonable. Hence, my colleagues conclude that "reasonable minds cannot differ or it would be unreasonable for a jury to find breach or causation" and that summary judgment was appropriate. Due to the aforementioned changes in premises liability law, I must disagree with my colleagues, as I believe the case requires a jury's determination.

The Supreme Court's decision in *Shelton* expressly eliminated much of the emphasis on a condition's "open and obvious" nature, removing it as a fact which, if shown, would absolve a defendant of his duty and placing it as a mere factor to be considered in determining breach and causation. This shifted the

analysis from one of legal calculation to one of factual determination only to be summarily ended when reasonable minds could not differ as to breach and causation. I proffer that this is not the case.

Rather, in light of our Supreme Court's decision in *Shelton*, I contend that the questions of foreseeability, Janice's attention or inattention to the condition of the step and where she was stepping, and the open and obvious nature of the step must remain to inform a jury's analysis of the defendant's breach and even the comparative fault of the parties in this case. While the Supreme Court announced that summary judgment remains a viable possibility in premises liability cases, it is undeniably more difficult to obtain after *Shelton*. This being the case, and on these facts, I believe it was inappropriate for the trial court to grant summary judgment, and that the matter must proceed to a jury.

BRIEFS FOR APPELLANT:

Joseph T. Pepper
George Schuhmann
Louisville, Kentucky

BRIEF FOR APPELLEE:

Curt L. Sitlinger
John S. Gilliam
Louisville, Kentucky