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Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002256-MR

VICKIE JENKINS APPELLANT

ON REMAND FROM SUPREME COURT
2003-SC-000269

APPEAL FROM BOONE CIRCUIT COURT
v. HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 00-CI-00461

PETSMART, INC. APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS and McANULTY, Judges; and MILLER, Special Judge.[1]

COMBS, JUDGE: This case is again before us on remand from the Kentucky Supreme Court directing that we re-examine our previous opinion in light of its recent decision in Lanier v. Wal-Mart Stores, Inc., Ky., 99 S.W.3d 431 (2003).

We had considered the appeal of Vickie Jenkins from a summary judgment of the Boone Circuit Court of September 19,

[1]Senior Status Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

2001, dismissing her tort claim against the appellee, Petsmart, Inc. After reviewing the record and the pertinent authorities, we vacated and remanded. After once again examining our reasoning under the Lanier standard, we have determined that our original decision correctly concluded that the summary judgment be vacated and that this matter be remanded for a trial.

On April 23, 1999, Jenkins suffered an injury to her right ankle as a result of slipping on canine feces while shopping at Petsmart. She filed a complaint in the Boone Circuit Court alleging that Petsmart was negligent in failing to keep its premises in a reasonably safe condition -- thereby causing her injury.

In her discovery deposition, Jenkins testified that she had shopped at Petsmart once or twice each week for five or six years. Although she was aware of the store=s policy of allowing customers to bring their pets into the store while shopping, she testified that she had never seen feces or urine on the floor of the store during any of her previous visits. Jenkins also testified that on the day of her injury, she did not see the feces before she slipped in it. She did admit that the substance was clearly visible at the end of the aisle where she was walking and that she would have seen it had she been looking at the floor. Jenkins=s son saw the excrement and attempted to warn her. Although his warning came too late to prevent her from slipping, he managed to grab her and prevent her from falling all

the way to the floor. Jenkins testified that she had no knowledge of how long the feces had been on the floor and that she possessed no evidence from which a jury could infer how long the feces had been there before she slipped.

Petsmart moved for summary judgment. It argued that Jenkins=s own admissions concerning the condition of its premises, specifically the open and obvious placement of the feces at the end of the aisle, absolved it of any liability for her injuries as a matter of law. It contended that the existence of canine feces was a risk Jenkins should have recognized in light of the nature of the store=s business. It also argued that Jenkins could not prevail as she could not prove how long the feces had been on the floor. In response, Jenkins contended that summary judgment was not warranted. She argued that because of the unusual policy of allowing animals in its stores, Petsmart had a duty to Aconstantly inspect the premises to assure that any feces and/or urine is removed immediately.@ The trial court dismissed the complaint without explanation or elaboration. This appeal followed.

The standard of review on appeal of a summary judgment is whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. CR[2] 56.03; Scifres

[2]Kentucky Rules of Civil Procedure.

v. Kraft, Ky.App., 916 S.W.2d 779 (1996); Moore v. Mack Trucks, Inc., Ky.App., 40 S.W.3d 888, 890 (2001).

Jenkins acknowledges that there is no question of fact concerning the obvious location of the feces on the floor of the store. However, she argues that because of the appellee=s particular business practices, the store Ashould have a higher duty of care as it relates to the protection of business invitees.@

> [I]n the case at hand, the danger to patrons is a moving target. A dog or cat could defecate or urinate at any time and in any location in the store. This creates a hazardous condition that is unusual and should dictate a higher degree of scrutiny as it relates to the safety of patrons. . . . In a location where pets are encouraged to be on the premises it can be inferred that the business owner/operator knows or should know that said animals will defecate and or urinate causing unsafe conditions.

Petsmart counters by presenting a series of arguments essentially reflecting the history of premises liability law in Kentucky preceding the new rule announced in Lanier, supra. Petsmart has relied primarily on those cases which hold that an owner of business premises owes no duty to its invitees to remove or warn against open and obvious hazards. It argues that a customer Amay not bring suit where she slips and falls in canine feces when not watching where she is going.@ See, e.g., Johnson v. Lone Star Steakhouse and Saloon of Kentucky, Inc., Ky.App., 997 S.W.2d 490, 492 (1992), and Standard Oil Co. v. Manis, Ky., 433 S.W.2d 856 (1968). It also relies on principles of the law

relating to premises liability which place affirmative duties upon an invitee to exercise reasonable care for her own safety. Specifically, it cites Smith v. Smith, Ky., 441 S.W.2d 165, 166 (1969), in which the court held as follows:

> An invitee has a right to assume that the premises he has been invited to use are reasonably safe, but 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.

Finally, Petsmart argues that Jenkins cannot prevail because she admitted that she had no evidence that Petsmart was aware of the existence of the hazardous substance on its floor in order to remove it or to warn Jenkins prior to her injury.

Petsmart correctly notes cases such as Manis, supra, concerning obvious dangers and natural accumulations outdoors. In these cases, our appellate courts have consistently applied the Aobvious-risk rule@ to defeat the claims of invitees who slip and fall on business premises. PNC Bank of Kentucky, Inc. v. Green, Ky., 30 S.W.3d 185 (2000), held that the obvious nature of the danger created by ice precluded a customer from recovering for injuries caused by slipping and falling. In Rogers v. Professional Golfers Association, Ky.App., 28 S.W.3d 869 (2001), the plaintiff was injured when he slipped on matted grass while walking down a hillside. The court held that he could not recover due to the obviously slick nature of wet grass.

However, the obvious-risk rule does not bar a suit caused by a hazardous substance or object located on the floor of business premises that was not observed by the customer prior to an injury. See, Wal-Mart Stores, Inc. v. Lawson, Ky.App., 984 S.W.2d 485 (1998). In such a case, a jury question is raised as to whether the invitee, in exercising ordinary care for her own safety, should have seen the hazard.

Petsmart argues that even if the obvious-risk rule does not apply, it is still entitled to summary judgment. It relies on traditional precedent where Kentucky courts have held that an invitee rather than a business owner bears the burden of proof for dangerous conditions caused by someone other than the proprietor. That extra burden requires an injured invitee to prove that the owner had sufficient notice and time either to remove the danger or to warn the invitee of its presence. Cumberland College v. Gaines, Ky., 432 S.W.2d 650 (1968).

Jenkins has urged us to adopt a theory of liability premised on the Amode of operation@ of businesses -– a doctrine that many other jurisdictions have embraced in lieu of the obvious-risk rule by which we were bound prior to Lanier, supra. Under the mode-of-operation theory, an invitee may recover without showing actual notice or constructive knowledge by the business owner of the specific object causing the accident:

> if [she] shows the proprietor adopted a mode of operation where a patron=s carelessness should be anticipated and the proprietor fails to use reasonable measures commensurate

> with the risk involved to discover the condition and remove it.

Jackson v. K-Mart Corp, 251 Kan. 700, 709-711, 840 P.2d 463 (Kan.1992).

Smith v. Wal-Mart Stores, Inc., Ky., 6 S.W.3d 829 (1999), represents the penultimate pronouncement of the Kentucky Supreme Court on this controversy in the law of premises liability, preceding Lanier temporally but anticipating and laying the groundwork substantively for the new rule announced in Lanier.

In Smith, the plaintiff slipped on a blue liquid in a Wal-Mart store. A jury awarded her damages for her injuries. This Court reversed the judgment, holding that Wal-Mart was entitled to a directed verdict because Smith failed to show that the substance had been on the floor for a sufficient length of time to enable Wal-Mart to remedy the situation. In her appeal to the Kentucky Supreme Court, Smith urged that Court to adopt the mode of operation theory. Three justices declined to consider the theory because it had not been properly preserved for review. In a separate concurring opinion authored by Justice Cooper, three other justices opined that the Court should go farther and Aaddress the onerous burden of proof placed on retail customers@ by those cases which hold that the customer must prove how long a foreign substance or object had been on the floor prior to the accident. Id. at 831-832. The three justices suggested the following procedure as to burden of proof:

> To balance the competing principles of notice versus duty, the issues of causation and notice should be treated not as elements of the customer=s case, but as affirmative defenses of the proprietor. The customer would retain the burden of proving that there was a foreign substance/object on the floor and that such was a substantial factor in causing his accident and injury. Such proof that the premises were unsafe would avoid a summary judgment or directed verdict and shift to the proprietor the burden of proving that his employees did not cause the substance/object to be on the floor and that it had been there for an insufficient length of time to have been discovered and removed or warned of by his employees.

The Supreme Court rather strongly intimated that it was contemplating a change in the law to adopt the modern trend of removing from an invitee the more onerous burden of proof of notice to the proprietor. That change has come at last with Lanier.

The highly unique facts of Petsmart place it somewhere between the obvious-risk rule and the mode-of-operation theory. We originally decided that it was in a class by itself and incapable of resolution by recourse to the obvious-risk rule while at the same time not amenable to the mode-of-operation theory –- a rule that the new Lanier has stopped short of adopting. We decided the first Petsmart according to Johnson v. Lone Star, supra, because of the analogous factual scenario.

In Lone Star, the plaintiff slipped on peanut shells that other patrons had thrown onto the floor of the restaurant. The Court held that the danger was open and obvious to the

plaintiff since she had been in the restaurant for more than two hours and was familiar with the restaurant=s policy of allowing the patrons to eat peanuts and throw the shells on the floor. For that reason alone, the proprietor prevailed.

However, the facts in this case are distinguishable substantively from Lone Star despite their facial similarity. Although Johnson had previously shopped in Petsmart and was aware that customers were allowed to bring their pets into the store, she testified that she had never seen animal feces or urine on the floor at Petsmart and that she did not see the substance that caused her to slip prior to stepping in it. Jenkins=s duty to use reasonable care for her own safety did not require that she constantly look at the floor. It is wholly reasonable for a customer to be perusing merchandise on shelves lining the aisles through which she is walking instead of focusing solely on the surface beneath her feet. Additionally, Petsmart=s duty to keep its premises in a reasonably safe condition must be examined and evaluated in light of the special nature of the risks to customer safety inevitably created by the presence of animals.

In language highly pertinent to this case, the court in Lone Star analyzed the relative duties of invitees and business proprietors as follows:

> ›A possessor of business premises is not liable to his invitees for physical harm caused to them by any condition on the premises whose danger is known or obvious to them unless the possessor should anticipate

> the harm despite such knowledge or obviousness.
>
> Reasonable care on the part of the possessor of business premises does not ordinarily require precaution or even warning against dangers that are known to the visitor or so obvious to him that he may be expected to discover them.÷
>
> In short, a possessor of business premises is not liable for injuries suffered by another person due to an open and obvious condition on the premises. (Quoting, Bonn v. Sears, Roebuck & Co., supra, at 528 and citing Corbin Motor Lodge v. Combs, Ky., 740 S.W.2d 944 (1987)(emphasis added).)

Lone Star at 492. Thus, even though the proprietor was absolved of liability in Lone Star, that case acknowledges that a business owner can be subject to liability if he Ashould anticipate the harm despite [the] knowledge or obviousness [of the danger to the invitee].@ See also, Dan B. Dobbs, *The Law of Torts*, ' 235 (2001).

Since Petsmart encourages owners to bring their pets into the store, it should (in the language of Lone Star) reasonably anticipate that a customer shopping for pet supplies might not see the droppings left by animals accompanying other patrons. The unique circumstances of this case dictate both that the risk was not open and obvious to Jenkins and that Petsmart nonetheless (and regardless of her awareness or lack of it) had an ongoing, continuing duty to anticipate the very harm to which she fell victim. Again, to quote Lone Star, a proprietor is

relieved of liability unless he Ashould anticipate the harm despite such knowledge or obviousness.@ Id. at 492.

The analysis of this case pursuant to Lanier leaves no doubt that we originally reached the proper conclusion –- albeit a bit more circuitously and perhaps more tentatively. Lanier is the definitive step beyond Lone Star as it creates a new standard governing the burden of proof in premises liability cases, directly overruling the long line of previous cases that had essentially placed that burden squarely on the injured plaintiff. It recognizes the injustice of the obvious-risk rule as a practical matter in requiring an injured plaintiff to demonstrate just when and how long a proprietor may have known of the existence of a dangerous condition. However, it does not impose an absolute burden on the proprietor by adopting the almost *per se* approach of the mode-of-operation analysis. Lanier opts for the center path between the two extremes of the obvious-risk rule and the mode-of-operation theory -- namely, the burden-shifting approach to premises liability.

Justice Cooper in Lanier revisits his earlier concurring opinion from Smith, supra, which was clearly a harbinger of the shift officially announced in Lanier. Incorporating Smith by reference, Lanier holds that a business invitee who is injured retains the burden of establishing: (1) that there was a foreign substance on the floor of the premises where he/she was shopping and (2) that the substance was a

substantial factor in causing the injury. The invitee no longer must show notice on the part of the proprietor. The burden of proof then shifts to the owner of the premises to establish his own absence of negligence in causing the substance to be present and/or his inability to arrange for it to be removed due to insufficiency of time for his notice or opportunity to act. The notice requirement that was formerly an element of the invitee's case has now become an affirmative defense for the proprietor in this process of burden-shifting between plaintiff and defendant. Smith, supra, at 831-32.

Pursuant to Lanier, we hold that Jenkins has met her burden of establishing the presence of excrement on the floor and that her injury was cause by her slipping in the substance. The burden of proof has now shifted to Petsmart to show its absence of negligence or lack of notice as an affirmative defense. Therefore, summary judgment was prematurely and erroneously entered against Vickie Jenkins.

Accordingly, the summary judgment of the Boone Circuit Court is vacated, and this case is remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

C. Ed Massey
Erlanger, Kentucky

BRIEF FOR APPELLEE:

David S. Strite
Mark E. Hammond
Louisville, Kentucky