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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001216-MR

DEBORAH JOHNSTON and
THOMAS JOHNSTON — APPELLANTS

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 99-CI-00453

RODNEY SHORT BUILDERS, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, KNOPF, and TACKETT, Judges.

COMBS, JUDGE. Deborah Johnston and her husband, Thomas Johnston, appeal from the summary judgment of the Madison Circuit Court that dismissed their claims for injuries resulting from Deborah's fall on property owned by the appellee, Rodney Short Builders, Inc. (RSB). After a review of the record and the applicable law relating to premises liability, we affirm.

The material facts relating to this appeal are not in dispute. On April 16, 1998, the Johnstons visited a new house

that RSB was in the process of constructing for their daughter and future son-in-law. They arrived at the construction site late in the day on a Sunday when no one else was present. The only way to obtain access to the interior of the house was by walking up a two-foot by twelve-foot wooden plank that was propped up against the front stoop and which ascended to a height of six or seven feet above the ground. Deborah held on to her husband's trousers as they walked up the plank. She testified that the board was "shaky" after Thomas alighted. Upon leaving the house, she stepped onto the plank, which turned and caused her to fall to the ground. She sustained serious and painful injuries to her left wrist and knee.

On March 31, 1999, the Johnstons filed their complaint seeking damages for Deborah's injuries and Thomas's loss of consortium. They alleged that RSB owed them a duty "to maintain the property and construction site . . . in a reasonably safe condition;" that RSB was negligent in "placing an unstable unsecured wood plank" on the front porch to be used as an entrance to the site; that RSB

> knew or should have known that the dangerous condition of the unstable unsecured wood plank was a hazardous trap or pitfall which unreasonably endangered the general health and welfare of the public and . . . [that RSB] further failed to warn the Plaintiff of the dangerous conditions or take adequate measures to remedy the dangerous condition.

On February 15, 2002, RSB moved for summary judgment. It argued that at the time of Deborah's injury, the Johnstons were either licensees or trespassers and that RSB owed them no duty to keep the premises safe. It further argued that there was no evidence that it acted wantonly with respect to the maintenance of the property; thus, the Johnstons could not establish any breach of its duties relating to the property. Finally, RSB noted the walkway was narrow and high and that Deborah testified she was afraid of heights. It argued, therefore, that the danger of walking on the plank was open and obvious. Therefore, RSB should be wholly absolved of any liability for Deborah's injuries regardless of the legal status of the Johnstons.

In response, the Johnstons argued that they should be classified as invitees. Alternatively, they contended that if they were determined to be licensees, the duties owed by RSB "were essentially the same" as those owed to invitees. The Johnstons also argued: (1) that the wooden walkway was a "latent hazard"; (2) that the danger inherent in walking across it was not obvious to Deborah; and (3) that whether the hazard was "readily apparent" to Deborah and whether her failure to perceive the danger was reasonable were material facts to be decided by a jury rather than disposed of by summary judgment.

In the order from which the Johnstons have appealed, the trial court found that Deborah Johnston's status at the time of her injury was that of a licensee. It also found that "the nature and condition of the plank . . . was an open and obvious condition," thereby concluding that RSB was entitled to summary judgment as a matter of law. In their appeal, the Johnstons do not contest the trial court's ruling with respect to Deborah's status. They argue instead that the trial court erred in ruling that RSB had no liability because the condition of the plank was open and obvious.

Our task in reviewing a summary judgment is to determine "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, Ky.App., 916 S.W.2d 779, 781 (1996). We must consider the evidence in the light most favorable to the Johnstons' position. We are persuaded that the trial court correctly determined that reasonable minds could not escape the conclusion that the condition of the plank was open and obvious to Deborah.

The Johnstons contest the nature of the plank and contend that there was a material issue of fact as to whether a reasonable person would realize that the plank was unsecured. They summarize their argument as follows:

> RSB created a dangerous walkway as the only entrance to its spec home when it could anticipate that individuals like Ms. Johnston would be likely to enter. Ms. Johnston was entitled to assume that the walkway was safe for use. RSB's "open and obvious" defense does not bar liability under these circumstances but is merely a factor to be considered in an application of comparative fault principles.

Additionally, the Johnstons argue that there was "no evidence presented to establish that this danger was observable to a reasonable person"; while Deborah "anticipated the walk to be high and narrow," she did not expect it to be "unsecured."

We agree with the appellants' obseration that "every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury." Grayson Fraternal Order of Eagles v. Claywell, Ky., 735 S.W.2d 328, 332 (1987); Isaacs v. Smith, Ky., 5 S.W.3d 500 (1999). However, there is no duty in Kentucky requiring the possessor of land to warn a person of a known or obvious condition or danger. Rogers v. Professional Golfers Association of America, Ky.App., 28 S.W.3d 869, 872 (2000). That rule was emphatically reiterated by this court in Johnson v. Lone Star Steakhouse & Saloon of Kentucky, Inc., Ky. App., 997 S.W.2d 490 (1999), holding that:

> 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.

Id. at 492, quoting Bonn v. Sears, Roebuck & Co., Ky., 440 S.W.2d 526, 528 (1969).

The appellants place significant reliance on Wallingford v. Kroger Co., Ky.App., 761 S.W.2d 621 (1988) and Wal-Mart Stores, Inc. v. Lawson, Ky.App., 984 S.W.2d 485 (1998). However, these cases involve injuries to invitees, whereas the appellants before us now have been characterized in the less protected status of licensees, a ruling which they contested below but have not challenged on appeal. Contrary to the Johnstons' argument, RSB did not owe them the duty to make the premises safe for their use. Shipp v. Johnson, Ky., 452 S.W.2d 828 (1969). Therefore, RSB's only duty was to refrain from knowingly causing harm or failing to warn of a hidden peril. Scifres v. Kraft, 916 S.W.2d at 781; Perry v. Williamson, Ky., 824 S.W.2d 869, 874 (1992). The only issue is whether the plank constituted a hidden peril triggering RSB's duty to warn or whether its unstable nature was obvious "or one which should or could be observed by the licensee in the exercise of ordinary care." Scifres, supra.

Deborah testified that the wooden plank was not intended to be a permanent structure but was merely propped up against the front porch for temporary access. She testified as to the size and angle of the board, observing that it reached a

considerable height of six or seven feet above the ground. She admitted that she is afraid of heights and that she held on to her husband as they walked up the board. She described that the board was shaky and wobbly after her husband stepped off the board. Nevertheless, she attempted to exit the house by walking down the board by herself. Although Deborah stated that neither she nor her husband looked to see if the board was secured in any fashion, she argues that its dangerous condition was not obvious to her; *i.e.*, that the board was unstable and that it could flip over and cause her to fall. These circumstances, analyzed in light of the duties owed to licensees, persuade us that the trial court did not err in holding that the danger posed by the plank was obvious and that its unsecured status was readily ascertainable. Id.

We affirm the judgment of the Madison Circuit Court.

ALL CONCUR.

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