

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002564-MR

ELIZABETH VICKERS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, JUDGE
ACTION NO. 99-CI-00265

BELLERIVE DEVELOPMENT, INC.

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER AND SCHRODER, JUDGES; MILLER, SENIOR JUDGE.¹

BARBER, JUDGE: Elizabeth Vickers ("Vickers") appeals from an order of the Fayette Circuit Court granting a motion for summary judgment filed by Bellerive Development, Inc. ("Bellerive"), in an action to recover for injuries sustained when she slipped and fell in a snow-covered parking lot. After reviewing the record, the arguments presented by the parties and the applicable case law, we agree with the trial court's decision that Bellerive was

¹ Senior 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 Ky. Rev. Stat. (KRS) 21.580.

under no duty to warn Vickers of the hazardous condition of the parking lot or to clear the snow. Consequently, we affirm the trial court's decision to grant summary judgment to Bellerive.

On February 5, 1999, Vickers slipped and fell on packed snow in the parking lot in front of a Kroger Supermarket located in a shopping center on Bryan Station Road in Lexington, Kentucky. Bellerive is the owner of the shopping center and the parking lot. Bellerive contracts with a private company, Tates Creek Paving, for the removal of snow and ice from this parking lot when such service become necessary. Tates Creek Paving plowed the lot once on the morning of February 4, 1999 while a second contractor plowed the lot again later that morning. The lot was plowed a third time on February 5, 1999, but not until after Vickers fell. Bellerive was unable to have the parking lot cleared from second cleaning on February 4, 1999 until after Vickers' fall because of the blizzard-like conditions that had occurred in Lexington during this time.²

On the day of this accident, Vickers had previously visited the Bryan Station Road Kroger and was fully aware that no effort had been made to clear the snow from the parking lot. Despite her knowledge of the parking lot's condition, she returned to the store to purchase additional items. After completing her second round of grocery shopping, Vickers left

² More than one foot of snow had fallen in Lexington as a result of this storm.

the store and proceeded to slip and fall on packed snow in the parking lot while walking back to her vehicle. As a result of this fall, Vickers broke her left ankle.

Vickers filed her complaint against Bellerive alleging that it had negligently failed to clear the shopping center's parking lot of snow and ice and that this negligence resulted in her fall and injury. Bellerive filed a motion for summary judgment, arguing that Kentucky law did not recognize a duty to clear the snow or warn against the obviously slippery condition of the parking lot. The trial court granted summary judgment for Bellerive, concluding that no duty existed for it to either remedy or warn against the obvious natural hazard posed by the snow-covered parking lot. This appeal followed.

The standard for summary judgment in Kentucky has been definitely announced in Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). In Steelvest, our Supreme Court adhered to the principle that summary judgment should be cautiously applied and not used as a substitute for trial. Id., at 483. Summary judgment "should only be used 'to terminate litigation 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 its favor and against movant.'" Id., quoting Paintsville Hospital Company v. Rose, Ky., 683 S.W.2d 255, 256 (1985). Nonetheless, "a party opposing

a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing there is a genuine issue of material fact for trial.”

Steelvest, 807 S.W.2d at 482. Accordingly, our standard for reviewing a trial court’s award of summary judgment is whether the trial court correctly found that no genuine issues of material fact existed and that the moving party was entitled to judgment as a matter of law. Moore v. Mack Trucks, Inc., Ky. App., 40 S.W.3d 888, 890 (2001).

On appeal, Vickers argues that the trial court erred in granting summary judgment to Bellerive because Bellerive knowingly undertook the duty of removing snow and ice from the shopping center’s parking lot. We disagree.

The Kentucky Supreme Court has defined the law regarding liability for injury due to natural outdoor hazards. In Standard Oil Co. v. Manis, Ky., 433 S.W.2d 856 (1968), the Court held that “*natural outdoor hazards* which are so obvious to an invitee as to the owner of the premises do not constitute *unreasonable* risks to the former which the landlord has a duty to remove or warn against.” (Emphasis in original). Id., at 858. This standard was recently reaffirmed in PNC Bank v. Green, Ky., 30 S.W.3d 185 (2000).

In PNC Bank, Green slipped and fell on the sidewalk in front of her bank. The accident occurred in broad daylight and

Green admitted that she was aware of the treacherous weather conditions after nearly falling on ice earlier that day. Nevertheless, Green attempted to walk along the sidewalk to reach the bank, but fell just outside the building. Our Supreme Court determined that the trial court correctly granted summary judgment to the bank because Green's own deposition testimony demonstrated her awareness of the hazard and that PNC Bank had done nothing to make the sidewalk even more hazardous.

In the matter before us, on February 5, 1998, Vickers returned to the Bryan Station Road Kroger after having shopped there earlier in the day. During the first visit, Vickers became aware that the parking lot had not been cleared of the snowfall. On her second visit, Vickers was placed on notice that the parking lot's condition had not changed. Despite her awareness of the obvious slick and icy condition of the parking lot, Vickers chose to walk in the parking lot. These facts, which are sufficiently similar to the facts in PNC Bank, support the trial court's finding that Bellerive had no duty to clear the snow or to warn Vickers of an obvious natural hazard that was readily apparent to her prior to her unfortunate injury.

Vickers contends that Bellerive knowingly, willingly and voluntarily undertook the duty of clearing its parking lot through its own acts as well as through the act of its contractors. In support of this contention, Vickers relied upon

Estep v. B.F. Saul Real Estate Trust, Ky. App., 843 S.W.2d 911 (1992). We believe Vickers' reliance on Estep is misplaced.

In Estep, a store patron was injured when she slipped and fell on a sidewalk near the entrance to McAlpins at the Lexington Mall. Even though the plaintiff in Estep was aware of the inclement weather conditions present at the time, she observed that the parking lot had been cleared of snow when she arrived at the shopping mall. The plaintiff then noted that the sidewalk had been cleared as well, although she observed a thin layer of snow thereon. After taking several steps, she slipped and fell on ice that was concealed underneath the snow. In reversing the trial court's grant of summary judgment in favor of the defendants, a panel of this Court found that Estep was not aware of the transparent layer of ice on the seemingly cleared sidewalk until she stepped upon it, despite her knowledge of the generally icy and snowy weather conditions that had been occurring. Estep, supra, at 913. Accordingly, this Court found that genuine issues of material fact existed concerning the obviousness of the hazard, thereby precluding summary judgment.

This matter before us is distinguishable from Estep. The Estep case recognized that a duty voluntarily assumed cannot be carelessly undertaken without incurring liability therefore. Moreover, under Estep, a business owner is subject to liability

upon undertaking measures that, in fact, heighten or conceal the nature of the dangerous condition. However, in this matter before us, nothing that Bellerive did made the natural hazard any less obvious or increased the likelihood that Vickers would slip and fall. Vickers' accident occurred because of her conscious decision to ignore an obvious natural outdoor hazard, not from any action undertaken by Bellerive to heighten or conceal the ice or snow that had blanketed the Kroger parking lot. While we sympathize with Vickers' predicament, Kentucky law simply fails to afford her any relief. Since the trial court correctly found that Vickers presented no genuine issues of material fact, we must affirm its decision to grant summary judgment to Bellerive.

For the aforementioned reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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