RENDERED: February 18, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001958-MR

RUBY MCNAY — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 99-CI-00039

SHELL'S SEAFOOD RESTAURANTS, INC. — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: DYCHE, GUIDUGLI, AND McANULTY, JUDGES.

McANULTY, JUDGE: This is an appeal from a summary judgment granted in favor of Shell’s Seafood Restaurants, Inc. (Shell’s Seafood) in a premises liability case. Because we believe genuine issues of material fact exist, we vacate and remand to the trial court for trial.

At about 6:30 p.m. on January 22, 1998, Ruby McNay (Ruby) and her husband, Wilfred McNay (Wilfred or collectively, the McNays) went to Shell’s Seafood in Florence, Kentucky. At

the time they entered the restaurant parking lot, it was misting rain. Ruby's husband parked their car, and they both got out to go inside. Ruby was headed toward the sidewalk surrounding the restaurant, and it started pouring down rain. She began walking quickly and tripped over the sidewalk curb. She did not see the curb because it was dark and raining hard, making it difficult for her to see the change in elevation from the parking lot to the sidewalk. As a result of the fall, Ruby fractured both of her elbows and suffered a shoulder injury.

Ruby sued Shell's Seafood alleging that the restaurant lighting was insufficient to illuminate the curb. Wilfred filed a loss of consortium claim.

More than four years after Ruby and Wilfred filed their lawsuit, Shell's Seafood made a motion for summary judgment. In support, Shell's stated that its duty of care to Ruby was to take reasonable care to discover the actual condition of the premises and either make them safe or warn its patrons of such a dangerous condition. It argued that the totality of the facts lead to only one conclusion -- Shell's Seafood fulfilled its duty to Ruby as a business invitee on the premises. Curbs are commonly located in areas where patrons and pedestrians are likely to walk. Thus, curbs cannot reasonably be considered a dangerous condition of the property that Shell's should have discovered and then warned Ruby or other patrons

about. Alternatively, Shell's Seafood argued that even if Ruby had established that it breached its duty of care, that breach was not the proximate cause of Ruby's fall. The combination of the weather conditions and Ruby's failure to watch where she was going in her haste to get inside caused her to fall.

In her response to the motion for summary judgment, Ruby argued that the recent Kentucky case of Lanier v. Wal-Mart Stores, Inc., 99 S.W.3d 431, 433 (Ky. 2003) established a more advanced duty owed by Shell's Seafood:

> The occupier must not only use care not to injure the visitor by negligent activities, and warn him of hidden dangers known to the occupier, but he must also act reasonably to inspect the premises to discover possible dangerous conditions of which he does not know, and take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use of the property.

(quoting William Prosser and W. Page Keeton, Prosser and Keeton on Torts, § 61, at 425-26 (5th ed.1984)). And Lanier changed the burden of proof in a premises liability case by imposing "a rebuttable presumption that shifts the burden of proving the absence of negligence, *i.e.*, the exercise of reasonable care, to the party who invited the injured customer to its business premises." Id. at 437.

The trial court granted Shell's Seafood's motion for summary judgment and dismissed Ruby and Wilfred's claims. In so

doing, the trial court distinguished Lanier by noting that the majority limited the application of the burden-shifting approach to "so-called 'slip and fall' cases brought by business invitees who claim to have been injured as a result of slipping on a foreign substance while conducting business on commercial premises." Id. at 432. Further, the trial court held that Ruby "cannot describe or infer anything [from] which the Court could determine that there was a question of fact as to whether or not the Defendants breached" their duty of care.

Preliminarily, we state that Wilfred is not properly before this court because he was not specified by name as an appellant in the Notice of Appeal as required by CR 73.03. In this case, the Notice of Appeal states that Ruby McNay -- and only Ruby McNay -- appeals the order granting the Defendant's Motion for Summary Judgment. Although Shell's Seafood did not raise this issue at any point in these proceedings, we do not believe that the Appellants' Notice of Appeal met the principal objective of providing fair notice to Shell's Seafood that Wilfred was also appealing. See Blackburn v. Blackburn, 810 S.W.2d 55, 56 (Ky. 1991). In reaching this conclusion, we also considered the language of Appellant's prehearing statement, which says nothing about the dismissal of Wilfred's loss of consortium claim. Thus, the summary judgment in favor of Shell's Seafood stands as to Wilfred McNay.

Ruby presents four arguments for our review. First, she argues that genuine issues of material fact as to whether the lighting was adequate precluded summary judgment. Second, she contends that the trial court failed to address whether Shell's Seafood's breach of its duty of care was the proximate cause of her injury. Third, she asserts that the trial court erred in granting summary judgment without addressing whether a genuine issue of material fact existed as to Wilfred's loss of consortium claim. Fourth, she asserts that summary judgment was premature since she was denied the opportunity to complete discovery.

The standard of review of a trial court's granting of summary judgment is "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, 916 S.W.2d 779, 781 (Ky.App. 1996). Additionally,

> [T]he summary judgment procedure is not a substitute for trial. The circuit judge must examine the evidentiary matter, not to decide any issue of fact, but to discover if a real or genuine issue exists. All doubts are to be resolved in favor of the party opposing the motion. The movant should not succeed unless a right to judgment is shown with such clarity that there is no room left for controversy, and it is established that the adverse party cannot prevail under any circumstances.

City of Florence, Kentucky v. Chipman, 38 S.W.3d 387, 390 (Ky. 2001).

We begin by considering the duty of care owed by Shell's Seafood, as the possessor of land, to the McNays. Shell's Seafood stipulates that the McNays were invitees. Although Kentucky case law and authorities on the matter phrase Shell's Seafood's duty of care to its invitee in a number of different ways, we believe it was adequately summarized for our purposes in Rogers v. Professional Golfers Ass'n of America, 28 S.W.3d 869, 872 (Ky.App. 2000). Rogers states:

> Generally, the owner of premises to which the public is invited has a general duty to exercise ordinary care to keep the premises in a reasonably safe condition. McDonald v. Talbott, 447 S.W.2d 84, 86 (Ky. 1969). However, "[r]easonable 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." Johnson v. Lone Star Steakhouse & Saloon of Kentucky, Inc., 997 S.W.2d 490, 492 (Ky.App. 1999), quoting Bonn v. Sears, Roebuck & Co., 440 S.W.2d 526, 528 (Ky. 1969). See also Standard Oil Co. v. Manis, 433 S.W.2d 856 (Ky. 1968) wherein the court held that owners of premises do not have a duty to warn against natural outdoor hazards which are as obvious to the invitee as to the owner. Id. at 858.
>
> Further, the court in Smith v. Smith, 441 S.W.2d 165 (Ky. 1969), held that
>
> > 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.

Id. at 166.

We do not believe that Lanier imposed any greater duty on Shell's Seafood than that described above. And we agree with Shell's Seafood and the trial court that the burden of proof is not shifted in this case to Shell's Seafood to prove the exercise of reasonable care. The application of Lanier is limited to slip and fall cases brought by business invitees who have been injured as a result of slipping on a foreign substance. See id. at 432.

Guided by the above, we turn to the facts of this case. The only deposition taken in this action was that of Ruby McNay. In her deposition, she stated that she had been to the restaurant a couple of times before the night she tripped and fell, but she had only been during the day. She headed across the parking lot in the rain. She knew there was a sidewalk around the restaurant and she was looking for it. But she could not see the curb (or the step up) because it was dark and raining. Ultimately, she tripped on the curb and fell.

An exhibit to Ruby's deposition is a rough sketch of the parking lot showing the freestanding lights and the street lights on the access roads. It is not clear from the exhibit

where Ruby tripped and fell in relation to the lights. In addition to the drawing, two pictures depicting the area where Ruby fell are also exhibits to Ruby's deposition. In the pictures, the parking lot asphalt, the curb and the sidewalk are of similar color and there is no paint on the curbwork to clearly delineate the step up, which may have been helpful at night in adverse weather conditions such as a downpour to see the curb.

Ruby alleges in her complaint that the area of the sidewalk where she fell did not have adequate lighting. The McNays cite a line of Kentucky cases dealing with manmade curbing or abutments for the proposition that the issue of adequate lighting is a jury question. The first case is Downing v. Drybrought, 249 S.W.2d 711 (Ky. 1952). In that case, the Downing court held that a 10 inch by 8 inch concrete strip in a parking lot, the purpose of which was to divide the parking lot into sections, may not have been dangerous of itself; but may have become dangerous or unsafe when considered in connection with the lighting conditions existing at the time of the trip and fall accident. See id. at 712. In the next case, Jones v. Winn-Dixie of Louisville, Inc., 458 S.W.2d 767 (Ky. 1970), the court held that a directed verdict in favor of Winn-Dixie was improper when lighting and other visibility factors were at issue in a trip and fall case occurring at night on the premises

of a Winn-Dixie store. The court reasoned in part, "In pedestrian fall-down cases arising out of defects in or obstructions on the walking surface the visibility factor is vital." Id. at 769. Lastly, in Cantrell v. Hardin Hosp. Mgmt. Corp., 459 S.W.2d 164 (Ky. 1970), the court followed Downing and Jones and held that summary judgment was inappropriate in a trip and fall case in which adequate lighting was at issue.

Returning to the facts of this case and following the reasoning of Downing in particular, the only evidence in the record to dispute Ruby's allegation of inadequate lighting is a sketch purporting to show the location of all the lights around the restaurant. However, "the record is completely silent as to whether these lights were sufficient to provide adequate illumination, whether they were in good condition, or even whether they were burning at the time of the accident." Id. at 712. Based on this state of the record, we do not believe that Shell's Seafood's right to judgment is shown with such clarity that there is no room left for controversy. In other words, the evidence is not dispositive that Shell's Seafood used ordinary care in lighting the parking lot so as to keep it in a reasonably safe condition. See id. We vacate the trial court's summary judgment as it pertains to Ruby McNay and remand for trial.

Having concluded that genuine issues of material fact precluded summary judgment in this case, we need not consider the McNay's additional arguments on appeal.

GUIDUGLI, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT.

BRIEF FOR APPELLANT:

C. Ed Massey
Erlanger, Kentucky

BRIEF FOR APPELLEE:

Douglas May
Martin & Bailey
Cincinnati, Ohio