RENDERED: March 25, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000580-MR

VERNON D. CURTIS, and
MICHELLE CURTIS — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 03-CI-005772

KIMBERLEY A. BECKER;
JAMES R. SHAW, D/B/A
RICK SHAW REALTORS; and
JOSEPH M. DAVIS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Vernon D. Curtis and Michelle Curtis appeal from a summary judgment of the Jefferson Circuit Court in favor of the appellees, pursuant to an action to recover for injuries Vernon sustained when he slipped and fell on a patch of snow-covered ice on a residential driveway. We affirm.

On January 26, 2003, Vernon Curtis (Mr. Curtis), along with his wife, Michelle Curtis (Mrs. Curtis) and their children, went to an advertised "open house" at 3110 Cromarty Way in Louisville, Kentucky, to inspect the house for possible purchase. The house was owned by appellee Kimberley A. Becker (now Kimberley Manney, but shall be referred to herein as Ms. Becker), and listed for sale with appellee Joseph Davis (Mr. Davis), a real estate agent who worked as an independent contractor for appellee Rick Shaw Realtors. Mr. Davis was present on behalf of Ms. Becker for the open house. Ms. Becker was not at home during the open house.

The Curtises arrived at the open house at approximately 2:00 p.m. The weather was cold and there was snow on the ground, and on the home's driveway, which had not been shoveled. Mr. Curtis parked his car along the street, perpendicular to the driveway. After viewing the home, Mr. Curtis, leaving the premises, walked down the driveway, at the end of which he slipped on a patch of snow-covered ice, thereby fracturing his ankle.

Mr. Curtis filed a complaint naming Ms. Becker, Mr. Davis, and James R. Shaw d/b/a Rick Shaw Realtors ("Shaw") as defendants, alleging negligence for failure to warn of or remedy the dangerous condition (the snow-covered ice). The complaint also included a claim by Michelle Curtis for loss of consortium.

On December 3, 2003, Ms. Becker moved for summary judgment, on grounds that (1) the snow-covered ice was an open and obvious, natural condition, and therefore she had no duty to remedy or warn; (2) that she could not be held liable as Mr. Curtis fell outside of her property line in a public right-of-way; and (3) because Curtis's claim fails, that Michelle Curtis cannot recover for loss of consortium as it is derivative of Mr. Curtis' claim. On January 13, 2004, Shaw and Mr. Davis moved for summary judgment citing the same grounds as Ms. Becker.

In an opinion and order entered February 26, 2004, the trial court granted the motions for summary judgment brought by Ms. Becker, Mr. Davis, and Shaw. The trial court found that, under the particular circumstances of this case, the condition of snow and underlying ice was a natural, open and obvious condition, and therefore, the appellees had no duty to remedy or warn. Finding summary judgment proper on this ground, the court found it unnecessary to address the argument that Mr. Curtis fell outside of Ms. Becker's property line. The court also found summary judgment proper as to Mrs. Curtis's claim, as her cause of action was derivative of Mr. Curtis's. This appeal followed.

Summary judgment should be cautiously applied and not used as a substitute for trial. Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991). 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 his favor and against the movant.'" Id. at 483, quoting Paintsville Hospital Company v. Rose, 683 S.W.2d 255, 256 (Ky. 1985). Our standard for reviewing 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).

The law regarding liability for injury due to natural outdoor hazards was defined by our Supreme Court in Standard Oil Co. v. Manis, 433 S.W.2d 856 (Ky. 1968). In Standard Oil, 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." Id., at 858 (emphasis original). In the present case, the patch of snow-covered ice which caused Mr. Curtis's fall was located in a "dip" at the end of the home's driveway, in the area where the driveway meets the street. Mr. Curtis contends that Ms. Becker knew, or, in the exercise of ordinary care, should have known about the dangerous condition, as she was aware that water tended to pool and freeze

over in the area where he fell. Ms. Becker testified in her deposition as follows:

> Q. Okay. Were you aware that water tended to pool at the bottom of your driveway towards the street?
>
> A. If we had a big rain, my driveway, like several others on that same street, they have a little bit of a dip, and there would be water that would stand there if there was a big rain.
>
> Q. Would there be – would it just be if there was a big rain?
>
> A. Yes.
>
> Q. What about when there's lots of snow and melting snow?
>
> A. I am sure that that's possible.
>
> Q. Okay. I mean, was it your experience to see –
>
> A. You know, I can't really remember, but it would make sense if there was snow there and then it melted that there would be – you know, if it melted, I guess, quickly enough that it couldn't be absorbed fast, it would probably be standing.
>
> Q. And you had noticed that – had you noticed that during your stay at that home?
>
> A. Possibly in previous years. Not this particular January. It was always covered.
>
> Q. What do you mean by that?
>
> A. I mean, there was always snow there, and it was so cold in January, the temperatures I don't think ever really got high enough for it to melt.

> Q. Okay. Do you ever – it do you remember ever telling Mister Davis that particular – I'm not going to call it a problem and that might be overstating it, but just to communicate the point about that particular problem with the property?
>
> A: I never perceived it as a problem. It never appeared that way to me, and I'm sure that I never mentioned it to him. I grew up with a driveway like that. I just thought all – it was just a little bit of a dip. I didn't think it was a big deal.
>
> . . . .
>
> Q. [I]n your experience as the owner of that home, had you ever seen or observed ice where that water is pooled?
>
> A. Oh, I'm sure I did. You know, during the course of the time that I lived there, it snowed and was freezing temperatures, so undoubtedly.
>
> Q. So that water that was – that would pool in that particular location of the driveway, you had noticed before would freeze over, again given the correct weather conditions?
>
> A. I'm sure that it did. I never paid specific attention to that one area, of course, because I had no reason to do so, but there were definitely times that I have to assume that if it was below freezing, you know, that that area may have had snow and ice.

Ms. Becker testified that, after Mr. Curtis's fall, she and Mr. Davis had a conversation in which they speculated that water may have pooled and frozen over. As to the amount of snow on the ground on the day at issue, Ms. Becker recalled the snow as being about one to two inches. Mrs. Curtis testified

that it was very cold, and agreed there was undisturbed snow on the driveway and sidewalks. Mr. Davis testified that he guessed there were "maybe a couple of inches" of snow on the ground, and that it was cold. Mr. Curtis could not recall how much snow there was. Ms. Becker testified that she did not shovel the driveway the day of the open house. Mr. Davis testified that he did not do anything to remove snow or ice on the premises either, although he was aware that Ms. Becker had a snow shovel in the garage. Mr. Curtis testified that he did not see the ice upon which he slipped, as it was covered with snow.

Mr. Curtis contends that summary judgment was improper, because genuine issues of material fact existed as to whether the dangerous condition was open and obvious. Mr. Curtis cites to Estep v. B.F. Saul Real Estate Investment Trust, 843 S.W.2d 911 (Ky.App. 1992) and Schreiner v. Humana, Inc., 625 S.W.2d 580 (Ky. 1981), in which cases issues of fact were found to exist as to whether ice, unseen by the plaintiffs, was an open and obvious condition. Estep involved a slip and fall on a sidewalk near a mall entrance. The previous day had been snowy and icy. The Esteps arrived at the mall at about 11:00 a.m., and the parking lot had been scraped. The sidewalks appeared to have been scraped as well, although the Esteps noticed a "thin skiff" of snow covering the sidewalk (there had been a light snowfall that morning). The Esteps walked across the mall's

parking lot and stepped over piled snow onto the sidewalk near the mall entrance. After taking a few steps, Mrs. Estep slipped and fell, sustaining injuries. The fall was attributed to ice on the sidewalk concealed under the snow. The trial court granted summary judgment for the defendants. On appeal, this court held summary judgment to be improper, concluding that genuine issues of fact existed relating to the parties knowledge of the ice. Estep, at 913-914.

Similarly, in Schreiner, the snow had been removed from a walkway leading to the entrance of an office building. The sidewalk "looked 'perfectly clear' to Mrs. Schreiner." Schreiner, at 580. However, when Mrs. Schreiner stepped onto the "cleared sidewalk", her foot slipped on a transparent layer of ice, causing her to fall and injure herself. There was evidence that the maintenance department had been advised of the glaze of ice prior to Mrs. Schreiner's fall. Citing Standard Oil, our Supreme Court held the trial court's grant of summary judgment to be improper, concluding that a genuine issue of fact existed as to whether Mrs. Schreiner's knowledge of the icy condition was in parity with that of the defendants. The Court went on to note that "whether a natural hazard like ice or snow is obvious depends upon the unique facts of each case." Schreiner, at 581.

Summary judgment was held to be proper, however, in PNC Bank, Kentucky, Inc. v. Green, 30 S.W.3d 185 (Ky. 2000), wherein the plaintiff, Green, slipped and fell on an obviously snowy and icy sidewalk. Green testified that she was aware of the bad weather conditions that day (snow and freezing rain), that earlier in the day she had to walk like she was "walking on eggs" to avoid falling, that she noticed the sidewalk at the PNC Bank was icy, and that there was no indication that any measures had been taken to clear the sidewalk. Id. at 187. As Green's own testimony dispelled any issue as to whether the risk was open and obvious, our Supreme Court concluded that PNC Bank was entitled to summary judgment.

Similarly, in Ashcraft v. Peoples Liberty Bank and Trust Co., Inc., 724 S.W.2d 228 (Ky.App. 1986), three days after a heavy snow, Ashcraft parked her car in the bank's snow covered parking lot. It was clearly visible to her that no attempt had been made to clear the lot of ice and snow. As she proceeded from her car to the bank, she slipped on the ice and snow. In concluding the hazard was as open and obvious to the invitee as to the owner, this court noted the undisputed testimony was that the hazard was created by natural elements, it was outside, exposed in broad daylight, and that it was obvious to Ms. Ashcraft that it was "slick all over." Ashcraft, at 229. "There was no duty on [appellees] to stay the elements or make

this walkway absolately [sic] safe. Nor was there a duty to warn [appellant] that the obvious natural conditions may have created a risk." Id., quoting Standard Oil, 433 S.W.2d at 859.

In the present case, we believe the trial court correctly found that the dangerous condition was natural, open and obvious. Standard Oil Co. v. Manis, 433 S.W.2d 856 (Ky. 1968). Unlike Estep and Schreiner, wherein it appeared to the plaintiffs that the sidewalks had been cleared, it is undisputed that the driveway upon which Mr. Curtis chose to walk was not shoveled. As in Ashcraft and PNC Bank, it is undisputed that it was daytime, and Mr. Curtis was fully aware that he was walking down an uncleared, snowy driveway on a cold day. Ice is a readily foreseeable companion for snow. See Estep, at 911. Nor is there a genuine issue of fact as to the parties knowledge of ice under the snow. Even though the homeowner was aware that at times, water would pool in the "dip" and freeze, there is nothing in the record to indicate that the owner knew of the existence of ice under the snow on this particular occasion. Therefore, summary judgment was proper.

Mr. Curtis additionally contends that, citing Wallingford v. Kroger Co., 761 S.W.2d 621 (Ky.App. 1988), even where the dangerous condition is open and obvious, the property owner is not always relieved of his duty of ordinary care. In Wallingford, the plaintiff, a deliveryman, slipped on a snowy,

icy ramp which the store required him to use. The Wallingford court stated that, while per Standard Oil v. Manis, the existence of obvious, outdoor hazards generally creates no duty upon the owner/occupier of the land, "a far different situation is presented where the invitee is compelled by his employment to use a particular path and entranceway, asks for assistance in making it safe and is refused, attempts to clear the path himself, proceeds cautiously, and is injured anyway." Wallingford, at 624. "Wallingford obviously had no other recourse but to proceed at his peril or risk losing his means of livelihood." Id. Wallingford further recognized an exception to the general rule exists where there is evidence of the owner/occupier's creation of an inherent danger. Id. at 625. In Wallingford, there was evidence that the ramp the store required the deliverymen to use was "dangerously steep". Id., at 624. As distinguished from Wallingford, in the present case, there is no evidence that the driveway itself was inherently dangerous, nor was Mr. Curtis compelled to proceed across the snowy driveway. Accordingly, the exceptions recognized in Wallingford are not applicable to the present case.

For the foregoing reasons, the summary judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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