

RENDERED: JANUARY 20, 2006; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-002368-MR

ALONZO BURTON

APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT  
HONORABLE LEWIS D. NICHOLLS, JUDGE  
ACTION NO. 02-CI-00643

OUR LADY OF BELLEFONTE HOSPITAL  
AND OUR LADY OF  
BELLEFONTE HOSPITAL FOUNDATION

APPELLEES

OPINION  
REVERSING AND REMANDING

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BEFORE: GUIDUGLI AND HENRY, JUDGES; POTTER, SENIOR JUDGE.<sup>1</sup>

GUIDUGLI, JUDGE: Alonzo Burton appeals from a summary judgment entered by the Greenup Circuit Court dismissing his premises liability and negligence action against Our Lady of Bellefonte Hospital and Our Lady of Bellefonte Hospital Foundation (hereinafter "Bellefonte"). Burton claimed that Bellefonte owed a duty of care to insure his physical safety, the breach of which resulted in him falling over a retaining wall causing him

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<sup>1</sup> Senior Judge John W. Potter, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

to suffer a broken neck and other serious injuries. The court found that Bellefonte did not owe a duty of care to Burton because he fell in an area not intended for pedestrian traffic. For the reasons stated below, we reverse and remand the summary judgment.

On December 30, 2001, Linda Felty transported her father, Alonzo Burton, to Our Lady of Bellefonte Hospital in Greenup County, Kentucky. The weather was inclement, and snow and ice were on the ground.

Felty parked her vehicle on a paved area next to a driveway leading to Bellefonte's emergency room. The area was conspicuously marked with "No Parking" signs and did not have a sidewalk. Adjacent to the area where Felty parked was a small embankment. After Burton exited the vehicle, he slipped and fell over a 13" high exposed section of retaining wall and fell approximately 4' to the ground below. Burton sustained serious injuries, including a broken neck and fractured hip. Neither Burton nor Felty know why Burton fell, though Felty surmises that ice or snow may have been on the ground and could have contributed to the fall.

Burton subsequently filed the instant action against Bellefonte in Greenup Circuit Court. The suit alleged that Bellefonte was negligent in failing to remove snow and ice, and that it breached a duty to the public by improperly designing

and maintaining the driveway and failing to install a railing on the retaining wall. Bellefonte filed a general denial.

After depositions and other proof were tendered, Bellefonte filed a motion for summary judgment arguing that no genuine issues of material fact existed and that it was entitled to a judgment as a matter of law. It claimed that it owed no duty to Burton because he knowingly exited the vehicle in a no parking area not intended for pedestrian traffic, and that as such, the action should be dismissed.

Upon considering the proof and the written arguments, the circuit court rendered a summary judgment in favor of Bellefonte on October 13, 2004. The court found it "indisputable that [Bellefonte] owed no duty to [Burton] to insure the safety of the no-parking zone as regards pedestrians or inclement weather." It went on to conclude that Bellefonte could not have reasonably foreseen that Burton would proceed "without exercising caution", and that it had no duty to warn invitees that the obvious natural conditions may have created risk. The court did not address Burton's contention that the retaining wall was negligently designed, or the claim that Bellefonte was negligent in failing to install a rail on top of the retaining wall as required by the Kentucky Building Code. In sum, it found that Bellefonte did not breach a duty to Burton, that no genuine issue of material fact existed, and that

as such, Bellefonte was entitled to a judgment as a matter of law. This appeal followed.

Burton now argues that the trial court erred in granting Bellefonte's motion for summary judgment. He maintains that genuine issues of material fact exist regarding whether Bellefonte owed a duty of care to him and whether that duty was met. He also argues that genuine issues of material fact exist as to whether Bellefonte was negligent in constructing a retaining wall without a safety rail. He seeks an order reversing the summary judgment and remanding the matter for further proceedings.

The complaint sets forth three causes of action. First is the claim that Bellefonte was negligent in removing ice and snow in the area where Burton fell. The second claim is that Bellefonte was negligent in designing and maintaining the driveway and adjacent retaining wall. And lastly, Burton contends that Bellefonte was negligent in failing to install a railing when it knew or should have known that patients and visitors would park in the area.

The circuit court disposed of the first issue, i.e., whether Bellefonte was negligent in its removal of ice and snow, by relying on Standard Oil v. Manis.<sup>2</sup> Standard Oil recognized the rule that "natural outdoor hazards which are as obvious to

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<sup>2</sup> 433 S.W.2d 856 (Ky. 1968).

an invitee as to the owner of the premises do not constitute unreasonable risks to the former which the landowner has a duty to remove or warn against."<sup>3</sup> The court found that Burton was aware of the snow and ice, that it was a natural condition, and that as such, Bellefonte had no duty to remove it.

The circuit court went on to find a case relied on by Burton, namely Estep v. B.F. Saul Real Estate,<sup>4</sup> to be distinguishable from the instant facts. Estep stands for the proposition that where a landowner undertakes snow removal, it must be done reasonably. The circuit court, in the matter at bar, concluded that Estep was distinguishable because Estep fell in an area where pedestrians could be expected to traverse, whereas Burton was not in an area where pedestrians could be expected to traverse.

This conclusion was erroneous, we believe, because testimony in the record reveals that invitees at Bellefonte regularly parked their vehicles on the paved area from which Burton fell, and that Bellefonte was aware of this. That is to say, the instant facts are not distinguishable from Estep because in each case the injury occurred in an area where the landowner could reasonably foresee pedestrian use.

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<sup>3</sup> Id. at 858.

<sup>4</sup> 843 S.W.2d 911 (Ky.App. 1992).

More important, a landowner has a duty to exercise reasonable care to protect an invitee against a dangerous condition, even when the invitee fails to protect himself against it.

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he:  
(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees;  
and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect them against the danger. (Emphasis added).<sup>5</sup>

In the matter at bar, one's first reaction on hearing the facts may be to conclude that no duty is owed to an invitee who voluntarily places himself in a no parking area. But, as noted in the Restatement (Second) of Torts, as adopted in Lanier, a duty of ordinary care is owed to an invitee even where the invitee fails to protect himself. Taken in light of the plethora of case law basing duty on foreseeability, and given that Burton's presence in the no parking area arguably was foreseeable by virtue of the fact that other invitees also regularly parked there, we must conclude that the trial court

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<sup>5</sup> Lanier v. Wal-Mart Stores, Inc., 99 S.W.3d 431, 433 (Ky. 2003) (quoting Restatement (Second) of Torts Section 332(3)).

erred on this issue. At a minimum, issues of fact and law exist sufficient to overcome Bellefonte's motion for summary judgment.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."<sup>6</sup> "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."<sup>7</sup> "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact."<sup>8</sup> Finally, "[t]he standard of review on appeal of a 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."<sup>9</sup>

When we view the record in a light most favorable to Burton and resolve all doubts in his favor, and for the above-stated reasons, the claim of negligent failure to remove ice and

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<sup>6</sup> CR 56.03.

<sup>7</sup> Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 480 (Ky. 1991).

<sup>8</sup> Id.

<sup>9</sup> Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996).

snow is sufficient to overcome Bellefonte's motion for summary judgment.

Similarly, it is abundantly clear that Burton is entitled to further adjudication of his claims relating to the alleged negligent construction of the wall and negligent failure to install a railing. Though these claims are clearly stated in the complaint, they were not addressed by the circuit court in the summary judgment other than in the court's conclusion that "the absence of the rail was not the cause of this accident . . . ." This cursory dismissal does not comport with the requirements of Steelvest.

For the foregoing reasons, we reverse the summary judgment of the Greenup Circuit Court and remand the matter for further proceedings.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR  
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BRIEF AND ORAL ARGUMENT FOR  
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