

RENDERED: DECEMBER 2, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-CA-000669-MR

MARY ELIZABETH ENGLER

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 03-CI-00182

ALBERTA DAVIS AND MARSHALL DAVIS

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: DYCHE AND SCHRODER, JUDGES; ROSENBLUM, SENIOR JUDGE.¹

DYCHE, JUDGE: 78-year-old Mary Engler fell, sustaining physical injuries, while she was a patron/business invitee of Books on Broadway in Paducah. She had entered the store, stepped up one step to a landing where she looked at books on shelves for about five minutes, and fell while descending the one step to the

¹ Senior Status Judge Paul W. Rosenblum sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

original elevation. She filed this action to recover money damages to compensate her for those injuries. The trial court granted a summary judgment (Ky. R. Civ. Pro. 56) to Alberta and Marshall Davis, owners of the building, holding that the step was an open and obvious hazard, and that the Davises should not have anticipated harm to Engler. She now appeals.

It is unquestioned, at least for the purposes of the motion below, that: the step was uneven in elevation, its rise being greater in the middle than on the ends; Engler had ascended the step approximately five minutes before she fell down it; the step was covered with carpet the same color as the carpet on the rest of the floor above and below, with no markings delineating the step; and there were no warnings on or around the step.

We acknowledge that the law of slip-and-fall cases has undergone a sea change in the last few years, and that in such cases the burden of proof has changed. Lanier v. Wal-Mart Stores, Inc., 99 S.W.3d 431 (Ky. 2003). This is not, however, a slip-and-fall case, where the plaintiff slipped on a foreign substance and the question is how long the substance had been on the floor. In this case the issue is whether the step's condition constituted a hazardous condition (were the premises reasonably safe?), and, if so, whether the hazard was open and obvious to Engler, or whether the Davises had a duty to warn

invitees of the step and its danger to them. Johnson v. Lone Star Steakhouse & Saloon of Kentucky, Inc., 997 S.W.2d 490 (Ky. App. 1999). The trial court implicitly found that the step was dangerous, and explicitly that it was open and obvious to Engler, who argues that the latter finding was error. We agree.

We cannot say, as a matter of law, that the hazard was open and obvious to Engler, despite the fact that she had ascended the step a short time earlier. The Davises acknowledge that the step is uneven in its elevation side-to-side. Whether that unevenness was not apparent and is what made Engler fall, or her fall was caused by her own inattentiveness to the open and obvious hazard, are jury questions.

The judgment of the McCracken Circuit Court is reversed, and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Cathy Kelley
Lexington, KY

BRIEF FOR APPELLEES:

Serietta G. Jagers
Princeton, KY