

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000979-MR

DESIREE WILLMAN

APPELLANT

v. APPEAL FROM JEFERSON CIRCUIT COURT
HONORABLE MARTIN F. McDONALD, JUDGE
ACTION NO. 05-CI-002210

AZALEA OF KENTUCKY, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, HOWARD, AND THOMPSON, JUDGES.

DIXON, JUDGE: Desiree Willman appeals from the summary judgment of the Jefferson Circuit Court dismissing her negligence action against Azalea of Kentucky, Inc. (hereinafter "Azalea"), for damages resulting from her slip on stairs located outside of the back entrance to the restaurant. Willman claims that the trial court improperly dismissed her action, arguing that even though the danger presented by the allegedly defective stairs was open and obvious, she was still entitled to recovery. Finding no genuine issue of

material fact, we agree that Azalea was entitled to judgment as a matter of law, and affirm.

Where summary judgment has been granted, all facts must be viewed in a light most favorable to the non-moving party. *See, Ross v. Powell*, 206 S.W.3d 327, 330 (Ky. 2006). Therefore, we will accept, for the purpose of our review, Willman's statement of facts as to the incident giving rise to her claims against Azalea.

On May 24, 2004, Willman drove to Azalea's restaurant for lunch. While walking toward the back entrance, she stumbled on steps leading to the restaurant, and twisted her ankle. Willman testified by deposition, that the steps looked somewhat “crumbly” and “fragile.” By her own admission, Willman clearly observed the condition of the steps and was proceeding very carefully down them when her ankle “rolled” and “popped” very loudly. Apparently, hand rails were available at each end of the steps, but Willman did not use them. She was then escorted into the restaurant and given a bag of ice to reduce the swelling. Thereafter, Willman attended a business meeting before eventually proceeding to the local hospital emergency room for examination.

The sole issue on appeal relates to what duty, if any, Azalea owed to Willman for the condition of the steps located outside the restaurant. Willman argues that Azalea, as possessor of the land may be liable even where the danger is known or obvious. She cites our Supreme Court's decision in *Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364 (Ky. 2005), for this proposition, contending that the case holds that a possessor of land is not relieved of their duty of reasonable care simply

because the danger is open and obvious. She claims that the issue is whether Azalea should have anticipated the harm, obvious or not. We, however, find Willman's reliance upon this opinion misplaced.

In *Horne, supra*, the plaintiff tripped and fell on a parking block while on Precision Auto's car lot. The block, rather than open and obvious, was obscured by a parked car. Horne was injured when he tripped and fell over the block while looking at the car parked up against it. Precision argued that the parking block was open and obvious, and therefore, it was not liable to Horne. The Supreme Court found however, that “the parking barrier on which [Horne] tripped and fell was not 'known or obvious to' [him]. In fact, its presence was partially concealed from him by the manner in which a[n] . . . employee had parked the [car].” *Id.* at 370.

Moreover, Justice Cooper, in *Horne*, set out the only three categories of premises liability law recognized in Kentucky. None of these would impose liability on Azalea under these circumstances. The first category deals with natural outdoor hazards such as snow and ice on the premises. The second category involves foreign substances creating hazards. Clearly, neither of these categories applies to these sets of facts. Finally, the third category involves hazards caused by the owner. Our Supreme Court declared in *Horne*, “[i]f the hazard is 'known or obvious to' the invitee, the owner has no duty to warn or protect the invitee against it.” *Id.* at 368.

Willman argues that because the Court in *Horne* recited the *Restatement 2d of Torts* § 343A, which contains the additional statement, “*whose danger is known or*

obvious to [the invitee], unless the possessor should anticipate the harm despite such knowledge or obviousness,” that Kentucky has now adopted this additional duty. In *Horne*, the Court did additionally determine under this section of the *Restatement*, reversal was required. The Court specifically noted that, “because [Precision Auto] would expect that a customer in the process of examining its wares while they were being touted by one of its sales staff 'may be distracted, so that he will not discover what is obvious, or will forget what he has discovered',” Precision Auto could be liable. *Id.* at 370. These facts are much different than Willman's. Nothing prevented her from clearly observing and appreciating the danger the steps presented. To the contrary, Willman's situation more closely resembles the facts of *Johnson v. Lone Star Steakhouse and Saloon of Kentucky, Inc.*, 997 S.W.2d 490 (Ky. App. 1999). In fact, *Horne* distinguishes the *Lone Star* decision, putting forth the following analysis,

[T]he plaintiff was a customer in a restaurant that provided peanuts to its customers and permitted them to toss empty shells onto the floor. Johnson was in the restaurant for more than two hours and admitted that she was aware of the peanut shells on the floor and considered them a hazard. Upon attempting to exit the restaurant after finishing her meal, she slipped on the peanut shells and fell . . . the Court of Appeals held that the owner of the premises owed no duty to the plaintiff because the hazard was both known and obvious to her In such cases, the plaintiff's own admission that the hazard was both known and obvious to him or her pertains not only to the issue of contributory fault, but also to whether the hazard was so known and obvious as to obviate any duty on the part of the owner to warn or protect the invitee against the hazard. (Citations omitted).

Id. at 369. Clearly, Willman's situation is much more akin to that of *Lone Star* than *Horne*. Just as the plaintiff in *Lone Star*, Willman has admitted that the hazard here was open and obvious. There was nothing to distract her from observing the open and obvious hazard, and she did in fact, observe and appreciate the danger posed. As such, Azalea owed no duty to warn or protect her from any hazard created by the condition of the steps.

Finally, Willman argues, that Kentucky, as a comparative fault state, requires a jury to allocate fault and therefore, summary judgment is inappropriate. As Azalea aptly notes, because the hazard here was open and obvious, Azalea owed **no duty** to Willman, consequently, there is no fault on Azalea's part for a jury to “allocate.” Thus, comparative fault has no bearing under these facts.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

John M. Longmeyer
Louisville, Kentucky

BRIEF FOR APPELLEE:

Robert E. Stopher
Michael S. Jackson
Louisville, Kentucky