RENDERED: OCTOBER 12, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001485-MR

GARY S. LOGSDON — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE A. WILSON, JUDGE
ACTION NO. 05-CI-01025

PAJ, A GENERAL PARTNERSHIP; PETER C. GEORGETON; SALLY ROSE GEORGETON; JOHN C. GEORGETON; ANN C. GEORGETON; ALBERT JONES; CAROLYN JONES; E.W. JAMES, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND KELLER, JUDGES; GRAVES,[1] SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Gary S. Logsdon appeals from an order of the Warren Circuit Court awarding summary judgment to the appellees upon his claims of negligence. Logsdon alleges that the appellees negligently caused his outdoor slip and

[1] Senior Judge J. William Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

fall accident by failing to adequately maintain their shopping center parking lot following a snowstorm. Because this case is not distinguishable from the *Standard Oil Co. v. Manis*, 433 S.W.2d 856 (Ky. 1968) line of cases, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellees Peter C. Georgeton, Sally Rose Georgeton, John C. Georgeton, Ann C. Georgeton, Albert Jones, and Carolyn Jones own PAJ, a general partnership. We refer to the aforementioned appellees herein collectively as PAJ. PAJ owns and operates a shopping center in Bowling Green located on Scottsville Road. One of the tenants in the shopping center is the grocery store chain, appellee E.W. James, Inc.

During the night of December 22-23, 2004, the Bowling Green area received precipitation, which included snow. PAJ had a contract with Moore's Lawn Care to provide snow removal service, and at about 11:00 p.m. on the evening of the 22nd it made efforts to remove snow from the shopping center parking lot and roadway. It appears that those efforts consisted of plowing and salting, and that no other efforts to clear the parking lot were made subsequent to that time. The whether had cleared by the afternoon of the 23rd.

At approximately 7:00 p.m. on the evening of December 23, 2004, Logsdon and his wife were on a shopping trip. The roads were clear and the parking lots the Logsdons had negotiated during their shopping trip had presented no difficulties. As their last stop, planning to purchase a few items at E.W. James, the Logsdons pulled into the PAJ shopping center. It was still daylight but becoming dark and was overcast.

Logsdon, who was driving, observed that the parking lot itself had been poorly cleared. Logsdon observed that the parking lot still had ice and snow on it, and that there was a fair amount of accumulated ice in the parking lot.

Because the area was better cleared and was more attractive from a safety standpoint, Logsdon parked his vehicle in the firelane (a no parking area) immediately adjacent to the walkway in front of the store. The Logsdons' Chevrolet Suburban was parked such that the driver's side faced away from the store, and Logsdon walked around the rear of the Suburban to enter the store. Logsdon testified that his pathway had a modest amount of dampness to it, but was very stable to the foot. He entered without incident, and remained in the store for approximately 15 minutes.

Logsdon speculates that while he was in the store it became dark and colder. Upon exiting the store he traversed the same path he had used upon entering. As Logsdon reached for the door handle, his left foot slipped completely from under him, placing all of his weight on his right leg. His right leg crumpled and suffered multiple fractures and injuries. Logsdon suffered a right distal fibula fracture, a posterior mallelor fracture, a bimalleolar right ankle fracture, and a deltoid ligament tear. The injuries required surgery and the placement of hardware to aid in the healing of the fractures.

Logsdon described the ground in the area where he fell immediately after the fall as “not hard, but soft, icy, slippery dampness . . . . it was the sludge that had tightened up. When I had gotten out of the truck it was wet, melted . . . from either chemical engagement or use, that being either salt, kitty litter or anything . . . . And when

I came back and was lying on the ground, that dampness had taken the form of crystal and particle, not a conglomerate, but just -- you know, ten minutes later, it would have been completely frozen tight, but it was just mushy . . . it wasn't frozen when I went in . . . but it had begun to freeze [when I came out]."[2]

On June 24, 2005, Logsdon failed a Complaint in Warren Circuit Court. The Complaint alleged that the appellees[3] were negligent in causing his December 23, 2004, slip and fall in that they failed to maintain their business premises in a reasonably safe condition; and/or failed to warn him of the unreasonably safe conditions; negligently undertook snow and ice removal activities; and failed to comply with City of Bowling Green Ordinances requiring owners and occupiers to keep sidewalks and other areas adjacent to their premises free from ice and snow.

In due course, and after substantial discovery, the defendants filed their respective motions for summary judgment. On May 8, 2006, the circuit court entered an order granting all defendants summary judgment. This appeal followed.

STANDARD OF REVEIW

The standard of review on appeal when a trial court grants a motion for 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

[2] In his brief Logsdon refers to the area where he slipped as having formed a layer of black ice. However, in his sworn deposition Logsdon describes the accident area as stated above, and, in fact, disclaims that black ice was involved in the accident. In our review of the evidence, we have relied upon Logsdon's sworn deposition.

[3] The Complaint also named E.W. James' predecessor, the Winn Dixie Charlotte, Inc., grocery chain, as a defendant. The claim against Winn Dixie was eventually dismissed

matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996); Kentucky Rules of Civil Procedure (CR) 56.03. "The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky.App. 2001), citing *Steelvest v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480-82 (Ky. 1991).

The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.' "*Lewis*, 56 S.W.3d at 436, citing *Steelvest*, 807 S.W.2d at 482. The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." *Steelvest*, 807 S.W.2d at 480. The Supreme Court of Kentucky has held that the word "impossible," as set forth in the standard for summary judgment, is meant to be "used in a practical sense, not in an absolute sense." *Lewis*, 56 S.W.3d at 436. "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo." *Scifres*, *supra*.

DISCUSSION

Before us, Logsdon contends that the circuit court erred in granting the defendants summary judgment upon his negligence claims.

A negligence action requires proof of: (1) a duty on the part of the defendant; (2) a breach of that duty; (3) a consequent injury, which consists of actual injury or harm; and (4) legal causation linking the defendant's breach with the plaintiff's injury. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 88-89 (Ky. 2003). "[A] premises owner has a duty to conduct his activities in such a way as not to expose others to what in the circumstances would be an unreasonable risk of harm." *Baker v. McIntosh*, 132 S.W.3d 230, 232 (Ky. App.2004), citing *Perry v. Williamson*, 824 S.W.2d 869 (Ky. 1992).

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 as obvious to 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." *Id.*, at 858. This standard was reaffirmed in the most recent significant published case in this area, *PNC Bank v. Green*, 30 S.W.3d 185 (Ky. 2000). However, "whether a natural hazard like ice or snow is obvious depends upon the unique facts of each case." *Schreiner v. Humana, Inc.,* 625 S.W.2d 580, 581 (Ky. 1981).

Applying the foregoing to the present circumstances, the hazard faced by Logsdon - snow, ice, and freezing slush - was created by natural elements. It was

outside, and while it was not full daylight, Logsdon makes no claim that deficient lighting contributed to his fall. Being a frequent shopper at the store, Logsdon was familiar with the parking lot area and had traversed the same path only 15 minutes prior to his slip on his way into the store. He was fully aware of the accumulation of ice and snow in the area. Upon entering the store he realized that the area surrounding his vehicle was damp and slushy. Upon exiting the store he noticed that it had become colder. Therefore, that there might be additional freezing or refreezing was a distinct possibility. Under these circumstances we are of the opinion that the defendants could not have reasonably foreseen that Logsdon would proceed without exercising commensurate caution. *Standard Oil* at 859.

There was no duty on the defendants to stay the elements or make its parking lot absolutely safe. Nor was there a duty to warn Logsdon that the obvious natural conditions may have created a risk. If the firelane area was damp and slushy, and the temperatures were falling, whatever hazards those conditions constituted was as apparent to Logsdon as it was to the defendants. We are unable to find a breach of duty by the latter. *Id; see also Corbin Motor Lodge v. Combs,* 740 S.W.2d 944 (Ky. 1987).

In opposition to summary judgment, Logsdon relies upon upon *Estep v. B.F. Saul Real Estate Trust*, 843 S.W.2d 911 (Ky.App. 1992). We acknowledge that the *Estep* decision reiterates the well-known rule that a duty voluntarily assumed cannot be carelessly undertaken without incurring liability therefore. *Id.* at 914; *see also Louisville Cooperage Co. v. Lawrence*, 313 Ky. 75, 230 S.W.2d 103 (1950).

In *Estep*, a store patron was injured when she slipped and fell on a sidewalk near the entrance to McAlpins at the Lexington Mall. Even though the plaintiff in *Estep* was aware of the inclement weather conditions present at the time, she observed that the parking lot had been cleared of snow when she arrived at the shopping mall. The plaintiff then noted that the sidewalk had been cleared as well, although she observed a thin layer of snow thereon. After taking several steps, she slipped and fell on ice that was concealed underneath the snow. In reversing the trial court's grant of summary judgment in favor of the defendants, a panel of this Court found that Estep was not aware of the transparent layer of ice on the seemingly cleared sidewalk until she stepped upon it, despite her knowledge of the generally icy and snowy weather conditions that had been occurring. *Estep* at 913. Accordingly, this Court found that genuine issues of material fact existed concerning the obviousness of the hazard, thereby precluding summary judgment.

Hence, under *Estep*, a business owner is subject to liability upon undertaking measures that, in fact, heighten or conceal the nature of the dangerous condition. However, in the matter before us, nothing that the defendants did made the natural hazard any less obvious or increased the likelihood that Logsdon would slip and fall. As such, Logsdon's reliance upon *Estep* is misplaced.

CONCLUSION

For the foregoing reasons the judgment of the Warren Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kurt A. Maier
David W. Anderson
Bowling Green, Kentucky

BRIEF FOR APPELLEE E.W. JAMES, INC:

Emily Faith
Louisville, Kentucky

BRIEF FOR APPELLEE PAJ, A GENERAL PARTNERSHIP; PETER C. GEORGETON; SALLY ROSE GEORGETON; JOHN C. GEORGETON; ANN C. GEORGETON; ALBERT JONES; AND CAROLYN JONES:

Bruce A. Hunter
Cincinnati, Ohio