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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000331-MR

SHARON SCHROADER; ROBERT SCHROADER — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULZ GIBSON, JUDGE
ACTION NO. 05-CI-010602

BRE/HOMESTEAD PORTFOLIO, LLC — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

KELLER, JUDGE: Sharon Schroader (Mrs. Schroader) and her husband appeal from the Jefferson Circuit Court's summary judgment in favor of BRE/Homestead Portfolio, LLC (Homestead). Mrs. Schroader, who suffered personal injury when she slipped and fell in Homestead's parking lot, argues that the circuit court improperly decided issues of fact in its order granting Homestead's motion for summary judgment. Homestead argues that it had no duty to Mrs. Schroader because the alleged dangerous conditions in the parking lot were open and obvious. For the reasons set forth below, we reverse and remand.

FACTS

Mrs. Schroader works as an independent contractor for Forever Sharp, demonstrating and selling cutlery at stores such as Sam's Club, Wal-Mart, Minniard's, K-Mart, and Value City. As part of her job, Mrs. Schroader travels throughout the Midwest and to the East Coast. In mid to late December of 2004, Mrs. Schroader traveled to Louisville to demonstrate and sell her products at a local Sam's Club in the weeks prior to and following Christmas. While in Louisville, Mrs. Schroader stayed at the Homestead Extended Stay Hotel located near the Sam's Club where she was working.

Two or three days before Christmas, a winter storm dumped three to four inches of snow and ice on the Louisville area. Following the storm, a truck cleared the snow from the Homestead parking lot; however, a sheet of ice remained on the surface of the parking lot. Because Mrs. Schroader had been unable to move her car the day after the storm, Homestead personnel transported her to and from the Sam's Club on several occasions. On December 26, Homestead was short-staffed and there was no one available to transport Mrs. Schroader. Therefore, on the advice of the desk clerk, Mrs. Schroader decided to try to drive herself. While carefully walking across the ice-covered parking lot, Mrs. Schroader slipped and fell, injuring her shoulder, elbow, and knee. Mrs. Schroader admitted that she knew of the icy conditions and that was why she exercised a great deal of care while walking to her car. After getting up, Mrs. Schroader returned to the Homestead lobby and reported her fall to the front desk clerk. The clerk advised Mrs. Schroader that at least one other person had fallen on the parking lot. Furthermore, the

clerk told Mrs. Schroader that management had been asked on several occasions to remove the ice from the parking lot, but nothing had been done.

In December of 2005, Mrs. Schroader and her husband filed suit against Homestead, alleging that Mrs. Schroader had fallen as a result of Homestead's negligence in failing to warn Mrs. Schroader of the hazards presented by the snow and ice, in failing to restrict slippery areas, in failing to provide a safe means of egress, and in failing to properly remove snow and ice from the parking lot. Mr. Schroader asserted a loss of consortium claim as a result of his wife's injuries.

Following Mrs. Schroader's deposition, Homestead filed a motion for summary judgment asserting that, since the slippery conditions were open and obvious to Mrs. Schroader, Homestead owed no duty to warn or to protect Mrs. Schroader. In her response, Mrs. Schroader argued that, because Homestead was a long-term stay hotel, she should be deemed a tenant rather than an invitee. As a tenant, Mrs. Schroader had a reasonable right to transgress the icy parking lot to get to her car and the reasonableness of Mrs. Schroader's actions created an issue of fact for the jury. In the alternative, Mrs. Schroader argued that she was an invitee and Homestead owed her the duty to refrain from increasing or concealing an obvious hazardous condition. According to Mrs. Schroader, whether Homestead's removal of the snow and failure to remove the ice amounted to a violation of its duty created an issue of fact for the jury.

The circuit court disposed of Mrs. Schroader's landlord-tenant argument noting that KRS 385.535(4) excludes transient occupancy in a hotel from the Landlord

and Tenant Act. The circuit court then analyzed Mrs. Schroader's claim under relevant premises liability law and found that the hazardous condition of the parking lot was open and obvious to Mrs. Schroader and that Homestead's actions did not escalate or conceal that hazardous condition. Therefore, the circuit court found that Homestead was entitled to judgment as a matter of law and dismissed the Schroaders' claims. It is from this order that the Schroaders appeal.

STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). Summary judgment is only proper when "it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc., v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). We note that in *Steelvest* the word "'impossible' is used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992). In ruling on a motion for summary judgment, the Court is required to construe the record "in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor." *Steelvest,* 807 S.W.2d at 480. With the preceding standards in mind, we must determine whether the trial court properly found that the Schroaders could not have presented any evidence at trial warranting a judgment in their favor.

ANALYSIS

We begin our analysis by noting that the Schroaders are not arguing before us that Mrs. Schroader was a tenant and that the Landlord and Tenant Act should apply. Therefore, we will not address that issue.

Taking it as given that Mrs. Schroader was an invitee, we must look to the law of premises liability to determine what duty Homestead owed to Mrs. Schroader. We must then determine whether Mrs. Schroader could have produced any evidence at trial that Homestead had breached that duty.

The owner of property owes an invitee "a general duty to exercise ordinary care to keep the premises in a reasonably safe condition and warn invitees of dangers that are latent, unknown or not obvious." *Lewis v. B & R Corporation*, 56 S.W.3d 432, 438 (Ky.App. 2001). "The occupier is not an insurer of the safety of invitees, and his duty is only to exercise reasonable care for their protection." *Bartley v. Educational Training Systems, Inc.*, 134 S.W.3d 612, 615 (Ky. 2004). "[N]atural 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 landlord has a duty to remove or warn against." *PNC Bank, Kentucky, Inc. v. Green*, 30 S.W.3d 185, 186 (Ky. 2000), *citing Standard Oil Company v. Manis*, 433 S.W.2d 856, 858 (Ky. 1968). While a business owner has no duty to remove obvious natural outdoor hazards, if a business owner "undertakes reasonably prudent measures to increase the safety of the premises" those measures must not "escalate or conceal the nature of the hazard" or liability may attach. *See PNC Bank*, 30 S.W.3d at

187-88 and *Estep v. B.F. Saul Real Estate Inv. Trust*, 843 S.W.2d 911, 914 (Ky.App. 1992).

Applying the above to the Schroaders' case, we must reverse the circuit court's decision. Homestead relies on *PNC Bank, Kentucky, Inc. v. Green* to support its position that it owed no duty to Mrs. Schroader. However, *PNC Bank* is distinguishable on its facts. In *PNC Bank*, wintry precipitation had been falling throughout the day. Bank employees had, at various times, put some type of deicer on the sidewalk in front of the bank. Approximately one and a half hours after the deicer had been applied, Green slipped and fell on ice that had accumulated in the interim. The Supreme Court of Kentucky held that "given the fact that it was intermittently snowing and sleeting that day, it would have been virtually impossible for bank employees to have maintained a constant watch over the condition of the sidewalk. More importantly, nothing that PNC Bank did made the natural hazard any less obvious or increased the likelihood that Green would slip and fall." *PNC Bank,* 30 S.W.3d at 187-88.

Unlike in *PNC Bank*, precipitation was not actively falling when Mrs. Schroader slipped and fell. In fact, it had been two or three days since any precipitation had fallen and Homestead had received several complaints from an employee about the slippery conditions. Furthermore, the step PNC Bank took to alleviate the situation, applying deicer, did reduce the danger, albeit only temporarily. However, the step Homestead took, removing the snow but leaving the ice, may have increased rather than decreased the danger and, "there's the rub."[1]

[1] W. Shakespeare, *Hamlet*, Act III, Scene 1.

Homestead did not have any duty to remove the snow and ice, which were obvious natural hazards. However, once it undertook to clear the parking lot, Homestead had the duty to do so reasonably so as not to escalate the hazard associated with the snow and ice. In determining whether Homestead breached its duty, the questions are: (1) whether Homestead acted reasonably when it had the snow removed but did nothing to remove the underlying ice, particularly in the face of several complaints from its own employee; and (2) whether the removal of the snow, while leaving the ice, acted to escalate the nature of the hazard. As this Court noted in *Estep*, the question of whether Homestead "acted reasonably is a classic jury question, which precludes summary judgment." 843 S.W.2d at 914 -915. Therefore, we must reverse the circuit court and remand this matter for trial.

CONCLUSION

For the foregoing reasons, we hold that the Schroaders did present issues of fact and summary judgment was not appropriate. Therefore, we reverse and remand to the Jefferson Circuit Court.

ALL CONCUR.

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