KENTUCKY SUPREME COURT
NO. 2010-SC-0098-D
(2009-CA-0264)

TONYA STAPLETON — APPELLANT

VS. APPEAL FROM JOHNSON CIRCUIT COURT
ACTION NO. 09-CI-00185

CITIZENS NATIONAL CORPORATION, ET AL — APPELLEE

APPELLANT'S BRIEF

Comes now the Appellants, by counsel, and pursuant to Kentucky Rule of Civil Procedure 76.12, hereby submits the following brief in support of their appeal from the Summary Judgment entered by the Johnson Circuit Court on January 20, 2009.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was mailed, postage prepaid to: Johnson Circuit Court Clerk, Johnson County Judicial Center, Suite 109, 908 3rd Street, Paintsville, Kentucky 41240; Hon. Johnathan D. Webb, Hon. Susan L. Maines, Casey, Bailey & Maines, 3151 Beaumont Centre Circle, Suite 200, Lexington, Kentucky 40513; Hon. John David Preston, Judge, Johnson Circuit Court, Johnson County Judicial Center, Suite 217, 908 3rd Street, Paintsville, Kentucky 41240 and ten copies to the Kentucky Supreme Court, 700 Capital Avenue, #209, Frankfort, Kentucky 40601 on the 4th day of January, 2010.

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INTRODUCTION

This is a case concerning a slip and fall injury sustained in the parking area of Citizen's National Bank, wherein summary judgment was entered by the Circuit Court. The parties to his action have placed arguments before the Court as to whether a business owner owes his invitees the duty and/or obligation to make their premises safe from any hazards and/or unsafe environments to avoid harm to their business invitees.

ORAL ARGUMENT

The Appellant does not wish to present this case for oral argument. This case has been presented for oral argument with Johnson Circuit Court, and briefs have previously been submitted with all applicable cases and case laws prior to the appeal of the Summary Judgment entered by the Circuit Court.

STATEMENT OF POINTS AND AUTHORITIES

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BRIEF STATEMENT OF THE CASE

Tonya Stapleton was a business invitee on the premises of Citizens National Bank (hereinafter Bank) in Paintsville, Kentucky on January 30, 2008. Tonya went to the Bank with her mother, Lois Bowling. Tonya and her mother went to the Bank and conducted business. Upon exiting the bank, Appellant has alleged that she slipped and fell on some ice located on the blacktop while getting into the passenger side of her mother's car. The ice was located on the passenger side of the car and was partially under the car. Ms. Stapleton filed this cause of action against the Appellee seeking damages for injuries, that included a broken coccyx bone.

ARGUMENT

Appellee is not entitled to summary judgment as several genuine issues of material fact exist that are disputed. Appellee owed to Appellant, a business invitee, the duty to warn or make their premises safe of dangerous conditions and the ice on the blacktop was not "open and obvious" to the Appellant to the extent that Appellee should not be entitled to summary judgment.

A. Open and Obvious Argument:

Appellant was a business invitee upon the premises of the Appellee, Citizens National Bank.

The Kentucky Supreme Court has held that an invitee must prove that he or she has had an encounter with a foreign substance or other dangerous condition on the premises, that said encounter was a substantial factor in causing the accident and the invitee's injuries, and by reason of the presence of

the substance or condition, the premises were not in a reasonably safe condition for the use of invitees and such proof creates a rebuttable presumption sufficient to avoid summary judgment or directed verdict and the burden of proving an absence of negligence or lack of reasonable care sifts to the owner of the premises. Martin vs. Mekanhart Corporation, Ky., 113 S.W. 3d 95, 97 (2003), See also, Lanier vs. Wal-Mart Stores, Inc., Ky., 99 S.W.3d 431 (2003).

Counsel realizes, as appellee has previously stated, that an "open and obvious" defense exists that would provide Appellee some immunity for nature outdoor hazards that are as obvious to the Appellant as the Appellee. Standard Oil Company v. Manix, Ky., 433 S.W.2d 856 (1968). It is the position of the Appellant that the ice that caused her fall was not open and obvious and at the least, genuine issues of material fact exist that would prohibit dismissal of her claim based on the above defense.

In addition, there has been a recent case that was brought before the Kentucky Supreme Court directly addressing the "Open and Obvious Doctrine". The case Kentucky River Medical Center vs. McIntosh, ____.S.W.3d ____, 2010, WL 3374239 (Ky. 2010), points out that, "Under the Restatement (Second) view, in such cases the land possessor may still owe a duty of reasonable care, which may require him to "take other reasonable steps to protect [the invitee] against the known or obvious condition". The Supreme Court of Mississippi in the case of Tharp v. Bunge Corp., 651 So.2d 20, 25 (Miss. 1954) directly approached this matter by saying, "The party in the best position to eliminate a dangerous condition should be burdened with that responsibility. If a dangerous condition is

obvious to the plaintiff, then surely it is obvious to the defendant as well. The defendant, accordingly, should alleviate the danger."

Since the last court hearing, Appellant's counsel has had the opportunity to take depositions of several employees/officers of the Appellant Bank. The assistant vice president and branch manager of the Bank, Judy Frazier, testified by deposition. Ms. Frazier took photographs of the area of Appellant's fall and she interviewed and prepared a written statement regarding the events of January 30, 2008. (Judy Frazier Deposition, pp. 8, 9, Exhibit A). When Ms. Frazier was asked about the area of the fall, she stated the following:

Q. 39 Okay. Was the blacktop wet?

A Yeah.

Q 40. Was there ice in some of the wet spots?

A Well, you really couldn't tell whether it was just wet, ice or dark spots.

(Judy Frazier Deposition, pp. 10, 11)

Defense counsel for the Bank has asked Tonya Stapleton about the area and has shown her photographs of the area of her fall in the parking lot. Tonya was asked whether there was . . . . .either a wet spot or an icy spot in the stall, just from the picture? Ms. Stapleton simply answered, "Yes." (Tonya Stapleton Deposition, Exhibit B, pp 33, 34, emphasis added)

The undersigned counsel would ask the court to look at the photographs that were taken at the scene of the accident. Common sense and a plain view of the area of the fall shows that the answer given by Bank employee, Judy Frazier,

was accurate in that it is impossible to tell whether the area of Appellant's fall was on a wet, ice, or a dark spot on the blacktop.

It is the position of the Appellant that under any scenario that the ice on the blacktop helped her to fall was not an open and obvious condition that was clearly visible to her as she was entering a motor vehicle. Further, if the assistant vice president of the Bank could not tell what the substance was after immediately inspecting the scene of Appellant's fall, then it would be unfair to the Appellant to dismiss her claim based upon the alleged open and obvious nature of the icy area of the parking lot. Regardless, a question of fact is disputed and exists, regarding whether the ice in this case (natural outdoor hazard) was as obvious to the Appellant as the landowner.

The basic holding of Appellee's cited cases is 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. Standard Oil Company v. Manis, Ky. 433 S.W.2d 856 (1968). This position has been distinguished by Kentucky Courts. The Kentucky Court of Appeals has held that whether natural hazard like ice and snow is obvious depends on the unique facts of each case. Estep vs. B.F. Saul Real Estate Investment Trust et al, Ky. 843 S.W.2d 911, 913 (1992), quoting Schreiner vs. Humana, Inc., Ky., 625 S.W.2d 580, 581 (1982). The Court of Appeals went on to hold that not "all natural conditions outdoors are equally apparent to landowners and invitees."Id. at 913.

Appellee cites numerous cases in support of its motions for summary judgment that rely on a strict adherence to the open and obvious doctrine. However, most of the cases cited by the Appellee are based on situations involving heavy snow, ice, sleet that were painfully obvious to both Appellants and Appellees.

In the case at bar, it was agreed that it was not snowing or sleeting and that it was very cold and the temperature was below freezing. (Judy Frazier Depo., pp. 9, 10). Tonya Stapleton has testified that on her way to meet her mother on the morning of the accident, she did not notice much snow or ice on the roadway or on the side of the road and to her memory, it had snowed days before the incident. (Tonay Stapleton Depo., p 23). There was no severe winter storm occurring on the day of this incident and snow and ice were not readily apparent on any type of basis.

The facts of this case demonstrate that Appellant was not aware of any obvious ice, snow or sleet that would eliminate Appellee from liability based upon a natural outdoor hazard being open and obvious. It was simply very cold and as such conditions dictate, Appellee owed a duty to inspect and warn of any dangerous conditions, such as ice, and a duty to make the premises safe for business invitees, such as Tonya Stapleton.

The Bank employees and staff were in a better position to inspect their premises and warn customers/invitees such as the Appellant. This leads to the next portion of the Appellant's Argument/Response.

B. Appellee's Duty to Warn/Make Premises Safe

It is the position of the Appellant, Tony Stapleton, that the Bank has breached it's duties to properly inspect their premises for hazards, make their premises safe or to warn of a dangerous condition that existed on their premises on January 30, 2008 that led to her fall in the parking lot of the Bank.

In determining a negligence action, there are four (4) basic requirements: (1) a duty on the part of the Appellee; (2) a breach of that duty; (3) consequent injury, which consists of an actual injury or harm; and (4) legal causation linking the Appellee's breach with the Appellant's injury. Logsdon vs. Paj, Ky. App. 2006-CA-001485-MRI (2007).

From recently taken depositions of Bank employees, Sharon Collins, Jerry Booth, and Judy Frazier, it was readily apparent that Jerry Booth was in charge of the day–to–day maintenance, inspection and basic safety condition of the Bank's business premises.

Mr. Booth is the maintenance supervisor for Citizens National Bank and he testified by deposition in this matter. Mr. Booth admitted that he was responsible for inspecting the sidewalks and parking lots on the premises of Appellee Bank on a daily basis. (Jerry Booth Depo. Exhibit C, pp. 5, 10). He further stated that during times of inclement weather, that he was responsible for removal of snow by snowplow, brooms, shovels or "ice melt". (Booth Depo., p. 6).

Jerry Booth stated that he typically arrived at the Bank at 7:00 am before the drive-thru of the Bank opens at 7:30 a.m. and the lobby opens at 9:00 a.m.

(Booth Depo., p. 11). Mr. Booth does not keep any type of inspection log or journal regarding inspection of the parking lot area and he was not certain as to whether he had inspected the Bank's parking lot on January 30, 2008, the date of Appellant's accident. (Booth Depo., pp. 12, 15). Mr. Booth further stated that neither he nor the Bank employees that are under his direction check the sidewalk or outside area daily. (Booth Depo., p. 13, Q/A 68).

When asked about this issue, Mr. Booth replied as follows:

Q. 68. Okay. It's by the elevator. Do you or your employees make a point, then, to walk around the building or to look at the sidewalk?
A. Not every day.
(Booth Depo., p. 13)

Further, Mr. Booth was asked about his actions on the date of Ms. Stapleton's accident and he stated as follows:

Q 93. No. On January 30, 2008, I think you said that you don't remember being contacted about Ms. Stapleton's fall?
A. Huh-uh. No.
Q 94. Do you remember, at all, walking through the parking lots, sidewalk area, outside the building after she fell?
A. I can't remember if I did or not.
Q 95. Okay. As far as you know, that day, though, it was not – it was not actively snowing or sleeting that day, to your memory, was it?
A. Not to my memory, no.

(Booth Depo., pp. 17, 18).

As stated herein, it was a consensus that it was very cold on the day of Tonya Stapleton's accident. The undersigned counsel asked Jerry Booth if cold temperatures would cause him concern about the parking area. Mr. Booth's answers are as follows:

Q. 72 When the weather gets to be a certain temperature, whether or not it is actually snowing or sleeting, does that trigger any concern?

A. Yes.

Q. 73. What type?

A. Well, I'll check.

Q. 74. Okay. Now, when you say you'll check, what does that mean?

A. I'll go out to the parking lots, where the customers park and then to the employees.

(Jerry Booth Depo., pp. 13, 14)

It is the position of Tonya Stapleton that Appellee has breached it's duty to inspect, warn and make safe their premises on January 30, 2008. Mr. Booth, as stated above, and other bank employees were in a much better position to observe and inspect the condition of the Bank's parking lot prior to business hours. During testimony of Appellee's employees, no proof was offered to show affirmatively that the premises were inspected by anyone on the morning of January 30, 2008.

In the case at bar, Tonya Stapleton, has met her burden and should avoid summary judgment. Ms. Stapleton had an encounter with a foreign substance/dangerous condition (icy spot on blacktop). The condition was a substantial factor in causing this accident. Finally, the premises were not in a reasonably safe condition due to the fact that the ice was allowed to remain on the parking lot untreated and was located in areas where customers (business invitees park their motor vehicles. Obviously, while entering and exiting vehicles, a person's vision is limited and the ice on the parking lot on January 30, 2008 was not open and obvious to the Appellant. At least, the ice could have been

seen and treated prior to business hours, when the parking lot is empty and before cars fill the parking stalls, thereby limiting the field of vision of the Bank's customers who may park partially or completely over some icy areas of the parking lot.

Kentucky law requires that all persons should exercise ordinary care for safety of others who foreseeably may be injured by their acts or omissions. Wallingford vs. Kroger Company, Ky. App., 761 S.W.2d 621 (1988).

In the case at bar, Appellee failed to inspect, warn or make safe the business that was visited by Tonya Stapleton on January 30, 2008 and clearly did not exercise ordinary care to protect it's business invitees.

C. Summary Judgment Standard

In order to obtain a summary judgment, the moving party must demonstrate to the trial court that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any issue of material fact and the moving party is entitled to judgment as a matter of law. Kentucky Rule of Civil Procedure 56.03.

In Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255, 256 (1985), the Supreme Court of Kentucky held that for a summary judgment to be proper, the movant must show that the adverse party cannot prevail under any

circumstances and that it would appear impossible for the adverse party to prevail under any circumstances. See also, Steelvest v. Scansteel Service Center Inc, Ky., 807 S.W.2d 476 (1991).

When construing summary judgment motions, 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. Steelvest vs. Scansteel, supra. Further, it has been held that even if the trial court believes that the party opposing the motion for summary judgment can not prevail at trial, but that an issue of fact exists that is disputed that the Court must overrule the motion for summary judgment. See Steelvest and Paintsville Hospital, supra.

In the case at bar, there are genuine disputed issues of material facts. Appellee has definitely not shown that the Appellant could not prevail under any circumstances at trial. To keep it simple, there is a genuine dispute as to the cause of this accident.

Tonya Stapleton maintains that the Appellee was negligent by failing to inspect, warn or make safe a dangerous condition that existed on January 30, 2008. She maintains that the condition was not a natural hazard that was open and obvious to her, nor was it obvious to the Bank vice president, Judy Frazier, who took pictures and inspected the area, as summarized above.

Whether or not the ice in question was open and obvious is a genuine issue of disputed fact. Whether or not the Bank took appropriate measures to safeguard the health of their business invitees on January 30, 2008, including Tonya Stapleton, is a genuine disputed fact issue. As the Estep, supra., holding

mandates, these natural outdoor hazard cases are to be examined on a case by case basis and the facts of the case at bar show that fact issues are disputed that preclude the entry of a summary judgment against the Appellant.

CONCLUSION

The Johnson Circuit Court erred in granting summary judgment and the Commonwealth Court of Appeals erred by failing to reverse said unfavorable decision and therefore the Appellant requests that the Johnson Circuit Court's Order of January 20, 2009 be reversed and this case be remanded back to the Circuit Court.

RESPECTFULLY SUBMITTED BY:

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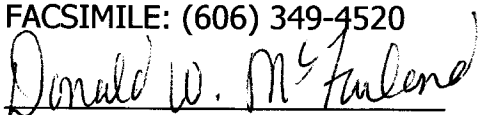

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