rel: January 31, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180635

Rose McClurg

v.

Birmingham Realty Company

Appeal from Shelby Circuit Court
(CV-16-901063)

PARKER, Chief Justice.[1]

Rose McClurg sued Birmingham Realty Company ("BRC") based on injuries she sustained when she fell in the parking lot of

---

[1]This case was originally assigned to another Justice on this Court. It was reassigned to Chief Justice Parker on October 17, 2019.

a shopping center owned by BRC. The circuit court entered a summary judgment in favor of BRC, and McClurg appeals. Because there was a genuine issue of material fact as to whether the hole in which McClurg stepped was an open and obvious danger, we reverse the summary judgement.

I. Facts and Procedural History

In October 2015, Rose McClurg, an 82-year-old woman, visited a Dollar Tree discount store in Pelham. The weather was clear. She parked in a parking spot next to a raised landscape island that was surrounded by a curb. McClurg noticed a shopping cart that had been left partly on the island. She walked around the island to retrieve the cart. As she dislodged the cart from the curb and turned it in the direction facing the store, she took a step back. Her heel went into a "pothole" in the asphalt where the asphalt met the curb of the island, and she lost her balance and fell, injuring her shoulder. McClurg later testified in deposition that she did not see the hole because she was focused on retrieving the shopping cart.

A day or two after the incident, McClurg returned to the parking lot to photograph the pothole. It measured 4 to 5

inches wide, 16 inches long, and 4.5 inches deep. The hole was unmarked and unguarded, and, at the time McClurg returned to measure it, it was obscured with garbage and paper.

McClurg sued BRC, the owner of the shopping center, in the Shelby Circuit Court, alleging negligence and wantonness based on a failure to maintain the parking lot in a safe condition and a failure to warn invitees of hidden dangers. After several months of discovery, BRC moved for a summary judgment, asserting that the pothole was an open and obvious danger. The circuit court granted BRC's summary-judgment motion. McClurg appeals.

II. Standard of Review

> "'The standard of review applicable to a summary judgment is the same as the standard for granting the motion....' McClendon v. Mountain Top Indoor Flea Market, Inc., 601 So. 2d 957, 958 (Ala. 1992).
>
> > "'A summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c)(3), Ala. R. Civ. P. The burden is on the moving party to make a prima facie showing that there is no genuine issue of material fact and that it is entitled to a judgment as a matter of law. In determining whether the movant has carried that burden, the court is to view the evidence in a light most favorable to the nonmoving party and to draw all reasonable inferences in favor of

> that party. To defeat a properly supported summary judgment motion, the nonmoving party must present "substantial evidence" creating a genuine issue of material fact -- "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." Ala. Code 1975, § 12-21-12; West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989).'
>
> "Capital Alliance Ins. Co. v. Thorough-Clean, Inc., 639 So. 2d 1349, 1350 (Ala. 1994)."

Pritchett v. ICN Med. Alliance, Inc., 938 So. 2d 933, 935 (Ala. 2006).

III. Discussion

McClurg argues that whether the pothole was an open and obvious danger was a question of fact to be decided by a jury. BRC responds that the pothole was an open and obvious danger as a matter of law, and that, even if it was not, McClurg presented no evidence that BRC had notice of the pothole before McClurg was injured.

a. Open and Obvious Danger

"A premises owner's legal duty to a party injured by a condition of the premises depends upon the legal status of the injured party." South Alabama Brick Co. v. Carwie, 214 So. 3d 1169, 1175 (Ala. 2016). Where, as here, the plaintiff enters

the property for the purpose of conferring a material or commercial benefit upon the landowner, the plaintiff is an invitee. See Ex parte Mountain Top Indoor Flea Market, Inc., 699 So. 2d 158, 161 (Ala. 1997). "The owner of premises owes a duty to business invitees to use reasonable care and diligence to keep the premises in a safe condition, or, if the premises are in a dangerous condition, to give sufficient warning so that, by the use of ordinary care, the danger can be avoided." Armstrong v. Georgia Marble Co., 575 So. 2d 1051, 1053 (Ala. 1991).

The owner's duty to make safe or warn is obviated, however, where the danger is open and obvious -- that is, where "the invitee ... should be aware of [the danger] in the exercise of reasonable care on the invitee's part." Mountain Top, 699 So. 2d at 161. The test is an objective one: "[W]hether the danger should have been observed [by the plaintiff], not whether in fact it was consciously appreciated [by him or her]." Jones Food Co. v. Shipman, 981 So. 2d 355, 362 (Ala. 2006); see Sessions v. Nonnenmann, 842 So. 2d 649 (Ala. 2002). Furthermore, the issue of open and obvious danger is an affirmative defense. See Barnwell v. CLP Corp.,

235 So. 3d 238, 244 (Ala. 2017); Dolgencorp, Inc. v. Taylor, 28 So. 3d 737, 742 (Ala. 2009). Thus, the premises owner bears the burden of proving that the danger was open and obvious. Barnwell, 235 So. 3d at 244.

This Court has consistently held that "'[q]uestions of openness and obviousness of a defect or danger ... are generally not to be resolved on a motion for summary judgment.'" Ex parte Kraatz, 775 So. 2d 801, 804 (Ala. 2000) (quoting Harding v. Pierce Hardy Real Estate, 628 So. 2d 461, 463 (Ala. 1993)); see Denmark v. Mercantile Stores Co., 844 So. 2d 1189, 1195 (Ala. 2002) ("Whether a condition is open and obvious is generally a question for the jury."); Barnwell, 235 So. 3d at 244 ("'[T]he question whether a danger is open and obvious is generally one of fact.'" (quoting Howard v. Andy's Store for Men, 757 So. 2d 1208, 1211 (Ala. Civ. App. 2000)). Exceptions to this general rule are narrow, permitted only in circumstances where reasonable minds could not differ regarding the obviousness of the danger. See Jones v. Newton, 454 So. 2d 1345, 1348 (Ala. 1984) (holding that summary judgment is appropriate only where the nonmovant could not "conceivably prevail"). Examples of such exceptional cases

generally fall into three categories: (1) cases in which the plaintiff has admitted carelessness or subjective knowledge of the condition, see, e.g., Browder v. Food Giant, Inc., 854 So. 2d 594, 596 (Ala. Civ. App. 2002) (finding open and obvious danger in grocery store parking lot where plaintiff admitted that she was not paying attention as she walked); (2) cases in which the type of condition was so obviously dangerous as to preclude liability under any circumstances, see, e.g., Ex parte Industrial Distribution Servs. Warehouse, Inc., 709 So. 2d 16, 19 (Ala. 1997) ("Total darkness, possibly concealing an unseen and unknown hazard, presents an open and obvious danger to someone proceeding through unfamiliar surroundings, as a matter of law."); and (3) cases in which, under the particular circumstances, no reasonable jury could find that the danger was not open and obvious, see, e.g., Jones Food Co. v. Shipman, 981 So. 2d 355, 363 (Ala. 2006) (holding that "a ladder leaned against the facade of [a] restaurant at a 45° angle to the ground," was an open and obvious danger under the circumstances). This case does not belong in the first category because McClurg has not admitted carelessness or knowledge of the danger.

The second category -- types of conditions that are so obvious that they per se preclude liability -- is particularly narrow. This Court has applied this per se rationale to only one condition: total darkness. See Industrial Distribution, 709 So. 2d at 19 (Ala. 1997) ("Total darkness ... presents an open and obvious danger to someone proceeding through unfamiliar surroundings, as a matter of law."). Such a case has been called a "'step-in-the-dark' case." Id. at 21 (Cook, J., concurring in the result). This Court has also suggested that an open body of water would constitute an open and obvious danger per se. See Owens v. National Sec. of Alabama, Inc., 454 So. 2d 1387, 1389-90 (Ala. 1984) (observing that, like darkness, water "is an open and obvious danger, and hence no duty to warn exists even where the water conceals dangers beneath the surface").

This case does not belong in the second category; holes in parking-lot asphalt are not so categorically obvious that the situation merits a per se defense. A reasonable jury could conclude that people exercising reasonable care while walking in a parking lot are normally watching for other hazards, such as cars, other pedestrians, and stray shopping

carts, and may not necessarily notice a pothole in the asphalt. Because a reasonable jury could conclude, under the circumstances of a given case, that a pothole is not an open and obvious danger, potholes in parking lots are not an open and obvious danger per se.

In the third category of cases, the evidence has established that the danger was so extraordinarily obvious that plaintiffs could not conceivably prevail on their premises-liability claims. Those circumstances include: a social guest who, during a "monsoon," stepped on an upside-down doormat, lying out in the rain, which she believed she had consciously avoided stepping on earlier that day, Ex parte Neese, 819 So. 2d 584, 590 (Ala. 2001); a contractor who leaned a ladder at a 45° angle against a roof facade, on ground that sloped away from the building, Jones Food Co. v. Shipman, supra; a subcontractor who fell into an open stairwell in a building under construction, see Sessions v. Nonnenmann, supra; and a person who climbed down an unsecured, portable aluminum ladder propped against a metal gutter, Quillen v. Quillen, 388 So. 2d 985, 989 (Ala. 1980). In each of those situations, some extraordinary circumstance or

behavior by the plaintiff elevated the obviousness of the danger to the point that the plaintiff could not conceivably prevail on the claim.

This case does not belong in the third category -- BRC did not establish that it was not possible for a reasonable jury to find that the hole in the asphalt was not open and obvious. The position and dimensions of the hole, the fact that the hole was of the same color and material as the surrounding asphalt, and the fact that the hole was unmarked are all factors a jury could reasonably consider to reach a conclusion that the hole was not an open and obvious danger. Accordingly, summary judgment was improper.

b. Notice of Dangerous Condition

BRC argues that we should affirm the summary judgment, even if we hold that it was not an open and obvious danger, because, BRC says, the burden of establishing that the pothole was known to BRC was on McClurg, and McClurg did not present any evidence that BRC had actual or constructive notice of the pothole. BRC is correct that McClurg bears the ultimate burden of showing that BRC "'had or should have had notice of the defect before the time of the accident.'" Burlington Coat

Factory of Alabama, LLC v. Butler, 156 So. 3d 963, 969 (Ala. Civ. App. 2014) (quoting Hale v. Sequoyah Caverns & Campgrounds, Inc., 612 So. 2d 1162, 1164 (Ala. 1992)). However, BRC moved for summary judgment only on its open-and-obvious-danger affirmative defense, not on the elements of McClurg's claim. Because BRC never raised this notice issue before the circuit court, for this Court to affirm the summary judgment on that basis would violate McClurg's due-process rights. See Liberty Nat'l Life Ins. Co. v. Univ. of Ala. Health Servs. Found., P.C., 881 So. 2d 1013, 1020 (Ala. 2003) (holding that this Court will not affirm a summary judgment "where [the] movant has not asserted before the trial court a failure of the nonmovant's evidence on an element of a claim ... and therefore has not shifted the burden of producing substantial evidence in support of that element"). Accordingly, we will not consider the issue of notice, which was raised for the first time on appeal.

IV. Conclusion

The evidence at the summary-judgment stage in this case did not establish that the pothole that caused McClurg to fall was an open and obvious danger as a matter of law.

Accordingly, we reverse the summary judgment and remand the case for further proceedings.

REVERSED AND REMANDED.

Wise, Mendheim, and Stewart, JJ., concur.

Bryan, J., concurs in the result.

Bolin, Shaw, and Sellers, JJ., dissent.

Mitchell, J., recuses himself.

BOLIN, Justice (dissenting).

I believe that the circuit court correctly entered a summary judgment in favor of Birmingham Realty Company ("BRC") in Rose McClurg's "slip and fall" action against BRC. Accordingly, I must respectfully dissent.

McClurg argues that this Court's caselaw holds that whether a hazard on property is "open and obvious" is typically a fact question for a jury.[2] McClurg further argues that BRC failed to satisfy its burden of submitting sufficient evidence to prove that the pothole was an open and obvious danger and that McClurg's failure to see the pothole was unreasonable.

In Barnwell v. CLP Corp., 235 So. 3d 238, 243-44 (Ala. 2017), this Court set forth the following applicable law in determining whether a condition on a premises presents an open and obvious danger:

> "'The liability of a premises owner to an invitee is well settled.'
>
> > "'"In a premises-liability setting, we use an objective standard to assess whether a

[2]I believe that the main opinion's categorical analysis of "open and obvious" conditions ignores the particular facts of this case.

hazard is open and obvious. As discussed in Sessions [v. Nonnenmann, 842 So. 2d 649 (Ala. 2002)], the question is whether the danger should have been observed, not whether in fact it was consciously appreciated:

"'"'[I]n order for a defendant-invitor in a premises-liability case to win a summary judgment or a judgment as a matter of law grounded on the absence of a duty on the invitor to eliminate open and obvious hazards or to warn the invitee about them, the record need not contain undisputed evidence that the plaintiff-invitee consciously appreciated the danger at the moment of the mishap. While Breeden [v. Hardy Corp., 562 So. 2d 159 (Ala. 1990)], does recite that "[a]ll ordinary risks present are assumed by the invitee," 562 So. 2d at 160, this recitation cannot mean that the invitor's duty before a mishap is determined by the invitee's subjective state of mind at the moment of the mishap. This Court has expressly rejected the notion that an invitor owes a duty to eliminate open and obvious hazards or to warn the invitee about them if the invitor "should anticipate the harm despite such knowledge or obviousness." Ex parte Gold Kist, Inc., 686 So. 2d 260, 261 (Ala. 1996) ....'

> "'"842 So. 2d at 653-54 (some emphasis added)."
>
> "'Jones Food Co. v. Shipman, 981 So.2d 355, 362-63 (Ala. 2006). Similarly, this Court has stated that "'[t]he owner of premises has no duty to warn an invitee of open and obvious defects in the premises which the invitee is aware of, or should be aware of, in the exercise of reasonable care on the invitee's part.'" [Ex parte] Mountain Top Indoor Flea Market, 699 So. 2d [158,] 161 [(Ala. 1997)](quoting Shaw v. City of Lipscomb, 380 So. 2d 812, 814 (Ala. 1980), citing in turn Tice v. Tice, 361 So. 2d 1051 (Ala. 1978)). The test for determining whether a hazard is open and obvious "'"is an objective one."'" Id. (quoting Hines v. Hardy, 567 So.2d 1283, 1284 (Ala. 1990), quoting in turn Restatement (Second) of Torts § 343A (1965)).'

"Dolgencorp, Inc. v. Taylor, 28 So.3d 737, 741-42 (Ala. 2009). Further, we note that

> "'[t]he question whether a danger is open and obvious is generally one of fact. Harris v. Flagstar Enterprises, Inc., 685 So.2d 760, 762-63 (Ala. Civ. App. 1996). '[T]he plaintiff's appreciation of the danger is, almost always, a question of fact for the determination of the jury.' F.W. Woolworth Co. v. Bradbury, 273 Ala. 392, 394, 140 So.2d 824, 825-26 (1962).'

"Howard v. Andy's Store for Men, 757 So.2d 1208, 1211 (Ala. Civ. App. 2000)."

McClurg relies primarily on Barnwell, supra, and Harley v. Bruno's Supermarkets, Inc., 888 So. 2d 525 (Ala. Civ. App.

2004). In Barnwell, the trial court entered a summary judgment for the restaurant owner, and this Court reversed that judgment because there were genuine issues of material fact as to whether the alleged "slick spot" in front of the restroom was an open and obvious danger. An open and obvious danger is an affirmative defense and, accordingly, the restaurant owner bore the burden of proving that the slick spot was open and obvious to be entitled to a summary judgment. The restaurant owner did not offer any evidence indicating that the slick spot was an open and obvious danger.

Harley involved a patron of a grocery store who tripped over a curb that was painted yellow in the grocery-store parking lot. At the time she tripped, it was 6 p.m. and the parking lot was illuminated only by the light from inside the grocery store. In Harley, the Court determined that a genuine issue of material fact existed precluding summary judgment. The Harley Court stated:

> "Our supreme court has held, under circumstances similar to those presented here, that the question as to whether a danger was open and obvious is a question of fact to be determined by a jury. In Ex parte Kraatz, 775 So. 2d 801 (Ala. 2000), an invitee tripped and fell over a speed bump located in the premises owner's parking lot; the incident occurred at night, and the parking lot was dimly lit. The

speed bump was not marked in such a way as to make it visible at night or to otherwise set it apart from the rest of the parking lot. In this case, the curb was painted with the same yellow paint as was the striping of the fire lane, it was dark outside the store, and the only illumination of the scene came from the store. In Kraatz, the supreme court distinguished the case before it from cases involving total darkness, see Owens v. National Security of Alabama, Inc., 454 So. 2d 1387 (Ala. 1984), and Ex parte Industrial Distribution Services Warehouse, Inc., 709 So.2d 16 (Ala.1997), by stating:

> "'Several salient features distinguish the Kraatz case before us from Owens and Ex parte Industrial Distribution Warehouse, supra. First, [the invitee in Kraatz] was walking in dim light, not total darkness. Partial or poor light, like that in the case before us, could mislead a reasonably prudent person into thinking that he or she would be able to see and avoid any hazards. The variable factors which make openness-and-obviousness under partial or poor light conditions a fact question not appropriate for resolution by summary judgment are direction, level, color, diffusion, shadows, and like qualities of light, as well as the other physical features of the scene. See, e.g., Woodward [v. Health Care Auth. of Huntsville, 727 So. 2d 814 (Ala. Civ. App. 1998)].
>
> "'Second, [the invitee] was walking in the light conditions which [the premises owner] provided and expected his customers to use in walking where she fell. The light conditions were not abnormal for the time or place so as to alert [the invitee] or any other invitee to a need to forgo walking there. Third, [the invitee] was

> walking on a surface [the premises owner] provided and expected his customers to use. [The invitee] had no reason to expect or to suspect an obstruction in her path. Indeed, what would have been open and obvious to [the premises owner's] customers was that the premises owner had provided both the light conditions and the surface conditions for them to use for walking, just as [the invitee] was using them when she tripped and fell.'
>
> "775 So. 2d at 804."

Harley, 888 So. 2d at 527-28.

Barnwell and Harley are distinguishable from the present case as each of those cases involved conditions on the premises that were deceptive in appearance so as to create conditions not "open and obvious." I believe that the present case is more like Browder v. Food Giant, Inc., 854 So. 2d 594 (Ala. Civ. App. 2002). In Browder, there was a depression in the parking lot adjacent to the grocery store that contained a drainage pipe. The patron fell when her foot got caught in a hole in the pavement. She testified that the day of the fall was clear and sunny, that nothing obstructed her view of the depression, that she was not "looking for anything like that," and that she did not normally look in front of her while walking. The court held that the circuit

court did not err in entering a summary judgment for the grocery store.

Applying the law and analysis of Browder to the facts of this case, I conclude that the circuit court did not err in entering a summary judgment for BRC. Like the depression in Browder, the pothole in this case was open and obvious, and McClurg did not present any evidence indicating otherwise. Here, the pothole, at the time of the incident, was not obscured by trash, nothing blocked McClurg's view, and it was daylight. McClurg testified that she never noticed the pothole. Although McClurg did not notice the pothole, the question is whether the danger should have been observed, not whether in fact it was consciously appreciated. McClurg was dislodging a shopping cart when she stepped backward into the pothole. McClurg's actions -- stepping backward without looking -- limited her own ability to observe an open and obvious condition. I do not believe the circuit court erred in entering a summary judgment for the grocery store. Based on the foregoing, I dissent.

Shaw and Sellers, JJ., concur.