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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2010-2011

2090881

Susie M. Price

v.

Macon County Greyhound Park, Inc.

Appeal from Macon Circuit Court
(CV-07-151)

BRYAN, Judge.

Susie M. Price, the plaintiff below, appeals from a summary judgment in favor of Macon County Greyhound Park, Inc. ("the Park"), the defendant below. We affirm.

On November 29, 2007, Price sued the Park, alleging that,

on April 9, 2007, while she was an invitee on the Park's premises, she had fallen as a result of some debris on the Park's asphalt driveway and had suffered injuries. Based on those allegations, she stated claims of negligence and wantonness. Answering, the Park denied liability and asserted as an affirmative defense that the debris that had caused Price to fall was open and obvious.

On July 17, 2009, the Park moved for a summary judgment. The Park asserted that it was entitled to a summary judgment with respect to Price's negligence claim because, the Park said, (1) the evidence did not establish that the Park had actual or constructive notice of the presence of the debris that had caused Price to fall before she fell and (2) the evidence established that the presence of the debris was open and obvious. The Park asserted that it was entitled to a summary judgment with respect to Price's wantonness claim because, the Park said, the evidence did not establish that the Park had acted or failed to act with knowledge of the conditions and with a consciousness that its acting or failing to act would likely or probably result in Price's injury.

Opposing the summary-judgment motion, Price asserted (1)

that the evidence did establish that the Park had actual or constructive notice of the presence of the debris before she fell, (2) that the evidence did not establish that the presence of the debris was open and obvious, and (3) that the evidence did establish that the Park had acted or failed to act with knowledge of the conditions and with a consciousness that its acting or failing to act would likely or probably result in Price's injury. As evidentiary support for her opposition to the Park's motion, Price relied on her deposition testimony and the affidavit of her husband.

Price, who was approximately 57 years old when the accident occurred, testified as follows. From 2004 until April 9, 2007, she played bingo at the Park seven days a week. On April 9, 2007, she drove herself and two friends, Patrice Satterwhite and Patricia Rushing, to the Park. They arrived at the Park in the daytime. Price stopped her automobile in the valet-parking area, and she and her friends got out of Price's automobile and walked from her automobile to the front entrance of the Park's building. The area outside the front entrance of the Park's building is not well lighted. Moreover, Price was aware that a portion of the Park's building was

being remodeled or constructed. Consequently, Price was careful to look at the ground to make sure she did not step on anything as she walked from her automobile to the front entrance. Walking from her automobile to the front entrance, she did not see anything on the ground that would cause someone to trip and fall. After entering the building, Price, Satterwhite, and Rushing played bingo for approximately three hours and then exited the front entrance of the Park's building at approximately 8:30 p.m. when it was dark outside. They walked from the front entrance to the valet-parking area, along the same route they had earlier walked when they entered the front entrance from the valet-parking area, and got into Price's automobile. Price did not have any problem walking from the front entrance to her automobile in the valet-parking area. After getting inside her automobile, Price could not find her cellular telephone, and Satterwhite went back inside the Park's building to see if she could find it. The valet-parking attendant told Price to move her automobile a short distance forward to wait for Satterwhite so that her automobile would not block traffic. Price drove her automobile a short distance forward, parked, and found her cellular

telephone before Satterwhite returned. Price then got out of her automobile to go inside to tell Satterwhite that she had found her cellular telephone. Price walked from her automobile toward the front entrance; however, she tripped and fell on the asphalt driveway before she reached the sidewalk in front of the front entrance.[1] While she was on the ground, she saw some debris that she thought consisted of gravel or loose pieces of asphalt. The route she was walking when she fell was a few feet from the route she had already walked twice that day between the valet-parking area and the front entrance. Although the route she was walking when she fell was in an area that was not well lighted, Price was walking normally when she fell instead of looking at the ground "because [she] had already done that one time already ... the same afternoon," "[s]o I wouldn't be expecting anything to be on the ground." Finally, Price testified as follows:

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[1]Price's principal brief states:

> "While it is true that Ms. Satterwhite noted that there was trash around the entrance when they arrived and exited the main entrance from the valet parking area, this was not the same place where Ms. Price fell and was a little further down."

(Emphasis added.)

"Q. [BY THE PARK'S COUNSEL:] All right. Do you know whether or not Macon County Greyhound Park knew that this piece of gravel that you fell on was out there prior to the time that you fell on it?

"A. I don't think so.

"Q. Okay.

"A. They usually had people out there cleaning that off.

"Q. All right. And so do you believe that if Macon County Greyhound Park knew that this gravel was out there that they would have cleaned it up?

"A. Yes, sir."

The affidavit of Price's husband stated:

"My name is J. Victor Price and I am over the age of 19 years and a resident citizen of the State of Alabama. Over the past several years, I have been a frequent visitor to Macon County Greyhound Park in Shorter, Alabama. I know of my own personal knowledge that the casino at Macon County Greyhound Park was undergoing extensive construction and renovation in 2007, including the date of April 9, 2007. During this period of time, it was not unusual to see loose gravel, rocks and clumped asphalt in the area where the asphalt parking lot abuts the concrete apron near the main entrance to the casino."

Following a hearing, the trial court entered an order granting the summary-judgment motion on February 18, 2010, without stating its rationale for that ruling. Price timely appealed to the supreme court, which transferred the appeal to

this court pursuant to § 12-2-7(6), Ala. Code 1975.

> "We review a summary judgment de novo. American Liberty Ins. Co. v. AmSouth Bank, 825 So. 2d 786 (Ala. 2002).
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> > "'We apply the same standard of review the trial court used in determining whether the evidence presented to the trial court created a genuine issue of material fact. Once a party moving for a summary judgment establishes that no genuine issue of material fact exists, the burden shifts to the nonmovant to present substantial evidence creating a genuine issue of material fact. "Substantial evidence" is "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." In reviewing a summary judgment, we view the evidence in the light most favorable to the nonmovant and entertain such reasonable inferences as the jury would have been free to draw.'
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> "Nationwide Prop. & Cas. Ins. Co.[v. DPF Architects, P.C.], 792 So. 2d [369] at 372 [(Ala. 2001)] (citations omitted), quoted in American Liberty Ins. Co., 825 So. 2d at 790."

Potter v. First Real Estate Co., 844 So. 2d 540, 545 (Ala. 2002).

Price first argues that the trial court erred in granting the Park's summary-judgment motion with respect to her negligence claim because, she says, (1) the evidence established that the Park had actual or constructive notice of

the presence of the debris that caused her to fall before she fell and (2) the evidence did not establish that the presence of that debris was open and obvious.

There is no dispute that Price was an invitee on the Park's premises. In Perry v. Macon County Greyhound Park, Inc., 514 So. 2d 1280, 1281-82 (Ala. 1987), the supreme court stated:

> "As an invitee on the premises, the plaintiff is owed by the defendants a duty to exercise ordinary and reasonable care to keep the premises in a reasonably safe condition. Gray v. Mobile Greyhound Park, Ltd., 370 So. 2d 1384 (Ala. 1979) (quoting, Tice v. Tice, 361 So. 2d 1051, 1052 (Ala. 1978)). The owner of the premises, however, is not an insurer of the safety of his invitees, and the fact that the plaintiff fell and was injured raises no presumption of negligence. Delchamps, Inc. v. Stewart, 47 Ala. App. 406, 255 So. 2d 586, cert. den., 287 Ala. 729, 255 So. 2d 592 (1971); Great Atlantic & Pacific Tea Co. v. Bennett, 267 Ala. 538, 103 So. 2d 177 (1958). The plaintiff has the burden of proving that the defendant breached its duty to exercise ordinary and reasonable care and failed to keep its premises in a reasonably good condition. The law does not place upon the defendant the duty to take extraordinary care to keep a floor completely dry or free from debris. Wal-Mart Stores, Inc. v. White, 476 So. 2d 614 (Ala. 1985); Terrell v. Warehouse Groceries, 364 So. 2d 675 (Ala. 1978). As stated in Mobile Greyhound Park, Ltd., a racetrack is under no duty to keep a floor completely dry or completely free of litter or other obstructions. 370 So. 2d at 1388-89. As the Court stated in that case:

> "'At such places of amusement as race tracks, dog tracks, ball parks, stadiums and the like, an accumulation of debris upon the walkways during the course of an event is not unlike the build-up of rain water on a storekeeper's floor during storms. In both cases, the accumulation may adversely affect foot traffic -- a fact with which the invitee is or should be aware.'

"370 So. 2d at 1388-89. The Court further stated that a storekeeper is under no duty to keep his floor completely dry, and, in a like manner the owners and operators of public amusement facilities are not under a duty to keep their floors completely clean. Id.

"The plaintiff's burden of proof in a premises liability case is to prove that the defendant knew there was some defect in the condition of the premises, which can be proved in one of two ways. The first is by showing that the defendant had actual knowledge of the defect and the second is by showing the defendant had implied knowledge of it.

"....

"In order to prove the defendant had implied knowledge, the plaintiff must present evidence that the foreign substance, regardless of its nature, had been on the floor for a sufficient period of time to raise the presumption that the defendant had notice of its presence. See, e.g., May-Bilt, Inc. v. Deese, 281 Ala. 579, 206 So. 2d 590 (1968) (holding that the presence of a bean that was green, hard and fresh did not support a reasonable inference as to the length of time the bean had been on the floor); Winn-Dixie Store No. 1501 v. Brown, 394 So. 2d 49 (Ala. Civ. App. 1981) (in which the court held that the plaintiff offered no evidence that the defendant had actual notice of the foreign substance on the

> floor, or that the defendant had implied knowledge because it was the plaintiff's own testimony that the vegetable matter on the floor 'appeared fresh and green')."

In the case now before us, Price did not present any evidence from which it can be inferred that, before Price fell, the Park had actual notice of the presence of the particular debris that caused Price to fall. Moreover, Price did not present any evidence from which it can be inferred that the particular debris that caused her to fall had been present where she fell for a sufficient length of time to raise the presumption that the Park had notice of its presence there. Neither Price nor any other witness testified that that particular debris was present where Price fell before she fell.[2] The testimony of Price's husband that "it was not unusual to see loose gravel, rocks and clumped asphalt in the area where the asphalt parking lot abuts the concrete apron near the main entrance to the casino" while a portion of the Park's building was being remodeled or constructed does not establish that the particular debris that caused Price to fall had been present where she fell for a sufficient length of

[2]See note 1, supra.

time before Price fell to raise the presumption that the Park had notice of its presence. Accordingly, the trial court did not err in granting the Park's summary-judgment motion with respect to Price's negligence claim.

Price next argues that the trial court erred in granting the Park's summary-judgment motion with respect to her wantonness claim. In Ex parte Essary, 992 So. 2d 5, 9 (Ala. 2007), the supreme court stated:

> "'Wantonness' has been defined by this Court as the conscious doing of some act or the omission of some duty while knowing of the existing conditions and being conscious that, from doing or omitting to do an act, injury will likely or probably result. Bozeman v. Central Bank of the South, 646 So. 2d 601 (Ala. 1994). To constitute wantonness, it is not necessary that the actor know that a person is within the zone made dangerous by his conduct; it is enough that he knows that a strong possibility exists that others may rightfully come within that zone. Joseph v. Staggs, 519 So. 2d 952, 954 (Ala. 1988). Also, it is not essential that the actor should have entertained a specific design or intent to injure the plaintiff, only that the actor is 'conscious' that injury will likely or probably result from his actions. Id. 'Conscious' has been defined as '"perceiving, apprehending, or noticing with a degree of controlled thought or observation: capable of or marked by thought, will, design, or perception"'; '"having an awareness of one's own existence, sensations, and thoughts, and of one's environment; capable of complex response to environment; deliberate."' Berry v. Fife, 590 So. 2d 884, 885 (Ala. 1991) (quoting Webster's New Collegiate Dictionary 239 (1981) and The American

Heritage Dictionary of the English Language 283 (1969), respectively)."

In the case now before us, Price did not present any evidence from which it can be inferred that the Park knew of the existing conditions, i.e., the presence of the particular debris that caused Price to fall in the location where she fell. Consequently, the trial court did not err in granting the Park's summary-judgment motion with respect to Price's wantonness claim.

AFFIRMED.

Thompson, P.J., and Pittman, Thomas, and Moore, JJ., concur.