IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

PHYLLIS TRACY and RAYFORD TRACY,	)	
Plaintiffs/Appellants,	)	**Shelby Law No. 56704 T.D.**
VS.	)	**Appeal No. 02A01-9512-CV-00277**
EXXON CORPORATION, d/b/a EXXON SHOP,	)	
Defendants/Appellees.	)	

FILED

December 31, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

APPEAL FROM THE CIRCUIT COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE
THE HONORABLE WILLIAM W. O'HEARN,
SPECIAL JUDGE BY DESIGNATION

EDWIN C. LENOW
Memphis, Tennessee
Attorney for Appellants

JOHN J. HEFLIN, III
ALEX C. ELDER
BOURLAND, HEFLIN, ALVAREZ, HOLLEY & MINOR, PLC
Memphis, Tennessee
Attorneys for Appellees

AFFIRMED

ALAN E. HIGHERS, J.

CONCUR:

HOLLY KIRBY LILLARD, J.

BROOKS McLEMORE,

In this slip and fall case, the Plaintiffs, Phyllis and Rayford Tracy, filed suit against

the Defendant, Exxon Corporation, for injuries sustained from Phyllis Tracy's fall at the Defendant's place of business. The trial court granted summary judgment in favor of the Defendant based upon the open and obvious rule. The Plaintiffs have appealed the trial court's order granting the Defendant's motion for summary judgment arguing that the open and obvious rule does not apply in this case. For the reasons stated hereafter, we affirm the judgment of the trial court.

On September 25, 1992, Phyllis Tracy ("the Plaintiff") patronized the Defendant's service station located at 5158 Summer Avenue and White Station Road in Memphis, Tennessee. The Plaintiff parked her car, walked past the gasoline pumps, stepped up onto the raised concrete sidewalk surrounding the Exxon store and entered the Exxon store. The Plaintiff purchased some cough drops and exited the store. After exiting the store, the Plaintiff walked along the raised sidewalk surrounding the store toward a garbage receptacle and threw a paper bag and a wrapper into the receptacle. The Plaintiff then stepped off the raised sidewalk and fell injuring herself.

The Plaintiffs argue that the trial court was incorrect in granting the Defendant's motion for summary judgment. Therefore, the only issue before this Court is whether the trial court erred in granting the Defendant's motion for summary judgment.

When considering a motion for summary judgment, the trial court considers whether a factual dispute exists, whether the disputed fact is material to the outcome of the case and whether the disputed fact creates a genuine issue for trial. Byrd v. Hall, 847 S.W.2d 208, 214 (Tenn. 1993). When confronted with a disputed fact, the court must examine the elements of the claim or defense at issue and determine whether the resolution of the fact will affect the disposition of the claim or defense. Id. at 215. If there is no genuine issue as to any material fact and a moving party is entitled to judgment as a matter of law, the court should grant the moving party's motion for summary judgment. Tenn. R. Civ. P. 56.03.

In order to prevail in an action based upon negligence, a plaintiff must establish: (1) a duty of care owed by the defendant to the plaintiff; (2) conduct falling below the applicable standard of care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate or legal cause. McCall v. Wilder, 913 S.W.2d 150, 153 (Tenn. 1995); Bradshaw v. Daniel, 854 S.W.2d 865, 869 (Tenn. 1993); McClenahan v. Cooley, 806 S.W.2d 767, 774 (Tenn. 1991); Lindsey v. Miami Development Corp., 689 S.W.2d 856, 858 (Tenn. 1985). The existence or nonexistence of a duty owed by the defendant to the plaintiff is entirely a question of law for the court. Bradshaw v. Daniel, 854 S.W.2d at 869.

In determining whether a duty of care exists, a court should consider

> whether, upon the facts in evidence, such a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of others-- or, more simply, whether the interest of the plaintiff which has suffered invasion was entitled to legal protection at the hands of the defendant. This is entirely a question of law to be determined by reference to the body of statutes, rules, principles and precedents which make up the law; and it must be determined by the court. A decision by the court that, upon any version of the facts, there is no duty, must necessarily result in judgment for the defendant.

Id. at 869-70, quoting Lindsey v. Miami Development Corp., 689 S.W.2d 856, 858-59 (Tenn. 1985).

The duty of care owed by a premises owner to an invitee is a duty of reasonable care under all the circumstances. McCall v. Wilder, 913 S.W.2d at 153; Eaton v. McLain, 891 S.W.2d 587, 593 (Tenn. 1994). A business owner has a duty to maintain his premises in a reasonably safe condition. Id. This duty includes the responsibility of either removing or warning against any latent, dangerous condition on the premises of which the owner is aware or should have been aware through the exercise of reasonable diligence. Eaton, 891 S.W.2d at 593-94; Dawson v. Sears, Roebuck & Co., 394 S.W.2d 877 (Tenn. 1965); Chambliss v. Shoney's, Inc., 742 S.W.2d 271 (Tenn. App. 1987); Teal v. E.I. DuPont de Nemours and Co., 728 F.2d 799 (6th Cir. 1984).

When considering the potential liability of a business owner to one who is injured on his premises, the essential query is the likelihood or probability of an occurrence such as the one which caused the plaintiff's injuries. Eaton, 891 S.W.2d at 594. Foreseeability is the essential test of negligence. Id. A defendant's duty of care is measured by "the risk entailed through probable dangers attending the particular situation and is to be commensurate with the risk of injury." Doe v. Linder Constr. Co., 845 S.W.2d 173, 178 (Tenn. 1992); Leach v. Asman, 172 S.W. 303 (Tenn. 1914). In order to prevail in a premises liability action, the plaintiff must show "that the injury was a reasonably foreseeable probability, not just a remote possibility, and that some action within the [defendant's] power more probably than not would have prevented the injury." Doe, 845 S.W.2d at 178; Tedder v. Raskin, 728 S.W.2d 343, 348 (Tenn. App. 1987).

The underlying rationale for extending liability to an owner of a business premises is based upon the assumption that the owner has superior knowledge of latent, perilous conditions on the premises. Kendall Oil Co. v. Payne, 293 S.W.2d 40, 42 (Tenn. App. 1955). Liability does not arise, however, where the danger is open and obvious. Eaton v. McLain, 891 S.W.2d 587, 595 (Tenn. 1994).

The Plaintiff testified in her deposition as follows:

> Q: Where were you looking when you stepped off the curb?
>
> A: I'm not really sure if I looked down. Do you always look down when you step down? I don't know if I did or not. I'm not sure.

Although Tennessee law provides that a premises owner has a duty to warn an invitee of latent or hidden dangers, this duty does not arise where the danger is open and obvious. Eaton v. McLain, 891 S.W.2d at 595; Odum v. Haynes, 494 S.W.2d 795, 800 (Tenn. App. 1972); Jackson v. Tennessee Valley Authority, 413 F. Supp. 1050, 1056 (M.D. Tenn. 1976). The Plaintiff admits in her deposition that she was "not really sure if [she] looked down" when she stepped off the elevated sidewalk. Because the existence of the elevated sidewalk surrounding the Defendant's gas station convenience store was as

obvious to the Plaintiff as it was to the Defendant, the Defendant had no duty to warn the Plaintiff of the condition. We, therefore, agree with the trial court's order granting the Defendant's motion for summary judgment.

The judgment of the trial court is hereby affirmed. Costs on appeal are taxed to Appellant for which execution may issue if necessary.

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HIGHERS, J.

CONCUR:

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LILLARD, J.

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McLEMORE, S.J.