IN THE COURT OF APPEALS 10/15/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00310 COA

FLORENCE WILTZ

APPELLANT

v.

K-MART CORPORATION

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. KOSTA N. VLAHOS

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

PAUL J. DELCAMBRE, JR.

ATTORNEY FOR APPELLEE:

WILLIAM L. MCDONOUGH, JR.

NATURE OF THE CASE: PREMISES LIABILITY

TRIAL COURT DISPOSITION: JURY VERDICT FOR DEFENDANT

BEFORE FRAISER, C.J., BARBER, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Wiltz sued for injuries she suffered on K-Mart's premises. The jury returned a verdict for K-Mart.

Wiltz appealed, claiming that the jury was improperly instructed regarding K-Mart's defense that a watering hose that caused Wiltz to trip was "open and obvious." Because of a change in the law on this issue, we reverse and remand.

FACTS

In the spring of 1987, Wiltz went to K-Mart in D'Iberville where she frequently shopped. She parked her car in the parking lot and walked across the lot to the store. K-Mart had set up a temporary greenhouse in the parking lot. The greenhouse plants were watered daily which required K-Mart to run a hose across the parking lot to the greenhouse from a spigot on the front of the store. As Wiltz entered K-Mart, she saw the hose. However, on her way back to the car, she testified that her attention was diverted to the traffic in the parking lot rather than the hose. She fell over the hose and injured herself on the pavement. K-Mart employees ran to her assistance and escorted her into the store. They placed ice on her injured hands and offered to get additional medical assistance and/or a driver to take Wiltz home. Wiltz drove herself home and immediately went to her own doctor. As a result of this incident, Wiltz brought a premises liability action against K-Mart.

DISCUSSION

The principal and indeed controlling issue raised concerns the propriety of an instruction given the jury on the "open and obvious" defense. The applicable standard of review of a trial court's grant or denial of jury instruction is this:

> By analogy to our familiar test as to when any fact question may be taken from the jury, our rule is this: The refusal of a timely requested and correctly phrased jury instruction on a genuine issue of material fact is proper, only if the trial court - and this Court on appeal - can say, *taking the evidence in the light most favorable to the party requesting the instruction, and considering all reasonable favorable inference which may be drawn from the evidence in favor of the requesting party, that no hypothetical, reasonable jury could find the facts in accordance with the theory of the requested instruction. Cf. Lee v. State*, 469 So. 2d 1255, 1230-31 (Miss. 1985); *Fairchild v. State,* 459, So. 2d 793, 801 (Miss. 1984).

Hill v. Dunaway, 487 So. 2d 807, 809 (Miss. 1986) (emphasis added). Wiltz argues that the instruction on obviousness of the hazard was fatally defective because it did not require that the jury, before returning a verdict for K-Mart, find both that the water hose was open and obvious *and* that her failure to see it was the sole proximate cause of the accident. She argues that if a condition is open and obvious, but also unreasonably safe for use by business invitees, the owner or occupier of that premises is still negligent. Wiltz also argues that the court wrongfully refused a jury instruction that required the jury to determine if a reasonably prudent person would assume that the plaintiff would see the hose.

1. The "Open and Obvious" Defense

K-Mart submitted and the trial court granted jury instruction D-3:

> K-Mart is not the insurer of the safety of Florence Wiltz so that it should be automatically

> responsible for any injury she may have sustained. Rather, it is the duty of K-Mart to keep the premises reasonably safe, and when not reasonably safe, to warn her only where there is a hidden danger or peril that is not in plain and open view.
>
> If you believe from a preponderance of the evidence the water hose running from the K-Mart store across the asphalt parking lot to the "greenhouse" was a reasonably safe condition; *or, if not a reasonably safe condition, that it was a danger in plain and open view to the Plaintiff Florence Wiltz, then you must return a verdict in favor of K-Mart Corporation.*

The second paragraph allows the jury to find for K-Mart if the unreasonably dangerous condition was open and obvious. The instruction was potentially appropriate when given, but *Tharp v. Bunge Corp.*, 641 So. 2d 20, 23 (Miss. 1994) subsequently changed the law. The result is the "open and obvious" doctrine is no longer a complete defense to negligence actions in premises liability cases where the condition is unreasonably dangerous. *Id.*

The present case was heard in November of 1993. A final judgment of the circuit court was entered on December 3, 1993. Therefore, the court and the parties did not have the benefit of the change in our law at the time the trial took place. The supreme court has in recent appeals reversed premises liability judgments that were properly entered at the time of trial, and remanded for application of the revamped standard. *Downs v. Choo*, 656 So. 2d 84, 87 (Miss. 1995) (court said the "trial court did not have the benefit of these recent cases and, for this reason, the summary judgment is reversed and remanded"); *Baptiste v. Jitney Jungle Stores of Am., Inc.*, 651 So. 2d 1063, 1067 (Miss. 1995) (court remanded the case for trial in order for the jury to find liability, if any). Because cases following *Tharp* have allowed retroactive application of the new approach, we are constrained to follow that law.

K-Mart argues that regardless of *Tharp,* all of the instructions taken as a whole adequately informed the jury of what are now the correct legal principles. In other words, K-Mart says that regardless of instruction D-3, the other instructions informed the jury that "it is not necessary for the Plaintiff to prove that negligence of the Defendant was the sole cause of her injuries, but only that it was a contributing proximate cause." They further argue that Plaintiff's instruction P-4A allows the jury to return a verdict for the Plaintiff if she proved by a preponderance of evidence that K-Mart breached its duty of reasonable care. Instruction P-4A reads:

> The Court instructs the jury that KMART CORPORATION, as the owner and operator of store number 7052, had a duty to FLORENCE WILTZ as its invitee, to maintain its premises in a reasonably safe condition, and to take measures reasonable calculated to remove the danger of any hazards caused or created by its employees. Therefore, if you find from a preponderance of the evidence in this case, that:
>
> 1. KMART CORPORATION was in control of KMART store number 7052 and its accompanying property including the parking lot located in D'Iberville, Mississippi; and
>
> 2. FLORENCE WILTZ was on the property in answer to that express or implied

> invitation of KMART CORPORATION to do business; and
>
> 3. That the hose lying in the parking lot and running from the store through the parking lot to the greenhouse constituted an unreasonably hazardous condition upon the property; and
>
> 4. That the condition was created by employees of the KMART CORPORATION; and
>
> 5. That the Defendant, KMART CORPORATION, failed to take measures reasonably calculated to remove the hazardous condition; and
>
> 6. That the failure on the part of KMART CORPORATION to take such measures was a contributing, proximate cause of Plaintiff's injuries;
>
> Then it is your duty to return a verdict for the Plaintiff.

K-Mart is correct as to the proper way to view instructions. They "are to be taken collectively rather than be given individual consideration. So long as all the instructions read together adequately and properly instruct the jury on the issues, an individual instruction given to the jury will not constitute reversible error." *Detroit Marine Eng'g. v. McRee,* 510 So. 2d 462, 467-68 (Miss. 1987) and cases cited therein. Nonetheless, instruction D-3 required the jury to return a verdict for K-Mart on the sole grounds, regardless of other instructions, that the hose was an open and obvious danger. The instructions "as a whole" do not remove that jury obligation.

We adhere to the law that the open and obvious doctrine is not a complete defense where the "condition complained of was unreasonably dangerous." *Fulton v. Robinson Indus.*,664 So. 2d 170, 173 (Miss. 1995) (quoting *Downs v. Choo*, 656 So. 2d 84, 87 (Miss. 1995). Instruction D-3 is not in line with recent law. The jury must first determine if the owner of the premises breached his duty to keep the premises reasonably safe. If the condition complained of was unreasonably dangerous, then the jury must determine if the condition was open and obvious. This would not end the query as allowed in jury instruction D-3. If the unreasonably dangerous condition was open and obvious, that would be "a fact to be considered by the jury in assessing damages under our comparative fault doctrine." *Fulton,* 664 So. 2d at 172, citing *Tate v. Southern Jitney Jungle Co.,* 650 So. 2d 1347, 1348 (Miss. 1995). The jury was not properly instructed and we reverse.

2. Foreseeability

The other complaint raised also concerns an instruction. Since the same instruction may be offered at a retrial, we will address the point. Wiltz argues that instruction P-7 should have been given to the jury. That rejected instruction reads:

> The Court instructs the jury that in determining whether or not the Defendant, KMART CORPORATION, may assume that FLORENCE WILTZ would exercise ordinary care to see or observe the hose running through the parking lot of store number 7052, you should consider whether a reasonably prudent person would assume that FLORENCE WILTZ would observe or see the hose running through the parking lot of store number 7052

under the circumstances then and there existing.

An invitee is required to exercise ordinary care for her own safety. *Fulton,* 664 So. 2d at 175. Thus it would have been improper to create a jury issue regarding whether K-Mart could assume Wiltz would exercise that legally required care for her own safety. As the *Fulton* court also said, the law after *Tharp* "still revolves around what the owner can 'anticipate' or 'expect,' or what is 'usual.'" *Id.* If a new trial occurs and Wiltz presents a similar jury instruction, it needs to conform to those *Fulton* requirements.

THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY IS REVERSED AND THIS CASE IS REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLEE.

FRAISER, C.J., AND BRIDGES, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND PAYNE, JJ., CONCUR.

THOMAS, P.J., NOT PARTICIPATING.