IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

KENNETH VALENTINE and wife, RITA VALENTINE,	)	
Plaintiffs/Appellants,	)	**Henderson Circuit No. 94-010-J**
VS.	)	**Appeal No. 02A01-9511-CV-00264**
DOUG WEATHERFORD,	)	
Defendant/Appellee.	)	

FILED

December 31, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

APPEAL FROM THE CIRCUIT COURT OF HENDERSON COUNTY
AT LEXINGTON, TENNESSEE
THE HONORABLE CHARLES McPHERSON, JUDGE BY DESIGNATION

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Lexington, Tennessee
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Jackson, Tennessee
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AFFIRMED

ALAN E. HIGHERS, J.

CONCUR:

DAVID R. FARMER, J.

HOLLY KIRBY LILLARD, J.

In this slip and fall case, the Plaintiffs, Kenneth and Rita Valentine, filed suit against

the Defendant, Doug Weatherford, for injuries sustained from Kenneth Valentine's fall at the Defendant's home. The trial court granted the Defendant's motion for summary judgment based upon application of 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 to the facts of this case. For the reasons stated hereafter, we affirm the judgment of the trial court.

FACTS

On February 18, 1993, the Plaintiff went to the Defendant's home in order to assist the Defendant in paneling an enclosed porch. The Plaintiff arrived at the Defendant's home around 12:30 p.m. While at the Defendant's home, the Plaintiff cut and installed paneling for the Defendant's enclosed back porch. One person would cut the paneling, and the other would hang the paneling inside the porch. The two would periodically switch jobs.

Two sawhorses were placed outside in the Defendant's backyard on which the paneling was cut with a skillsaw. The sawhorses were positioned approximately one to two feet from a drop-off at a retaining wall. At approximately 3:30 p.m. while cutting paneling atop a sawhorse, the Plaintiff stepped backwards, slipped on the retaining wall and fell injuring his left knee.

LAW

The Plaintiffs argue that the trial court was incorrect in granting the Defendant's motion for summary judgment. Therefore, the 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 premises 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. Ct. App. 1987); Teal v. E.I. DuPont de Nemours and Co., 728 F.2d 799 (6th Cir. 1984).

When considering the potential liability of an 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. Ct. App. 1987).

The underlying rationale for extending liability to an owner 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. Ct. 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).

When asked whether he was aware of the existence of the retaining wall which caused his fall, the Plaintiff testified in his deposition as follows:

> Q: But were you aware of it [the retaining wall] before you fell? You knew it was there?
>
> A: A retaining wall, yes, but --

Q: But what?

A: No.

Q: Huh? I just wanted -- You said but I. Just finish whatever it was that you were going to say.

A: What was your question?

Q: You knew the retaining wall was there before you fell and you said yes.

A: (No audible response.)
. . .

Q: You've described that you stepped down on your right foot and you're coming off of a piece of paneling and all of a sudden you slip and you went back. So, you don't know what you slipped on? You assume it's that wall. You assume it is that piece of paneling or that piece of plywood there. You can't testify today what you slipped on, can you?

A: Yeah. My foot hit that plywood. I tripped on that plywood.

Q: So, you saw that plywood before you fell?

A: I'm sure I saw it. I never made it no conscious mind.

Q: Okay. You knew it was there then?

A: Is that a question?

Q: Yes. I said you knew it was there then?

A: I never paid the plywood any mind.

Q: You paid the drop off some mind?

A: Yes.

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. Ct. App. 1972); Jackson v. Tennessee Valley Authority, 413 F. Supp. 1050, 1056 (M.D. Tenn. 1976). The Plaintiff states in his deposition that he was aware of the presence of the retainer wall before he fell. Because the existence of the retainer wall 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 Appellants for which execution may issue if necessary.

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HIGHERS, J.

CONCUR:

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FARMER, J.

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LILLARD, J.