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160 S.E.2d 420 (1968) | Cited 0 times | Court of Appeals of Georgia | January 15, 1968

Ruth Morgan brought an action against A. B. Griffith for damages for alleged personal injuries sustained as a result of the defendant's alleged negligence. The petition, as finally amended, alleged materially as follows: "2. The defendant owner leases the premises at 1160 Prince Avenue to Dr. Nile Clark, M.D. for use as offices in the practice of medicine. 3. At the front entrance of the doctor's office is a porch with one step leading down to the blacktop parking area between the office and Prince Avenue. 4. Separating the parking area from the front porch of Dr. Clark's office was a curb approximately six inches in height and running parallel to the front porch for the length of the building and this curb is so situated that leaves a narrow path of about 2 1/2 feet between it and the front porch steps. 5. The shape of the curb is very deceptive, giving the appearance of being symmetrical design but in fact is constructed in a shape similar to a quarter section of a circle and in addition the curb was painted with an unknown type of paint that caused it to be very slippery. 6. In addition to the negligent construction, deceptive appearance and slippery surface of the curb it was negligently and improperly placed directly in front of the main entrance of the doctor's office. 1. On an unknown date, soon after the negligent construction of the curb, notice was given to the defendant owner's secretary by Mrs. Barbara Clark, Dr. Nile Clark's wife, that an unknown person had stumbled over the defective curb and that the curb should be fixed or removed to prevent further injury to Dr. Clark's patients. 9. On April 8, 1966, after visiting Dr. Clark's office for professional treatment, Mrs. Morgan came out of the main door of his office, stepped down on the step and then stepped on to the blacktop paving area, and then she took a step to go to her car but stepped onto the deceptive looking curb and slipped across the deceptive looking curb. 10. The sole reason for Mrs. Morgan's fall and her resulting injuries, as set forth later, was the negligent construction of the curb, the slippery paint used to paint that curb, the improper placing of the curb in front of a heavily used doctor's entrance, and the negligent conduct of the defendant in not providing for the safety of his lessee's patients or even warning them of the dangerous situation that existed, . . . 15. Ruth Morgan specifies the following acts of negligence by the defendant as being the direct cause of her accident and the resulting injuries: A. In constructing a curb deceptive in appearance. B. In negligently constructing the curb as hereinbefore stated and described so that it was dangerous for anyone using their parking lot. C. In painting this curb with a very slippery type paint. D. In failing to warn the public of this dangerous situation by a sign or any other means. E. In negligently locating the inherently dangerous curb in such a manner as to make it even more of a hazard than it already was."

The defendant filed general and special demurrers to the petition and filed renewed and additional demurrers to the petition as finally amended. The court overruled all of the foregoing, from which judgment the defendant appeals.

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1. The principal issue raised by the general demurrer is whether the defendant landowner was negligent in constructing and maintaining on his property, used as a public parking area for doctors' patients, a curb which is alleged to be six inches high, shaped deceptively and asymmetrically like a quarter section of a circle, extending parallel to and for the length of the building, located between the building and the blacktop parking area, 2 1/2 feet from the front porch steps, and painted with a paint of unknown type and unspecified color, so as to make it very slippery.

It is a question for a jury whether the owner of premises has exercised proper care and diligence in keeping the premises safe for those invited thereon, especially when the defective condition is one of such character that reasonable and prudent men may reasonably differ as to whether an injury could or should have been reasonably anticipated from its existence or not. Code § 105-401; Goldsmith v. Hazelwood, 93 Ga. App. 466 (92 S.E.2d 48); Roberts v. Wicker, 213 Ga. 352 (99 S.E.2d 84). None of the cases cited to us involving similar factual situations, in which the owner or occupier has been held not negligent as a matter of law, has the same set of facts as the instant case. Each case must rest upon its own facts, of which there is an infinite variety. This case is distinguishable on its facts from Broadview Plaza, Inc. v. Goodman, 116 Ga. App. 738 (158 S.E.2d 258), in that, in that case, the curb or divider was so placed that it was not necessary to walk over it, it was not asymmetrically shaped or slippery, it did not appear that the plaintiff had tripped on the alleged defect on the divider, rather than merely on the divider itself, and, finally, that plaintiff was in the process or stepping over the divider, rather than stepping onto it, as the present plaintiff alleges she did.

We are of the opinion that the present petition alleges a cause of action arising out of the defendant's negligence. Whether or not the plaintiff failed to avoid the consequences of the defendant's negligence, if any, is also a jury question. Chotas v. J.P. Allen & Co., 113 Ga. App. 731, 734 (149 S.E.2d 527) and cit.

2. The court erred in its judgment overruling the special demurrer to Paragraph 7 of the petition. Said paragraph does not allege that the defendant's notice of the other alleged injury was received prior to the plaintiff's fall, but merely that it was on an "unknown date, soon after the negligent construction of the curb," which could have been after her fall.

The court did not err in its judgment overruling the general demurrer to the petition as amended, but erred in overruling the special demurrer thereto.

Judgment affirmed in part; reversed in part.

Eberhardt, Judge, Dissenting.

In my judgment the factual situation presented by this petition is not logically distinguishable from those presented in McMullan v. Kroger Co., 84 Ga. App. 195 (65 S.E.2d 420); Ely v. Barbizon Towers, Inc., 101 Ga. App. 872 (115 S.E.2d 616); McHugh v. Trust Co. of Ga., 102 Ga. App. 412 (116 S.E.2d 512);

Carmichael v. Timothy, 104 Ga. App. 16 (120 S.E.2d 814); Cook v. Parrish, 105 Ga. App. 95 (123 S.E.2d 409); Pulliam v. Walgreen Drug Stores, 108 Ga. App. 90 (131 S.E.2d 801); Sanders v. Jefferson Furniture Co., 111 Ga. App. 59 (140 S.E.2d 550); Associated Distributors, Inc. v. Canup, 115 Ga. App. 152 (154 S.E.2d 32); and Broadview Plaza, Inc. v. Goodman, 116 Ga. App. 738 (158 S.E.2d 258), all of which dealt with parking lot situations and in all of which we held that no cause of action was presented.

If it be conceded that the painting of the parking lot curb or divider, though rendering it more clearly visible, made it slippery when one stepped on it, the facts alleged show without question that there was no necessity for plaintiff to step on it. She could and should have stepped over the six-inch concrete curb installed for the purpose of providing a stop for parking vehicles, affording a uniformity in parking and use of the lot. As we have observed in several of the cited cases, this is a usual and customary practice in the designing of parking lots.

Though the owner of land does owe the duty of ordinary care in the keeping of his premises in a reasonably safe condition for use by those invited to come upon them, if an invitee fails to exercise ordinary care for his own safety in the use of the premises he cannot recover. Code § 105-603; City of Columbus v. Griggs, 113 Ga. 597 (38 S.E. 953, 84 ASR 257); Southern R. Co. v. Hogan, 131 Ga. 157 (62 S.E. 64); Ball v. Walsh, 137 Ga. 350 (73 S.E. 585); Vaissiere v. J.B. Pound Hotel Co., 184 Ga. 72 (190 S.E. 354). And this rule applies even though plaintiff's injury "may be in part attributable to the negligence of the defendant." Southern R. Co. v. Dickson, 138 Ga. 371 (5) (75 S.E. 462). The owner of the premises is not and does not become an insurer of a patron's safety. Platz v. Kroger Co., 110 Ga. App. 16 (137 S.E.2d 561). And, as Chief Judge Felton asserted in Lane Drug Stores, Inc. v. Story, 72 Ga. App. 886 (35 S.E.2d 472), "The rule of law as to the duty of the occupier of premises to an invitee applies to hidden defects and to those not discoverable by the invitee by the exercise of ordinary care." The defect here, if there was one, was neither hidden nor undiscoverable by the use of ordinary care.

Particularly applicable to outside areas is the principle that "The pedestrian is not entitled to an absolutely level and unobstructed passageway." 4 Shearman & Redfield on Negligence, p. 1817, § 795. "The drop in elevation of some 3 or 4 inches from the paved walk to the paved parking space, where plaintiff was walking at the time of the accident, cannot be said to present a hidden or concealed danger for any person using it in broad daylight especially, and keeping a reasonable watch as to where he is walking, and with no unreasonable distractions. Certainly plaintiff, upon entering or leaving a store of this character, and undertaking to walk through and upon the parking grounds, must take notice that such changes in elevations are not uncommon and are to be expected." Seal v. Safeway Stores, 48 N.M. 200 (5) (147 P2d 359). "In determining what is a defect in a sidewalk, or a store aisle, or a parking lot, we must take into consideration the nature of the establishment, and we must undertake to determine just what type of surface the user would have the right to expect. A person walking through a store is justified in assuming that the floor is level and smooth. But where a person walks in a parking lot . . . it must be realized that that surface will have indentations and

depressions, and the person using it must exercise such care as may be required in the use of such a surface, and we do not see that it can be said to be actionable negligence of the owner of such a surface to allow indentations such as that which is indicated by the evidence here, to remain." Byrnes v. National Cas. Co., (La. App.) 45 So.2d 408. Conversely, the user must also expect to find curbs, separators, and the like in parking lots.

Whether it was a curb, a separator or a divider of parking places, the concrete bar has a specific utilitarian use and purpose and this was recognized in the decisions cited above. It was intended, not as something for users of the parking lot to step on, but something to guide them in an orderly parking of vehicles, and thus was something which they should anticipate and step over. Cases involving these situations differ and are distinguishable from Chotas v. J.P. Allen & Co., 113 Ga. App. 731 (149 S.E.2d 527), where the offending object was a large rubber door mat on which a store patron had to step in getting into the store. In stepping on the curb or divider plaintiff devoted it to a use not reasonably intended, and when one is injured in so doing the owner or occupier of the land cannot be held therefor. Balch v. Garling, 102 Ga. 586 (29 S.E. 146); Knowles v. Central of Ga. R. Co., 118 Ga. 795 (45 S.E. 605); Babcock Bros. Lumber Co. v. Johnson, 120 Ga. 1030 (3) (48 S.E. 438); Culbreath v. Kutz Co., 37 Ga. App. 425 (140 S.E. 419); McDade v. West, 80 Ga. App. 481, 487 (2) (56 S.E.2d 299); Hornsby v. Haverty Furniture Co., 85 Ga. App. 425 (69 S.E.2d 630); Howerdd v. Whitaker, 87 Ga. App. 850 (75 S.E.2d 572); Augusta Amusements, Inc. v. Powell, 93 Ga. App. 752 (92 S.E.2d 720).

I would reverse the overruling of the general demurrer.

I am authorized to state that Presiding Judge Bell joins in this Dissent.