

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000702-MR

CAROLYN DUVALL

APPELLANT

v. APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
ACTION NO. 99-CI-00016

J.W. NEAL REVOCABLE TRUST;
JEFFERSON W. NEAL,
D/B/A NEAL MANAGEMENT CO.;
AND JEFFERSON W. NEAL,
INDIVIDUALLY

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: BARBER, DYCHE, AND JOHNSON, JUDGES.

BARBER, JUDGE: The sole issue on appeal is whether the trial judge erred in excluding evidence of a subsequent remedial measure under KRE 407. Finding no error, we affirm.

The Appellant is Carolyn Duvall ("Duvall"). On May 16, 1998, while visiting her fiancé at his residence, Duvall was injured when her left foot slipped through a drainage grate in the driveway. Duvall's fiancé leased the residence from the J.W. Neal Revocable Trust, which holds title to the property. Duvall filed suit against the Trust, Jefferson W. Neal d/b/a Neal

Management Company and Jefferson W. Neal, individually (collectively, "Neal").

On January 4, 2000, Neal filed a motion in limine to exclude evidence from being heard at trial that Neal had had the separate sections of the drainage grate welded together after Duvall's injury. The trial court granted Neal's motion, following a hearing. The jury returned a verdict in favor of Neal. On January 28, 2000, the court entered judgment and dismissed Duvall's complaint with prejudice. On February 2, 2000, Duvall filed a motion for a new trial, notwithstanding the verdict, on the ground that she should have been allowed to introduce the subject evidence. The court denied the motion by order entered February 22, 2000.

On appeal, Duvall contends that the trial court erred, as a matter of law, in applying KRE 407 because it construed the list of exceptions contained in the rule as exhaustive, rather than illustrative.

KRE 407 provides:

When, after an event, measures are taken which, if taken previously, would have made an injury or harm allegedly caused by the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence in connection with the event. This rule does not require the exclusion of evidence of subsequent measures in products liability cases or when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Having reviewed the trial videotape, we do not believe that the trial court misconstrued the rule. The court noted Lawson's (Robert G. Lawson, The Kentucky Evidence Law Handbook, (3rd Ed. 1993) (which Duvall cites in her brief on appeal), but simply did not see that any of the exceptions to the rule "fit." The court did not refuse to consider a particular exception on the basis that the exception was not specifically listed in the rule; rather the court believed this to be a classic post-accident remedial measure.

Duvall also maintains that the evidence should have been allowed in order to prove a dangerous condition, relying on L.&N.R. Co. v. Woodward, 15 Ky. L. Rptr. 445 (1893). Duvall's reliance upon Woodward is misplaced. In Woodward, evidence of subsequent measures was admissible for the purpose of proving **when** a condition existed. Testimony for the defendant had shown that protruding railroad ties were sawed off before the plaintiff's accident. The plaintiff was permitted to show that the ties were sawed off after the accident. The condition of the premises at the time of Duvall's injury is not at issue.

Pitasi v. The Stratton Corp., 968 F.2d 1558 (2d Cir. 1992), also relied upon by Duvall, is distinguishable. In Pitasi, a ski resort had roped off the top of a trail which had been closed due to dangerous conditions; the side entrances had not been roped off. After the plaintiff was injured, the resort ordered its employees to place warning signs and ropes across the side entrances to the trail. At trial, the primary defense was

that the risk posed by the trail was so obvious that no warning signs or ropes were needed. On appeal, the Court held that the evidence of remedial measures was admissible to rebut an argument that the plaintiff was contributorily negligent and to impeach the defendant's employees' testimony that the danger was obvious and apparent.

Duvall contends that the subsequent "act of welding the grates would have been offered as evidence of an implicit admission by the appellees that they recognized that the unwelded grates posed a danger to the tenant," In other words, Duvall wanted to use the evidence to prove that Neal maintained a dangerous condition. We agree with the trial court that this is a "classic" subsequent remedial measure excluded under KRE 407. The policy underlying the general rule [removal of disincentives to take corrective action] can be easily threatened "if courts look for 'other purposes' for admitting the evidence, without sensitivity to the fact that the law is intended to be predominantly exclusionary." Lawson, supra at 2.45, 130. The trial court did not abuse its discretion in excluding the evidence. Goodyear Tire & Rubber Co. v Thompson, Ky., 11 S.W.3d 575, 577 (2000). We affirm.

ALL CONCUR.

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