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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002369-MR

WAL-MART STORES, INC. APPELLANT

v.

APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE LARRY MILLER, JUDGE
ACTION NO. 99-CI-00037

JOHN HULSE APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: EMBERTON, MILLER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Appellant, Wal-Mart Stores, Inc., appeals from a jury verdict awarding damages to appellee, John Hulse, as a result of injuries incurred by Hulse in a slip and fall accident at a Wal-Mart store. As the trial court erred in denying Wal-Mart's motion for a directed verdict, we reverse.

On February 15, 1998, John Hulse, along with his wife and two relatives, went to the Wal-Mart store in Jackson, Kentucky. After entering the store, Hulse separated from the others and went to the sporting goods section of the store. A short time later, Hulse came back out to the main aisle, and decided to find his wife in the craft department. Hulse cut

through the middle of two displays in order to avoid people coming down the aisle. As he stepped around the corner of one of the displays, Hulse slipped in a liquid and fell to the floor, injuring his right shoulder, arm, and wrist.

Hulse brought a negligence action against Wal-Mart, and a jury trial was held on September 18, 2000. At trial, Hulse testified that he did not see the spill, which he described as a clear liquid covering four or five tiles, until after he had fallen. Hulse stated that after he fell, he raised up and looked around for help, but did not see any Wal-Mart employees. Hulse testified that he saw two customers walking in his direction, but they turned away and did not come over to help. Hulse got up and located two employees in what he believed was a break room, and told them he had fallen in liquid on the floor and that it needed to be cleaned up. One of the employees, whom Hulse believed to be Polly Clemons, left quickly, while the other employee gave Hulse some towels to wipe the liquid off of his pants. Hulse then proceeded back to the spill, at which time he met Wal-Mart assistant manager Agnes Hall and two other employees on their way to clean up the spill. Hulse estimated that from the time he fell, found the employees in the break room, and met Hall, could have been as much as five minutes or more. Hulse testified that Wal-Mart did not make any announcements.

Brenda Jewell testified that she was shopping in the Wal-Mart on the same day when she, too, slipped and fell in a clear liquid. She got up after two or three seconds, did not see any Wal-Mart personnel around, and therefore went to the back of

the store where she found two Wal-Mart employees who returned to the spill site with her. Jewell stated that it took her two or three minutes to find the Wal-Mart employees. Jewell testified that after returning to the spot with the two employees, Agnes Hall came up to the site. Jewell testified that she remembered seeing Hulse standing near the site while it was being cleaned up, and that he had a wet spot on his back. Jewell described the substance that she fell in as a clear liquid which covered at least a three-foot circle. Jewell testified that she did not hear any announcements made over the store's speaker.

Agnes Hall, an assistant manager of the Wal-Mart, testified that Jewell walked up to her and informed her that there was a spill on the floor and that she (Jewell) had fallen in it. Hall stated that she and several associates immediately went to the site of the spill to get it under control. Hall testified that caution cones and buggies were placed to block people from approaching the spill. Despite the cones, a customer, Tina Hernandez started to come through the area with a baby. Hall stepped in and tried to stop Hernandez, at which point Hall fell and Hernandez fell on top of her. Hall testified that the spill was about two feet long and two feet wide, and that it was later determined the liquid had come from a bottle that had been opened and put back on a shelf. Hall was not sure if Hulse fell before, or after, Jewell had fallen.

Hall testified that the employee responsible for the area where the spill was located, the "chemical section", that day was Jason Fugate, who was responsible for a total area of

about four aisles. Hall stated that Fugate's job was to stay in those four aisles, unless he was on a break or getting something down for a customer. Hall testified that the falls all occurred sometime between 2:30 and 3:00 p.m., at which time the employees were engaged in "zone defense". Zone defense occurs from 1:00 to 3:00, at which time employees are required to patrol their areas, and do nothing but straighten and clean, unless a customer needs help. Hall testified that when there is a spill, "code white" is announced, at which time employees in the area come to assist. Hall testified that even during times other than "zone defense", spills are cleaned up immediately after they are discovered, and that when a spill is noted, an employee goes directly to the spill and guards it until it is taken care of.

Polly Clemons, a Wal-Mart support team manager, testified that she was in the layaway department, when Hulse approached and told her that there was a spill on the floor. Clemons stated that she immediately went to the spill site, which Hulse had pointed to, and found Agnes Hall present and the caution cones in place. Clemons testified that it was her job to walk around the store and make sure everyone was in "zone defense". Clemons testified that she had been through the area of the spill a few minutes prior to Hulse's reporting it to her, but had not seen a spill. Jason Fugate, the chemical section employee, testified that he had been away from the section for five or ten minutes, helping get down a vacuum cleaner for a customer, when he heard the "code white" over the intercom, after which he immediately returned to the chemical section. Fugate

stated that he had not seen a spill before he left the chemical section.

At the close of Hulse's case, and again at the close of all of the evidence, Wal-Mart moved for a directed verdict, both of which motions the court denied. The jury found Wal-Mart 100% liable for Hulse's injuries, and awarded him $73,670.40 in damages. On September 28, 2000, Wal-Mart filed a motion for judgment notwithstanding the verdict and new trial, which the court denied on October 6, 2000. This appeal followed.

On appeal, Wal-Mart argues that the court erred in denying its motion for directed verdict, due to the lack of evidence that Wal-Mart knew of the substance on the floor and lack of evidence as to how long the substance had been there. "It is well settled law in Kentucky that a business is not absolutely liable to its invitees." Stump v. Wal-Mart Stores, Inc., 946 F. Supp. 492, 493 (E.D. Ky. 1996), citing Wiggins v. Scruggs, Ky., 442 S.W.2d 581, 583 (1969). A store owner has a duty to exercise ordinary care to have his premises in a reasonably safe condition for the expected use of the invitee. Smith v. Smith, Ky., 441 S.W.2d 165 (1969).

> Where the floor condition is one which is traceable to the possessor's own act - that is, a condition created by him or under his authority - or is a condition in connection with which the possessor is shown to have taken action, no proof of notice of the condition is necessary. However, where it is not shown that the condition was created by the possessor or under his authority, or is one about which he has taken action, then it is necessary to introduce sufficient proof by either direct evidence or circumstantial evidence that the condition existed a sufficient length of time prior to injury so

> that in the exercise of ordinary care, the possessor could have discovered it and either remedied it or given fair adequate warning of its existence to those who might be endangered by it.

Cumberland College v. Gaines, Ky., 432 S.W.2d 650, 652 (1968). No testimony was presented at trial, and Hulse does not allege, that Wal-Mart created the spill on the floor. Id. Thus, Hulse was required to establish either by direct or circumstantial evidence that the substance was on the floor a sufficient length of time prior to his fall so that in the exercise of ordinary care, Wal-Mart could have discovered it. Jones v. Jarvis, Ky., 437 S.W.2d 189 (1969); Gaines, 432 S.W.2d at 652.

The standard of review of a trial court's denial of a motion for directed verdict is as follows:

> Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'"

Lewis v. Bledsoe Surface Mining Co., Ky., 798 S.W.2d 459, 461-462 (1990) (citations omitted).

No evidence was presented at trial which would indicate the amount of time the liquid was on the floor prior to Hulse's

fall. Smith v. Wal-Mart Stores, Inc., Ky., 6 S.W.3d 829 (1999); Jones, 437 S.W.2d 189. Hall testified that the spill came from a bottle that had been opened and put back on a shelf. The evidence indicated that Hulse slipped within a short time of Brenda Jewell. Jewell testified that it took her 2-3 minutes from the time she fell until she located the Wal-Mart employees, who immediately returned to the site to clean up the spill. There was no evidence to indicate that Wal-Mart knew of the spill prior to Jewell's report. Clemons, the support team manager, did not know how long the spill had been there, but testified that she had walked through the area within a few minutes of Hulse reporting the spill, at which time there was nothing on the floor. Fugate, on duty in the chemical section, testified that he had not seen a spill prior to leaving the area, five to ten minutes prior to learning of the spill's existence.

As insufficient evidence was presented as to the length of time the liquid was on the floor, we conclude that a jury could not reasonably infer that the spill existed for a sufficient length of time prior to Hulse's fall so that Wal-Mart, in the exercise of ordinary care, could have discovered its existence, and remedied or warned of it. Gaines, 432 S.W.2d at 652; Jones, 437 S.W.2d 189. Hence, the question of negligence should not have been submitted to the jury and Wal-Mart was entitled to a directed verdict. Smith, 6 S.W.3d 829; Jones, 437 S.W.2d 189.

For the aforementioned reasons, we reverse the judgment of the Breathitt Circuit Court and remand for the entry of an appropriate order.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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