RENDERED: FEBRUARY 23, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000419-MR

JOHNNY BISHOP APPELLANT

APPEAL FROM CLAY CIRCUIT COURT
v. HONORABLE R. CLETUS MARICLE, JUDGE
ACTION NO. 96-CI-00262

DARLENE LUNSFORD AND
SOUTHEASTERN UNITED MEDIGROUP
INC. d/b/a ANTHEM BLUE CROSS
BLUE SHIELD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DIXON AND VANMETER, JUDGES.

COMBS, CHIEF JUDGE: Johnny Bishop, individually and d/b/a Bishop's Mobile Home Sales, appeals from a jury verdict and judgment of the Clay Circuit Court rendered in favor of Darlene Lunsford in her premises liability tort action against Bishop. On appeal, Bishop contends that the circuit court erred in its instructions to the jury when it

failed to include appropriate instructions on apportionment and the duties owed by the parties. After our review, we affirm.

Lunsford was injured on December 7, 1995, when she fell upon exiting a mobile home. The injuries occurred while Lunsford and four family members visited Bishop's mobile home lot to look for a mobile home for her son. Wooden steps were located in front of a mobile home that Lunsford and her family entered. They had all used the steps to gain access to the mobile home in order to look around inside, and all of Lunsford's family descended the steps without incident after their visit. According to Lunsford, when she attempted to descend the steps, they collapsed beneath her, causing her to fall to the ground and to suffer severe injuries.

On July 19, 1996, Lunsford filed suit in the Clay Circuit Court against Bishop to recover for the injuries she suffered as a result of her fall at the mobile home lot. She later filed an amended complaint adding as defendants First National Bank of Manchester and Mike Hooker, individually and d/b/a Hooker's Grocery and Gas because of their alleged ownership of the mobile home from which she fell and the property upon which the home was located; however, these parties were eventually dismissed from the litigation and are not involved in this appeal. Southeastern United Medigroup, Inc., d/b/a Anthem Blue Cross Blue Shield, also intervened in the action to protect its subrogation interests and remains a party to this case. Its involvement does not affect the issues raised on appeal.

After a number of delays, the case was finally tried on August 14, 2003. The jury was unable to reach a verdict and a mistrial was declared. The case was tried

again on January 10 and 11, 2006, and the jury returned a verdict in favor of Lunsford, awarding her $164,375.65 (plus interest) in damages. On January 12, 2006, the circuit court entered a trial order and judgment consistent with the jury's verdict. Bishop's post-trial motions for relief were denied. This appeal followed.

On appeal, Bishop argues that the trial court erred in failing to tender appropriate instructions to the jury as to apportionment and as to the duties owed by the parties in a premises liability tort case. Although Lunsford contends that the issues raised by Bishop are not properly preserved for our review, we disagree.

Kentucky Rule of Civil Procedure (CR) 51(3) provides that a party may not assert a claim of error as to jury instructions:

> unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

The record reflects that Bishop tendered proposed instructions to the circuit court that included comparative fault and apportionment instructions. Lunsford concedes this fact in her brief. Thus, Bishop's position on the issue of apportionment and the duties owed by the parties was properly presented in his proposed instructions, and nothing more was required to preserve the matter for appeal. *Surber v. Wallace*, 831 S.W.2d 918, 920 (Ky.App. 1992); *Cobb v. Hoskins*, 554 S.W.2d 886, 888 (Ky.App. 1977).

Bishop asserts several claims of error. Alleged errors regarding jury instructions are considered questions of law that we examine under a *de novo* standard of review. *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky.App.

2006). "Instructions must be based upon the evidence and they must properly and intelligibly state the law." *Howard v. Commonwealth*, 618 S.W.2d 177, 178 (Ky. 1981). Of particular relevance here is the fact that "[e]ach party to an action is entitled to an instruction upon his theory of the case if there is evidence to sustain it." *Farrington Motors, Inc. v. Fidelity & Casualty Co. of New York*, 303 S.W.2d 319, 321 (Ky. 1957); *see also Reece*, 188 S.W.3d at 449.

Bishop first argues that a jury instruction on apportionment of fault is required in all tort actions. He cites to Kentucky Revised Statute (KRS) 411.182, which provides that "[i]n all tort actions . . . involving fault of more than one (1) party to the action," the jury must determine "[t]he percentage of the total fault of all the parties to each claim that is allocated to each claimant [and] defendant." KRS 411.182(1) & (1)(b). We do not agree that such an instruction is automatically required as a matter of law. Our courts have consistently held that a finding of fault *a priori* must be the predicate for an apportionment instruction:

> apportionment of fault may not even be considered by the jury unless and until the trial court makes a threshold assessment that reasonable jurors could, in fact, determine that an individual was at fault.

Kentucky Farm Bureau Mut. Ins. Co. v. Ryan, 177 S.W.3d 797, 804 (Ky. 2005); *see also Reese*, 188 S.W.3d at 451; *Owens Corning Fiberglas Corp. v. Parrish*, 58 S.W.3d 467, 471-72 n.5 (Ky. 2001). Accordingly, in order to determine if an apportionment instruction was required here, we must examine whether there was sufficient evidence that Lunsford bore any fault for the accident.

Bishop contends that the record contains ample evidence that Lunsford was at least partially at fault for her injuries. In considering this argument, we note from our review of the briefs that Bishop appears to acknowledge Lunsford's status as that of an "invitee." "[A]n invitee is generally defined as one who comes upon the land in some capacity connected with the business of the possessor." *Hardin v. Harris*, 507 S.W.2d 172, 174 (Ky. 1974). "An invitee enters upon the premises at the express or implied invitation of the owner or occupant on business of mutual interest to them both, or in connection with business of the owner or occupant." *Scuddy Coal Co. v. Couch*, 274 S.W.2d 388, 390 (Ky. 1954).

Bishop first observes that the area surrounding the mobile home steps was wet and muddy due to melting snow. Primarily relying on *Ferguson v. J. Bacon and Sons*, 406 S.W.2d 851 (Ky. 1966), he contends that Lunsford "should have seen the mud that resulted from the snow and known that a dangerous condition was possible in light of the snowy weather and taken appropriate precautions . . . ." He argues that she had a duty to protect herself "in weather that creates dangerous conditions."

In contrast to *Ferguson*, this is not a "slip-and-fall" case. Lunsford was not injured after slipping on dangers created by the elements; she testified that the steps were free of mud and ice. Instead, the evidence is undisputed that the steps simply collapsed under her while she was leaving the mobile home. There is nothing in the record to indicate that mud, ice, snow, or any other natural outdoor hazard had anything to do with the incident. Thus, snow and mud on the ground adjacent to the clear steps in no way warranted an apportionment instruction.

Bishop next contends that Lunsford is partially at fault for her injuries because she testified that she did not look at the steps before trying to descend them. Lunsford's testimony was ambiguous – perhaps even contradictory – on this point. Although she did testify that she did not look at the steps before using them, she also indicated that the steps appeared to be "pretty stable" and that she assumed that they were accessible and usable. As a general rule, "[a] person does not have to 'look directly down at [her] feet with each step taken but, in the exercise of ordinary care for [her] own safety, one must observe generally the surface upon which [she] is about to walk.'" *Reece*, 188 S.W.3d at 450-51, quoting *Humbert v. Audubon Country Club*, 313 S.W.2d 405, 407 (Ky. 1958). As there is nothing else noteworthy in the record pertaining to the exact circumstances of Lunsford's accident, we must determine whether this testimony constitutes sufficient evidence that Lunsford failed to exercise reasonable care in exiting the mobile home so as to merit an apportionment instruction. After careful consideration, we believe that it does not.

While Lunsford as an invitee had a duty to exercise reasonable care for her safety, she was not required to undertake an actual inspection. As noted in *Humbert*, *supra*, a general observation was sufficient. An invitee "is not obliged to make an inspection of the premises to assure himself that they are safe, and he is contributorily negligent **only when the peril is obvious** to a person of ordinary prudence in the situation." (Emphasis added). *Milby v. Mears*, 580 S.W.2d 724, 729-30 (Ky.App. 1979). An invitee is also "not required to look for danger when there was no reason to

apprehend danger." *Winn-Dixie Louisville, Inc. v. Smith*, 372 S.W.2d 789, 792 (Ky. 1963).

After reviewing the record, we cannot conclude that Lunsford had a reason to apprehend danger or that she otherwise failed to exercise reasonable care in using the steps. Although she stated that she did not look directly at the steps, she also testified that they appeared usable and stable. She testified that she and her family were able to use the steps to enter the mobile home and that her family members were able to leave the mobile home using those same steps immediately before they collapsed beneath Lunsford. Lunsford directly observed that the steps were free of ice and snow, indicating that she did take general notice of the surface upon which she was about to walk. *Humbert*, *supra*. There was no testimony or evidence to indicate that Lunsford's accident in any way resulted from her failure to exercise reasonable care or to take note of any obvious risks or dangers. In *res ipsa loquitur* fashion, the steps simply collapsed beneath her for reasons beyond her control. Since there was no evidence to demonstrate any fault whatsoever on her part, there was no predicate upon which to base an apportionment instruction or to require an instruction relating to her failure to adhere to any duty. We find no error on the part of the trial court in refraining from so instructing.

Bishop last argues that the trial court improperly instructed the jury as to the duties he owed to Lunsford. With regard to an invitee, a business owner has a duty "to use ordinary care to have the premises in reasonably safe condition, but does not insure [her] safety." *Scuddy Coal*, 274 S.W.2d at 390; *see also Ferrell v. Hellems*, 408 S.W.2d 459, 463 (Ky. 1966); *Lewis v. B & R Corp.*, 56 S.W.3d 432, 438 (Ky.App. 2001). This

rule has been extended to a business owner's use and maintenance of stairs. *See Wilkinson v. Family Fair, Inc.*, 381 S.W.2d 626, 628 (Ky. 1964). While a business owner does not insure an invitee's safety, he "has an affirmative duty to exercise reasonable care to inspect for hazardous conditions." *Lanier v. Wal-Mart Stores, Inc.*, 99 S.W.3d 431, 433 (Ky. 2003). That duty to inspect is set forth as follows:

> he must also act reasonably to inspect the premises to discover possible dangerous conditions of which he does not know, and take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use of the property.

Id., quoting William Prosser and W. Page Keeton, *Prosser and Keeton on Torts*, § 61, at 425-26 (5th ed. 1984).

Bishop contends that he was only responsible for those perilous conditions of which he either "knew or should have known," and that his "knowledge was an issue for the jury." However, the question of whether Bishop knew or should have known of the dangers presented by the mobile home steps was properly presented to the jury for its consideration. "Instruction No. 1(b)" advised the jury that "[y]ou will find for PLAINTIFF if, and only if, you are satisfied from the evidence as follows: . . . that the stairs were in a state of repair so as to cause an unsafe condition, **that was known or should have been known to the DEFENDANT**." (Emphasis added). We find no error as to the trial court's instructions on Bishop's owed duties.

The jury verdict and judgment of the Clay Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Stella B. House
Manchester, Kentucky

BRIEF FOR APPELLEE:

Stephen W. Cessna
London, Kentucky