RENDERED: March 12, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

No. 1997-CA-002920-MR

WAL-MART STORES, INC. APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELER, JR., JUDGE
ACTION NO. 96-CI-000321

DEBORAH ROBERTSON APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; DYCHE and KNOX, JUDGES.

KNOX, JUDGE: Appellant, Wal-Mart Stores, Inc. (Wal-Mart), appeals from a judgment entered by the Hopkins Circuit Court upon a jury verdict in favor of appellee, Deborah Robertson, in a personal injury case. We affirm the decision of the trial court.

This case arose out of an incident which occurred at a Wal-Mart store located in Madisonville, Kentucky. On November 18, 1995, while appellee and her mother were shopping at Wal-Mart, two wooden ladderback chairs fell from a display and hit appellee, who was in a wheelchair at the time, on her head, shoulders, and right ear. In June 1996, appellee filed a

complaint against Wal-Mart, alleging negligence and ultimately requesting $50,000.00 in compensatory damages plus medical expenses. Wal-Mart filed a third-party complaint against an unknown defendant who, Wal-Mart alleged, was shopping at Wal-Mart on November 18, 1995, and was solely responsible for the incident which occurred that day. The matter was tried before a jury on September 30, 1997.

Appellee, who suffers from multiple sclerosis, had been using a wheelchair to get around on the date of the accident. She testified her mother was pushing her down an aisle at Wal-Mart when, suddenly, she felt a "bang" on her head, which knocked her head to her shoulder and made her think her right ear had been "jerked off." She was dazed momentarily, and then began feeling intense pain on the top of her head and shoulders, and a burning in her ear. Shortly thereafter, it appeared to her that two wooden ladderback chairs had fallen from a display above her head. Appellee's mother drove her to the emergency room at the Regional Medical Center in Madisonville, where appellee's ear was examined. She was given some Tylenol for her pain and was sent home.

Two days later, appellee testified, she went to her hometown doctor because she was experiencing pain in her ear, neck, back, and head. X-rays were taken of her skull. One week later, she returned for a follow-up visit, and this time, a CT scan was performed on her spine. Neither the x-rays nor the CT scan revealed any damage. Appellee testified, however, that

although she had been able to take a few steps without the aid of a cane or walker prior to the incident, she was no longer able to do so. When asked whether she had seen any other customers in the area, or whether she had seen the wooden chairs on display, appellee testified that she had observed neither the display nor any customers.

Ona Robertson (Ona), appellee's mother, corroborated appellee's version of the events. She testified there was no forewarning that the chairs would fall, nor did she see anyone in close proximity to her and her daughter. Ona testified that after the incident, she looked up and saw several chairs on a shelf high above her head. The chairs were stacked in twos, seat to seat (one chair right side up and the other bottom side up).

Two eyewitnesses to the accident, sisters Reva May (Reva) and Eva Dean May (Eva), also testified. Eva testified that she and her sister were walking up the aisle toward appellee and her mother when, suddenly, two chairs fell on appellee's head. Eva noticed no immediate reaction from appellee, and proceeded to check on her. She noticed blood on appellee's right ear which, by then, had turned black. Eva testified she had noticed at least four (4) chairs on the display shelf, which she estimated to be at shoulder height. She further stated that a man in a blue jean jacket had been looking at the chairs, although she did not see him actually touch them. After the accident, she testified, the man remained in close proximity, evidently concerned about appellee.

Reva testified she had seen a gentleman looking at some ladderback chairs.

> He had one of them down on the floor. . . . When he finished looking at this chair, he started to put it back and, when he did, the legs flipped off and flipped over, and hit Ms. Robertson. . . . When he finished, he picked the chair up and proceeded to set it bottom side up on another chair, just like the others were setting, and they were real close to the edge.

Reva described the gentleman as approximately five (5) feet ten (10) inches tall, with wavy brown hair and glasses, wearing blue jeans and a blue jean jacket. She testified there was no forewarning and no time to prevent the accident. Reva thought appellee's neck was broken, and immediately began looking for help. The gentleman in the blue jean jacket, she testified, "stood around awhile" to see if appellee was alright. She pointed the man out to two (2) Wal-Mart employees (including the manager), but did not see either of them attempt to speak with him. By that time, she testified, appellee's ear had swollen, turned black, and was bleeding. Reva corroborated Eva's testimony that the display shelf was approximately shoulder height.

Gerald White (Gerald), the co-manager of the Madisonville Wal-Mart at the time, was paged concerning the accident and arrived shortly thereafter. He testified he observed a "little bruise" on appellee's right ear. Gerald stated that Wal-Mart's policy regarding displays was that merchandise was to be stacked in a "safe and stable" manner.

These particular wooden ladderback chairs had been on display since August 1995, approximately two (2) months prior to the incident. He testified that although certain merchandise in the store is secured in some way to a fixture, the ladderback chairs were not bolted or secured in any way to the shelf. Contrary to other testimony, Gerald testified he did not believe the man in the blue jean jacket stayed at the scene of the accident for any appreciable length of time. Gerald did, however, "walk the store" to see if he could locate the man.

At the close of the evidence, Wal-Mart moved for a directed verdict on the issue of liability, arguing that the man in the blue jean jacket was solely responsible for appellee's injuries. Further, Wal-Mart maintained its only legal duty to appellee was to take reasonable steps to discover any unsafe conditions created by third parties on the premises, and to remedy them upon discovery. Wal-Mart argued there was no time for its employees to have discovered any unsafe condition the man in the blue jean jacket may have created, given Reva May's testimony that the accident happened too quickly for even those on the scene to have prevented it. Thus, Wal-Mart argued, it should not be held responsible for appellee's injuries.

The trial court found the evidence established that based upon the testimony, Wal-Mart had no time to discover the unsafe condition in which the chairs had been returned to the display shelf. It sustained Wal-Mart's motion to that extent. However, the court denied a directed verdict on the broad issue

of liability, finding there was a factual issue as to whether Wal-Mart's stacking of the wooden ladderback chairs on the display shelf created an unsafe condition in the first place, i.e. as the trial court stated, "Was the stacking itself negligent?"

The jury returned a verdict in favor of appellee. Specifically, the jury found that Wal-Mart employees knew, or by the exercise of ordinary care should have known, that "stacking the chairs in the manner described in the evidence created an unsafe condition to its business invitees, including the plaintiff, Deborah Robertson." Further, the jury found that the unknown defendant had breached his duty of ordinary care to appellee, and that his conduct was a "substantial factor" in causing appellee's injuries. The jury awarded appellee her medical expenses of $1,210.65 and awarded her $15,000.00 for pain and suffering. The jury then apportioned fault 99% to Wal-Mart and 1% to the unknown defendant. Judgment in the matter was entered on October 9, 1997.

Wal-Mart has appealed the judgment, arguing: (1) the trial court erred in refusing to grant Wal-Mart a mistrial as a result of an improper reference during voir dire to liability insurance; (2) the trial court erred in failing to grant a directed verdict on the issue of liability; (3) the verdict is contrary to the evidence; and, (4) the trial court improperly instructed the jury as to the appropriate standard of care to be applied in this case.

Mistrial

During voir dire, the trial court questioned potential jury members whether they or any member of their families had ever been sued or had a claim for damages made against them. One potential juror answered, "We had a suit filed against us because an insurance company decided not to pay the claim, but it was settled out of court between the insurance company and the parties." Wal-Mart moved for a mistrial on the basis that reference had improperly been made to liability insurance. The court overruled Wal-Mart's motion and proceeded with the trial.

Wal-Mart maintains the juror made an improper reference to liability insurance. Further, Wal-Mart notes that appellee testified she had previously worked for an insurance company, and argues that given the totality of the circumstances, the issue of liability insurance was impermissibly brought to the attention of the jurors. Wal-Mart maintains that KRE 411 prohibits such references and, as such, Wal-Mart was entitled to a mistrial.

Appellee argues that the potential juror's reference to a lawsuit filed against him when his insurance carrier refused to pay a claim was innocuous and in no way deprived Wal-Mart of a fair trial. We agree, and adopt the trial court's reasoning that the comment made by the juror had no connection to this case nor was there any direct questioning of the jurors concerning the issue of insurance. The comment was made in response to the question whether any potential jurors had been parties to lawsuits in the past. The juror who responded merely referenced

the substance of the lawsuit in which he was involved. We do not believe the comment was prejudicial. Further, we recognize the necessity of affording the trial court "wide discretion" in these matters. Meadors v. Gregory, Ky., 484 S.W.2d 860, 863 (1972).

As concerns Wal-Mart's argument that KRE 411 is applicable to inquiry made during voir dire, we adopt the reasoning set forth below that it is not:

> *Inquiry on Voir Dire:* KRE 411 controls the admissibility of evidence of liability insurance and has no direct bearing on what can or cannot be asked on voir dire examination of jurors. The Kentucky cases on voir dire examination indicate that inquiry about possible association of jurors with insurance companies is appropriate if conducted in "good faith," with good faith measured by the following standard: "[T]he question should never be asked, unless asked in good faith . . . [which] will depend on whether or not [plaintiff's counsel] has reasonable grounds to believe that defendant carries indemnity insurance, and that one or more of the jurors are in some way interested in the insurance company."

Robert G. Lawson, The Kentucky Evidence Law Handbook, § 2.60 (3d ed. 1993) (citation omitted) (emphasis added). The question posed in this case had nothing to do with whether the jurors were associated in some way with an insurance company and, further, had nothing to do with whether the defendant in this case, Wal-Mart, carried indemnity insurance. We believe the comment made by the juror was harmless and had no prejudicial effect whatsoever on the proceedings.

Directed Verdict

Wal-Mart argues the trial court erred in refusing to grant a directed verdict on the issue of liability. Specifically, it alleges: (1) the evidence established that the conduct of the unidentified customer constituted a superseding cause, thereby relieving Wal-Mart of any liability; and, (2) appellee presented no proof that Wal-Mart deviated from its standard of care. We disagree.

Both Eva and Reva May testified the display shelf on which the wooden ladderback chairs were located was at least shoulder height. The chairs were stacked seat to seat and, as Reva testified, were "real close" to the edge of the shelf. As Gerald White testified, the chairs were neither bolted down nor in any other way secured to the shelf. Further, Gerald testified he and his employees were well aware that after handling merchandise, customers do not always return the items they do not wish to purchase to the location in which they originally found those items. He stated that the merchandise "ended up everywhere." Finally, Gerald testified the display of wooden ladderback chairs had not been inspected for at least a 48-hour period preceding the incident on November 18, 1995.

The trial court was to consider this evidence as true, and determine whether it was of "such substance that a verdict rendered thereon would be 'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'" National Collegiate Athletic Ass'n v. Hornung, Ky., 754 S.W.2d 855, 860 (1988) (citations omitted).

"Generally, a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue. . . ." Bierman v. Klapheke, Ky., 967 S.W.2d 16, 18 (1998).

In NKC Hosp., Inc. v. Anthony, Ky. App., 849 S.W.2d 564 (1993), this Court defined a superseding cause as "an intervening independent force." Id. at 568. We added, however, that an intervening force does not necessarily constitute a superseding cause: "[I]f the resultant injury is reasonably foreseeable from the view of the original actor, then the other factors causing to bring about the injury are not a superseding cause." Id. We believe a material issue in this case is whether Wal-Mart should have foreseen the type of accident that occurred on November 18, 1995, given the manner in which the wooden ladderback chairs were stacked.

In light of the testimony given, we believe the evidence was sufficient to submit to the jury the issue of foreseeability, and believe the trial court correctly submitted that issue to the jury.

> In reviewing the sufficiency of evidence, the appellate court must respect the opinion of the trial judge who heard the evidence. A reviewing court is rarely in as good a position as the trial judge who presided over the initial trial to decide whether a jury can properly consider the evidence presented.

Bierman, 967 S.W.2d at 18. In light of the evidence before the trial court, we believe Wal-Mart's motion for directed verdict was properly denied. The issue was squarely presented to the trial judge, who heard and considered the evidence, and we will

not substitute our judgment for his. Id. Further, Wal-Mart owes its business invitees the duty "to have the premises in a reasonably safe condition." Rojo, Inc. v. Drifmeyer, Ky., 357 S.W.2d 33, 35 (1962). While Wal-Mart maintains there was no evidence that it breached the standard of care owed appellee, we believe the evidence was sufficient to go to the jury on the issue of whether Wal-Mart maintained its premises in a reasonably safe condition.

Verdict

In its post-trial motions, Wal-Mart moved for judgment notwithstanding the verdict on the basis that the verdict was contrary to the evidence. The trial court denied Wal-Mart's motion. Wal-Mart argues the physical facts of the case can lead to only one conclusion: the unknown defendant was the cause of the incident on November 18, 1995, and is responsible for appellee's injuries. We disagree. A trial court may not set aside a jury's verdict unless the evidence to the contrary is so strong that reasonable men could not have differed. Sutton v. Combs, Ky., 419 S.W.2d 775, 777 (1967). We do not believe the evidence before the jury, as it has been summarized above, established liability on the unknown defendant's part to the extent that reasonable men could not have believed Wal-Mart to have been negligent in displaying the wooden ladderback chairs.

Wal-Mart further argues the jury's verdict was based upon appellee's physical condition, i.e. her multiple sclerosis and her dependence upon a wheelchair. Wal-Mart maintains the

trial court was obligated to set aside the verdict under Brothers v. Cash, Ky., 332 S.W.2d 653, 655 (1959), wherein our former Court of Appeals stated, "it is the duty of the court to set aside a jury verdict which imposes liability, upon sympathetic considerations, where fault is not shown." However, we see no evidence that the jury rendered its verdict based upon appellee's physical disability and, thus, need not address the issue further.

Jury Instruction

The trial court, in Instruction No. 1, advised the jury that as to Wal-Mart, "ordinary care . . . means the degree of care the jury would expect of an ordinarily prudent business and all its employees serving business invitees to exercise under similar circumstances." Instruction No. 2 stated as follows:

> You will find for the Plaintiff, Deborah Robertson, if you are satisfied from the evidence as follows:
>
> (A). That the Plaintiff's injuries were caused by the falling chairs at the Wal-Mart Store in Madisonville, Kentucky, on November 18, 1995; and,
>
> (B). That the Defendant's employees knew, or by the exercise of ordinary care should have known[,] that stacking the chairs in the manner described in the evidence created an unsafe condition to its business invitees, including the Plaintiff, Deborah Robertson; or
>
> Otherwise, you will find for the Defendant, Wal-Mart Stores, Inc.

The jury unanimously found in favor of appellee under this instruction. Wal-Mart argues the instruction deviates from

Kentucky's "bare bones" standard, and improperly enunciates a duty more specific than the duty to keep the business premises reasonably safe, in violation of Rogers v. Kasdan, Ky., 612 S.W.2d 133 (1981). Wal-Mart maintains the instruction inappropriately called the jury's attention to various ways in which Wal-Mart might have acted.

We disagree, and distinguish Rogers from the present case. The instruction at issue in Rogers concerned a hospital's duty to its patients. The trial court instructed the jury that the hospital had a duty to exercise the degree of care ordinarily used by hospitals under like circumstances. However, the court continued by enumerating additional specific duties owed the patient, e.g.: (1) monitoring the staff's maintenance of medical records; (2) providing nurses with knowledge of adequate patient care; (3) monitoring staff physicians for proper conduct consistent with good medical practices; (4) monitoring the nursing staff for proper fluid input and output of the patients; (5) monitoring the nursing staff for proper dispensing of drugs and proper use of the Physicians Desk Reference; and, (6) monitoring the nurses for proper conduct consistent with good medical and hospital care.

The Supreme Court found that the instruction provided too much detail, gave undue prominence to facts and issues, and improperly listed various methods by which a defendant must conduct himself in order to meet his duty. The Court noted that while the list "constituted criteria that the jury might use to

decide the question of ordinary care, listing them in this manner was not necessary to pose the issue of the hospital's duty." Id. at 136. The Court concluded:

> In the instant case, the listing of various means by which the plaintiff contended the hospital failed to exercise the proper standard of care begged the jury to find some minor or technical error. It could have given them the false impression that unless all these procedures were complied with exactly, the hospital breached its duty. The effect of the instruction was to demand more of the hospital than the law requires.

Id. (Citation omitted).

We do not have before us an instruction similar to that in Rogers. As we noted above, Wal-Mart had a duty to "use ordinary care to have the premises in a reasonably safe condition." Rojo, Inc., 357 S.W.2d at 35. Instruction No. 2 does nothing more than call attention to that duty insofar as it affected the manner in which Wal-Mart displayed the wooden ladderback chairs. Unlike the instruction in Rogers, Instruction No. 2 does not reference any specific duties Wal-Mart owed appellee, e.g., there is no mention that Wal-Mart had a duty to secure the chairs to the shelf, maintain a railing on the shelf, display the chairs at a lower height, maintain a sign warning of the danger, or take any other specific action to prevent such incidents. We find that the instruction does not violate the standard set forth in Rogers.

Wal-Mart further argues the trial court should have instructed the jury that appellee's prior medical condition, i.e.

her multiple sclerosis, was not to be considered in its deliberation of damages. Wal-Mart relies upon Carlson v. McElroy, Ky. App., 584 S.W.2d 754 (1979), a case in which there was conflicting testimony concerning whether the plaintiff's injuries were truly the result of the accident which was the subject of the litigation, or whether they were caused by a pre-existing medical condition or two other accidents in which the plaintiff was involved, one before and one after the accident at issue. In Carlson, the cause of the plaintiff's injuries was undeniably in question. In the present case, however, there was no testimony indicating that appellee's injuries were caused by any event or condition other than two chairs having fallen on appellee while she was shopping at Wal-Mart on November 18, 1995. Further, the medical expenses submitted by appellee appear to have been incurred as a result of the incident at Wal-Mart, and did not represent treatment for appellee's multiple sclerosis. Finally, it does not appear from the verdict that the damages awarded appellee represented any pain or suffering she may have experienced as a result of having multiple sclerosis. We do not find Wal-Mart's argument to have merit.

Appellee's Request for Sanctions

Appellee asks this Court to award her sanctions under CR 73.02(4):

> If an appellate court determines that an appeal or motion is frivolous, it may award just damages and single or double costs to the appellee or respondent. An appeal or motion is frivolous if the court finds that

> it is so totally lacking in merit that it appears to have been taken in bad faith.

We have considered appellee's argument. However, we do not believe that sanctions are justified under the facts and circumstances of this case.

For the foregoing reasons, we affirm the judgment of the Hopkins Circuit Court.

GUDGEL, CHIEF JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

| BRIEF FOR APPELLANT: | BRIEF FOR APPELLEE: |
| --- | --- |
| Matthew J. Baker<br>Bowling Green, Kentucky | Dick Adams<br>Madisonville, Kentucky |