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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001740-MR

WAL-MART STORES, INC. APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE SAM HOUSTON MONARCH, JUDGE
ACTION NO. 1995-CI-00006

CHARLES RICHARD CLEMONS APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, HUDDLESTON AND KNOPF, JUDGES.

KNOPF, JUDGE: This is an appeal from a judgment in favor of the appellee in a slip-and-fall claim. We find that there was substantial evidence to support the jury's conclusion that the hazardous condition was not open and obvious. We further find that the trial court did not abuse its discretion in allowing the appellee to amend his claim for damages on the eve of trial. Hence, we affirm.

During the afternoon of February 11, 1994, the appellee, Charles Richard Clemons, went to the Wal-Mart discount department store in Leitchfield. Upon leaving the store by the

left ramp, he slipped and fell on his left leg. As a result of the fall, he broke his ankle.

The night before the accident, a large amount of snow and ice had fallen in the area as a result of a winter storm. Wal-Mart employees salted and scraped the entrance ramps earlier in the day. Although the temperature did not rise above freezing that day, some melting occurred during the daylight hours, causing water and slush to collect on the left ramp. The temperature decreased as the sun set and the water on the ramp had begun to re-freeze when Clemons came out of the store.

Clemons brought this action against Wal-Mart, Inc., for his medical expenses, lost wages, and pain and suffering. A jury trial was conducted on June 10, 1998. At the close of Clemons's proof, Wal-Mart unsuccessfully moved for a directed verdict. The jury found that Clemons incurred $1,320.40 in past medical expenses, $6,184.70 in lost wages, and $25,000.00 in mental and physical pain and suffering, for a total of $32,505.10. The jury also apportioned fault for the accident equally between Clemons and Wal-Mart. Consequently, the trial court entered a judgment for Clemons in the amount of $16,252.55. Wal-Mart now appeals.

Wal-Mart first argues that the trial court erred in denying its motion for a directed verdict. It asserts that the ice and slush on the ramp were open and obvious, thereby precluding any liability on its part. Clemons responds that there was substantial evidence that the ice and slush on the ramp was not open and obvious. Based upon the evidence presented and

the applicable law, we find that the issue was properly presented to the jury.

The prevailing winter weather patterns in this state have made cases such as the present one fairly common. However, our courts have not always been consistent in their treatment of these cases. In Standard Oil Co. v. Manis, Ky., 433 S.W.2d 856 (1968), the plaintiff slipped and fell on a wooden platform. At trial, the plaintiff testified that at the time of his accident there was snow and ice on the ground, and that after he fell he noticed that the platform "was nothing but a glare of ice." Id. at 857. The former Court of Appeals held:

> [N]atural outdoor hazards which are as obvious to an invitee as to the owner of the premises do not constitute unreasonable risks to the former which the landowner had a duty to remove or warn against.
>
> * * * *
>
> As we have heretofore noted, the hazard faced by appellee was created by natural elements. It was outside, and exposed in broad daylight. Appellee was thoroughly familiar with the structure. He was fully aware of the accumulation of ice and snow in the area. He saw that the level part of the walkway was wet, indicating that melting ice had been there. That there might be on the platform unmelted ice, or refreezing water, was a distinct possibility. Under these circumstances, we are of the opinion defendant could not have reasonably foreseen that appellee would proceed without exercising commensurate caution.
>
> There was no duty on appellant to stay the elements or make this walkway absolutely safe. Nor was there a duty to warn appellee that the obvious natural conditions may have created a risk. If a "glare of ice" existed on the platform, whatever hazard it constituted was as apparent to appellee as it was to appellant. We are unable to find a breach of duty by the latter.

Id. at 858-59 (Emphasis in original).

The Supreme Court subsequently upheld Manis in Corbin Motor Lodge v. Combs, Ky., 740 S.W.2d 944 (1987). The plaintiff in Corbin Motor Lodge slipped and fell on ice while she was leaving a restaurant. The Court held that the condition was naturally occurring, that the plaintiff was aware of the treacherous conditions, and that the danger was open and obvious. Although the doctrine of assumption of risk has been abolished by the adoption of comparative fault, our Supreme Court found no reason to alter the rule in Manis. Corbin Motor Lodge, 740 S.W.2d at 946. Consequently, the Court upheld the trial court grant of summary judgment in favor of the property owner.

There have been modifications of the holdings of the Manis and Corbin Motor Lodge cases. In Schreiner v. Humana, Inc., Ky., 625 S.W.2d 581 (1982), the Supreme Court noted that the obviousness of the hazard may be an issue of fact depending upon the facts of the particular case. In Wallingford v. Kroger Co., Ky. App., 761 S.W.2d 621 (1988), this Court noted that the plaintiff, an injured vendor, was compelled to traverse an icy ramp to make a delivery in the course of his employment. We held that the plaintiff was entitled to a comparative negligence instruction in his suit against the property owner.

In Davis v. Coleman Management Co., Ky. App., 765 S.W.2d 37 (1989), this Court reversed a summary judgment in favor of a landlord whose tenant had slipped on ice outside her apartment building. The Davis court relied on the common law pertaining to the duties of a landlord to keep common areas

reasonably safe. Id. at 39. Yet both Wallingford and Davis were based on special duties owed by the property owner to the particular plaintiff, and Schreiner predates the later Supreme Court ruling in Corbin Motor Lodge.

Clemons contends that the facts of his case are most similar to those in Estep v. B. F. Saul Real Estate Investment Trust, Ky. App., 843 S.W.2d 911 (1992). In that case, the plaintiff slipped and fell at the defendants' shopping mall. Evidence at trial established that when the plaintiff and her husband arrived at the mall, the parking lot had been cleared. The plaintiff testified that she believed that the sidewalks had also been cleared, although she did notice a thin coating of snow on the sidewalks. There was no question that the plaintiff was aware of the weather conditions, but the plaintiff testified that she fell because there was a layer of ice under the snow on the sidewalk. The trial court entered summary judgment in favor of the defendant based on the ruling in Manis.

On appeal, the plaintiff argued that summary judgment was improper under Manis because "ice under the snow was not an obvious natural hazard." Estep, 843 S.W.2d at 913. This court agreed that summary judgment was improper, stating:

> ...[N]ot "all natural conditions outdoors are equally apparent to landowners and invitees. On the contrary, whether a natural hazard like ice and snow is obvious depends on the unique facts of each case". Schreiner v. Humana, Inc., Ky., 625 S.W.2d 580, 581 (1982). As a result, it appears that there is a genuine issue as to whether [defendant] knew of the ice under the snow, which was not obvious to [plaintiff].
> Estep, at 913.

The Estep court held that summary judgment was inappropriate because there was a genuine issue of material fact as to defendant's knowledge of the presence of ice under the snow. This court went on to address other issues raised by the plaintiff in the event that the question of whether the defendant knew of the ice was resolved in favor of the defendant. In doing so, the court distinguished Manis on the ground that the assumption of duty rule applied. The court noted that because the defendant had decided to clear ice and snow from the premises, it was required to do so in a reasonable manner. The court reversed the summary judgment granted to the defendant on the assumption of duty issue, holding that the issue of whether the defendant acted reasonably in removing the ice and snow was "a classic jury question, which precludes summary judgment." Id. at 914-15.

The only question raised by Wal-Mart regarding liability is whether there was evidence that the icy condition of the ramp was open and obvious. On a motion for a directed verdict, the trial court must consider the evidence in the light most favorable to the party opposing the motion and must give that party the advantage of every fair and reasonable intendment that the evidence can justify. Lovins v. Napier, Ky., 814 S.W.2d 921, 922 (1991). The court may only grant a directed verdict if the plaintiff's evidence, whether taken alone or in light of all the evidence, is not of sufficient probative value to induce conviction in the minds of reasonable persons. Burnett v. Ahlers, Ky., 483 S.W.2d 153, 157 (1972). On appeal, this 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 (1990).

The facts of this case place it squarely within the rule set out in Estep. Having assumed the duty to clear the ramps, Wal-Mart had a duty to do so in a reasonable manner. Indeed, when a landowner takes steps to remove ice and snow, an invitee may be led to believe that the way is safe. Thus, a hazardous condition such as re-freezing water may not be readily apparent.

Under such circumstances, whether a condition is open and obvious becomes a question of fact. In this case, Wal-Mart took affirmative steps to clear the ramp of snow and slush. Specifically, there was evidence that Wal-Mart employees salted the ramp twice during the day. The ice formed on the ramp as a result of re-freezing water and slush. Several witnesses, including Clemons, testified that no ice was visible on the ramp until they were actually standing on it. Based upon this evidence, we conclude that the matter was properly presented to the jury.

Wal-Mart next argues that the trial court erred in allowing Clemons to amend his claim for damages. In his pre-trial disclosures pursuant to CR 8.01, Clemons claimed $5,000.00 for mental and physical pain and suffering. During discovery, the trial court entered an order giving Clemons until April 25, 1998, to supplement his CR 8.01 disclosure of damages. Prior to

that deadline, Clemons filed a disclosure which still sought $5,000.00 for pain and suffering.

On June 9, 1998, the day before the scheduled trial, Clemons filed a motion to amend his CR 8 disclosure to seek $50,000.00 for pain and suffering. Wal-Mart objected, arguing that the amendment was untimely. The trial judge offered Wal-Mart a continuance if the amendment prejudiced the defense. Counsel for Wal-Mart stated that he did not want a continuance, only to limit the claim for pain and suffering to $5,000.00. Wal-Mart's counsel stated that if the motion to amend the interrogatory were granted, then he preferred to go to trial that day. Based on this response, the trial court granted Clemons's motion to amend the interrogatory and the case proceeded to trial.

CR 8.01(2) provides in part that when a claim is made against a party for unliquidated damages, that party may obtain information as to the amount claimed by interrogatories. If this is done, the amount claimed shall not exceed the last amount stated in answer to interrogatories. The rule prevents a trial court from awarding additional sums which were not disclosed in the plaintiff's pre-trial compliance. National Fire Insurance Co. v. Spain, Ky. App., 774 S.W.2d 449 (1989). However, the Court in Spain also noted that "[i]f the interrogatories are answered, the amount requested shall not exceed the answer in the interrogatories, *unless, the interrogatories are amended to conform to the evidence."* Id. at 451 *(Emphasis added).* The rule

does not specify how long before trial any amendment to a claim for damages must be made.

In the present case, Clemons moved to amend his damage disclosure one (1) day before trial, and some six (6) weeks after the trial court's pre-trial order required such motions to be made. We do not encourage such last-minute amendments to a pre-trial compliance. Furthermore, a trial court should take care to consistently enforce its pre-trial orders. Nonetheless, a trial court has considerable discretion in determining how to enforce compliance with its pre-trial orders regarding discovery. Thus, the standard for review is whether the trial court abused its discretion by allowing the amendment. City of Louisville v. Allen, Ky., 385 S.W.2d 179, 184 (1964).

In the present case, Wal-Mart was given an opportunity to continue the trial if the amendment caused undue hardship. Wal-Mart elected to proceed to trial that day. Furthermore, Wal-Mart does not offer any indication how its defense of the case was prejudiced by the trial court's ruling. Therefore, we cannot find that the trial court abused its discretion by allowing Clemons to amend his claim for damages prior to trial.

Wal-Mart also argues that the evidence did not support the jury's award of $25,000.00 in pain and suffering. However, we find no indication in the record that Wal-Mart preserved this error by any post-trial motions for a new trial. Wal-Mart contends that this ground of error was preserved by its pre-trial objection to Clemons' amending his claim for pain and suffering. Nonetheless, a motion for a new trial pursuant to CR 59.01 cannot

be made prior to trial. Rather, the trial court must decide whether the jury's award appears "to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court." CR 59.01(d). This is a discretionary function assigned to the trial judge who has heard the witnesses first-hand and viewed their demeanor and who has observed the jury throughout the trial. Davis v. Graviss, Ky., 672 S.W.2d 928, 932-33 (1984).

Furthermore, Wal-Mart only made a general objection after the verdict was returned that the "verdict was inconsistent with the evidence." We do not find this objection sufficient to preserve a claim of error regarding the amount of damages awarded. Since it is not appropriate for an appellate court to review the grant or denial of a new trial for excessive or inadequate damages unless the trial court has first considered the substance of the claim, we must decline to address Wal-Mart's ground of error. Cooper v. Fultz, Ky., 812 S.W.2d 497, 501 (1991).

Lastly, Wal-Mart contends that the trial judge made improper remarks during the voir dire of the jury. During voir dire, the trial court informed the jury panel of the standard for proving negligence cases, and asked the members of the panel if they could decide the case based upon the law as proven by the evidence presented by Clemons. In concluding this line of questioning, the trial court asked the panel:

> Let us assume, Ladies and Gentlemen, that he proves all three of the things: Proves a duty; proves a breach of the duty; and he proves damages. And in this case he proves

> damages of ten million dollars . . . ten million dollars. Is there any of you that could not award that type of money?

Three (3) prospective jurors raised their hands to the question and were excused from the panel. Counsel for Wal-Mart objected to the form of the question. The trial judge stated that he was merely trying to determine which jurors were willing to follow the instructions. Subsequently, the trial judge asked the remaining members of the panel if they could follow the instructions and award damages based solely on the evidence. From our review of the record, we find that Wal-Mart's objection to this question was not preserved. Wal-Mart's counsel did not argue to the trial court that the question was prejudicial, nor did he ask for a mistrial or for a new jury panel. He only asked if the three (3) members of the panel who raised their hands could be allowed to remain. Although the trial court denied that motion, the judge clarified the question for the remaining members of the panel. Because Wal-Mart did not preserve its objection to the question on the ground of unfair prejudice, we need not consider the issue on appeal.

Accordingly, the judgment of the Grayson Circuit Court is affirmed.

ALL CONCUR.

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