RENDERED: March 17, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002152-MR

SOFTBALL CITY, INC. APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS STEPHENS, JUDGE
ACTION NO. 96-CI-01722

ANGELA M. DIXON APPELLEE

OPINION
AFFIRMING IN PART, AND REVERSING IN PART
** ** ** ** **

BEFORE: EMBERTON, MILLER AND TACKETT, JUDGES.

TACKETT, JUDGE: Appellant, Softball City, Inc. ("Softball City") appeals from a judgment ordering it to pay $14,692.50 in compensatory damages and $100,000.00 in punitive damages to appellee, Angela Dixon (Dixon). For the reasons set forth herein, we affirm in part and reverse in part.

Dixon was an employee of Softball City, which is a fifty-acre softball complex owned by Dixon's father, grandfather, and uncle. Dixon parked her vehicle, a 1994 Toyota Celica (the Celica), in Softball City's parking lot on May 28, 1996. Heavy rains occurred and Dixon's vehicle suffered water-related damage. Dixon had taken possession of the Celica from Holly Dacey (Dacey)

after paying Dacey $13,400. Liens on the Celica incurred by Dacey were never released, however, and Dacey was unable to assign the title to Dixon. It is undisputed that Dacey held legal title to the Celica on the date it was damaged.

Dixon filed suit against Softball City and Dacey.[1] A jury returned a verdict awarding Dixon $9,700 from Softball City for reduction in fair market value of the Celica, $1,792.50 for loss of use of the Celica, $3,200 for reasonable towing and storage of the Celica, and $100,000.00 in punitive damages. The trial court denied Softball City's motion for judgment notwithstanding the verdict, motion for new trial, and motion to alter, amend or vacate the judgment, whereupon Softball City filed this appeal.

Softball City first contends that it was entitled to a directed verdict due to an alleged lack of evidence to support a finding that it acted negligently toward Dixon. A directed verdict is proper only if there is a "complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ." Bierman v. Klapheke, Ky., 967 S.W.2d 16, 18-19 (1998). Furthermore, when an appellate court reviews the evidence supporting a judgment entered pursuant to a jury's verdict, it is "not at liberty to determine credibility or the weight which should be given to the evidence," and must deem true all the evidence which favors the prevailing party. Lewis v. Bledsoe Surface Mining Company, Ky., 798 S.W.2d

[1]Various insurance companies were parties below. However, they are not parties to this appeal.

459, 461 (1990). This court may reverse the trial court's judgment only if it concludes that the jury's verdict was "flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice." Bierman, supra, at 19.

The evidence supporting a finding of negligence against Softball City consists of the following facts: (1) the parking lot had flooded during periods of heavy rain prior to May 28, 1996; (2) at least one other vehicle had previously suffered water-related damage in Softball City's parking lot; (3) Softball City posted no warning signs that its parking lot was subject to flooding; and, (4) it took no affirmative steps to modify its drainage system to diminish the risk of flooding. There is evidence that Softball City did warn its employees and patrons via an intercom to move their vehicles to avoid flood damage, that Dixon had prior knowledge that the parking lot was subject to flooding, and that Dixon delayed moving the Celica for several minutes following the oral warning. However, drawing all reasonable inferences in favor of Dixon and bearing in mind that it is a jury's function to resolve conflicting evidence, we do not believe that the jury's verdict is so unsupported by evidence as to be the product of passion or prejudice. Id. Thus, the trial court did not err in submitting the issue of Softball City's negligence to the jury.

Softball City next contends that Dixon had no standing to bring a property damage claim as she was not the legal owner of the Celica. In order to have standing, a party must have a

judicially recognizable "present or substantial interest" in the subject matter of the action. Plaza B.V. v. Stephens, Ky., 913 S.W.2d 319, 322 (1996). As Dixon had paid Dacey in full for the Celica prior to the flood, it follows that Dixon had a substantial, equitable interest in the matter sufficient to give her standing. Likewise, Dixon was the real party in interest under Rule of Civil Procedure (CR) 17.01 as that rule focuses on whether a plaintiff has a "significant interest" in the action. Kentucky Center for the Arts v. Whittenberg Engineering & Construction Company, Ky. App., 746 S.W.2d 71, 73 (1987). A significant interest "may be less than a legal or title interest." Id. Therefore, we conclude that Dixon had standing to prosecute the action and was the real party in interest under CR 17.01.

Softball City next argues that it was entitled to a directed verdict on Dixon's claim for punitive damages. In order to recover punitive damages, Kentucky Revised Statute (KRS) 411.184(2) requires a plaintiff to prove by clear and convincing evidence "that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice." It is clear that Softball City did not defraud Dixon or act toward her with oppression, as those terms are defined in KRS 411.184(1). Therefore, in order to recover punitive damages, Dixon was required to show that Softball City acted with malice. Malice is defined by KRS 411.184(1)(c) as "conduct that is carried out by the defendant both with a flagrant indifference to

the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm."[2]

There is no evidence, much less clear and convincing evidence, to demonstrate that Softball City acted in an "intentionally cruel" manner toward Dixon, Bowling Green Municipal Utilities, supra, at 580, or that it had a "subjective awareness" that its failure to post warning signs or improve the drainage of its property would result in human death or bodily harm. In fact, no deaths or bodily injuries were sustained as a result of this flood and the evidence is void of any likelihood that such injury would occur under the circumstances that were presented herein. Initially the trial court ruled in favor of Softball City on the issue of punitive damages. Softball City was entitled to a directed verdict on the issue and the punitive damage award is hereby vacated.[3]

Softball City next argues that Dixon's claims for loss of use of the Celica, storage costs, and towing costs should have been dismissed due to Dixon's failure to fully answer an interrogatory asking Dixon to specify her damages. See CR 8.01. Softball City asserts that Dixon failed to comply with the trial

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[2] We are aware that KRS 411.184(1)(c) was declared unconstitutional in Williams v. Wilson, Ky., 972 S.W.2d 260 (1998). However, Williams was not final when Dixon's trial occurred in May 1998. There is no indication that the parties challenged the constitutionality of KRS 411.184 at trial. Thus, this case must be reviewed under KRS 411.184 as it existed at trial. See Bowling Green Municipal Utilities v. Atmos Energy Corporation, Ky., 989 S.W.2d 577, 580 (1999).

[3] Our conclusion that Softball City was entitled to a directed verdict on Dixon's claim for punitive damages renders moot all other punitive damage-related arguments.

court's March 27, 1998, order which required her to provide supplemental answers to Softball City's interrogatories at least thirty days prior to trial. That order compelled Dixon to supplement only her answers to interrogatories two, three and four (which were the interrogatories named by Softball City in its motion to compel). However, interrogatory number five asked Dixon to identify and specify the amount of damages she was seeking. Thus, Softball City's argument is not well taken. We further find that any alleged deficiencies in Dixon's responses to Softball City's request for production of documents are insufficient to merit reversal. CR 61.01.

Next, Softball City contends that Dixon was not entitled to recover for loss of use of the Celica as the vehicle was used for more than business purposes only. See Wittmer v. Jones, Ky., 864 S.W.2d 885, 889 (1993). ("[a] tort claim . . . for compensatory damages for 'loss of use' of a damaged vehicle . . . applies only to a vehicle with a business use."). This argument is without merit as KRS 304.39-115 specifically provides that loss of use of a motor vehicle, "regardless of the type of use, shall be recognized as an element of damage in any property damage liability claim."

Softball City also argues that it was entitled to a directed verdict on the issue of liability since Dixon was aware that its parking lot was prone to flood. Even assuming that Dixon was aware that the parking lot was subject to flooding, Softball City's argument must fail. The cases cited by Softball City generally stand for the proposition that a danger as obvious

and well known to a business invitee as to an owner cannot be the basis for a recovery.[4] However, the case at hand did not involve a current, manifestly obvious danger (such as the ice in Manis and Fisher or the open grease pit in Bonn) but rather involved only a potential, contingent danger as the parking lot was not flooded when Dixon parked her vehicle. Therefore, it cannot be said as a matter of law that the potential of flooding was an open and obvious danger as envisioned by Bonn, et al. Softball City's related argument that it was entitled to a directed verdict on liability because flooding is an act of nature beyond its control is also without merit. As stated previously herein, the issue of Softball City's negligence was properly presented to the jury and it is clear that recovery can be had for an injury caused by the combination of an act of nature and negligence. See e.g. Dunning v. Kentucky Utilities Company, 270 Ky. 44, 109 S.W.2d 6, 9-10 (1937).

Softball City's next contention is that the trial court erred in failing to dismiss a juror, Ms. Hemmer, for cause. Hemmer admitted in voir dire that she had recently consulted Dixon's attorney on a matter unrelated to Dixon's action, but further stated that she had not hired the attorney and that her consultation with the attorney would not make it difficult for her to serve as a juror. After a considerable delay, Softball

[4] Standard Oil Company v. Manis, Ky., 433 S.W.2d 856 (1968); Bonn v. Sears, Roebuck & Company, Ky., 440 S.W.2d 526 (1969); Fisher v. Hardesty, Ky., 252 S.W.2d 877 (1952).

City unsuccessfully moved to strike Hemmer for cause.[5] We are not persuaded that Hemmer's brief, isolated, consultation with Dixon's attorney constituted a "close relationship" mandating her disqualification. Butts v. Commonwealth, Ky., 953 S.W.2d 943, 945 (1997).

We disagree with Softball City's argument that testimony concerning the flooding of other vehicles was improperly admitted. That testimony was relevant to show that Softball City failed to take corrective action to improve the drainage of its parking lot despite having knowledge that it had a propensity to flood and damage vehicles. Therefore, the evidence was relevant, admissible, and the trial court did not abuse its discretion in permitting the evidence to be introduced. Green River Electric Corporation v. Nantz, Ky. App., 894 S.W.2d 643, 645 (1995).

We have examined Softball City's arguments relating to Dixon's expert witnesses and have found those arguments to be without merit. Any alleged deficiencies in the testimony relating to the diminution in value of Dixon's vehicle go to the weight, not the admissibility of that testimony, and Softball City was free to cross-examine the experts about their opinions. Kentucky Rule of Evidence (KRE) 703(c). Furthermore, we do not

[5]Softball City raises other issues involving Hemmer in its brief. However, we will consider only Hemmer's relationship with Dixon's attorney since that is the only reason presented by Softball City to the trial court in its motion to strike Hemmer for cause. See Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225, 228 (1989) ("The Court of Appeals is without authority to review issues not raised in or decided by the trial court").

believe that the trial court abused its discretion in refusing to grant a mistrial based upon one isolated statement on cross-examination by one of Dixon's expert witnesses regarding a damage report prepared by an insurance company. See Gould v. Charlton Company, Inc., Ky., 929 S.W.2d 734, 741 (1996) (holding that a trial court's decision to overrule a motion for a mistrial cannot be reversed absent an abuse of discretion). Finally, we believe that any error regarding Dixon's expert witness allegedly testifying from a document not previously provided to Softball City in discovery is insufficient to merit reversal under CR 61.01.

For the reasons set forth above, the trial court's judgment is reversed on the issue of punitive damages and affirmed as to all other issues.

ALL CONCUR.

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