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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002773-MR

WESLEY LeMASTER and
APRIL LeMASTER — APPELLANTS

APPEAL FROM JOHNSON CIRCUIT COURT
v. HONORABLE DANIEL SPARKS, JUDGE
ACTION NO. 01-CI-00384

APPLETREE PLAZA LIMITED
PARTNERSHIP;
AUTOZONE, INC.; and
BOYLAN, INC. — APPELLEES

NO. 2004-CA-000033-MR

APPLETREE PLAZA LIMITED
PARTNERSHIP AND
BOYLAN, INC. — APPELLANTS

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AUTOZONE, INC. — APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND
REMANDING

** ** ** ** **

BEFORE: BARBER, BUCKINGHAM, AND HENRY, JUDGES.

BUCKINGHAM, JUDGE: This case involves two separate appeals, one by Wesley and April LeMaster and the other by Appletree Plaza Limited Partnership and Boylan, Inc. Both appeals arise out of the same set of facts, and both are directed at orders and judgments rendered in favor of AutoZone, Inc. For the reasons stated below, we affirm in part, vacate in part, and remand.

FACTS

On September 26, 2000, Wesley and April LeMaster went to the Appletree Plaza Shopping Center to shop at the AutoZone store. When the LeMasters arrived at the shopping center, it was already dark. As they were leaving the parking lot, Wesley drove their automobile into an unilluminated light pole located in the lot. Both Wesley and April claim that they suffered personal injuries as a result of the collision.

The shopping center property is subject to a ground lease from a third party to Arthur Boylan, Jr., and his wife, Karen. Arthur Boylan, Jr., in addition to being a general partner in Appletree Plaza Limited Partnership, is the president of Boylan, Inc. The Boylans assigned their lease to Appletree

Plaza Limited Partnership. AutoZone subleases one unit of the shopping center building from Appletree under a 1996 sublease agreement. Boylan, Inc., has a management contract with Appletree. Under the contract, Boylan, Inc., is responsible for maintaining the shopping center property.

The sublease between Appletree and AutoZone has several provisions that are relevant to this case. Paragraph 3 provides that AutoZone, as the sublessee, is only gaining control over approximately 6,600 square feet of retail space inside a building. Paragraph 12 provides in part that Appletree will "maintain in good working order and repair throughout the Term" outside improvements, including the parking lot. Paragraph 24 provides that Appletree will maintain the common facilities, including the parking lot, in good repair and ensure that they are adequately lighted. This paragraph makes it clear that Appletree retains control over the common areas, holding them out for the joint use of all subtenants. Paragraph 34 contains an indemnity clause which provides in relevant part that:

> Moreover, if either party hereto without fault is made a party to any litigation instituted by or against any other party to this Sublease, such other party shall indemnify Sublessor or Sublessee, as the case may be, against and hold harmless from all costs and expenses, including reasonable attorney's fees, incurred by it in connection therewith.

When Appletree constructed the shopping center, it erected two 60-foot light poles in the parking lot. AutoZone later added, with Arthur Boylan's permission on behalf of Appletree, two additional light poles down the center of the parking lot directly in front of its store. The LeMasters' automobile collided with one of the two poles placed on the lot by AutoZone. It was later discovered that the timer switch for the lights on the pole had not been properly set.[1] This switch was maintained, not in the light pole, but in a separate pole containing lighted store signs. It is alleged that this was the reason the pole was not lighted when the LeMasters' automobile collided with it, although it was already dark outside.

PROCEDURAL HISTORY

Nearly one year after the accident, the LeMasters filed a civil complaint in the Johnson Circuit Court against Appletree. Appletree later filed a third-party complaint against AutoZone, seeking indemnity for any recovery due the LeMasters. In response, AutoZone filed a counterclaim against Appletree seeking indemnity based on the terms of the sublease. Later, the LeMasters amended their complaint, adding AutoZone and Boylan, Inc., as defendants. This led Appletree and Boylan, Inc., to file common law indemnity claims against AutoZone.

[1] Arthur Boylan testified he was not sure whether his electrician discovered the switch in October of 2001 or March of 2002.

Following discovery, AutoZone sought summary judgment on all claims filed against it. It also sought summary judgment on its indemnity claim against Appletree. On May 6, 2003, the circuit court entered an order granting summary judgment in favor of AutoZone on all claims. The court also directed AutoZone's attorneys to submit an affidavit in support of the amount of attorney's fees and costs AutoZone was claiming under the indemnity clause in the sublease. Postjudgment motions by the losing parties were rejected by the court in an order dated June 6, 2003.

AutoZone submitted an affidavit seeking fees and costs incurred as of November 20, 2003. The affidavit provided only a general summary of the type of work done, and it stated attorney's fees in the amount of $26,418 and costs in the amount of $1,204.08. In response to the court's request, AutoZone's attorneys submitted detailed billing records for in camera review. At the request of AutoZone's attorneys these billing records were not provided to Appletree for its review. In a final order entered on December 16, 2003, the court found the fees to be reasonable and awarded the full amount sought by AutoZone. These appeals followed.

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The first appeal is that of the LeMasters against AutoZone. The LeMasters argue that the circuit court

erroneously granted AutoZone summary judgment on their negligence claim. Although the LeMasters settled with Appletree and Boylan, Inc., on their claims against them, they argue that AutoZone shared liability with Appletree and Boylan, Inc., for the injuries they suffered as a result of striking one of the poles that AutoZone had installed in the shopping center parking lot. On the other hand, AutoZone maintains that the court correctly granted it summary judgment on the LeMasters' negligence claim against it on the grounds that it owed no legal duty to the LeMasters concerning the condition of the parking lot.[2]

The LeMasters cite Lewis v. B & R Corp., 56 S.W.3d 432 (Ky. App. 2001), to support their argument that AutoZone owed a duty to them as business invitees. In describing this duty, the court in the Lewis case stated that "[u]nder common law premises liability, the owner of a premises to which the public is invited has a general duty to exercise ordinary care to keep the premises in a reasonably safe condition and warn invitees of dangers that are latent, unknown, or not obvious." Id. at 438. The fallacy in the LeMasters' argument is that AutoZone, while it may have been the occupier of a portion of the shopping center building, was not an owner or occupier of the parking

[2] In order for there to be a finding of liability, there must first be an affirmative duty owed by the defendant to the plaintiff. See Mullins v. Commonwealth Life Ins. Co., 839 S.W.2d 245, 247 (Ky. 1992).

lot. Pursuant to the sublease, Appletree expressly retained control over the parking lot. Therefore, it was Appletree, not AutoZone, that owed the LeMasters and others a duty to exercise reasonable diligence to keep the parking lot in a safe condition. See Davis v. Coleman Management Co., 765 S.W.2d 37, 38-39 (Ky. App. 1989).

The LeMasters cite other authorities in support of their argument that the court should not have awarded summary judgment to AutoZone. First, the LeMaster cite Waldon v. Housing Auth. of Paducah, 854 S.W.2d 777 (Ky. App. 1991), and argue that AutoZone had a duty to them under the "universal duty" rule. See id. at 778, quoting Grayson Fraternal Order of Eagles, Aerie No. 3738, Inc. v. Claywell, 736 S.W.2d 328 (Ky. 1987). However, the "universal duty" rule in the Grayson case "is not without limits." James v. Wilson, 95 S.W.3d 875, 891 (Ky. App. 2002). The court in the James case also noted that decisions following Grayson "illustrate that the duty has been narrowly applied[.]" Id. Furthermore, in Fryman v. Harrison, 896 S.W.2d 908 (Ky. 1995), the Kentucky Supreme Court rejected the application of the "universal rule" in that case and held that "[t]he question in any negligence action is whether the defendant owes a legal duty to the plaintiff." Id. at 910. We conclude that the "universal duty" rule is not applicable to the facts of this case.

The LeMasters also argue that AutoZone could not shift its duty to them to Appletree by the terms of the sublease agreement. In support of this argument, the LeMasters cite Louisville Cooperage Co. v. Lawrence, 313 Ky. 75, 230 S.W.2d 103 (1950). Because the circuit court correctly held that AutoZone owed no duty to the LeMasters, it therefore follows that AutoZone had no duty to shift to Appletree under the sublease. Therefore, the Louisville Cooperage case is not applicable to this case.

In the Mullins case, the court made it clear that the existence of a duty is a question of law. 839 S.W.2d at 248. Because under the uncontested facts of the case AutoZone owed no duty to the LeMasters as it related to the parking lot, we conclude that the circuit court did not err in granting AutoZone summary judgment on the LeMasters' claim against it.

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The second appeal is by Appletree and Boylan, Inc. Like the LeMasters, they argue that the circuit court erroneously awarded AutoZone summary judgment on the issue of liability. Appletree and Boylan, Inc., contend that it naturally follows from an acceptance of that argument that the court therefore erred in dismissing their third-party claims for common law indemnity against AutoZone. Further, Appletree argues that the award of attorney's fees and costs to AutoZone

should be vacated because Appletree was denied a meaningful opportunity to challenge the amounts claimed by AutoZone and awarded to it.

Citing City of Madisonville v. Poole, 249 S.W.2d 133, 135 (Ky. 1952), Appletree and Boylan, Inc., state that a party in possession of real property may be found to have a tort duty to disclose hazards on the property, especially to business invitees. Then, citing Lambert v. Franklin Real Estate Co., 37 S.W.3d 770, 776 (Ky. App. 2000), Appletree and Boylan, Inc., maintain that the duty to warn or disclose hazards to business invitees rests with the possessor of the property rather than the owner when "the tenant is put in complete and unrestricted possession and control of the premises." They further argue that AutoZone was in "unrestricted possession and control of the premises." Therefore, their argument is that AutoZone, as the exclusive possessor of the property, had a duty to its business invitees to make known hazards of which it was aware and which were not open and obvious.

Appletree and Boylan, Inc., recognize that such a duty may be shifted to the property owner by either agreement or warranty. They then claim that any holding by the court that the sublease shifted the duty to Appletree was inconsistent with the proof in the case because there was no proof that Appletree agreed to maintain the two poles placed in the parking lot by

AutoZone and because there were fact issues concerning an oral modification of the sublease.

We conclude that these arguments are without merit. First, AutoZone was not placed in the "unrestricted possession and control of the premises." Rather, pursuant to the terms of the sublease, Appletree retained control of all common facilities, including the parking lot.[3] "[W]here the landlord retains control of a certain part of the demised premises for the common use and benefit of a number of the tenants he must exercise ordinary care to maintain same in a reasonably safe condition." Lindsey v. Kentucky Dev. Co., 291 Ky. 253, 163 S.W.2d 499, 500 (1942). Therefore, AutoZone owed no duty to the LeMasters, and it had no duty in regard to parking lot maintenance or safety that it could shift to Appletree. Second, there is no fact issue concerning any oral modification of the sublease. Any such agreement was subject to the statute of frauds and was required to be in writing. See KRS[4] 371.010. Since Appletree was unable to show a written modification, the original terms of the sublease must stand unaltered.

In short, we conclude that the circuit court correctly awarded AutoZone summary judgment on the claims against it. It

[3] Under Kentucky law, the construction of a contract, as well as the determination of its legal effect, are questions of law. Morganfield Nat'l Bank v. Damien Elder & Sons, 836 S.W.2d 893, 895 (Ky. 1992).

[4] Kentucky Revised Statutes.

owed no duty to the LeMasters, and thus a negligence claim against it could not be maintained by the LeMasters. As a consequence, the common law indemnity claims by Appletree and Boylan, Inc., against AutoZone were properly resolved by summary judgment in AutoZone's favor.

Finally, in light of paragraph 34 of the sublease, AutoZone's indemnity claim against Appletree was properly resolved by the circuit court's entering summary judgment in AutoZone's favor. The award was in the amount of $27,626.18. Appletree's remaining argument on appeal is that this award, if any should have been given at all, should be vacated and the matter remanded for a hearing because Appletree did not have the opportunity to challenge the nature and amounts of the fees and costs. As we have noted, when AutoZone's attorneys submitted a detailed record of fees and costs to the court, the court's review was in camera and Appletree was precluded from making any review or challenge to those matters.

The amount of an attorney's fees award is generally within the discretion of the trial court. A&A Mechanical, Inc. v. Thermal Equip. Sales, Inc., 998 S.W.2d 505, 514 (Ky. App. 1999). However, "this discretion is not unlimited, that, in exercising its discretion, a trial court should require parties seeking attorney fees to demonstrate that the amount sought is not excessive and accurately reflects the reasonable value of

bona fide legal expenses incurred." Id. Such awards are reviewed by this court for an abuse of discretion. See Angel v. McKeehan, 63 S.W.3d 185, 190 (Ky. App. 2001).

Detailed billing records can support a trial court's conclusion that the attorney's fees and costs are reasonable. A&A Mechanical, 998 S.W.2d at 514. However, Appletree had a right to challenge the reasonableness of the fees and costs that the court ordered it to pay. Although AutoZone may have contracted with its attorneys and may owe those amounts under their contract, that does not mean Appletree is responsible for the full amount billed. It is only responsible for the reasonable fees and costs incurred, and it must be given the opportunity to challenge the reasonableness of those amounts. For this reason, it was an abuse of discretion for the trial court to deny Appletree access to the proof AutoZone submitted to justify its request. Therefore, concerning this second appeal, we affirm in part, but we vacate in part and remand for further proceedings concerning the reasonableness of the fees owed by Appletree under the indemnity clause in the sublease.

ALL CONCUR.

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