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ORDERED NOT PUBLISHED BY THE KENTUCKY SUPREME COURT: AUGUST 18, 2004 (2003-SC-0786-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001102-MR

TIMOTHY EVERSOLE — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 97-CI-01187

LOUISVILLE LADDER GROUP,
A.K.A. LOUISVILLE LADDER CORPORATION — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, COMBS, AND KNOPF, JUDGES.

BARBER, JUDGE: The Appellant, Timothy Eversole, appeals from a judgment of the Boone Circuit Court, granting a directed verdict in favor of the Appellee, Louisville Ladder Group a/k/a Louisville Ladder Corp. ("Louisville Ladder").

Eversole was an employee of the Kenton County Air Board, working at the Cincinnati/Northern Kentucky International Airport. On November 14, 1996, while installing cable, Eversole was injured when he fell from a six-foot fiberglass stepladder.

The ladder belonged to CA One Services, one of the airport's tenants. CA One Services operated the Back Nine Bar where Eversole was installing the cable. Scott Irvine, a maintenance technician for CA One Services, had let Eversole use the ladder. It had been purchased a short time before the accident, and was kept in a locked storage facility near the Back Nine Bar. Irvine confirmed that there was no damage to the ladder before Eversole's use –- that there was no observable damage, buckling or bending of any kind.

On November 3, 1997, Eversole filed a complaint in the Boone Circuit Court against the manufacturer of the ladder alleging, *inter alia,* breach of an implied warranty of merchantability, strict liability, negligent design and manufacturing.

The case was tried on May 7-8, 2002. Eversole explains that "the trial court rejected . . . [his] contention that . . . [he] could meet his evidentiary burden by establishing that he properly used a virtually new product and that the product nevertheless failed." Eversole had contended that *res ipsa loquitur* applied, and that he should not be required to offer expert testimony regarding product defect or negligence in manufacturing. The trial court disagreed and dismissed Eversole's complaint, in its entirety, by judgment entered May 15, 2002:

> The court heard and considered Louisville Ladder's motion for a directed verdict pursuant to CR 50.01 on plaintiff's remaining claims of strict liability, negligence, and breach of warranty. The court also heard and considered Timothy Eversole's argument and authorities in response, specifically considering plaintiff's assertion of, and complete reliance on, the doctrine of *res ipsa loquitur* as a basis for Louisville Ladder's liability. Having determined that Timothy Eversole failed to create any submissible jury issue as to Louisville Ladder's liability for the accident and that the defendant's motion for a directed verdict should and would be granted for the reasons stated on the record[.]

On appeal, Eversole argues that the trial court erred in granting Louisville Ladder's motion for directed verdict because he met his burden of proof with respect to a breach of warranty claim and with respect to both strict liability and negligence claims under the doctrine of *res ipsa loquitur.* "[W]hether a product is defective has different elements under negligence, under strict liability in tort, and under breach of warranty. Although the same evidence may prove one, two or all three theories, liability as defined under each is different and each carries different implications."[1]

We agree with Louisville Ladder that the trial court properly granted its motion for directed verdict with respect to the breach of warranty claim.

> On a motion for directed verdict, the trial judge must draw all fair and reasonable

[1]*Williams v. Fulmer*, Ky., 695 S.W.2d 411, 414 (1985).

> inferences from the evidence in favor of the party opposing the motion. . . . Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous. (Citation omitted.)[2]

KRS 355.2-318 provides:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Eversole is not included within the parameters of the statute. The necessary element of privity is lacking.[3]

We also agree with Louisville Ladder that the doctrine of *res ipsa loquitur* does not apply to a strict liability claim. Negligence is not the basis of strict liability.[4]

An examination of the status, application and effect of the doctrine in Kentucky is found at 57B Am.Jur.2d Negligence §2119:

> The *res ipsa loquitur* doctrine has evolved as a legal precept affording satisfactory evidence of negligence. (Footnote omitted.) The doctrine simply recognizes that as a matter of common knowledge and experience the very

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[2] *Bierman v. Klapheke*, Ky., 967 S.W.2d 16, 18 (1998).
[3] *McLain v. Dana Corp*., Ky. App., 16 S.W.3d 320 (1999).
[4] *Kroger Co. v. Bowman*, Ky., 411 S.W.2d 339 (1967).

nature of an occurrence may justify an inference of negligence on the part of the person who controls the instrumentality causing the injury; the inference is based on circumstantial evidence and the legal effect of such evidence depends on the degree of probability reflected by it. (Footnote omitted.) But *res ipsa loquitur* applies only where the thing shown speaks of negligence of the defendant and not merely the occurrence of an accident. (Footnote omitted.) The doctrine does not apply where the existence of the negligent acts is not more reasonably probable and where the proof of occurrence, without more, leaves the matter resting only to conjecture. (Footnote omitted.)

It is the duty of the court to determine, under a test of experience and common knowledge, whether the accident would not have happened without negligence, and negligence is not presumed from the fact of injury or accident. (Footnote omitted.) The court, rather than the jury, decides whether the essential requirements are present for the invocation of the doctrine. (Footnote omitted.)

Kentucky has adopted the majority view that the *res ipsa loquitur* doctrine creates merely a permissible inference of negligence. (Footnote omitted.) While the doctrine will supply the plaintiff with evidence or proof of ordinary negligence, . . . [t]he doctrine does not have the effect of shifting the burden of proof, as distinguished from the burden of going forward with the evidence. (Footnote omitted.)

The jury determines the sufficiency of the defendant's rebuttal evidence. (Footnote omitted.) If the defendant submits rebuttal evidence which is uncontroverted, then defendant may be entitled to a directed verdict in his favor. (Footnote *Cox v. Wilson*, Ky., 267 S.W.2d 83, 44 ALR2d 830)

Eversole maintains that the evidence established he had used "an essentially new ladder whose design and manufacturing were exclusively under the control of the . . . Louisville Ladder." Further, "He used the product according to its warnings and instructions in an entirely proper manner." Eversole testified that he heard a loud snap that sounded like a .22, then felt himself and the ladder moving forward. When he fell, his body weight drove his wrist and shoulder into the floor where it met the wall, then his lower back and right buttocks area rolled over hitting some part of the ladder. Eversole introduced the ladder at trial. The right rear leg bracing was buckled; there was also buckling in the bottom front step.

Louisville Ladder contends that this is not a *res ipsa* case, because Eversole had "every opportunity" to have the ladder examined for defects, but elected not to do so; further, that a fall from a stepladder can and does occur in the absence of a product defect; and that the only fact established was that an accident occurred. Moreover, Louisville Ladder submitted uncontroverted expert engineering testimony that the ladder was designed and tested to comply with safety requirements of the American National Standard A14.5; that the ladder had no manufacturing defects; that the ladder did not fail under the load of Eversole's standing upon it; that it is physically impossible for the described damage to occur with the ladder

properly set up with four feet on the ground; and that it was more likely than not that the bent rear leg was caused when Eversole fell on the ladder. Louisville Ladder contends that in addition to this affirmative evidence, it is entitled to a presumption that the ladder was not defective, under KRS 411.310(2).[5]

Louisville Ladder's position is well-taken. Accepting Eversole's version of the accident as true, he offered no expert testimony to rebut the opinion of Louisville Ladder's product safety engineer. The trial court's determination that Eversole failed to create any submissible jury issue is not clearly erroneous.

Next, Eversole argues that the trial court erred by excluding certain items of evidence: Exhibits 17 and 18, pages from Louisville Ladder's website showing designs after the manufacture date of the ladder Eversole was using, that the court excluded as irrelevant; and Exhibit 20, a chart listing prior incidents of ladder failures alleged to be similar in nature to

[5] The statute provides:
In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the product was not defective if the design, methods of manufacture, and testing conformed to the generally recognized and prevailing standards or the state of the art in existence at the time the design was prepared, and the product was manufactured.

the one in this case, that the court excluded for lack of a proper foundation.

The standard of review of a trial court's evidentiary rulings is abuse of discretion.[6] In product liability cases, evidence of subsequent modifications is admissible if the design or manufacturing change has been examined by the court and found to be relevant and material.[7] Courts will also allow evidence of other accidents occurring under substantially similar conditions if relevant to the "existence or causative role of a dangerous condition, or a party's notice of such a condition."[8] In both situations, the trial court is required to make a finding of relevance, before admitting the evidence.[9]

We find no abuse of discretion here. Eversole fails to demonstrate the relevance of the features on the pictured ladders or how the lack of such features on the ladder he did use caused his fall. Eversole also fails to convince us that the prior claims occurred under substantially similar conditions. The list does not contain enough information about the particular circumstances of the claims to make such a determination.

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[6] *Goodyear Tire and Rubber Co. v. Thompson*, Ky., 11 S.W.3d 575, 577 (2000).
[7] *Ford Motor Co. v. Fulkerson,* Ky., 812 S.W.2d 119, 125 (1991).
[8] *Montgomery Elevator* Co. *v. McCullough,* Ky., 676 S.W.2d 776, 783 (1984).
[9] *Id.*

Accordingly, we affirm the Judgment of the Boone Circuit Court entered May 15, 2002.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

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BRIEF FOR APPELLEE:

John L. Tate
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ORAL ARGUMENT FOR APPELLEE:

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