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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001310-MR

KENTUCKY RIVER MEDICAL CENTER AND JACKSON HOSPITAL CORPORATION — APPELLANTS

v.

APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 05-CI-00089

IRENE MCINTOSH — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND TAYLOR, JUDGES; BUCKINGHAM, SENIOR JUDGE.[1]

BUCKINGHAM, SENIOR JUDGE: Kentucky River Medical Center and Jackson Hospital Corporation (collectively referred to as "the Hospital") appeal from a judgment of the Breathitt Circuit Court, which was entered after a jury found the Hospital liable for injuries suffered by Irene McIntosh. McIntosh, a paramedic, was injured when she tripped and fell over a curb at the Hospital's emergency room entrance. We affirm.

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Immediately outside the emergency room entrance to the Hospital, there is a flat area that is eleven feet wide to allow stretchers and gurneys to be wheeled directly from ambulances into the emergency room. The flat area rises on each side to form a curb. These curbs are unmarked.

On May 27, 2004, McIntosh, who is a trained and licensed paramedic, was transporting a patient on a stretcher into the emergency room with the assistance of two EMTs. McIntosh was attending to the patient while the EMTs carried the stretcher. McIntosh is the co-owner of McIntosh Ambulance Services, which owns five ambulances and employs 20 to 25 people. Her company transports patients to the Hospital and various other hospitals in several counties adjoining Breathitt County.

McIntosh had transported more than 400 patients to the emergency room at the Hospital without incident since its construction in April 2001. On this occasion, however, she tripped and fell over the curb beside the flat area. She suffered a fractured hip and a sprained wrist. McIntosh brought a civil action in the Breathitt Circuit Court against the Hospital, alleging that it had breached its duty to maintain the premises in a reasonably safe condition and that its negligence was the cause of her injuries.

A trial was held on April 9-10, 2007, following which the jury awarded McIntosh $40,409.70 for past medical expenses, $65,000 for impairment of the ability to earn money in the future, and $50,000 for future pain and suffering, for a total award of $155,409.70. After the entry of a final judgment, the Hospital appealed to this court.

The Hospital first argues that the trial court erred in denying its motions for a directed verdict and for a judgment notwithstanding the verdict on the question of liability. It contends that the trial court should have ruled, as a matter of law, that the Hospital had no duty to warn of or to protect against the change in elevation from the

flat area to the curb because it was an open and obvious condition. "The question of duty presents an issue of law. When a court resolves a question of duty it is essentially making a policy determination." *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 248 (Ky. 1992) (citations omitted).

McIntosh's status with respect to the Hospital was that of an invitee. "An invitee enters upon the premises at the express or implied invitation of the owner or occupant on business of mutual interest to them both, or in connection with business of the owner or occupant." *Horne v. Precision Cars of Lexington, Inc.*, 170 S.W.3d 364, 367 (Ky. 2005) (citations omitted).

> A possessor of business premises is not liable to his invitees for physical harm caused to them by any condition on the premises whose danger is known or obvious to them unless the possessor should anticipate the harm despite such knowledge or obviousness.
>
> Reasonable care on the part of the possessor of business premises does not ordinarily require precaution or even warning against dangers that are known to the visitor or so obvious to him that he may be expected to discover them.

Bonn v. Sears, Roebuck & Company, 440 S.W.2d 526, 528 (Ky. 1969). "If the hazard is 'known or obvious to' the invitee, the owner has no duty to warn or protect the invitee against it." *Horne*, 170 S.W.3d at 368.

The Hospital contends that the hazard in this case was open and obvious because the transition from the flat area to the curb was not obscured or hidden in any way. The Hospital notes that the incident occurred during daylight hours, the area is covered by a canopy with built-in lighting, and McIntosh had successfully negotiated the area on 453 prior occasions. We have reviewed the cases relied upon by the Hospital in support of this argument, but we conclude that the factual circumstances here are significantly different.

Our courts have consistently emphasized that the nature of the hazard must be assessed in the context of the premises on which it is found. *See Horne*, 170 S.W.3d at 368. In the *Bonn* case, for example, the court found that Sears had not breached its duty to a customer who fell into a "grease pit" in an automobile service area. *Id*. at 529. After noting that the area was well-lighted and that the pit was neither unusual nor hidden from view, the court stressed the importance of assessing whether the risk (the pit) was inherent in the nature of the activity being performed in the area:

> In the instant case, Sears' activities involved a risk that was known or obvious to those who entered the premises, because the risk was inherent in the nature of the activity itself. In determining the extent of preparation that a business visitor is entitled to expect to be made for his protection, the nature of the premises and the purposes for which it is used are of great importance. It has been pointed out that one who goes on business to the executive offices in a factory is entitled to expect that the possessor will exercise reasonable care to secure his visitor's safety. If, however, on some particular occasion he is invited to go on business into the factory itself, he is not entitled to expect that special preparation will be made for his safety, but is entitled to expect only such safety as he would find in a properly conducted factory.

Id. Simply put, someone entering an automobile service area could reasonably expect to see a grease pit; it is far less likely that a paramedic rushing a patient into an emergency room would expect to encounter an uneven curb.

Context was also of paramount importance in *Layman v. Ben Snyder, Inc.*, 305 S.W.2d 319 (Ky.1957), a case in which the plaintiff stepped backwards and fell down a flight of stairs in a department store. In ruling that the steps were an open and obvious hazard, the court stated:

> The law contemplates the exercise of reasonable care by every person for his own protection against injury. Nor does it license one to walk blindly into dangers which are obvious or which could be anticipated by one of ordinary prudence.

Id. at 321(citation omitted). The court also observed that the "[f]rom the evidence it was disclosed appellant had been on the second floor of appellee's store several times prior to the accident." *Id.*

The Hospital has argued that because McIntosh had entered the emergency room on over 400 prior occasions, she had similarly been put on notice of the uneven curb. We disagree. Although McIntosh had safely entered the emergency room numerous times, she could have done so without ever noticing the change in elevation of the curb, whereas Layman could not have reached the second floor of the store without noticing that she was climbing steps.

Although McIntosh admitted she was very familiar with the Hospital's emergency room entrance, there was no evidence she had specifically observed the unevenness of the curb, unlike the plaintiff in *Willman v. Azalea of Kentucky, Inc.,* 2007 WL 1794905, 2006-CA-000979-MR (Ky.App. June 22, 2007), who observed that the steps leading from a restaurant looked fragile and crumbling yet went ahead and used them in spite of this knowledge. This was also the scenario in *Montgomery Ward v. Ellis*, 380 S.W.2d 223 (Ky. 1954), wherein the court ruled that the plaintiff's contributory negligence was the cause of her injury after she admitted that she had observed an overhanging doorway in a shop yet nevertheless struck her head on it a few moments later. *Id*. at 224.

Similarly, in *Johnson v. Lone Star Steakhouse and Saloon of Ky., Inc.,* 997 S.W.2d 490 (Ky.App. 1999), the court found that peanut shells strewn on the floor of a restaurant were an open and obvious hazard when a customer who slipped and fell on the shells had previously waited two hours for a table, during which time she had ample opportunity to observe the shells. *Id*. at 492. By contrast, the uneven curb at the

Hospital was not something an ambulance attendant necessarily would have had the leisure to observe while rushing a patient towards the emergency room entrance.

The factual situation in this case is far more akin to that found in *Horne v. Precision Cars of Lexington, Inc*., 170 S.W.3d 364 (Ky. 2005), wherein the plaintiff tripped over a parking barrier partially hidden by a car he was interested in purchasing. The court found that the barrier was not "open and obvious" because the owner of the premises "would expect that a customer in the process of examining its wares while they were being touted by one of its sales staff 'may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it.'" *Id*. at 370. Similarly, the Hospital could reasonably expect that a paramedic treating a critically-ill patient could be distracted, could forget (if she had ever observed it) that the curb was uneven, and could fail to protect herself against it.

The reasoning employed in *Winn-Dixie Louisville, Inc. v. Smith*, 372 S.W.2d 789 (Ky.1963), is also applicable to this situation. In that case, a customer stepped into a cardboard box left on the floor of a supermarket and fell, sustaining various injuries. The court concluded that

> While appellee was required to exercise ordinary care for her own safety, such did not require her to look directly down at her feet with each step taken. *Humbert v. Audubon Country Club*, Ky., 313 S.W.2d 405. Appellee had entered appellant's market as a customer. At the time she sustained the fall she was in a part of the market where she had a right to be, and where expected to be, as an invitee. *Wall v. F. W. Woolworth Co.*, 209 Ky. 258, 272 S.W. 730. She had a right to assume that the floor of the market would be free from obstructions of a dangerous nature. While she was required to exercise ordinary care for her own safety, she was not required to look for danger when there was no reason to apprehend danger.

Winn-Dixie, 372 S.W.2d at 792.

The standard of review of an order denying a motion for a directed verdict is stated in *Lewis v. Bledsoe Surface Mining Company*, 798 S.W.2d 459 (Ky. 1990), as follows:

> Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant a motion for directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. *Kentucky & Indiana Terminal R.Co. v. Cantrell*, Ky., 184 S.W.2d 111 (1944), and *Cochran v. Downing*, Ky., 247 S.W.2d 228 (1952). The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate 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." *NCAA v. Hornung*, Ky., 754 S.W.2d 855 (1988). If the reviewing court concludes that such is the case, it is at liberty to reverse the judgment on grounds that the trial court erred in failing to sustain the motion for directed verdict. Otherwise, the judgment must be affirmed.

Id. at 461-62. In light of our foregoing analysis, we conclude that the trial court did not err in denying the Hospital's motion for a directed verdict or its motion for a judgment notwithstanding the verdict.

The Hospital's next argument concerns the introduction into evidence by McIntosh of several photographs depicting the main entrance of the Hospital and the emergency room entrances of four hospitals in the region. The photographs show that Hospital's main entrance, like the emergency entrance, has a flat central portion that slopes upward to curbs on the sides. Unlike the curbs at the emergency room entrance, however, the Hospital's main entrance curbs are marked with stripes of yellow paint. The photographs of the emergency room entrances of the other hospitals show that

they are either completely level or that the change from the level area to the curb is marked with yellow paint or barriers.

The photographs were used by plaintiff's expert witness to illustrate the type of design and warnings that, in his opinion, should have been present at the Hospital's emergency room entrance. The Hospital argues that these photographs were irrelevant, because the configuration of these entrances or the color of paint applied to the curbs at these entrances cannot establish that the configuration of the entrance to its emergency room was dangerous in any respect. It also contends that the photographs confused the jury.

Kentucky Rules of Evidence (KRE) 401 provides the following definition of "relevant evidence:"

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

KRE 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

A trial judge's decision with respect to relevancy of evidence under KRE 401 and 403 is reviewed under an abuse of discretion standard. *Love v. Commonwealth*, 55 S.W.3d 816, 822 (Ky. 2001) (citations omitted). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (citation omitted).

The trial court did not abuse its discretion in admitting the photographs, which were probative not only of the allegation that the Hospital had been negligent in

failing to ameliorate or mark the hazard, but also of the allegation that the Hospital either was aware (as evidenced by the markings of its own front entrance), or could easily have made itself aware, of simple precautions to avoid tripping hazards. Moreover, the Hospital has failed to explain how this evidence confused the jury.

The Hospital's final argument is that the trial court erred in admitting into evidence the testimony of plaintiff's witness James Lapping. Lapping testified as an expert with regard to the safety of emergency room entrances. Lapping is an engineer and certified safety professional who served as the safety director for the AFL-CIO for over 20 years and later worked for OSHA where he wrote training programs for OSHA inspectors. Lapping testified that in order to make the emergency entryway safe, the Hospital should have leveled it, installed guardrails at the sloped area, or used yellow paint to mark the area.

The Hospital argues, relying on *O'Connor & Raque Co. v. Bill*, 474 S.W.2d 344 (Ky. 1997), that the jury did not need expert guidance in determining whether the emergency room entrance was safe because this was an issue that was within the practical experience of the jurors. In *Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997), the Kentucky Supreme Court stated:

> The real question should not be whether the expert has rendered an opinion as to the ultimate issue, but whether the opinion "will assist the trier of fact to understand the evidence or to determine a fact in issue." KRE 702. Generally, expert opinion testimony is admitted when the issue upon which the evidence is offered is one of science and skill, *Greer's Adm'r v. Harrell's Adm'r*, 306 Ky. 209, 206 S.W.2d 943 (1947), and when the subject matter is outside the common knowledge of jurors. *O'Connor & Raque Co. v. Bill*, Ky., 474 S.W.2d 344 (1971).

Id. at 889-90.

Emergency room entrances are not generally used by members of the public, but by specialized workers such as EMTs and paramedics transporting patients

on stretchers or gurneys. Lapping testified that in his opinion the entrance violated a specific OSHA regulation that governs the marking of physical hazards. It was not an abuse of discretion to allow expert testimony as to the proper construction and marking of such an entryway.

The Hospital argues that Lapping's testimony as to the ultimate fact, i.e., that the entrance was negligently designed and constructed, was put in serious issue because he acknowledged on cross-examination that he was unaware that McIntosh had used the ramp on hundreds of prior occasions without incident. Lapping also admitted on cross-examination that he had never actually served as an OSHA inspector, that he was aware that McIntosh had filed a complaint with OSHA, and that OSHA had investigated and found no violations. These statements were all the result of proper cross-examination by the defense in an effort to impeach the expert's credibility, and they were all heard and considered by the jury. There is no requirement that an expert's opinion must be infallible or unimpeachable in order for it to be admissible. We conclude that the trial court did not abuse its discretion in admitting Lapping's testimony.

Finally, the Hospital has noted that Lapping was allowed to address the jury from the podium for 12 to 13 uninterrupted minutes. Although the Hospital made a motion in limine objecting to Lapping's testimony, no specific contemporaneous objection was made to the manner of his testimony, and we will not therefore review that issue.

The judgment of the Breathitt Circuit Court is affirmed.

LAMBERT, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

TAYLOR, JUDGE, DISSENTING: Respectfully, I dissent. I agree with Appellant that the hospital did not owe Appellee a duty to warn as concerns the obvious

and open condition of the hospital premises adjacent to the emergency room entrance, which Appellee had utilized on over 400 occasions. I agree that Appellee was an invitee of Appellant and *Johnson v. Lonestar Steakhouse of Kentucky, Inc.*, 997 S.W.2d 490 (Ky.App. 1999), is controlling. Appellant's motion for a directed verdict should have been granted by the trial court. I would reverse and remand for entry of judgment for Appellant.

BRIEFS FOR APPELLANT

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