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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002370-MR

GLORIA LAMBERT

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 05-CI-005903

LANDRY'S SEAFOOD-KENTUCKY, INC.,
D/B/A JOE'S CRAB SHACK

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; CAPERTON AND CLAYTON, JUDGES.

CAPERTON, JUDGE: Gloria Lambert (Lambert) appeals the Jefferson Circuit Court's grant of Landry's Seafood-Kentucky (Landry's) motion for judgment notwithstanding the verdict (JNOV) of the jury's finding that Landry was 100% liable. Lambert also appeals the denial of her motion for a new trial on the sole issue of

damages relating to pain and suffering. After a careful review of the parties' arguments, the record, and the applicable law, we reverse and remand to the Jefferson Circuit Court.

Lambert went to eat at the Landry's Louisville Joe's Crab Shack with her mother, two daughters, and a niece in April 2005. Lambert tripped¹ exiting the restaurant on the stairs and landed on the platform separating the upper set of stairs from the lower set of steps facing the water. She drove back home to Indiana prior to receiving medical treatment for a broken ankle.

After the fall, Lambert suffered from soft tissue damage in addition to the broken ankle. She underwent open reduction surgery to install plates and other fixation devices for the broken ankle. After surgery she developed reflex sympathetic dystrophy (RSD), which according to Lambert is a painful swelling of a traumatically injured joint provoked by an immune system response, which is incurable and will require further medical treatment.

Based on the complications from the broken ankle, Lambert sued Landry's for \$43,568 for incurred medical expenses, future medical expenses of \$330,000, pain and suffering of \$200,000, and \$140,000 for her impairment of power to labor and earn money. The matter proceeded to trial.

¹ According to Lambert, she felt her foot snag immediately before the fall. She testified that the parties had not been drinking and were not in a hurry to exit the restaurant.

At trial, Lambert presented her own testimony² in addition to that of her mother, Ms. Hill, and her daughter, Ms. Steele. Lambert's expert witnesses included John Schroering, a licensed professional engineer, and Dr. David Laitinen.³

Lambert testified that she was proceeding down the staircase when she felt a tug on her foot and then she fell to the bottom of the staircase experiencing excruciating pain.⁴ When questioned about the location of the fall, Lambert was unable to articulate⁵ the vicinity of her fall, only that she was on the staircase. Lambert's mother, Ms. Hill, testified that she was proceeding down the staircase behind Lambert when the fall occurred. Hill could not identify the location of the fall at trial.

During cross-examination, counsel for Landry's impeached Hill concerning the location of the fall by use of Hill's deposition testimony, which placed the location of Lambert's fall at the bottom of the stairs. Lambert's daughter, Ms. Steele, was behind Hill on the staircase and at trial claimed not to have seen her mother fall nor did she know from where she fell. However, on

² Multiple witnesses for both parties were presented at trial but are not referenced in this opinion as the evidence produced by these witnesses is not germane to this appeal.

³ Dr. Laitinen testified via deposition that Lambert's broken ankle had caused her RSD and that RSD is very painful and will require future medical treatment.

⁴ Lambert was impeached during cross-examination concerning previous injuries. Her vocational physical therapist believed the cause of Lambert's pain was from her back injury in a car crash and not from the fall at Joe's Crab Shack.

⁵ At trial Lambert refused to even hazard a guess as to whether she fell from the top, the middle, or the bottom of the staircase.

cross-examination, counsel for Landry's impeached Steele based on her deposition testimony that possibly placed Lambert falling from the bottom of the staircase.

John Schroering investigated the staircase mere days after Lambert's fall. The staircase at Landry's was comprised of wooden steps with wood risers and a handrail on each side and in the center of the staircase. Each step had an aluminum tread/friction plate held in place by wood screws. Schroering testified that many of the screws had backed out or otherwise loosened, causing the friction plate on some of the steps to become loose. The loose plates and the protruding screws created a tripping hazard. Further, some of the plates protruded from the steps which affected one's stepping geometry.

Schroering took pictures of the most glaring hazards, which were presented at trial. Specifically Schroering found steps 3, 6, 7, 8, 11, and 13 to be defective steps.⁶ Schroering testified that the friction plates were the direct cause of Lambert's fall and resulting injuries. He further testified that the stairway did not comply with two safety standards/codes and that the stairs were not repaired and maintained in a safe condition. Schroering based his conclusion on the condition of the *entire* staircase.

On cross-examination, counsel for Landry's questioned Schroering's knowledge of the location of the fall. While Schroering denied having actual knowledge of the location of the fall, counsel for Lambert had sent a letter to

⁶ There were 15 steps in total. Schroering numbered the stairs from the bottom up. He was unable to document via photos the movement of the plates underfoot. The steps explicitly mentioned were the most egregious hazards.

Schroering identifying the location of the fall as from the bottom of the stairs, specifically from the third to the sixth step, and not from the top as counsel initially believed.

Landry's presented Elreco Thomas, the manager on duty at Joe's Crab Shack at the time of Lambert's fall. Thomas filled out the incident report and placed Lambert's fall from the third step based on information he obtained from the group. Thomas could not specifically identify at trial who had given this information to him.

At the close of the evidence, Landry's moved for a directed verdict, which was summarily denied. After the four days of trial, the jury found Landry's 100% liable and awarded Lambert \$43,568.80 in past medical expenses. The jury awarded nothing for future medical expenses, pain and suffering, and impairment to labor and earn money. Lambert objected, and the trial court had the jury reconsider their award. The jury again awarded no additional damages.

Lambert moved for a new trial on the issue of damages. Prior to the court's ruling, Landry's made a motion for judgment notwithstanding the verdict (JNOV), arguing that Lambert had not proven that she had encountered a dangerous condition that was a substantial factor in causing her fall.⁷ The court

⁷ Lambert refers to this as Landry's "exact step theory"; i.e., Lambert cannot identify the exact step she fell from and thus she did not meet her burden of proof. This theory was presented multiple times to the trial court in numerous directed verdict motions and in a summary judgment motion. All prior motions based on the "exact step theory" had been overruled by the trial court.

summarily granted the JNOV motion.⁸ Lambert moved the court to set aside its order but the trial court summarily denied that motion. It is from the grant of JNOV and the denial of her motion for a new trial on damages that Lambert now appeals.

Lambert presents five arguments on appeal. First, she contends that the trial court erred in granting JNOV as Lambert proved that she had an encounter with a dangerous condition on the business premises of Landry's. Second, Lambert argues that the trial court erred in granting the JNOV as Lambert proved that her encounter with a dangerous condition was a substantial factor in causing the accident and her injuries. Third, she asserts that the trial court erred in denying Lambert a new trial on the sole issue of damages relating to the pain and suffering associated with her ankle fracture. Fourth, Lambert claims that under Kentucky law, it was improper for the jury to award no damages for pain and suffering when the evidence is undisputed that Lambert suffered. Fifth, Lambert argues that her case is distinguishable from other cases which have upheld minimal damage awards because there is no dispute that Lambert was seriously injured.

Lambert's first and second arguments condense into one argument, namely, whether Lambert proved that she had an encounter with a dangerous condition on the business premises of Landry's which was a substantial factor in causing her injury. Lambert's third, fourth, and fifth arguments also condense into one argument and will be addressed as whether Lambert was entitled to a new trial

⁸ The court seems to have relied upon the reasons given in Landry's memorandum accompanying their motion in granting the JNOV, but this is unclear.

on damages alone because the jury failed to award her damages for pain and suffering.

Landry's counter-argues that the court properly granted its motion for JNOV because the court reached the correct conclusion that Lambert failed to offer any evidence that she encountered a dangerous condition that caused her injury. Furthermore, Lambert is not entitled to a new trial on damages alone for three reasons. One, the trial court did not rule on Lambert's CR 59.01⁹ motion; therefore, the question of whether the verdict was insufficient and entitled to a new trial is not ripe. Two, the jury award was supported by substantial evidence. Three, Kentucky law prohibits a new trial on damages alone as the appropriate remedy is to order a new trial on all issues.¹⁰

At the outset, we note that a motion for JNOV shall not be granted unless "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.*

⁹ CR 59.01 states: A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:

- (a) Irregularity in the proceedings of the court, jury or prevailing party, or an order of the court, or abuse of discretion, by which the party was prevented from having a fair trial.
- (b) Misconduct of the jury, of the prevailing party, or of his attorney.
- (c) Accident or surprise which ordinary prudence could not have guarded against.
- (d) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court.
- (e) Error in the assessment of the amount of recovery whether too large or too small.
- (f) That the verdict is not sustained by sufficient evidence, or is contrary to law.
- (g) Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial.
- (h) Errors of law occurring at the trial and objected to by the party under the provisions of these rules.

¹⁰ We decline to address Landry's third argument as the trial court on remand will have the opportunity to address this issue.

Klapheke, 967 S.W.2d 16, 18-19 (Ky. 1998). We review a decision granting JNOV for clear error. *Moore v. Environmental Const. Corp.*, 147 S.W.3d 13, 16 (Ky. 2004). This means that we must review the evidence presented to the jury, drawing all reasonable inferences most favorable to the verdict returned by the jury, and that we must uphold the trial court's decision if a reasonable person could not have found as the jury did. *Id.*

In granting the motion for JNOV, the trial court merely sustained the motion and offered no explanation. As granting a motion for JNOV is not undertaken lightly, an adequate explanation as to why the trial court determined that JNOV was appropriate would assist in appellate review. *See Garrison v. Jervis B. Webb Co.*, 583 F.2d 258 (6th Cir. 1978). As such, we shall review the trial court's grant of JNOV as if the reasoning were that Lambert failed to prove that she had an encounter with a dangerous condition on the business premises of Landry's and that the condition was a substantial factor in causing her injury, *i.e.*, Lambert failed to prove causation.

Our Kentucky Supreme Court recently addressed premises liability negligence as follows:

Under *Lanier v. Wal-Mart Stores, Inc.*, Ky. 99 S.W.3d 431 (2003), the customer retains the burden of proving that: (1) he or she had an encounter with a foreign substance or other dangerous condition on the business premises; (2) the encounter was a substantial factor in causing the accident and the customer's injuries; and (3) by reason of the presence of the substance or condition, the business premises were not in a reasonably safe condition for the use of business invitees. *Id.* at 435-36.

Such proof creates a rebuttable presumption sufficient to avoid a summary judgment or directed verdict, *id.* at 435, and “shifts the burden of proving the absence of negligence, i.e., the exercise of reasonable care, to the party who invited the injured customer to its business premises.” *Id.* at 437.

Martin v. Mekanhart Corp., 113 S.W.3d 95, 97 (Ky. 2003)

Landry’s argues that the court properly granted its motion for JNOV because the court reached the correct conclusion that Lambert failed to offer any evidence that she encountered a dangerous condition that caused her injury, (*i.e.*, that Lambert could not identify the location of her fall on the stairwell). That argument would impose a greater burden of proof upon the plaintiff in a premises liability case involving a slip and fall on a staircase than is required by our case law. A detailed reading of our case law renders the conclusion that a plaintiff is not required to identify the exact location from which they fell, only the general *vicinity* of the fall. *See Roseberry v. Louisville Ry. Co.*, 181 S.W. 1117, (Ky. 1916)(evidence as to exact location was merely cumulative of evidence at trial as to approximate location).

If we accept Landry’s exact-step theory, this begs the question of what was the position of the foot on the step; *i.e.*, near the edge or back from the edge, and the evidence may bring forth even more footing positions as a particular case develops. The exact position will likely never be known. The testimony was that several of the steps had loose treads, that Lambert was descending the steps, and

that Lambert felt her foot snag immediately before the fall.¹¹ Lambert's description of how the fall occurred, in laypersons' terms, is consistent with the type of accident that would be caused by the alleged negligent condition present at the site of the accident.

The alleged negligent condition, the loose and hazardous steps, certainly had the potential to produce the type of accident alleged to have occurred; *i.e.*, the snagging of Lambert's foot resulting in her fall as she descended the staircase. The jury was presented with evidence that six out of the fifteen steps on the staircase were hazardous and that the hazardous steps were distributed throughout the entire staircase. Thus, the jury could reasonably infer that a loose tread could cause one's foot to "snag" based on the evidence presented. We think it is enough that Lambert was located on the steps in the vicinity of loose treads that could cause the type of fall occasioned by Lambert, and we so hold.

While Lambert was unable to identify the exact location of her fall at trial, Landry's presented multiple witnesses that identified the vicinity of Lambert's fall. First, Thomas testified that the incident report which was filled out in close temporal proximity to the fall indicated¹² that Lambert had fallen from the third step. While this evidence could have been used by the jury to determine

¹¹ Lambert testified that "my foot felt like it had got caught." Video Record Tape 3 at 2:31. She later testified that "I felt a tug and a force and I was at the bottom of the stairs....I felt the force, felt the tug, like I had been snagged on something." Video Record Tape 3 at 4:50, and 4:52.

¹² Thomas testified that someone in Lambert's group told him where she had fallen and that is why the third step was listed in the report. At trial, Thomas was unable to identify who in Lambert's party had given him this information.

where Lambert fell, the jury could also consider the evidence brought forth during the impeachment of Schoering, Hill, and Steele. During their impeachment, Landry's brought to light that the fall occurred between the third and the sixth step. Without an admonition¹³ to the jury that the impeachment evidence was to be used solely for impeachment purposes, the jury could consider the evidence substantively. *Continental Cas. Co. v. Freeman*, 481 S.W.2d 309, 316 (Ky. 1972) and *Paducah Dry Goods*, *supra*.

The evidence presented indicated that the staircase had defective steps at the top, the middle, and the bottom. Sufficient evidence was presented to place the location of the fall anywhere from the third to the sixth step. Therefore, evidence on the location of the fall was properly before the jury.¹⁴ Given the high bar imposed before a trial court may grant a JNOV and the evidence presented at trial, we agree with Lambert that the trial court erred by granting Landry's JNOV.¹⁵ Therefore, we reverse the trial court's granting of the motion for JNOV.

We next address Lambert's argument that she was entitled to a new trial on damages alone because the jury improperly awarded her no damages for

¹³ Our review of the record did not reveal that Landry's requested an admonition. Pursuant to CR 76.12(4)(d) the appellee is required to provide ample citation to the record. Without such citation to the admonition and given that our review of the record failed to establish that Landry's requested an admonition, we must conclude that the jury could freely consider the impeachment evidence as substantive evidence.

¹⁴ "While it is jury's province to weigh evidence, court will direct verdict where there is no evidence of probative value to support opposite result, and jury may not be permitted to reach verdict based on speculation or conjecture." *Wiser Oil Co. v. Conley*, 380 S.W.2d 217, 218 (Ky. 1964).

¹⁵ Where there is substantial evidence upon which to support the jury verdict, the verdict is conclusive on appeal. *Carey-Reed Co. v. Hart*, 53 S.W.2d 689 (Ky.App.1932)

pain and suffering. This case presents a bit of a quandary not anticipated by CR 50. Therein, the rule provides that the motion for JNOV may be joined with a motion for a new trial. CR 50.02. Such joinder necessarily contemplates that the party moving for the JNOV is also the party moving for the new trial. To the contrary, the situation presented sub judice has Landry moving for a JNOV and Lambert moving for a new trial on damages alone. This situation requires further analysis in that CR 50 may provide guidance but does not specifically address the issue of one party moving for JNOV and the other moving for a new trial.

First, we shall consider the purposes of the motions for JNOV and for new trial. The motion for a directed verdict is provided for in CR 50.01.¹⁶ It is to be made at the close of the evidence offered by an opponent. The motion for JNOV is provided for in CR 50.02¹⁷ and, pursuant thereto, allows a party who has

¹⁶ CR 50.01 states:

A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefore. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

¹⁷ CR 50.02 states:

Not later than 10 days after entry of judgment, a party who has moved for a directed verdict at the close of all the evidence may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned, such party within 10 days after the jury has been discharged may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the

moved for directed verdict at the close of all the evidence to thereafter move for a JNOV in accordance with the prior motion for a directed verdict.

The standard applicable for the trial court's grant of a motion for a directed verdict is the same as for a JNOV. A trial court ruling on either such motion is to consider the evidence presented before the trial court, and, if the moving party can establish that on basis of the evidence presented at trial that reasonable minds could not differ on the proper resolution of the case, then directed verdict/JNOV would be proper. *See* CR 50.01; *Bierman, supra*, and *Spivey v. Sheeler*, 514 S.W.2d 667, 673 (Ky. 1974).

In contrast, the motion for a new trial is provided for by CR 59 and, pursuant to CR 59.01, specific "causes" are set forth as grounds for the granting of such a motion. Thus, the motion for a directed verdict/JNOV is more focused on evidentiary matters whereas a motion for a new trial is broader in scope.¹⁸

As to the arguments of the parties, Lambert argues that her motion for a new trial was implicitly overruled when the trial court granted Landry's motion for JNOV. To the contrary, Landry argues that the issue is not ripe for appeal because the trial court never ruled on the motion for new trial.

judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

¹⁸ We note that certain "causes" set forth under CR 59.01 are evidentiary in nature but that other "causes" therein are not based on evidence.

In reviewing the party's motions contained in the record, Landry argued to the trial court in its motion for JNOV that Lambert had not proven that she had encountered a dangerous condition that was a substantial factor in causing her fall. Lambert's motion for a new trial, on the other hand, was based on the failure of the jury to award damages for pain and suffering. The practical effect of the trial court's sustaining Landry's motion for JNOV was to deny Lambert a new trial on damages alone, but yet the trial court did not specifically rule on Lambert's motion.

We, the Court of Appeals, are a Court of review. In that we have decided that the grant of a JNOV by the trial court was error, then the motion for a new trial is now ripe for decision. The question then arises: which court should make the decision on the motion for a new trial? If we accepted Lambert's argument that the motion for a new trial was implicitly overruled by the trial court then we might be justified in deciding the motion for a new trial. However, in doing so we would blur the otherwise bright-line rule established in *Fischer v. Fischer*, 197 S.W.3d 98 (Ky. 2006) (appellate court is without authority to review issues not decided by trial court). Moreover, the question would arise as to the application of *Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644 (Ky. 2007) (the trial court speaks through the language of its orders and judgments). We believe that remand to the trial court for such a ruling is most proper in light of our reversal of the trial court's decision which granted Landry's motion for JNOV.

For the foregoing reasons, we reverse the trial court's granting of Landry's motion for JNOV and remand to the trial court for a ruling on Lambert's motion for a new trial on damages.

ALL CONCUR.

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