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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-000267-MR
AND
NO. 2002-CA-000560-MR

DEBRA URSINI — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS McDONALD, JUDGE
ACTION NO. 98-CI-000778

KENTUCKY KINGDOM, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; BARBER and COMBS, JUDGES.

EMBERTON, CHIEF JUDGE. Debra Ursini was allegedly injured while riding the Chang roller coaster at Kentucky Kingdom, a Louisville amusement park. She filed the present action on February 10, 1998, alleging Kentucky Kingdom failed to adequately warn of the dangers of the ride and that it was negligently operated. The trial court held that there was no genuine issue of material fact and Kentucky Kingdom was entitled to summary judgment.

On July 1, 1997, Ursini and her family visited Kentucky Kingdom and while there, rode Chang, a "stand-up" roller coaster. She alleges that during the ride her head was moving violently back and forth unsecured by the head rest and finally, when the ride stopped, that her head slammed forward and sharply backward. When she departed from the ride she had a severe headache and rode no more rides on that date. Ursini's neck pain continued and on July 23, 1997, Dr. Robert Jacob diagnosed her with cervical strain. She continued to see Dr. Jacob through September 1997, and then began treatment with Dr. Lawrence Peters who treated her with trigger point injections. In August 1998, while working at Caritas Hospital Ursini was attacked by a thirteen-year-old patient. Dr. Peters continued to treat Ursini with cervical injections. Ursini subsequently developed seizures, dystonia, and myoclonus.[1]

The standard for a summary judgment motion was stated in Steelvest, Inc. v. Scansteel Service Center,[2] wherein the court reaffirmed that it should be granted only when, as a matter of law, it appears it would be "impossible" for the non-

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[1] Ursini filed a medical malpractice claim against Dr. Peters and an action against Caritas Medical Center. Dr. Peters was dismissed from the action. The claims against Dr. Peters and Caritas are not a part of this appeal.

[2] Ky., 807 S.W.2d 476, 482 (1991).

moving party to prevail at trial. Since Scansteel, the term "impossible" has been further defined with emphasis that the term is to be applied in a practical sense, not in an absolute sense.[3] In Welch v. American Publishing Company,[4] the Supreme Court further explained the application of the Scansteel standard:

> Since rendition of our decision in Steelvest v. Scansteel, Ky., 807 S.W.2d 476 (1991), on the question of the proper standard for deciding summary judgment motions, much attention has been given to the use of the word "impossible." Summary judgment is improper unless it would be "impossible for the respondent to produce evidence at trial warranting a judgment in his favor and against the movant." Id. at 483. Steelvest did not repeal CR 56. See CR 56.03 (summary judgment shall be granted if "there is no genuine issue as to any material fact"). It merely stated forcefully that trial judges are to refrain from weighing evidence at the summary judgment stage; that they are to review the record after discovery has been completed to determine whether the trier of fact could find a verdict for the non-moving party. Steelvest at 482-483. The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial. (Emphasis added).

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[3] Perkins v. Hausladen, Ky., 828 S.W.2d 652, 654 (1992).

[4] Ky., 3 S.W.3d 724, 729-30 (1999).

Ursini alleges negligence in the maintenance, care, custody, control, and operation of Chang. An amusement park operator does not insure the safety of its guests, but has a duty to exercise the degree of care and skill ordinarily expected of reasonable and prudent operators of amusement parks under similar circumstances.[5] To prevail, Ursini must show that Kentucky Kingdom failed to exercise ordinary care in preventing her from being injured.[6]

Ursini alleges that Kentucky Kingdom failed to: (1) properly stop the ride; (2) provide a proper head brace; (3) have the attendant move the ride sidebars; and (4) operated the ride with excessive shifting and jerking. There is no evidence, other than Ursini's bare allegations to support her contentions. There is no evidence in the record that Chang was improperly operated. Also of significance, Ursini had difficulty describing the ride, the safety equipment, or movement of the roller coaster. Even if the appellant had offered such evidence there is no expert testimony concerning the proper operation of the ride or safety equipment.

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[5] Sidebottom v. Aubrey, 267 Ky. 45, 101 S.W.2d 212 (1937).

[6] See Murphy v. Second Street Corp., Ky. App., 48 S.W.3d 571 (2001).

Ursini also alleges that Kentucky Kingdom failed to properly warn of possible risks of the ride. However, she testified that there was a sign stating the risks to riders with certain conditions, including back and heart conditions. Again, absent evidence that Kentucky Kingdom was, or should have been, aware of the risks such as whiplash or head injuries, there was no duty to warn. Moreover, there was no indication by Ursini's appearance or otherwise that she could not physically withstand the roller coaster ride.[7] The duty to warn applies only to foreseeable risks.[8]

We agree with the trial court that under the circumstances, the doctrine of res ipsa loquitur is inapplicable. The general requirements of the doctrine are:

> (1) The defendant must have had full management and control of the instrumentality which caused the injury.
>
> (2) The circumstances must be such that, according to common knowledge and the experience of mankind, the accident could not have happened if those having control and management had not been negligent.

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[7] See Jackson v. Kings Island, 390 N.E.2d 810, Ohio (1979)(where an eighty-seven-year-old amusement park visitor was obviously physically infirm and the court held the facts indicated that the ride operator should have known of the danger of injury for the normal operation of the ride to the visitor).

[8] Fryman v. Harrison, Ky., 896 S.W.2d 908, 909 (1995).

(3) The plaintiff's injury must have resulted from the accident.[9]

In Cox, the court explained that the second element is not satisfied merely because the cause of the accident is unknown:

> The fact that some mystery accompanies an accident does not justify the application of the doctrine of res ipsa loquitur. The fact that we cannot pinpoint an act of omission or commission wherein one fails to respect the rights of others does not summon its use. A lack of knowledge as to the cause of the accident does not call for the application of the doctrine. The separate circumstances of each case must be considered and from them it must be first decided whether according to common knowledge and experience of mankind, this accident could not have happened if there had not been negligence.
>
> The primary responsibility for this decision rests upon the court because it is the court's duty judicially to notice whether as a matter of common experience the accident could not have happened without dereliction in duty on the part of the person charged with the management and operation of the thing. In other words, the doctrine of res ipsa loquitur does not involve the establishment of the ultimate fact by circumstantial evidence or of presumed negligence merely because of injury. So, the first step in connection with its use is to classify the type of accident and decide whether it is of that class containing only those accidents which would not in the ordinary course of things

[9] Cox v. Wilson, Ky., 267 S.W.2d 83, 84 (1954).

> occur without negligence.[10] (Citations omitted).

In this case, Ursini has failed to show that anything unusual happened during or immediately after the ride. Although she alleges there was a jerk at the end of the ride, it is common knowledge that jerks and sudden movements are usual on roller coasters. In the absence of proof that some out of the ordinary event occurred, the doctrine has no application.

We agree with Ursini that the primary obstacle to surviving Kentucky Kingdom's motion for summary judgment is her failure to develop proof to support her claims; we disagree, however, that she was not given sufficient opportunity for discovery. It is not necessary that a party actually complete discovery but only that a party has had adequate opportunity to do so.[11] Ursini filed her complaint in 1998 and during the four years the case was pending, took only three depositions, none of which included witnesses to Ursini's roller coaster ride, Kentucky Kingdom's employees, or experts as to the operation of roller coasters. Although she contends that Kentucky Kingdom was not cooperative, Ursini never sought the aid of the court in

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[10] Id. at 84.

[11] Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co., Ky. App., 579 S.W.2d 628, 630 (1979).

compelling discovery. Certainly four years provided an adequate time frame to conduct discovery.

The record is devoid of evidence to support Ursini's claims. Summary judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Leland R. Howard, II
Callie E. Walton
HOWARD & HELMERS PLC
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gaylee W. Gillim
Louisville, Kentucky

Edmund P. Karem
SITLINGER, McGLINCY, THEILER & KAREM
Louisville, Kentucky