RENDERED: August 15, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001503-MR

JOAN BRYAN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 00-CI-000206

O'CHARLEY'S INC. AND O'CHARLEY'S RESTAURANT PROPERTIES, LLC — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, McANULTY, AND TACKETT, JUDGES.

TACKETT, JUDGE: Joan Bryan (Bryan) appeals from the July 3, 2002 order of the Jefferson Circuit Court granting appellees', O'Charley's Inc. and O'Charley's Restaurant Properties, LLC, (hereinafter O'Charley's, or appellees) motion for directed verdict. We affirm.

January 16, 1999, was warm for a winter's day. The temperature reached 55 degrees and there was no recorded precipitation. After completing supper at O'Charley's with her

date, Bryan left the restaurant and began walking toward her car. As she stepped off the sidewalk and onto the parking lot pavement, Bryan alleges she slipped on a patch of "black ice," causing her to fall. The result of this slip-and-fall was a broken left ankle.

Later, Bryan initiated an action against O'Charley's alleging negligence in its failure to discover, warn, or remedy a hazard posing an unreasonable risk to its business invitees, the result of which was serious injury, lost income, and "profound" pain and suffering. Upon the conclusion of Bryan's evidence at trial, the circuit court granted appellees' motion for directed verdict. This appeal followed.

The standard for a directed verdict has been stated as follows:

> A directed verdict is appropriate when, "drawing all inferences in favor of the nonmoving party, a reasonable jury could only conclude that the moving party was entitled to a verdict." The trial court is required to "consider the evidence in its strongest light in favor of the party against whom the motion was made and must give him the advantage of every fair and reasonable intendment that the evidence can justify." In our review, we must "consider[] the evidence in the same light."

Lambert v. Franklin Real Estate Co., Ky. App., 37 S.W.3d 770, 775 (2000)(citations omitted).

> Generally, a trial judge cannot enter a directed verdict 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. Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts, as well as matters affecting the credibility of witnesses.

Bierman v. Klapheke, Ky., 967 S.W.2d 16, 18-19 (1998). On appeal, where the issue has been "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." Id. at 18.

In order to succeed on a negligence claim, a plaintiff must establish the existence of a duty imposed on the defendant, a breach of that duty, a causal connection between that breach and the injury suffered, and injury to the plaintiff. Lewis v. B & R Corporation, Ky. App., 56 S.W.3d 432, 436-37 (2001). The burden of proof rests upon the plaintiff. Id. at 436. If one of these elements cannot be established, the action must fail. Id.

It is undisputed that Bryan was a business invitee[1] on the restaurant's premises. As such, O'Charley's

> owes [her] the active, positive duty of keeping those parts of the premises to which [s]he is invited, or may reasonably be expected to use, in a condition reasonably safe for [her] use in a manner consistent

[1]A business invitee or visitor is one who is invited or permitted to come upon the land of another for a purpose directly or indirectly connected with the business which the possessor conducts thereon, or for a purpose which is connected with the visitor's own business, which itself is directly or indirectly connected with any purpose, business or otherwise, for which the possessor uses the premises. City of Madisonville v. Poole, Ky., 249 S.W.2d 133, 135 (1952) (citations omitted).

> with the purpose of the invitation. If the possessor knows, or by the exercise of ordinary care or reasonable diligence could discover a natural or artificial condition which, if known he should realize involves an unreasonable risk to the invitee and does not remedy the condition or serve fair warning of peril, he is negligent.

City of Madisonville v. Poole, Ky., 249 S.W.2d 133, 135 (1952)(citations omitted). This duty is "to exercise ordinary care to keep the premises in a reasonably safe condition," not the heightened duty intimated by Bryan. Rogers v. Professional Golfers Ass'n of America, Ky. App., 28 S.W.3d 869, 872 (2000)(citations omitted). To prevail, Bryan must establish that O'Charley's breached its duty to her as a result of its failure to remedy or warn against a condition that created an unreasonable risk of harm.

Bryan's arguments have misinterpreted the facts and skewed the law. After a thorough review it appears this case is entirely appropriate for a judgment of directed verdict. Simply put, the evidence is insufficient to establish Bryan's claims.

Bryan argues that a directed verdict in O'Charley's favor was erroneous in that the evidence, when viewed in the light most favorable to her, established that no steps were taken toward discovering potential hazards on the day in question. This evidence, Bryan contends, was found in the testimony of

Julie Miles and Alan Hincks.[2] Because Miles did not work for the appellees on January 16, her testimony as to that day's events was irrelevant. Hincks' relevant testimony was as follows:

> Q: Do you know how long it had been since one of the hourly employees had checked the parking lot?
> A: No.
> Q: And there would be no way for you to determine that?
> A: No, sorry.

Deposition of Alan Hincks, p. 10. As stated by the circuit court, this testimony does not suggest that O'Charley's breached its duty, but rather, that Hincks simply "could not say as to when . . . someone may have checked" the parking lot. See Partial Transcript of Hearing, July 3, 2002, p. 12. This evidence does not establish that O'Charley's breached its duty.

Next, Bryan contends that a directed verdict was inappropriate because "O'Charley's cannot point to any evidence whatsoever that the legal duties required of it . . . were met in this action." Brief of Appellant, p. 8. Bryan argues throughout her brief that O'Charley's failed to establish that it complied with its legal duty. Brief for Appellant, pp. 7-8, 8-9. It is not incumbent upon a defendant to prove that it did not breach its duty of care. Caselaw places the burden of proof on plaintiffs to establish the elements of negligence. Lewis, 56 S.W.3d at 436-37.

[2] At the time in question, O'Charley's employed Miles and Hincks as managers. Their depositions, taken during discovery, were read into the record at trial.

In Lanier v. Wal-Mart Stores, Inc., Ky., 99 S.W.3d 431 (2003),[3] the Kentucky Supreme Court reversed summary judgment for the defendant where Lanier, a customer, was injured when she slipped on a clear substance that had been spilled in an aisle of the defendant's store. Admittedly, Lanier could not prove how long the substance had been on the floor or that Wal-Mart had actual or constructive notice thereof for a sufficient time to have remedied the hazardous situation. Id. at 434.

Determining that a plaintiff's burden in premises liability cases was "onerous," "virtually insurmountable," and "inconsistent with the proposition that a proprietor of a place of business has a duty to keep his premises in a reasonably safe condition for normal use by his customers[,]" the court adopted a burden-shifting approach. Id. at 434-35. The effect of this approach would be

> [t]o balance the competing principles of notice versus duty. . . [T]he issues of causation and notice should be treated not as elements of the customer's case, but as affirmative defenses of the proprietor. The customer would retain the burden of proving that there was a foreign substance/object on the floor and that such was a substantial factor in causing his accident and injury. Such proof that the premises were unsafe would avoid a summary judgment or directed verdict and shift to the proprietor the burden of proving that his employees did not cause the substance/object to be on the floor and that it had been there for an

[3] This opinion was published in March 2003, some four months after the parties' briefs for this appeal were filed.

> insufficient length of time to have been discovered and removed or warned of by his employees.

Id. at 435.

This holding represents a dramatic shift in premises liability cases. However, we find it is distinguishable from the case *sub judice*. Lanier involved an artificial hazard inside a store. Bryan's injury allegedly stems from a natural outdoor condition. The ordinary care required of a proprietor in respect to artificial indoor hazards is different than that regarding those found naturally occurring outdoors. Kentucky cases have repeatedly drawn this subtle distinction. See, e.g., Standard Oil Co. v. Manis, Ky., 433 S.W.2d 856, 858 (1968). The Lanier case frequently points out that the substance was on the floor of an aisle *inside* the store.

We decline to apply Lanier's burden shifting approach to this case. Therefore, because the burden of proof falls on Bryan, who has failed to present any affirmative evidence suggesting that O'Charley's breached its duty to her, we cannot say that the circuit court was clearly erroneous when it entered a directed verdict in favor of O'Charley's.

Bryan also relies heavily on Estep v. B.F. Saul Real Estate Inv. Trust, Ky. App., 843 S.W.2d 911 (1992). In that case, the defendants had attempted to clear the parking lot and sidewalks of ice and snow, but failed to clear a patch of ice,

subsequently covered by a thin layer of falling snow, upon which Estep slipped and fell. The court held that while owners are not liable for a natural accumulation of snow or ice, if they undertake to clear the premises, "presumably to attract more customers," they must act reasonably. Id. at 914-15. "The question of whether they acted reasonably is a classic jury question, which precludes summary judgment." Id.

Here, not only do the circumstances differ from those in Estep, but Bryan has presented no evidence suggesting that O'Charley's attempted to clear its parking lot of ice and snow. A directed verdict is appropriate upon issues in which there is a complete absence of proof on a material issue. Bierman, 967 S.W.2d at 18.

Finally, Bryan relies on Smith v. Wal-Mart, Ky., 6 S.W.3d 829 (1999). In that case, the plaintiff was injured when she fell after slipping on a blue "Icee" drink that had melted on the floor. The court held that since evidence showed that the frozen drink had been on the floor long enough to liquefy, there was sufficient proof on the issue of whether Wal-Mart had a reasonable amount of time to remedy the hazard so that a jury question was raised. Id. The circumstances surrounding Smith

and the case *sub judice* are quite dissimilar.[4] Because these cases are easily distinguished, Smith does not apply.

Although not the basis of the circuit court's ruling, we find that the "black ice" upon which Bryan slipped to be an obvious condition. Considering the circumstances (a "balmy" day with temperatures well above freezing), we doubt that O'Charley's had any duty to discover, warn, or remedy the alleged icy condition of its parking lot. "Bryan admits that the "black ice" was "invisible." Brief of Appellant, p. 8. As such, it would be virtually impossible for anyone to discover. This is a case where an "outdoor natural hazard [is] as obvious to the invitee as to the owner."[5] Rogers, 28 S.W.3d at 872. O'Charley's had no duty toward Bryan in regard to this ice.

It is unreasonable to expect O'Charley's to divert resources to inspect its parking lot for black ice when the outside temperature was significantly above the freezing point. Furthermore, under such weather conditions, it is impossible to say that O'Charley's knew of, or could have discovered, the black ice, so as to trigger its duty to warn or remedy the hazardous situation. We cannot say that O'Charley's acted unreasonably.

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[4] The dissimilarity involved is that between an artificial, indoor hazard and one naturally-occurring outdoors, as previously discussed.

[5] "[R]easonable 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," Id., such as those in Standard Oil Co. v. Manis, Ky., 433 S.W.2d 856, 858 (1968), "wherein the court held that owners of premises do not have a duty to warn against natural outdoor hazards which are as obvious to the invitee as to the owner." Rogers, 28 S.W.3d at 872.

Inasmuch as Bryan failed to present evidence sufficient to support her claims to the circuit court, we hold that a reasonable jury could reach judgment only in O'Charley's favor, there being no material issues of fact on the required element of breach of duty. The circuit court's decision was not clearly erroneous.

For the foregoing reasons, the order of the Jefferson Circuit Court granting O'Charley's Motion for Directed Verdict is affirmed.

ALL CONCUR.

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