

RENDERED: May 5, 2006; 2:00 p.m.
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2004-CA-001248-MR

DELLA ANN FORD

APPELLANT

APPEAL FROM HARLAN CIRCUIT COURT
v. HONORABLE JAMES L. BOWLING, JR., SPECIAL JUDGE
ACTION NO. 02-CI-00399

PAUL LEWIS, INDIVIDUALLY AND
AS AN AGENT OF THE HARLAN FISCAL
COURT; AND SARAH FARMER, INDIVIDUALLY AND
AS AN AGENT OF THE HARLAN FISCAL
COURT

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: GUIDUGLI, McANULTY, AND SCHRODER, JUDGES.

McANULTY, JUDGE: On March 21, 2002, Della Ford slipped and fell in a puddle of water on some interior steps in the Harlan County Courthouse. As a result of the fall, she fractured her wrist. She filed a lawsuit alleging negligence against Paul Lewis and Sarah Farmer, individually and as agents of the Harlan Fiscal Court. At the time, the Harlan Fiscal Court employed Lewis and Farmer as custodians. The case proceeded to a jury trial, but the trial court directed a verdict against Ford at the close of her proof. In this appeal, Lewis and Farmer have filed an

objection to Ford's designation of the record and a corresponding motion to strike from the record on appeal their depositions, which motion was passed to a consideration of the merits of this case. Because there was a complete absence of proof on the issue of negligence, we affirm on the merits.

As stated in Ford's complaint, her theory of the case is that, in their capacity as custodians, Lewis and Farmer were responsible for the supervision and upkeep of the Harlan County Courthouse. Further, while acting in the scope of their employment, Lewis and Farmer negligently and carelessly failed to maintain the Harlan County Courthouse in a safe condition because they left an amount of water on the stairwell.

Ford's claim survived a motion for summary judgment filed by Lewis and Farmer, and the case eventually proceeded to a jury trial. To prove her case, Ford testified and she called four other witnesses: Granville Thompson, a witness who observed water on the steps before Ford fell; Drs. Tsai and Kotay who treated Ford's injuries; and Glenn Ford, Della Ford's husband. At the close of Ford's proof, Lewis and Farmer made a motion for a directed verdict as to the issues of liability and damages. The trial court granted their motion.

In its directed verdict order and judgment, the trial court held as follows:

This matter having been called for Trial on April 1, 2004, and both sides announcing ready, the matter proceeded to Trial.

The case proceeded with the Plaintiff calling on her case herself, Della Ann Ford, a witness, Granville Thompson, medical evidence through the depositions of Dr. Tsai and Dr. Kotay, and concluding with the testimony of Plaintiff's husband, Glenn Ford. At the conclusion of the Plaintiff's case, the Plaintiff announced closed. Whereafter, counsel for the Defendant made certain directed verdict motions requesting that a directed verdict be entered on behalf of the Defendants as to the issue of liability and damages.

Having heard the arguments, and having carefully considered the matter, the Court sustained the Motion for Directed Verdict on behalf of the Defendants. [sic] The Court finding that no evidence was placed in the record by the Plaintiff as to the identity or activity of the Defendants individually sued, Sarah Farmer and Paul Lewis. There was not a scintilla of evidence in the record establishing the job duties of the Defendants, their whereabouts on the date of the accident, whether they were working that day, or even inside the courthouse on the date of the accident. Further, no evidence was placed in the record by the Plaintiff establishing the Defendants' job duties or their connection, if any, to the Plaintiff's claimed accident and injuries. It was admitted in Plaintiff's case through the testimony of the Plaintiff's witnesses that it was unknown how long the claimed liquid had been present or whether the Defendants knew about same.

WHEREFORE, a directed verdict is entered on behalf of the Defendants and incorporated into this judgment herein by reference. Accordingly, judgment is entered on behalf of the Defendants and the Plaintiff's claims are dismissed with

prejudice. There being no just cause for delay, this is a final and appealable order.

Nine days after the trial court issued its directed verdict order, Ford filed a motion to alter, amend or vacate and set for a new trial. The trial court denied the motion, precipitating this appeal.

In this appeal, Ford argues that the trial court erred in directing a verdict *sua sponte* based on the fact that Farmer and Lewis were not properly identified as defendants because that fact was not in actual dispute. Ford argues that this fact has been judicially admitted, and a judicial admission eliminates the need to present proof on the issue. Moreover, Ford argues that the real issues at trial were (1) how long the water was on the steps before Ford slipped on it and fell and (2) whether there was sufficient time for the Defendants to have reacted and corrected the problem.

In response, Lewis and Farmer argue that in spite of the fact that Ford complains that the trial court issued a directed verdict *sua sponte* against her on the grounds that they were not properly identified as defendants, the record of the trial shows that the trial court granted the Defendants' motion for a directed verdict because there was a complete failure of proof by Ford in support of her claim.

We turn to the merits of this appeal. In ruling on a motion for directed verdict, a trial court is "under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence." Taylor v. Kennedy, 700 S.W.2d 415, 416 (Ky. App. 1985). And a trial court is precluded from entering a directed verdict "unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ." Id.

In this case, Ford alleges negligence on the part of Lewis and Farmer. In any negligence case, a plaintiff is required to prove three elements: (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached the standard by which his or her duty is measured, and (3) consequent injury. Pathways, Inc. v. Hammons, 113 S.W.3d 85, 88 (Ky. 2003). "'Consequent injury' consists of what hornbooks separate into two distinct elements: actual injury or harm to the plaintiff *and* legal causation between the defendant's breach and the plaintiff's injury." Id. at 88-89. Duty presents a question of law, while breach and injury are questions of fact for the jury to decide. See id. at 89. And legal causation presents a mixed question of law and fact. See id.

Here, because Ford did not call Lewis, Farmer, or anyone else to establish their job duties, there is a complete absence of proof on one of the required elements of negligence. In its order, the trial court illustrated Ford's lack of proof of negligence beginning with her failure to identify the Defendants and ending with her failure to establish the first element of any negligence case: duty. Thus, the directed verdict in favor of Lewis and Farmer was not based solely on Ford's failure to identify the Defendants, as Ford alleges in this appeal, and was entirely proper.

To overcome the lack of proof, Ford argues that the Defendants judicially admitted in their memorandum in support of summary judgment and in their attorney's opening statement at trial that they owed a duty to Ford. A judicial admission is "conclusive, in that it removes the proposition in question from the field of disputed issue, and may be defined to be a formal act done in the course of judicial proceedings which waives or dispenses with the necessity of producing evidence by the opponent and bars the party himself from disputing it; and, as a natural consequence, allows the judge to direct the jury to accept the admission as conclusive of the disputed fact." Sutherland v. Davis, 286 Ky. 743, 151 S.W.2d 1021, 1024 (Ky. App. 1941).

But in this case, the arguments made in support of a motion for summary judgment are just that -- arguments. They do not constitute judicial admissions, and neither do comments made by an attorney in his or her opening statement. See generally id.; Stopher v. Commonwealth, 57 S.W.3d 787, 806 (Ky. 2001) (holding that opening statements are not evidence). In this case, Lewis and Farmer did not even concede that there was liquid on the steps, much less that they owed a duty to Ford.

Notwithstanding our conclusion that arguments made in support of summary judgment or opening statements are not judicial admissions, if Ford sought to rely on them as judicial admissions, she did not avail herself of any such admissions by offering them into evidence and reading them to the jury. See Mid-Southern Toyota, Limited v. Bug's Imports, Inc., 453 S.W.2d 544, 550 (Ky. 1970) ("Clearly, in the case of a jury trial, admissions and answers to interrogatories would not be evidence unless introduced as such . . ."); Judy v. Arkansas Log Homes, Inc., 923 S.W.2d 409, 418 (Mo. App. W.D. 1996) (buyers of log home kit could not rely on manufacturer's admission in its answer when buyers did not offer admission into evidence and read it to the jury during trial). As a result, any purported judicial admission is not evidence and could not be used against Lewis and Farmer.

Finally, we must consider Lewis and Farmer's objection to Ford's designation of the record and a corresponding motion to strike from the record on appeal their depositions. Given our conclusion in this case on the merits of the appeal, the motion to strike is denied.

The judgment of the Harlan Circuit Court granting a directed verdict in favor of Lewis and Farmer is affirmed.

ALL CONCUR.

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