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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001412-MR

RICHARD LOVELACE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
CIVIL ACTION NO. 01-CI-006719

HOLIDAY INN HURSTBOURNE
AND CUSTOM BATH LINERS — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: GUIDUGLI AND MINTON, JUDGES; ROSENBLUM, SENIOR JUDGE.[1]

MINTON, JUDGE: A trial court may not enter judgment notwithstanding the verdict (j.n.o.v.) unless there is a complete absence of proof on a material issue or there is no dispute on issues of fact upon which reasonable jurors could differ. In the case before us, the trial court granted j.n.o.v. to Holiday Inn Hurstbourne, setting aside a substantial jury verdict

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

awarded to Richard Lovelace on his personal injury claim against the hotel. We reverse the j.n.o.v. and remand the case to the circuit court with direction to reinstate the original judgment because we hold that Lovelace presented proof at trial sufficient to create a rebuttable presumption of Holiday Inn's liability, which precluded entry of the j.n.o.v.

Lovelace sued Holiday Inn for injuries he sustained when he fell while stepping from the bathtub in his guestroom at the hotel. He presented evidence that the unstable bottom of the bathtub caused the fall. According to the undisputed evidence, shower water had collected between the bathtub liner and the bathtub, creating a "waterbed effect." Holiday Inn named Custom Bath Liners, the company that installed the liners, as a third party defendant. Lovelace, however, never amended his complaint to assert a claim against Custom Bath. At the conclusion of the evidence at trial, the jury found Holiday Inn to be 85 percent responsible for Lovelace's injuries and Custom Bath to be 15 percent responsible. The total jury award was $887,379.86, from which the trial court deducted 15 percent (representing Custom Bath's *pro rata* share), leaving Lovelace with a judgment against Holiday Inn for $754,272.88.

Lovelace filed no post-trial motion seeking to amend the 15 percent reduction in the jury's verdict. Rather, Holiday Inn filed a motion for j.n.o.v. The trial court granted Holiday

Inn's j.n.o.v. motion, finding that Lovelace presented no evidence that Holiday Inn was aware, or should have been aware, of the problem with the bathtub. Lovelace asks us to vacate the j.n.o.v. and, furthermore, to add back the 15 percent deducted from the jury verdict. We agree with Lovelace that the j.n.o.v. was improper and must be reversed. But we conclude that the issue of the propriety of the 15 percent reduction is not properly before us.

Kentucky Rules of Civil Procedure (CR) 50.02 provides that "[n]ot 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[.]" When ruling on a motion for a j.n.o.v. or a 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. And, it is precluded from entering either a directed verdict or judgment n.o.v. 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.[2]

[2] Taylor v. Kennedy, 700 S.W.2d 415, 416 (Ky.App. 1985).

Allegations of negligence, such as in this case, become questions of law that are properly subject to a j.n.o.v. only if "there is no controversy or conflict, and only one conclusion may be drawn by reasonable minds."[3] In fact, even in cases where the essential facts are uncontroverted, such as the case at hand, the inferences to be drawn from the evidence must be resolved by the jury.[4]

As a guest in the hotel, Lovelace was a business invitee of Holiday Inn.[5] So Lovelace was required to prove that: "(1) he . . . 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."[6] If Lovelace offered such proof, Holiday Inn was not entitled to a directed verdict or a j.n.o.v.[7]

In the case at hand, the parties agree that Lovelace was harmed by the "waterbed effect," that such a condition is a

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[3] VanHoose v. Bryant, 389 S.W.2d 457, 459 (Ky. 1965).

[4] Middleton v. Partin, 347 S.W.2d 75, 76 (Ky. 1961).

[5] *See, e.g.,* Lanier v. Wal-Mart Stores, Inc., 99 S.W.3d 431 (Ky. 2003) (discussing business invitees in "slip and fall" cases).

[6] Martin v. Mekanhart Corp., 113 S.W.3d 95, 98 (Ky. 2003).

[7] *Id.*

defect, and that this defect caused Lovelace to suffer an injurious fall. The only remaining question, therefore, is whether the business premises, specifically the bathtub, was "in a reasonably safe condition." Clearly, a hotel bathtub made unstable by the waterbed effect was not in a reasonably safe condition. And there is no indication that Lovelace himself caused the waterbed effect.

Holiday Inn argues that the j.n.o.v. was proper because there was no indication that it had notice that the bathtub in Lovelace's room was unsafe. But for purposes of ruling on a directed verdict or a j.n.o.v. motion, notice of the dangerous condition is irrelevant. A business invitee may avoid a directed verdict and j.n.o.v. by merely showing that an encounter with a dangerous condition was a substantial factor in causing him to suffer an injury and that the business site was not in a reasonably safe condition. After the plaintiff makes such a showing, the burden of proof shifts to the defendant to present evidence that the dangerous condition had not been present long enough to have reasonably been discovered.[8] It was for the jury to decide whether the party who invited the injured customer exercised reasonable care. So the j.n.o.v. was improperly granted.

[8] *See id*. at 98; Lanier, 99 S.W.3d at 435.

As to the issue of the owner opportunity to discover the condition of the bathtub, we note that the record contains testimony from Custom Liners' owner, Larry Gosnell, that many showers would be required for enough water to accumulate between the liner and the tub to cause this waterbed effect. This means that the jury heard some evidence to support a possible inference that Holiday Inn had failed properly to inspect the tub. Thus, the evidence was conflicting regarding the length of time the waterbed effect could have existed. The existence of this conflicting evidence is further reason why the j.n.o.v. was improper.

Having determined that the trial court erred by granting the j.n.o.v., we now turn our attention to Lovelace's contention that the trial court erred by reducing the jury's damage award by 15 percent. The trial court issued a pretrial order, dated February 20, 2004, ruling that any recovery by Lovelace would be limited to the percentage of fault the jury attributed to Holiday Inn because Lovelace had asserted no claim against the third-party defendant, Custom Bath. Lovelace's brief does not show where, if at all, he objected to that order, either before or after the trial.[9] CR 76.12(4)(c)(iv) requires

[9] Lovelace's brief merely states as follows: "Over Lovelace's objection, the trial court ruled that principles of several liability mandated that Holiday Inn not be held responsible for any negligence the jury attributed to Custom Bath Liners." Notably, the

an appellant's brief to "contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." Lovelace's brief does not comply with that requirement. It is not our role to search through this voluminous record to ascertain whether the record supports Lovelace's assertion that he preserved this issue for review.[10] In addition, we note that Lovelace's notice of appeal states that he is appealing only the order granting Holiday Inn's j.n.o.v. motion. The notice of appeal makes no mention of an appeal from the original judgment that contained the 15 percent reduction.[11] So we conclude that the propriety of the 15 percent reduction in the judgment attributable to Custom Bath Liner's negligence is not an issue that is properly before us.[12]

For the foregoing reasons, the trial court's order granting j.n.o.v. to Holiday Inn is reversed; and this matter is remanded for the reinstatement of the original judgment.

ALL CONCUR.

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brief cites to only the trial court's order and does not cite to where, or how, Lovelace purportedly raised his objection.

[10] *See, e.g.,* Monroe v. Cloar, 439 S.W.2d 73 (Ky. 1969).

[11] CR 73.03(1) specifies that a notice of appeal "shall identify the judgment, order or part thereof appealed from."

[12] We express no opinion as to whether, on remand, Lovelace may properly file a motion to alter, amend, or vacate that original judgment under CR 59.05 or 60.02.

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