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Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-001936-MR

DARRELL AND TERRY LEWIS,
INDIVIDUALLY, AND AS THE
NATURAL PARENTS AND NEXT
FRIEND OF COURTNEY LEWIS,
A MINOR — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 01-CI-003779

C&C ENTERPRISES;
CHARLES PAYNE; CINDY
PAYNE; ROMAN CATHOLIC
ARCHBISHOP OF LOUISVILLE — APPELLEES

OPINION
AFFIRMING

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

BEFORE: BARBER, MINTON, AND TAYLOR, JUDGES.

BARBER, JUDGE: Darrell and Terry Lewis, Individually, and as the Natural Parents and Next Friend of Courtney Lewis, a minor, appeal from a jury verdict adjudging C&C Enterprises, Charles Payne, Cindy Payne, and the Roman Catholic Archbishop of Louisville, not liable in connection with an accident involving a carnival ride which occurred on the premises of St. Athanasius Church in June 2000. The appellants contend that the trial

court erred by failing to properly instruct the jury. Because the trial court properly determined that the issue of *res ipsa loquitur* should not be presented to the jury; because the jury instructions properly reflected the Archbishop's duty to an invitee; and because the remaining issues are moot, we affirm.

The St. Athanasius Summer Festival is an annual event held on the grounds of St. Athanasius for the benefit of St. Athanasius and the Roman Catholic Archbishop of Louisville. St. Athanasius sponsors and conducts the Summer Festival with the authority, consent and approval of the Archbishop. The festival is open to the general public, including parishioners and non-parishioners alike. Fees are charged for many activities at the festival, including fees for riding the various amusement rides operated at the festival.

C&C Enterprises is a proprietorship in the business of operating carnival rides at county fairs and at small venues such as the St. Athanasius Summer Festival. The business is owned and operated by Charles Payne and Cindy Payne.

In 2000, as in prior years, St. Athanasius hired C&C Enterprises to provide and operate the amusement rides at the Summer Festival. To this end, the parties entered into a written contract which, among other things, provided for the splitting of all income from ticket sales for the amusement rides. In June 2000, in preparation for the Summer Festival,

C&C set up several amusement rides to be operated at the carnival, including an amusement ride called the Flying Comet.

The Flying Comet is an amusement ride consisting of a central hub, to which are attached six “arms.” Dangling from the end of each arm is a cylindrical-shaped “tub” which resembles a small ski-lift gondola. Along the underside of each arm, facing the tub, are decorative lights. The patrons of the ride sit in seats which are arranged around the passenger compartment of the tub in a circular-fashion facing inward. During the course of the ride the hub spins and the arms move up and down. In the meantime, at the center of each tub is a steering-wheel style apparatus which the riders can turn to make the tub spin around.

After the rides were set up, as a routine matter they were inspected by the Kentucky Department of Agriculture. In the course of the inspection the inspector noted that one of the passenger-carrying tubs, tub 5, on the Flying Comet had loose aluminum sheet-metal on the underside of the tub. The loose metal was on the outside of the tub, and not within the passenger compartment. The inspector cited the ride as needing to have the loose metal repaired, but approved the ride for operations at the Summer Festival.

On June 2, 2000, Courtney Lewis, along with her parents, Darrell and Terry Lewis, attended the Summer Festival.

The Lewis family members are parishioners of St. Athanasius Church, and had supported the Summer Festival in past years by participating in the festival as patrons and as booth workers. The family was doing the same at the 2000 festival.

Courtney and two of her friends, Sarah Holland and Emily Silverhorn, purchased tickets to ride the Flying Comet. Courtney, Sarah, and Emily took their place in tub 5 of the Flying Comet and the ride began. According to Courtney, when the ride was stopped to let off the riders in another tub, her tub began to swing inward toward the supporting arm. The tub then made contact with the decorative lights lining the underside of the arm, breaking several of the bulbs. Courtney's left-middle finger was partially amputated, and her index finger was severely cut.

Fortunately, doctors were able to reattach Courtney's partially amputated finger, and she has substantially recovered from her injuries.

On June 1, 2001, Darrell and Terry Lewis, Individually and as the Natural Parent and Next Friend of Courtney Lewis, filed a Complaint in Jefferson Circuit Court in connection with the accident naming as defendants C&C Enterprises, Charles Payne, Cindy Payne, the Roman Catholic Archbishop of Louisville,

and Jessup Amusements, Inc., the owner of the Flying Comet.[1] The Complaint alleged counts of negligence against the defendants and sought compensatory and punitive damages.

On January 22, 2003, the trial court entered an order granting the Archbishop summary judgment on the issue of whether there was an agency relationship between the Archbishop and C&C Enterprises, determining that there was not. The trial court determined that the Archbishop did not exercise the requisite degree of control over C&C Enterprises' operations of the amusement rides so as to make it vicariously liable for C&C's negligence as a principal of C&C Enterprises.

On July 1, 2003, the trial court granted the Archbishop summary judgment on the issue of whether it was engaged in a joint venture with C&C Enterprises at the time of Courtney's accident, determining that he was not, and could not be held vicariously liable for the negligence of C&C Enterprises as a joint venturer. The trial court held the Archbishop in the case, however, on the issue of whether the Archbishop had independently breached its duty of care owed to Courtney.

The case was heard before a jury on August 10 and 11, 2004. At the conclusion of the trial, the jury returned a verdict in favor of all defendants. The trial court entered

[1] On February 13, 2003, the trial court granted summary judgment to Jessup Amusements, Inc., and dismissed the Lewis' claim against this defendant. The appellants do not challenge the dismissal of their claim against Jessup Amusements.

judgment on the jury verdict on August 17, 2004. The appellants' motions for judgment notwithstanding the verdict or, in the alternative, for a new trial, were denied. This appeal followed.

First, the appellants contend that the trial court erred by failing to give an instruction on the doctrine of *res ipsa loquitur*.

The appellants tendered a jury instruction providing as follows:

> The doctrine of *res ipsa loquitur* applies in situations where the proximate cause of injury cannot be determined absolutely. For *res ipsa loquitur* to apply:
>
> (1) The accident must be of a kind which ordinarily does not occur in the absence of someone's negligence.
>
> (2) It must be caused by an agency or instrumentality within the exclusive control of the defendant; and
>
> (3) It must not have been due to any voluntary action or contribution on the part of the plaintiff.
>
> Do you find that Courtney Lewis' injuries would not have occurred absent someone's negligence, that the ride known as the Flying Comet was, for the purposes of assembly, maintenance, and operation, within the exclusive control of C&C Enterprises and Courtney Lewis was not injured due to any voluntary action on her part?
>
> Yes _____ No _____

Res ipsa loquitur is a "Latin phrase, which means nothing more than the thing speaks for itself," and is simply "[o]ne type of circumstantial evidence." Prosser and Keeton on Torts, Sec. 39 (5th ed. 1984). It is an evidentiary doctrine which allows a jury to infer negligence on the part of the defendant. If the inference is forceful enough it can create a rebuttable presumption of negligence, possibly resulting in a directed verdict. Sadr v. Hager Beauty School, Inc., 723 S.W.2d 886, 887 (Ky.App. 1987) (citing Bowers v. Schenley Distillers, Inc., 469 S.W.2d 565 (Ky. 1971); Bell & Koch, Inc. v. Stanley, 375 S.W.2d 696 (Ky. 1964). Invocation of the doctrine requires a showing that (1) the defendant had full control of the instrumentality which caused the injury; (2) the accident could not have happened if those having control had not been negligent; and (3) the plaintiff's injury resulted from the accident. Id. The doctrine does not apply if it is shown that the injury may have been due to some voluntary action on the plaintiff's part. Id. (citing Schmidt v. Fontaine Ferry Enterprises, 319 S.W.2d 468 (Ky. 1958).

Negligence cannot be inferred simply from an undesirable result. Perkins v. Hausladen, 828 S.W.2d 652, 655 (Ky. 1992). "A *res ipsa loquitur* case is ordinarily merely one kind of case of circumstantial evidence, in which the jury may reasonably infer both negligence and causation from the mere

occurrence of the event and the defendant's relation to it." Id. at 656, quoting the Restatement (Second) of Torts, Section 328D, comment 6, p. 157, (1965). According to the Restatement, Section 328D(1), several conditions must be met before the doctrine of *res ipsa loquitur* can be applied:

> It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when [:]
>
> (a) the event is of a kind which ordinarily does not occur in the absence of negligence;
>
> (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and
>
> (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff. (Emphasis added.)

However, even if we agreed with the appellants that this was a case for application of the *res ipsa loquitar* doctrine, they would not be entitled to have a *res ipsa loquitur* instruction submitted to the jury. As noted, the *res ipsa loquitur* doctrine is an evidentiary doctrine which allows a jury to infer negligence on the part of the defendant. Sadr v. Hager Beauty School, Inc., supra. The doctrine merely creates a rebuttable presumption of negligence when the elements for application of the doctrine are met. On occasion, the rebuttable presumption may be strong enough to require a

directed verdict. Id. However, instructions on *res ipsa loquitur* should not be submitted to a jury. The Kentucky Supreme Court succinctly stated the applicable rule in Meyers v. Chapman Printing Co., Inc., 840 S.W.2d 814 (Ky. 1992). In that case, the Court recognized that:

> In Kentucky, the burden of proof is always on the party who would lose if no evidence was presented. CR 43.01(2). In Kentucky jury instructions do not include evidentiary presumptions. Such presumptions alter the burden of going forward with the evidence, and thus may result in a directed verdict in the absence of countervailing evidence, but the jury instructions should be framed only to state what the jury must believe from the evidence in order to return a verdict in favor of the party who bears the burden of proof.

Id. at 824.

Clearly, this principle applies to the doctrine of *res ipsa loquitur*. The appellants could request the application of the doctrine to avoid a directed verdict or to win a directed verdict,[2] but the trial court properly refused to give the *res ipsa loquitur* instruction tendered by the appellants. See also Conley's Adm'r v. Ward, 291 S.W.2d 568 (Ky. 1955).

[2] The appellants do not argue that they were entitled to a directed verdict based upon the doctrine of *res ipsa loquitur.* They argue only that the trial court erred by failing to give their tendered instruction. Accordingly, it is not necessary that we undertake a detailed application of the doctrine to the facts of this case.

Next, the appellants contend that the trial court erred by giving an improper instruction concerning the duties the Archbishop owed to Courtney.

A person is an invitee if "(1) he enters by invitation, express or implied, (2) his entry is connected with the owner's business or with an activity the owner conducts or permits to be conducted on his land and (3) there is mutuality of benefit or benefit to the owner." Johnson v. Lone Star Steakhouse & Saloon of Kentucky, Inc., 997 S.W.2d 490, 491-92 (Ky.App. 1999) (quoting Black's Law Dictionary 827 (6th ed. 1990)). "[T]he invitee is placed upon a higher footing than a licensee." Id. [footnote omitted]. Prosser and Keaton, *The Law of Torts*, § 61 (5th ed. 1984). Because Courtney was at the Summer Festival at the invitation of the Archbishop, her entry onto the premises was in connection with the activity being conducted by the Archbishop on the premises, i.e., the Summer Festival; and because there was a mutuality of benefit in connection with Courtney's entry onto the premises, Courtney was an invitee at the time of the Flying Comet accident.

"[T]he owner or possessor of property owes an invitee or business visitor the active, positive duty of keeping those parts of the premises to which the invitee or visitor is invited, or may reasonably be expected to use, in a condition reasonably safe for use in a manner consistent 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 or business visitor and does not remedy the condition or serve fair warning of peril, the possessor is negligent." Ferrell v. Hellems, 408 S.W.2d 459, 463 (Ky. 1966) (citing of City of Madisonville v. Poole, 249 S.W.2d 133 (Ky. 1952).

The instruction given by the trial court concerning the liability of the Archbishop stated as follows:

> You will find for the Plaintiff's against the Defendant Roman Catholic Archbishop of Louisville if you are satisfied from the evidence as follows:
>
> (1) The Plaintiff, Courtney Lewis' injuries were caused by a discoverable defect in the Flying Comet;
>
> (2) That by reason of that defect in the Flying Comet, the Defendant, Roman Catholic Archbishop of Louisville's premises were not in a reasonably safe condition for the use of its invitees, including Plaintiff, Courtney Lewis;
>
> AND
>
> (3) The Defendant, Roman Catholic Archbishop of Louisville, knew of, or by exercise of ordinary care[3] should have discovered, the defect in the Flying Comet in sufficient time before the Plaintiff was injured to correct it.

[3] Ordinary care was defined elsewhere in the instructions as "such care as the jury would expect an ordinarily prudent church contracting with carnival ride operators to exercise under similar circumstances."

> Otherwise, you will find for the Defendant, Roman Catholic Archbishop of Louisville.
>
> Do you find for the Plaintiff, Courtney Lewis?
> Yes _____ No _____

We believe that the instruction presented to the jury by the trial court accurately reflects the duty of a premises owner, as stated in Ferrell v. Hellems, to an invitee. A comparison of the statement of the duties contained therein with the trial court's instruction readily demonstrates this.

The appellants' argument in opposition to the instruction is a little difficult to decipher. In their brief, the appellants state as follows:

> The Church, as possessor of land, owed Courtney Lewis, an invitee, the duty to discover dangerous conditions on the land. The Church failed in this duty, as there clearly existed a condition dangerous enough to result in laceration and near amputation to two of her fingers, with no evidence she contributed to her own injuries.
>
> The Church contends that it exercised reasonable care to discover dangerous conditions on the land. The Church fails to recognize, however, that a dangerous condition was present and was identified to C&C Enterprises by the DOA inspector. This information was readily available to the Church before Courtney was injured. Through the exercise of reasonable care, the Church could have discovered that a dangerous condition was present and in fact had the duty to discover that dangerous condition.

As stated in Ferrell, the Archbishop had a duty to exercise ordinary care to discover unreasonable risks of danger and either remedy the condition or warn Courtney. This issue was squarely presented to the jury in the trial court's instruction. The appellants appear to argue for application of strict liability, but that is not the rule. "The occupier is not an insurer of the safety of invitees, and his duty is only to exercise reasonable care for their protection. But the obligation of reasonable care is a full one, applicable in all respects, and extending to everything that threatens the invitee with an unreasonable risk of harm." Bartley v. Educational Training Systems, Inc., 134 S.W.3d 612 (Ky. 2004). (citing William Prosser and W. Page Keeton, *Prosser and Keeton on Torts*, § 61 (5th ed. 1984).

The appellants also cite to the Department of Agriculture inspection, which identified a problem with loose sheet metal on the underside of the tub 5. The appellants were free to argue the defect in tub 5 in favor of liability; however, given Courtney's own testimony, it appears that this defect was not a substantial factor in causing her injury. The mere fact that the Archbishop did not shut down the ride based upon the Department of Agriculture inspection report does not demonstrate that the trial court's instruction was erroneous.

In summary, the instruction presented by the trial court accurately reflected the Archbishop's duties to Courtney in this case, and we are not persuaded that any shortcomings in the instruction resulted in reversible error.

Finally, the appellants contend that the trial court erred by failing to submit the issue of joint venture to the jury and by finding that C&C Enterprises was not the agent of the church.

These issues are relevant only regarding the matter of whether the Archbishop may be held vicariously liable for the negligence of C&C Enterprises. Because the jury held that C&C Enterprises was not liable for Courtney's injuries, and because this opinion upholds that verdict, the issues of joint venture and agency are moot. We accordingly will not address those issues on the merits.

For the foregoing reasons the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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