

RENDERED: MAY 25, 2007; 2:00 P.M.
TO BE PUBLISHED

MODIFIED: JUNE 15, 2007; 10:00 A.M.

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000429-MR

DANIEL BUGG

APPELLANT

v. APPEAL FROM ANDERSON CIRCUIT COURT
HONORABLE JOHN ROBERT MORGAN, JUDGE
ACTION NO. 02-CI-00210

AMERICAN LEGION, ANDERSON POST
NO. 34

APPELLEE

OPINION AFFIRMING

** ** *

BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Daniel Bugg (hereinafter “Bugg”) has appealed the Anderson Circuit Court's order entered on January 20, 2006, which granted a directed verdict in favor of American Legion, Anderson Post No. 34 (hereinafter “American Legion”). For the following reasons, we affirm.

I. Background

On July 6, 2001, Bugg was a participant in the Castleman Classic Horse Show (hereinafter “Castleman Classic”) being held at the American Legion Fairgrounds in Lawrenceburg, Anderson County, Kentucky. Bugg had rented a stall in the barn area of the fairgrounds for his champion saddlebred horse which he intended to show at the event. Bugg had shown horses for many years at this and other venues. As he prepared his horse and stall for the show, Bugg, an innocent bystander, was injured by a bullet fired from Charles Justice's (hereinafter “Justice”) pistol as Justice was being arrested.

Earlier that morning, Justice and his fiancée, Sarah White (“White”), had departed their home in Pikeville, Kentucky, bound for the Castleman Classic. Along the way, the pair engaged in the use of marijuana, cocaine, and alcohol. Justice had a handgun in his possession for which he intended to get parts while on their journey. Justice and White made their way to Louisville, Kentucky, where they picked up White's mother to accompany them to the horse show. During their travels, Justice announced his great displeasure with White's continued use of illegal substances while she was pregnant with his child. The discussion became heated and continued to escalate as they made their way to Lawrenceburg. Before their arrival, and prompted by White's threat to have an abortion, Justice brandished his handgun and threatened to shoot himself, but ultimately discharged the weapon out the vehicle's rear window.

When the trio arrived in Lawrenceburg, they parked their vehicle across the street from the American Legion Fairgrounds. The two women began walking toward

the fairgrounds while Justice attended to his dog and slightly lowered the windows of the vehicle for ventilation. Justice determined he should carry his handgun on his person rather than leaving it unsecured in the vehicle. Justice then made his way into the fairgrounds where he rejoined his party near the horse barns at the rear of the property, close to the stall Bugg had rented and was currently occupying. Justice thereupon resumed the earlier argument with White in a loud and boisterous manner, which altercation attracted the attention of a Castleman Classic representative who sought out an American Legion representative to summon police to the scene.

Lawrenceburg Police Officer Chad Cox (hereinafter “Officer Cox”) arrived shortly thereafter and engaged Justice in conversation. Justice had his hands in his pockets concealing the outline of the handgun and refused Officer Cox's repeated demands to remove them. Justice became verbally combative with Officer Cox and refused to submit to the officer's commands. Officer Cox then forcefully executed a “take-down” of Justice in order to place him under arrest. As Justice hit the ground his firearm discharged, and the bullet struck Bugg in the hand and upper thigh.

Bugg filed suit in the Anderson Circuit Court on July 1, 2002, against Justice, White, Officer Cox, the City of Lawrenceburg,¹ and American Legion,²

¹ The City of Lawrenceburg has a partial ownership interest in the American Legion Fairgrounds. Bugg alleged liability on the part of the City of Lawrenceburg for premises liability as well as vicarious liability for the actions of its employee, Officer Cox.

² Bugg did not name Castleman Classic as a defendant in his initial complaint. However, American Legion filed a third-party complaint to have Castleman Classic brought into the action for the purpose of apportionment of liability, if any.

advancing various theories of liability for his injuries. The Circuit Court entered agreed orders dismissing the complaint against Justice on October 21, 2005, and against White on October 25, 2005. The case proceeded to trial with the remaining parties on October 24, 25, and 26, 2005. At the close of Bugg's case-in-chief, the Circuit Court granted American Legion's motion for directed verdict pursuant to Kentucky Rules of Civil Procedure (CR) 50.01, and further, upon agreement of the parties, granted a partial directed verdict for the City of Lawrenceburg.³ The jury returned a verdict in favor of Bugg for \$631,675.55, apportioning fault to Justice (75%) and White (25%), and assigning no liability to Officer Cox or the City of Lawrenceburg. Judgment was entered accordingly on November 21, 2005.

On December 8, 2005, Bugg filed motions for a new trial pursuant to CR 59.01; to alter, amend, or vacate judgment pursuant to CR 59.05; and alternatively for judgment notwithstanding the verdict pursuant to CR 50.02. The Circuit Court denied these motions on January 5, 2006, and an amended final judgment was entered on January 27, 2006.⁴ This appeal followed.

³ The premises liability claim against the City of Lawrenceburg was dismissed by agreement, but the vicarious liability claim remained to be presented to the jury.

⁴ American Legion had previously filed a motion to amend the original judgment to remove language that the third-party complaint against Castleman Classic was dismissed with prejudice. The revised judgment reserved American Legion's right to re-file its complaint against Castleman Classic in the event Bugg was successful on appeal or later filed a different action against American Legion couched on the same facts as the instant complaint. As we are affirming the Circuit Court's ruling on directed verdict, further discussion of this amendment would be superfluous.

On appeal, Bugg's sole contention is that the Circuit Court erred in granting a directed verdict in favor of American Legion. We disagree and affirm the Circuit Court's decision.

II. Standard of Review

The standard of review for appeal of a directed verdict is well established in the Commonwealth. A reviewing court is limited in its inquiry to determining whether the trial court erred in its ruling on the directed verdict motion. *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998) (citing *NCAA v. Hornung*, 754 S.W.2d 855 (Ky. 1988)). We are directed to review the evidence only to determine whether the ruling “is palpably or flagrantly against the evidence so as to indicate that it was reached as the result of passion or prejudice.” *Id.* at 18. Furthermore, “the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence.” *Id.* See also *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814 (Ky. 1992). Thus the ruling of the Circuit Court shall not be overturned on appeal unless it is clearly erroneous.

III. Directed Verdict

A motion for directed verdict raises a question of law as to whether any evidence has been presented which would support a verdict. *Harris v. Cozatt, Inc.*, 427 S.W.2d 574 (Ky. 1968). In *Gibbs v. Wickersham*, 133 S.W.3d 494, 496 (Ky.App. 2004), this Court noted “[w]hile it is the jury's province to weigh evidence, the [circuit] court

will direct a verdict where there is no evidence of probative value to support the opposite result and the jury may not be permitted to reach a verdict based on mere speculation or conjecture” [citations omitted]. A directed verdict admits the truth of all evidence which is favorable to the party opposing the motion. *Kentucky & Indiana Terminal R. Co. v. Cantrell*, 298 Ky. 743, 184 S.W.2d 111 (1944). Unless there is a complete absence of proof on a material issue, or there are no disputed issues of fact upon which reasonable minds could differ, a trial court is prohibited from entering a directed verdict. *Gibbs*, 133 S.W.3d at 494 (citing *Bierman, supra*). Therefore, if conflicting evidence is presented, the matter must be submitted to the trier of fact for resolution of the issue and a directed verdict is improper.

IV. Analysis

Bugg has couched his claims against American Legion in the common law cause of action of premises liability. Bugg contends that American Legion failed to protect him, its invitee, from a dangerous condition involving an unreasonable risk of harm, to wit, Justice. *See* Restatement (Second) of Torts § 343 (1965). A premises liability claim is generally regarded as a sub-category of general negligence law. Under negligence law, in order to prevail the one so pleading must prove (1) the defendant owed him a duty of care, (2) a breach of that duty, and (3) a causal connection between the breach and the pleader's consequent injury. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky.App. 2001). *See also Pathways, Inc. v. Hammons*, 113 S.W.3d 85 (Ky. 2003); and *Mullins v. Commonwealth Life Insurance Co.*, 839 S.W.2d 245 (Ky. 1992).

However, “[w]hile general negligence law requires the existence of a duty, premises liability law supplies the nature and scope of that duty when dealing with tort injuries on realty.” *Lewis*, 56 S.W.3d at 437-38. The nature and scope of such duty, if any, is determined based upon the status of the one injured at the time of his injury, and is more particularly determined by one's classification as an invitee, licensee, tenant, or trespasser.

It is undisputed that Bugg was a business invitee on the premises owned by American Legion.⁵ It is axiomatic that invitees are placed upon a higher footing than other classes of persons with respect to the duty of care that is owed to them while they enjoy the owner's premises. This Court held in *Lewis*, 56 S.W.3d at 438, under common law premises liability principles the duty owed by a premises owner to an invitee is “a general duty to exercise ordinary care to keep the premises in a reasonably safe condition and warn invitees of dangers that are latent, unknown or not obvious” [citations omitted]. An owner is under a duty to discover dangerous conditions on the premises and either correct them or warn its invitees of their existence. *Johnson v. Lone Star Steakhouse & Saloon of Kentucky, Inc.*, 997 S.W.2d 490 (Ky.App. 1999). However, “[t]he occupier is not an insurer of the safety of invitees, and his duty is only to exercise reasonable care for their protection.” *Bartley v. Educational Training Systems, Inc.*, 134 S.W.3d 612, 615 (Ky. 2004) (citing William Prosser and W. Page Keeton, *Prosser and Keeton on Torts*, § 61 (5th ed. 1984)). “What constitutes ordinary care varies with the nature of the business

⁵ Black's Law Dictionary 832 (7th ed. 1999) defines an invitee as a “person who has an express or implied invitation to enter or use another's premises, such as a business visitor or a member of the public to whom the premises are held open.”

and the use to which the premises are put, but it is a care commensurate with the particular circumstances involved in the given case [citations omitted].” *Sidebottom v. Aubrey*, 267 Ky. 45, 101 S.W.2d 212, 213 (1937). This Court recently held in *Murphy v. Second Street Corp.*, 48 S.W.3d 571, 574 (Ky.App. 2001) that in order to prevail on a claim similar to the one sub judice, a “plaintiff must show either: (1) that the proprietor had knowledge that one of his patrons was about to injure the plaintiff and he failed to exercise ordinary care to prevent such injury; or, (2) that the conduct of some of the persons present was such as would lead a reasonably prudent person to believe that they might injure other guests” [footnote omitted].

Bugg contends Justice entered the premises through the main gate while obviously intoxicated and loudly cursing and berating his female companions, a situation which American Legion should have reasonably recognized as a risk to other patrons. Bugg further contends that the heated debate continued as the party made their way across the grounds, thus allowing American Legion greater opportunity to discover the potential danger. Finally, Bugg contends Justice could have easily been identified and kept away from other patrons, thus eliminating the danger of harm, if American Legion had provided adequate security. However, a review of the record fails to support his claims.

Justice testified that he had no recollection of how he came to enter the fairgrounds and did not remember passing through a gate or paying admission, nor did he recall whether he might have scaled the fence surrounding the fairgrounds. No other

evidence was presented regarding how he gained entry to the premises. Further, Justice testified that his first memory after entering the premises was arguing with White near the barn area, the location where Castleman Classic and American Legion representatives became aware of the problem and immediately summoned assistance from police.

No evidence was presented to support Bugg's claim that Justice was loud, profane, and “screaming” as he made his way across the fairgrounds. Bugg also failed to present any testimony to support his argument that the presence of additional security would have prevented his injury. Uncontroverted testimony revealed that the shooting was accidental and not an intentional act, and that it occurred after Officer Cox had arrived.

There was no evidence presented which would sustain a finding that American Legion knew or reasonably should have known that anyone was in imminent danger of being injured by Justice,⁶ nor that American Legion breached any duty of care owed to its invitees. *See Napper v. Kenwood Drive-In Theatre Co.*, 310 S.W.2d 270, 272 (Ky. 1958). As American Legion is not an insurer of the safety of its invitees, it would be unreasonable to hold them accountable for the unforeseeable and unfortunate result of Justice's arrest. *See Murphy*, 48 S.W.3d at 574. We therefore find Bugg's contentions to be based solely on conjecture and speculation.

⁶ Moreover, although a risk of immediate harm was not foreseeable, it is noteworthy that American Legion took immediate steps to protect all of its patrons upon learning of the altercation by summoning the local police who arrived on-scene only minutes later. Thus, Bugg's contention on appeal that American Legion did nothing to protect him is thereby easily refuted.

Finding nothing in the record which would support a judgment in favor of Bugg against American Legion, we hold the trial court was correct in ruling Bugg had failed to establish a cause sufficient to be presented to the jury on his premises liability claim against American Legion and properly granted the directed verdict. As the judgment of the Anderson Circuit Court was not clearly erroneous nor flagrantly against the weight of the evidence, its judgment is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
FOR APPELLANT:

Daniel A. Simons
Richmond, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

Terry Sellars
Lexington, Kentucky