

RENDERED: JULY 6, 2007; 2:00 P.M.

NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001200-MR

EILEEN HASSLER

APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE MARC I. ROSEN, JUDGE
ACTION NO. 02-CI-00954

PARAMOUNT ARTS CENTER, INC.
AND CARROT TOP, INC.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: THOMPSON AND VANMETER, JUDGES; PAISLEY,¹ SENIOR JUDGE.

THOMPSON, JUDGE: The appellant, Eileen Hassler, filed this action as a result of injuries she allegedly sustained as a result of being exposed to toxic fumes generated from smoke emitted from pyrotechnics and a fog machine used during a performance by the appellee, Carrot Top, Inc. (Carrot Top), on the premises of the appellee, Paramount Arts Center, Inc. Also named in the complaint was RES Specialty Pyrotechnics

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Company, Inc., the manufacturer of some of the material used in the pyrotechnic display.² The circuit court granted the appellees' motions for summary judgment on the basis that Hassler failed to present any affirmative evidence that the appellees were negligent. Because Hassler failed to present any evidence that her exposure to the fumes caused her illnesses, we agree with the circuit court that summary judgment was proper.

Paramount and Carrot Top entered into a contract for the performance of the Carrot Top show at the Paramount facility. The contract contained provisions as to the responsibilities of both Paramount and Carrot Top, including the special effects to be used during the performance. Under the terms of the contract, Paramount was to obtain any license or permit required for the use of the pyrotechnics and it was further required to place any warning signs mandated by applicable local regulations. Carrot Top purchased the materials used in the performance from a wholesaler/distributor who had purchased them from the manufacturer, RES.

Prior to the performance, Paramount applied for and received a permit for the use of pyrotechnics at the Carrot Top show. An affidavit submitted by Eric Godfrey, the pyrotechnician and road manager for Carrot Top stated that Carrot Top and Paramount complied with all applicable safety and regulation requirements when utilizing the pyrotechnics. Affidavits by David Sloan, Deputy Fire Chief of the Ashland Fire Department and Michael Baer, a captain of the Ashland Fire Department, confirmed that the use of the pyrotechnics complied with all applicable regulations.

² Hassler's complaint also named as plaintiffs, Federal Insurance Company a/k/a Chubb Group Of Insurance Companies and Putnam Agency, Inc. Neither company was named as a party to this appeal.

On April 30, 2002, Hassler attended the Carrot Top performance. Because she was a volunteer at the Paramount facility, she did not pay an admission fee, and during the performance, did not have seating. Instead, her presence in the theater was limited to a “few minutes here and there” and she stood against the wall, approximately 100 feet away from the stage. She alleges that immediately after the Carrot Top performance she began experiencing respiratory problems and, subsequently, her hair has turned white and has fallen out, and that her veins have been damaged.

On September 12, 2002, Hassler filed a complaint against the appellees alleging that she attended the performance as a business invitee and, that as a result of the appellees' negligence and failure to warn of the potential dangers posed by exposure to the fumes generated, the appellees were jointly and severally liable for her injuries.

Three years after the filing of the complaint, the appellees moved the circuit court for summary judgment. They did so in reliance on the affidavits of Godfrey, Sloan, and Baer, all of which confirmed that during the performance all applicable regulations were complied with, Hassler's own testimony concerning her exposure to the fumes, and the lack of evidence produced by Hassler which would indicate any negligence by any or all of the appellees. The same pyrotechnics had been used in numerous performances prior to the April 2002 performance and were standard in the entertainment business. No other person, they claimed, including anyone else who attended the specific Carrot Top show at Paramount, ever reported to have suffered the injuries Hassler allegedly sustained.

Hassler responded to the motions for summary judgment arguing that there were material issues of fact regarding the duty owed her by the appellees and whether the appropriate procedures were followed in the use of the pyrotechnics and fog machine. In her attempt to persuade the circuit court to deny their motions, she advanced various legal arguments including that strict liability applied or, alternatively, that *res ipsa loquitur* applied. The only evidence submitted was Hassler's and her daughter's affidavits stating that there were no signs posted at the performance warning of any possible dangers posed by the fumes produced.

It is on this state of the record that we review Hassler's appeal.

In *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky.App. 2001), this court addressed the proper standard of review in appeals from summary judgments:

The standard of review on appeal when a trial court grants a motion for summary judgment is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present “at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” The trial court “must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists.” While the Court in *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) used the word “impossible” in describing the strict standard for summary judgment, the Supreme Court later stated that that word was “used in a practical sense, not in an

absolute sense.” Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*. (citations in footnotes omitted.)

As the allegations are framed in Hassler's complaint, this is a negligence case. Thus, to defeat the appellees' properly supported motions for summary judgment, Hassler was required to provide some affirmative evidence that, at trial, she could prove that any or all of the appellees owed her a duty of care which was breached and that she suffered consequent injury. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85 (Ky. 2003). Although Hassler devotes much of her argument on appeal to her status as an invitee on the Paramount premises and the application of strict liability and *res ipsa loquitor*, we find no need to delve into a discussion as to the merits of her contentions. Regardless of their resolution, the result would ultimately be the same. To defeat the motions for summary judgment, she was required to come forth with affirmative evidence of legal causation.

This Commonwealth has adopted the legal causation standard set forth in *Restatement (Second) of Torts* §431 (1965):

“What Constitutes Legal Cause

The actor's negligent conduct is a legal cause of harm to another if

(a) his conduct is a substantial factor in bringing about the harm, and

(b) there is no rule of law relieving the actor from liability

because of the manner in which his negligence has resulted in the harm.”

See Deutsch v. Shein, 597 S.W.2d 141, 144, (Ky. 1980).

Thus, to defeat the summary judgment motions, Hassler was required to present at least some affirmative evidence that the use of the pyrotechnics were a substantial factor in bringing about her present illnesses.

Legal causation can be proven by circumstantial evidence where the evidence reasonably establishes a causal connection between the alleged negligence and the injury. *Johnson v. Vaughn*, 370 S.W.2d 591, 597 (Ky. 1963). However, when common knowledge or experience of a layman is not extensive enough to infer negligence from the facts, expert medical testimony is required. *Jarboe v. Harting*, 397 S.W.2d 775 (Ky. 1965). We believe that this case is one which requires expert testimony.

Pyrotechnics are used in countless concerts and shows and we can find no reported cases where the fumes generated from pyrotechnics, used in conformity with applicable safety and health regulations, have resulted in similar physical complaints as those alleged by Hassler. While the rarity of Hassler's alleged injury does not preclude her claim, it does take the issue of causation from the realm of the common understanding of a layperson and, therefore, requires expert testimony.

Although this case had been pending for well over three years prior to the appellees' motions for summary judgment, Hassler had yet to take the first deposition or otherwise attempt to substantiate her allegations. Although she states in her brief that

“Dr. Thorarinsson diagnosed her with a chemical burn on her lung as result of being exposed to the chemicals, such as pyrotechnics used at the Carrot Top event,” there are no medical reports, depositions, or affidavits in the record to support Hassler's statement.

At the time the summary judgment motions were filed, Hassler had ample opportunity to produce affirmative evidence to support her negligence claim. Although a summary judgment is a final order and, therefore, should not be entered as a form of penalty for failure of the plaintiff to prove his case quickly enough, it is proper when, as here, the opportunity was given to conduct discovery, yet, the party opposing the motion fails to offer controverting evidence. *Pendleton Bros. Vending, Inc. v. Com. Finance & Administration Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988) (citing *Hartford Insurance Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628 (Ky.App. 1979)).

In view of the facts and the applicable law, we conclude that the trial court did not err in granting summary judgment. The judgment is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT EILEEN
HASSLER:

G.C. Perry, III
Paintsville, Kentucky

ORAL ARGUMENT FOR APPELLANT
EILEEN HASSLER:

Heather M. Gearheart
Paintsville, Kentucky

BRIEF FOR APPELLEE PARAMOUNT
ARTS CENTER, INC.:

David B. Sloan
Molly G. Vance
Covington, Kentucky

ORAL ARGUMENT FOR APPELLEE
PARAMOUNT ARTS CENTER, INC.:

David B. Sloan
Covington, Kentucky

BRIEF FOR APPELLEE RES SPECIALTY
PYROTECHNICS COMPANY, INC.:
(PARTY SUBSEQUENTLY DISMISSED
BY COURT ORDER)

Neal Smith
Pikeville, Kentucky

BRIEF FOR APPELLEE CARROT TOP,
INC.:

Edward H. Stopher
Darryl S. Lavery
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE
CARROT TOP, INC.:

Darryl S. Lavery
Louisville, Kentucky