RENDERED: OCTOBER 19, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

**ORDERERD NOT PUBLISHED BY SUPREME COURT:
OCTOBER 15, 2008
(FILE NO. 2007-SC-001871)**

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001871-MR

BRANDI HAYS, MOTHER AND NEXT FRIEND OF ALYSSA SUMMERS, A MINOR — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 04-CI-002535

NAJEH LATIF ALIA; REMAH LATIF ALIA; RICHARD SUMMERS; AND SUSAN SUMMERS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, STUMBO, AND THOMPSON, JUDGES.

STUMBO, JUDGE: This appeal arises from a personal injury suit which, after a jury trial, resulted in a defense verdict. The injury was sustained when seven-year-old Alyssa Summers, AKA Katie, suffered a severe break to her leg while using a neighbor's trampoline without adult supervision. On appeal the issues include denial of Appellant's

motion for directed verdict on the issues of liability and contributory fault, and the court's refusal to instruct the jury that the owners of the trampoline were required to comply with the manufacturer's warnings, the refusal to allow Appellant to present evidence of disposal of the trampoline, and the denial of Appellant's request that the court give a spoliation of evidence instruction.

On July 13, 1999, Katie was staying with her grandparents, Richard and Susan Summers, for the summer in Louisville, Kentucky, while her mother and step-father remained at home in Virginia Beach, Virginia. Later in the day, Katie was apparently going to a neighbor's house to play. Her grandfather watched her walk down the street but did not see her meet up with the the child she was to visit, nor see that she got to her house.

Before Katie reached the child's house, she passed by the home of Najeh and Remah Latif Alia, Appellees herein. Sofia, the daughter of the Latif Alias, was jumping on a trampoline in the yard unsupervised. It is disputed whether Katie invited herself to jump on the trampoline or if Sofia invited her. Regardless, both girls began jumping on the trampoline together unsupervised. A few minutes later, Katie crumpled and started to cry. Sofia ran to tell her mother, who was inside the house, and it was later discovered that Katie had broken her left leg. As a result, the growth in her left leg became stunted as compared to that of her right leg. After two surgeries in an attempt to fix and prevent further leg length discrepancy, Katie's left leg is 1 to 2 inches shorter than her right. Because Katie was under the care of her grandparents, Mr. and Mrs. Summers, when the injury occurred, the Latif Alias filed a third-party complaint seeking apportionment of liability for negligent supervision of their granddaughter.[1] Acting as

[1] We note that Appellant's arguments do not allege any error in the jury's findings in their favor.

next friend, Katie's mother, Ms. Hays, brought suit and appeals the decision of the trial court.

At the trial court level, Ms. Hays sought a directed verdict on liability because the Latif Alias allowed the trampoline to be used in violation of the manufacturer's specific safety warnings. These warnings were that jumpers were not to use the trampoline unsupervised and that there should not be multiple jumpers. As for the issue of contributory fault of Katie, she was only seven-and-one-half years old on the date of the accident and Appellant argued she was too young to be contributorily negligent. She also sought to include in the jury instructions that the Latif Alias' legal duties included compliance with the manufacturer's warnings and a spoliation of evidence instruction because Mr. Latif Alia disposed of the trampoline after the accident. She also wanted to present evidence of this disposal. The judge denied the motion, refused to explicitly instruct the jury on the warnings or give a spoliation of evidence instruction, nor allow the Appellant to present evidence of disposal. At the conclusion of the trial, the jury returned a judgment against the Appellant. We find that the trial court's decisions were proper and affirm them as such.

Appellant's first argument is that she was entitled to a directed verdict on the issue of liability because the Latif Alias openly ignored the manufacturer's warnings on the trampoline. This Court's standard of review for a motion for directed verdict is "firmly entrenched in our law." *Gibbs v. Wickersham*, 133 S.W.3d 494, 495 (Ky.App. 2004). The court must favor the party against whom the motion is made, including all inferences reasonably drawn from the evidence, and cannot enter a directed verdict 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. *Id*. However, while it is for the jury to weigh evidence, "the 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." *Id*.

The Appellant contends that the trial court should have directed a verdict regarding the alleged failure to enforce the product warnings on those who used their trampoline; however, this alleged failure is not dispositive of the issue of liability. There was evidence presented that Katie had jumped improperly on trampolines before at her grandparents' home some two years before the injury involved herein and that she had done so in the company of her mother and uncle. Further, Katie's mother, Ms. Hays, testified that she did not consider the trampoline owned by her parents to be dangerous. Additionally, the evidence indicates that the Latif Alias did not know of Katie's presence on their property until after the accident and that Katie was supposed to be under the supervision of her grandparents. Clearly there was sufficient evidence on the issue of liability to present a question of fact for the jury to determine.

Appellant also argues she was entitled to a directed verdict regarding Katie's contributory fault. At the time of the accident, Katie was seven-and-one-half years old. Appellant alleges that Katie would have been too young to understand the dangers of a trampoline and thus could not be held contributorily negligent. Kentucky courts have held that "a child under seven years of age is considered incapable of negligence, and one between the ages of seven and fourteen is presumptively not charged with such, but in the latter [age] category the presumption may be rebutted by counter testimony." *Willoughby v. Stilz*, 387 S.W.2d 10, 11 (Ky. 1965). In this case, there was

evidence that Katie had used trampolines in the same manner in the past. However, this evidence indicated that her trampoline use occurred some two years prior to the events that led to this suit, at which time Katie would have been only five years of age. Additionally, there is no evidence that Katie had been given any instructions or warnings by anyone about the proper use of a trampoline.

In *Willoughby v. Stiltz*, the issue before the court was whether a nine-year-old boy who ran out into the road and was struck by an automobile could be found to be negligent. The court found from the record that "this nine-year-old boy could be held responsible for his negligent acts as a matter of law, since the evidence was undisputed that he, a child of normal intelligence for his age, knew the danger of running against a red light into the street and beyond the crosswalk at a busy intersection." *Id.* The evidence considered by the court came from the child's mother and a teacher, both of whom testified that the child had been educated on the dangers of playing near the street and the proper way to cross a street. Both witnesses also testified that the child was sufficiently intelligent to understand what he had been taught.

While Appellant offers an interesting legal issue for resolution, we need not address it. The trial court gave the following instruction in regard to the duties of Alyssa Summers:

> It was the duty of the plaintiff, Alyssa Summers, to exercise ordinary care for her own safety at the time and under the circumstances of the accident about which you have heard evidence. 'Ordinary care,' as applied to the plaintiff, means that degree of care usually exercised by ordinarily careful and prudent children of the age, intelligence and experience of the plaintiff, Alyssa Summers, under circumstances like or similar to those in this case.
>
> Are you satisfied from the evidence that Alyssa Summers failed to comply with her duty of care for her own

safety, and if so, that this failure was a substantial factor in causing the accident?

The jury answered this instruction with "no," finding that she did not act in a negligent fashion. Given this resolution of the issue of whether the child was negligent, we need not address whether the trial court erred in refusing to direct a verdict.

Appellant also contends that the trial court should have instructed the jury that the Appellees were required to comply with the manufacturer's warnings as part of their duty of care and should have given jurors a spoliation of evidence instruction. The jury instruction regarding liability read as follows:

INSTRUCTION NO. 3

At the time of the accident about which you have heard evidence, it was the duty of Najeh Latif Alia and Remah Latif Alia as owners of real property to exercise ordinary care for children on their property, to protect or warn of any artificial condition which they realized, or should have realized, created an unreasonable risk of bodily harm to children who would not be able to comprehend the risk or danger involved. Factors to be considered are whether:

(a) Najeh Latif Alia and Remah Latif Alia had reason to know that children were likely to come into their back yard, and

(b) Najeh Latif Alia and Remah Latif Alia knew or should have realized the trampoline involved an unreasonable risk of death or serious bodily harm to such children, and

(c) Plaintiff because of her youth would not have discovered the condition or realized the risk involved in using the trampoline, and

(d) the effort to make sure children used the trampoline safely was slight as compared with the risk to children involved, and

(e) whether Najeh Latif Alia and Remah Latif Alia failed to exercise reasonable care to eliminate the danger or otherwise to protect the children.

Kentucky law "mandates the use of 'bare bones' jury instructions in all civil cases." *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226, 229 (Ky. 2005). However, the

instructions "may not be so vague or diluted as to obscure the jury's findings." *Hilsmeier v. Chapman*, 192 S.W.3d 340, 344 (Ky. 2006). Evidence of the warnings provided to the purchasers of a trampoline was introduced into evidence and throughly addressed during closing arguments. The instruction given clearly sets forth the theory of Appellant's case, that the failure of the owners of the trampoline to enforce protective measures resulted in the injury to the child. The instructions were more than adequate to satisfy the "bare bones" instruction requirement. In fact, this instruction may well have gone beyond what was necessary.

Finally, Appellant contends that she was entitled to present evidence to the jury that the Appellees disposed of the trampoline after the injury suffered by Alyssa and that she was entitled to a spoliation of evidence instruction. Kentucky has declined to create a cause of action for spoliation of evidence. *Monsanto Co. v. Reed*, 950 S.W.2d 811, 815 (Ky. 1997). Further, "[w]here the issue of destroyed or missing evidence has arisen, we have chosen to remedy the matter through evidentiary rules and 'missing evidence' instructions." *Id*. To determine whether this instruction should be given, Kentucky courts look to see if the failure to produce the evidence "will substantially prejudice appellant's right to fair trial." *Tinsley v. Jackson*, 771 S.W.2d 331, 332 (Ky. 1989).

The trial court deemed Appellees' disposal of the trampoline to be a subsequent remedial measure. As such, the evidence of that disposal was found to be inadmissible. More importantly, in order to remedy the fact that the trampoline had been disposed of, Appellant was permitted to introduce a comparable trampoline box, user's manual, and set of warnings into evidence. We find that the introduction of this evidence

cured any possible prejudice that might have arisen from the destruction of the original trampoline. Because there was no prejudice and comparable trampoline warnings, there was no need for the requested instruction and no need to present evidence of the disposal.

For the foregoing reasons, we affirm the trial court's decisions and hold that the jury verdict stands as it is.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Bradley D. Harville
Dana T. Skaggs
Louisville, Kentucky

ORAL ARGUMENT
FOR APPELLANT:

Bradley D. Harville
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT
FOR APPELLEES,
NAJEH LATIF ALIA AND REMAH
LATIF ALIA:

Mark A. Osbourn
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT
FOR APPELLEES,
RICHARD SUMMERS AND
SUSAN SUMMERS:

Galen L. Clark
Louisville, Kentucky