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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001421-MR

GELS CO. INC. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 09-CI-005906

KATHERINE HESSELGRAVE APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: J. LAMBERT, MAZE AND STUMBO, JUDGES.

STUMBO, JUDGE: Gels Co. Inc., d/b/a The Connection appeals from a judgment of the Jefferson Circuit Court which awarded Katherine Hesselgrave $17,594.58. Appellant raises four argument on appeal: (1) that the trial court should have granted summary judgment in its favor; (2) that the trial court should have dismissed the case as Appellee was not the real party in interest; (3) that the trial court should have not allowed Appellee's expert to testify at trial; and (4) that the

trial court should have granted a mistrial due to improper comments made by Appellee's counsel during closing argument. We find no error and affirm.

On June 13, 2008, Appellee was at The Connection, a local bar/dance club. The Connection has a dance floor. In the middle of the dance floor is a raised platform in the shape of an X. The platform was originally intended for seating, but patrons regularly climbed onto it to dance. The platform did not have a railing along the perimeter. On the night at issue, Appellee and around 20 other people were dancing on the platform. While Appellee was dancing, she either slipped or was bumped by another dancer and fell off the platform. When Appellee landed on the floor, she severely injured her wrist. Appellee brought suit against Appellant for negligence and claimed that the platform was unsafe. The jury eventually awarded her $58,648.61. The jury also found that Appellee was 70% at fault for her own injury, thereby reducing her award to $17,594.58. This appeal followed.

Appellant's first argument on appeal is that the trial court erred when it denied its multiple motions for summary judgment. Appellant argues that the raised platform was an open and obvious hazard; therefore, Appellee cannot recover for her injuries. Appellant claims that the platform was open and obvious because the platform was 24.5 inches tall, without a railing, and was occupied with around 20 other dancers at the time of the fall. While we agree that the platform was an open and obvious condition, we disagree with Appellant's argument that the trial court should have granted summary judgment.

> The standard of review on appeal of a 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. Kentucky Rules of Civil Procedure (CR) 56.03. . . . "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest,* 807 S.W.2d at 480, *citing Paintsville Hospital Co. v. Rose,* 683 S.W.2d 255 (Ky. 1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor. . . ." *Huddleston v. Hughes,* 843 S.W.2d 901, 903 (Ky. App. 1992)[.]

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996).

> In order to state a cause of action based on negligence, a plaintiff must establish a duty on the defendant, a breach of the duty, and a causal connection between the breach of the duty and an injury suffered by the plaintiff. The causal connection or proximate cause component traditionally was composed of two elements: cause-in-fact and legal or consequential causation. Cause-in-fact involves the factual chain of events leading to the injury; whereas, consequential causation concerns the concepts of foreseeability and the public policy consideration on limiting the scope of responsibility for damages. In Kentucky, the cause-in-fact component has been redefined as a "substantial factor" element as expressed in Restatement (Second) of Torts § 431. The scope of duty also includes a foreseeability component involving whether the risk of injury was reasonably foreseeable.
>
> While 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. Under common law premises liability, the owner of a premises to which the public is invited has 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.

Lewis v. B & R Corp., 56 S.W.3d 432, 436-38 (Ky. App. 2001) (citations and footnotes omitted).

Before 2010, Kentucky plaintiffs were generally prevented from recovering for injuries suffered by a hazard that was deemed open and obvious. In recent years, the Kentucky Supreme Court modified the open and obvious doctrine with the cases of *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010) and *Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 901 (Ky. 2013).

In *Shelton*, the Supreme Court stated:

> A target for criticism for well over fifty years, the open-and-obvious doctrine persists in our jurisprudence. In *McIntosh,* we took steps to ameliorate the harsh effect of the open-and-obvious doctrine for injured persons seeking recovery. We adopted the Restatement (Second) of Torts Section 343A and held that "lower courts should not merely label a danger as 'obvious' and then deny recovery. Rather [the courts] must ask whether the land possessor could reasonably foresee that an invitee would be injured by the danger." According to Section 343A, harm to the invitee is reasonably foreseeable despite the obviousness of the condition "where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious or will forget what he has discovered, or fail to protect himself against it" and, also, "where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk." Under this modern approach to cases dealing with open-and-obvious dangers, there is no duty for the land possessor to warn of the dangers; but this "does not mean there is no duty at

> all[.]" Indeed, "even where the condition is open and obvious, a landowner's duty to maintain property in a reasonably safe condition is not obviated[.]"

Shelton at 907.

> [T]he existence of an open and obvious danger does not pertain to the existence of duty. Instead, Section 343A involves a factual determination relating to causation, fault, or breach but simply does not relate to duty. Certainly, at the very least, a land possessor's general duty of care is not eliminated because of the obviousness of the danger.

Id.

> According to the Restatement, a possessor of land is "subject to liability" when he fails to protect his invitees from harm, despite the condition's open-and-obvious nature, because he should have anticipated that harm would result. But a possessor of land is simply "not liable to his invitees for physical harm caused to them by any condition on the premises whose danger is known or obvious to them unless the possessor should anticipate the harm despite such knowledge or obviousness." Read together, as called for by the Restatement (Second), Section 343 outlines the general standard of care applicable to invitors; and Section 343A serves as an acknowledgment that under certain limited circumstances, negligence will not be present. In other words, Section 343A suspends liability when the danger is known or obvious to the invitee, *unless* the invitor should anticipate or foresee harm resulting from the condition despite its obviousness or despite the invitee's knowledge of the condition.

Id. at 911 (citations and footnotes omitted).

In denying Appellant's motions for summary judgment, the trial court found that while the platform was an open and obvious hazard, it was reasonably foreseeable to both the Appellant and Appellee that someone could fall off and

injure herself. The trial court believed that this created genuine issues of material fact as to whether Appellant breached its duty to protect Appellee from a foreseeable harm and whether or not Appellee was partially responsible for her own injury.

We agree with the trial court. A dance platform which is a little over two feet high, without a railing, in a dark room with dance club style flashing lights, and occupied by many other dancers is clearly an open and obvious hazard. "[T]he foreseeability of the risk of harm should be a question normally left to the jury under the breach analysis. In doing so, the foreseeability of harm becomes a factor for the jury to determine what was required by the defendant in fulfilling the applicable standard of care." *Id*. at 914 (citation and footnote omitted). The trial court was correct in finding genuine issues of material fact existed and properly denied summary judgment.

Appellant's second argument on appeal is that the trial court erred in denying its motion to dismiss. Appellant moved to dismiss the case because it believed Appellee was not the real party in interest. After the filing of the complaint, but before trial, Appellee filed for Chapter 13 bankruptcy. Appellant alleged that this required the case to be brought in the name of the Bankruptcy Trustee as the Trustee will have total control over any funds recovered.

Review of a motion to dismiss is for abuse of discretion. *Polk v. Wimsatt*, 689 S.W.2d 363, 365 (Ky. App. 1985). Kentucky Rule of Civil Procedure (CR) 17.01 requires that all actions shall be brought in the name of the "real party in

interest". "The real party in interest is the one who is entitled to the benefits of the action upon the successful termination thereof." *Brandon v. Combs*, 666 S.W.2d 755, 759 (Ky. App. 1983).

The trial court denied the motion to dismiss because Chapter 13 bankruptcy is different from Chapter 7 bankruptcy. The trial court held that a debtor who files for Chapter 13 bankruptcy still retains his or her assets; therefore, Appellee still has the primary interest in the subject matter of the litigation. We agree.

Appellant cites to multiple cases which it claims demonstrate that once a debtor files for bankruptcy, the Trustee becomes the real party in interest because it controls all the assets of a bankruptcy estate, including the interest in any judgments a debtor may recover. The cases cited by Appellant are distinguishable from the case at hand because they concern Chapter 7 bankruptcy. As the trial court noted, Chapter 7 bankruptcy and Chapter 13 bankruptcy are different. A debtor, such as Appellee, who files for Chapter 13 bankruptcy remains in possession of all property of the estate. 11 U.S.C. § 1306; *In re Chavis*, 47 F.3d 818, 824 (6th Cir. 1995). Because Appellee retained possession of her property and assets, she remained the real party in interest. The trial court did not abuse its discretion in denying Appellant's motion to dismiss.

Appellant's third argument on appeal is that the trial court should not have allowed Appellee's expert to testify. Appellant made multiple motions to exclude Appellee's architectural expert, Lee Martin. The trial court denied these requests and allowed Mr. Martin to testify at trial. Mr. Martin testified that the platform

was dangerous because it was elevated two feet, too narrow, had insufficient lighting, and did not have a railing.

Appellant argues that Appellee's expert's opinion was unreliable because he relied, in part, on information he gained from a Google search and that this did not meet the expert opinion standard set forth in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The proper standard for review of evidentiary rulings is abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

> The factors set forth in *Daubert* and adopted in [*Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky. 1995)] that a trial court may apply in determining the admissibility of an expert's proffered testimony include, but are not limited to: (1) whether a theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether, with respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique's operation; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific, technical, or other specialized community. *Daubert,* 509 U.S. at 592-94, 113 S.Ct. at 2796-97, 125 L.Ed.2d at 482-83.

Goodyear Tire at 578-79.

"This procedure exists, in essence, to 'ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.' Thus the trial

court must first assess the reliability of the expert testimony – 'a factual determination for the trial judge' - and then evaluate its relevance." *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004) (citations and footnotes omitted). "While the *Daubert* factors are helpful in evaluating the reliability of expert testimony, they are not an exclusive list. The Supreme Court stated in *Daubert* itself that a trial court's consideration is not limited to the four listed factors." *Id.* at 918 (citations and footnotes omitted).

Here the trial court allowed Mr. Martin to testify. We believe the court did not abuse its discretion in doing so. Mr. Martin has been an architect for over 30 years. He is licensed in multiple states, including Kentucky. Since 2009, he has been employed by Robson Forensics to provide expert architectural opinions to attorneys and insurance adjustors. In forming his opinion in this case, Mr. Martin went to The Connection, examined the dance floor and platform, and took measurements. Mr. Martin prepared a report which mirrored his trial testimony. He opined that had the platform been a square shape and had a protective railing, it would have been a reasonably safe dance platform. He also did a Google search and found other companies who provide dance floors with safety railings.

Mr. Martin's technique for forming his opinion in this case revolved around his previous years of experience, taking measurements, comparing the platform at issue with other platforms, and discovering ways to make the platform safer.

> "[T]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the

> subject of his testimony." The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert,* nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.

Kumho Tire Co. v. Carmichael, 526 U.S. 137, 150, 119 S. Ct. 1167, 1175, 143 L. Ed. 2d 238 (1999) (citation omitted). This case did not require highly technical or scientific examination of the dance platform. The method Mr. Martin used to reach his expert conclusion was reliable and sufficient for the case at hand.

Appellant's final argument on appeal is that the trial court should have granted its motion for a mistrial due to improper remarks made by Appellee's trial counsel during closing arguments. Appellant brings to our attention two instances of alleged improper closing remarks.

The first occurred when Appellee's counsel repeatedly referred to Appellant as a "successful" and "profitable" business. Counsel for Appellant objected and argued that Appellee's counsel was trying to paint Appellant as being wealthy and having deep pockets. The trial court overruled the objection but advised Appellee's counsel to reign in his comments. Appellant claims that the trial court should have granted a mistrial because of these comments. This issue is not preserved for our review because Appellant's counsel did not request a mistrial or admonition in this instance. *Lewis v. Charolais Corp.*, 19 S.W.3d 671, 676-77 (Ky. App. 1999).

The second instance of improper remarks occurred when Appellee's counsel stated:

> This is our community and our community will decide, that's what juries do, they represent the community our community. They will decide what they will tolerate and what they will not. That's what happens in criminal cases, that's what happens in civil cases. The community will decide what you will tolerate.

Appellant's counsel objected to these remarks as improper "send a message" remarks and requested a mistrial. The trial court sustained the objection, but denied the motion for a mistrial.

"A trial court has discretion in deciding whether to declare a mistrial, and its decision should not be disturbed absent an abuse of discretion." *Clay v. Commonwealth*, 867 S.W.2d 200, 204 (Ky. App. 1993) (*citing Jones v. Commonwealth*, 662 S.W.2d 483 (Ky. App. 1983)).

> It is universally agreed that a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice. The occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way.

Gould v. Charlton Co., Inc., 929 S.W.2d 734, 738 (Ky. 1996) (citations omitted).

> Even if an argument is improper, however, the question remains whether the probability of real prejudice is sufficient to warrant a reversal. In making this determination, each case must be judged on its unique facts. An isolated instance of improper argument, for example, is seldom deemed prejudicial. But, "when it is repeated in colorful variety by an accomplished orator its deadly effect cannot be ignored."

Rockwell Int'l Corp. v. Wilhite, 143 S.W.3d 604, 631 (Ky. App. 2003) (citations and footnotes omitted).

"Send a message" remarks are used to fuel the passion of jurors in hopes of rendering a positive verdict and are improper. *See generally Wilhite, supra*. This was, however, an isolated incident and Appellee's counsel made no further remarks. The closing argument of Appellee's counsel lasted approximately 36 minutes. This "send a message" statement lasted only around 30 seconds. This did not reach the level of manifest injustice that would require a mistrial. The trial court did not abuse its discretion in overruling the motion.

For the foregoing reasons we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

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