

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002124-MR

AND

NO. 2008-CA-002272-MR

BRENDA SHELL

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE JAMES D. ISHMAEL, JR, JUDGE
ACTION NO. 06-CI-00600

DAVID A. HAGGARD; TINA
HAGGARD; MICHAEL M.
EVERSOLE; JULIA H. EVERSOLE;
TONY HAGGARD; AND CAMILLE N.
HAGGARD LLC, d/b/a ANTIOCH
PROPERTIES

APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** *

BEFORE: CAPERTON AND STUMBO, JUDGES; KNOPF,¹ SENIOR JUDGE.

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

KNOPF, SENIOR JUDGE: Brenda Shell appeals the November 10, 2008, order of the Fayette Circuit Court. That order denied Shell's motion for a new trial in her negligence action against David A. Haggard; Julia H. Eversole; Michael M. Eversole; Camille Haggard; Tina Haggard; Tony Haggard; and Camille M. Haggard LLC, d/b/a Antioch Properties (collectively "Antioch"). Because we find no error with the trial court's order, we affirm.

On February 20, 2005, a fire broke out in the apartment building where Shell's second-story apartment was located. Shell was alerted to the fire by smoke entering her apartment and the active alarm on a smoke detector located within her apartment. After discovering that the handle on the door leading to the common hallway was hot, Shell phoned 911. She then made her way to a window and yelled for help to a woman standing on the ground below. Shell testified that the woman directed Shell to stay put and that she would come and get Shell. The woman then left, returned shortly, and told Shell that she could not get into the building because the rear fire escape could not be opened. It was then that Shell attempted to escape through the window and fell, severely breaking her right ankle. Shell, and another building tenant, would later testify that the back door fire escape had been blocked for an extended period of time.

Shell subsequently filed a lawsuit against the owners of the property, Antioch, under a theory of negligence. Shell testified that a smoke alarm in the building hallway had been improperly maintained, which led to a delayed notification of the fire, her forced escape through a window, and her eventual fall

and resulting injury. Shell also alleged that Antioch had negligently failed to keep a rear fire exit free for passage.

After proof was offered to a jury, a verdict was returned in favor of Antioch. A judgment in conformity with the verdict was presented by the trial court stating that Shell would recover nothing from Antioch and that Antioch would recover from Shell its costs and disbursements incurred in the action. Shell filed a motion for a new trial and that motion was denied. This appeal and cross-appeal followed.

In her direct appeal, Shell first argues that the trial court erred when it incorrectly instructed the jury as to the duty of care required of Antioch in maintaining the apartment premises. “Errors alleged regarding jury instructions are considered questions of law and are to be reviewed on appeal under a *de novo* standard of review.” *Peters v. Wooten*, 297 S.W.3d 55, 64 (Ky. App. 2009), *citing Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006).

After the evidentiary portion of the trial, both parties submitted proposed jury instructions. Shell’s proposed jury instruction read: “[i]t was the duty of the defendants . . . to maintain all fire suppression and fire protection equipment, systems and devices and safeguards in the premises” Instead, the trial court applied the following jury instruction:

It was the duty of the defendant, Antioch Properties, to exercise ordinary care to keep the building in which the Plaintiff was a tenant in reasonably safe condition for use by its tenants and this general duty included the following specific duties:

- (a) To keep the smoke detector in the hallway outside the Plaintiff's apartment in good working order and you further believe from the evidence that the smoke detector in question did not work because of a condition that in the exercise of ordinary care, Antioch Properties knew or should have known of before the fire, and that Antioch Properties failed to discover or repair it before the fire; AND
- (b) That such condition (if you so believe) was a substantial factor in causing Plaintiff's injuries.

Shell argues that she was entitled to a jury instruction under the doctrine of negligence *per se*, because the duty of care imposed upon Antioch is established by a statute as opposed to common law. The duty of care to which Shell refers is 815 KAR² 10:060 § 3(5). That regulation reads, in relevant part:

(5) Maintenance of equipment.

(a) All fire suppression and fire protection equipment, systems, devices, and safeguards shall be maintained in good working order.

(b) This administrative regulation shall not be the basis for removal or abrogation of a fire protection or safety system or device that exists in a building or facility.

815 KAR 10:060 § 3.

Although the law on which Shell relies is an administrative regulation, it is still given the full force of the law.

² Kentucky Administrative Regulations.

In the proper circumstances, violations of administrative regulations constitute negligence per se. Like statutes and ordinances, regulations, once adopted, have the force and effect of law[.] However, in order for a violation to become negligence per se, the plaintiff must be a member of the class of persons intended to be protected by the regulation, and the injury suffered must be an event which the regulation was designed to prevent. If both questions are answered in the affirmative, negligence per se is established *and the applicable regulation defines the relevant standard of care.*

Carman v. Dunaway Timber Co., Inc., 949 S.W.2d 569, 570 (Ky. 1997) (internal citations omitted) (emphasis added). Therefore, Shell must show that: 1) she was a member of the class of persons intended to be protected by 815 KAR 10:060 § 3(5); and 2) the injury she suffered was an event which the regulation was designed to prevent. *Id.* The title of 815 KAR 10:060 is *Kentucky Standards of Safety*, and the title of Section 3 is *Existing Buildings and Conditions*. As a tenant of the building where the fire broke out, Shell is exactly the type of person intended to be protected by the regulation. Because it is a residential building, the purpose of the regulation, as applied to such a structure, would be to protect the building's tenants and guests. Furthermore, it is our belief that Shell suffered an injury which the regulation was designed to prevent. The Supreme Court of Kentucky has previously held:

[w]e think it is clear that so far as foreseeability enters into the question of liability for negligence, it is not required that the particular, precise form of injury be foreseeable-it is sufficient if the probability of injury of some kind to persons within the natural range of effect of the alleged negligent act could be foreseen.

Isaacs v. Smith, 5 S.W.3d 500, 502 (Ky. 1999) (citation omitted). Shell's broken ankle, which resulted from a second-story fall, is within the scope of foreseeability because it is within the natural range of effect of a fire that takes place in a multi-level residential building.

Because Shell has met both prongs of the negligence *per se* requirement, she is entitled to a jury instruction that utilizes the standard of care defined by the regulation. However, we are not of the opinion that the regulation cited by Shell imposes a standard higher than that of ordinary care. "Ordinary care," also known as "reasonable care," is "the degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under similar circumstances." BLACK'S LAW DICTIONARY 167 (7th ed. 2000). The regulation imposes the duty of "maintaining" fire suppression and protection equipment in "good working order." 815 KAR 10:060 § 3(5)(a). To "maintain" something is "to keep (it) in a condition of good repair or efficiency." THE AMERICAN HERITAGE COLLEGE DICTIONARY 834 (4th ed. 2002). The regulation does not impose a duty of strict functionality of fire suppression and protection equipment, but rather a duty of good repair. This duty is no higher than that which would be exercised by any other prudent and competent property owner under similar circumstances and therefore falls under the realm of ordinary care. Because the regulation does not define a standard of care higher than that of ordinary care, we see no reason why one should have been applied by the trial court. Accordingly, we find no error in its jury instruction.

Shell's second argument on appeal is that the trial court erred by improperly excluding evidence regarding the rear fire escape of the apartment building. "[A]buse of discretion is the proper standard of review of a trial court's evidentiary rulings." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000) (citations omitted). "The test for abuse of discretion is whether the trial [court's] decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* at 581.

In support of its decision to exclude the fire escape evidence, the trial court determined that it was irrelevant to the central issue in the case, which was whether the hallway smoke detector was functioning. The trial court further opined that the evidence was irrelevant because Shell had not attempted to use the fire escape. We agree.

The fire escape which Shell argues was blocked was actually a rear exit of the apartment building located on the first floor. Because Shell's apartment was located on the second floor and the fire took place on the first floor, it is difficult to see how Shell could have made her way from her apartment to the rear exit if she had tried. The argument that the stranger outside of the building could not enter the building through the rear exit is irrelevant. Exits of this nature are generally locked to the outside for purposes of security. Furthermore, this stranger was never produced at trial to testify. *See* KRE³ 801 *et seq.* Lastly, Shell's attorney, at oral arguments, admitted that the evidence regarding the rear exit did

³ Kentucky Rules of Evidence.

not address Shell's ability to escape but went to the stranger's inability to access the building. Accordingly, we do not believe the trial court abused its discretion when excluding this evidence.

Antioch makes several arguments of its own on cross-appeal. Those arguments are: 1) Shell's brief should be stricken for failure to cite to the record; 2) the trial court erred by not directing a verdict in Antioch's favor on the issue of liability; 3) Antioch was entitled to a directed verdict on claims for past medical expenses and pain and suffering due to a failure to seasonably respond to an interrogatory; 4) Antioch was entitled to a directed verdict on claims for past medical expenses due to a proper lack of foundation for those claims; and 5) Antioch was entitled to a directed verdict on claims for impairment of future earning capacity due to a lack of evidentiary foundation for those claims.

We first note that Antioch previously filed a motion with this Court to strike Shell's brief. A motion panel of this Court denied that motion in an order entered on July 29, 2009. Accordingly, we will not address that issue a second time.

We next turn our attention to the remainder of Antioch's arguments, which are essentially a collection of arguments in favor of a directed verdict. Because we are affirming the trial court's order, and that order is in favor of Antioch, these arguments are irrelevant, and we will not address them.

For the foregoing reasons, the November 10, 2008, order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
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