

RENDERED: FEBRUARY 4, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002359-MR

HOUSE OF IMPORTS, INC.,
D/B/A IN STYLE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 08-CI-007849

BENJAMIN WRIGHT, JR.

APPELLEE

OPINION REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: TAYLOR, CHIEF JUDGE; DIXON, JUDGE; ISAAC,¹ SENIOR JUDGE.

TAYLOR, CHIEF JUDGE: House of Imports, Inc., d/b/a In Style, brings this appeal from a November 20, 2009, judgment of the Jefferson Circuit Court upon a

¹ Senior Judge Sheila Isaac 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.

jury verdict awarding Benjamin Wright, Jr., \$120,863.67 in damages. We reverse and remand.

This is a premises liability case. While shopping at the House of Imports for a pair of shoes, Wright fell down a staircase located within the store. The staircase consisted of three stairs and had a handrail located in the middle. The stairs provided access from a lower level of the House of Imports to a slightly higher level of the store.

Wright filed a complaint against House of Imports alleging that it negligently failed to maintain the stairs in a reasonably safe condition, thus causing Wright to fall and suffer personal injuries. Ultimately, the case was tried by a jury. The jury found that both Wright and House of Imports were negligent and apportioned 25 percent of fault to Wright and 75 percent of fault to House of Imports. The jury also found that Wright's total damages were \$86,151.56 for medical expenses and \$75,000 for pain and suffering. Based upon the jury's apportionment of fault, the circuit court awarded Wright damages of \$120,863.67. This appeal follows.

House of Imports contends that the circuit court committed reversible error in its admission of the expert testimony of John Schroering. The record reveals that Schroering was a professional engineer and was board certified as a safety professional. He was called to testify on behalf of Wright. At trial, Schroering

presented extensive testimony as to building code safety standards related to the stairs at House of Imports. He opined that the “Kentucky Building Code” applied to the stairs found within the House of Imports and that the stairs violated sundry provisions of the Building Code. He testified at length as to each Building Code violation and gave his opinion that the stairs were unsafe. For the following reasons, we believe the admission of Schroering’s testimony as to violations of the Building Code constitutes clear and reversible error.

To establish an actionable negligence claim, a plaintiff must establish the existence of a duty, breach of that duty, causation, and damages. *Helton v. Montgomery*, 595 S.W.2d 257 (Ky. 1980).² A legal duty may be found in the common law, in a statute, or in an ordinance. *Lewis v. B & R Corp.*, 56 S.W.3d 432 (Ky. App. 2001). A negligence claim premised upon a statute or ordinance is referred to as a “negligence per se claim.” *Id.* In a negligence per se claim, a “statutory standard of care [or duty] is substituted for the common law standard.” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 438 (Ky. App. 2001). And, the applicability of a statutory standard of care or duty squarely presents a question of law for the court. If the trial court determines a duty contained in a statute, regulation, or ordinance is pertinent, the court must then instruct the jury upon such statutory duty. However, a statutory duty is not evidence, and facts revolving around violations of a statutory duty may not be introduced into evidence absent a

² There is no dispute in this case that Wright was a business invitee on the business premises of House of Imports, Inc., d/b/a In Style, for which a duty of care was owed to Wright. *Lanier v. Wal-Mart Stores, Inc.*, 99 S.W.3d 431 (Ky. 2003).

concomitant jury instruction setting forth such statutory duty. The case of *O'Connor & Raque Co. v. Bill*, 474 S.W.2d 344 (Ky. 1971), aptly sets forth the law on this issue.

In *O'Connor*, appellee sustained a fall while shopping at appellant's business establishment. *Id.* During trial, an expert witness testified that the entrance to appellant's business was unsafe and violated the building code. *Id.* A disagreement between the parties ensued as to which version (1950 or 1959) of the building code was applicable. *Id.* The Supreme Court noted that "the trial court did not resolve the question [of which code was applicable], nor were any of the code requirements recited in the [jury] instructions included within the . . . company's duties." *Id.* at 346. The Court held that the trial court erred by allowing introduction of evidence concerning violations of the building code without a concomitant jury instruction informing the jury of appellant's duty under the applicable code provisions. The Court explained its holding:

[T]hat after the authenticity and applicability of an ordinance have been established it is within the discretion of the trial court to determine whether it shall be read to the jury. Generally speaking, however, it seems to us that an ordinance or regulation creating rights and duties is no different from a statute and should be treated in the same way. For example, statutes regulating traffic on the highways are not read to the jury in accident cases. To the extent that they are applicable their substance is incorporated in the instructions covering the law of the case. So it should have been here. The building code or codes from which portions were read to the jury either did or did not place certain duties on the defendant company which were applicable at the time of the accident. If they did impose such duties, they either

called for a directed verdict against the company on the issue of its negligence (as requested by Bill) or they should have been submitted to the jury under an appropriate instruction on proximate cause. If they did not impose such duties, or if as a matter of law the company's failure to comply was not a proximate causal factor in the accident, then they were not relevant to the case and should not have been brought to the jury's attention at all. As it is, the jury received the information and was left to decide for itself what, if any, was its relevance and legal effect.

O'Connor, 474 S.W.2d at 346.

In this case, Wright's negligence claim against the House of Imports was submitted to the jury based upon violation of the common-law duty of care. The jury was not instructed upon any statutory or regulatory duty of care owed by House of Imports to Wright despite substantial evidence being introduced regarding the violation of building codes. As in *O'Connor*, the trial court herein failed to determine the legal question of the applicability of the Building Code and then compounded this error by admitting Schroering's testimony detailing sundry violations of the building code by House of Imports. *See id.* These errors resulted in the jury being "left to decide for itself what, if any, was its relevance and legal effect." *See id.* at 346.

Considering the quantity and substance of the erroneously admitted testimony, we are compelled to conclude that this error affected the substantial rights of House of Imports and, thus, constituted reversible error. Kentucky Rules of Evidence (KRE) 103; *Crane v. Com.*, 726 S.W.2d 302 (Ky. 1987). Simply put, the circuit court's abdication of its role to the jury resulted in a tainted jury verdict

in which this Court lacks confidence. Although we are generally reluctant to set aside a jury verdict, reversal of the verdict in this case is warranted.

As to House of Imports' other issues of error, we perceive same to be without merit. Wright's testimony concerning his gaze while transversing the stairs did not constitute a judicial admission. *See Zapp v. CSX Transp., Inc.*, 300 S.W.3d 219 (Ky. 2009). And, the House of Imports was not entitled to a directed verdict. Kentucky Rules of Civil Procedure (CR) 50.01; *Lee v. Tucker*, 365 S.W.2d 849 (Ky. 1963).

In sum, we reverse the November 20, 2009, judgment of the Jefferson Circuit Court. Upon remand and trial, we also direct the parties and the trial court's attention to the recent case of *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010), wherein the Kentucky Supreme Court has modified the open and obvious doctrine in premises liability actions by adopting the Restatement (Second) of Torts, § 343A(1) (1965).

For the foregoing reasons, the judgment of the Jefferson Circuit Court is reversed and this cause is remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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