RENDERED: FEBRUARY 6, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001958-MR

VICKI BRAY AND
ROBERT BRAY APPELLANTS

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 08-CI-00558

RONNIE DICK; MARY ELLEN
DICK; AND DOLLAR GENERAL
CORPORATION APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; J. LAMBERT AND TAYLOR, JUDGES.

LAMBERT, J., JUDGE: This is a premises liability action arising out of a slip and fall in the parking lot of a Dollar General store in Saline, Kentucky. Vicki and Robert Bray (the Plaintiffs or the Appellants), have appealed from the Pulaski Circuit Court's trial order and judgment and the order denying their motion for

apportionment under Kentucky Revised Statutes (KRS) 411.182, both entered on October 24, 2012, as well as from the September 21, 2012, partial protective order related to the testimony of a treating physician. Finding no reversible error, we affirm the orders on appeal.

In November 1999, Ronnie Dick and Mary Ellen Dick (the Defendants or the Appellees), as lessors, entered into a lease agreement with Dollar General Partners, as lessee, to lease a building to house a Dollar General store in Saline, Kentucky. The seven-year lease was to begin on May 1, 2000, and end on April 30, 2007, with two successive, five-year extensions under the same terms and conditions. Pursuant to the terms of the lease regarding maintenance, the Defendants were to maintain the exterior of the premises:

> V. MAINTENANCE. . . . . Lessor [the Defendants] shall maintain at its cost and expense in good condition and shall perform all necessary maintenance, repair and replacement to the exterior of the premises including, but not limited to, the roof, all paved areas, foundation, floors, walls, all interior and exterior utility lines and pipes, and all other structural portions of the building during the term of this lease and any renewal periods.

Section XXVII(b) of the lease addressed parking lot maintenance and provided that "[c]are and maintenance shall include lighting, cleaning, security, snow removal and striping, but shall not include capital repairs." Dollar General was responsible for maintaining the interior of the premises. The lease also included a hold harmless clause:

> XX. HOLD HARMLESS. Lessor [the Defendants] agrees to hold Lessee [Dollar General] harmless from any and all claims which may arise from, on, in or about the demised premises when such claims arise out of or are caused in whole or in part by a defective, dangerous, or unsafe condition of the premises, equipment, fixtures, or appurtenances required by law or the terms hereof to be maintained by the Lessor.

As with the maintenance provision of the lease, Dollar General agreed to hold the Defendants harmless from claims arising out of a condition in an area it was required to maintain.

On April 10, 2007, Ms. Bray fell in the Dollar General parking lot after she slipped on an unidentified substance and allegedly injured her knee. On April 4, 2008, Ms. Bray and her husband, Robert, filed a complaint against Dollar General Corporation; Valley Plaza, Inc.;[1] Ronnie and Mary Ellen Dick; and Kentucky Farm Bureau Insurance Company, alleging causes of action for negligence in failing to maintain the premises in a safe condition, a violation of the Kentucky Unfair Claims Settlement Practices Act and bad faith on the part of Kentucky Farm Bureau, and loss of consortium. They requested compensatory damages, punitive damages, costs, expenses, and attorney fees. The Plaintiffs moved to amend their complaint upon discovery that the property had been leased to Dollar General Corporation, Dollar General Partners, Dolgencorp, Inc., Dad Lease Management, Inc., and Dollar General Financial, Inc. This motion was granted on June 25,

[1] The complaint states that the Dicks owned Valley Plaza, Inc., the entity that owns the real property where the Dollar General store was located. Pursuant to a joint motion, Valley Plaza, Inc., was dismissed as a party to the action by order entered May 21, 2008, because that entity did not have any ownership interest in the property in question or any relationship to Dollar General.

2008. By order entered June 20, 2008, the circuit court granted Kentucky Farm Bureau's motion to sever the claims against it, and those claims were held in abeyance pending final adjudication of the Plaintiffs' tort claims.

In August 2008, Dollar General filed a motion for a declaratory judgment, seeking a ruling regarding the Defendants' obligations to defend and indemnify it pursuant to the terms of the lease. The lease provided that the Defendants were responsible for maintaining the exterior of the premises, including the paved parking lot. The lease also included an indemnification agreement holding Dollar General harmless from any claim arising from a personal injury on the part of the premises for which the Defendants had a maintenance obligation. In response, the Defendants argued that a factual question existed as to what the landlords' duties were under the lease. In addition, the Defendants argued that they did not have any liability, relying upon Mr. Dick's affidavit in which he stated that he did not clean the parking lot on a daily basis and that this task was performed by Dollar General employees. The Defendants cited to *Dutton v. McFarland*, 199 S.W.3d 771 (Ky. App. 2006), to support their argument that they could not be liable because they did not retain possession or control over the parking lot where the fall took place.

The circuit court held a hearing on February 9, 2009. At the hearing, the parties discussed the terms of the lease, including maintenance of the parking lot and the hold harmless provision. The Plaintiffs and the Defendants both argued that the clean up necessitated by the spill fell outside of the Defendants' responsibility to maintain the parking lot, while Dollar General contended that this

was a claim that arose from the area the Defendants, as landlords, had the duty to maintain and that the Defendants should be required to indemnify Dollar General and assume its defense. On April 9, 2009, the court entered a declaratory judgment granting relief to Dollar General. After reviewing the terms of the lease, the court stated:

> The terms of the lease are clear that the Lessor is holding the Lessee harmless for "any and all claims" which arise in a part of the premises the Lessor is responsible for maintenance and care of the parking lot including the cleaning on the part of the Lessor. Therefore, it was the intent of the parties that the Lessor be responsible for "any and all claims" which arose out of the parking lot since the Lessor was charged with maintaining the paved areas. The lease is more clear once paragraph XXVII b is read. This paragraph states the lessor's duties as to care and maintenance which include cleaning as well as responsibilities.
>
> Lessor's argument that the record needs to be more sufficiently developed to determine the duties of the parties contravenes the principle that the language of the contract controls unless there is an ambiguity. There is no ambiguity and the record is sufficiently developed.

Finding that the lease was clear as to the parties' respective responsibilities and liabilities, the court granted Dollar General's motion for a declaratory judgment.

In July 2009, Dollar General filed a motion seeking to compel the Defendants to assume its defense pursuant to the declaratory judgment order. By notice filed the next month, Defendants' counsel assumed the defense for Dollar General as requested. Almost three years later, in May 2012, Dollar General filed

a notice of substitution of counsel when its counsel of record was appointed as a United States Magistrate Judge.

On January 18, 2012, the circuit court entered a scheduling order with the trial to begin on October 8, 2012. The order provided that Kentucky Rules of Civil Procedure (CR) 26.03 expert witness identification must be provided sixty days prior to trial by the Plaintiffs, and forty-five days prior to trial by the Defendants.

On August 31, 2012, the Defendants filed a motion for a protective order to exclude the discovery and testimony of Dr. Daniel R. Yanicko, Jr., who had been treating Ms. Bray's knee condition. After mediation on August 29, 2012, counsel for the Plaintiffs contacted counsel for the Defendants to tell him that Ms. Bray had been seeing Dr. Yanicko for treatment and that he (counsel) had been unaware of this treatment until that time. After noting that the CR 26 disclosure deadline for the Plaintiffs had passed and the deposition deadline was September 7, 2012, the Defendants requested a protective order excluding Dr. Yanicko's testimony. In response, the Plaintiffs indicated that they planned to designate Dr. Yanicko as a fact witness and did not need to provide a CR 26 disclosure to include him as a witness. The circuit court entered a partial protective order on September 21, 2012, following an off-the-record meeting between the court and the parties in chambers earlier that month. The court permitted the parties to depose Dr. Yanicko prior to trial and permitted the witness to testify at trial by deposition, but only as to the treatment he had rendered and the cost of the treatment. Dr. Yanicko was not permitted to testify "to any KRE [Kentucky Rules of Evidence] 702 expert

opinions on causation, future medical care, and future medical expenses regardless of the said opinions being formed during his treatment of the Plaintiff, Ms. Bray, and of the fact Dr. Yanicko was not retained by the Plaintiff in anticipation of litigation or trial."

In their trial memorandum, the Plaintiffs stated that Dollar General and the Defendants were blaming each other for the fall and that they planned to seek a verdict of negligence. The Plaintiffs tendered jury instructions that included references to Dollar General as a defendant and an instruction assigning fault among Dollar General, Mr. Dick, and Ms. Bray.

In their trial memorandum, the Defendants stated that the lease placed responsibility for liabilities outside of the premises on the landlord, but noted that Dollar General employees cleaned the parking lot on a daily basis. The Defendants would pressure wash and repair or reseal the parking lot as needed. They also listed the discussion of Dollar General as a nominal party as a trial issue. In their tendered jury instructions, the Defendants listed only Ms. Bray and themselves in the apportionment question.

The jury trial commenced October 8, 2012. Prior to the beginning of the trial, the court held a conference in chambers that was not included in the record on appeal. As the court later set forth in its October 24, 2012, order, during the conference, the court addressed the apportionment issue as it applied to its earlier declaratory judgment and informed the parties that apportionment of fault between the Defendants and Dollar General was not appropriate because the terms of the

lease held the Defendants to be responsible for any claims arising from the parking lot. The court stated that as a matter of law, Dollar General had no responsibility or liability in the case because it was not a party to the action. The court went on to inform the jury that Dollar General could not be considered to be responsible under the lease for Ms. Bray's injuries because it was not a party. During their opening statement, the Defendants informed the jury about how the lease functioned between them and Dollar General and that there was no evidence that either the Defendants or Dollar General knew about the spill in the parking lot before Ms. Bray's fall or failed to use ordinary care in occupying the land.

Dollar General employee Deborah Irvine was the first witness to testify.[2] She was the assistant manager working at the Dollar General store on April 10, 2007, when Ms. Bray fell. Only one other person was scheduled to work the closing shift with her the day of the accident. Ms. Irvine stated that the traffic count for the store was generally 300 people per day, and her shift had the highest traffic count. She became aware of Ms. Bray's fall when she heard someone yell in the store that someone had fallen in the parking lot. Ms. Irvine was in the back of the store at the time. Ms. Irvine went outside, asked Ms. Bray if she was alright, and took her inside. Ms. Bray showed her the spot where she had fallen in the parking lot. Ms. Irvine described it as a puddle consisting of an oily, green substance. She agreed that the spot would have been slippery and that she would have considered it to be a hazard as a manager of the store. Ms. Irvine did not

[2] We shall only include summaries of the testimony from witnesses who are relevant to the issues raised on appeal.

complete an accident report or take a photograph of the spot. After Ms. Bray fell, the normal procedure would have been to put down kitty litter to absorb the spill. At that time, Ms. Irvine offered to call an ambulance or someone to help Ms. Bray, but Ms. Bray declined the offer.

Ms. Irvine testified that Dollar General did not have a maintenance crew. The parking lot was swept by the morning employees each day at 9:00 a.m., but she could not say that it had been done that morning because she was not there. The closing shift employees would not have inspected or swept the parking lot. If a customer or employee bringing in carts let them know something potentially hazardous was in the parking lot during the day, they would address any problem or spill. She had seen Mr. Dick's crew pressure wash the parking lot in the past as well as repave and restripe the lot, but she only saw them clean or inspect the parking lot four or five times during her nine years of employment. On cross-examination, she confirmed that she would not have called Mr. Dick to address a spot in the parking lot had she been aware of it, but rather would have gotten kitty litter off of the shelf to treat it. None of the employees was responsible for scanning the parking lot every five minutes or even every two or three hours.

Mr. Dick was the next witness to testify. He owns several rental properties, including the location where Ms. Bray was injured. On April 10, 2007, Mr. Dick did not clean or sweep the parking lot at Dollar General, and he could not offer any testimony about the condition of the parking lot that day. Pursuant to the terms of the lease agreement he had entered into with Dollar General, Mr. Dick, as the

lessor, was responsible for the exterior of the premises, including cleaning the parking lot, and he was reimbursed by Dollar General for performing such maintenance. Under the care and maintenance provision of the lease agreement, Mr. Dick would pressure wash the parking lot two times per year, in the spring and fall. He would also seal the parking lot every four to five years, stripe it as needed, and perform snow removal. He did not inspect the parking lot on a daily basis, and he was only present at the Dollar General once or twice per month. He had never cleaned up an oil spill at the Dollar General parking lot or sent out a maintenance team to do so, although he testified that it was common for customers to purchase motor oil and spill it in the parking lot.

Mr. Dick had entered into leases with nine different Dollar General stores, and the leases were similar. Daily maintenance and cleaning of the parking lot was performed by Dollar General employees, and Mr. Dick had never performed any of the daily parking lot maintenance and cleaning at any of the properties he leased. He had never received complaints, and he expressed satisfaction with the job Dollar General did to clean the parking lot. However, he understood from the lease that he was responsible for defending liabilities from the parking lot.

On the second day of the trial, the Plaintiffs filed a motion for an apportionment instruction as set forth in their tendered jury instructions. They pointed out that although the court had granted Dollar General's declaratory judgment motion and held that the Defendants were responsible for any damages arising out of the complaint, the court had not dismissed Dollar General as a

defendant and it therefore remained a nominal party. The Plaintiffs argued that the jury could find that Dollar General had voluntarily assumed the duty of cleaning the parking lot and breached that duty, causing Ms. Bray's injury. The jury could also have apportioned fault between the Defendants and Dollar General. But regardless of how fault was apportioned, the Defendants would be responsible for any of the fault that the jury assigned. The Plaintiffs labeled this as an "empty chair" defendant problem and sought an instruction to avoid a situation where the jury might believe that Dollar General was responsible for the fall but fail to return a verdict against the Defendants. An apportionment instruction would avoid the "empty chair" problem. The parties discussed the motion off the record, and the court denied the motion.

As referenced above, the court addressed this ruling in a written order entered October 24, 2012. The court held that Dollar General did not fall within the purview of KRS 411.182 because it was no longer a party to the case and had not otherwise entered into a settlement agreement. Rather, the court had held that Dollar General could not be held responsible for Ms. Bray's injuries pursuant to the terms of the lease. The court included the text of an admonishment it gave to the jury during the course of the trial:

> Ladies and gentlemen of the jury, in this video deposition you have heard that Dollar General Store is a defendant in this case. They are not a party however, as I have made a ruling of law that the lease is clear that the lessor, the Dicks, hold the lessee, Dollar General Store, harmless. In other words, Dollar General Store is not responsible for the maintenance, care, and cleaning of the

> parking lot. Therefore, I found by law that any and all claims arising therefrom should only be considered as to the party defendants Dicks, not Dollar General Store.

Pursuant to the terms of the lease agreement, the court determined that the Defendants were solely responsible for the cleaning of the parking lot and that fault could not be apportioned to Dollar General pursuant to KRS 411.182. Therefore, the court denied the Plaintiffs' motion for an apportionment instruction.

At the conclusion of the trial, the court instructed the jury without referencing Dollar General in the instructions based upon its earlier rulings. We note that during the discussion of the jury instruction, the Plaintiffs again objected to the exclusion of Dollar General from the apportionment instruction. In their closing argument, the Defendants argued there was no evidence that they knew, or reasonably should have known, that the substance was in the parking lot or how long it had been there, but there was evidence that Dollar General employees generally swept the parking lot each morning. The Plaintiffs objected when the Defendants argued that the jury would have to find that Dollar General or the Defendants knew about the presence of the substance that caused Ms. Bray to fall in order to find liability, arguing that the court had ruled that Dollar General was not a party. The court indicated that this argument would help the Plaintiffs establish their case based on the knowledge of the Dollar General employees, since the evidence had established that Mr. Dick was never on site at the premises. The court went on to issue an admonition to clarify that Dollar General was to be held harmless and was not responsible for the maintenance and cleaning of the parking

lot based on the terms of the lease. Therefore, the only claim would be against the Defendants, not Dollar General, as it was not a party. The Defendants went on to argue that neither Dollar General nor the Defendants knew or reasonably could have known about the substance in the parking lot because the substance Ms. Bray slipped on was sitting on top of the asphalt and had not been absorbed in the lot – in other words, it was a new spill – as opposed to a pothole or evidence of a long-term spill that had been absorbed into the pavement.

In their closing argument, the Plaintiffs stated that Mr. Dick's testimony that he had not seen the parking lot at Dollar General the day of Ms. Bray's fall was problematic for him pursuant to the terms of the lease requiring him to maintain the exterior of the premises. They argued that because Mr. Dick was aware of oil problems in the parking lot, his failure to inspect and clean the parking lot was unreasonable and he breached his duty to maintain a safe parking lot. Mr. Dick had the responsibility to maintain the parking lot, not Dollar General. The Plaintiffs also disputed the testimony from Ms. Irvine regarding the spill, asserting that she might have known about it, but was too busy to address it.

At the conclusion of the trial, the jury deliberated and returned a verdict in favor of the Defendants, finding on Question 1 that the Defendants had not failed in their duty to keep the parking lot in a reasonably safe condition. By separate orders entered October 24, 2012, the court entered an order setting forth its rulings on the Defendants' motions for directed verdict, which had been denied, as well as

the trial order and judgment setting forth the jury's verdict in favor of the Defendants and dismissing the Plaintiffs' complaint. This appeal now follows.

On appeal, the Plaintiffs (now the Appellants) continue to argue that they were entitled to an apportionment instruction pursuant to KRS 411.182 and that the circuit court erred in limiting Dr. Yanicko's testimony. The Defendants (now the Appellees) argue that the circuit court's rulings should be upheld.

The Appellants' first argument addresses whether the circuit court erred when it declined their request to include Dollar General in the apportionment instruction pursuant to KRS 411.182. The Appellants contend that our review is *de novo*, while the Appellees contend that our review is limited to whether the circuit court abused its discretion. We agree with the Appellants that our review is *de novo*. "Alleged errors regarding jury instructions are considered questions of law that we examine under a *de novo* standard of review." *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006), citing *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App. 2006).

In *Hamilton*, this Court provided additional direction regarding jury instructions:

> "Instructions must be based upon the evidence and they must properly and intelligibly state the law." *Howard v. Commonwealth*, 618 S.W.2d 177, 178 (Ky. 1981). "The purpose of an instruction is to furnish guidance to the jury in their deliberations and to aid them in arriving at a correct verdict. If the statements of law contained in the instructions are substantially correct, they will not be condemned as prejudicial unless they are calculated to mislead the jury." *Ballback's Adm'r v. Boland–Maloney*

> *Lumber Co.*, 306 Ky. 647, 652–53, 208 S.W.2d 940, 943 (1948).

Hamilton, 208 S.W.3d at 275.

In this case, the Appellants contend that Dollar General should have been included in the apportionment instruction. KRS 411.182 provides as follows:

> (1) In all tort actions, including products liability actions, involving fault of more than one (1) party to the action, including third-party defendants and persons who have been released under subsection (4) of this section, the court, unless otherwise agreed by all parties, shall instruct the jury to answer interrogatories or, if there is no jury, shall make findings indicating:
>
> > (a) The amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and
> >
> > (b) The percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under subsection (4) of this section.
>
> (2) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.
>
> (3) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under subsection (4) of this section, and shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.
>
> (4) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable, shall discharge that person from all liability for contribution, but it shall not be considered to discharge any other

> persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons shall be reduced by the amount of the released persons' equitable share of the obligation, determined in accordance with the provisions of this section.

In *Baker v. Webb*, 883 S.W.2d 898, 900 (Ky. App. 1994), this Court considered the application of KRS 411.182, stating:

> [T]he thrust of KRS 411.182, considered in its entirety, limits allocation of fault to those who actively assert claims, offensively or defensively, as parties in the litigation or who have settled by release or agreement. When the statute states that the trier-of-fact shall consider the conduct of "each party at fault," such phrase means those parties complying with the statute as named parties to the litigation and those who have settled prior to litigation, not the world at large.

In a subsequent case, the Supreme Court of Kentucky explained that the court or the jury must find the party at fault before an allocation may be made:

> Fault may not be properly allocated to a party, a dismissed party or settling nonparty unless the court or the jury first finds that the party was at fault; otherwise, the party has no fault to allocate. KRS 411.182; *Floyd v. Carlisle Const. Co., Inc.*, Ky. 758 S.W.2d 430, 432 (1988) ("If there is an active assertion of a claim against joint tortfeasors, and *the evidence is sufficient to submit the issue of liability to each*, an apportionment instruction is required whether or not each of the tortfeasors is a party-defendant at the time of trial." *Id.* (emphasis added)). The mere fact that a party has been sued or has settled does not permit the factfinder to allocate part of the total fault to that party. [Emphasis in original.]

Owens Corning Fiberglas Corp. v. Parrish, 58 S.W.3d 467, 471 n.5 (Ky. 2001). *See also Kentucky Farm Bureau Mut. Ins. Co. v. Ryan*, 177 S.W.3d 797, 804 (Ky. 2005), for further discussion of the comparative negligence doctrine.

In the present case, the Appellants argue that because Dollar General was named as a party to the action and had never been dismissed, Dollar General should have been included in the apportionment instruction as a nominal party. They argue that regardless of the relationship between Dollar General and the Appellees pursuant to the lease, Dollar General still owed a duty to its customers to keep the premises safe for its business invitees, including the parking lot area. A reasonable jury could have concluded that Dollar General breached its voluntarily assumed duty to keep the parking lot safe by cleaning and maintaining it on a daily basis, regardless of the provision in the lease assigning this responsibility to the Appellees. Therefore, the Appellants contend that the circuit court should have included Dollar General in the apportionment of fault and damages. The Appellees argue that apportionment is not an absolute right, but it is subject to other considerations, including situations where liability is precluded as a matter of law or where there is a question of whether a reasonable juror could determine an individual is at fault.

First, we must agree with the Appellants that Dollar General was not dismissed pursuant to the order ruling on the declaratory judgment motion and that it remained a party throughout the litigation. In its motion for declaration of rights, Dollar General merely sought a judgment that it was entitled to the benefit of the hold harmless provision in the lease with the Appellees. It did not move to be dismissed as a party in the motion, and the circuit court did not dismiss Dollar General in the order granting its motion. Rather, the Appellees assumed Dollar

General's defense, and the hold harmless clause would have prevented Dollar General from being responsible for any judgments arising out of an unsafe condition located outside of the building. As the Appellants state, the lease did not assign liability for Dollar General's negligence to the Appellees or eliminate Dollar General's legal duty of care to its business invitees.

Kentucky case law supports that a duty may be voluntarily assumed, even in opposition to the terms of an agreement. "[A] duty voluntarily assumed cannot be carelessly undertaken without incurring liability therefore." *Estep v. B.F. Saul Real Estate Inv. Trust*, 843 S.W.2d 911, 914 (Ky. App. 1992), citing *Louisville Cooperage Co. v. Lawrence*, 313 Ky. 75, 230 S.W.2d 103, 105 (1950). In *Estep*, this Court addressed snow removal at a mall department store in an appeal from a summary judgment. The Court recognized that terms of the lease between the mall and McAlpins required McAlpins to keep the sidewalks at issue free from snow and ice. However, the mall, not McAlpins, hired subcontractors to clean and salt the sidewalk. "Since they chose to so act, they must act in a reasonable manner or be liable for their failure." *Id*. The Court ultimately reversed the summary judgment based upon the mall's assumption of McAlpins' duty. *See also Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840, 847 (Ky. 2005) ("It is well established that a breach of a voluntarily assumed duty can give rise to tort liability."). The *Carneyhan* Court went on to state:

> Before such a voluntarily assumed duty can be found, one of three further preconditions must exist: (1) the failure to exercise reasonable care in performing the

> undertaking must increase the risk of harm; (2) the duty undertaken must already be owed to the third person by another; or (3) the third person must rely on the undertaking. *Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530, 538 (Ky. 2003); Restatement (Second) of Torts § 324A (1965). *See also* Restatement (Third) of Torts: Liability for Physical Harm § 43 (Proposed Final Draft No. 1, 2005).

Carneyhan, 169 S.W.3d at 848 n.2.

In the present case, there was certainly evidence introduced to establish that Dollar General had voluntarily assumed the duty to clean and maintain the parking lot on a day-to-day basis and possibly breached that duty when it failed to clean up the spill that caused Ms. Bray to fall. The lease did not absolve Dollar General of any and all liability; it merely required the Appellees to hold it harmless from any judgment arising from claims relating to the parking lot. In the order denying the motion for apportionment, the circuit court indicated that its earlier declaratory judgment had removed Dollar General as a party to the case and therefore was no longer in the purview of KRS 411.182. We disagree with the circuit court that Dollar General had been removed as a party based upon the declaratory judgment. Rather, Dollar General remained in the case as a nominal party. Therefore, the circuit court erred as a matter of law in omitting Dollar General from the apportionment instruction.

Despite this holding, we must nevertheless hold that this error was harmless in light of the circumstances of this case. Pursuant to CR 61.01,

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or

> in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Here, the jury decided that the Appellees had not breached their duty of care to the Appellants. We note that in closing arguments, the Appellees contended that neither they nor Dollar General knew or should reasonably have known about the substance in the parking lot, and the jury agreed with this argument in returning the verdict it did. Therefore, including Dollar General in the apportionment instruction, which is the argument before this Court, would not have made a difference in the result.

Based upon our holding above, we need not address the Appellants' second argument related to the testimony of Dr. Yanicko.

For the foregoing reasons, the judgment of the Pulaski Circuit Court is affirmed.

ACREE, CHIEF JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS.

BRIEF FOR APPELLANTS:

Robert E. Norfleet
Somerset, Kentucky

BRIEF FOR APPELLEES, RONNIE DICK AND MARY ELLEN DICK:

John B. Adams
Somerset, Kentucky