RENDERED: APRIL 28, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000826-MR

CBL & ASSOCIATES MANAGEMENT, INC.;
FAYETTE MALL SPE, LLC, as indemnities of
ERMC III PROPERTY MANAGEMENT COMPANY, LLC APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA GOODWINE, JUDGE
ACTION NO. 10-CI-04656

KAORU CHATFIELD APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; COMBS AND JONES, JUDGES.

COMBS, JUDGE: This is a premises liability case. Appellants contend that the trial court erred in ruling that Appellee, Kaoru Chatfield (Chatfield), had met her burden of establishing a dangerous condition and in allowing her counsel, to make comments during closing argument that allegedly violated an order *in limine.*

Chatfield claimed that she was injured on March 19, 2010, when she slipped and fell on an oily substance on the floor in a common area of Fayette Mall. Chatfield was walking between a Sunglass Hut kiosk and a Bath and Body Works store in the mall. She testified that the next thing she knew, her left leg was sliding and she was on the ground. She did the splits when she fell. Her shoe left a skid mark: "my shoe mark was so clear … there was some stuff on the ground. That's where my feet was [*sic*] sliding." The substance stained her skirt, which ripped from the fall. Chatfield testified that several people helped her get up, one of whom worked at Sunglass Hut. Chatfield testified that she was embarrassed and just wanted to leave, but she added: "… I was lucky didn't my head [sic] but next person wouldn't be lucky enough. So I turned and tried to – somebody who works for mall could do something -- to clean up." She searched for someone who worked at the mall.

Chatfield encountered a police officer and another man, Kenneth Howse, in front of a jewelry store. Howse was security director for Fayette Mall. He was employed by Appellant, ERMC, Inc., which provided security and housekeeping services. Chatfield testified that she told him "that there was a slippery area – need to get attention." According to Howse, Chatfield told him "there's a slick spot on the floor and she wanted to show me where it was. So we went over where it was. I rubbed my foot across it; I didn't feel anything slick." Howse testified that he "took the trash can that was right there and slid it over the spot."

Although Chatfield had a bruise on her elbow, she did not believe she needed medical attention at the time. She did not complete an incident report until the following day after she woke up in pain. The incident report reflects that there was an oily liquid on the floor, that Chatfield fell, that she hit her elbow, and that she stretched her legs "too far." Ultimately, she underwent hip replacement as a result of the injury she sustained.

The case was tried on March 23 and 24, 2015. The trial court denied Appellants' motion for directed verdict, and the jury found for Chatfield. The trial court entered a Judgment and Order on March 31, 2015. On April 9, 2015, Appellants filed a Motion for Judgment Notwithstanding the Verdict, which the trial court denied by Order entered May 12, 2015:

> Defendants now argue that Plaintiff failed to meet her initial burden of proof by establishing her fall occurred due to the existence of a dangerous condition in Fayette Mall. …
>
> Defendants cite … *Lanier v. Wal-mart Stores, Inc.,* 99 S.W.3d 431 (2003) and *Smith v. Wal-mart Stores, Inc.,* 6 S.W.3d 829 (Ky. 1999) ….
>
> [I]n their Motion [Defendants argue] that Plaintiff's evidence of the existence of a dangerous condition at Fayette Mall failed to meet the requisite evidentiary burden … and the Court should have entered a directed verdict in Defendants' favor. Defendants'[sic] make this argument and conclusion based on the fact that Plaintiff's sole evidence supporting her allegations of a dangerous condition came from her own testimony without substantiation. Defendants also cite to *Jones v. Abner,* 335 S.W.3d 471 (Ky. App. 2011) and argue that the circumstances of this case are, legally, no different ….

> Plaintiff distinguishes *Abner* from the facts in this case …. Further, Plaintiff argues that [*Lanier*] does not require that a Plaintiff have a parade of eye witnesses or a video of the fall; conversely, Plaintiff's testimony alone is sufficient to meet her burden. The Court agrees with Plaintiff and finds that the jury was properly instructed. Specifically, the jury was asked if Plaintiff had proven more likely than not that she fell in a substance on the floor. Ten of the 12 jurors agreed she had.

On June 1, 2015, Appellants filed a Notice of Appeal to this Court from the trial court's March 31, 2015, Judgment and its May 12, 2015, Order overruling their Motion for Judgment Notwithstanding the Verdict.

Before us, Appellants again contend that Chatfield failed to meet her burden of establishing a dangerous condition on the mall floor and that the trial court erred in denying their motion for directed verdict. They explain that the issue is "not one of duty of care but, instead, the necessary degree of evidence an injured party must produce to satisfy that an injury occurred due to the existence of a dangerous condition in accordance with … *Lanier v. Wal-mart Stores, Inc.*, 99 S.W.3d 431 (Ky. 2003)."

> Under *Lanier,* the customer retains the burden of proving that: (1) he or she had an encounter with a foreign substance or other dangerous condition on the business premises; (2) the encounter was a substantial factor in causing the accident and the customer's injuries; and (3) by reason of the presence of the substance or condition, the business premises were not in a reasonably safe condition for the use of business invitees. Such proof creates a rebuttable presumption sufficient to avoid a summary judgment or directed verdict, and shifts the burden of proving the absence of negligence, *i.e.,* the exercise of reasonable care, to the party who invited the injured customer to its business premises.

Martin v. Mekanhart Corp., 113 S.W.3d 95, 98 (Ky. 2003) (citations and internal quotation marks omitted).

Appellants assert that Chatfield's evidence was "specious at best"; *i.e.,* that the only evidence she offered at trial was her own testimony that she slipped and fell in an oily substance on the floor and that *Edwards v. Capitol Cinemas, Inc.,* 2003-CA-000246-MR, 2003 WL 23008792 (Ky. App. Dec. 24, 2003), "dealt with this exact issue." We disagree. *Edwards* is distinguishable on its facts. In *Edwards*, the plaintiff slipped and fell outside a theatre. She "only alleged that the pavement where she slipped was terrazzo, and that the theater may in the past have placed a rug along the terrazzo portion of the pavement." *Id.* at *1. Noting that "[s]everal courts … including this state's highest court, have held that terrazzo … is not inherently dangerous," this Court agreed with the trial court about the inference to be drawn from presence of an alleged rug -- "that [the defendant] believed the terrazzo to be slick and dangerous -- is, **without more**, merely speculative and thus would not support a jury verdict in [plaintiff's] favor." *Id.* (Emphasis added).

Appellants also rely on *Jones v. Abner*, 335 S.W.3d 471 (Ky. App. 2011). *Jones,* too, is distinguishable. There, plaintiff slipped while stepping into the bathtub to take a shower in her motel room. She alleged that the condition of the tub was unreasonably dangerous. In her deposition, plaintiff claimed that the tub was slicker than when she had showered before, but "she had 'no idea' why … ." *Id.* at 474. This court explained that plaintiff's "speculative hypothesis that a

'slick residue' was left in the bathtub after it was cleaned … does not satisfy our standards for summary judgment." *Id.* at 476 (footnote omitted).

By contrast, in the case before us, Chatfield did not merely hypothesize about what might have caused her to fall. Chatfield's sworn testimony established that she indeed had an encounter with a foreign substance on the business premises -- an oily substance on the mall floor. Chatfield was not required to identify the particular substance. In *Lanier,* "[t]he exact nature and source of the substance was never established." *Id.,* at 434. Howse testified that he did not feel anything slick when he went to the location *after* the fall. However, "a directed verdict in a personal injury action is proper only when there is no conflict in the evidence or it is susceptible of but one interpretation …. [T]he weight to be given the evidence and the credibility of the witnesses were questions to be determined by the jury." *Kroger Grocery & Baking Co. v. Diebold,* 276 Ky. 349, 124 S.W.2d 505, 507 (1939). Thus, it was the role of the jury to assess the conflict between the testimonies of Chatfield and Howse.

As we explained in *Peters v. Wooten*, 297 S.W.3d 55, 65 (Ky. App. 2009):

> The standard of review regarding a motion for a JNOV is a high one for an appellant to meet.
>
> > In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the

> strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ.
>
> *Taylor v. Kennedy,* 700 S.W.2d 415, 416 (Ky.App.1985). A reviewing court may not disturb a trial court's decision on a motion for a judgment notwithstanding the verdict unless that decision is clearly erroneous. *Bierman v. Klapheke,* 967 S.W.2d 16, 18 (Ky. 1998). The denial of a motion for a judgment notwithstanding the verdict should only be reversed on appeal when it is shown that the verdict was palpably or flagrantly against the evidence such that it indicates the jury reached the verdict as a result of passion or prejudice. *Id.* at 18–19.

Because none of the grounds to support a j.n.o.v. exists, we find no error in the trial court's denial of the motion.

Next, Appellants argue that the trial court committed reversible error in allowing Chatfield's counsel -- during closing argument -- to identify and to comment on individuals who did not testify at trial. According to Appellants, these individuals were identified in a chart that Chatfield's counsel presented to the jury referencing the testimony of Alex Collins, Vice-President of Operations for ERMC. Appellants contend that this commentary by counsel violated paragraph 3 of trial court's Order, which incorporated paragraph 12(k) of Chatfield's Motion *in limine* prohibiting "references to persons not being present in the court to testify

and be cross-examined." Appellants cite *T. C. Young Const. Co. v. Brown,* 372 S.W.2d 670, 674 (Ky. 1963). *Young* holds that "[t]he rule that … a party's failure to produce a witness is a fit subject for fair comment does not apply when there is nothing to indicate that the witness has material information not otherwise proved."

Chatfield explains that the chart showed "who was working for ERMC in March 2010, and what they offered regarding the policies and procedures for monitoring the floors and keeping patrons safe." The chart included the name of Lindy Belhoff, who was the on-site operations manager at Fayette Mall. Chatfield explains that Alex Collins testified he did not know what verbal training Belhoff was giving employees in 2010. Chatfield contends that counsel's fleeting reference in closing argument to Lindy Belhoff merely represented that his instructions to mall employees were unknown. Nothing of substance was discussed. Chatfield explains that it was *she* who had filed the motion *in limine* to prohibit *defense* counsel from referencing the proposed testimony of a witness not called at trial; thus, there was no admonition against her as to her course of conduct. Additionally, Chatfield asserts that the door "had been kicked wide open" by Appellants' counsel who referenced Belhoff multiple times during trial.

In its Order of March 11, 2015, the trial court granted Paragraph 12(k) of Chatfield's Motion *in limine* seeking to exclude "Commentary **by defense counsel** and/or witnesses concerning the following: … References as to persons not being present in the court to testify and be cross examined." (Emphasis

added). We agree with Chatfield that there was no violation of the trial court's *in limine* order. Any argument to the contrary is a distortion of the reality of the circumstances – as a matter of logic and of fact.

"It is a well settled principle that matters pertaining to closing arguments lie within the discretion of the trial court." *Hawkins v. Rosenbloom*, 17 S.W.3d 116, 120 (Ky. App. 1999). We find no abuse of discretion.

The Fayette Circuit Court's Judgment and Order upon the jury verdict and Order denying the Appellants' Motion for Judgment Notwithstanding the Verdict are affirmed.

JONES, JUDGE, CONCURS.

KRAMER, CHIEF JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

James G. Womack
Lexington, Kentucky

BRIEF FOR APPELLEE:

Sheila P. Hiestand
Louisville, Kentucky