IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

FILED

December 17, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

NANCY ARNOLD,	)	
	)	
Plaintiff/Appellant,	)	Shelby Circuit No. 61011 T.D.
	)	
vs.	)	
	)	
THE KROGER COMPANY,	)	Appeal No. 02A01-9701-CV-00025
	)	
Defendant/Appellee.	)	

APPEAL FROM THE CIRCUIT COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE

THE HONORABLE D'ARMY BAILEY, JUDGE

For the Plaintiff/Appellant:	For the Defendant/Appellee:
J. Logan Sharp	Betty Ann Milligan
Marshall Gerber	Thomas F. Preston
Memphis, Tennessee	Memphis, Tennessee

AFFIRMED

HOLLY KIRBY LILLARD, J.

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

DAVID R. FARMER, J.

OPINION

This is a slip and fall case. The plaintiff slipped on grapes on the floor of a grocery store. The jury found the plaintiff to be forty-nine (49%) percent at fault and the defendant grocery store to be fifty-one (51%) percent at fault, and found damages totaling $3,500.00. The plaintiff appeals the determination that she was negligent, as well as the amount of the damage award. We affirm.

On June 22, 1991, Plaintiff/Appellant Nancy Arnold ("Arnold") went to a store owned by Defendant/Appellee The Kroger Company ("Kroger") to shop for groceries. Her son and another young man went to the store with her. While walking past the salad bar, Arnold slipped and fell. Arnold testified that her right leg slid out from under her, her left leg twisted, and she landed on her knee. Arnold alleges that she slipped on some grapes on the floor. Arnold acknowledged that her view was not obstructed and that she was looking ahead of her instead of at the floor.

It is undisputed that grapes were seen on the floor after the accident. Arnold testified that she did not see the grapes until after she had fallen. Testimony indicated that the grapes were purple and that the floor was "light colored." Both parties estimated that approximately six grapes were on the floor at the scene of the accident.

After the accident, the co-manager of the store, Jonathan Timothy Myers ("Myers"), assisted Arnold. Arnold and her son testified that Myers mentioned that some youths had been throwing some grapes in that vicinity. At trial, Myers stated that he did not recall making such a statement. Myers completed a customer incident report on the accident, which did not mention anyone throwing grapes. Myers testified that if the alleged grape throwing incident had occurred, he would have recorded it in the report. Another Kroger employee at the scene of the accident, Elroy Bond ("Bond"), testified that he did not hear Myers make this comment.

At trial, the parties disputed the extent of Arnold's injuries. Arnold testified that she informed Myers that she had injured her knee. Myers did not recall Arnold's injury, and deferred to his report, which states, "aggravated her previous injury, (cracked ribs in the back)." Bond testified that Arnold complained only of back pain.

Arnold visited Dr. James L. Guyton ("Dr. Guyton") a few weeks after her injury. Dr. Guyton diagnosed a hyperflexion of the knee. He prescribed an anti-inflammatory and advised Arnold to wear a knee immobilizer. Arnold was given a note to be absent from work. About two weeks later, Dr. Guyton concluded that Arnold had reached maximum improvement, released her, and permitted her to work without restrictions. Dr. Guyton charged Arnold $253.00 for these visits.

Arnold continued to complain of pain and scheduled appointments with Dr. Guyton. In June of 1993, Dr. Guyton performed a diagnostic arthroscopy to determine the cause of this pain. Dr. Guyton's only objective finding was that Arnold suffered from chondromalacia in the tibiofemoral joint, caused by a previous accident in 1965. According to Dr. Guyton, most of Arnold's pain came from the patellofemoral joint, which was unaffected by the Kroger incident. Dr. Guyton, nevertheless, opined that the fall at the Kroger's store exacerbated Arnold's pain.

Dr. Guyton calculated Arnold's impairment rating as three (3%) percent to the lower extremity and one (1%) percent to the body as a whole. Dr. Guyton stated that Arnold suffers from a permanent disability "to the extent that it affects her livelihood."

At trial, Arnold contended that the accident affected her work performance and resulted in a loss of income. Arnold is owner and a representative for Arnold Instrument Company, which sells industrial equipment. Arnold claimed that her job performance was adversely affected by persistent pain associated with such tasks as climbing stairs, ladders, and catwalks, and sitting with her knees flexed for a prolonged period of time, such as in a car or behind a desk.

The jury attributed forty-nine (49%) percent of the fault for the accident to Arnold and fifty-one (51%) percent of the fault to Kroger. The jury assessed damages at $3,500.00. After the verdict, Arnold filed a motion for additur or, in the alternative, for a new trial. The trial court denied this motion without comment. Arnold now appeals.

On appeal, Arnold asserts that the trial court erred in allowing forty-nine (49%) percent of the fault to be attributed to her. Arnold also argues that the trial court erred in sustaining the amount of the jury's determination of damages.

Our review of the trial court's findings is ***de novo*** on the record with a presumption of correctness of the trial court's findings. Tenn. R. App. P. 13(d). "The verdict of a jury, approved by the trial judge in a personal injury case is entitled to great weight in the reviewing court in the absence of a showing of fraud or corruption." ***Brown v. Null,*** 863 S.W.2d 425, 430 (Tenn. App. 1993). A jury's findings of fact "shall be set aside only if there is no material evidence to support the verdict." Tenn. R. App. P. 13(d).

Acting as thirteenth juror, the trial judge independently weighs the evidence to determine whether the verdict is supported by the evidence. ***Ladd v. Honda Motor Co.,*** 939 S.W.2d 83, 105 (Tenn. App. 1996). "If called upon to act as a thirteenth juror following the filing of a motion for

a new trial, the trial judge simply approves a verdict without any comment, it is presumed by an appellate court that he has performed his function adequately." ***Miller v. Doe,*** 873 S.W.2d 346, 347 (Tenn. App. 1993).

The owner of a premises owes a duty to invitees. ***Eaton v. McLain***, 891 S.W.2d 587, 593 (Tenn.1994). This duty imposes an obligation to "maintain the premises in a reasonably safe and suitable condition" and includes "the responsibility of either removing or warning against any latent, dangerous condition on the premises of which the (owner is) aware or should have been aware through the exercise of reasonable diligence." ***Id.*** at 593-94.

Eaton set forth the following non-exclusive list of relevant criteria to consider in assigning a percentage of fault to each party:

> (1) the relative closeness of the causal relationship between the conduct of the defendant and the injury to the plaintiff; (2) the reasonableness of the party's conduct in confronting a risk, such as whether the party knew of the risk, or should have known of it; (3) the extent to which the defendant failed to reasonably utilize an existing opportunity to avoid the injury to the plaintiff; (4) the existence of a sudden emergency requiring a hasty decision; (5) the significance of what the party was attempting to accomplish by the conduct, such as an attempt to save another's life; and (6) the party's particular capacities, such as age, maturity, training, education, and so forth.

Id. at 592.

In previous cases, this Court has considered the relative fault of a plaintiff who slipped on a substance on the floor of a store. In ***Strawn v. SCOA Industries, Inc.,*** 804 S.W.2d 80 (Tenn. App. 1990), the plaintiff was injured in a similar accident. In this case the plaintiff slipped on a substance similar to either PineSol or Mr. Clean while holding a bath mat in Hills department store. ***Id.*** at 82. The only other evidence to forewarn her were the substance's smell and the bottle and the cap, which lay nearby. ***Id.*** The trial judge granted a directed verdict in favor of the plaintiff in regard to the issue of whether she was contributorily negligent. ***Id.***

On appeal, this Court found that the issue of the plaintiff's contributory negligence could not be characterized as an issue "where the facts are established by evidence free from conflict, and the inference from the facts is so certain that all reasonable men, in the exercise of a free and impartial judgment must agree upon it." ***Id.*** (quoting ***Frady v. Smith,*** 519 S.W.2d 584, 586 (Tenn. 1974)). Finding that a reasonable jury could conclude that the bath mat obstructed the plaintiff's vision, this Court reversed the trial court, stating that "[w]hether failure to see the spill under these circumstances was contributory negligence was obviously a question for the jury." ***Id.***

In ***Maxwell v. Red Food Stores, Inc.***, No. 88-110.II, 1988 WL 95273 (Tenn. App. Sept. 16, 1988), the plaintiff slipped on an unidentified substance in a grocery store. The substance was described as being approximately three-and-one-half inches in diameter and of a "creamy color and consistency." ***Id.*** at *2. The plaintiff appealed the trial court's decision to include an instruction regarding contributory negligence in its jury instructions.

This Court concluded that the evidence was sufficient for the jury to find the plaintiff contributorily negligent, reasoning:

> Plaintiff testified that she was walking along the store aisle and looking at display items immediately preceding her fall. She did not have a grocery cart, nor did she have anything else with her to distract her attention. She testified that there was nothing to obstruct her view of the floor. There is evidence that the substance on the floor, while somewhat the same color as the floor, was three-and-a-quarter to three-and-a-half inches in diameter. There is evidence in the record from which the jury could conclude that the plaintiff was guilty of contributory negligence in not watching where she was walking and in her failure to keep a lookout and failing to see the substance on the floor.

Id. at *5.

In ***Sherrell v. Food Lion, Inc.***, No. 01A01-9607-CV-00313, 1997 WL 5170 (Tenn. App. Jan. 8, 1997), the plaintiff slipped on a puddle in a grocery store. The plaintiff was wearing "flip-flop" sandals at the time of the accident and had her hands full. ***Id.*** at *1. The plaintiff's vision was not hindered and she was not distracted. ***Id.*** The jury attributed no comparative fault to the plaintiff. Affirming the verdict, this Court held that "how much water was on the floor and how easily it could have been seen" were issues for the jury to determine. ***Id.*** ***See also Karnes v. Shoney's of Knoxville, Inc.***, Anderson Law C/A No. 159, 1988 WL 86531 (Tenn. App. August 19, 1988) (holding that "whether a defect is such that an invitee coming on the premises should observe and avoid it is for the jury.").

Kroger argues that the fact that Arnold was walking "kind of fast," was not looking at the floor, and the fact that her vision was not obstructed is considered "material evidence" by which the jury could conclude that she was partly at fault. Tenn. R. App. P. 13(d). The jury could also have considered the number of grapes on the floor and the contrast of the dark grapes with of the light floor.

The evidence of negligence by the plaintiff in this case is slender, indeed. Grocery stores are generally designed to attract shoppers' attention to the merchandise rather than the floor. The testimony of both parties indicated that, at most, there were "six or seven" grapes on the floor.

However, it is undisputed that the grapes were dark, in contrast to the light floor. In addition, the plaintiff conceded that she was walking "kind of fast." Our review is limited to whether there is material evidence to support the jury's verdict. Tenn. R. App. P. 13(d). Under the circumstances, we must conclude that there was material evidence to support the jury's attribution of forty-nine (49%) percent of the fault to Arnold.

Arnold also appeals the trial court's denial of her motion for additur to the jury's award of $3,500.00 in damages. "In personal injury cases, the amount of damages is primarily for the determination of the jury, and next to the jury the most competent person to pass upon the issue is the Trial Judge." ***Buchanan v. Harris,*** 902 S.W.2d 941, 944 (Tenn. App. 1995). Therefore, the amount of damages awarded by the jury and approved by the trial judge is "entitled to great weight in the Court of Appeals." ***Id.***

In this case, there was evidence from which the jury could have concluded that most of Arnold's medical visits were either disingenuous or unrelated to the Kroger's accident. There was also evidence indicating that Arnold's claim for lost profits was speculative. Moreover, the issue of damages in this case turned in part on the credibility of the witnesses. Normally trial courts are "in the best position to judge the credibility of the witnesses since they have seen and heard the witnesses testify." ***Gaskill v. Gaskill,*** 936 S.W.2d 626, 633 (Tenn. App. 1996). Therefore, determinations made by the jury and the trial judge with regard to credibility are "entitled to great weight." ***Id.*** Considering the entire record, we find that the trial court did not err in denying Arnold's motion for additur.

The judgment of the trial court is affirmed. Costs on appeal are taxed against the Appellant, for which execution may issue if necessary.

HOLLY KIRBY LILLARD, J.

CONCUR:

W. FRANK CRAWFORD, P. J., W.S.

DAVID R. FARMER, J.