

JANET KAUFMAN and)
JESSE KAUFMAN,)
)
Plaintiff/Appellants,)
)
VS.)
)
OPRYLAND USA, INC.,)
)
Defendant/Appellee.)

Appeal No.
01-A-01-9604-CV-00165

Davidson Circuit
No. 93C-229

FILED
September 20, 1996
Cecil W. Crowson
Appellate Court Clerk

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CIRCUIT COURT OF DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

THE HONORABLE MARIETTA M. SHIPLEY, JUDGE

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AFFIRMED AND REMANDED

BEN H. CANTRELL, JUDGE

CONCUR:
TODD, P.J., M.S.
KOCH, J.

OPINION

In this slip and fall case the jury returned a verdict for the property owner. On appeal, the plaintiffs assert that the trial judge's comments while overruling a motion for a new trial show that she disagreed with the verdict; that in performing her duty as thirteenth juror she should have set the verdict aside. We affirm.

I.

After the jury's verdict, the plaintiff moved for a new trial on the following ground: "The law and evidence in this cause preponderates in favor of the plaintiffs and against the Defendant." After hearing arguments on the motion the trial judge stated:

THE COURT: Okay. Well, obviously, what both of you have particularly concentrated on is the original question of whether there was liability of Opryland. A great deal of the trial was taken up with the damages to Ms. Kaufman and whether she was injured in the first fall or injured in the second fall and so forth. So it appears to me this morning by looking at your briefs, and I've reviewed my notes particularly as to the liability part, that a lot of this does center around the fact of whether Ms. Thrasher did give notice or whether Opryland was on notice by that previous fall that there was a dangerous condition here.

And I think to me this obviously was a jury question. I don't think it could have been a directed verdict, so I can probably look at both sides of this question. But as the 13th juror, without really commenting further on the evidence because that seems to get us in trouble, I'm just going to say that I approve the verdict of the jury in this case.

Immediately after the court overruled the motion for a new trial, the defendant argued its motion for the award of discretionary costs. In the course of that discussion the trial judge stated "[I] do think they [the plaintiffs] had a legitimate claim."

II.

When a party moves for a new trial on the ground that the verdict is against the weight of the evidence, it is the duty of the trial judge to weigh the evidence and determine where the preponderance lies. *James E. Strates Shows, Inc. v. Jakobik*, 554 S.W.2d 613 (Tenn. 1977). If the trial judge is dissatisfied with the verdict it is her duty to set it aside. *Vaulx v. Tennessee Central Railroad Company*, 120 Tenn. 316, 108 S.W. 1142 (1907).

The appellate court's function is not to reweigh the evidence but to see if the trial judge properly reviewed the evidence and was satisfied or dissatisfied with the verdict. *Miller v. Doe*, 873 S.W.2d 346 (Tenn. App. 1993). If the trial judge approves the verdict without comment the appellate courts presume that she properly performed her function as thirteenth juror. *Holden v. Rannick*, 682 S.W.2d 903 (Tenn. 1984). If the trial judge makes comments on the record when overruling a motion for a new trial, the appellate court will examine the comments to determine if the thirteenth juror function has been properly carried out. *Id.*

In this case we think the trial judge properly performed her duty as thirteenth juror. We cannot infer from any of her comments that she did not weigh the evidence or that she disagreed with where the preponderance lay. The fact that the trial judge thought the plaintiffs had a legitimate claim does not indicate anything more than her belief that the claim was not frivolous.

The judgment of the trial court is affirmed and the cause is remanded to the Circuit Court of Davidson County for any further proceedings necessary. Tax the costs on appeal to the appellants.

BEN H. CANTRELL, JUDGE

CONCUR:

HENRY F. TODD, PRESIDING JUDGE
MIDDLE SECTION

WILLIAM C. KOCH, JR., JUDGE

