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Notice of Judgment

May 02, 2012

Docket Number: 2011 - CA - 1862

Cora Ann Ball and Elwyn Ball
versus
Capital City Cornichon Corporation

TO:

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You are hereby served with a copy of the opinion in the above-entitled case. Your attention is invited to Rule 2-18. Rehearing of the Uniform Rules of Courts of Appeal.

I hereby certify that this opinion and notice of judgment were mailed this date to the trial judge, all counsel of record, and all parties not represented by counsel as listed above.

Peggy F. Landry

CHRISTINE L. CROW
CLERK OF COURT

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1862

CORA ANN BALL AND ELWYN BALL

VERSUS

CAPITAL CITY CORNICHON CORP.

Judgment Rendered: MAY - 2 2012

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On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket No. 2009-11726

Honorable Raymond S. Childress, Judge Presiding

* * * * * *

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American Home Assurance Company

* * * * * *

BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

McCLENDON, J.

In this slip-and-fall case, the defendant restaurant and its insurer appeal the judgment of the trial court awarding damages in favor of the plaintiffs. The plaintiffs answer the appeal, seeking additional damages. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

This lawsuit arises from a slip-and-fall accident that occurred at the Piccadilly Restaurant (Piccadilly) in Slidell, Louisiana, on July 26, 2008. Upon entering the restaurant at approximately 3:00 p.m., Ms. Cora Ann Ball, who was 68 years old on the date of the accident, encountered a "wet floor" sign, walked around the sign, and stepped onto a floor mat toward the cashier. When she stepped onto the mat, Ms. Ball slipped and fell, landing on her right side and shoulder. As a result of the accident, Ms. Ball was treated for injuries to her right shoulder, neck, and low back, as well as for elevated blood pressure and headaches.

On March 26, 2009, Ms. Ball and her husband, Elwyn Ball, filed a petition for damages against Capital City Cornichon Corp., as the owner and operator of Piccadilly, and its insurer, American Home Assurance Company. Following a bench trial on the merits, held on March 17, 2011, written reasons for judgment were issued by the trial court on May 31, 2011, in favor of the Balls and against the defendants, awarding Ms. Ball $99,115.00 in past medical expenses, $5,000.00 in future medical expenses, and $125,000.00 for the mental anguish, pain and suffering, and loss of enjoyment of life sustained by Ms. Ball. The trial court further awarded Mr. Ball the sum of $15,000.00 for his loss of consortium claim. Judgment in accordance with the written reasons was signed on June 13, 2011. On July 12, 2011, a consent judgment was signed by the court amending the reasons for judgment and the prior judgment solely to substitute Piccadilly

Restaurants, LLC for Capital City Cornichon Corp. as the owner and operator of the Piccadilly Restaurant in Slidell, Louisiana where the accident occurred.[1]

Thereafter, the defendants suspensively appealed, and the Balls filed an answer to the appeal. In their appeal, the defendants contend that the trial court erred in finding that Piccadilly was liable to the Balls under LSA-R.S. 9:2800.6. The defendants further assert that the trial court erred in finding Ms. Ball's elevated blood pressure was related to the accident and in admitting the deposition of Gail Conerly without establishing that she was unavailable for trial. The Balls answered the appeal, requesting that the general damages awarded to Ms. Ball be raised to $200,000.00 and to Mr. Ball be raised to $25,000.00.

DISCUSSION

Louisiana Revised Statutes 9:2800.6 sets forth the burden of proof applicable to the claims at issue and provides, in pertinent part:

> A. A merchant owes a duty to persons who use his premises to exercise reasonable care to keep his aisles, passageways, and floors in a reasonably safe condition. This duty includes a reasonable effort to keep the premises free of any hazardous conditions which reasonably might give rise to damage.
>
> B. In a negligence claim brought against a merchant by a person lawfully on the merchant's premises for damages as a result of an injury, death, or loss sustained because of a fall due to a condition existing in or on a merchant's premises, the claimant shall have the burden of proving, in addition to all other elements of his cause of action, all of the following:
>
> (1) The condition presented an unreasonable risk of harm to the claimant and that risk of harm was reasonably foreseeable.
>
> (2) The merchant either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence.
>
> (3) The merchant failed to exercise reasonable care. In determining reasonable care, the absence of a written or verbal uniform cleanup or safety procedure is insufficient, alone, to prove failure to exercise reasonable care.

Thus, merchants are required to exercise reasonable care to protect those who enter the premises, and this duty extends to keeping the premises safe from

[1] Shortly after the initial judgment was rendered in this matter, counsel for Capital City Cornichon Corp. was notified that the actual owner of the Piccadilly Restaurant was Piccadilly Restaurants, LLC. Accordingly, following a hearing, the amended judgment was signed to correct the name of the owner and operator.

unreasonable risks of harm and warning persons of known dangers. A hazardous condition is one that creates an unreasonable risk of harm to customers under the circumstances. **Pena v. Delchamps, Inc.**, 06-0364, p. 4 (La.App. 1 Cir. 3/28/07), 960 So.2d 988, 991, writ denied, 07-0875 (La. 6/22/07), 959 So.2d 498.

The question of whether a condition presents an unreasonable risk of harm is subject to review under the manifest error standard. Thus, we must uphold the trial court's determination if we are convinced, from a review of the entirety of the record, that it has a reasonable factual basis. **Id.** Where there are two permissible views of the evidence, the factfinder's choice cannot be manifestly erroneous or clearly wrong. **Stobart v. State, Through Dep't of Transp. and Dev.**, 617 So.2d 880, 882 (La. 1993). In applying the manifest error standard of review, a trial court's credibility determinations are entitled to great deference. See **Pena**, 06-0364 at pp. 4-5, 960 So.2d at 991-92.

In this appeal, the defendants initially contend that the trial court erred in finding liability under LSA-R.S. 2800.6, as there was no connection between a prior spilled drink and the "green slimy substance" noticed by Ms. Ball under the mat when she fell. The defendants maintain that the Balls failed to establish that Piccadilly created or had actual or constructive notice of the green slimy substance or failed to exercise reasonable care as required under the statute.

Ms. Ball testified at trial that after she fell on her right side she sat up and saw what looked like a "green slimy substance" under the mat. She also stated that she felt a sticky substance on her legs. The assistant manager at Piccadilly on the date of the accident, Willie E. Morgan, Sr., testified that he had cleaned up a spill approximately ten to fifteen minutes before this accident in the same general area.[2] He admitted that the wet floor sign was present at the time Ms. Ball fell because he still considered the area dangerous. He also admitted in an earlier deposition that he kept the wet floor sign out because the area was "still a little bit too wet" to remove the sign.

[2] Mr. Morgan testified that the spill could have been tea, water, or maybe a drink.

In its written reasons, the trial court specifically found that "the slippery substance under the mat was there as a result of the inadequate clean up measures taken ten minutes prior to the accident when the assistant manager mopped the area." The court further determined that Piccadilly knew or should have known of the condition.[3]

Upon a thorough review of the record, we agree and find that the record sufficiently supports these factual findings. Therefore, they cannot be manifestly erroneous.

Defendants also assert that the trial court abused its discretion in admitting into evidence the deposition of Ms. Conerly, since there was no evidence presented to show that she was unavailable for trial. The defendants assert that because it was legal error to admit the deposition, such error interdicted the fact finding process requiring *de novo* review. Defendants contend that because the trial court evaluated the testimony of Mr. Morgan in light of the Balls' attempt to impeach his testimony with Ms. Conerly's deposition, defendants were substantially prejudiced by the admission.

Louisiana Code of Civil Procedure Article 1432 provides:

> A deposition to perpetuate testimony taken under Articles 1429 through 1431 may be used in any action involving the same subject matter subsequently brought in any court of this state, in accordance with the provisions of Article 1450.

Additionally, LSA-C.C.P. art. 1450 provides, in relevant part:

> A. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the Louisiana Code of Evidence applied as though the witnesses were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:
>
> * * *
>
> (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:
>
> (a) That the witness is unavailable.

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[3] The trial also found that there was no comparable negligence on the part of Ms. Ball as she was taking a path in observance of the wet floor sign when the accident occurred. Defendants did not appeal this finding.

In the parties' joint pre-trial order, the Balls listed Ms. Conerly as a witness for trial and reserved their right to use her deposition at trial should she be unavailable. On the day of trial, in discussing preliminary matters prior to the start of the trial, counsel for the defendants stated to the court that he was going to object to the use of excerpts from Ms. Conerly's deposition by the plaintiffs based on her unavailability for trial. Thereafter, counsel for the Balls stated that it was the defendants who noticed the deposition of Ms. Conerly for the purpose of discovery, including the perpetuation for use at trial. He further represented to the court that he tried to call Ms. Conerly after her deposition was taken at the telephone number she provided, and the number had been disconnected. Counsel also stated that he personally went to Ms. Conerly's residence to see if anyone was there so she could be served and saw that all of the furniture was gone and the residence was being painted. He stated that as a result there was no reason to request a subpoena. Counsel then offered the deposition, arguing that the witness was unavailable, and counsel for defendants objected. The trial court allowed the deposition to be admitted into evidence, stating it would give whatever weight to the testimony it thought was appropriate. The court concluded that "[i]t may even have very little weight."

A trial court has much discretion in determining whether to allow the use of deposition testimony at trial, and its decision will not be disturbed upon review in the absence of an abuse of that discretion. **State Through Dept. of Social Services Support Enforcement Services in the Interest of Bordelon v. Guichard**, 94-1795, p. 10 (La.App. 1 Cir. 5/5/95), 655 So.2d 1371, 1378, writ denied, 95-1405 (La. 9/15/95), 660 So.2d 454. Under the circumstances, we cannot conclude that the trial court abused its discretion.[4]

In their last assignment of error, defendants contend that the trial court erred in finding that Ms. Ball's elevated blood pressure was related to this

[4] We also note, as did the Balls, that the trial court, in its reasons for ruling, did not reference the deposition and apparently placed little or no weight on it. Thus, any error herein is, at best, harmless absent a showing that the trial court relied on these remarks in rendering its decision. Accordingly, even assuming that the deposition was improperly admitted, we find that it was harmless error.

accident and request that her medical damages be reduced by $14,645.04. Defendants point to Dr. Edward D. Frolich's deposition in which he testified that while Ms. Ball's episodes of elevated blood pressure were exacerbated by the accident, they were not caused by the accident.

Ms. Ball's treating physician, Dr. Christy Graves, testified in her deposition that while Ms. Ball had a history of hypertension, her blood pressure "had been pretty well controlled prior to the accident." After the accident, Dr. Graves found that Ms. Ball's blood pressure went back up and stayed up, which she correlated to the trauma Ms. Ball sustained. As a result, Dr. Graves recommended that Ms. Ball see Dr. Frolich, an expert in internal medicine with a specialty in hypertension. It was Dr. Frolich's opinion that Ms. Ball's underlying condition of hypertension was exacerbated by the accident due to the pain and anxiety involved.

The trial court concluded that Ms. Ball sustained an increase in blood pressure resulting from the accident. After a complete review of the record, we cannot say that the trial court manifestly erred or was clearly wrong. See **Stobart**, 617 So.2d at 882.

Lastly, the Balls answered the appeal, requesting an increase in the award of damages. They contend that the $125,000.00 awarded to Ms. Ball in general damages for mental anguish, pain and suffering, and loss of enjoyment of life and the $15,000.00 awarded to Mr. Ball in general damages for loss of consortium were both below the lowest amount that the trial court could have reasonably awarded.

The discretion vested in the trier of fact is "great," and even vast, so that an appellate court should rarely disturb an award of general damages. Reasonable persons frequently disagree about the measure of general damages in a particular case. It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court should increase or reduce the award. **Youn v. Maritime**

Overseas Corp., 623 So.2d 1257, 1261 (La. 1993), cert. denied, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994). See also LSA-C.C. art. 2324.1.

As a result of the slip and fall, Ms. Ball sustained injuries to her right shoulder, neck, and low back, as well as elevated blood pressure and headaches. The injury to her right shoulder included a torn rotator cuff that required surgery. A pre-existing neck condition was aggravated in the fall, resulting in increased neck pain and headaches. Ms. Ball also suffered low back pain as a result of the accident and, while minor in relation to her other injuries, caused her pain and affected her enjoyment of life. Mr. Ball testified that he has had to assist his wife and that all aspects of their married life have been affected.

Based on our thorough review of the record, we cannot say that the trial court abused its vast discretion in the amount of general damages awarded. We cannot conclude from the entirety of the evidence in this record, viewed in the light most favorable to the prevailing party in the trial court, that a rational trier of fact could not have fixed the awards of general damages at the level set by the trial court. Accordingly, we affirm the trial court's award of general damages in this matter.

CONCLUSION

For the above and foregoing reasons, we affirm the judgment of the trial court in favor of Cora Ann Ball and Elwyn Ball. Costs of this appeal are assessed to the defendants, Piccadilly Restaurant, LLC and American Home Assurance Company.

AFFIRMED.