Ola Mae THOMPSON *v.* AMERICAN DRUG STORES, INC.

96-615 932 S.W.2d 333

Supreme Court of Arkansas
Opinion delivered November 11, 1996
[Petition for rehearing denied December 23, 1996.]

1. NEGLIGENCE — SLIP-AND-FALL CASES — PROOF REQUIRED IN FOREIGN-SUBSTANCE CASES. — In slip-and-fall cases involving a foreign substance on the floor, the plaintiff must prove either that the presence of the substance upon the floor was the result of the defendant's negligence or that the substance had been on the floor for such a length of time that the defendant's employees knew or reasonably should have known of its presence and failed to use ordinary care to remove it; a plaintiff may also allege that a defendant has been negligent in cleaning or waxing a floor; if wax is applied to the floor, it must be in a manner that affords reasonably safe conditions for the proprietor's invitees; if such compounds cannot be used on a particular type of floor material without violation of the duty to exercise ordinary care for the safety of invitees, by reason of the dangerous conditions they create, they should not be used at all.
2. JURY — INSTRUCTIONS — WHEN REVERSAL MAY BE WARRANTED. — An appellant may not obtain a reversal on an instruction unless the instruction proffered by the appellant would have allowed the judge to properly instruct the jury; if a proffered instruction is as incorrect as the instruction it purports to replace, reversal is not warranted.
3. JURY — INSTRUCTION PROFFERED BY APPELLANT INCOMPLETE — COURT'S FAILURE TO ISSUE PROFFERED INSTRUCTION DID NOT WARRANT REVERSAL. — Had the court given the instruction proffered by appellant rather than the instruction that was given, the jury would not have been properly instructed; the version of the instruction proffered by appellant was as incomplete as the instruction given by the court; it did not contain the elements of proof necessary for a traditional, foreign-substance slip-and-fall cause of action; had the court given the proffered instruction, it would have erred; therefore, the court declined to reverse on this issue.
4. APPEAL & ERROR — RECORD ON APPEAL CONFINED TO THAT WHICH IS ABSTRACTED — ISSUE NOT REACHED. — The two arguments raised by appellant regarding evidentiary rulings by the trial court were not addressed on appeal due to deficiencies in the appellant's abstract; the abstract did not contain the appellant's objections to the evidence, the proffers of evidence, or the court's rulings; the record on appeal is confined to that which is abstracted; the court will not consider

matters contained in the argument portion of the brief as a substitute.

Appeal from Pulaski Circuit Court; *John Ward*, Judge; affirmed.

J.R. Nash, for appellant.

Wright, Lindsey & Jennings, by: *Alston Jennings, Jr.*, for appellee.

BRADLEY D. JESSON, Chief Justice. The appellant, Ola Mae Thompson, slipped and fell at an Osco Drug Store in Little Rock. The store was owned and operated by the appellee, American Drug Stores, Inc. Mrs. Thompson sued American Drug Stores for negligence, and the case went to trial. The jury found in favor of American Drug Stores. We affirm.

It was raining on the morning of May 24, 1993, when Mrs. Thompson entered the Osco Drug Store for the purpose of getting a prescription filled. A short distance inside the store, near the shopping carts, she fell. She was assisted to her feet by store employees, got her prescription filled, and left the store. A short time later, she went to the hospital, where she complained that she had hurt her knee, her neck, and her lower back in the fall. Over the next two years, she incurred over $13,000.00 in medical bills.

In July of 1995, Mrs. Thompson filed suit against American Drug Stores. She alleged that she had stepped in water on the floor, which had caused her to fall. She also claimed that American Drug had failed to warn its patrons that its floor became extremely slick when wet. When the case went to trial, Mrs. Thompson presented two alternative theories of recovery. Part of her proof was directed to her contention that she fell because there was water on the floor. She testified that, while she had not actually seen water on the floor, when she arose from the fall, the back of her dress was wet. The other part of her proof was directed to the theory that American Drug had negligently used a type of wax in its entry area which became extremely slick when wet. In support of this theory, Mrs. Thompson presented the testimony of Mr. Kelly Rogers. Rogers, who had been in the tile business for thirty-six years, said that the wax on the Osco floor "looked to me like it was an acrylic-type wax". He further testified that acrylic wax is extremely slick when wet. The appellee's expert, Billy Rutledge, testified that the type of wax used on the floor had a "wet look" but was actually very slip-resistant. On appeal, Mrs. Thompson argues that the trial court's

instructions to the jury did not encompass both of her theories.

The jury was instructed with the following version of AMI 3d 1105:

> Plaintiff contends that she slipped and fell on water which was present on defendant's premises. Defendant, American Drug Stores, Inc., owed plaintiff a duty to use ordinary care to maintain the premises in a reasonably safe condition. To establish a violation of this duty, plaintiff must prove either that the presence of the water upon the floor was the result of negligence on the part of the defendant, American Drug Stores, Inc., or that the defendant, American Drug Stores, Inc., knew of the presence of the water upon the floor, or that the water had been on the floor for such a length of time that the defendant, American Drug Stores, Inc., reasonably should have known of its presence and failed to use ordinary care to remove it.

Mrs. Thompson objected to the use of 1105 as follows:

> I object to 1105 because it tells the jury that they can disregard the wax and problems presented by the wax. The testimony of the defendant's expert was this wax on the floor, the wax makes it look like water on the floor, extremely difficult for plaintiff or any other people to see water on the floor. If we go simply with a foreign substance instruction, as it pertains to water, that tells the jury to disregard the problems presented to pedestrians by this wax and its "deep wet look" that they admitted they used by the defendant. I think negligence is already covered when we get to the foreign substance, it misleads the jury in what they can consider. I offer 1104 to be a better instruction.

AMI 3d 1104, which Mrs. Thompson proffered in place of 1105, read as follows:

> In this case, Ola Thompson was a business invitee upon the premises of American Drug Stores, Inc. American Drug Stores, Inc. owed Ola Thompson a duty to use ordinary care to maintain the premises in a reasonably safe condition.

[1] In her brief, the appellant states that, "the negligence of the defendant in letting water get on the floor and letting it stay there was a secondary consideration and certainly not the thrust of

the plaintiff's case. There is a definite and clear distinction between these two theories of negligence in fall cases. . . ." The appellant is correct.

In slip-and-fall cases involving a foreign substance on the floor, the plaintiff must prove either that the presence of the substance upon the floor was the result of the defendant's negligence, or, that the substance had been on the floor for such a length of time that the defendant's employees knew or reasonably should have known of its presence and failed to use ordinary care to remove it. *Wal-Mart Stores, Inc.* v. *Kelton*, 305 Ark. 173, 806 S.W.2d 373 (1991). A plaintiff may also allege that a defendant has been negligent in cleaning or waxing a floor. In *National Credit Corp.* v. *Ritchey*, 252 Ark. 106, 477 S.W.2d 488 (1972), we quoted, with approval, the following language from *Nicola* v. *Pacific Gas & Electric Co.*, 50 Cal. App. 2d 612, 123 P.2d 529 (1942):

> If wax, or, as in the present case, both wax and soft soap, are applied to the floor, it must be in such manner as to afford reasonably safe conditions for the proprietor's invitees, and if such compounds cannot be used on a particular type of floor material without violation of the duty to exercise ordinary care for the safety of invitees, by reason of the dangerous conditions they create, they should not be used at all.

We also impliedly recognized such a theory of recovery in *J.M. Mulligan's Grille, Inc.* v. *Aultman*, 300 Ark. 544, 780 S.W.2d 554 (1989), but said that the plaintiff did not prove her case.

[2, 3] The AMI 1105-based instruction given by the court did not encompass both of the appellant's theories. However, the appellant may not obtain a reversal unless the instruction that she proffered would have allowed the judge to properly instruct the jury. If a proffered instruction is as incorrect as the instruction it purports to replace, reversal is not warranted. *Ozark Kenworth, Inc.* v. *Neidecker*, 283 Ark. 196, 672 S.W.2d 899 (1984); *Dickerson Constr. Co.* v. *Dozier*, 266 Ark. 345, 584 S.W.2d 36 (1979). Had the court given the 1104-based instruction in place of the 1105-based instruction, the jury would not have been properly instructed. The version of AMI 3d 1104 proffered by Mrs. Thompson was as incomplete as the instruction given by the court. It did not contain the elements of proof necessary for a traditional, foreign-substance slip-and-fall cause of action. That, too, was a part of Mrs. Thomp-

son's case. Had the court given the proffered instruction, it would have erred. Therefore, we will not reverse on this issue.

[4] Mrs. Thompson makes two other arguments on appeal, both regarding evidentiary rulings by the trial court. She claims that, when she returned from the hospital on the day of her fall, she telephoned the Osco store and told them to get the water off the floor. Supposedly, an employee responded that they already had. The trial court granted American Drug's motion in limine regarding this testimony. The court also excluded the testimony of expert witness Kelly Rogers regarding the types of tile or floor covering used by other stores, which, in his opinion, should have been used by Osco. We are unable to address these issues due to deficiencies in the appellant's abstract. The abstract does not contain the appellant's objections to this evidence, the proffers of evidence, or the court's rulings. Some of the material which should have been abstracted is set out in the argument portion of the appellant's brief. However, the record on appeal is confined to that which is abstracted. We will not consider matters contained in the argument portion of the brief as a substitute. *In the Matter of the Estate of Brumley*, 323 Ark. 431, 914 S.W.2d 735 (1996); *Wynn* v. *State*, 316 Ark. 414, 871 S.W.2d 593 (1994).

Affirmed.

NEWBERN and ROAF, JJ., dissent.

DAVID NEWBERN, Justice, dissenting. The majority opinion correctly points out that AMI 3d 1105 was a proper instruction to the jury in view of the evidence that Mrs. Thompson's fall may have been caused by a foreign object on the floor of the drug store, *i.e.*, water. It is also correct for the majority to say that, had the Trial Court refused to give AMI 3d 1105 and given only the much more general AMI 3d 1104, that would have been error.

As the majority seems to concede, however, AMI 3d 1104 would have been a proper instruction, as it would have brought before the jury the question of negligence in the use of a particular kind of wax on the floor where Mrs. Thompson fell. The proper course of the Trial Court would have been to give both instructions.

Although Mrs. Thompson asked that 1104 be given in place of 1105, I would not punish her for the error in asking that 1105 not

be used. She proffered 1104. It would have been a correct instruction, and I think she has demonstrated prejudice as a result of the instruction not being given. She proffered the instruction and explained why it was appropriate. *See* Ark. R. Civ. P. 51; *City of Little Rock* v. *Webber,* 298 Ark. 382, 767 S.W.2d 529 (1989). It should have been given.

I respectfully dissent.

ROAF, J., joins.