IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED

December 17, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

KENNETH MICHAEL BAILES	)	KNOX COUNTY
	)	03A01-9605-CV-00157
Plaintiff-Appellee	)	
	)	
	)	
v.	)	HON. DALE C. WORKMAN,
	)	JUDGE
	)	
PUBLIC BUILDING AUTHORITY	)	
	)	REVERSED, DISMISSED
Defendant-Appellant	)	and REMANDED

PAUL D. HOGAN, JR., OF KNOXVILLE FOR APPELLANT

T. SCOTT JONES OF KNOXVILLE FOR APPELLEE

OPINION

Goddard, P.J.

The Public Building Authority of the City of Knoxville appeals a judgment of $26,873.10 rendered against it in favor of Kenneth Michael Bailes as a result of injuries suffered by him when he fell while exiting a malfunctioning elevator in the City-County Building. In making the award the Trial Court allocated 90 percent of the negligence causing the accident to the City and 10 percent to Mr. Bailes.

The Building Authority raises three issues on appeal as follows:

I. Whether the Defendant owed Plaintiff a duty to warn, when the danger was open and obvious, and known by Plaintiff.

II. Alternatively, whether Plaintiff's negligence exceeds 50% and bars him from recovering from Defendant.

III. Whether damages should have been awarded in this case when there was no dispositive evidence as to causation at trial.

At the outset, we recognize that our review of the Trial Court's finding of fact is de novo with a presumption of correctness unless the evidence preponderates to the contrary, Rule 13, Tennessee Rules of Appellate Procedure, and we will adhere to this mandate in our disposition of this appeal.

On February 19, 1992, about 8:20 a.m. Mr. Bailes, who is employed by the office of the Fire Marshall of the City of Knoxville, entered elevator number six in the City-County Building at a lower level, intending to go to his office on level five. He was joined in the elevator by a co-employee, who intended to exit at level four. As the elevator ascended it began to shake. It did stop at the fourth floor where the co-employee left the elevator. Mr. Bailes remained on the elevator. After the doors closed the elevator began to shake violently and the doors began opening and closing rapidly. Mr. Bailes was finally able to get the doors to remain open by pressing the open

door button. Upon their opening, he, in getting out of the elevator, which was some six to 12 inches above the fourth floor level, fell, injuring himself.

The Building Authority contends it was guilty of no negligence because it had no duty to Mr. Bailes. This assertion is based upon a traditional premise liability defense that the injured party is as cognizant of the danger as is the owner of the premises.

In support of its insistence the City cites the recent unreported case of this Court, Shope v. Radio Shack, filed in Knoxville on December 7, 1995.

Shope, however, recognizes a well known exception to the general rule:

> We take note that there were exceptions to the open and obvious rule long before the adoption of comparative fault by the Supreme Court. By way of example, an exception to the open and obvious rule is the "momentary forgetfulness" rule. See City of Knoxville v. Cox, 103 Tenn. 368, 53 S.W. 734 (1899); Mayor and Aldermen v. Cain, 128 Tenn. 250, 159 S.W. 1084 (1913) and Peters v. Tennessee Cent. Ry., 167 S.W.2d 973 (Tenn.1943). Under the "momentary forgetfulness" rule, a plaintiff could avoid the bar of contributory negligence provided he could establish that the lapse of memory resulted from reasonable cause. We perceive no reason why the same reasoning cannot be applied under the concept of comparative fault. It would logically follow that if the defendant was a substantial factor in causing the momentary forgetfulness, he could be chargeable with negligence which would require a comparison of the plaintiff's negligence against the defendant's negligence in accordance with the rules adopted in McIntyre.

We believe included in this exception, or perhaps an additional exception, is where the negligence of the landowner caused the injured party to act while in a shock or panic as occurred here.

We also believe the foregoing exception applies to the facts of this case. It is undisputed that the elevator in which Mr. Bailes was riding was malfunctioning just prior to the accident and that he, as is understandable, was in a state of panic. When he was finally able to get the elevator doors to stay open he obviously exited with alacrity, which, as already stated, comes within the exception above noted.

Moreover, we point out that the elevator was not in a static condition as was the sales display case in Shope, but was moving.

In issue two the Building Authority takes exception to the Trial Court's allocation of negligence. The record discloses that there had been previous problems, not only with elevator six, but with other elevators, and that previous malfunctions had been remedied by Montgomery Elevator Company, which manufactured the elevator and with which the Building Authority had a maintenance contract.

The proof also shows that this particular elevator passed an inspection by the State on February 10, less than two weeks before the accident and, as already noted, had not malfunctioned since that date. Because the proof is undisputed as to these points, we believe the evidence preponderates against a finding of any negligence on the part of the Building Authority, much less the 90 percent found by the Trial Court, and as a consequence the Building Authority should be absolved of liability.

In conclusion as to this issue, we question whether Mr. Bailes was guilty of any negligence and that the proximate cause of the accident most likely was the negligence of employees of Montgomery Elevator in their maintenance of the elevator, or of the employees of the State in their inspection.

In light of our disposition of issue two, it is unnecessary that we discuss issue three. However, we deem it appropriate to do so in the event the Supreme Court should accept an appeal and disagree with our treatment of issue two.

In support of its third issue, the Building Authority contends that Mr. Bailes was unable to show a causal connection between the injury he received when he fell upon leaving the elevator and the disability and medical expenses he subsequently incurred.

It is true that Mr. Shope had experienced previous back problems as a result of an automobile accident and had undergone surgery to repair a ruptured disc some six months before his fall from the elevator. It is also true that on September 22, 1992, subsequent to the accident, he had fallen or was knocked down as a result of an attack by a pit bull. Nevertheless, the proof is undisputed that Mr. Bailes received injuries to his mouth and teeth as a result of the accident and incurred a dental bill in the amount of $4859. There is also proof that he lost wages in the amount of $5000 and incurred another medical bill as a result of treatment by Dr. Joe D. Beals in the amount of $3774.84 between March 10, 1992, when he first contacted Dr. Beals and the date of the pit bull attack. This, coupled with Dr. Beals' testimony that in his opinion Mr. Bailes aggravated his pre-existing back condition, we conclude that the evidence does not preponderate against an award of $25,000 plus dental expenses found by the Trial Court to have been as a result of the fall from the elevator.

For the foregoing reasons the judgment of the Trial Court is reversed and the cause dismissed. The case is remanded for collection of costs below, which are, as are costs of appeal, adjudged against Mr. Bailes.

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Houston M. Goddard, P.J.

CONCUR:

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Don T. McMurray, J.

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Charles D. Susano, Jr., J.