VIOLET VOSS,

Plaintiff/Appellee,

v.

LOWE'S HOME CENTERS, INC.,

Defendant/Appellant.

Appeal No.
01-A-01-9706-CV00255

Maury Circuit
No. 6840

FILED

August 24, 1998

Cecil W. Crowson
Appellate Court Clerk

COURT OF APPEALS OF TENNESSEE

APPEAL FROM THE CIRCUIT COURT FOR MAURY COUNTY

AT COLUMBIA, TENNESSEE

THE HONORABLE WILLIAM B. CAIN, JUDGE

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AFFIRMED AND REMANDED

WALTER W. BUSSART, SPECIAL JUDGE

OPINION

This is a premises liability suit in which the plaintiff recovered in the trial court for injuries sustained after falling on the grounds of one of the defendant's stores. The jury awarded the plaintiff damages for medical expenses as well as for pain and suffering. The defendant has appealed challenging, among other things, the sufficiency of the evidence regarding negligence and the actions of the trial judge in his function as thirteenth juror. After a careful review of the record, we affirm the decision below.

I. Standard of Review

"Where there has been a verdict for the plaintiff approved by the Trial Judge, in considering a defendant's motion for a directed verdict the Court of Appeals must look at all the evidence, construe it most favorably to the plaintiff, take the plaintiff's evidence which supports his theory as true, discard all countervailing evidence and indulge all reasonable inferences to uphold the verdict." ***Tennessee Liquefied Gas Corp. v. Ross,*** 450 S.W.2d 587, 588 (Tenn. Ct. App. 1968). Pursuant to Rule 13(d) of the Tennessee Rules of Appellate Procedure, the duty of this court is to determine whether there is any material evidence to support the verdict.

II. Facts

The proof in its most favorable light to the plaintiff shows that on May 26, 1995, Violet Voss severely fractured her right wrist when she fell at a curb ramp while shopping in the garden center at Lowe's Home Centers in Columbia, Tennessee. Ms. Voss testified that she never saw the curb ramp as it was not marked. She was wearing glasses and "thought" she would have seen it had it been marked. She testified that there were many flowers all around the area and that she fell while trying to go from one side of the curb cut to the other to reach certain of these flowers. She testified that, though she was looking at the flowers as she walked, she would have noticed the curb cut had it been marked.

At the time of the accident, Ms. Voss was eighty-one years old. The proof was that she suffered from bilateral cataracts. The optometry record of Dr. James Felch reflected that Ms. Voss's best corrected vision was 20/50 in one eye and 20/60 in the other. While she had quit driving a few years before, the proof was that, before the accident, Ms. Voss lived in and kept up a house on her own. She planted flowers, shopped for groceries and went out to restaurants with her daughter. She testified that though age and arthritis slowed her down, she made an effort to do these things.

Testimony as well as exhibits revealed that the ramp where Plaintiff fell was cut into the sidewalk and that there were potted plants and shrubs placed around the ramp area. Ms. Voss's daughter, Billie Jean Lovett, testified that there was no way to get to where certain wares were being sold from the sidewalk part of the garden department without going across the curb ramp. Ms. Lovett was walking three feet behind her mother when her mother fell. She testified that she did not notice the drop-off at the curb ramp as there was no visible indicator of the drop-off. On cross-examination, Ms. Lovett agreed that she and her mother had been to the garden center at Lowe's on six or seven prior occasions. She said that neither of them had ever fallen over the curb cut nor even noticed it before. Ms. Lovett also agreed that the flower displays were four or five feet from where Plaintiff fell on the curb.

Regarding Plaintiff's health, Ms. Lovett testified that her mother suffered from osteoporosis and arthritis of the hips. However, she said that her mother had no difficulty walking. Ms. Lovett did state that her mother had difficulty reacting to sensory information or surroundings such that Ms. Lovett would often help her mother with steps.

David Cox was also shopping at Lowe's when Ms. Voss fell. A former employee at Lowe's, Mr. Cox described the curb ramp as follows:

> It's like a handicapped curb coming -- like going across the street. It's got a little off ramp, and it's concrete. And the curb is the same color as the concrete, and it had all the flower pots, the concrete flower pots, and everything was more or less blocking the curb. And if you don't watch what you're doing, you will step off of it.

He said that he had "caught [him]self a few times stepping off . . . looking at the flowers and . . . getting into looking at them." Mr. Cox testified that the curb was about four or five inches tall and that it was the same color as the concrete. In addition, Mr. Cox's wife, Pamela, testified that the concrete on the sidewalk and on the ramp was all the same color such that "[y]ou couldn't tell from the walkway to the ramp the difference in it."

Plaintiff put on the expert proof of an engineer Robert Warren who had inspected the curb cut where Ms. Voss fell. It was his opinion that the type of ramp placed persons "at risk, because as they walk along the sidewalk, parallel to the curb and perpendicular to the ramp, they could injure themselves by stepping off this unprotected edge." In addition, Mr. Warren testified that when there is a change of grade of greater than half an inch in the sidewalk, there should be some indicator to persons walking and here there was none. He stated that Defendant's ramp did not comply with the 1991 version of *An Illustrated Handbook of the Handicapped Section of the North Carolina State Building Code* ("the *Illustrated Handbook*" or "the North Carolina code") which was essentially the same as the 1986 version of the same code. The parties had stipulated that the 1986 version of the North Carolina code was "the law that the [parties] and the Court are bound to look to determine whether or not Lowe's was in compliance or not in compliance or whether it should have been in compliance with the building code." The problem with the sidewalk is that it allowed movement over the section with the grade differential without any indicator of that grade differential. In order to comply, Mr. Warren opined that there should have been a hand-rail or a non-walking surface to prevent perpendicular travel over the curb. Mr. Warren explained the danger as follows:

> Someone walking down the sidewalk could have stepped off the -- there's a reason that's important. When you're walking this way, coming in and out of a building, you would anticipate stepping off the curb onto a drive or a street or something like that. This is something that you wouldn't anticipate unless you happened to be looking right down at your feet as you were walking.

On cross-examination, it was pointed out to Mr. Warren that § 3.2(a)(2)

of the North Carolina code required "at least one accessible route that connects accessible buildings, common facilities elements and functional spaces that are on the same site." Mr. Warren agreed therefore that if one route did provide access to this area, then it would not be necessary that the ramp in question comply. Mr. Warren testified that, at the time of his inspection, there was a gate and chain-link fence blocking the route which did comply with the North Carolina code; however, he admitted that he did not know whether the route was accessible on the day that Plaintiff fell. A certificate of occupancy was signed by the Building Commission and Mr. Warren acknowledged that this indicated that, at least according to the Commission, the building met the minimum building code specifications. He testified that the building was occupied in 1986. He testified that the building violated the 1982 version of the *Illustrated Handbook* which, according to Plaintiff, shows that the curb violated the many versions of the code.

In response to cross-examination, David Stanfill, an employee at Lowe's and a defense witness, stated that it would have been feasible to paint the curb bright yellow or orange. He also said that it would have been feasible to place plants or planters or some other non-walking surface back along the sidewalk where the curb extends into the walking path. Another Lowe's employee, Michael Cook, agreed that painting the curb yellow would have made it more visible. Mr. Cook testified that there were two ramps at the front of the Lowe's through which many handicapped people entered the store. When asked what kind of handicapped persons had used this area to enter the store, Mr. Cook replied that "there [had] been people in wheelchairs and people with walkers and canes." He said that the place where Ms. Voss fell was used primarily to bring products into the garden center area though he figured that it could be used as a handicap ramp.

At the close of all the proof, the jury returned a general verdict of $18,000 for medical expenses and of $100,000 for pain and suffering. The jury apportioned 100% of the fault to Defendant. In the trial court's order denying Defendant's Motion for New Trial and J.N.O.V., the court stated its approval of the verdict as the thirteenth juror. However, it "note[d] that if the court had authority to impose its own assessment of comparative fault on the part of the Plaintiff, . . . the court would find the Plaintiff to have been at fault in the

percentage amount of 25%, however, absent that authority the court approves the verdict of the jury."

III. Issues

In this appeal, we address the following issues:

> 1. Whether there exists legally sufficient evidence that Defendant was negligent?
>
> 2. Whether the court erred in its function as a thirteenth juror when it failed to grant a new trial after expressing dissatisfaction with the apportionment of fault to Defendant?

IV. Negligence

In its first issue, Defendant contends that Plaintiff failed to present legally sufficient evidence as to the duty element of her negligence claim. The gist of Defendant's argument on appeal is that the curb cut where Plaintiff fell was open and obvious to the reasonable observer. As such, Defendant possessed no duty to warn of this condition. In making its argument, Defendant focuses on the specific duty to warn which is a part of the more general "duty to maintain the premises in a reasonably safe and suitable condition." ***Eaton v. McLain***, 891 S.W.2d 587, 593-94 (Tenn. 1994).

Much of the evidence in the record regarding negligence related to the curb's non-compliance with the *Illustrated Handbook*. The trial court instructed the jury that non-compliance of a duty imposed by a statute is in and of itself negligence or, in other words, negligence per se. The court charged that § 68-120-204 of the Tennessee code was in effect in 1986, when Defendant's building was first occupied. That statute provides as follows:

> Any public building which is constructed, enlarged, or substantially altered or repaired after July 1, 1983, shall be designed and constructed pursuant to specifications, approved by the responsible authority, making such building accessible to and usable by physically handicapped persons. The minimum specifications, except as provided in § 68-120-205, shall be either the CABO/ANSI Handicap Code or the 1976 edition of An Illustrated

> Handbook of the Handicapped section of the North Carolina state building code, any amendments or supplement thereto or any edition which supersedes the 1976 edition as such edition, amendments or supplements are in effect as the state architect determines by rule.

Tenn. Code Ann. § 68-120-204(a)(1)(1996). The court then gave the jury the Tennessee code's definition of "physically handicapped" which is "handicapped on account of sight disabilities, hearing disabilities, disabilities of incoordination, disabilities of aging, and any other disability that significantly reduces mobility, flexibility or perceptiveness." Tenn. Code Ann. § 68-120-203(1996).

Next, the trial court read to the jury portions of the North Carolina code stating that "it was the duty of the Defendant . . . to maintain its building in compliance with the following provisions of the North Carolina code." The court then read the pertinent part of the code to the jury as follows:

> Section 3.1, General Requirements: Site access shall be accomplished by properly designed curb cuts, ramps, stairs, or other site elements. This shall include access to outdoor facilities subject to use by the public.
>
> Section 3.1D, Changes in level up to one-fourth inch may be vertical and without edge treatment. Changes in level greater than one-half inch shall be accomplished by means of ramps that shall comply with the requirements of Chapter 4, Part 1.
>
> Section 3.2, Site Access: . . . Sites shall be provided with at least one accessible route that connects accessible buildings, common facilities, elements and functional spaces that are on the same site.
>
> Section 2.1B, Accessible route means a continuous, unobstructed path connecting all accessible elements and spaces in a building or facility that can be negotiated by a person with a severe disability using a wheelchair and that is also safe and useable by people with other disabilities.
>
> Section 2.1E, Disability: Disability is a limitation or loss of use of a physical, mental, or sensory body part or function.
>
> [Section] 3.3., Public walks shall have a finished surface, that is fixed, firm, and non-slip. The continuous common surface shall not be interrupted by steps or abrupt changes in level greater than one-half inch. Where walks . . . cross driveways, or parking lots, they shall blend to a common level by means of curb cuts or sloped areas whose grading shall not exceed 12 inches vertical rise for each 12 feet horizontal run.

After reading the above laws to the jury, the court charged the jury that it was the

duty of Defendant to comply with these laws. It stated that "if you find that Lowe's violated any of the laws read to you, you will find that violation was negligence" which requires a finding against Defendant if there is also proximate cause.

Finally, the court instructed the jury that, in order to consider an alleged statutory violation, the jury "must first decide the question of whether Ms. Voss was a person intended to be protected by the statute . . . [in other words, whether she was] a physically handicapped person as defined by Tennessee Code Annotated [§] 68-120-203." The court stated that "[i]f you find that she was not so physically handicapped, the handicapped law does not apply in this case. If you find that Ms. Voss was so physically handicapped, you must then consider whether this Lowe's store, at the time the project was submitted to the responsible authority for final approval of construction, met the minimum standard of building accessibility set forth in Tennessee Code Annotated [§] 68-120-204 and *[A]n [I]llustrated [H]andbook of the [H]andicapped [S]ection of the North Carolina [S]tate [B]uilding [C]ode.* If you find that Lowe's did not meet these minimum standards, you must find that Lowe's was negligent."

It is true, as the trial court charged, that "[t]he standard of conduct expected of a reasonable person may be prescribed in a statute and, consequently, a violation of the statute may be deemed to be negligence per se." ***Cook by and through Uithoven v. Spinnaker's of Rivergate, Inc.***, 878 S.W.2d 934, 937 (Tenn. 1994). Once a defendant is shown to have violated such a statute, "the proof must show that the injured party was within the class of persons whom the legislative body intended to benefit and protect by the enactment of that particular statute or ordinance." ***Smith v. Owen***, 841 S.W.2d 828, 831 (Tenn. Ct. App. 1992). Finally, after establishing negligence per se, "the plaintiff must of course show that such negligence was the proximate cause of the injury." ***Id.***; ***see McIntyre v. Balentine***, 833 S.W.2d 52, 59 (Tenn. 1992).

In this case, we acknowledge that the proof showed that this particular curb ramp violated certain of the standards embodied in the *Illustrated Handbook* and made applicable to Tennessee cases by § 68-120-204 of the Tennessee code.

The proof showed that a ramp was cut into the sidewalk with a vertical drop off on either side. Expert testimony revealed that the curb cut represented a change in the grade of the sidewalk of greater than half an inch. Mr. Warren, the expert, as well as Plaintiff, her daughter and Mr. and Ms. Cox all stated that there was no indication of the change in grade. Section 3.3 of the North Carolina state building code provides that "[t]he continuous common surface shall not be interrupted by steps or abrupt changes in level greater than one-half inch." Section 3.1D states that "[c]hanges in level up to one-fourth inch may be vertical and without edge treatment. Changes in level greater than one-half inch shall be accomplished by means of ramps."

However, despite this particular curb ramp's non-compliance, it is clear that the North Carolina code only requires one accessible route. Defendant's employee, Michael Cook, testified that there were two ramps at the front of the Lowe's through which many handicapped people entered the store. The ramp where Ms. Voss fell was not used as an entrance for handicapped persons; rather, it was used primarily by Lowe's employees to bring products into the garden center area. This evidence is uncontroverted. Therefore, the construction of this particular ramp has nothing to do with access to Lowe's by handicapped persons. Since the applicability of the North Carolina code relates to handicapped access, it cannot be the vehicle for negligence per se under these facts.

Therefore, we find that the North Carolina code is irrelevant to the outcome of this case. Defendant has raised an issue regarding whether the appropriate edition of the North Carolina state building code was stipulated below. Due to our conclusion that negligence can not be based on a violation of Tennessee Code Annotated § 68-120-203, and thus non-compliance with the North Carolina state building code, we find that it is unnecessary to address this issue.

However, our finding with regard to negligence per se does not preclude a finding that Defendant is liable to Plaintiff under a theory of common law negligence. In addition to the jury instructions on Tennessee Code Annotated § 68-120-204 and the North Carolina code, the trial court also charged the jury

with regard to the general principles of negligence concerning premises liability. For clarification of the legal duties involved in premises liability under these general principles, we turn first to the supreme court's opinion in ***Eaton v. McLain***, 891 S.W.2d 587 (Tenn. 1994). There, the plaintiff was an overnight guest in the defendants' home. ***Id.*** at 589. She injured herself by falling down stairs when she awoke in the night and, without turning on any lights, opened a closed door to what she thought was a bathroom but what was instead a stairway down to a basement. ***Id.*** The supreme court stated that the plaintiff was owed "a duty of reasonable care under all the circumstances. Therefore, the [defendant homeowners] owed [the plaintiff guest] a duty to maintain the premises in a reasonably safe and suitable condition; this general duty included the responsibility of either removing or warning against any latent dangerous condition on the premises of which the [homeowners] were aware or should have been aware through the exercise of reasonable diligence." ***Id.*** at 593-94.

The court began by "examin[ing] the concept of duty generally in order to determine whether the [homeowners'] duty to maintain reasonably safe premises included the specific responsibility to leave the lights on, lock the basement door, or warn of the location of the staircase." ***Id.*** at 594. The court found that there had been no showing that the defendants reasonably knew or should have known of the probability of an occurrence such as the one which caused the plaintiff's injuries. ***id; see Doe v. Linder Constr. Co.***, 845 S.W.2d 173 (Tenn.1992). "In order for the [homeowners] to be charged with the duty to leave on the light in the hall and to lock the basement door, they must have been able to reasonably foresee that [the plaintiff] would get out of bed in total darkness, walk across the hall, and step into the basement stairwell, all without turning on any lighting whatsoever." ***Eaton***, 891 S.W.2d at 594.

The court next addressed the issue of whether there existed a duty of the homeowners to warn the plaintiff of the location of the stairs. ***Id.*** at 595. The court stated that "[a]lthough Tennessee law provides that premises owners owe invitees the duty to warn of latent or hidden dangers, this duty does not arise if the danger is open and obvious." ***Id.*** (citing ***Jackson v. Tennessee Valley Auth.***, 413 F. Supp. 1050, 1056 (M.D. Tenn.1976) and ***Odum v. Haynes***, 494 S.W.2d

795, 800 (Tenn. Ct. App.1972)). Concluding that there was no duty to warn, the court cited a similar decision from another jurisdiction which found no duty to warn a plaintiff of a relocated staircase: "[W]e find no hidden or concealed defects or perils in the placement of the stairway. Stairs leading from hallways are common in homes and even to one temporarily in a strange home, an owner would not ordinarily realize an unknown stairway involved an unreasonable risk." ***Eaton***, 891 S.W.2d at 596 (citing ***Schlicht v. Thesing***, 151 N.W.2d 119, 121 (Wis. 1967)).

In a recent supreme court case, the court revisited the "open and obvious" doctrine in the wake of comparative fault. ***Coln v. City of Savannah***, 966 S.W.2d 34 (Tenn. 1998). There, the court joined the majority of other jurisdictions which have limited the traditional "open and obvious" rule (where no duty arises if a danger is open and obvious) in favor of the Restatement approach. The court clarified that the "open and obvious" analysis is first upon duty, and only after a duty is imposed are the circumstances analyzed under principles of comparative fault. ***Id.*** at 42. The court held as follows:

> That a danger to the plaintiff was "open and obvious" does not, *ipso facto*, relieve a defendant of a duty of care. Instead, the duty issue must be analyzed with regard to foreseeability and gravity of harm, and the feasibility and availability of alternative conduct that would have prevented the harm. The factors provided in the Restatement (Second) of Torts, § 343A relate directly to the foreseeability question; in short, if the foreseeability and gravity of harm posed from a defendant's conduct, even if "open and obvious," outweighed the burden on the defendant to engage in alternative conduct to avoid the harm, there is a duty to act with reasonable care. The circumstances of the case are then analyzed under comparative fault.

Id. at 43.

With guidance from the court's opinions in ***Eaton*** and these other cases, we must analyze the duty owed by Defendant Lowe's to Plaintiff. We reiterate that in all premises liability cases, the duty owed by the premises owner to an invitee is "a duty of reasonable care under all the circumstances." ***Eaton***, 891 S.W.2d at 593-94; ***see also Jones v. Exxon Corp.***, 940 S.W.2d 69, 72 (Tenn. Ct. App. 1996). The issue becomes whether the general duty of reasonable care which encompasses the duty to maintain reasonably safe premises included the

specific responsibility of constructing this particular curb cut in a different matter or of warning Defendant's patrons of the existence of the curb cut.

The scope of a premises owner's duty is grounded upon the foreseeability of the risk involved. In ***Eaton***, the Court stated as follows:

> The term reasonable care must be given meaning in relation to the circumstances.... Ordinary, or reasonable, care is to be estimated by the risk entailed through probable dangers attending the particular situation and is to be commensurate with the risk of injury.... The risk involved is that which is foreseeable; a risk is foreseeable if a reasonable person could foresee the probability of its occurrence or if the person was on notice that the likelihood of danger to the party to whom it owed a duty is probable. Foreseeability is the test of negligence. If the injury which occurred could not have been reasonably foreseen, the duty of care does not arise, and even though the act of the defendant in fact caused the injury, there is no negligence and no liability. 'The plaintiff must show that the injury was a reasonably foreseeable probability, not just a remote possibility, and that some action within the [defendant's] power more probably than not would have prevented the injury.' (citations omitted).

Eaton, 891 S.W.2d at 594 (quoting ***Doe v. Linder Constr. Co.***, 845 S.W.2d 173, 178 (Tenn.1992)).

We believe that there was material evidence to support a finding that Defendant Lowe's could have reasonably foreseen that one of its patrons would fall on the curb ramp as it existed at the time Plaintiff fell. It was undisputed that the curb ramp was not marked in any way -- the concrete was all the same color and there was not in place a non-walking surface to indicate the different levels. Employees of Lowe's agreed that it would have been feasible to paint the curb a bright color and that doing so would have made it more visible. A former employee of Lowe's, Mr. Cox, testified that if one were not watching for the drop-off, he or she would step off it. Mr. Cox said he had almost fallen a few times while looking at the flowers. Furthermore, according to the testimony of Plaintiff and her daughter, the flowers were set up in a manner which invited, even required, customers to walk in the area of and across the different levels of sidewalk. It is certainly reasonable to anticipate that patrons would do so while looking at the flowers. Plaintiff's own testimony was that she was looking at the

flowers when she fell but that she would have noticed the curb cut had it been marked.

Finally, there is the testimony of Plaintiff's expert that this type of ramp placed persons at risk because as they walk along the sidewalk, they could step off the unprotected edge. Unlike a grade differential occurring at an entrance or exit to a building where people anticipate stepping off the curb onto a drive or street, persons would not anticipate the location of this drop-off. Consequently, they would not notice it unless they "happened to be looking right down at [their] feet as [they] were walking."

Regardless of the existence of the North Carolina code, the evidence supports a finding that injury on this curb ramp was reasonably foreseeable. Lowe's therefore had a duty to either prevent patrons from walking over the curb cut by placing a rail or some other object in their way or to warn patrons of the drop off by painting it a different color or otherwise calling patrons' attention to the different levels.

Furthermore, we reject Defendant's contention that its duty is removed because the curb cut is open and obvious. In light of the evidence presented below, reasonable minds could certainly differ as to whether the condition was open and obvious. Indeed, it is the evidence that the curb ramp was not readily noticeable which supports the existence of a duty here. The jury considered that evidence and could have so concluded. Moreover, even if the curb cut were an open and obvious danger, the test for the existence of a duty is whether the foreseeability and gravity of harm posed by the defendant's conduct outweigh the burden upon the defendant to engage in alternative conduct. ***Coln v. City of Savannah***, 966 S.W.2d 34, 43 (Tenn. 1998). As stated above, the evidence supports that the danger here was reasonably foreseeable and that alternative conduct on the part of Lowe's could have easily reduced that danger.

As noted above, Defendant has raised an issue regarding the appropriate edition of the *Illustrated Handbook* to have been applied below. The gist of Defendant's argument is that the 1976 edition of the *Illustrated Handbook*

controlled the 1986 construction of the Lowe's store. Therefore, the parties' stipulation at trial that the 1986 version of the handbook applied was in error. Because we conclude in this opinion that the jury verdict could be upheld on a theory of common law or general negligence, we chose not to address the issue of the applicable version of the *Illustrated Handbook.* Nonetheless, Defendant contends that the jury's consideration of negligence per se and the standards embodied in the *Illustrated Handbook* so permeated the proceedings that the jury's judgment was more probably than not affected. In other words, it is the Defendant's position that, regardless of this court's decision to uphold the judgment on a general negligence theory, evidence of the 1976 version of the handbook prejudiced the verdict.

Rule 36 of the Tennessee Rules of Appellate Procedure gives the following guidance as to the effect of errors:

> A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process.

"Under this rule an error is prejudicial if it 'more probably than not' affected the judgment." Tenn. R. App. P. 38(b) advisory commission comment. Defendant alleges in its appellate brief that the "1976 law did not require planted, grassed, or gravel-covered areas adjacent to a return curb nor tactile warning surfaces (either on the walking or adjacent surfaces)." Defendant asserts therefore that the jury considered significant immaterial evidence that "more probably than not" affected the verdict. We disagree.

Plaintiff's proof of negligence was that injury was reasonably foreseeable on this curb ramp which was unmarked in any way. This proof consisted of testimony that the ramp was not marked in any way such that it was difficult to notice, that the ramp would have been more visible if painted, that a former employee had nearly fallen on it a few times, that Plaintiff specifically would have noticed the ramp had it been marked. Assuming arguendo that the court erred by allowing the jury to know the additional requirements of the 1986 law, the proof still supports that the curb ramp posed a foreseeable risk apart from

these additional requirements. We can not say that this evidence more probably than not affected the judgment in light of the significant amount of material evidence supporting the existence of negligence under general principles of liability.

V. Thirteenth Juror

Finally, we address Defendant's contention that the court erred in its function as thirteenth juror when it failed to grant a new trial after expressing dissatisfaction with the jury's attributing 100% of fault to Lowe's. At the hearing on Defendant's Motion for a New Trial, the trial court made the following statement:

> The only problem that I've had with the case is the problem of the allocation of percentages at 100 percent versus nothing. That is a source of bother, but I do not know what the authority is. In keeping with [Plaintiff's attorney's] suggestion, which is probably as good as anything else, if I have the authority to reposition the findings as to percentage allocation, it would be 25 percent for the Plaintiff, 75 percent for the Defendant. If I do not have that authority, then the Court will approve the verdict of the jury as to the allocation of percentages.

Defendant concedes that the trial court did not have the authority to reallocate fault, since apportioning fault is a function of the fact finder. However, it is Defendant's position that the court should have granted a new trial in light of the dissatisfaction that he expressed regarding the jury's verdict.

In his or her capacity to act as thirteenth juror, "the trial judge is under a duty to independently weigh the evidence and determine whether the evidence preponderates in favor of or against the verdict." ***Shivers v. Ramsey***, 937 S.W.2d 945, 947 (Tenn. Ct. App. 1996). If the judge gives reasons for granting or refusing to grant a new trial, "this court looks to them only for the purpose of determining whether he passed upon the issues, and was satisfied or dissatisfied with the verdict thereon." ***Holden v. Rannick***, 682 S.W.2d 903, 905 (Tenn. 1984) (quoting ***Cumberland Telephone & Telegraph Co. v. Smithwick***, 79 S.W. 803, 805 (Tenn. 1904)). "If a trial judge, in discharging his duty as a thirteenth juror, makes comments which indicate that he has misconceived his duty as a

thirteenth juror, an appellate court must reverse the trial judge and remand for a new trial." ***Holden***, 682 S.W.2d at 905.

In the order overruling the motion for a new trial, the trial court expressly stated that he approved the verdict. After providing that the court had reflected on all the evidence presented at trial, the order included the following language:

> The court notes that if the court had authority to impose its own assessment of comparative fault on the part of the Plaintiff, that the court would find the Plaintiff to have been at fault in the percentage amount of 25%, however, absent that authority the court approves the verdict of the jury.

In addition, the judge noted at the hearing that if he did not have the authority to reallocate fault, he approved the verdict. He commented, "[t]he alternative would be to let my worries about 100 percent versus nothing compel a new trial. And I don't believe that the law would require me to do that, nor would I if I were given the choice."

The question becomes whether the law does requires a trial judge who disagrees, not with the verdict, but with the jury's allocation of fault, to grant a new trial in his capacity as thirteenth juror. We find that it does if the trial judge's disagreement rises to the level of his finding that the evidence preponderates against the jury's allocation of fault. In the recent case of ***Turner v. Jordan***, 797 S.W.2d 815, 816 (Tenn. 1997), the supreme court held "that the trial court may not reallocate the comparative fault after weighing the evidence as the thirteenth juror, **but must instead grant a new trial**." ***Id.*** (emphasis added). In so doing, it cited the Florida Supreme Court as follows:

> Since liability is inextricably bound up with the apportionment of damages under the doctrine of comparative negligence, this matter must be left to the jury. When the percentages of liability are contrary to the manifest weight of the evidence, the trial court must treat this defect as an error in the finding of liability itself. The only remedy is to order a new trial on all issues affected by the error.

Id. at 823 (citing ***Rowlands v. Signal Constr. Co.***, 549 So.2d 1380 (Fla. 1989)).

Commenting on the jury's allocation of 100% fault to Defendant, the court below articulated this as a "worry" and "a source of bother" to him. He never

said that the evidence preponderated against the 100% apportionment of fault to Defendant. In fact, he stated that he ". . . approves the verdict . . ." and would not grant a new trial if "given the choice." We find therefore that the trial judge did not err by not granting a new trial.

VI. Conclusion

In conclusion, we hold that there was material evidence supporting the verdict against Defendant Lowe's on a theory of common law/general negligence. Further, the trial court approved the allocation of fault by the jury. The case is therefore affirmed and this appeal dismissed. The costs are assessed against Defendants and the case is remanded to the trial court for enforcement in accordance with this opinion.

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WALTER W. BUSSART, SPECIAL JUDGE

CONCUR:

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HENRY F. TODD, PRESIDING JUDGE, M.S.

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WILLIAM C. KOCH, JR., JUDGE