[Cite as *Turk v. NovaCare Rehab. of Ohio*, 2010-Ohio-6477.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94635

ANNA MARIE TURK, ET AL.

PLAINTIFFS-APPELLANTS

vs.

NOVACARE REHABILITATION OF OHIO, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-684984

BEFORE: Vukovich, J.,* Gallagher, A.J., and Jones, J.

RELEASED AND JOURNALIZED: December 30, 2010

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JOSEPH J. VUKOVICH, J.:*

{¶ 1} Plaintiffs-appellants, Anna Marie and Frank Turk (collectively "plaintiffs") appeal the trial court's award of summary judgment in favor of defendants-appellees, NovaCare Rehabilitation of Ohio, Inc. ("NovaCare") and 731 Beta, Ltd. ("Beta") (collectively "defendants"). For the reasons set forth below, we affirm.

{¶ 2} On February 17, 2009, plaintiffs instituted this action against defendants seeking damages for alleged injuries suffered as a result of a row of lockers at NovaCare falling on top of and pushing Ms. Turk against a wall. In the complaint, plaintiffs asserted claims of negligence and loss of consortium.

After timely answers were filed, the parties engaged in discovery, which established the following undisputed facts.[1]

{¶ 3} On October 31, 2005, Ms. Turk was a physical therapy patient at NovaCare. Ms. Turk was in the women's locker room when a row of lockers fell on top of her and pushed her against the adjacent wall. Plaintiffs were unable to establish during discovery the cause of the lockers' collapse but maintain that NovaCare was negligent for maintaining a "defective and dangerous condition" by not fastening the lockers to the wall. NovaCare leases its facility from Beta, which owns the property where NovaCare is situated.

{¶ 4} Following discovery, NovaCare and Beta filed separate motions for summary judgment on June 17, 2009. The trial court granted Beta and

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[1] In this case, defendants did not file the deposition transcript of Deborah Singer and plaintiffs did not file the transcript of Michael Webster. Nevertheless, the parties rely on these depositions in their briefs arguing for, and against, summary judgment.

"When a movant relies on deposition testimony in support of a motion for summary judgment, the depositions should be filed with the court. However, the opposing party's failure to object to the submission of unfiled deposition testimony, particularly when the opposing party uses that same transcript without objection, cannot be grounds for error." *Dinnin v. Bencin* (July 30, 1998), Cuyahoga App. No. 73141 (internal citations omitted).

Pursuant to Ohio law, in this case, we accept as facts those parts of the Singer and Webster deposition transcripts attached to the briefs because neither party objected to the unfiled transcripts and relied on the same testimony in their opposing motions.

"We are, however, limited to accepting as facts only those parts of the depositions that were actually appended to the briefs of the parties either in support of, or in opposition to, the various motions for summary judgment." *Urbanek v. All State Home Mtge. Co.*, 178 Ohio App.3d 493, 2008-Ohio-4871, ¶2, 898 N.E.2d 1015.

NovaCare's motions summary judgment on October 19, 2009 and January 13, 2010, respectively.

{¶ 5} Plaintiffs now appeal and present five assignments of error for our review. Because we find their first, third, and fourth assignment of errors related, we address them simultaneously. Their first provides:

{¶ 6} "The Trial Court Erred As a Matter of Law When it Granted Beta's and Nova Care's Motions for Summary Judgment Because the Evidence Before It Established that Genuine Issues of Material Fact Remained as to the Requisite Elements of 731 Beta's and NovaCare's Negligence."

{¶ 7} Plaintiffs' third assignment of error states:

{¶ 8} "The Trial Court Erred As a Matter of Law When it Granted Beta's and NovaCare's Motion for Summary Judgment Because Beta, as the Owner of the Premises Where the Injury Occurred, and NovaCare, as Tenant, were Jointly Responsible for the Hazard that Caused Appellants' Injuries."

{¶ 9} Their fourth assignment of error asserts:

{¶ 10} "The Trial Court Erred As a Matter of Law When It Granted 731 Beta's Motion for Summary Judgment Because 731 Beta's Lease with NovaCare Demonstrates That They Were in Control of the Premises at Issue."

{¶ 11} Within these assignments of error, plaintiffs argue that the trial court erred in granting summary judgment because genuine issues of material fact remained as to NovaCare and Beta's negligence as well as Beta's responsibility

as lessor of the premises. Finding plaintiffs' arguments unpersuasive, we affirm the trial court's granting of summary judgment.

{¶ 12} With regard to procedure, we note that we employ a de novo review in determining whether a trial court properly granted summary judgment. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241; *Zemcik v. La Pine Truck Sales & Equip. Co.* (1997), 124 Ohio App.3d 581, 585, 706 N.E.2d 860.

{¶ 13} Prior to the granting of summary judgment, a court must determine that "(1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party." Civ.R. 56(C); *State ex rel. Dussell v. Lakewood Police Dept.*, 99 Ohio St.3d 299, 300-301, 2003-Ohio-3652, 791 N.E.2d 45, citing *State ex rel. Duganitz v. Ohio Adult Parole Auth.*, 77 Ohio St.3d 190, 191, 1996-Ohio-326, 672 N.E.2d 654.

{¶ 14} The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201. Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise

provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138.

{¶ 15} Plaintiffs maintain that the trial court erred in granting defendants' motions for summary judgment because plaintiffs presented adequate evidence demonstrating that a genuine issue of material fact existed as to whether defendants knew, or should have known, that the lockers should have been affixed to the wall or floor prior to Ms. Turks' incident on October 31, 2005 at NovaCare. We disagree.

{¶ 16} In order to establish actionable negligence, a plaintiff must demonstrate the existence of a duty, a breach of the duty, and an injury proximately resulting therefrom. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 680, 1998-Ohio-602, 693 N.E.2d 271.

{¶ 17} In this case, it is undisputed that Ms. Turk was a business invitee and under Ohio law an owner or occupier of a premises owes its "business invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition so that its customers are not unnecessarily and unreasonably exposed to danger." *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 203, 480 N.E.2d 474. An owner or occupier of a premises is not, however, the insurer of a business invitee's safety, id., and the plaintiff must prove that the business

owner or occupier had either actual or constructive notice of the alleged hazard that caused the injury. *Peerboom v. Hartman* (Nov. 18, 1998), Williams App. No. WMS-88-2.

{¶ 18} In Ohio, the law is clear that for a business invitee to recover for injuries sustained from a hazard on the premises, the following must be established:

{¶ 19} "1. That the defendant through its officers or employees was responsible for the hazard complained of; or

{¶ 20} 2. That at least one of such persons had actual knowledge of the hazard and neglected to give adequate notice of its presence or remove it promptly; or

{¶ 21} 3. That such danger had existed for a sufficient length of time reasonably to justify the inference that the failure to warn against it or remove it was attributable to a want of ordinary care." *Johnson v. Wagner Provision Co.* (1943), 141 Ohio St. 584, 589, 49 N.E.2d 925.

{¶ 22} In this matter, Ms. Turk offered no evidence of the cause of the lockers' collapse, i.e., whether she pulled on the lockers, someone bumped into them, or any other reason. Instead, she merely asserts that defendants were negligent in failing to affix the lockers to the wall or floor. Plaintiffs, however, provide no evidence establishing that NovaCare, through an employee or representative, had either actual or constructive knowledge that the lockers should have been fastened to the wall or floor.

{¶ 23} Deborah Singer, Vice President of NovaCare, testified to the following:

{¶ 24} "Q. You were working with NovaCare at the time the lockers were delivered?

{¶ 25} "A. Yes.

{¶ 26} "Q. Now with respect to the delivery of the lockers, did they come with any instructions which said that these lockers were to be affixed to a wall?

{¶ 27} "A. No.

{¶ 28} "Q. Did the lockers come with any hardware by which they could be affixed to a wall?

{¶ 29} "A. No.

{¶ 30} "Q. Did the lockers have any holes in them whereby you could attach brackets, or anything to them?

{¶ 31} "A. No, they did not.

{¶ 32} "Q. These lockers have came with no instructions, nor any information to affix them to a wall?

{¶ 33} "A. Correct."

{¶ 34} Furthermore, Michael Webster, Vice President of Engineering at Tennsco, the manufacturer of the lockers, testified that in 1994, when the lockers were purchased, Tennsco sold the type of lockers involved in this situation two ways: preassembled and unassembled. He explained that in 1994, although the unassembled lockers came with instructions, the preassembled lockers did not

come with instructions or mounting devices indicating to NovaCare that the lockers were to be affixed to a wall or floor. Deborah Singer provided in her affidavit that NovaCare received the lockers from Tennsco preassembled. Further, Webster stated in his affidavit that "[t]he type of lockers being used in NovaCare Rehabilitation's women's locker room on October 31, 2005 were not delivered with instructions from Tennsco on how the lockers should be installed." He also averred that "[t]he type of lockers being used in NovaCare Rehabilitation's women's locker room on October 31, 2005 were not normally sold or delivered with anchoring weights or other mounting devices." Accordingly, NovaCare had no way of knowing that the lockers should have been fastened to a wall or the floor.

{¶ 35} Furthermore, the evidence demonstrated that the lockers had never fallen prior to the October 31, 2005. Accordingly, the evidence establishes that NovaCare had neither actual, nor constructive knowledge, that the lockers should be affixed to the wall or floor. Therefore, we affirm the trial court's grant of summary judgment in favor of NovaCare, finding that no genuine issues of material fact exist and NovaCare is entitled to judgment as a matter of law.

{¶ 36} Having determined that no genuine issues of material fact exist that NovaCare did not have knowledge that the lockers should be fastened to the wall or floor, we naturally conclude that Beta was equally unaware of this alleged defect. Nevertheless, even if NovaCare knew of the alleged defect, the law is well-settled that a commercial lessor, such as Beta, who has neither possession

nor control of premises, is not liable for damages resulting from the condition of the premises. *Hendrix v. Eighth & Walnut Corp.* (1982), 1 Ohio St.3d 205, 207, 438 N.E.2d 1149; *Collova v. Matousek* (1993), 85 Ohio App.3d 440, 620 N.E.2d 104. "A lessor who does not retain the right to admit or exclude others from the premises has generally not reserved the degree of possession or control necessary to impose liability for the condition of the premises." *Hendrix*, supra.

{¶ 37} This rule has also been applied to insulate a commercial landlord from liability from damages resulting from the condition of the premises even in cases where the landlord agreed to make repairs, as courts have determined that the reservation of such a limited right does not justify a finding that the lessor retained control of the premises. Id., citing *Cooper v. Roose* (1949), 151 Ohio St. 316, 85 N.E.2d 545; *Berkowitz v. Winston* (1934), 128 Ohio St. 611, 193 N.E. 343.

{¶ 38} In this matter, the commercial lease between Beta and NovaCare vested NovaCare with possession and control of the premises and did not provide for Beta to retain the right or power to admit or exclude others from the premises. Beta did retain the right to inspect and to enter the premises for limited purposes, but this is insufficient to constitute control for purposes of establishing liability.

{¶ 39} Finally, with regard to the claim for loss of consortium, it is derivative of the other claims and can only be maintained if the primary cause of action is proven. *Vinicky v. Pristas*, 163 Ohio App.3d 508, 2005-Ohio-5196, 839 N.E.2d

88; *Messmore v. Monarch Mach. Tool Co.* (1983), 11 Ohio App.3d 67, 68-69, 463 N.E.2d 108. Because a derivative claim cannot afford greater relief than that relief permitted under a primary claim, a derivative claim fails when the primary claim fails. Id.; *Breno v. Mentor*, Cuyahoga App. No. 81861, 2003-Ohio-4051. Accordingly, the trial court properly granted defendants summary judgment.

{¶ 40} Plaintiffs' second assignment of error states:

{¶ 41} "The Trial Court Erred As a Matter of Law When It Granted Beta's and NovaCare's Motion For Summary Judgment Because the Evidence Before It Established that the Doctrine of *Res Ipsa Loquitur* is Applicable to the Facts and Circumstances of this Case."

{¶ 42} Whether the doctrine of res ipsa loquitur applies is determined on a case-by-case basis. *Jennings Buick, Inc. v. Cincinnati* (1980), 63 Ohio St.2d 167, 171, 406 N.E.2d 1385. In *Hake v. George Wiedemann Brewing Co.* (1970) 23 Ohio St.2d 65, 262 N.E.2d 703, the Ohio Supreme Court stated:

{¶ 43} "It is well established by earlier decisions of this court that res ipsa loquitur is a rule of evidence which permits the trier of fact to infer negligence on the part of the defendant from the circumstances surrounding the injury to plaintiff. To warrant application of the rule a plaintiff must adduce evidence in support of two conclusions: (1) That the instrumentality causing the injury was, at the time of the injury, or at the time of the creation of the condition causing the injury, under the exclusive management and control of the defendant; and (2) that the injury occurred under such circumstances that in the ordinary course of

events it would not have occurred if ordinary care had been observed." Id. at 66-67 (citations omitted).

{¶ 44} "Res ipsa loquitur does not apply where the facts are such that an inference that the accident was due to a cause other than defendant's negligence could be drawn as reasonably as if it was due to his negligence." *Cochran v. Ohio Auto Club* (Oct. 3, 1996), Marion App. No. 9-96-33, citing *Greer v. Frazier-Williams Chevrolet-Oldsmobile, Inc.* (Apr. 3, 1991), Hamilton App. No. C-900242.

{¶ 45} Here, plaintiffs failed to present evidence that the lockers were under the exclusive management and control of NovaCare. Rather, the evidence demonstrated that Ms. Turk was utilizing the lockers at the time they collapsed and offers no explanation as to the cause of the fall. Furthermore, Singer averred that the facility was open six days a week for 52 weeks a year with an average of six to 10 patients utilizing the lockers a day. Accordingly, any patient, including Ms. Turk, could have come in contact with the locker so as to cause them to collapse. As such, the lockers were not under the exclusive management and control of NovaCare.

{¶ 46} Additionally, as previously stated, plaintiffs have not established the actual cause of the locker's fall, which were initially standing upright and had never fallen prior to October 31, 2005. Thus, we are not certain that the cause of the accident was due solely to defendants' alleged negligence and not due to

another's negligence, such as other patrons of NovaCare or the negligence of Ms. Turk herself. Plaintiff's second assignment of error is overruled.

{¶ 47} Their final error provides:

{¶ 48} "The Trial Court Erred As a Matter of Law When it Granted Beta's and NovaCare's Motions for Summary Judgment Because Beta's and NovaCare's Egregious and Conscious Disregard for Mrs. Turk's Safety Permits an Award of Punitive Damages."

{¶ 49} Finally, having determined that defendants did not have knowledge that the lockers should have been affixed to the wall or floor, they necessarily could not have egregiously and consciously disregarded the alleged risk. Thus, plaintiffs' final assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JOSEPH J. VUKOVICH, JUDGE*

SEAN C. GALLAGHER, A.J., and
LARRY A. JONES, J., CONCUR

*(Sitting by Assignment: Judge Joseph J. Vukovich of the Seventh District Court of Appeals)