

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Shirley Bryant

Court of Appeals No. L-08-1262

Appellant

Trial Court No. CI-2007-7215

v.

The Scooter Store, et al.

DECISION AND JUDGMENT

Appellees

Decided: August 7, 2009

* * * * *

John B. Fisher and Jonathan M. Ashton, for appellant.

Shawn W. Maestle, Carolyn M. Cappel, and John L. Antel,
for appellee Pride Mobility Products Corporation.

* * * * *

OSOWIK, J.

{¶ 1} Appellant, Shirley Bryant, appeals the grant of summary judgment to appellee, Pride Mobility Products Corporation ("Pride"). This is an accelerated appeal pursuant to 6th Dist.Loc.App.R. 12. For the following reasons, we affirm the trial court's judgment.

{¶ 2} Pride manufactures "power wheelchairs" or "scooters." The Scooter Store sells mechanical wheelchairs manufactured by Pride. Bryant sustained injuries while riding a wheelchair purchased from The Scooter Store and manufactured by Pride. Her first complaint, filed in 2006, alleged that when the wheelchair left Pride's control, it had a design defect, inadequate warnings, and improper instructions.

{¶ 3} The trial court granted summary judgment to Pride on all counts in the first complaint. That judgment entry lacked language indicating that there was no just cause for delay pursuant to Civ.R. 54(B). Several months after that judgment, Bryant filed a notice of voluntary dismissal pursuant to Civ.R. 41(A) to all parties and claims.

{¶ 4} Almost one year after dismissing the first complaint, Bryant filed a second complaint. The second complaint also raised claims against Pride of design defect, inadequate warnings, and a statutory claim that the wheelchair failed to conform to Pride's representations. Bryant styled these claims with a new theory of recovery, specifically, that it should have been foreseeable that incontinent customers would experience incontinence while using Pride's wheelchairs. She further alleged that Pride failed to design the wheelchair to protect against user's incontinence; that Pride failed to warn incontinent users that the wheelchairs were inappropriate for their use; and that Pride represented to customers that the wheelchairs were safe for incontinent users.

{¶ 5} Pride moved for summary judgment. In its motion, it argued the following: (1) that Bryant's second complaint was barred by the "law of the case" doctrine; (2) that the applicable statutes of limitations barred the second complaint; and (3) that Bryant had

failed to preserve her wheelchair and thus lacked evidence to sustain her burden of proof. These arguments were set off in the motion by bold headings.

{¶ 6} Pride's motion for summary judgment also argued the following. First, it argued that Bryant advanced no evidence that she was incontinent or experienced incontinence while using Pride's wheelchair. Second, it argued that Bryant has not presented an expert's opinion regarding the alleged design defect. Third, Pride asserted that Bryant assumed the risk when she operated the wheelchair on a public street covered with ice and snow, contrary to Pride's warnings. Fourth, Pride asserted that Bryant had not advanced evidence of a causal link between her own incontinence and the wheelchair's alleged malfunction. These arguments were not separately set off in the motion by headings, but were contained in a general section arguing that summary judgment was appropriate.

{¶ 7} In her motion in opposition, Bryant noted that "the basis of Pride's motion are legal [sic] rather than based upon the facts * * *." Bryant's motion then argued that (1) the savings statute applied to her second complaint and so the statutes of limitations did not apply; (2) the "law of the case" doctrine did not apply; (3) the issue of the wheelchair's preservation was not yet ripe. Bryant did not address the other grounds for summary judgment raised by Pride.

{¶ 8} The trial court agreed with Bryant in that the savings statute applied to her second complaint. However, it granted Pride's motion as to each of Bryant's claims.

{¶ 9} As to Bryant's design defect claim, it held that Bryant presented no expert testimony as to whether the wheelchair was defectively designed. As to Bryant's

inadequate warning claim, it held that Bryant did not answer Pride's argument that the owner's manual adequately warned of the risks in operating the wheelchair when exposed to moisture. It also held that Bryant pointed to no evidence creating an inference that a lack of warning to incontinent users was the proximate cause of her accident, or that Bryant herself was incontinent when she used the wheelchair. As to her claim that the wheelchair failed to conform to Pride's representations, it found that Bryant's motion in opposition failed to state the representation upon which she relied.

{¶ 10} The trial court's judgment entry granting summary judgment, like the first judgment entry, failed to contain Civ.R. 54(B) language. One month after the judgment entry was filed, Pride filed a motion requesting that the trial court issue Civ.R. 54(B) certification on the judgment.

{¶ 11} Bryant filed a motion requesting an extension of time to respond to Pride's motion. The trial court granted an extension and allowed Bryant until July 28, 2008, to respond. On July 17, however, the trial court granted Pride's motion and issued a separate order stating that "there is no just reason for delay in making that order final and appealable."

{¶ 12} On July 25, Bryant filed a joint motion for reconsideration of the grant of summary judgment and a motion in opposition to Pride's request for Civ.R. 54(B) certification. The trial court did not consider Bryant's motion for reconsideration. Instead, Bryant appealed. She asserts the following errors for review:

{¶ 13} "Assignment of Error No. 1: Assuming arguendo that one or both of the trial court's May 27 or July 16, 2008 orders are final appealable orders, the trial court's

grant of summary judgment to Pride violates the rule of law from *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112.

{¶ 14} "Assignment of Error No. 2: The trial court deprived the plaintiff of her right to due process by granting her an extension of time within which to respond to Pride's motion and then failing to give her that time before ruling."

{¶ 15} Before arguing her first assignment of error, Bryant argues briefly that the trial court's grant of summary judgment is not a final, appealable order because she "has been unable to find any cases in which a trial court had been permitted to retroactively make an interlocutory order a final and appealable order."

{¶ 16} "An order of a court is a final appealable order only if the requirements of both R.C. 2505.02 and, if applicable, Civ.R. 54(B), are met. *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, syllabus." *State ex rel. Scruggs v. Sadler*, 97 Ohio St.3d 78, 2002-Ohio-5315, ¶ 5. Civ.R. 54(B) applies, since Bryant's claims against other defendants remain pending. The trial court complied with Civ.R. 54(B), by determining that there was no just reason for delay.

{¶ 17} "For purposes of Civ.R. 54(B) certification, in deciding that there is no just reason for delay, the trial judge makes what is essentially a factual determination – whether an interlocutory appeal is consistent with the interests of sound judicial administration.

{¶ 18} "Where the record indicates that the interests of sound judicial administration could be served by a finding of 'no just reason for delay,' the trial court's certification determination must stand." *Wisintainer v. Elcen Power Strut Co.* (1993), 67 Ohio St.3d 352, paragraphs one and two of the syllabus.

{¶ 19} Accordingly, we find that the trial court's grant of summary judgment was a final, appealable order.

{¶ 20} In her first assigned error, Bryant argues that the rule of *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, prohibits the trial court from granting summary judgment because Pride did not "specifically delineate" the factual basis for summary judgment. *Mitseff* held: "A party seeking summary judgment must specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond." *Id.* at syllabus.

{¶ 21} The initial burden that a moving party bears on its motion for summary judgment is clear. "[A] party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of *informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims.* The moving party cannot discharge its initial burden under Civ.R. 56 simply by *making a conclusory assertion that the nonmoving party has no evidence to prove its case.* Rather, the moving party must be able to specifically point to some *evidence* of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. (Emphasis added.)

{¶ 22} A review of Pride's motion shows Bryant's argument to be without merit. Pride clearly stated the bases for its motion. In its motion, Pride argued that Bryant had produced no expert which identified a design defect. Further, Pride argued that Bryant

produced no expert to support her claim that incontinence caused the wheelchair to malfunction. Pride also argued that Bryant assumed the risk when she operated the wheelchair on a public road, in the dark, and in snowy and icy conditions. Pride also argued that Bryant misused the wheelchair when she used it after exposure to "moisture of any kind" without allowing it to dry.

{¶ 23} In support of these arguments, Pride pointed to Bryant's deposition testimony, where she discussed riding the power chair on an icy road. Pride pointed to a lack of any mention of incontinence by Bryant in her deposition and written discovery responses. Additionally, Pride attached to its motion the affidavit of its vice-president, Gerald White. Attached to White's affidavit is an owner's manual for the same wheelchair involved in Bryant's accident.

{¶ 24} Pride's motion specifically pointed to warnings in the owner's manual. These warnings are in bold letters, outlined in a box, with a large warning symbol:

{¶ 25} (1) "WARNING! You should not operate your power chair on public streets and roadways."

{¶ 26} (2) "WARNING! Pride recommends that you do not operate your power chair in icy or slippery conditions or on salted surfaces (i.e., walks or roads). Such use may adversely affect the performance and safety of your power chair, resulting in an accident and personal injury."

{¶ 27} (3) "WARNING! Do not expose your power chair *to any type of moisture at any time* (rain, snow, mist, or wash). Such exposure can damage your power chair.

Never operate your power chair if it has been exposed to moisture until it has dried thoroughly."

{¶ 28} Pride's motion for summary judgment did inform the trial court and Bryant of the bases of its motion and identified portions of the record upon which its arguments were based. Pride also supported its motion with evidentiary materials of its own. The motion allowed Bryant a meaningful opportunity to respond. Bryant's first assignment of error is not well-taken.

{¶ 29} In her second assigned error, Bryant argues that she was deprived of due process when the trial court certified the order granting summary judgment pursuant to Civ.R. 54(B) without waiting for Bryant to file her motion in opposition. The trial court had granted Bryant an extension of time to respond. When Bryant filed her motion in opposition after that order, she included a motion for reconsideration. Attached to the dual motion for reconsideration/motion in opposition were two affidavits from alleged expert witnesses, averring that the power chair was defectively designed.

{¶ 30} Bryant argues that the trial court deprived her of notice and an opportunity to be heard on Pride's request for Civ.R. 54(B) certification. She does not identify what substantial right the trial court violated.

{¶ 31} Trial courts may add Civ.R. 54(B) language to an order through a nunc pro tunc entry. *Ferraro v. B.F. Goodrich Co.*, 149 Ohio App.3d 301, 2002-Ohio-4398. A nunc pro tunc order may be issued by a court sua sponte, since the function of a nunc pro tunc order is limited to correcting what the court actually decided. *Id.* at ¶ 9, citing *State ex rel. Fogle v. Steiner* (1995), 74 Ohio St.3d 158, 164. As such, a nunc pro tunc order is

an exercise of a court's inherent authority. *Id.*, citing *State ex rel. Litty v. Leskovyansky* (1996), 77 Ohio St.3d 97, 100.

{¶ 32} We already determined, *supra*, that the trial court correctly determined on the facts that Civ.R. 54(B) certification was appropriate. Thus, the trial court could have issued the *nunc pro tunc* order at any time, even absent Pride's request. Bryant could not, therefore, have been deprived of a right to be heard.

{¶ 33} Moreover, Bryant's request for an extension of time stated that Bryant "intends to respond to [Pride's request for Civ.R. 54(B) certification] with an affidavit of one or more expert witnesses." She explained that her "counsel is not able to meet with these expert witnesses until very near the deadline for her response." Two affidavits from expert witnesses were attached to the motion for reconsideration. Thus, Bryant's request shows an intention to respond with materials irrelevant to determination of whether "an interlocutory appeal is consistent with the interests of sound judicial administration." *Wisintainer v. Elcen Power Strut Co.* (1993), 67 Ohio St.3d 352, paragraph one of the syllabus.

{¶ 34} In this light, given Bryant's failure to respond to Pride's arguments on summary judgment, Bryant's motion for reconsideration and opposition to Pride's request for Civ.R. 54(B) certification appears to be a belated request for an extension of time to respond with factual evidence to Pride's motion for summary judgment.

{¶ 35} Civ.R. 56(F) states, "Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may

refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just."

{¶ 36} Civ.R. 56(F) thus allows a party facing a motion for summary judgment to request an extension of time to respond in opposition in order to continue discovery. A trial court errs if it enters summary judgment against a party who has asked for more discovery in opposition to a motion for summary judgment, even if a formal motion pursuant to Civ.R. 56(F) is not made, if that party "was allotted insufficient time to discover the essential facts." *Falcon Painting, Inc. v. Trustcorp Bank, Ohio* (Nov. 8, 1991), 6th Dist. No. L-90-285, citing *Tucker v. Webb Corp.* (1983), 4 Ohio St.3d 121, 122.

{¶ 37} However, if a party fails to ask for a continuance to conduct discovery necessary to respond in opposition, the party waives any error in a trial court's premature ruling on motions for summary judgment. *Benjamin v. Deffet Rentals, Inc.* (1981), 66 Ohio St.2d 86, 92.

{¶ 38} Soon after Pride filed its motion for summary judgment, Bryant sought an extension of time to respond in opposition, asserting that she needed Pride to respond to "outstanding discovery requests." Bryant then filed her motion in opposition prior to the extension deadline without renewing a request for an extension to obtain expert witnesses.

{¶ 39} Since Pride's Civ.R. 56 motion specifically argued that summary judgment was warranted for Bryant's failure to present expert testimony as to any defect design in the product or causation, Bryant should have responded by requesting additional time to

obtain an expert pursuant to Civ.R. 56(F). Because she did not, any error is waived and it is improper to submit such materials in a motion for reconsideration. Bryant's second assignment of error is not well-taken.

{¶ 40} We briefly note that Pride's brief contains what it labeled a "cross assignment of error." Pride, however, has not filed a cross-appeal pursuant to App.R. 3. Because we affirm the trial court's judgment, Pride's argument is moot.

{¶ 41} Finding substantial justice was done the party complaining, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____

JUDGE

Arlene Singer, J. _____

JUDGE

Thomas J. Osowik, J. _____
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.