[Cite as *Jenkins v. Tower City Ave., L.L.C.*, 2015-Ohio-2154.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101759

SABRINA JENKINS

PLAINTIFF-APPELLANT

vs.

TOWER CITY AVENUE, LLC

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-799461

BEFORE: Keough, P.J., McCormack, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: June 4, 2015

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KATHLEEN ANN KEOUGH, P.J.:

{¶1} Plaintiff-appellant, Sabrina Jenkins ("Jenkins"), pro se, appeals from the trial court's judgment granting summary judgment to defendant-appellee, Tower City Avenue, LLC ("Tower City"). Finding no merit to the appeal, we affirm.

{¶2} The record reveals the following. On January 31, 2011, at approximately 6:15 a.m., Jenkins exited the portico doors from Tower City Center that lead to Public Square. Jenkins had walked through these doors on her way to work every day for years without any problem. As she was passing through the door, which was being held open for her by an unidentified woman, the metal bracket holding the hydraulic arm that opens and closes the door (the "door closer") broke, and the door closer swung down, hitting Jenkins in the head. Upon learning of the incident, Tower City personnel immediately responded and took the door out of service, in accordance with Tower City safety procedures.

{¶3} Jenkins subsequently filed suit against Tower City, alleging that its negligence had caused her injury. The complaint further alleged that Tower City had created or permitted the existence of a dangerous condition that constituted a nuisance. Tower City filed a motion for summary judgment, which the trial court granted. Jenkins now appeals from that order.

{¶4} In a single assignment of error, Jenkins argues that the trial court erred in granting Tower City's motion for summary judgment.

{¶5} An appellate court reviews a trial court's decision on a motion for summary

judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is appropriate when: (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) after construing the evidence most favorably for the party against whom the motion is made, reasonable minds can reach only a conclusion that is adverse to the nonmoving party. Civ.R. 56(C); *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201 (1998).

{¶6} The party moving for summary judgment bears the initial responsibility 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 elements of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). After the moving party has satisfied this initial burden, the nonmoving party has a reciprocal duty to set forth specific facts by the means listed in Civ.R. 56(C) showing that there is a genuine issue of material fact for trial. *Id.*

{¶7} To prevail in a negligence action, a plaintiff must demonstrate that: (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached that duty, and (3) the defendant's breach proximately caused the plaintiff's injury. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 680, 693 N.E.2d 271 (1998).

{¶8} A property owner owes its business invitees a duty of ordinary care to maintain the premises in a reasonably safe condition and to warn of hidden dangers. *Paschal v. Rite Aid Pharmacy, Inc.*, 18 Ohio St.3d 203, 480 N.E.2d 474 (1985). The

owner "must also inspect the premises to discover possible dangerous conditions of which he does not know, and take reasonable precaution to protect the invitee from dangers which are foreseeable from the arrangement or use." *Perry v. Eastgreen Realty Co.*, 53 Ohio St.2d 51, 52, 372 N.E.2d 335 (1978).

{¶9} In a premises-liability action, the plaintiff can prove the defendant's breach of duty by establishing that (1) the defendant, through its officers or employees, was responsible for the hazard; (2) the defendant had actual knowledge of the hazard and neglected to promptly remove it or give adequate notice of its presence; or (3) the hazard existed for a sufficient length of time to reasonably justify the inference that the failure to remove it or warn against it was attributable to a lack of ordinary care. *Johnson v. Wagner Provision Co.*, 141 Ohio St. 584, 589, 49 N.E.2d 925 (1943).

{¶10} It is undisputed that Jenkins was a business invitee of Tower City. It is clear, therefore, that Tower City owed Jenkins a duty of care. Nevertheless, construing the evidence in a light most favorable to Jenkins, there is no evidence that Tower City breached its duty.

{¶11} The evidence established that Tower City conducts numerous daily inspections of the portico doors by both maintenance and security personnel. Maintenance personnel visually and operationally inspect the doors every day and if necessary, adjust or repair a door, or put a "Closed" sign on it. Tower City security staff also inspect the doors when they are opened in the morning and locked at night. Importantly, Tower City security officer Craig Johnston testified that he inspected the

door in question when he unlocked it early on the morning of January 31, 2011, and that the "door closer" was not broken when he unlocked it:

> Q. Now, briefly with respect to the doors in the portico, would you encounter each door yourself personally every day?
>
> A. Yeah. I had somewhere in the neighborhood of 60 doors that I was responsible for causing to be locked or unlocked. * * * I either locked or unlocked all those doors personally so I could look at the locks, hinges, door closers to see if there's any obvious problems.
>
> Q. Can you say with reasonable certainty that when you worked your way through the portico unlocking the doors on the morning of the day of this incident that the door closer was not broken at that point?
>
> A. Yes, I can. That's one of the things I particularly look for to make sure the doors are operational.

{¶12} In addition to the inspections by maintenance and security personnel, Tower City housekeeping staff clean the glass portion of the portico doors approximately twice per day, and are equipped with radios to notify maintenance of any issues with the doors. Any Tower City employee who detects a problem with a door can lock the door and place a "Closed" sign on the door, taking it out of service. The signs are available from the security attendant booths that are located 50 to 60 feet away from the doors.

{¶13} Tower City maintenance technician Darrell Mayo testified that he responded to the portico upon learning of the incident. He observed that the metal mounting bracket that held the door closer to the top of the door had broken in two pieces; the door closer itself had not broken. According to Mayo, this type of problem could not have been detected prior to the incident because it would be impossible during an inspection to see that the metal mounting bracket located behind the door closer was splitting.

{¶14} In light of this evidence, the trial court did not err in granting summary judgment to Tower City on Jenkins's negligence claim. There is no evidence that Tower City created the condition that led to the incident, and Jenkins produced no evidence demonstrating that a Tower City employee had done anything that would cause the metal mounting bracket to split. Instead, the evidence demonstrated that Tower City employees regularly inspect, maintain, and repair the portico doors, and close them to the public if they are not operational.

{¶15} There is also no evidence that Tower City had actual or constructive knowledge of the hazardous condition of the metal mounting bracket. Rather, the evidence demonstrates that the door in question was inspected on the morning of the incident and was functioning properly. Jenkins offered no evidence demonstrating that Tower City should have discovered the allegedly defective metal mounting bracket, and, in fact, the evidence demonstrated that it would have been impossible to detect the problem with the metal mounting bracket prior to the incident. Further, the evidence demonstrated that this type of incident — where the metal mounting bracket holding the door closer split, causing the door closer to swing down and hit someone — had never happened at Tower City before.

{¶16} Jenkins testified that seconds before this incident, another woman stepped through the same door and the door operated as expected. She testified further that she did not notice anything unusual as she approached the door, and that the metal bracket holding the hydraulic arm broke at the exact moment she walked through the door. The

mere happening of an accident, however, does not give rise to a presumption of negligence. *Parras v. Std. Oil Co.*, 160 Ohio St. 315, 319, 116 N.E.2d 300 (1953). Because there is no evidence that Tower City breached its duty of care to Jenkins, the trial court did not err in granting summary judgment to Tower City on Jenkins's negligence claim.

{¶17} Jenkins's complaint also alleged that Tower City had created or allowed to exist a dangerous condition that constituted a nuisance, and that it had failed to warn against such nuisance. The trial court properly found that nuisance law does not apply to this case.

{¶18} In Ohio, nuisance is defined as the wrongful invasion of a legal right or interest. *Taylor v. Cincinnati*, 143 Ohio St. 426, 436, 55 N.E.2d 724 (1944). A nuisance is either absolute or qualified. *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 712, 622 N.E.2d 1153 (4th Dist.1993). The essence of an absolute nuisance is that the wrongful act at issue is so dangerous that it cannot be conducted without damaging someone else's property or rights, no matter how careful one is in conducting the activity, and absolute liability attaches notwithstanding the absence of fault. *Id.* A qualified nuisance is premised upon negligence, and involves "'a lawful act that is so negligently or carelessly done as to create a potential and unreasonable risk of harm, which in due course results in injury to another.'" *Temple v. Fence One, Inc.*, 8th Dist. Cuyahoga No. 85703, 2005-Ohio-6628, ¶ 41, quoting *Taylor* at paragraph three of the syllabus. Because a qualified nuisance requires negligence, a party must show a duty

owed and a breach of that duty that proximately resulted in cognizable injury. *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, ¶ 18.[1]

{¶19} Jenkins cannot establish either an absolute or a qualified nuisance. The complained of activity — Tower City's maintenance of the portico doors at Tower City and its warning of defective conditions with the doors — is not conduct that is so abnormally dangerous that it cannot be conducted without damaging someone else's property or rights. Thus, strict liability in absolute nuisance does not apply to the incident at issue. Moreover, because Jenkins failed to demonstrate that Tower City breached its duty of care to her, she cannot establish a qualified nuisance.

{¶20} In her brief in opposition to Tower City's motion for summary judgment, Jenkins also argued, as she does on appeal, that "spoliation is an issue" in this case because Tower City threw away the metal mounting bracket that hit Jenkins in the head. The elements of a spoliation claim are: (1) pending or probable litigation involving the claimant; (2) the respondent's knowledge that litigation exists or is probable; (3) willful destruction of evidence by respondent designed to disrupt the claimant's case; (4) actual disruption of the claimant's case; and (5) damages resulting therefrom. *Sivinski v. Kelley*, 8th Dist. Cuyahoga No. 94296, 2011-Ohio-2145, ¶ 23, citing *Smith v. Howard Johnson*, 67 Ohio St.3d 28, 29, 615 N.E.2d 1037 (1993). Jenkins never amended her complaint to add a claim for spoliation, and did not produce any evidence that Tower City

[1] Nuisances may be further characterized as "public" or "private" nuisances. Such characterization is not necessary to our analysis in this case because Jenkins's nuisance claim fails in any event.

willfully destroyed or concealed the metal mounting bracket in order to disrupt her case. In fact, the evidence demonstrates that the plate was apparently discarded the day of the incident by a maintenance worker who was unaware that an incident had taken place and knew only that the door needed to be repaired. Accordingly, there was no spoliation issue for the trial court to consider.

{¶21} The trial court also properly determined that the doctrine of res ipsa loquitur does not apply to this case. Res ipsa loquitur is an evidentiary rule that permits an inference of negligence when the elements of the doctrine are shown. *Jennings Buick, Inc. v. Cincinnati*, 63 Ohio St.2d 167, 169, 406 N.E.2d 1385 (1980). To warrant the application of the rule, a plaintiff must produce evidence demonstrating that (1) the instrumentality causing the injury was, at the time of the injury, or at the time of the creation of the condition that caused the injury, under the exclusive management and control of the defendant; and (2) 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.*

{¶22} Jenkins argued that the door in question was in Tower's City's exclusive management and control because Tower City was responsible for the maintenance and repair of the door in question, including determining what type of door closer would be used, when the door would be serviced, and when it would be open to the public. Jenkins argued further that members of the public regularly pass through doors in public places without sustaining injury and, therefore, an injury due to a public door necessarily

indicates negligence. Jenkins's argument is without merit.

{¶23} As the Fourth District explained:

> The doctrine of res ipsa loquitur is founded on an absence of specific proof of acts or omissions constituting negligence, and the particular justice of the doctrine rests upon the foundation that the true cause of the occurrence, whether innocent or culpable, is within the knowledge or access of the defendant and not within the plaintiff's knowledge or accessible to him.

Fidelty & Guaranty Ins. v. Spires, 4th Dist. Athens No. 1123, 1983 Ohio App. LEXIS 13537 (May 26, 1983). "For this reason, Ohio courts generally hold that a premises occupier will not be deemed to have exclusive control over an object where the public has access to it." *Id.*

{¶24} Here, although Tower City maintains the portico doors, it does not have exclusive control of them because the doors are regularly open to and accessible by the public. *See, e.g.*, *Lewis v. Newburg Supermarket*, 8th Dist. Cuyahoga No. 73238, 1998 Ohio App. LEXIS 4479, *12 ("[T]he electronic door and cart storage area are located in a public area with many people using them, thereby eliminating any exclusive control the supermarket may have had on them."). In fact, an unidentified woman was holding the door open for Jenkins as she approached; thus she had control of the door immediately before the incident. Jenkins therefore cannot prove that the instrumentality that caused her injury was under Tower City's exclusive management and control.

{¶25} Jenkins also cannot demonstrate that under the circumstances, the incident would not have happened if ordinary care had been observed. Rather, as discussed above, the evidence established that Tower City observed ordinary care regarding its care

and maintenance of the doors. Because Jenkins cannot prove the elements of res ipsa loquitur, the trial court properly concluded that the rule did not apply.

{¶26} There are no genuine issues of material fact for trial, and, therefore, the trial court properly granted Tower City's motion for summary judgment. The assignment of error is overruled.

{¶27} Affirmed.

It is ordered that appellee recover from appellant 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.

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

TIM McCORMACK, J., and
SEAN C. GALLAGHER, J., CONCUR