

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Steven Thompson, Executor and Administrator of the Estate of Beverly Thompson,	:	
	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-612 (C.P.C. No. 09CVC07-11330)
Ohio State University Physicians, Inc. et al.,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on May 12, 2011

Tyack, Blackmore & Liston Co., LPA, and Jonathan T. Tyack,
for appellant.

Freund, Freeze & Arnold, and Carl A. Anthony, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Plaintiff-appellant, Stephen Thompson, Executor ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas, in which that court granted summary judgment in favor of defendants-appellees, Ohio State University Physicians, Inc., and OSU Internal Medicine, LLC ("appellees"). For the following reasons, we reverse.

{¶2} Appellant is the executor of the estate of his mother, Beverly Thompson ("decedent"). On February 14, 2008, decedent visited appellees' medical office to undergo testing, including a venous duplex ultrasound and a cardiac ultrasound, and to see her physician, Steven Dean, D.O. ("Dr. Dean"). According to the record, decedent had a vascular condition known as cellulitis and chronic venous insufficiency causing "[s]evere bilateral lower extremity swelling, pain, and redness." (Dean depo. 7.) Decedent's medical condition, however, did not affect her ability to walk or get around without assistance. Decedent's daughter, Denise Thompson, accompanied her to the appointment and remained in the waiting area during decedent's testing.

{¶3} At the time, a "temporary room" was set up to accommodate the ultrasound equipment due to ongoing renovations at the medical office. (Bisson depo. 14-15.) The "temporary room" contained a desk, bed, ultrasound machine, treadmill, therapy steps, microwave cart and file cabinet, with a restroom located in the back of the room. After completing the venous duplex ultrasound test, decedent inquired about using the restroom. Susana Bisson ("Bisson"), the ultrasound technician, directed decedent to use the restroom in the back of the "temporary room" and warned her to be careful due to obstacles in the way.

{¶4} There was approximately six to eight inches of space between the treadmill and therapy steps and, in order to access the restroom, decedent would have to step over the corner of the treadmill. On her way to the restroom, decedent either tripped and fell while attempting to step over the treadmill and used the railing of the therapy steps to brace her fall or lost her balance while using the railing to assist her in maneuvering through the obstacles. Although the railing was attached to the therapy steps, the steps

were not secured to the wall or the floor, and decedent pulled the therapy steps down on top of her as she fell.

{¶5} On July 29, 2009, appellant filed a complaint for negligence, alleging that appellees negligently created an unreasonably dangerous condition by (1) leaving a treadmill, therapy steps, and other therapy equipment in front of the restroom, such that it blocked the path to the restroom, and (2) failing to properly secure the therapy steps and other therapy equipment when defendant knew, or should have known, that business invitees would rely on the equipment for support while trying to walk through, on, over, or around the equipment, on their way to the restroom. (See Complaint ¶9.) On May 11, 2010, appellees filed a motion for summary judgment; on May 24, 2010, appellant filed a memorandum contra; and on June 7, 2010, appellees filed a reply. On June 17, 2010, the trial court granted summary judgment in favor of appellees, finding that the obstruction was open and obvious, with no attendant circumstances distracting decedent. In its decision, the trial court reasoned that:

In this case, the record indicates that the decedent fell over a treadmill that was positioned in front of the restroom door and in order to break her fall, grabbed onto the therapy steps, causing it to fall on top of her. However, the evidence presented to this Court indicates that the treadmill and the therapy steps were in plain sight. * * * There has been no evidence offered indicating that the decedent was not aware of the equipment obstructing the pathway to the restroom. As such, this Court finds that the danger the decedent encountered was open and obvious and that the plaintiff's assertion that the obstruction was hidden and created a latent defect lacks merit.

(Emphasis sic.) (See Decision and Entry Granting Defendants' Motion for Summary Judgment at 4-5.)

{¶6} Appellant timely filed a notice of appeal on June 30, 2010, and sets forth one assignment of error for our consideration:

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR THE DEFENDANTS-APPELLEES AS GENUINE ISSUES OF MATERIAL FACT EXIST.

{¶7} We review a grant of summary judgment de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review, without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107; *Brown* at 711.

{¶8} Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65

Ohio St.3d 356, 358-59, 1992-Ohio-95, citing *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 2.

{¶9} In order to prevail on a negligence claim, a plaintiff must show that: (1) defendant owed him a duty; (2) defendant breached that duty; and (3) the breach proximately caused his injuries. *Coffman v. Mansfield Corr. Inst.*, 10th Dist. No. 09AP-447, 2009-Ohio-5859, citing *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 295.

{¶10} A defendant's duty to a plaintiff depends on the parties' relationship at the time the incident occurred. *McCoy v. The Kroger Co.*, 10th Dist. No. 05AP-7, 2005-Ohio-6965, ¶7. Here, the parties do not dispute that decedent entered appellees' medical office as a business invitee. A business owner owes business invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition, including an obligation to warn invitees of latent or hidden danger, so as not to unnecessarily and unreasonably expose its invitees to danger. *Sherlock v. Shelly Co.*, 10th Dist. No. 06AP-1303, 2007-Ohio-4522, ¶9, citing *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203; *Perry v. Eastgreen Realty Co.* (1978), 53 Ohio St.2d 51, 52. A latent danger is "a danger which is hidden, concealed and not discoverable by ordinary inspection, that is, not appearing on the face of a thing and not discernible by examination." *McCoy* at ¶8, quoting *Potts v. Smith Constr. Co.* (1970), 23 Ohio App.2d 144, 148.

{¶11} Nevertheless, a business owner is not an insurer of a customer's safety. *Sherlock* at ¶9. The open-and-obvious doctrine eliminates a premises owner's duty to warn a business invitee of dangers on the premises either known to the invitee or so obvious and apparent to the invitee that he or she may reasonably be expected to discover them and protect against them. *Id.*, citing *Simmons v. Am. Pacific Ents., L.L.C.*,

164 Ohio App.3d 763, 2005-Ohio-6957, citing *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45. The doctrine's rationale is that because the open-and-obvious nature of the hazard itself serves as a warning, business owners may reasonably expect their invitees to discover the hazard and take appropriate measures to protect themselves against it. *Id.*, citing *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644, 1992-Ohio-42.

{¶12} Open-and-obvious dangers are those not hidden, concealed from view, or undiscoverable upon ordinary inspection. *Lydic v. Lowe's Cos., Inc.*, 10th Dist. No. 01AP-1432, 2002-Ohio-5001, ¶10. A person does not need to observe the dangerous condition for it to be an "open-and-obvious" condition under the law; rather, the determinative issue is whether the condition is observable. *Sherlock* at ¶11, citing *Lydic*. Even in cases where the plaintiff did not actually notice the condition until after he or she fell, this court has found no duty where the plaintiff could have seen the condition if he or she had looked. *Id.*, citing *Lydic*.

{¶13} In the present matter, appellant contends that the trial court erred in granting summary judgment in favor of appellees because (1) competing inferences preclude the granting of summary judgment, and (2) attendant circumstances existed at the time of decedent's fall. (See Appellant's Brief at 9.)

{¶14} As noted above, appellant claims that appellees were negligent in two respects. First, by positioning the treadmill, therapy steps and other equipment in such a manner as to obstruct the path to the restroom. Second, by failing to properly secure the therapy steps when appellees knew or should have known that business invitees would rely on said equipment for support while trying to walk through, on, over or around the equipment en route to the restroom.

{¶15} In granting summary judgment, the trial court addressed only the first basis of the alleged negligence—i.e., that appellees were negligent in the placement of the treadmill, therapy steps and other equipment. We agree with the trial court's determination that the presence of the treadmill, therapy steps and other equipment as an obstruction in the path to the restroom constituted an open-and-obvious danger. As noted above, "an owner or occupier of property owes no duty to warn invitees of open and obvious dangers on the property." *McCoy* at ¶8. " 'If there is no duty, then no legal liability can arise on account of negligence.' " *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 142, quoting 70 Ohio Jurisprudence 3d (1986) 53-54, Negligence, Section 13. However, our examination does not end there because appellant also asserts that appellees were negligent in failing to secure or anchor the therapy steps. Analysis of this second basis for appellant's negligence claim requires an understanding of the court's role regarding evidence and inferences drawn therefrom in the context of summary judgment motions.

{¶16} In the context of summary judgment, we are required not only to construe evidence in a light most favorable to nonmoving parties but to also resolve inferences which may reasonably be drawn from the evidence in favor of nonmoving parties. *McCarthy v. Robinson* (Dec. 1, 1994), 10th Dist. No. 94APE05-619. "Where competing inferences may be drawn or where the facts presented are uncertain or indefinite, summary judgment is not appropriate and such matters must be left to the trier-of-fact." *Sprouse v. Allstate Ins. Co.* (Oct. 17, 1989), 10th Dist. No. 89AP-131, citing *Duke v. Sanymetal Prods. Co.* (1972), 31 Ohio App.2d 78.

{¶17} Appellant's claim that appellees were negligent in failing to secure the therapy steps implicates both competing evidence and competing inferences. The

competing evidence involves the element of causation and whether the fact that the therapy steps were not secured or anchored caused decedent's injury. The competing inference involves the question of duty and whether appellees had a duty to secure the therapy steps or to warn decedent that the steps and the railing were unstable. We will examine the causation evidence first because negligence is not actionable without a showing of proximate cause. *McCoy* at ¶9 ("A finding of negligence is precluded when the plaintiff, either personally or with the use of outside witnesses, cannot identify what caused the fall."). Without proximate cause, it would not be necessary to determine if appellees had a duty to (1) secure the therapy steps or (2) warn decedent of the instability of the therapy steps and the railing.

{¶18} Appellees have presented evidence that decedent tripped and fell over the treadmill and *then* grabbed onto the railing of the therapy steps to brace her fall. In essence, appellees argue the instability of the railing did not cause decedent's injury; rather, the obstructed pathway caused decedent's injury. Therefore, according to appellees, the open-and-obvious nature of an obstructed path justifies dismissal of all claims. The alternative evidence emphasized by appellant is that decedent used the railing of the therapy steps for balance and support while maneuvering the obstructed pathway to the bathroom. Appellant argues that because the therapy steps were not secured, the railing was unstable and caused decedent to fall when she attempted to use it for support.

{¶19} The depositions of Denise Thompson, Joseph Thompson and Christy Thompson support appellees' argument. Denise Thompson testified that, in describing the incident, decedent said "she went to step over the treadmill and lost her balance and

tried to grab the stairs to catch herself." (Denise Thompson depo. 16-17.) Similarly, Joseph Thompson testified that decedent told him that the entrance to the bathroom was blocked and "when she tried to walk around it, she tripped and fell." (Joseph Thompson depo. 14.) Christy Thompson also testified that decedent stated that "she tried to walk in-between a treadmill and a pair of stairs, wooden stairs that were in the corner, and that when she went to step over the opening * * * she tripped which caused her to fall. * * * And she reached out and grabbed the railing on the stairs to brace herself, or to keep her from falling." (Christy Thompson depo. 19-20.) This testimony constitutes evidence that decedent tripped over the treadmill and then grabbed the railing of the therapy steps to brace her fall.

{¶20} We note that portions of Susana Bisson's testimony also tend to support the appellees' argument. In the incident report, Bisson stated that "[a]s the patient enroute [sic] to the restroom she tripped [and] fell on her buttocks with the railing of the stepper on top of her foot as she braced herself with it." (Plaintiff's Exhibit B and Bisson depo. 27-28, 30-31.) Bisson further explained in her deposition:

Q: All right. You also mentioned, in the written statement, that "she fell on her buttocks with the railing of the stepper on top of her foot as she braced herself with it." What did you mean by that?

A: Usually, when you fall, you would try to catch hold of something to, you know, break your fall.

(Bisson depo. 35.) However, we also note that Bisson's deposition reveals that she had trouble reading her own handwriting on the written incident report from which the testimony highlighted above was drawn. Furthermore, Bisson did not recall actually seeing decedent fall. (Bisson depo. 27-33.)

{¶21} By contrast, Beth Seagle ("Seagle") testified that decedent stated that "she attempted to step over the treadmill, grabbing onto the railing of the stairs for balance, and the stairs were not secured to anything and they pulled over causing her to lose her balance, and when she fell, they fell on top of her." (Seagle depo. 25-26.) This testimony supports the argument urged by appellant—that decedent was using the railing of the therapy stairs for balance and support to maneuver the obstructed pathway to the restroom and that the instability of the unsecured steps and railing *caused* decedent's fall.

{¶22} Therefore, we are faced with competing evidence as to whether decedent grabbed the railing to brace her fall or was using the railing for balance and support prior to her fall. At summary judgment, we are required to construe the evidence in the light most favorable to the nonmoving party and to resolve any reasonable inferences in favor of the nonmoving party. *McCarthy*, supra. Summary judgment is not proper based on evidence that decedent tripped and began to fall before grabbing the railing of the therapy steps to catch herself when there is also evidence that decedent attempted to use the railing for support and fell because the therapy steps and the railing were unstable. This constitutes a genuine issue of material fact to be determined by the fact finder. Therefore, we must consider whether summary judgment would be proper based on the element of appellees' duty to secure the therapy steps or to warn decedent that they were unstable.

{¶23} The issue of whether appellees had a duty to secure the railing when they knew or should have known business invitees such as decedent might have relied on such equipment for support while en route to the restroom involves competing inferences. Implicit in appellant's argument that such a duty existed is his argument that the instability

of the therapy steps railing was a latent or hidden danger. If appellees had no such duty, however, there can be no negligence. *Jeffers* at 142.

{¶24} Inferences may be made in order to formulate conclusions when based upon the facts in the record. "The inferences drawn from the same facts by different minds may often greatly differ." *Johnson v. State* (1902), 66 Ohio St. 59, 68. "The only inferences of fact which the law recognizes are immediate inferences from facts proved, but a given state of facts may give rise to two or more inferences, and in such case one inference is not built upon another but each is drawn separately from the same facts." *McDougall v. Glenn Cartage Co.* (1959), 169 Ohio St. 522, paragraph two of the syllabus.

{¶25} Appellees invite the court to infer that decedent had used the same therapy steps prior to her fall and, therefore, knew or should have known of the instability of the therapy steps and the railing. Based on this inference, appellees argue that there was no duty to secure the railing or to warn decedent of the railing's instability because it was an open-and-obvious condition. The alternative inference, propounded by appellant, is that decedent had not used the steps prior to her fall and, therefore, did not know of the railing's instability. As such, the instability of the therapy steps was a hidden or latent defect, and appellees had a duty to secure the railing or to warn decedent of its instability. Both inferences are drawn from the same evidence, the deposition testimony of Susana Bisson and Dr. Dean.

{¶26} Bisson stated in her deposition:

Q. Okay. If a person comes in for a venous ultrasound, is there any reason that the person would be using the stair stepper for that procedure?

A. Depending on which venous ultrasound you're talking about. Because we do two different ones.

Q. Okay.

A. We do venous ultrasound for a DVT, for deep vein thrombosis. We also, in addition to that, we also use it – do venous ultrasound looking for venous insufficiency or reflux.

Q. Okay. Do you recall, did Mrs. Thompson use the stair stepper that day?

A. Her tests were – I don't recall. But most likely, in her condition, it's most likely for venous for a DVT.

Q. So she would not have used the stair stepper then?

A. No.

* * *

Q. All right. Just so we're clear. If a person is being tested for venous insufficiency, that's a test that would not have required the use of the stair stepper.

A. It would.

Q. It would require it. Okay. And you said it, I'm just trying to remember. You said there was one type of test where you would use the stair stepper, and another type of test where you would not use the stair stepper.

A. Correct.

Q. Remind me again, what are the two different tests?

A. One is looking for deep venous thrombosis.

Q. Okay. That's the one that would not use the stair stepper?

A. No.

* * *

Q. I'm going to show you Exhibit D. And I'm just going to point out a couple of things. I have no idea whether these will refresh your recollection or will tell you anything, because I'm not a medical person, so you have to trust my ignorance on that.

But if I show you Exhibit D, three quarters of the way down there's a paragraph that says, "Bilateral lower extremity venous duplex ultrasound." Does that help you understand what she was doing that day? If it doesn't, tell us it doesn't.

I'm right here. You can read that paragraph or any part of this, and see if it refreshes your recollection about what she was doing that day.

A. Venous duplex ultrasound, yes.

Q. Does that tell you whether she was being tested for venous insufficiency or DVT?

A. In general, it could be interpretation. To me, it looks like it's for a DVT.

Q. So that looks more like DVT to you?

A. Yeah.

(Bisson depo. 50-51; 53; 58-59.)

{¶27} Bisson, however, also answered "yes" in response to the question "[b]ut, if [decedent] was being tested for venous insufficiency, that would have been part of her test. And she would have already done that by the time she eventually fell." (Bisson depo. 60.)

{¶28} Dr. Dean stated in his affidavit attached to appellees' reply memorandum that he ordered the venous ultrasound, "in part, to assess for deep venous insufficiency." Yet, his deposition testimony leaves unanswered the question whether such test on decedent was conducted using the therapy stairs or while decedent was sitting down. In

his deposition, Dr. Dean testified that the steps were in the room "to complete part of a venous ultrasound called a 'reflux study,' where they have to stand during the procedure."

Dr. Dean testified as follows:

Q. Okay. Would steps have been used in the procedure performed on Ms. Thompson that day?

A. A possibility, yes. She did undergo a reflux test. Now, whether or not she actually stood, a lot of times it's at the discretion of the performing ultrasonographer. If she can get the information she needs in a supine position, they don't necessarily stand up during the examination.

* * *

Q. All right. So it's not absolutely required every time you do that test, but it is sometimes necessary?

A. That's correct.

(Dean depo. 25-26.)

{¶29} The court finds this evidence to be inconclusive and ambiguous. Based on the evidence, both inferences are reasonable. We have competing inferences as to whether decedent used the therapy steps prior to her fall and, therefore, knew or should have known of the instability of the railing. At this stage we must construe the evidence in the light most favorable to appellant, as the nonmoving party, and resolve reasonable inferences in appellant's favor. *McCarthy*, supra. Thus, there is a genuine issue of material fact as to whether decedent had previously used the therapy steps.

{¶30} Because we find that competing evidence and inferences related to material issues of fact exist in this matter, summary judgment is improper and appellant's sole assignment of error is sustained.

{¶31} We decline to discuss appellant's argument regarding attendant circumstances as to the first basis for the negligence claim as it is not necessary given our ruling regarding appellant's second basis for the negligence claim.

{¶32} For the foregoing reasons, appellant's assignment of error is sustained. The judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law and consistent with this decision.

Judgment reversed and cause remanded.

BRYANT, P.J., concurs.

FRENCH, J., dissents.

FRENCH, J., dissenting.

{¶33} I respectfully dissent. In my view, both the treadmill and the therapy steps, and the potential dangers they presented, were open and obvious to Ms. Thompson. As to the steps, nothing about them was hidden from view. The room was well-lit, the steps were completely visible, and their size, shape, and weight were discernible. The railing did not come off the steps when Ms. Thompson reached for them, whether before or after she tripped on the treadmill. Rather, her grasp on the railing pulled the steps on top of her.

{¶34} Applying the same legal principles the majority applied, I conclude that a reasonable person would have appreciated the danger inherent in grasping the railing of the steps while falling. My view might be different if medical personnel had asked Ms. Thompson to use the steps during therapy, and they tipped over while she did so. But here, Ms. Thompson was not using the equipment; she was walking around it. It is

undisputed that the steps were located temporarily in a small space that also contained a bed, a desk, an ultrasound machine, a treadmill, a microwave cart, and a file cabinet. A reasonable person having to traverse that space to reach the restroom on the other side would have appreciated the danger before her and would have known that grasping the therapy steps (whether before or after she tripped over a treadmill that was obvious to her) might cause them to fall over on her. Therefore, I would affirm the judgment of the trial court. Because the majority has concluded otherwise, I dissent.
