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

Linda S. Power	Court of Appeals No. L-14-1133
Appellant	Trial Court No. CI0201301878
v.	
Bay Park Community Hospital, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: March 31, 2015

* * * * *

Emil G. Gravelle III, Russell W. Gerney and Kurt M. Young, for appellant.

Michael S. Scalzo and Meghan Anderson Roth, for appellee ProMedica Bay Park Hospital.

Mike DeWine, Ohio Attorney General, and Carolyn S. Bowe, Associate Assistant Attorney General, for appellee Administrator, Bureau of Workers' Compensation.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Plaintiff-appellant, Linda Power, appeals the judgments of the Lucas County Court of Common Pleas which granted summary judgment in favor of ProMedica Bay Park Community Hospital ("Bay Park") and the Ohio Bureau of Workers' Compensation

("BWC") on appellant's claim for workers' compensation benefits, and granted Bay Park's motion for summary judgment on appellant's premises liability claim. Because we agree that no genuine issues of fact remain for trial, we affirm.

{¶ 2} An overview of the facts is as follows. On June 29, 2012, appellant was employed as a secretary at Bay Park. On that date she was assigned to the second floor medical/surgical unit and was working the 7:00 p.m. to 7:00 a.m. shift. During her shift, she was informed by her friend, Robin Giles, that their mutual friend, Nancy McGee, over whom they both have power of attorney, had been transported to Bay Park's emergency room with a suspected stroke; Giles planned to pick her up. Within hours, it was determined that McGee had a transient ischemic attack, or mini-stroke, and she was set to be discharged. At that time, the emergency room, located on the ground floor, was not busy and appellant was informed that McGee could remain there until appellant was off-duty. Appellant's floor was also quiet so she clocked out at 6:15 a.m.

{¶ 3} Appellant proceeded to the emergency room and located her friend. Once the nurse brought the wheelchair, appellant began to leave the room to retrieve her vehicle. At that point she believes that either her coat or bag was ensnared on the wheelchair and she fell sustaining a right proximal humerus fracture.

{¶ 4} This action commenced with appellant's appeal from the Industrial Commission's denial of her claim for workers' compensation following the injury she sustained from her fall. Bay Park prevailed in the administrative proceedings by arguing

that the injury did not arise out of the course and scope of appellant's employment at the hospital.

{¶ 5} Appellant also brought a premises liability claim against Bay Park arguing that, as an invitee and employee, the hospital owed her a duty to warn of possible perils, to wit, that the nurse placed the wheelchair too close to the stretcher upon which McGee was lying to allow for safe ingress and egress. The court granted a motion to bifurcate the two claims.

{¶ 6} On October 28, 2013, Bay Park filed a motion for summary judgment as to the workers' compensation claim. In the motion, Bay Park argued that although appellant was injured on its property, her injury did not occur in the course and scope of her employment because the emergency room is not in the zone of her employment, appellant was not under Bay Park's direction at the time of the injury, and Bay Park did not receive a benefit from her presence. The BWC also filed a motion for summary judgment adopting Bay Park's arguments.

{¶ 7} On October 30, 2013, appellant filed a motion for partial summary judgment or, alternatively, complete summary judgment. Appellant argued that, at minimum, she was entitled a judgment as to the undisputed facts including that she was employed by Bay Park and amenable to the Ohio Workers' Compensation system, and that she was injured at Bay Park. Appellant further argued that at the time of her injury, Bay Park was receiving a benefit by appellant's act of "opening up" space in the emergency room and saving the hospital "time and resources" in finding McGee an alternative means home.

{¶ 8} On January 27, 2014, the trial court granted appellees' motions. The court agreed that appellant was not coming or going from work and was in an area that she would not normally traverse. The court further found that appellant in picking up McGee from the emergency room, was not acting for the benefit of Bay Park. Appellant appealed this decision but the matter was remanded pending a ruling on the premises liability claim.

{¶ 9} On March 3, 2014, Bay Park filed a motion for summary judgment as to the issue of premises liability. Bay Park argued that any condition regarding the placement of the wheelchair was "open and obvious" and it had no obligation to warn appellant. Further, Bay Park argued that recovery was precluded because appellant could not establish the proximate cause of her injury. In her opposition, appellant argued that the attendant circumstances defense to the open and obvious doctrine applied. She contended that the wheelchair was an attendant circumstance.

{¶ 10} The trial court agreed with Bay Park's arguments and granted summary judgment. This appeal followed.

{¶ 11} Appellant brings two assignments of error for our review:

> 1. The trial court erred in the workers compensation claim by granting appellees' motions for summary judgment and denying motion for partial summary judgment, and in the alternative complete summary judgment because the trial court improperly applied the summary judgment standard and weighed the facts against the appellant Linda Power.

2. The trial court erred in the premises liability claim by granting appellee Bay Park's motion for summary judgment.

{¶ 12} At the outset we note that our standard of review is de novo. *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Accordingly, we review the trial court's grant of summary judgment independently and without deference to the trial court's determination. *Brown v. Scioto Cty. Bd. of Commrs.,* 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993). Summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.,* 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978); Civ.R. 56(C). The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt,* 75 Ohio St.3d 280, 294, 662 N.E.2d 264 (1996). However, once the movant supports his or her motion with appropriate evidentiary materials, 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).

{¶ 13} In appellant's first assignment of error she argues that the trial court erred by granting appellees' summary judgment motions. Appellant believes that issues of fact remain regarding whether she was in the zone of her employment at the time of her injury

and whether Bay Park benefited from her act of picking up her friend from the emergency room.

{¶ 14} In order be eligible to receive workers' compensation benefits, an injured worker must demonstrate that he or she sustained an injury, "whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment." R.C. 4123.01(C). Accordingly, the injury must be both "in the course of" and "arising out of" the employment to be compensable. *Fisher v. Mayfield*, 49 Ohio St.3d 275, 277, 551 N.E.2d 1271 (1990). As a general rule, the workers' compensation statute must be "liberally construed in favor of employees." R.C. 4123.95; *Fisher* at 278.

{¶ 15} The Supreme Court of Ohio has recently examined the "in the course of" and "arising out of" prongs as set forth in *Fisher*. *Friebel v. Visiting Nurse Assn. of Mid-Ohio*, Slip Opinion No. 2014-Ohio-4531. The court stated that an injury is "in the course of" employment where the employee is injured "while engaged in a required employment duty or activity consistent with their contract for hire and logically related to the employer's business. *Id.* at ¶ 13, citing *Ruckman v. Cubby Drilling, Inc.*, 81 Ohio St.3d 117, 120, 689 N.E.2d 917 (1998).

{¶ 16} As to the "arising out of" prong, the court stated that it

> refers to the causal connection between the employment and the injury, and whether there is sufficient causal connection to satisfy this prong "'depends on the totality of the facts and circumstances surrounding the accident,

including: (1) the proximity of the scene of the accident to the place of employment, (2) the degree of control the employer had over the scene of the accident, and (3) the benefit the employer received from the injured employee's presence at the scene of the accident.'" *Fisher* at 277, 551 N.E.2d 1271, quoting *Lord v. Daugherty*, 66 Ohio St.2d 441, 423 N.E.2d 96 (1981) syllabus. This list of factors is not exhaustive, however, and an employee may fail to establish one or more of these three factors and still be able to establish the requisite causal connection. *Fisher* at 279, 551 N.E.2d 1271, fn. 2; *Ruckman* at 122, 689 N.E.2d 917. *Id*. at ¶ 14.

{¶ 17} This court has further explained that an injury arises in the course of and arising out of employment where "the injury follows as a natural incident of the work and as a result of exposure occasioned by the nature, conditions, and surroundings of the employment." *Remer v. Conrad*, 153 Ohio App.3d 507, 2003-Ohio-4096, 794 N.E.2d 766, ¶ 12 (6th Dist.).

{¶ 18} Bay Park first argues that appellant's injury did not occur in her zone of employment and was not a result of the conditions of her employment. In support, Bay Park relies on a case where a hospital employee was found not to be in the course of her employment when she was injured in the hospital. *Jackson v. Univ. Hosp. of Cleveland*, 122 Ohio App.3d 371, 701 N.E.2d 787 (8th Dist.1997). In *Jackson*, the employee worked as a laboratory technician and had clocked out following her shift. *Id.* at 372. The employee then proceeded from the fifth floor lab to the cafeteria located on the first

floor. *Id.* at 373. At the cafeteria, the employee purchased a coffee and doughnut and then proceeded to the employee's lounge located two floors below the cafeteria in the sub-basement. *Id.* While in the stairwell, the employee attempted to open the door with her coffee in one hand and doughnut in the other and spilled her coffee causing burns. *Id.* The court concluded that because the circumstances surrounding the injury and the employee's job duties were not related in any way, she was not under the hospital's direction, and the hospital received no benefit, the injury did not arise out of the course and scope of her employment. *Id.* at 376.

{¶ 19} In the present case, appellant finished her shift on the second floor and clocked out. She stated in her deposition that on a regular work day, she would not traverse the first-floor emergency room either going to or from work. Although appellant's friend had planned to get McGee upon her discharge, appellant offered to do so after work. On that day, the emergency room was "slow" so McGee was permitted to remain there until appellant arrived. Because appellant's floor was also "slow," she was allowed to clock out early.

{¶ 20} Reviewing these facts, we conclude that appellant's injury did not occur in the course of or arising out of her employment. Appellant was not under the direction of her employer when she went to get her friend and Bay Park received no benefit from her doing so. Thus, we find that the court did not err when it granted appellees' motions for summary judgment as to appellant's claim for workers' compensation. Appellant's first assignment of error is not well-taken.

{¶ 21} In her second assignment of error, appellant contends that the trial court erred when it granted Bay Park's motion for summary judgment as to her premises liability claim. "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 to be injured." *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, 909 N.E.2d 120, ¶ 10.

{¶ 22} Appellant argues that, as an invitee, Bay Park was required to warn her of latent or hidden dangers. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 5. However, an owner or occupier of property has no duty to warn invitees of open and obvious dangers on the property. *Sidle v. Humphrey*, 13 Ohio St.2d 45, 233 N.E.2d 589 (1968), paragraph one of the syllabus; *Paschal v. Rite Aid Pharmacy, Inc.*, 18 Ohio St.3d 203, 480 N.E.2d 474 (1985). This is so, because an invitee is expected to discover such perils and take appropriate safeguards. *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644, 597 N.E.2d 504 (1992).

{¶ 23} An exception to the open and obvious doctrine exists where attendant circumstances distracted the individual just prior to the injury. "An attendant circumstance is a factor that contributes to the fall and is beyond the control of the injured party." *Cooper v. Meijer Stores Ltd. Partnership*, 10th Dist. Franklin No. 07AP-201, 2007-Ohio-6086, ¶ 15, citing *Backus v. Giant Eagle, Inc.*, 115 Ohio App.3d 155, 158, 684 N.E.2d 1273 (7th Dist.1996). Such circumstances may include "poor lighting, large volume of pedestrian traffic, heavy vehicular traffic, visibility of the defect, the overall

condition of the walkway, and whether the accident site is such that one's attention would be easily distracted." *Stinson v. Kirk*, 6th Dist. Ottawa No. OT-06-044, 2007-Ohio-3465, ¶ 25, citing *Humphries v. C.B. Richard Ellis, Inc.*, 10th Dist. Franklin No. 05AP-483, 2005-Ohio-6105, ¶ 20. To circumvent the open and obvious doctrine and prevent summary judgment, the attendant circumstance must substantially increase the risk of harm; in other words, the attendant circumstance must distract the attention of the pedestrian to the degree that a minor defect is raised to a "substantial and dangerous" defect. *Id.* at ¶ 24-25.

{¶ 24} Appellant argues that the placement of the wheelchair narrowed the passage between the stretcher and the chair and that her lab coat or bag strap became entangled in the chair causing her to fall. Appellant argues that the wheelchair was an attendant circumstance which contributed to her fall. During her deposition, when appellant was questioned as to the circumstances surrounding her fall, she stated:

> Q: Okay. You think that you hit the wheelchair. Do you think you contacted the wheelchair at all any time during your fall; do you recall?
>
> A: I guess the best way to answer that is that's what I fell and tripped over. I got caught on that, and the wheelchair was there.
>
> Q: Okay. Now when you were here in the room, you saw the wheelchair, correct?
>
> A: Yes.
>
> Q: Okay. And you saw the stretcher?

A: Yes.

Q: How do you think you got hung up then on the wheelchair?

A: I don't know.

Q: Okay. You don't know if it was your purse or some of your clothing; it that what you're saying?

A: No, I did not know.

Q: And you don't therefore know what part of the wheelchair or the stretcher might have hung up your purse or your clothing. Correct?

A: No, I don't.

Q: You're not saying that you tripped on the wheelchair, are you? You're saying – as opposed – meaning like your foot got caught on it?

A: I don't know. I just know I fell and got hurt and that's all I remember. I mean, I do not remember a lot.

{¶ 25} Reviewing the open and obvious doctrine and the attendant circumstance exception, we find that appellant has failed to raise a genuine issue of fact as to whether Bay Park breached its duty of care. As set forth above, appellant concedes that the wheelchair was open and obvious. Appellant argues, however, that the alleged hazard that may have caused her fall was also the attendant circumstance which contributed to her fall. The purpose of the attendant circumstance exception is to render an otherwise obvious hazard non-obvious and it significantly increases the danger of the hazard.

Appellant has not argued that the wheelchair was in any way obstructed or that her attention was diverted. Thus, the exception is inapplicable and we conclude that the wheelchair was an open and obvious hazard.

{¶ 26} Even assuming that appellant could demonstrate a breach of duty, she has failed to show that the wheelchair caused her fall. The mere fact that an individual fell and sustained an injury is insufficient to establish negligence. In other words,

> to establish negligence in a slip and fall case, it is incumbent upon the plaintiff to identify or explain the reason for the fall. Where the plaintiff either personally or by outside witnesses, cannot identify what caused the fall, a finding of negligence on the part of the defendant is precluded.
>
> *Estate of Mealy v. Sudheendra*, 11th Dist. Trumbull No. 2003-T-0065, 2004-Ohio-3505, ¶ 31, citing *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 67-68, 582 N.E.2d 1040 (12th Dist. 1989).

{¶ 27} Accordingly, because appellant failed to present evidence of an exception to the open and obvious doctrine and failed to show the cause of her fall we find that the trial court did not err when it granted Bay Park's motion for summary judgment on appellant's premises liability claim. Appellant's second assignment of error is not well-taken.

{¶ 28} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

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

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE