IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 2, 2016 Session

KARLA J. DENNIS, ET AL. v. DONELSON CORPORATE CENTRE I, LP, ET AL.

Appeal from the Circuit Court for Davidson County
No. 13C4872 Thomas W. Brothers, Judge

No. M2015-01878-COA-R3-CV – Filed May 13, 2016

This is a negligence case. Appellee, an elevator maintenance company, contracted with building owner to provide maintenance service for the building's elevators. Plaintiff was injured when one of the elevators allegedly did not level properly, causing her to fall as she was exiting the elevator. Plaintiff and her husband brought suit against the building's owner, the building's management company, and Appellee. Appellee filed a motion for summary judgment, which the trial court granted. Appellants appeal.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed and Remanded

KENNY ARMSTRONG, J., delivered the opinion of the Court, in which W. NEAL MCBRAYER and BRANDON O. GIBSON, JJ., joined.

Tim L. Bowden, Goodlettsville, Tennessee, for the appellants, Karla J. Dennis and Stanley Dennis.

T. Tamara Gauldin, Atlanta, Georgia, for the appellee, Nashville Machine Elevator Co., Inc.

OPINION

I. Background

Donelson Corporate Centre, LP ("Donelson Partnership") owns the Donelson Corporate Centre I building ("Corporate Centre") located in Nashville, Tennessee.

SmartSpace, LLC ("SmartSpace") is responsible for maintenance at the Corporate Centre. Donelson Partnership entered into a contract with Nashville Machine Elevator Company, Inc. ("NME" or "Appellee") to provide maintenance service on the Corporate Centre's elevators. Jeff Rogers, an employee of NME, was responsible for the routine maintenance of the elevators in the Corporate Centre, including the elevator at issue in this case. The subject elevator was known to NME as "#3" ("the elevator"). According to maintenance logs, which are included in the record, in 2012, Mr. Rogers performed routine maintenance on the elevator several times, but never found any issues with the elevator. The last scheduled maintenance on the elevator in 2012 occurred on December 5, 2012.

On December 7, 2012, Karla Dennis was exiting the elevator. The elevator allegedly did not stop level with the floor. Mrs. Dennis alleges it stopped three or four inches below floor level, and the uneven step caused her to fall, resulting in injuries to her knee, ankle, and leg. The injury to her knee required surgery.

In response to Mrs. Dennis's fall, Mr. Rogers was dispatched that same day to inspect the elevator. Rick Halfacre, a state inspector, was also dispatched, and he arrived on the site shortly after Mr. Rogers arrived. Mr. Rogers and Mr. Halfacre inspected the elevator together. During their inspection, they were unable to recreate the scenario where the elevator stopped three or four inches below the floor. Although Mr. Halfacre did not find any leveling problems with the elevator, he recommended replacing the elevator's leveling switch as a precaution, not a mandatory repair. After Mr. Halfacre concluded his inspection and left the premises, Mr. Rogers discovered the elevator had a leaking valve. In response to Mr. Rogers's discovery, NME replaced the valve.

On November 27, 2013, Mrs. Dennis and her husband, Stanley Dennis (together, "Appellants"), filed a complaint in the Circuit Court for Davidson County, naming the Donelson Partnership and SmartSpace as defendants. The complaint also incorrectly named "Nashville Machine Company, Inc." and "Nashville Mechanical Company, Inc." as defendants. Mrs. Dennis sought $250,000 in compensatory damages, and Mr. Dennis sought $25,000 for loss of consortium. On January 2, 2014, Donelson Partnership and Smartspace filed an answer to the complaint. On January 21, 2014, NME filed its answer to the complaint. On February 20, 2014, the trial court entered an agreed order substituting NME as the proper defendant in place of Nashville Machine Company, Inc. and Nashville Mechanical Company, Inc.

On April 16, 2014, Donelson Partnership and Smartspace filed a motion for summary judgment. NME filed its motion for summary judgment on April 23, 2014. Prior to hearing the motions for summary judgment, Appellants filed a notice of dismissal pursuant to Tennessee Rule of Civil Procedure 41 dismissing Donelson Partnership and SmartSpace; and, on June 24, 2014, the trial court entered an order dismissing those defendants. On July 3, 2014, Appellants filed a response to NME's motion for summary judgment. The parties

then commenced discovery. On May 1, 2015, Appellee filed a supplemental motion for summary judgment. On July 13, 2015, the Appellants filed their response to the supplemental motion for summary judgment. Following a hearing, the trial court granted Appellee's motion for summary judgment on July 31, 2015. Appellants timely filed their appeal.

II. Issues

The only issue presented to this Court for review is whether the trial court erred in granting the Appellee's motion for summary judgment.

III. Standard of Review

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. We review a trial court's ruling on a motion for summary judgment *de novo*, without a presumption of correctness. ***Rye v. Women's Care Center of Memphis, MPLLC***, 477 S.W.3d 235, 250 (Tenn. 2015) (citing ***Bain v. Wells***, 936 S.W.2d 618, 622 (Tenn. 1997)). "In doing so, we make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied." ***Id.*** (citing ***Estate of Brown***, 402 S.W.3d 193, 198 (Tenn. 2013)).

IV. Analysis

In appealing the grant of summary judgment, Appellants argue that a reasonable juror could conclude, under the *res ipsa loquitur* doctrine, that Appellee was negligent; alternatively, Appellants argue that they presented evidence creating a dispute of material fact as to the credibility of witnesses. Before addressing these arguments, we review the applicable law controlling summary judgment.

On summary judgment, "when the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense." ***Rye***, 477 S.W.3d at 264 (emphasis in original); *see also* Tenn. Code Ann. § 20-16-101.[1] "[A] moving party seeking summary judgment by

[1] Although the standards are similar, there is still some disagreement amongst members of this Court as to whether the standard set out in ***Rye*** or in Tennessee Code Annotated Section 20-16-101 is controlling. *See* ***Kathryn E. Mitchell et al. v. Charles Wesley Morris et al.***, No. E2015-01353-COA-R3-CV, slip op. at 8 (Tenn. Ct. App. Mar. 9, 2016); ***id.*** at 18 (Swiney, C.J., concurring).

attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis." ***Id.*** "Rather, Tennessee Rule 56.03 requires the moving party to support its motion with 'a separate concise statement of material facts as to which moving party contends there is no genuine issue for trial.'" ***Id.*** (quoting Tenn. R. Civ. P. 56.03).

"[T]o survive summary judgment, the nonmoving party 'may not rest upon the mere allegations or denials of [its] pleading.'" ***Id.*** at 265 (quoting Tenn. R. Civ. P. 56.03). The nonmoving party must "'set forth specific facts' *at the summary judgment stage* 'showing that there is a genuine issue for trial.'" ***Id.*** (quoting Tenn. R. Civ. P. 56.03)(emphasis in original). "The nonmoving party 'must do more than simply show that there is some metaphysical doubt as to the material facts.'" ***Id.*** (quoting ***Matsushita Elec. Indus. Co.***, 475 U.S. 574, 586 (1986)). "The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party." ***Id.*** "[A]fter adequate time for discovery has been provided, summary judgment should be granted if the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the existence of a genuine issue of material fact for trial." ***Id.*** (citing Tenn. R. Civ. P. 56.04, 56.06) (emphasis in original). "The focus is on the evidence the nonmoving party comes forward with at the summary judgment stage, not on hypothetical evidence that theoretically could be adduced, despite the passage of discovery deadlines, at a future trial." ***Id.***

A. *Res Ipsa Loquitur*

Appellants argue that a reasonable juror could have concluded that the Appellee was negligent under the doctrine of *res ipsa loquitur*. Appellee argues that the doctrine of *res ipsa loquitur* is not applicable. In addressing the Appellants' negligence claim, the trial court found that Appellee "did not receive the requisite notice to require it to take action and warn against any known danger." The trial court also found that "because [the Appellee] did not own or occupy the premises at Donelson Corporate Centre[,] it did not have a duty to warn Plaintiff of any alleged dangers of which it had no knowledge. [Appellee] never received any notice of the incident giving rise to [Appellants'] lawsuit."

Res ipsa loquitur, i.e. "the thing speaks for itself," is "a rule of evidence, not a rule of law." ***Burton v. Warren Farmers Co-Op.***, 129 S.W.3d 513, 525 (Tenn. Ct. App. 2002) (citing ***Quinley v. Cocke***, 192 S.W.2d 992, 996 (Tenn. 1946)). The *res ipsa loquitur* doctrine "permits, but does not require, a fact-finder 'to infer negligence from the circumstances of an injury.'" ***Id.*** at 525-26 (quoting ***Seavers v. Methodist Med. Ctr.***, 9 S.W.3d 86, 91 (Tenn. 1999)). "It is intended to come to the aid of plaintiffs who have no direct evidence of a defendant's negligence by providing a specialized vehicle for considering circumstantial evidence in negligence cases." ***Id.*** (internal citations omitted). "Plaintiffs relying on res ipsa loquitur need not prove specific acts of negligence by the defendant to get their case to a

jury." ***Id.*** (citing ***Summit Hill Assocs. v. Knoxville Utils. Bd.***, 667 S.W.2d 91, 96 (Tenn. Ct. App. 1983)). "[T]he doctrine of res ipsa loquitur cannot be invoked unless the circumstances surrounding the plaintiff's injury demonstrate: (1) that the injury or damage was probably the result of negligence; and (2) that it was probably the defendant who was the negligent person." ***Id.*** "Thus, plaintiffs intending to rely on the doctrine must establish three things. First, the plaintiff must identify how the injury occurred. Second, the plaintiff must demonstrate that the event causing the injury is a kind which does not ordinarily occur in the absence of negligence." ***Id.*** "Third… '[t]he plaintiff must demonstrate that he or she was injured by an instrumentality that was within the defendant's exclusive control….'" ***Id.*** (quoting, e.g., ***Seavers***, 9 S.W.3d at 91).

In reviewing the three elements set out in ***Burton v. Warren Farmers Co-Op.***, we conclude that Appellants satisfied the first element, i.e., demonstrating how the injury occurred. It is undisputed that Mrs. Dennis tripped and fell, resulting in her injuries. However, the second element, i.e., that a plaintiff "must demonstrate that the event causing the injury is a kind which does not ordinarily occur in the absence of negligence," is more problematic for the Appellants' case. Appellants' case rests on the argument that Mrs. Dennis tripped and fell because Appellee's alleged negligent maintenance of the elevator caused the elevator to level improperly. However, Appellants have not demonstrated that tripping and falling while exiting an elevator is an event that does not ordinarily happen in the absence of negligence. We conclude that it is certainly possible for a person to trip and fall while exiting an elevator, even if the elevator levels perfectly with the floor, and the Appellants did not present any evidence to the contrary at summary judgment.

The doctrine of *res ipsa loquitur* "does not permit a fact-finder to fix liability on a sheer leap of faith when the plaintiff's injury could reasonably have occurred even without the defendant's negligence." ***Psillas v. Home Depot, U.S.A., Inc.***, 66 S.W.3d 860, 865 (Tenn. 2001). Because Appellants failed to show that Mrs. Dennis's accident would not ordinarily occur in the absence of negligence, they have not demonstrated the second element required to invoke the *res ipsa loquitur* doctrine. Because Appellants did not meet the threshold requirements to invoke the doctrine of *res ipsa loquitur*, we conclude that the trial court did not err in finding that *res ipsa loquitur* does not apply in this case.

B. Dispute of Material Fact

Alternatively, Appellants argue that the trial court erred in granting summary judgment because they presented evidence creating a genuine issue of material fact as to a witness's credibility. Specifically, Appellants argue that because Mr. Rogers, in his deposition testimony taken June 10, 2014, could not remember whether he serviced the elevator two days before or a month before Mrs. Dennis' injuries, there is a question concerning his credibility. Appellants further argue that because Mr. Rogers's credibility is suspect, he likely concealed defects with the elevator. Appellants rely on ***Knapp v. Holiday***

Inns, Inc., 682 S.W.2d 936, 942 (Tenn. Ct. App. 1984) to support their argument that a genuine dispute of material fact exists because of the credibility issue. Appellee argues that the credibility issue is peripheral and has no bearing on the case. This Court has recognized that "summary judgments should not be granted in cases where the outcome hinges squarely upon the state of mind, intent, or credibility of the witnesses." ***Knapp***, 682 S.W.2d at 941-42. However, "[t]he credibility concerns that warrant denying a summary judgment must rise to a level higher than normal credibility questions that arise whenever a witness testifies. Any other rule would essentially prevent the courts from granting a summary judgment in any case." ***Hepp v. Joe B's, Inc.***, No. 01A01-9604-VC-00183, 1997 WL 266839, at * 3 (Tenn. Ct. App. May 21, 1997). "Thus, this court has found that credibility concerns preclude granting a summary judgment in cases where a witness's credibility has been specifically challenged, or where the record contained clear evidence of a witness's lack of credibility." ***Id.*** (internal citations omitted).

The issue before the ***Knapp*** Court was whether a grant of summary judgment was appropriate in the plaintiff's wrongful death action predicated upon a common law dram shop cause of action. In ***Knapp***, the individual defendant consumed alcoholic beverages at a bar owned by Holiday Inn. ***Knapp***, 682 S.W.2d at 938. The individual defendant then proceeded to leave the bar in his personal vehicle and subsequently caused an automobile accident that resulted in Mr. Knapp's death. ***Id.*** The executor of Mr. Knapp's estate brought suit against the individual defendant and the Holiday Inn. ***Id.*** Holiday Inn moved for summary judgment, presenting the affidavits of its employees regarding the defendant's level of intoxication while on Holiday Inn's premises and Holiday Inn's policies on serving alcohol. ***Id.*** Holliday Inn sought to show by these affidavits that the individual defendant was not visibly intoxicated when he was served at its bar. This Court determined that summary judgment was inappropriate when the only witnesses to the defendant's level of intoxication were an employee of the Holiday Inn who was a personal friend and former client of the individual defendant. The ***Knapp*** Court determined that "if the opponent to a motion for summary judgment succeeds in raising a genuine doubt concerning a witness' credibility by a sufficient showing of the witness' bias, prejudice, or interest, the summary judgment should be denied, and the case should be decided by the trier of fact." ***Id.*** at 942. The Court determined that the individual defendant's blood alcohol concentration, when viewed with the other proof, created a material factual dispute rendering summary judgment inappropriate. Blood taken from the individual defendant within an hour of the accident was found to have a blood alcohol concentration of .23.

The instant case, however, is distinguishable from ***Knapp***. This case does not hinge on any observation or individual's state of mind. In fact, there is nothing in the record to suggest that any witness exists who observed the elevator malfunctioning before Mrs. Dennis sustained her injuries. More importantly, the state elevator inspector who inspected the elevator shortly following Mrs. Dennis's fall, could not find anything wrong with the leveling function of the elevator. The Appellants' challenge to Mr. Rogers's credibility does not go to

the heart of the matter. Whether the elevator was serviced a month before or two days before is not a material fact in this case. Had Appellants alleged that Appellee did not maintain the regular service schedule for the elevator and thus caused its malfunction, then the elevator's last service date before Mrs. Dennis's fall would likely be relevant. However, Appellants are merely alleging that Mr. Rogers' inability to remember the date infers that Appellee is concealing damaging evidence. There is no proof of this in the record, and Mr. Rogers inability to remember a service date is merely peripheral to the issue of whether the Appellee breached a duty owed to Mrs. Dennis, that caused the elevator to mislevel. Furthermore, Mr. Rogers' inability to remember the service date does not bear on the Appellants' inability to demonstrate that her injuries would not ordinarily have occurred in the absence of negligence. Accordingly, from the totality of the circumstances, we conclude that Appellants' credibility challenge does not rise to the "higher than normal" level required to preclude summary judgment in this case, *see* ***Hepp***, 1997 WL 266839 at *3, and is not a material issue in this case.

V. Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed. The case is remanded for such further proceedings as may be necessary and are consistent with this opinion. Costs of the appeal are taxed to the Appellants, Karla and Stanley Dennis, and their surety, for all of which execution may issue if necessary.

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KENNY ARMSTRONG, JUDGE