

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

RONDA WICKS, as Administrator of the
Estate of Paris D. Wicks, II, etc.

C.A. No. 28925

Appellant

v.

LOVER'S LANE MARKET, et al.

Appellees

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2015-08-4200

DECISION AND JOURNAL ENTRY

Dated: June 28, 2019

HENSAL, Judge.

{¶1} Ronda Wicks appeals a judgment of the Summit County Court of Common Pleas that granted summary judgment to Lover's Lane Market on her wrongful death and other claims. For the following reasons, this Court affirms in part and reverses in part.

I.

{¶2} A group of men attacked and killed Paris Wicks outside of the Lover's Lane Market. Ms. Wicks, the administrator of Mr. Wicks's estate, sued the Market, two of its employees, and the men who committed the attack, alleging wrongful death, gross negligence, and multiple theories of negligence. Owners Insurance Company intervened and filed a complaint seeking a declaration that it has no duty to defend or indemnify the Market. After the men who committed the attack failed to answer, the trial court granted Ms. Wicks a default judgment against them.

{¶3} Owners moved for summary judgment on its complaint, which the trial court granted in part and denied in part. The Market moved for summary judgment on Ms. Wicks's claims, which the trial court granted. After the court determined the amount of damages owed by the attackers, it dismissed Owners' complaint as moot, and entered final judgment. Ms. Wicks has appealed the trial court's decision to grant summary judgment to the Market, assigning three errors. This Court will rearrange and combine some of the assignments of error for ease of disposition.

II.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT TO LLM ON WICKS'S WRONGFUL DEATH, SURVIVORSHIP, GROSS NEGLIGENCE, NEGLIGENCE PER SE AND *RESPONDEAT SUPERIOR* CLAIMS AS THOSE ISSUES WERE NOT PROPERLY BRIEFED OR ARGUED BY LLM.

{¶4} Ms. Wicks argues that the trial court incorrectly granted summary judgment to the Market on all of her claims because it only moved for summary judgment on some of the claims. Under Civil Rule 56(C), summary judgment is appropriate if:

(1) [n]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977). To succeed on a motion for summary judgment, the movant bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). If the movant satisfies this burden, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." *Id.* at 293, quoting

Civ.R. 56(E). This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996).

{¶5} “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.” *Misteff v. Wheeler*, 38 Ohio St.3d 112 (1988), syllabus. Accordingly, “[i]f a party files a motion based on some, but not all, issues in a case, the trial court should restrict its ruling to those matters raised. It is reversible error to award summary judgment on grounds not specified in the motion for summary judgment.” *Lindsey v. Summit County Children’s Servs. Bd.*, 9th Dist. Summit No. 24352, 2009-Ohio-2457, ¶ 10, quoting *Caplinger v. New Carlisle*, 2d Dist. Clark No. 2007CA0072, 2008-Ohio-1585, ¶ 26; see *Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 94 (1992).

{¶6} In her complaint, Ms. Wicks alleged that the Market was liable for the wrongful death of Mr. Wicks because it failed to warn and protect him from the criminal acts of third parties. She also alleged that the Market had acted negligently when it failed to warn and protect Mr. Wicks. She alleged that the Market was liable for gross negligence because it sold alcohol to a minor without checking his identification, allowed him to consume the alcohol on its premises, and allowed him to have weapons on its property, leading to Mr. Wicks’s death. She also alleged that the Market was negligent per se because of its failure to warn and protect Mr. Wicks and because of its conduct supporting her gross negligence claim. She also alleged that the Market’s employees had acted negligently and that the Market was liable for their acts under the principle of respondeat superior. She further asserted a claim on behalf of Mr. Wicks’s heirs for loss of consortium.

{¶7} In its motion for summary judgment, the Market argued that it did not owe Mr. Wicks a duty to warn and protect him against criminal conduct because the conduct was not foreseeable. It argued that, in the absence of a legal duty, Ms. Wicks's negligence, survivorship, and wrongful death claims failed as a matter of law. It further argued that the loss of consortium claim failed because there were no individually named plaintiffs and because Mr. Wicks was an emancipated adult. It did not make an argument, however, as to Ms. Wicks's claims that the Market committed gross negligence and negligence per se because it allowed a juvenile to purchase and consume alcohol, resulting in Mr. Wicks's death. It also did not make an argument regarding Ms. Wicks's respondeat superior claim. Accordingly, upon review of the record, we conclude that the trial court incorrectly granted summary judgment to the Market on Ms. Wicks's gross negligence, negligence per se, and respondeat superior claims. Ms. Wicks's third assignment of error is sustained.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED IN REFUSING TO CONSIDER THE SURVEILLANCE VIDEOS IN THE SUMMARY JUDGMENT ANALYSIS.

ASSIGNMENT OF ERROR II

THE TRIAL COURT'S ERROR IN FAILING TO CONSIDER THE STORE SURVEILLANCE VIDEO RESULTED IN THE TRIAL COURT ERRING IN GRANTING LLM'S MOTION FOR SUMMARY JUDGMENT BECAUSE BY FAILING TO CONSIDER THE STORE SURVEILLANCE VIDEO, THE TRIAL COURT FAILED TO VIEW THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE NON-MOVING PARTY.

{¶8} In her first assignment of error, Ms. Wicks argues that the trial court incorrectly refused to consider video from the Market's security cameras when it determined whether the Market was entitled to summary judgment. In her second assignment of error, she argues that the error led the court to grant summary judgment to the Market incorrectly. The trial court

refused to consider the security camera footage because it determined that it was “not proper summary judgment evidence” under Civil Rule 56(C).

{¶9} Rule 56(C) sets forth an exclusive list of the evidentiary materials a court may consider when determining how to rule on a motion for summary judgment. Specifically, the court may consider “the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact[.]” Civ.R. 56(C). In addition, “the trial court may consider a type of document not expressly mentioned in Civ.R. 56(C) if such document is ‘accompanied by a personal certification that [it is] genuine or [is] incorporated by reference in a properly framed affidavit pursuant to Civ.R. 56(E).’” (Alterations sic.) *Wallner v. Thorne*, 189 Ohio App.3d 161, 2010-Ohio-2146, ¶ 18 (9th Dist.), quoting *Countrywide Home Loans, Inc. v. Rodriguez*, 9th Dist. Lorain Nos. 03CA008345, 03CA008417, 2004-Ohio-4723, ¶ 9. Ms. Wicks points out that a trial court “retains discretion to either consider or ignore improper Civ.R. 56 evidence * * * [if] there has not been any objection to the evidence.” *Id.* In this case, however, the Market argued in its reply brief that several of the exhibits that Ms. Wicks attached to her opposition brief were improper under Rule 56 and specifically asserted that the surveillance video was “improperly offer[ed.]”

{¶10} Regarding whether the security camera footage could be considered by the trial court in reviewing the Market’s motion for summary judgment, Ms. Wicks notes that the Eighth District Court of Appeals has held that “video surveillance footage can be proper Civ.R. 56 evidence.” *Hogg v. Heath*, 8th Dist. Cuyahoga No. 100188, 2015-Ohio-515, ¶ 23. In *Hogg*, Mark Hogg argued that the trial court erred when it refused to consider a DVD allegedly containing surveillance video footage from a robbery. *Id.* at ¶ 21. The Eighth District explained that, if supporting evidence falls outside the materials listed in Rule 56(C), “the correct method

for introducing such evidence is to incorporate it by reference into a properly framed affidavit.” *Id.* at ¶ 24. It held that video evidence “falls into this category and must be incorporated through a properly framed affidavit.” *Id.* Because Mr. Hogg had done so, it concluded that the trial court had incorrectly stated that the video evidence could not be considered on summary judgment. *Id.* at ¶ 25.

{¶11} Unlike in *Hogg*, Ms. Wicks did not incorporate the surveillance videos into a properly-framed affidavit. The trial court, therefore, did not err when it refused to consider the security camera footage in ruling on the Market’s motion for summary judgment.

{¶12} Ms. Wicks also argues that the trial court incorrectly determined that the surveillance videos were not authenticated. We note that the court wrote in its decision that “the DVD submitted by [Ms. Wicks] is not authenticated in any way.” The reason it declined to consider the videos, however, was because “[t]he DVD * * * [did] not fall into any category of evidence permitted by the Rule” and, thus, was “not proper summary judgment evidence[.]” Inasmuch as the trial court did not refuse to consider the surveillance videos because they were not authenticated, we do not need to resolve Ms. Wicks’s authentication argument.

{¶13} The trial court correctly determined that the videos were not proper summary judgment evidence because Ms. Wicks did not incorporate them into a properly-framed affidavit. In light of this conclusion, it follows that the trial court’s refusal to consider the surveillance footage did not cause it to incorrectly grant summary judgment to the Market. Ms. Wicks’s first and second assignments of error are overruled.

III.

{¶14} Ms. Wicks’s third assignment of error is sustained. Her first and second assignments of error are overruled. The judgment of the Summit County Court of Common

Pleas is reversed, and this matter is remanded for further proceedings consistent with this decision.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

JENNIFER HENSAL
FOR THE COURT

TEODOSIO, P. J.
CONCURS.

CARR, J.
DISSENTING.

{¶15} I respectfully dissent as I disagree with the resolution of the first and second assignments of error in the lead opinion.

{¶16} The video footage at issue in the first and second assignments of error was a key piece of evidence for Ms. Wicks as it allegedly demonstrated that Lover's Lane Market permitted gang members to partake in drug use on the premises and engage in drug transactions in and around the store. The video footage, according to Ms. Wicks, was critical in establishing that LLM fostered an environment where a deadly altercation such as the one that occurred in this case was reasonably foreseeable. Multiple LLM employees acknowledged during their deposition testimony that the video footage from the surveillance system portrayed what transpired at the store on the date of the incident. The trial court refused to consider the video footage as it determined that it was not proper Civ.R. 56(C) evidence.

{¶17} LLM did not take the necessary steps to object to the admission of the video. In its reply brief, LLM argued that Ms. Wicks had attempted to "muddy the waters by repeatedly espousing unsupported accusations and pointing to improper evidence under Civ.R. 56(E)." In a corresponding footnote, LLM stated that it would file a motion to strike "and more fully address[] these issues." Notably, however, the motion to strike was never filed. *See State ex rel. Gilmour Realty, Inc. v. City of Mayfield Hts.*, 122 Ohio St.3d 260, 2009-Ohio-2871, ¶ 17 (A court may consider evidence other than the evidence listed in Civ.R. 56 when there is no objection.).

{¶18} Accordingly, I would sustain Ms. Wicks' first assignment of error pertaining to the trial court's exclusion of the video footage. I would further sustain Ms. Wicks' second assignment of error on the basis that the trial court erred in granting summary judgment as questions of material fact remain in this case.

APPEARANCES:

KENNETH D. MYERS, Attorney at Law, for Appellant.

MARK A. GREER and RICHARD C.O. REZIE, Attorneys at Law, for Appellee.