[Cite as *Streets v. Chesrown Enterprises, Inc.*, 2004-Ohio-554.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Oneita Streets,	:	
Plaintiff-Appellant,	:	
v.	:	No. 03AP-577 (C.P.C. No. 01CV12852)
Chesrown Enterprises, Inc.,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on February 5, 2004

Phillip D. Cameron; Donnita Carroll Pritchard, for appellant.

Alan E. Mazur, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

WATSON, J.

{¶1} This is an appeal from the decision of the Franklin County Court of Common Pleas granting defendant-appellee, Chesrown Enterprises, Inc.'s ("Chesrown") motion for summary judgment. For the following reasons, we affirm.

{¶2} On March 5, 2000, Oneita Streets ("appellant"), went to Chesrown with her niece to shop for a car. The two looked around and eventually went into the showroom

with a salesman, Mr. Lamar Woods. As appellant approached a chair to sit down in the showroom, the chair slipped from under her. Appellant hit the chair and fell to the ground. The legs of the chair contained wheels or casters. The floor was not carpeted but rather contained a covering that appellant described as "probably like linoleum." (Deposition of Oneita Streets at 58.) Appellant testified that she was carrying a purse in one hand and did not grab the chair with her empty hand to aid her in sitting down. Appellant claims she sustained injuries as a result of the fall. Appellant filed a negligence action against Chesrown on December 28, 2001. Chesrown filed a motion for summary judgment on October 3, 2002. The trial court granted Chesrown's motion. The trial court found that appellant failed to present *any* evidence demonstrating Chesrown's negligence. The court noted that appellant's memorandum contra to Chesrown's motion for summary judgment contained references to the deposition of Mr. Woods. However, appellant never filed the deposition with the court nor attached any relevant portions of it to its memorandum contra.

{¶3} Appellant asserts the following assignments of error:

> 1. The trial judge erred by sustaining the Defendant's motion for summary judgment and thereby dismissing Plaintiff's complaint without trial.
>
> 2. The trial court erred by sustaining the Defendant's motion for summary judgment that was filed out of time in violation of Ohio Civil Rule 56 without leave to do so.

{¶4} We will address the second assignment of error first. Appellant claims the trial court erred in allowing Chesrown to file its motion for summary judgment because it was out of rule. Appellant cites to Civ.R. 56(B) in support of this proposition. Section (B),

applicable to a *defending* party such as Chesrown, states that, if the action has been set for pretrial or trial, a motion for summary judgment may be made *only with leave of court*. Loc.R. 53.01 provides the following:

> All motions, including but not limited to summary judgment, judgment on the pleadings, and to dismiss, which seek to determine the merits of any claim or defense as to any or all parties shall be considered a dispositive motion. * * * All dispositive motions shall be filed no later than the date specified in the Case Schedule. Pursuant to Civ. R. 56(A), leave is hereby granted in all civil cases to file summary judgment motions between the time of filing and the dispositive motion date * * *.

{¶5} Although a literal reading of the local rule indicates that leave is granted only to those parties filing under Civ.R. 56(A), e.g., those seeking affirmative relief and *not* defending parties under section (B), there is a prior decision of this court wherein it was determined that the local rule automatically provides *a* party with the leave required to file a summary judgment motion under Civ.R. 56. *Franklin v. Columbus* (1998), 130 Ohio App.3d 53, 57 (affirming trial court's denial of appellant's motion to strike *defendant's* motion for summary judgment based on Loc.R. 53.01). Further, Loc.R. 57.04 provides that "[n]o motion for summary judgment shall be filed in any case after the dispositive motion date" without prior leave of court. This rule implies that leave is not required to file a motion for summary judgment prior to the dispositive motion date, regardless of whether the party is filing under Civ.R. 56(A) or (B). Based on the logic in *Franklin* and Loc.R. 57.04, we find no prejudicial error in the trial court's consideration of Chesrown's motion. The dispositive motion date was October 7, 2002. Chesrown filed its motion before that

date on October 3, 2002. However, we feel the better practice would be for the trial court to clarify its local rule(s) pertaining to summary judgment motions and leave to file such motions in conjunction with Civ.R. 56.[1] Accordingly, appellant's second assignment of error is overruled.

{¶6} In the first assignment of error, appellant argues the trial court improperly granted Chesrown's motion for summary judgment. Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. of Commrs.* (1997), 123 Ohio App.3d 158, 162. "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Banc Corp.* (1997), 122 Ohio App.3d 100, 103. Civ.R. 56(C) provides that summary judgment may be granted when the moving party demonstrates the following: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex rel. Grady v. State Emp. Relations Bd.* (1997), 78 Ohio St.3d 181, 183. In the summary judgment context, a "material" fact is one that might affect the outcome of the suit under the applicable substantive law. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340. When determining what is a "genuine issue," the court

[1] We also note that under the trial court's current case scheduling order initiated upon filing of all civil cases, the trial date is set immediately upon the filing of the case. Therefore, a literal reading of Civ.R. 56 and Loc.R. 53.01 means that all parties are required to obtain leave of court. And as it currently reads, Loc.R. 53.01 only automatically provides leave for parties seeking affirmative relief under Civ.R. 56(A).

decides if the evidence presents a sufficient disagreement between the parties' positions. Id.

{¶7} In *Dresher v. Burt* (1996), 75 Ohio St.3d 280, the Ohio Supreme Court held that a party seeking summary judgment on the ground that the nonmoving party cannot prove its case bears the initial burden to inform the trial court of the basis for the motion and identifying the portions of the record demonstrating an absence of a genuine issue of material fact. Id. The moving party does not discharge its burden simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Id. Rather, the moving party must specifically point to evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates the nonmoving party has no evidence to support its claims. Id. Further, when a motion for summary judgment has been supported by proper evidence, the nonmoving party may not rest on the mere allegations of the pleading, but must set forth specific facts, by affidavit or otherwise, demonstrating that there is a genuine triable issue. *Jackson v. Alert Fire and Safety Equip., Inc.* (1991), 58 Ohio St.3d 48, 52. If the nonmoving party does not demonstrate a genuine triable issue, summary judgment shall be entered against that party. Civ.R. 56(E).

{¶8} To prevail upon a claim of negligence, appellant must show that Chesrown owed her a duty of care, Chesrown breached that duty, and the breach was the proximate cause of her injuries. *Flowers ex rel. Estate of Kelley v. Penn Traffic Co.* (Aug. 16, 2001), Franklin App. No. 01AP-82.

{¶9} In Ohio, the status of a person who enters upon another's land determines the scope of the legal duty the landowner owes to the entrant. *Gladon v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 312, 315. A business owner owes business invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition so that its customers are not *unreasonably* exposed to danger. *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203. Business invitees are those who enter the premises of another by express or implied invitation for some purpose that is beneficial to the owner. *Flowers*, supra.[2] The owner must warn the invitee of unreasonably dangerous latent or hidden conditions that the invitee cannot reasonably be expected to discover. Id. A latent danger is hidden, concealed and not discoverable by ordinary inspection. Id. However, a business owner is not an insurer of a customer's safety. Id. Likewise, there is no duty to protect an invitee from open and obvious dangers. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 82, 2003-Ohio-2573. The open and obvious nature of the hazard serves as the warning and the owner may reasonably expect that persons entering the premises will discover those dangers and take measures to protect themselves. *Stuhr v. Anthony's Hair Fashions*, Franklin App. No. 03AP-240, 2004-Ohio-103.

{¶10} Appellant claims that sufficient evidence exists to create a genuine issue of material fact. Appellant cites examples from Woods' unfiled deposition, such as the carpet had been removed, the premises had recently been changed, the salesman

[2] In this case, appellant is an invitee. Appellant went to Chesrown, a car dealership open to the public, with the intent to purchase a new car.

(Woods) warned appellant's niece of the wheels on the chair, thus proving he had knowledge of the danger, but failed to warn appellant. Unfortunately for appellant, none of these circumstances suggest negligence on the part of Chesrown. First, we do not consider the purported testimony of salesman Woods. Appellant did not file Woods' deposition with the trial court nor attach any relevant portions to the memorandum contra to Chesrown's motion for summary judgment. See Civ.R. 56(C) (requiring depositions, affidavits, etc. to be "timely filed" in the action); *Shaw v. East Ohio Gas Co.* (Aug. 20, 2001), Stark App. No. 2001CA00102 (trial court properly refused to consider deposition that was not timely filed). Chesrown timely objected to the use of such testimony and the trial court properly refused to consider it. Appellant also attempts to introduce Woods' testimony with the use of appellant's affidavit. The affidavit simply states that appellant read the memorandum prepared on her behalf and she affirms that all factual statements within it are true to the best of her knowledge. However, without the deposition transcript, the affidavit attesting to Woods' testimony is inadmissible hearsay.[3]

{¶11} Ultimately, appellant's claim fails under the open and obvious doctrine. It is clear that even an invitee has a duty to exercise care for his or her own safety. *Austin v. Woolworth Dept. Stores* (May 6, 1997), Franklin App. No. 96APE10-1430 ("[t]hus, appellee does not have a duty to protect appellant from dangers which were known to appellant, or which were so obvious that he could have, upon reasonable inspection,

[3] Hearsay is defined as a statement, other than one made by a declarant, offered in evidence to prove the truth of the matter asserted. Ohio Evid.R. 801(C). Here, appellant is attempting to introduce statements made by Woods to prove the truth of the matter asserted, namely that he (Woods) warned appellant's niece

discovered them and taken sufficient steps to protect himself from them"). It is also clear that in this case, appellant did not exercise care for her own safety. Appellant simply failed to look at the legs of the chair, misjudged the location of the chair, and did not grab onto the chair as she went to sit down. The following testimony is illustrative:

> Q: * * * Prior to sitting down, did you look at the chair?
>
> A: Well, yeah, I looked at the chair. I always look at the chair.
>
> Q: What kind of chair was it?
>
> A: I don't even remember that.
>
> Q: Okay. Do you recall what kind of legs were on the chair?
>
> A: I don't - - I don't look at the legs on no chair.
>
> Q: You didn't look at the legs on the chair before you fell?
>
> A: No.
>
> * * *
>
> Q: Before you fell, was there anything that would have prevented you from seeing the legs on the chair?
>
> A: No, because I wouldn't have paid any attention to the chair. I just knew that it would be a chair to sit down in. I didn't go around examining the legs or anything.

(Appellant's Depo., at 52-53.)

{¶12} Appellant testified that there was nothing blocking her view. There was nothing on the floor that would have caused the chair to slip such as water or other liquid. Appellant testified that as she backed up to sit down, she was holding her purse in one

---

about the chair but does not recall warning appellant, that the carpet was recently removed, etc. These statements are inadmissible hearsay due to appellant's failure to file Woods' deposition.

hand but did not grab the chair with the other empty hand. Appellant also testified that the showroom was well lit. Appellant points to no specific evidence that Chesrown was unreasonable in any way, that the chair at issue was defective in any way, that having chairs with wheels on a hard "linoleum type" floor is unreasonably dangerous, or that Chesrown had notice of any defective condition. There is no evidence that any customers or employees fell from that chair or any other chair within the showroom. Therefore, we find the legs of the chair were an open and obvious condition appellant could have discovered upon reasonable inspection. *Austin*, supra. As such, Chesrown owed appellant no duty and appellant's negligence claim must fail. Accordingly, appellant's first assignment of error is overruled.

{¶13} Based on the foregoing, appellant cannot establish negligence on the part of Chesrown. The open and obvious condition of the wheels on the chair negates any duty on the part of Chesrown. There was simply no unreasonable risk of harm to appellant. Further, the trial court did not err in considering Chesrown's motion for summary judgment as Chesrown filed it prior to the dispositive motion deadline. Accordingly, appellant's first and second assignments of error are overruled and the judgment of the trial court is affirmed.

Judgment affirmed.

LAZARUS, P.J., and BOWMAN, J., concur.

_____