[Cite as *Mills v. Best Western Springdale*, 2009-Ohio-2901.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Katrena Jean Mills et al.,	:	
Plaintiffs-Appellants,	:	
		No. 08AP-1022
v.	:	(C.P.C. No. 07CVH07-10108)
Best Western Springdale,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 18, 2009

Law Offices of James P. Connors, and *James P. Connors*, for appellants.

Demers & Adams, LLC, and *David J. Demers*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, P.J.

{¶1} Plaintiffs-appellants, Katrena Jean Mills and Samuel Mills (collectively, "appellants"), appeal from the Franklin County Court of Common Pleas' entry of summary judgment in favor of defendant-appellee, Best Western Springdale ("Best Western"). For the following reasons, we affirm.

{¶2} On October 18, 2002, Katrena and her infant son, Samuel, traveled with a church group to the Best Western in Springdale, Ohio, for a retreat. Appellants, along with group members Janet Utt and Vickie Krupnik, stayed in room 608, while other group members stayed in rooms 607 and 609 for a single night.

{¶3} On July 31, 2007, appellants filed a complaint against Best Western, alleging claims for breach of contract, negligence, and violation of the Ohio Consumer Sales Practices Act ("CSPA"), R.C. 1345.01, et seq., arising from their contention that they contracted scabies during their hotel stay. Scabies is, "[i]n man, a dermatitis with intense itching, caused by the burrowing into the skin of the itch mite, *Sarcoptes scabei*." Stedman's Medical Dictionary, Unabridged Lawyers' Edition (1961); see also Webster's Third New Internatl. Dictionary of the English Language Unabridged (G&C Merriam Co. 1966) (defining scabies as "[i]tch or mange caused by mites [especially] when marked by the formation of exudative crusts"). Although the parties use the term "scabies" interchangeably to refer to the itch mites themselves and to the resultant skin condition, we will refer to the itch mites as "mites" and use the term "scabies" to refer to the condition caused by the mites burrowing into the skin.

{¶4} In their complaint, appellants alleged that Best Western breached its express and/or implied contractual obligation to provide them with a suitable, clean, and habitable hotel room by placing them in a room infested with mites. Appellants also alleged that Best Western breached its duty to provide them with a room that complied with Ohio statutory and regulatory cleanliness requirements. Lastly, appellants alleged that Best Western's actions underlying the breach of contract and negligence claims,

together with its alleged failure to resolve appellants' complaints, constituted unfair, deceptive, and unconscionable practices, in violation of the CSPA.

{¶5} On May 8, 2008, Best Western moved for summary judgment, arguing that the record contained no evidence causally connecting appellants' scabies to their hotel stay, as required for appellants' negligence and breach of contract claims. Best Western also argued that the record contained no evidence of an unconscionable, unfair or deceptive act to establish a violation of the CSPA. Appellants opposed Best Western's motion for summary judgment and filed their own motion for partial summary judgment on June 30, 2008, arguing that they were entitled to judgment as a matter of law on their negligence claims.

{¶6} The trial court granted Best Western's motion for summary judgment and denied appellants' motion for partial summary judgment. The trial court concluded that Best Western was entitled to summary judgment on appellants' breach of contract and negligence claims because the record contained no evidence to demonstrate the presence of mites in appellants' hotel room or to otherwise connect appellants' scabies with their hotel stay. The trial court further concluded that the evidence failed to establish a CSPA violation. The trial court issued its final judgment on October 20, 2008, and appellants filed a notice of appeal.

{¶7} Appellants assert the following assignments of error:

> 1. The trial court erred by granting summary judgment to appellee Best Western Springdale on all claims.
>
> 2. The trial court erred by denying partial summary judgment to the appellants Katrena and Samuel Mills.

Because both assignments of error concern the trial court's rulings on the parties' motions for summary judgment, we will address them together.

{¶8} We review a 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. We must affirm the trial court's judgment if any grounds the movant raised in the trial court support it. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶9} 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 non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶10} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 1996-Ohio-107. Once the moving party meets its initial burden, the non-movant must set forth specific facts demonstrating a genuine issue for trial. Id. at 293. Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 1992-Ohio-95, quoting *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 2.

{¶11} An overriding theme in appellants' arguments is that the trial court disregarded the principle that a claim for negligence or breach of contract may be based on circumstantial evidence and that the trial court granted summary judgment based solely on the lack of direct evidence connecting the scabies to the hotel. Of course, appellants are correct that circumstantial evidence may prove a claim, and Best Western does not dispute that assertion. "Circumstantial evidence is not inherently less reliable or certain than direct evidence." *Fogle v. Cessna Aircraft Co.* (Jan. 16, 1992), 10th Dist. No. 90AP-977, citing *State v. Jenks* (1991), 61 Ohio St.3d 259, 272. Both circumstantial and direct evidence are sufficient to support a verdict, and, in some cases, circumstantial evidence may be more persuasive than direct evidence. *Fogel*, citing *Michalic v. Cleveland Tankers, Inc.* (1960), 364 U.S. 325, 330, 81 S.Ct. 6, 11.

{¶12} Although the trial court stated in its summary judgment decision that there is no "direct evidence" showing that appellants contracted scabies from their hotel room and that appellants' evidence is "speculative and entirely circumstantial," it is not clear that the trial court was suggesting that appellants could not prove their case with circumstantial evidence. Reading the trial court's decision in its entirety, it appears that the trial court found that appellants lacked any evidence, even of a circumstantial nature, from which a trier of fact could find in favor of appellants without engaging in improper speculation. Nevertheless, regardless of whether the trial court proceeded from an erroneous position with respect to the validity of circumstantial evidence, our de novo standard of review on appeal renders any such error moot. See *Safe Auto Ins. Co. v. Hasford*, 10th Dist. No. 08AP-249, 2008-Ohio-4897, ¶18. Therefore, we proceed with our own review of the evidence.

{¶13} Because they are premised on the same alleged conduct, the trial court addressed appellants' breach of contract and negligence claims together, and we do the same. To prevail on a claim for breach of contract, the claimant must demonstrate the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff. *Jarupan v. Hanna*, 173 Ohio App.3d 284, 2007-Ohio-5081, ¶18. It is axiomatic that damages must be the natural and proximate result of the defendant's breach. *Ziss Bros. Constr. Co., Inc. v. TransOhio Sav. Bank* (June 20, 1991), 8th Dist. No. 58787. Indeed, a contracting party is at liberty to breach his contract, being liable only for damages proximately resulting from the breach. *Sorensen v. Wise Mgt. Servs., Inc.*, 8th Dist. No. 81627, 2003-Ohio-767, ¶39. See also *DeMuesy*

v. Haimbaugh (Dec. 31, 1991), 10th Dist. No. 91AP-212 (damages for breach of contract must be proximate and foreseeable). To establish actionable negligence, appellants must demonstrate (1) the existence of a duty from Best Western to appellants, (2) breach of that duty, and (3) damages proximately resulting from the breach. See *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 142. Thus, to recover on either a breach of contract or negligence theory, appellants must establish that their injuries or damages proximately resulted from either a breach of contract or a breach of a tort duty by Best Western.

{¶14} In support of its motion for summary judgment, and to demonstrate the absence of genuine issues of material fact, Best Western pointed to appellants' allegations in the complaint and to Katrena's deposition testimony and the documents incorporated therein. Best Western argued that appellants had no evidence, beyond Katrena's bare allegations, that appellants' hotel room or bed was infested with mites. Best Western specifically noted the absence of medical evidence linking appellants' scabies with their hotel stay. The only medical evidence referring to a scabies diagnosis are two short, handwritten doctor's notes, one a receipt for an office visit and examination of Katrena, stating: "Dx scabies," and the other a note, dated November 29, 2002, stating: "Please be advised that this patient [Samuel] is currently under treatment for scabies. He has been seen 3x's since 10-16-02 for this condition." Best Western also pointed to evidence that the two women sharing room 608 with appellants did not contract scabies. Based on the foregoing, and because each of appellants' claims stems from the contention that they contracted scabies from the Best

Western, we conclude that Best Western met its initial burden on summary judgment, thus implicating appellants' reciprocal burden, as outlined in Civ.R. 56(E).

{¶15} We now turn to the evidence submitted by appellants in opposition to Best Western's motion for summary judgment. That evidence included, in addition to Katrena's deposition, an affidavit from Katrena and various attached documents, as well as Best Western's responses to discovery requests. We glean the following facts and testimony from the evidence in the record.

{¶16} Katrena began itching on Saturday, October 19, and first noticed a rash the following Monday. She immediately began taking Benadryl, but, after a week, and after hearing that Debbie Bates, a church group member who stayed in room 607 at the Best Western, had contracted scabies, Katrena went to an urgent care facility on October 28. Despite her mention of scabies, the urgent care doctor diagnosed Katrena with a staph infection and prescribed Augmentin. The medical record from Katrena's urgent care visit indicates a diagnosis of foliculitis, but confirms the prescription for a ten-day supply of Augmentin. On November 11, 2002, after completing her ten-day regimen of Augmentin with no results, Katrena saw Thomas H. Baughman, M.D., who diagnosed her with scabies and a yeast infection and prescribed Elimite to treat the scabies. Katrina testified that she had never before had scabies.

{¶17} Katrena states that, prior to October 18, 2002, Samuel did not have a rash or scabies. A record from Samuel's medical checkup on October 16, 2002, two days before appellants' stay at the Best Western, described Samuel's skin as "[w]arm and dry" with "[n]o rashes." Katrena first noticed a rash on the back of Samuel's neck a

couple days after returning home from the Best Western and took Samuel to his doctor, William Collier, who thought the rash was nothing. Katrena stated that Samuel was finally diagnosed with scabies on November 26, 2002, more than two weeks after her own diagnosis. The medical report from Samuel's November 26, 2002 doctor's visit does not mention scabies, however. It states that Samuel's rash is most likely related to a viral upper respiratory infection, with which the doctor also diagnosed Samuel. The only mention of Samuel's scabies diagnosis in the documentary evidence is a November 29, 2002 note, stating that Samuel had been seen three times since October 16, 2002 for scabies. Katrena testified that the October 16, 2002 date is incorrect. Although Katrena testified that Samuel was treated with Elimite for scabies, there is no medical evidence to that effect. Katrena and Samuel's scabies symptoms were completely eliminated around the end of December 2002.

{¶18} Katrena stated that the sheets on the hotel bed she shared with Samuel looked "dingy and discolored" and "didn't look too clean," but she did not suspect the presence of mites, did not complain, and did not request new bedding. Mills Affidavit ¶4; Mills Depo. 19. Nevertheless, on November 21, 2002, Katrena telephoned Best Western, and an employee took a claim/incident report regarding Katrena's contention that she contracted scabies from the hotel.

{¶19} Although Katrena explained her situation to Best Western and its legal counsel, Best Western refused to pay appellants' medical bills or other out-of-pocket expenses. Best Western has consistently denied appellants' allegations that mites were present in their hotel room, and Katrena conceded in her deposition that no one from

Best Western has admitted to her that the hotel had a problem with scabies. Although Best Western settled a claim initiated by Bates, based on her contention that she contracted scabies while staying at the hotel, Best Western states that it settled Bates' claim as a good-will gesture while denying the presence of mites in any of its rooms and denying any legal liability. The record contains no affidavit or deposition testimony by Bates, no medical records confirming Bates' affliction with scabies, and no information about the terms of the purported settlement between Bates and Best Western. Any testimony by Katrena regarding Bates' settlement is hearsay and, therefore, insufficient to meet appellants' burden on summary judgment. See *Rigby v. Fallsway Equip. Co., Inc.*, 150 Ohio App.3d 155, 2002-Ohio-6120, ¶41; *Kinney v. Kroger Co.*, 146 Ohio App.3d 691, 2001-Ohio-3974, ¶26.

{¶20} As on summary judgment, Best Western maintains that appellants presented no evidence, direct or circumstantial, to support their theory that they contracted scabies during their hotel stay. We agree that the record contains no evidence from which reasonable minds could conclude that appellants' contraction of scabies proximately resulted from either a breach of contract or a breach of duty by Best Western, as there is no evidence connecting the scabies to appellants' hotel stay. Although a claimant may establish proximate cause through circumstantial evidence, "there must be evidence of circumstances which will establish with some degree of certainty that the alleged negligent acts caused the injury." *Woodworth v. New York Cent. R.R. Co.* (1948), 149 Ohio St. 543, 549. It is well settled that the issue of proximate cause is not subject to speculation and that conjecture as to whether a

breach caused the particular damage is insufficient as a matter of law. *Whiting v. Ohio Dept. of Mental Health* (2001), 141 Ohio App.3d 198, 203. If the plaintiff's quantity or quality of evidence on proximate cause requires speculation and conjecture to determine the cause of the event, the defendant is entitled to summary judgment as a matter of law. *Shooter v. Perella*, 6th Dist. No. L-07-1066, 2007-Ohio-6122, ¶25.

{¶21} Much of appellants' argument is based on their contention that neither they nor Bates had scabies prior to their stay at the Best Western, while all three of them developed symptoms of scabies within days after their stay. Appellants maintain that the record contained undisputed evidence that neither appellants nor Bates had scabies prior to their stay at the Best Western, but, upon review of the record, we are compelled to reject that argument. At best, the evidence establishes that neither Katrena nor Samuel had manifested symptoms of scabies prior to their hotel stay. Samuel's medical checkup from October 16, 2002, reveals only that he had no skin rash on that day, and Katrena's testimony reveals only that she had never previously had scabies. With respect to Bates, the record contains no admissible evidence as to when her scabies symptoms manifested or as to whether she may have been otherwise exposed to the mites that cause scabies. Moreover, without evidence regarding the incubation period of scabies prior to the development of symptoms, a juror could not reasonably infer that appellants were, in fact, scabies-free prior to their hotel stay despite their lack of symptoms.

{¶22} The record lacks any expert testimony or evidence to link appellants' scabies to their stay at the hotel. Generally, where an issue involves a question of

scientific inquiry that is not within the knowledge of lay witnesses or jurors, expert testimony is required. *Stacey v. Carnegie-Illinois Steel Corp.* (1951), 156 Ohio St. 205. As the Supreme Court of Ohio stated in *Ramage v. Cent. Ohio Emergency Servs., Inc.*, 64 Ohio St.3d. 97, 102, 1992-Ohio-109:

> Unless a matter is within the comprehension of a layperson, expert testimony is necessary. Evid.R. 702 and 703. Experts have the knowledge, training and experience to enlighten the jury concerning the facts and their opinion regarding the facts. *McKay Machine Co. v. Rodman* (1967), 11 Ohio St.2d 77, 40 O.O.2d 87, 228 N.E.2d 304.

{¶23} Here, there is no evidence, expert or otherwise, describing what scabies is, how it is contracted, what its symptoms are or when its symptoms manifest. There is no evidence from which a trier of fact could even base an inference that scabies may be contracted through contact with hotel bedding. Without such evidence, a trier of fact could only speculate wildly to conclude that appellants contracted scabies while guests at the Best Western and as a result of any breach, either of contract or tort, by Best Western. The mere fact that three participants in a church retreat, who traveled together to the same hotel and engaged in activities together as part of the retreat, manifested symptoms of scabies within several days after the hotel stay, even coupled with Katrena's testimony that the hotel bedding was "dingy," is insufficient to permit the inference that they contracted scabies from their hotel room, as appellants urge. At best, such a conclusion would require the impermissible stacking of inference upon inference. See *McDougall v. Glenn Cartage Co.* (1959), 169 Ohio St. 522, 525 ("an inference can not be predicated upon a fact the existence of which rests on another

inference"). We may not presume or infer the elements of negligence from guess or speculation. *Boles v. Montgomery Ward & Co.* (1950), 153 Ohio St. 381, 388 ("[i]t is incumbent on the plaintiff to show how and why an injury occurred-to develop facts from which it can be determined by the jury that the defendant failed to exercise due care and that such failure was a proximate cause of the injury").

{¶24} Appellants cite two cases in support of their claims, both of which are easily distinguishable. First, in *Mathias v. Accor Economy Lodging, Inc.* (C.A.7, 2003), 347 F.3d 672, the Seventh Circuit affirmed an award of punitive damages against a hotel that rented rooms with actual knowledge that they had live, active bedbugs, and having made a deliberate decision to conceal the condition from its guests. Second, in *Grogan v. Gamber Corp.* (N.Y.2008), 19 Misc.3d 798, 858 N.Y.S.2d 519, the court denied summary judgment on the plaintiffs-hotel guests' personal injury action against a hotel and the extermination service with which the hotel contracted, after allegedly being bitten by bedbugs. In that case, there was direct evidence that the plaintiff's bedbug bites occurred in her hotel room. Specifically, one plaintiff testified that she was awakened by something biting at her and that, when she turned on the light, she saw 40 to 50 live bugs, crushed bugs and blood splats on the sheets, and smears of blood on her hand. The record also contained an expert affidavit, which described the life cycle of bedbugs, opined that the bugs described were bedbugs, described how bedbugs can easily travel from room to room, and opined that defendants were on notice that if there was a bedbug problem in one room, then adjacent or contiguous rooms could have bedbugs as well. The extermination services' work tickets from the hotel established

the hotel's knowledge of bedbugs in rooms on the same floor as the plaintiffs' room. In neither case was there a question regarding the presence of bugs in the plaintiffs' hotel rooms, a central issue in this case. Nor was there any dispute that the plaintiffs' alleged damages were the proximate result of bugs encountered in their hotel rooms. Accordingly, these cases do not demonstrate error in the trial court's entry of summary judgment in Best Western's favor.

{¶25} Appellants make two additional arguments in support of their negligence claims against Best Western, namely that the doctrine of *res ipsa loquitur* applies to establish a presumption of negligence and that Best Western was negligent per se.

{¶26} Appellants argue that Best Western was negligent per se based on a violation of R.C. 3731.13, which provides as follows: "All bedding used in any hotel must be thoroughly aired, disinfected, and kept clean. No bedding which is infested with vermin or bedbugs shall be used on any bed in any hotel. All floors, carpets, and equipment in hotels, and all walls and ceilings shall be kept in sanitary condition." Where a legislative enactment imposes a specific duty for the safety of others, failure to perform that duty is negligence per se. *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 565, citing *Eisenhuth v. Moneyhon* (1954), 161 Ohio St. 367, paragraph two of the syllabus. Proving a violation of a legislative enactment establishes that the alleged tortfeasor has breached its duty to the injured party, but the injured party must still prove proximate cause and damages in order to prevail on a negligence per se claim. *Chambers* at 565. While proof of an infestation of mites in the hotel bedding could establish a statutory violation and, accordingly, a per se breach of duty by Best

Western, the record contains no evidence of infestation. Furthermore, although Katrena's statement about dingy bedding may create a genuine issue of material fact regarding cleanliness, the record contains no evidence that appellants' contraction of scabies proximately resulted from contact with unclean bedding. Accordingly, we conclude that appellants were not entitled to proceed on a theory of negligence per se.

{¶27} Finally, appellants argue that the doctrine of *res ipsa loquitur* applies here. *Res ipsa loquitur* is a rule of evidence, applied as an exception to the ordinary rule that negligence is never presumed, that allows a plaintiff to prove negligence circumstantially where the facts and circumstances give rise to a probability that the defendant is negligent. *Cunningham v. Neil House Hotel Co.* (App.1940), 33 N.E.2d 859, 33 Ohio Law Abs. 157; *Williams v. Lo*, 10th Dist. No. 07AP-949, 2008-Ohio-2804, ¶13. The doctrine of *res ipsa loquitur* does not alter the nature of the plaintiff's claim, but merely offers a method of proving negligence through the use of circumstantial evidence. *Jennings Buick, Inc. v. Cincinnati* (1980), 63 Ohio St.2d 167, 170. "To warrant application of the rule a plaintiff must adduce evidence in support of two conclusions: (1) That the instrumentality causing the injury was, at the time of the injury, or at the time of the creation of the condition causing the injury, under the exclusive management and control of the defendant; and (2) that the injury occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed." *Hake v. George Wiedemann Brewing Co.* (1970), 23 Ohio St.2d 65, 66-67; *Cunningham*. The doctrine does not apply where the facts are such that a trier of fact could as reasonably infer that the claimed injury resulted from a

cause other than the defendant's negligence as from the defendant's negligence. *Cooper v. Cannonball Transp. Co.* (Ohio App.1935), 19 Ohio Law Abs. 644.

{¶28} In *Cunningham*, the Franklin County Court of Appeals (then the Second District) rejected a hotel guest's invocation of *res ipsa loquitur* to her negligence claim based on an alleged bug bite while staying at the defendant hotel. The court stated, at 861:

> The insect or bug which stung or bit the plaintiff was not known or identified. Where it came from, how long it had been in the room or the conditions under which it entered the room do not appear. Neither is it shown that it was in or about the bed at any time prior to the occupancy of the room or during the period of its occupancy. * * * In this situation to permit the jury to draw an inference of lack of due care on the part of the hotel company would be no more than conjecture which is not appropriate in the application of the doctrine of res ipsa loquitur nor to prove specific averments of negligence.

The same rationale applies here, where the record is devoid of evidence either that the mites themselves or any items infested with mites were under the exclusive control of Best Western. Neither does the record contain evidence in support of the conclusion that, absent negligence by Best Western, appellants would not have contracted scabies. Accordingly, we conclude that *res ipsa loquitur* is inapplicable to this case.

{¶29} We lastly mention appellants' CSPA claim, in which they alleged that Best Western's actions in placing them in a room allegedly infested with mites and refusing to pay appellants' medical bills and out-of-pocket expenses constitute unfair, deceptive, and unconscionable trade practices. In opposition to Best Western's motion for summary judgment, appellants argued that their CSPA claim arose from Best Western's

failure to advise Katrena when it learned that there were mites in the hotel bedding and of Bates' scabies claim. The trial court found no basis for the CSPA claim because there was no evidence to show that the hotel room was infested with mites, giving rise to a duty to warn, and because Best Western was entitled to defend against appellants' claims and was not required to settle with appellants. On appeal, appellants make no argument of error directed to their CSPA claim. Therefore, we decline to address that claim.

{¶30} In conclusion, we discern no error in the trial court's entry of summary judgment in favor of Best Western on all of appellants' claims or in the trial court's denial of appellants' motion for partial summary judgment. Accordingly, we overrule both of appellants' assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and TYACK, JJ., concur.