[Cite as *Tucker v. Pope*, 2010-Ohio-995.]

IN THE COURT OF APPEALS FOR MIAMI COUNTY, OHIO

CRYSTAL M. TUCKER :

Plaintiffs-Appellants : C.A. CASE NO. 2009 CA 30

v. : T.C. NO. 08-504

DAVID POPE, et al. : (Civil appeal from Common Pleas Court)

Defendants-Appellees :

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O P I N I O N

Rendered on the 12th day of March, 2010.. . . . . .

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. . . . . Froelich, J.

{¶ 1} Crystal Tucker, Barbara Bixler, and Bixler's husband appeal from a judgment of the Miami County Court of Common Pleas, which granted summary judgment against them on their complaints for personal injuries. For the reasons discussed below, the judgment of the trial court will be affirmed.

I

{¶ 2} On September 16, 2006, Barbara Bixler ("Bixler") and Tucker worked for the QRA Agency, which provided social services to individuals with disabilities and mental illnesses. It was Tucker's first day working for QRA, and she was receiving instruction from Bixler as they made calls on consumers.

{¶ 3} In the afternoon of September 16, Bixler and Tucker visited the home of David and Ellen Pope to talk about providing services to Ellen. The Popes suggested that they conduct their business on the front porch of the home, because it was a beautiful day. During these discussions, the Popes sat on the porch furniture, and Bixler and Tucker stood or leaned or sat on one of the porch railings. At a point when both Bixler and Tucker were leaning or sitting on the same railing, the railing detached, and both women fell several feet onto a concrete driveway, sustaining injuries.

{¶ 4} Tucker filed a complaint against the Popes in June 2008;

Bixler and her husband filed a complaint in July 2008.[1] The trial court subsequently granted the Popes' motion to consolidate the cases. On May 26, 2009, the Popes filed a motion for summary judgment. On June 30, 2009, the trial court granted the Popes' motion for summary judgment, concluding that "the evidence is insufficient to create an issue of material fact."

{¶ 5} After summary judgment was granted, Bixler filed a motion for reconsideration, which the trial court overruled. She also filed a motion for relief from judgment; the trial court had not yet ruled on this motion when Bixler filed her notice of appeal.

{¶ 6} Tucker and Bixler raise three assignments of error on appeal.

II

{¶ 7} The first two assignments of error relate to the trial court's decision to grant summary judgment, and we will address them together.

{¶ 8} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN GENUINE ISSUES AS TO MATERIAL FACT EXIST."

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[1]The Bixlers' complaint included a claim for loss of consortium in addition to the claim for personal injuries. For purposes of our discussion, however, we refer only to Bixler's claim for personal injuries.

{¶ 9} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN THE EVIDENCE SHOWS THE APPELLEES HAD FAILED TO MEET THEIR LEGAL DUTY TO PROPERLY INSPECT THE PORCH RAILING PURSUANT TO *PERRY V. EASTGREEN CO.* (1978), 53 OHIO ST.2D 51."

{¶ 10} Bixler and Tucker contend that the trial court erred in granting summary judgment because there were genuine issues of material fact relating to how much furniture was on the porch, whether the Popes had "invited" them to sit on the railing, and whether the porch had been constructed in a safe manner. They also argue that the Popes had a duty to inspect for and discover dangerous conditions dating to the construction of the home, even if the construction pre-dated their ownership of the home.

{¶ 11} Civ.R. 56(C) provides that summary judgment may be granted when the moving party demonstrates that (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, 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.,* 78 Ohio St.3d 181, 183, 1997-Ohio-221; *Harless v. Willis Day*

Warehousing Co. (1978), 54 Ohio St.2d 64. Our review of the trial court's decision to grant summary judgment is de novo. See *Helton v. Scioto Cty. Bd. of Commrs.* (1997), 123 Ohio App.3d 158, 162.

{¶ 12} The status of the person who enters upon the land of another defines the scope of legal duty that the owner owes the entrant. *Gladon v. Greater Cleveland Reg. Transit Auth*., 75 Ohio St.3d 312, 315, 1996-Ohio-137. The parties agree that Bixler and Tucker were business invitees. A business invitee "is one who enters another's land by invitation for a purpose that is beneficial to the owner." Id. With respect to business invitees, an owner's duty is to keep the premises in reasonably safe condition and warn of dangers that are known to the owner. *James v. Cincinnati*, Hamilton App. No. C-070367, 2008-Ohio-2708, at ¶24, citing *Eicher v. U.S. Steel Corp*. (1987), 32 Ohio St.3d 248. Liability only attaches when an owner has "superior knowledge of the particular danger which caused the injury" as an "invitee may not reasonably be expected to protect himself from a risk he cannot fully appreciate." *Uhl v. Thomas*, Butler App. No. CA2008-06-131, at ¶13, citing *LaCourse v. Fleitz* (1986), 28 Ohio St.3d 209, 210.

{¶ 13} Bixler and Tucker contend that there was a genuine issue of material fact as to whether the railing had been "constructed in a manner so as not to be dangerous." They argue that the Popes had a duty to

inspect for possible dangerous conditions and, if the manner in which the railing had been constructed were unsafe, the Popes should have known of this fact and should be held liable. Bixler and Tucker rely on *Perry v. Eastgreen Realty Co.* (1978), 53 Ohio St.2d 51. *Perry* states:

{¶ 14} "The [owner or] occupier is not an insurer of the safety of invitees, and his duty is only to exercise reasonable care for their protection. But the obligation of reasonable care is a full one, applicable in all respects, and extending to everything that threatens the invitee with an unreasonable risk of harm. The [owner or] occupier must not only use care not to injure the visitor by negligent activities, and warn him of latent dangers of which the occupier knows, but he must also inspect the premises to discover possible dangerous conditions of which he does not know, and take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use. The obligation extends to the original construction of the premises, where it results in a dangerous condition." Id, citing Prosser on Torts (4 Ed.), 392-93 (1971).

{¶ 15} Although *Perry* discussed an owner's duty to maintain premises in a reasonably safe condition, to warn invitees of unreasonably dangerous latent conditions of which the owner had or should have had knowledge, and to inspect the premises to discover possible unsafe conditions, it did not impose strict liability on the owner for all injuries on

the premises. "The burden of producing sufficient proof that an owner has failed to take safeguards that a reasonable person would take under the same or similar circumstances falls upon the invitee." Id. at 53. In his deposition, David Pope testified that he had bought his home in December 2000. The railing was in place when he bought the property, and he had never done any repairs to the railing. An inspection done by a third party at the time of the purchase did not indicate any problem with the railing, and David Pope had never noticed that the railing was loose. Pope testified that he had "checked" the railing for looseness, although he did not remember how frequently he had done so. To the best of his knowledge, the railing had never been loose.

{¶ 16} To some extent, Tucker's statements in her deposition about the condition of the railing corroborated Pope's testimony that no defect had been apparent. Tucker testified that there had not been "any indication that [the railing] was going to give way" or that "the railing was anything but solid" – such as sagging or a cracking sound – before the railing fell to the ground. Bixler could not recall any details surrounding the accident.

{¶ 17} Bixler and Tucker offered expert testimony on the safety of the railing via the deposition of Larry Dehus. Dehus had some expertise in forensics, vehicle accident reconstruction, and fire inspections. Dehus

did not claim to be an architectural or a legal expert, but he testified about the Ohio Basic Building Code, as he had done in one other case. Dehus testified that the porch "appeared to be a part of the design of the original house." He also stated that there was "no way of knowing exactly how [the railing] was secured at the time of the accident" or of determining how much weight it could have supported at that time. Dehus expressed an opinion that the "porch was not constructed such that it complies with the current building code or reasonable workmanship standards." He acknowledged, however, that if the Pope house had been built prior to the enactment of the current building code, it would have been grandfathered in. Dehus could not say whether the Pope house had been built before or after the enactment of the building code. He did not opine that the Popes had repaired the railing or had had reason to know that there was any problem with the railing.

{¶ 18} Based on Pope's uncontroverted testimony that he had had the house inspected

{¶ 19} less than six years earlier when he purchased it without discovering any problem with the railing, that he had "checked" the railing since then and had not found it to be loose, Tucker's testimony that there had been no outward sign of a problem with the railing, and the absence of any suggestion in Dehus's testimony that the Popes should have

known of the problem with the railing, the trial court properly concluded that there was no genuine issue of material fact that the Popes had breached a duty to take reasonable measures to protect invitees to their property, to keep the premises in reasonably safe condition, or to warn of dangers that were known to them.

{¶ 20} Bixler and Tucker also contend that summary judgment was inappropriate because there was a genuine issue of material fact regarding how much furniture was on the porch at the time of the accident. Bixler and Tucker argue that since there was not enough furniture for them to sit on, they were required to stand and, given the length of the discussion, that it was foreseeable that they would sit or lean on the railing. In his deposition, David Pope testified that there had been enough seating for four people – a loveseat and two chairs. On the other hand, Bixler and Tucker recalled that there were only two seats on the porch, and the Popes sat in them. This factual discrepancy did not preclude the entry of summary judgment. Even if we assume for the sake of argument that there were only two seats on the porch and that the Popes sat in these seats, the alleged foreseeability of leaning on the railing is only conceivably relevant if there were a genuine issue regarding the Popes' knowledge of any defect, which we have held above there is not.

{¶ 21} The first and second assignments of error are overruled.

III

{¶ 22} Bixler's third assignment of error states:[2]

{¶ 23} "THE TRIAL COURT ERRED IN NOT GRANTING APPELLANTS BARBARA E. BIXLER AND JERRY L. BIXLER'S MOTION FOR RECONSIDERATION AND/OR MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(B) OF THE OHIO RULES OF CIVIL PROCEDURE."

{¶ 24} Bixler contends that the trial court erred in overruling her Motion for Reconsideration and to Allow the Filing of the Settlement Report. She claims that this document would have made the court more "fully aware of the mental deficiencies of David Pope and Ellen Pope," which affected their ability to inspect the porch railing. She also claims that the trial court erred in overruling her Motion for Relief from Judgment.

{¶ 25} A decision granting a motion for summary judgment on all of a plaintiff's claims is a final appealable order. See Civ.R. 54(B); *Stohlmann v.Koski-Hall*, Cuyahoga App. No. 82660, 2003-Ohio-7068, at ¶8; *Jackson v. Allstate Ins. Co.*, Montgomery App. No. 20443, 2004-Ohio-5775, at ¶16. The Ohio Rules of Civil Procedure do not

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[2]Although Bixler and Tucker filed a joint brief, only Bixler filed the

provide for a motion for reconsideration of a final order. Therefore, any order that a trial court enters on a motion for reconsideration is a legal nullity. *Robinson v. Robinson*, 168 Ohio App.3d 476, 2006-Ohio-4282, at ¶17, citing *Pitts v. Ohio Dept. Of Transp.* (1981), 67 Ohio St.2d 378; *State v. Hobson*, Montgomery App. No. 22842, 2008-Ohio-6725, at ¶10. Since the order itself was a nullity, Bixler and Tucker have no right to appeal from it.

{¶ 26} Bixler filed her Motion for Relief from Judgment on July 21, 2009, and she filed her notice of appeal on July 27, 2009, before the trial court ruled on the motion. According to the Popes' brief, the trial court denied the motion on August 12, 2009, citing its lack of jurisdiction. Bixler's notice of appeal did not encompass that judgment.

{¶ 27} App. R. 3(A) expressly states that the only jurisdictional requirement for the filing of a valid appeal is the timely filing of a notice of appeal. Bixler did not file a notice of appeal that listed the denial of a motion for relief from judgment as the subject of the appeal or that listed August 12, 2009, as the date of the judgment being appeal. (As stated above, the Notice of Appeal was filed before the decision.) Bixler contends, however, that *Howard v. Catholic Social Services* (1994), 70 Ohio St.3d 141, permits a court of appeals to "deal with" a Civ.R. 60(B)

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motions in the trial court that are at issue in this assignment of error.

motion and "all prior orders of the trial court."

{¶ 28} We disagree with this interpretation of *Howard*. In that case, the Supreme Court stated: "[W]e have expressly held that an appeal divests trial courts of jurisdiction to consider Civ.R. 60(B) motions for relief from judgment. *** Jurisdiction may be conferred on the trial court to consider a Civ.R. 60(B) motion while an appeal is pending only through an order by the reviewing court remanding the matter for consideration of the Civ.R. 60(B) motion." Id. at 147 (internal citations omitted). We issued no such order in this case. Therefore, we find that the trial court properly concluded that it lacked jurisdiction to consider Bixler's Civ.R. 60(B) motion and that our appellate jurisdiction has not been invoked to review the correctness of the trial court's order denying Bixler's motion for relief from judgment.

{¶ 29} The third assignment of error is overruled.

IV

{¶ 30} The judgment of the trial court will be affirmed.

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BROGAN, J. and GRADY, J., concur.

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