[Cite as *Lewin v. Lutheran W. High School*, 2007-Ohio-4041.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 88635

JOAN LEWIN, ET AL.

PLAINTIFFS-APPELLANTS

vs.

LUTHERAN WEST HIGH SCHOOL, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-543047

BEFORE: Calabrese, J., Sweeney, P.J., and Cooney, J.

RELEASED: August 9, 2007

JOURNALIZED:

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[Cite as *Lewin v. Lutheran W. High School*, 2007-Ohio-4041.]
ANTHONY O. CALABRESE, JR., J.:

{¶ 1} Plaintiffs-appellants, Joan Lewin, et al. ("appellants"), appeal the decision of the trial court. Having reviewed the arguments of the parties and the pertinent law, we hereby reverse and remand to the lower court.

I.

{¶ 2} This is a slip and fall case. Appellant Joan Lewin ("Joan") alleges that she sustained bodily injury when she stepped into a hole on September 20, 2002 at a football game at Lutheran West High School ("Lutheran West") in Rocky River, Ohio. The incident occurred in the parking lot of the football stadium at Lutheran West.

{¶ 3} Lutheran West contracted with Seuffert Construction Company (Seuffert) to perform general contracting and construction management work for a major addition and renovation project at the school. The renovation project was ongoing at the time of Joan's fall. The construction project was limited to the main school building, which is separate from the field. The project was a building expansion and renovation.

{¶ 4} On September 20, 2002, Joan entered the parking lot of the football stadium at Lutheran West to watch her grandson participate in a football game. She and her husband arrived at the high school at approximately 7:00 p.m. It was not raining at this time. Joan's husband drove their vehicle into the parking lot and

parked. Joan and her husband then followed the signs to the stadium, which led them through a path into the stadium.

{¶ 5} Approximately five minutes before the football game ended, it started to rain. Accordingly, Joan and various family members left the stadium. While leaving the stadium, Joan followed a path until she reached a fence located near the ticket office. She then left the stadium through an opening in the fence, using the same route that she entered earlier. After exiting the stadium, Joan turned right off the gravel path, fell into a hole, and injured her foot. There is dispute as to the exact location of her fall.

{¶ 6} Appellants Joan and Ellis Lewin filed a complaint in Cuyahoga County Common Pleas Court on September 16, 2004. Seuffert filed an answer to appellants' complaint on October 21, 2004. Lutheran West filed its answer, which included a cross-claim against Seuffert, on November 9, 2004. On January 7, 2005, Seuffert filed an answer, which was amended on August 12, 2005, to Lutheran West's cross-claim.

{¶ 7} Seuffert filed a motion for summary judgment on December 20, 2005. Lutheran West filed its own motion for summary judgment on January 31, 2006. On March 7, 2006, appellants filed briefs in opposition to appellees' motions for summary judgment. Seuffert and Lutheran West filed reply briefs in support of their pending motions on March 30, 2006 and April 4, 2006, respectively.

{¶ 8} The trial court granted summary judgment in favor of both appellees in journal entries dated July 24, 2006. On August 22, 2006, appellants filed a notice of appeal of the trial court's decision with this court.

II.

{¶ 9} First assignment of error: "The trial court erred by granting summary judgment to appellee Cleveland Lutheran High School because the evidence submitted, especially when viewed in a light most favorable to appellants, demonstrates that the issue of negligence is in genuine dispute and should be submitted to the triers of fact for resolution."

{¶ 10} Second assignment of error: "The trial court erred by granting summary judgment to appellee Seuffert Construction Company because the evidence submitted, especially when viewed in a light most favorable to appellants, demonstrates that the issues presented are in genuine dispute and should be submitted to the triers of fact for resolution."

III.

{¶ 11} Because of the substantial interrelation between appellants' first and second assignments of error, we shall address them together below.

{¶ 12} We review a lower court's granting of summary judgment de novo. Pursuant to Civ.R. 56(C), summary judgment is proper when: 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) it appears from such evidence that reasonable minds can come to but one conclusion and, reviewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to the party. See *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 364 N.E.2d 267.

{¶ 13} In order to efficiently discuss appellants' two assignments of error, a brief overview of premises liability law is required. In premises liability law, an invitee is one who enters another's land by invitation for a purpose that is beneficial to the owner. *Gladon v. Greater Cleveland RTA,* 75 Ohio St.3d 312, 315, 1996-Ohio-137, 662 N.E.2d 287. A property owner owes an invitee a duty of ordinary care to maintain the premises in a reasonably safe condition and to warn of hidden defects. *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 18 Ohio B. 267, 480 N.E.2d 474.

{¶ 14} As expected, in the case at bar there is some dispute as to who owns, and is responsible for, the gravel and dirt area where Joan said she fell. Lutheran West, correctly known as Cleveland Lutheran High School Association, states that the property where Joan alleges she was injured is not owned, created, maintained, or controlled in any way by the Cleveland Lutheran High School Association. Reverend Dr. David D. Buegler stated in a sworn affidavit that the area in question was not owned, possessed, or controlled by the Cleveland Lutheran High School

Association.[1] As expected, appellants argue that both appellees, Lutheran West and Seuffert, are indeed responsible.

{¶ 15} There is a dispute as to the exact cause and circumstances of Joan's injury. Therefore, we find it prudent in this case to examine the cause of Joan's fall before addressing any property ownership issues. To prevail on a negligence theory in a slip and fall case, the plaintiff must be able to identify the reason for the fall. See *Cleveland Athletic Assn. Co. v. Bending* (1934), 129 Ohio St. 152, 194 N.E. 6. "As such, a plaintiff will be prevented from establishing negligence when he, either personally or with the use of outside witnesses, is unable to identify what caused the fall. In other words, a plaintiff must know what caused him to slip and fall. A plaintiff cannot speculate as to what caused the fall. However, while a plaintiff must identify the cause of the fall, *he does not have to know, for example, the oily substance on the ground is motor oil. Instead, it is sufficient that the plaintiff knows the oily substance is what caused his fall.*" (Emphasis added.) *Beck v. Camden Place at Tuttle Crossing*, Franklin App. No. 02AP-1370, 2004-Ohio-2989. (Internal citations omitted.)

{¶ 16} In the instant case, Joan established the following regarding her fall:

"Q. Can you tell me specifically on that photo where you fell?

A. No. ***

[1] Buegler's affidavit.

***

Q. Could that have been the area where you fell that night?

A. I can't honestly tell you *exactly where*, *but it was in the area once we left the stadium. I know it was near the dumpster.* ***"

(Emphasis added.)

{¶ 17} Joan is not speculating as to what caused her fall; she knows that she fell in a hole by the dumpster. The evidence in the case at bar demonstrates that Joan knew that she fell near the dumpster. Joan knew when she fell, how she fell, and she knew that it was near the dumpster. However, there is dispute as to exactly how she fell. There is a genuine issue of material fact remaining, and it appears from such evidence that reasonable minds can come to more than one conclusion.

We find that the evidence demonstrates that a genuine issue of material fact remains to be litigated, and appellees are not entitled to judgment as a matter of law.

{¶ 18} Accordingly, appellants' first and second assignments of error are sustained.

{¶ 19} Judgment reversed and cause remanded to the lower court for proceedings consistent with this opinion.

It is ordered that appellants recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANTHONY O. CALABRESE, JR., JUDGE

JAMES J. SWEENEY, P. J., CONCURS;
COLLEEN CONWAY COONEY, J., DISSENTS WITH SEPARATE OPINION

COLLEEN CONWAY COONEY, J., DISSENTING:

{¶ 20} I respectfully dissent.

{¶ 21} The owner of premises must exercise reasonable or ordinary care for the invitee's safety and protection. Included in this duty is the duty to maintain the premises in a reasonably safe condition and to warn the invitee of latent or concealed defects of which the possessor has or should have knowledge. *Scheibel v. Lipton* (1951), 156 Ohio St. 308, 102 N.E.2d 453. However, the owner is not to be held as an insurer against all forms of risk. *S.S. Kresge v. Fader* (1927), 116 Ohio St. 718, 158 N.E. 174.

{¶ 22} In *O'Brien v. Bob Evans Farms, Inc.*, Trumbull App. No. 2003-T-0106, 2004-Ohio-6948, the Eleventh District Court of Appeals declared that: "'[t]o

establish negligence in a slip and fall case, it is incumbent upon the plaintiff to identify or explain the reason for the fall. Where the plaintiff either personally or by outside witnesses, cannot identify what caused the fall, a finding of negligence on the part of the defendant is precluded.' *Stamper v. Middletown Hospital Assn.* (1989), 65 Ohio App.3d 65, 67-68, 582 N.E.2d 1040."

{¶ 23} Additionally, where the plaintiff, either personally or by outside witnesses, cannot identify what caused the fall, a finding of negligence on the part of the defendant is precluded. *Stamper*, supra; *Mines v. Russo's Stop & Shop* (Feb. 23, 1989), Cuyahoga App. No. 55073*; Smith v. Resch's Bakery* (Dec. 10, 1987), Franklin App. No. 87AP-897.

{¶ 24} In *Kubiszak v. Rini's Supermarket* (1991), 77 Ohio App.3d 679, 603 N.E.2d 308, we stated that in order for a customer to recover damages for personal injuries sustained in coming in contact with a hole in the parking lot maintained by the supermarket and about which hole the customer has not been warned, the plaintiff has the burden of proving:

> "1. That the nature, size, extent and location of such [hole] involved a potential hazard to customers, sufficient to justify a reasonable conclusion that the duty of ordinary care, which the operator of such [business] owes to his customers, would require such operator to prevent or remove such [hole] or to warn his customer about it, and
>
> 2. (a) That such sufficient potential hazard was created by some negligent act of the operator of the [business] or his employees, or

> (b) That such operator or his employees had, or should in the exercise of ordinary care have had, notice of that potential hazard for a sufficient time to enable them in the exercise of ordinary care to remove it or to warn customers about it." Id., citing *Anaple v. Standard Oil Co.* (1955), 162 Ohio St. 537, 124 N.E.2d 128, paragraph one of the syllabus.

{¶ 25} The majority acknowledges that Lewin could not identify the exact location where she fell or the precise cause of her fall. She was unsure even which section of the pavement she fell on - asphalt, dirt, or gravel. She stated that she fell in a hole, but was unable to identify the hole in the photos. Thus, I would affirm the granting of summary judgment because a finding of negligence is precluded.