[Cite as *Abdelshahid v. Cleveland Clinic Found.*, 2015-Ohio-2274.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102109

AMGAD ABDELSHAHID

PLAINTIFF-APPELLANT

vs.

CLEVELAND CLINIC FOUNDATION

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-820394

BEFORE: Kilbane, J., Jones, P.J., and McCormack, J.

RELEASED AND JOURNALIZED: June 11, 2015

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MARY EILEEN KILBANE, J.:

{¶1} Plaintiff-appellant, Amgad Abdelshahid ("Abdelshahid") appeals from the trial court's judgment granting summary judgment in favor of defendant-appellee, Cleveland Clinic Foundation ("CCF"). For the reasons set forth below, we reverse and remand.

{¶2} In January 2014, Abdelshahid filed a negligence action against CCF for injuries she sustained when she tripped over the nurse call cord attached to her father's hospital bed. Abdelshahid amended her complaint in April 2014 by adding Lakewood Hospital as a defendant. In the amended complaint, Abdelshahid alleges that she was a business invitee at a medical facility in Lakewood, Ohio, when she was caused to fall and sustain injuries. CCF filed an answer to Abdelshahid's complaint denying the allegations and filed a motion for summary judgment asking for judgment as a matter of law with respect to Abdelshahid's identification of Lakewood Hospital as a defendant in her amended complaint. CCF argued that an amended complaint could not be used to add new parties after the statute of limitations expired on January 28, 2014. The trial court agreed and granted CCF's motion on August 13, 2014.

{¶3} On July 17, 2014, CCF filed a motion for extension of time to respond to Abdelshahid's written discovery requests. The trial court granted CCF's motion for extension of time on August 14, 2014, giving CCF until August 25, 2014, to respond to Abdelshahid's discovery requests. Prior to the trial court's granting of CCF's motion for extension, Abdelshahid filed a motion to compel discovery on August 7, 2014, stating

that she propounded interrogatories to CCF on June 10, 2014, and as of August 7, 2014, CCF still had not responded to her discovery requests even though she answered CCF's interrogatories and submitted to a video deposition. Abdelshahid stated that she would be prejudiced and could not fully evaluate her claim without discovery from CCF.

{¶4} CCF submitted its responses to Abdelshahid's discovery requests on August 11, 2014. On August 12, 2014, Abdelshahid filed a second motion to compel discovery, stating that CCF's response "constitutes frivolous conduct and complete abuse of process." Abdelshahid argued that CCF responded with form objections that were not applicable and provided answers by counsel instead of the individuals with firsthand knowledge as requested. CCF opposed Abdelshahid's motions on August 14, 2014, arguing that Abdelshahid failed to follow the local and civil rules prior to filing her motions. The trial court denied both of Abdelshahid's motions to compel on August 26, 2014. The parties also had a pretrial conference that day, at which a final pretrial was set for November 3, 2014, and trial was set for November 19, 2015.

{¶5} Then on September 12, 2014, CCF moved for summary judgment, arguing that Abdelshahid failed to establish that the nurse call cord was a hazardous condition and it did not owe her a duty to warn of an open and obvious hazard. Abdelshahid moved to strike CCF's motion for summary judgment under Civ.R. 56(A) because CCF filed its motion after trial was set, without first obtaining leave from the court, and it did not file Abdelshahid's deposition with the court.[1] CCF opposed, and the trial court denied

[1]Under Civ.R. 56(A), "[i]f the action has been set for pretrial or trial, a motion for summary

Abdelshahid's motion on October 10, 2014.[2] On the same date, the trial court granted CCF's motion for summary judgment.

{¶6} It is from this order that Abdelshahid appeals, raising the following three assignments of error for review, which shall be discussed together and out of order where appropriate.

Assignment of Error One

> The trial court erred in granting summary judgment when there are genuine issues of material fact.

Assignment of Error Two

> The trial court erred in applying the open and obvious doctrine to [Abdelshahid's] statement of facts.

Assignment of Error Three

> The trial court erred in denying [Abdelshahid's] motions to compel discovery.

Motion to Compel

{¶7} In the third assignment of error, Abdelshahid argues that the trial court abused its discretion when it denied her motions to compel discovery from CCF.

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judgment may be made only with leave of court." With that said, this court has held that "a trial court's granting a motion for summary judgment filed without leave indicates its implicit granting of leave." *Carpet Barn v. CSH, Inc.*, 8th Dist. Cuyahoga No. 71821, 1997 Ohio App. LEXIS 2445 (June 5, 1997), citing *Juergens v. Strang, Klubnik & Assocs., Inc.*, 96 Ohio App.3d 223, 234, 644 N.E.2d 1066 (8th Dist.1994); *Habeeb v. Stanley Magic Door, Inc.*, 8th Dist. Cuyahoga No. 68793, 1995 Ohio App. LEXIS 5510 (Dec. 14, 1995).

[2]Abdelshahid also filed a brief in opposition to CCF's motion for summary judgment.

{¶8} "We review the denial of a motion to compel discovery for an abuse of discretion." *Nemcek v. N.E. Ohio Regional Sewer Dist.*, 8th Dist. Cuyahoga No. 98431, 2012-Ohio-5516, ¶ 7, quoting *State ex rel. V Cos. v. Marshall*, 81 Ohio St.3d 467, 469, 1998-Ohio-329, 692 N.E.2d 198. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." (Citations omitted.) *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 404 N.E.2d 144 (1980).

{¶9} In her motions to compel, Abdelshahid sought to compel CCF to provide answers to her discovery requests. Her discovery requests sought information regarding: witnesses; witness statements; the proper name of the legal entity where she fell; experts; visitor safety information; the dimensions of the room; and the dimensions of the walking space on both sides of the bed. Of the 20 interrogatories Abdelshahid propounded on CCF, CCF objected to 18 of them. CCF used form objections, citing, among other things, to the "peer review" privilege, referred Abdelshahid to the medical records, or stated that the request was vague and burdensome.

{¶10} We note that when "exercising its discretion in a discovery matter, the [trial] court balances the relevancy of the discovery request, the requesting party's need for the discovery, and the hardship upon the party from whom the discovery was requested." *Stegawski v. Cleveland Anesthesia Group, Inc.*, 37 Ohio App.3d 78, 85, 523 N.E.2d 902 (8th Dist.1987), citing *Heat & Control, Inc. v. Hester Industries, Inc.*, 785 F.2d 1017

(Fed.Cir.1986). "'An appellate court will reverse the decision of a trial court that extinguishes a party's right to discovery if the trial court's decision is improvident and affects the discovering party's substantial rights. * * *' (Footnote omitted.)" *Id.*, quoting *Rossman v. Rossman*, 47 Ohio App.2d 103, 110, 352 N.E.2d 149 (8th Dist.1975).

{¶11} In the instant case, CCF's failure to cooperate with discovery obstructed Abdelshahid's defense to CCF's motion for summary judgment. "This court cannot condone a defense strategy that withholds vital factual information from the plaintiff, then demands summary judgment on the ground that plaintiff is unable to contradict the defendant's factual assertions." *Smith v. Klein*, 23 Ohio App.3d 146, 151, 492 N.E.2d 852 (8th Dist.1985).

{¶12} Thus, the third assignment of error is sustained.

Motion for Summary Judgment

{¶13} In the first and second assignments of error, Abdelshahid argues the court erred in granting summary judgment because there are genuine issues of material fact with regard to whether she saw the cord before she fell and whether attendant circumstances prevented her from discovering the "open and obvious condition" of the call cord. Specifically, she maintains that the hospital room was very confined, dimly lit, and the cord was covered by her father's blanket.

{¶14} We review an appeal from summary judgment under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671

N.E.2d 241; *Zemcik v. LaPine Truck Sales & Equip. Co.*, 124 Ohio App.3d 581, 585, 706 N.E.2d 860 (8th Dist.1998). In *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201, the Ohio Supreme Court set forth the appropriate test as follows.

{¶15} Pursuant to Civ.R. 56, summary judgment is appropriate when (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 nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 1995-Ohio-286, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264.

{¶16} Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138.

{¶17} A negligence action requires a plaintiff to demonstrate that "(1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached that duty, and (3) the defendant's breach proximately caused the plaintiff to be injured." *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, 909 N.E.2d 120, ¶ 10, citing *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195, ¶ 21, citing *Menifee v. Ohio Welding Prods.*, Inc., 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984). When the alleged negligence occurs in the premises-liability context, the applicable duty is determined by the relationship between the landowner and the plaintiff. *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 315, 1996-Ohio-137, 662 N.E.2d 287.

{¶18} In the instant case, Abdelshahid was an invitee at the time she sustained her injuries. *Crane v. Lakewood Hosp.*, 103 Ohio App.3d 129, 658 N.E.2d 1088 (8th Dist.1995) (where this court held that "[a] person who visits a relative in a hospital is an 'invitee' under Ohio law." *Id.* at 139, citing *Stinson v. Cleveland Clinic Found.*, 37 Ohio App.3d 146, 148, 524 N.E.2d 898 (8th Dist.1987)). As an invitee, Abdelshahid was owed a duty of ordinary care by the hospital. *Id.*, citing *Presley v. Norwood*, 36 Ohio St.2d 29, 303 N.E.2d 81 (1973).

{¶19} Under the open and obvious doctrine, the premises owner or occupier "owes no duty to persons entering those premises regarding dangers that are open and obvious." *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 5, citing *Sidle*. "The rationale underlying this doctrine is 'that the open and obvious

nature of the hazard itself serves as a warning. Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves.'" *Id.*, quoting *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644, 1992-Ohio-42, 597 N.E.2d 504. Where a condition is open and obvious, the premises owner is absolved from taking any further action to protect the plaintiff. *Id.* at ¶ 13. Therefore, the open and obvious doctrine obviates the duty to warn and acts as a complete bar to any negligence claims. *Id.* at ¶ 5.

{¶20} The question of whether a danger is open and obvious is an objective one. *Goode v. Mt. Gillion Baptist Church*, 8th Dist. Cuyahoga No. 87876, 2006-Ohio-6936, ¶ 25. The fact that a plaintiff was unaware of the danger is not dispositive of the issue. *Id.* Hence, a court must consider whether, in light of the specific facts and circumstances of the case, an objective, reasonable person would deem the danger open and obvious. *Id.* When reasonable minds could differ with respect to whether a danger is open and obvious, the obviousness of the risk is an issue for the jury to determine. *Klauss v. Marc Glassman, Inc.*, 8th Dist. Cuyahoga No. 84799, 2005-Ohio-1306, ¶ 18, citing *Carpenter v. Marc Glassman, Inc.*, 124 Ohio App.3d 236, 705 N.E.2d 1281 (8th Dist.1997).

{¶21} Furthermore, the "attendant circumstances" of a slip and fall may create a material issue of fact regarding whether the danger was open and obvious. *Id.* at ¶ 20, citing *Quinn v. Montgomery Cty. Educational Serv. Ctr.*, 2d Dist. Montgomery. No. 20596, 2005-Ohio-808; *Collins v. McDonald's Corp.*, 8th Dist. Cuyahoga No. 83282, 2004-Ohio-4074. "While 'there is no precise definition of "attendant circumstances" * *

* they generally include "any distraction that would come to the attention of a pedestrian in the same circumstances and reduced the degree of care an ordinary person would exercise at the time.'" *McGuire v. Sears, Roebuck and Co.* (1996), 118 Ohio App.3d 494, 499, 693 N.E.2d 807 (citation omitted)." *Id*. at ¶ 20. The phrase refers to all circumstances surrounding the event, such as time and place, the environment or background of the event, and the conditions normally existing that would unreasonably increase the normal risk of a harmful result of the event. *Id.*

{¶22} In the instant case, construing the evidence in a light most favorable to Abdelshahid, there are genuine issues of fact regarding whether the call cord was open and obvious, and whether Abdelshahid knew of its danger or may reasonably have been expected to discover it and protect against it, given that the dimensions of the room are unknown and it was asserted that the room was dimly lit. Abdelshahid was giving her father a sponge bath, with a nurse's assistance, when she tripped over the call cord, which was attached to her father's hospital bed. She asserts that she did not see the call cord because it was covered with a blanket in a confined space and the room was dimly lit. In her interrogatories propounded to CCF, Abdelshahid requested from CCF the dimensions of the room and "the walking space of both sides of the bed where the incident occurred." Abdelshahid also asked if the "call cord" that she "fell on was concealed or partially concealed by a blanket." CCF objected to both interrogatories, stating that they were vague and overly broad.

{¶23} CCF argues that the call cord is open and obvious, yet it failed to answer interrogatories going to the open and obvious nature of the call cord and the attendant circumstances in the hospital room. CCF cannot fail to comply with Abdelshahid's discovery requests and then prevail on its motion for summary judgment on the basis of the open and obvious doctrine, when it submitted no specific discovery pertaining to the incident. As stated above, we "cannot condone a defense strategy that withholds vital factual information from the plaintiff, then demands summary judgment on the ground that plaintiff is unable to contradict the defendant's factual assertions." *Smith,* 23 Ohio App.3d at 151, 492 N.E.2d 852 (8th Dist.1985).

{¶24} Without more evidence in the record, reasonable minds could differ as to whether the cord was an open and obvious condition. Therefore, based on the foregoing, we find genuine issues of material fact regarding whether the call cord was open and obvious, and whether Abdelshahid knew of its danger or may reasonably have been expected to discover it and protect against it.

{¶25} Accordingly, we find that summary judgment was improper.

{¶26} Therefore, the first and second assignments of error are sustained.

{¶27} Judgment is reversed, and the matter is remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover of appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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.

MARY EILEEN KILBANE, JUDGE

LARRY A. JONES, SR., P.J., and
TIM McCORMACK, J., CONCUR