[Cite as *Mixon v. K&D Apt. Community Owners & Mgrs.*, 2017-Ohio-98.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104338

DIANE MIXON, ET AL.

PLAINTIFFS-APPELLANTS

vs.

K&D APARTMENT COMMUNITY OWNERS AND MANAGERS, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-829514

BEFORE: Stewart, J., McCormack, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: January 12, 2017

ATTORNEY FOR APPELLANTS

Tyrone E. Reed
Tyrone E. Reed & Associates
11811 Shaker Boulevard, Suite 420
Cleveland, OH 44120

ATTORNEYS FOR APPELLEES

James J. Costello
Thomas Owen
Laurence J. Powers
Powers, Friedman, Linn, P.L.L.
23240 Chagrin Boulevard, Suite 180
Cleveland, OH 44122

Thomas W. Baker
Seth H. Wamelink
Tucker Ellis, L.L.P.
950 Main Avenue, Suite 1100
Cleveland, OH 44115

MELODY J. STEWART, J.:

{¶1} Plaintiffs-appellants Diane Mixon, Shawneta Harris, and Kimberly Hagler alleged that they were injured when an elevator located in an apartment building owned by defendant-appellees K&D Apartment Community Owners & Managers[1] and serviced by defendant-appellees Otis Elevator Company malfunctioned. The court granted summary judgment to the defendants on grounds that there was no evidence to place the defendants on prior notice that the elevator had been malfunctioning. In addition, the court found that the plaintiffs did not offer expert testimony to show the cause of the malfunction, so they could not prove that the defendants breached any duty of care.

{¶2} The first assignment of error addresses the negligence claims asserted against K&D. The plaintiffs alleged that K&D failed to comply with its R.C. 5321.04(A)(4) statutory duty to maintain elevators "in good and safe working order" with respect to Mixon, who was a tenant of the apartment building (Harris and Hagler were Mixon's guests). They argue that the malfunctioning elevator was itself proof that K&D failed to keep it in proper working order and thus breached the statutory duty of care.

[1] Referred to by counsel as K&D Management.

{¶3} In *Sabolik v. HGG Chestnut Lake L.P.*, 180 Ohio App.3d 576, 2009-Ohio-130, 906 N.E.2d 488, ¶ 13 (8th Dist.), we agreed that "[v]iolations of R.C. 5321.04(A)(4) are considered negligence per se." *Id.* at ¶ 13, citing *McKenzie v. FSF Beacon Hill Assoc., L.L.C.*, 10th Dist. Franklin No. 05AP1194, 2006-Ohio-6894, ¶ 11; *Trammell v. McDonald*, 3d Dist. Defiance No. 4-04-15, 2004-Ohio-4805, ¶ 12. We noted, however, that:

> It is important to recognize that negligence per se is not strict liability, but the legislative establishment of a standard of care, the violation of which constitutes negligence. *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565, 1998-Ohio-184, 697 N.E.2d 198. The plaintiff continues to bear the burden of proving a breach of the statutory standard of care. *Morgan v. Mamone*, Cuyahoga App. No. 87612, 2006-Ohio-6944, ¶ 19, citing *Shroades* [*v. Rental Homes, Inc*. (1981), 68 Ohio St.2d 20, 23, 427 N.E.2d 774]. "[A] landlord will be excused from liability [for a statutory violation] if he neither knew nor should have known of the factual circumstances that caused the violation." *Sikora v. Wenzel*, 88 Ohio St.3d 493, 2000-Ohio-406, 727 N.E.2d 1277, syllabus. Moreover, "negligence per se does not dispense with a plaintiff's obligation to prove that the breach of the duty was the proximate cause of the injury complained of, nor does it obviate a plaintiff's obligation to prove that the landlord received actual or constructive notice of the condition causing the statutory violation." *Allstate Ins. Co. v. Henry*, Butler App. No. CA2006-07-168, 2007 Ohio 2556, ¶ 11.

Id.

{¶4} In support of its motion for summary judgment, K&D submitted records showing that it hired Otis to conduct monthly maintenance on the elevator; that just three weeks before the incident involving the plaintiffs, the elevator passed an Otis safety inspection; and that it had no prior notice of any defects or problems with the elevator between the time the elevator passed the safety inspection and the incident involving the plaintiffs.

{¶5} The plaintiffs offered no evidence to show that K&D had been aware of any mechanical issues involving the elevator at the time of the incident. The evidence they did offer consisted of Mixon's deposition testimony describing how she and the other plaintiffs were riding the elevator from her third floor apartment to the ground floor when it "just dropped and it just stopped, and it just was silent." Mixon testified that her apartment complex (there were three separate buildings) had "ongoing" issues with the elevators. She said that her cousin had been stuck in one of the elevators some eight months earlier. Although the elevator had been fixed, Mixon testified that she sometimes took the stairs to her third floor apartment because "I knew people got stuck so much in there * * *." Mixon also testified that during her rescue from the stalled elevator, the "fire department" told her that "they're always coming out there for the elevators." When asked if she was aware of any instance where K&D did not have the elevators fixed if there was a problem, Mixon replied, "I wouldn't know."

{¶6} The court ruled that the plaintiffs failed to offer evidence to show that K&D had actual or constructive notice of any defect with the elevator. The undisputed evidence showed that the last service repair to the elevator was made four months before the plaintiffs were injured. Otis made a service call on the elevator three months before the incident, but determined that the elevator had not malfunctioned and was not in need of repair, but had stopped because it was overloaded and people were jumping in the elevator car. The elevator passed an Otis safety inspection less than three weeks before the incident.

{¶7} In addition to finding that there was no evidence to show that K&D knew that the elevator had any mechanical issues at the time it allegedly malfunctioned, the court found that the plaintiffs failed to offer any evidence to show the cause of the malfunction such that K&D knew or should have known that the elevator was malfunctioning. The court ruled that in the absence of evidence on the cause of the malfunction, "reasonable minds cannot determine that a duty was breached by either Defendant."

{¶8} This ruling segues into the plaintiffs' second assignment of error — that the court erred by "requiring" them to offer expert opinion on the cause of the malfunction. They maintain that the "harm and injury did not exceed the scope of what a lay witness could convey and a juror could understand * * *." The plaintiffs argue that "being trapped in an elevator is the land-owners [sic] fault, period, and a clear breach of its duty to provide a safe area."

{¶9} Given the undisputed facts showing that K&D had no reason to know of any mechanical issue with the elevator prior to the incident, the plaintiffs had to come forward with evidence showing why the elevator malfunctioned and that K&D knew or should have known about the malfunction. *Sabolik*, 180 Ohio App.3d 576, 2009-Ohio-130, 906 N.E.2d 488, at ¶ 13. That showing required expert evidence because "an elevator, like an automobile, is a complicated mechanical device." *Hickey v. Otis Elevator Co.*, 163 Ohio App.3d 765, 2005-Ohio-4279, 840 N.E.2d 637, ¶ 17 (10th Dist.). Expert evidence was particularly important in this case because K&D's affiant stated that some earlier reports of elevator malfunctions were not due to mechanical issues, but because occupants were overcrowding the cars or jumping up and down in the cars and causing them to stop.

{¶10} The plaintiffs complain that requiring them to offer expert opinion to explain the cause of the elevator car stopping is unfair and that people of ordinary intelligence would know that "elevators aren't suppose to get stuck in between floors." It is a truism to say that elevators should not stop between floors. Proving a breach of the standard of care, however, requires more than just pointing out that the elevator stopped — there could be other reasons why the elevator stopped. Some of the reasons may not have been mechanical, may not have been apparent to K&D, or may not have been within its ability to control. As K&D showed, some reported malfunctions of the elevator were not the result of any mechanical defect, but were caused by the occupants. The plaintiffs' argument that they need only show that the elevator stopped working would, in essence, convert the negligence per se standard of R.C. 5321.04(A)(4) into strict liability.

{¶11} Our decision in *Haywood v. Broadview S. & L. Assn.*, 8th Dist. Cuyahoga No. 34523, 1976 Ohio App. LEXIS 7529 (Mar. 4, 1976), does not require us to reverse the summary judgment. *Haywood* involved an injury caused by a wooden freight elevator. The elevator used a system of chains that were fastened by connector-links. Haywood was injured when some of the connector-links failed, causing the elevator to collapse. The evidence showed that fewer than two years before the accident, the elevator had been damaged in a fire. The Taylor Elevator Company made repairs to the elevator, but some of the connector-links were not replaced despite the possibility that high heat from the fire might have caused the connector-links to separate. A jury returned a verdict for Haywood, and on appeal, we upheld the verdict on appeal, finding that the jury could reasonably have concluded that Taylor Elevator's failure to replace all of the connector-links after the fire proximately caused Haywood's injury.

{¶12} The plaintiffs argue that *Haywood* stands for the proposition that it was not outside the province of the jury to find that an elevator malfunctioned without the assistance of expert testimony. What the plaintiffs in this case fail to acknowledge is that the cause of the accident in *Haywood* was undisputed — we stated that "[b]oth litigants agree that the separation of the unreplaced connector-link was the proximate cause of Haywood's injury." *Id*. at 6. In this case, K&D offered evidence to show that there was no obvious mechanical defect of which it was or should have been aware.

{¶13} Civ.R. 56(C) allows the court to grant summary judgment when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. K&D offered substantial evidence to show that the elevator was in proper working order before the incident and that it had no knowledge that the elevator had any mechanical defect prior to the incident. The plaintiffs offered nothing to rebut K&D's evidence. We conclude that reasonable minds could find no genuine issue of material fact on the issue of K&D's liability and that the court did not err by granting K&D's motion for summary judgment.

{¶14} The third assignment of error is that the court erred by admitting the opinion of Otis's expert, one of its regional field engineers who examined Otis's maintenance records and found no problems "relating to unintended, sudden stops in the Elevator," causing him to conclude that the elevator was "reasonably fit, suited and safe for passenger use" and that it was not "defectively repaired, serviced, or maintained" prior to the incident. The plaintiffs argue that this opinion was inadmissible because it was based on hearsay, it failed to authenticate the business records on which it relied, and made numerous "illicit conclusions."

{¶15} The plaintiffs did not object to the expert's affidavit, so they have forfeited the right to argue error on appeal. "Failure to move to strike or otherwise object to documentary evidence submitted by a party in support of, or in opposition to, a motion for summary judgment waives any error in considering that evidence under Civ.R. 56(C)." [2] *Darner v. Richard E. Jacobs Group, Inc.*, 8th Dist. Cuyahoga No. 89611, 2008-Ohio-959, ¶ 15, quoting *Stegawski v. Cleveland Anesthesia Group, Inc.*, 37 Ohio App.3d 78, 83, 523 N.E.2d 902 (8th Dist.1987).

{¶16} Judgment affirmed.

It is ordered that appellees recover of appellants 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.

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MELODY J. STEWART, JUDGE

TIM McCORMACK, P.J., and
MARY J. BOYLE, J., CONCUR

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[2] Although some cases refer to a failure to object as "waiving" error on appeal, it is more precise to call it a "forfeiture." A "waiver" is the intentional relinquishment of a known right; a "forfeiture" is failure to timely assert a right or object to an error. *See State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 20-21.