[Cite as *Miller v. Akron Gen.*, 2015-Ohio-2626.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

SUSAN MILLER, et al. Appellant v. AKRON GENERAL MEDICAL CENTER, et al. Appellee	C.A. No. 27493 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2012-02-0999

DECISION AND JOURNAL ENTRY

Dated: June 30, 2015

HENSAL, Presiding Judge.

{¶1} Susan Miller and her husband Charles Miller appeal the trial court's award of summary judgment to Akron General Medical Center on their claims of employer intentional tort, intentional infliction of emotional distress, and loss of consortium. For the reasons set forth below, we affirm.

I.

{¶2} As part of her employment at Akron General, Mrs. Miller was tasked with observing patients admitted into the psychiatric unit at the hospital. Every 15 minutes, she would write an update about the patient's mental state and behavior. On April 15, 2011, T.G.[1] was admitted to the hospital. Kathy McGonagle, the charge nurse during Mrs. Miller's shift that evening, believed that T.G. needed to be restrained and retrieved the restraints and placed them

[1] Given the circumstances in this case, we believe it is appropriate to refer to T.G. by her initials.

by T.G.'s room. She also informed the security officers that T.G. needed to be restrained; however, security did not initially restrain T.G.

{¶3} Mrs. Miller was tasked with observing T.G. and noted that T.G. was in an aggressive state. T.G. repeatedly screamed threats at Mrs. Miller, and Mrs. Miller informed Karen Wiland, a psychiatric nurse, that she believed T.G. needed to be restrained; Ms. Wiland agreed and told Mrs. Miller that she would take care of T.G. once she finished transferring a patient from a nearby room.

{¶4} Without warning, T.G. ran out of her room and attacked Mrs. Miller, causing her serious injury. Mrs. Miller filed a complaint against Akron General, the city of Akron, and T.G. Following a period of discovery, Akron General filed for summary judgment, arguing that it could not be found liable for having committed an intentional tort pursuant to Revised Code Section 2745.01. The trial court denied Akron General's motion, and the hospital moved for reconsideration, which the trial court also denied. Akron General filed a second motion for summary judgment, and the trial court granted the motion, finding that there was no just cause for delay.

{¶5} The Millers have appealed, raising three assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED IN GRANTING THE SECOND MOTION FOR SUMMARY JUDGMENT TO DEFENDANT AKRON GENERAL MEDICAL CENTER.

{¶6} Mrs. Miller[2] argues on appeal that the trial court should not have awarded summary judgment to Akron General because there was a genuine dispute of fact as to whether Akron General intended to injure her.

{¶7} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). "We apply the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party." *Garner v. Robart*, 9th Dist. Summit No. 25427, 2011-Ohio-1519, ¶ 8.

{¶8} Summary judgment is appropriate under Civil Rule 56(C) if:

> (1) [n]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977). To succeed on a motion for summary judgment, the movant bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). If the movant satisfies this burden, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." *Id*. at 293, quoting Civ.R. 56(E).

{¶9} "'Under Ohio law, employees injured in the workplace are generally limited to the remedy provided by the Workers' Compensation Act.'" *Simonelli v. Fligner*, 9th Dist. Lorain No. 11CA010098, 2012-Ohio-6112, ¶ 8, quoting *Barton v. G.E. Baker Constr., Inc.*, 9th

[2] Because Mr. Miller's cause of action for loss of consortium is contingent upon Mrs. Miller's claims, we will refer to the appellate arguments as being those of Mrs. Miller for ease of reading.

Dist. Lorain No. 10CA009929, 2011-Ohio-5704, ¶ 7. *See also Houdek v. ThyssenKrupp Materials N.A., Inc.* 134 Ohio St.3d 491, 2012-Ohio-5685, ¶ 25. "However, in limited situations, an injured employee may bring a claim against his employer for an employer intentional tort pursuant to the provisions of R.C. 2745.01." *Simonelli* at ¶ 8.

{¶10} Revised Code Section 2745.01 provides, in pertinent part,

> (A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.
>
> (B) As used in this section, "substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.

"[T]he General Assembly's intent in enacting R.C. 2745.01, as expressed particularly in 2745.01(B), is to permit recovery for employer intentional torts only when an employer acts with specific intent to cause an injury * * *." *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, ¶ 56. By redefining the definition of "substantially certain" to require deliberate intent, Section 2745.01 brought Ohio in line with the majority of other states. *See id.* at ¶ 99-100 ("R.C. 2745.01 appears to harmonize the law of this state with the law that governs a clear majority of jurisdictions * * * [as] 'Ohio [wa]s one of only eight states that ha[d] judicially adopted a 'substantial certainty' standard for employer intentional torts.'"), quoting (Footnote omitted.) *Talik v. Fed. Marine Terminals, Inc.*, 117 Ohio St.3d 496, 2008-Ohio-937, ¶ 32, citing 6 Larson, *Workers' Compensation Law*, Section 103.04[1], 103-10 (2007).

{¶11} There is no dispute that Mrs. Miller was an employee of Akron General at the time of the accident or that her injuries occurred during the course of her employment. Instead, Akron General argued that there was no evidence that it had acted with a specific intent to injure

Mrs. Miller. Mrs. Miller countered that the circumstantial evidence surrounding her injury at least established a dispute of fact as to whether Akron General had intended to injure her. Mrs. Miller pointed to T.G.'s medical records kept by Akron General that indicated that she had previously been admitted to the hospital and had to be restrained. She also points to Ms. McGonagle's deposition testimony that she had decided it was necessary to have T.G. restrained and had retrieved the restraints prior to T.G.'s arrival at the hospital. According to Mrs. Miller, Ms. McGonagle's failure to follow through and ensure T.G. was restrained, as Ms. McGonagle had the authority to do under Akron General's Restraint and Seclusion policy, gave rise to the inference that Akron General intended for T.G. to injure an employee. Similarly, Mrs. Miller argues that Ms. Wiland's failure to have T.G. restrained despite being warned by Mrs. Miller that T.G. was unstable also gives rise to the inference that Akron General intended for T.G. to injure an employee.

{¶12} If the only question before us was whether Akron General was negligent, reckless, or even wanton in its conduct, the decisions made on the evening of April 15, 2011, would give rise to a dispute of fact on that issue. However, assuming that the actions and decisions of Ms. McGonagle and Ms. Wiland could be imputed to Akron General, they would not support the conclusion that Akron General acted with specific intent to injure Mrs. Miller or any other employee. Rather, the summary judgment materials establish that Mrs. Miller's injuries were the result of miscommunication, a failure of communication, or an unfortunate prioritization of resources.

{¶13} Ms. McGonagle testified in her deposition that she heard a paramedic taking a call about an incoming patient, later identified as T.G., who was suicidal. Ms. McGonagle also saw the paramedic write "combative" on the run sheet, prompting her to go retrieve the restraints and

put them by the door to room 33, which was where the patient would be. She then went to tell security that a patient who was coming would probably need to be restrained. At no point prior to the attack on Mrs. Miller, however, was Ms. McGonagle aware of T.G.'s name. After telling security about the incoming patient, Ms. McGonagle went to assist another nurse with starting an IV on a patient and did not have any further interaction with T.G. until after she attacked Mrs. Miller.

{¶14} Ms. Wiland testified that, because T.G. was being admitted, she had to move the patient who was in room 33 upstairs. When she returned, she sat near Mrs. Miller and worked on paperwork required to move the patient in room 34 to a different floor because there was another new patient coming. While working on the paperwork, Ms. Wiland could hear T.G. demanding food, describing T.G. as irritable. After Ms. Wiland told T.G. on multiple occasions that she could not have food, T.G. ran out of the room and attacked Mrs. Miller.

{¶15} In her deposition, Mrs. Miller testified that Ms. McGonagle had placed the restraints next to her and told her that a patient was coming in that would need to be restrained and that she had informed security. When T.G. arrived, she was very agitated, repeatedly yelling at and threatening Mrs. Miller. Mrs. Miller told Ms. Wiland that T.G. "is a hot one. She is very agitated. She is one hot mess." Ms. Wiland agreed, and told Mrs. Miller that "'[she] w[ould] get to [T.G.] as soon as [she] could.'" Mrs. Miller acknowledged, however, that Ms. Wiland "was very busy * * *." Mrs. Miller also testified that Tricia Troyak, the triage nurse, had attempted to get information from T.G. but had not been able to do so. Mrs. Miller stated that she believed that Ms. Troyak should have gotten security at that point but, in Mrs. Miller's opinion, "didn't want to have to deal with it."

{¶16} The summary judgment materials, when viewed in the light most favorable to Mrs. Miller, reveal a bustling emergency room with staff engaged in a number of different activities and responsibilities at once. The materials do not establish, however, that anyone intended T.G. to injure anyone. Instead, it was the result of multiple people not taking precautions that may have prevented the incident. The failure to take precautions does not establish an intent to injure. *See Houdek*, 134 Ohio St.3d 491, 2012-Ohio-5685, at ¶ 26-28 (concluding that evidence establishing that the employer put the employee in a dangerous situation and failed to take precautions that could have prevented his injury did not establish the intent to injure required to pursue a claim under Section 2745.01).

{¶17} Accordingly, Mrs. Miller's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> THE TRIAL COURT ABUSED ITS DISCRETION IN NOT RULING ON APPELLANTS' MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, RELIEF FROM JUD[G]MENT OR ORDER PURSUANT TO CIV.R. 60(B).

{¶18} In Mrs. Miller's second assignment of error, she argues that the trial court erred by not ruling on her motion to reconsider its order granting Akron General's motion in limine to exclude T.G.'s medical records. However, "if a trial court fails to rule on a pending motion prior to entering judgment, it will be presumed on appeal that the motion in question was implicitly denied." *George Ford Constr., Inc. v. Hissong*, 9th Dist. Summit No. 22756, 2006-Ohio-919, ¶ 12. We cannot conclude, therefore, that the trial court committed reversible error by not explicitly ruling on the motion.

{¶19} Mrs. Miller also appears to challenge the trial court's order granting the motion in limine. However, this argument is not fully developed. *See* App.R. 16(A)(7). Furthermore, the summary judgment materials before the court contained references to Akron General's

knowledge that T.G. had previously been restrained, and there is no evidence in the record that the trial court did not consider that evidence when ruling on the motion for summary judgment.

{¶20} Accordingly, Mrs. Miller's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT GRANTED AGMC'S SECOND MOTION FOR SUMMARY JUDGMENT AFTER PREVIOUSLY DENYING THE FIRST SUMMARY JUDGMENT MOTION AND OVERRULING THE MOTION FOR RECONSIDERATION.

{¶21} Mrs. Miller argues in her third assignment of error that the trial court was prohibited by the law of the case doctrine from awarding summary judgment to Akron General after denying its first motion for summary judgment and the motion for reconsideration. "[T]he [law of the case] doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan*, 11 Ohio St.3d 1, 3 (1984). However, "the law of the case doctrine require[s] a final order." *Dunkle v. Children's Hosp. Med. Ctr. of Akron*, 9th Dist. Summit No. 26612, 2013-Ohio-5555, ¶ 34, citing *Grava Parkman Twp.*, 73 Ohio St.3d 379 (1995), syllabus. Thus, because the trial court had never entered a final judgment, law of the case doctrine did not prohibit it from revisiting the summary judgment issue. *Dunkle* at ¶ 34. *See also Price v. Carter Lumber Co.*, 9th Dist. Summit No. 24991, 2010-Ohio-4328, ¶ 11, citing Civ.R. 54(B).

{¶22} Accordingly, Mrs. Miller's third assignment of error is overruled.

III.

{¶23} The Millers' assignments of error are overruled, and the judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

JENNIFER HENSAL
FOR THE COURT

MOORE, J.
SCHAFER, J.
CONCUR.

APPEARANCES:

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