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2018 IL App (3d) 170650-U

Order filed October 2, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

VICTOR MODUGNO,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiff-Appellant,)	Tazewell County, Illinois.
)	
v.)	Appeal No. 3-17-0650
)	Circuit No. 15-L-61
WASHINGTON CHRISTIAN VILLAGE,)	
)	Honorable Michael D. Risinger,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Lytton and McDade concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in granting defendant's motion for summary judgment.

¶ 2 Plaintiff, Victor Modugno, filed this appeal following the Tazewell County circuit court's entry of summary judgment in favor of defendant, Washington Christian Village. Plaintiff asserts the trial court erred in (1) granting summary judgment where genuine issues of material facts exist and (2) basing its ruling on its own personal experience. We reverse and remand.

¶ 3

FACTS

¶ 4 In December 2014, plaintiff became a resident of defendant, a skilled nursing facility, after suffering a hemorrhagic stroke. On January 11, 2015, while being transferred from his wheelchair to his bed by defendant's staff, plaintiff suffered a seventeen-centimeter deep tissue laceration to his left leg, resulting in a trip to the emergency room where he received nine sutures and five staples. The injury later became infected requiring plaintiff to receive wound care treatment for nine months.

¶ 5 In June 2015, plaintiff filed a complaint alleging that defendant violated the Nursing Home Care Act (210 ILCS 45/1-101 *et seq.* (West 2014)) by failing to (1) ensure the surface on which they were placing him was free from protruding metal; (2) adequately protect his lower extremities while transferring him; (3) inspect the bed to make sure it did not contain an exposed metal frame; and (4) transfer him in a manner that did not result in injury. Plaintiff further alleged that he suffered severe and debilitating injuries as a result of defendant's negligence.

¶ 6 In January 2017, the parties took the discovery deposition of registered nurse Cathy Douglas who testified as follows. She worked for defendant as the Director of Nursing for the last nine years. In that position, she supervises 30 to 35 people and is expected to be aware of all policies and procedures in place at the facility to ensure the safety of defendant's residents. She recalled an incident in January 2015 when plaintiff "sustained a skin tear" while being transferred with a slide board. Douglas could not recall why plaintiff needed transfer assistance on January 11, 2015, but she agreed that his mobility assessment indicated plaintiff needed "extensive assistance" that required at least two people to transfer him. Douglas explained the general process for transferring a resident from a wheelchair to a bed using a slide board. First, the wheelchair is positioned as close to the bed as possible, the foot pedals are removed from the chair and it is locked in place. The bedspread, blanket, and top sheet of the bed are pulled down

and the bed is raised or lowered so that it is similar in height as the wheelchair. A gait belt is placed around the resident and a wooden board is placed between the wheelchair and the bed, underneath the resident, and then the resident is slid “inch by inch” along the board to the bed. According to Douglas, the slide board transfer is usually not used unless the patient is able to assist.

¶ 7 Douglas acknowledged that the Illinois Department of Public Health (IDPH) conducted two investigations, one in response to the incident at issue and a second in July 2015. Douglas testified that the first IDPH investigation found no violations. A report from the first investigation is not included in the record. The report from the second investigation reveals that the IDPH audited 25 patient beds and found that 23 “were missing the black protective plastic caps that cover the edge of the tubular metal support bars extending the width of the bed. The metal support bars have a blunt metal edge that is flush with the right and left side of the bed frames.” The IDPH noted that the bed manufacturer “stated that the black protective plastic caps that cover the end of the tubular metal support bars on their beds are intended to help prevent injuries” and “that the location of those metal bars could potentially come in contact with a resident’s skin during transfers or even just sitting on the edge of the bed.” It concluded that defendant “failed to ensure all resident beds were maintained to assure resident safety.” Douglas initially stated she was not aware of the IDPH findings during its second investigation but later agreed that the investigation found beds were missing black caps.

¶ 8 Although Douglas knew that the black caps “exist[ed],” she did not know what they looked like, how big they were, or where they were located on the bed frame. Nonetheless, she testified that she “went down and looked at [plaintiff’s] bed after the incident,” “that there were no black caps [on plaintiff’s bed] near the area where we believe or where the staff believed the

incident occurred,” and that she observed no sharp or exposed metal. Previously, Douglas stated her assistant conducted the investigation following the incident.

¶ 9 In March 2017, the parties took the discovery deposition of certified nursing assistant (CNA) Ashleigh Minton who testified as follows. Minton recalled that plaintiff came to defendant’s facility after suffering a stroke. She, along with another CNA and a licensed practical nurse, transferred plaintiff from the wheelchair to his bed on the date of the incident. She did not feel comfortable transferring plaintiff with just one other person because “he was very lethargic.” She explained that they

“kind of slid [plaintiff] so that we could put the board underneath of him after he already had the belt on and then we transferred him into the bed. And it was kind of a poor transfer just because he was so lethargic that he couldn’t help us. So then he didn’t holler or anything and Deb Elias, the other CNA, held his head so that way we could put him into bed and I moved the chair and grabbed his legs to pull him up into the bed and that’s when I noticed that there was blood on the carpet and all over myself.”

¶ 10 According to Minton, a Hoyer lift is sometimes used to transfer people who are unable to assist in their transfer “but the problem with that is trying to get the sling underneath somebody who can’t help you who’s already in a wheelchair, cause it’s a full body sling.” When asked why they did not use a Hoyer lift to transfer plaintiff, she replied, “Because we would not have been able to get the sling underneath of somebody who was not capable of helping us at all.” She agreed that plaintiff’s leg suffered a laceration during the transfer but could not recall anything sharp or exposed on the bed frame.

¶ 11 In June 2017, defendant filed a motion for summary judgment, asserting, in part, that plaintiff failed to demonstrate defendant knew or should have known of a dangerous condition that caused plaintiff’s injury, and thus, plaintiff failed to show any evidence of negligence on the part of defendant. Attached to its motion were photographs of an “exemplar of the bed frame at issue.” The photographs depict a white metal bed frame with 12 black protective caps (6 per side).

¶ 12 In August 2017, plaintiff filed a response to defendant’s motion for summary judgment. Plaintiff asserted, in part, that (1) “there is no question of law as to whether the Defendant owed a duty to [him]”; (2) he is not required to prove notice to survive summary judgment because he did not assert a claim of negligence based on premises liability; (3) his “injury would not have occurred but for the Defendant’s negligence”; (4) CNA Minton provided testimony in support of his contention that his injury proximately resulted from defendant’s negligence; and (5) Nurse Douglas’s testimony created a question of material fact as to whether his bed frame did not have a protective cap on the date of his injury.

¶ 13 The trial court conducted a hearing on the motion in August 2017. During argument, defendant’s counsel acknowledged that plaintiff sustained his injury at defendant’s facility, but asserted “the fact that he got cut in our facility does not give rise to negligence itself.” Counsel for plaintiff argued that the type of injury plaintiff sustained “does not occur in the absence of negligence.” Following arguments, the trial court granted the motion for summary judgment.

¶ 14 Plaintiff appeals.

¶ 15 ANALYSIS

¶ 16 On appeal, plaintiff asserts the trial court erred in (1) granting summary judgment where genuine issues of material fact existed and (2) basing its ruling on its own personal experience.

¶ 17 The purpose of summary judgment is not to try an issue of fact but to determine whether triable issues of fact exist. *Cincinnati Cos. v. West American Insurance Co.*, 287 Ill. App. 3d 505, 509 (1997). Summary judgment is appropriate only “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” 735 ILCS 5/2-1005(c) (West 2014). “Where the facts could lead a fair-minded person to draw more than one conclusion or inference, summary judgment must be denied.” *Deliberto v. Stahelin*, 171 Ill. App. 3d 355, 357 (1988).

¶ 18 The party moving for summary judgment bears the initial burden of proving that no genuine issues of material fact exist. *Benson v. Stafford*, 407 Ill. App. 3d 902, 912 (2010). The movant may satisfy this burden by establishing an absence of evidence to support the plaintiff’s case or by introducing evidence which would entitle it to judgment as a matter of law if uncontroverted. *General Auto Service Station v. Maniatis*, 328 Ill. App. 3d 537, 543 (2002). While a plaintiff need not prove his case at the summary judgment stage, he must present a factual basis that arguably entitles him to judgment at trial. *Benson v. Stafford*, 407 Ill. App. 3d at 912. “Summary judgment is a drastic measure and should only be granted if the movant’s right to judgment is clear and free from doubt.” *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). We review a trial court’s entry of summary judgment *de novo*. *Id.*

¶ 19 Defendant first argues that genuine issues of material fact precluded the trial court’s grant of summary judgment. Specifically, he asserts that genuine issues of material fact exist regarding (1) whether defendant’s employees were negligent in transferring him from the wheelchair to his bed on January 11, 2015; (2) whether that negligent transfer proximately caused his injury; and

(3) the credibility of defendant's employee Nurse Douglas. Defendant disagrees, asserting that the trial court appropriately granted summary judgment because plaintiff presented no evidence that defendant acted negligently and breached its duty under the Nursing Home Care Act.

¶ 20 Under the Nursing Home Care Act, owners and operators of nursing homes are liable to their residents for any injury caused by the intentional or negligent acts or omissions of their agents and employees. 210 ILCS 45/3-601 (West 2014). "[T]he appropriate standard of care for liability under the Act is one of ordinary negligence." *Myers v. Heritage Enterprises, Inc.*, 354 Ill. App. 3d 241, 246 (2004). Thus, to establish negligence, a plaintiff must show that defendant (1) owed him a duty of care, (2) breached that duty and (3) that the breach proximately caused his injury. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430 (2006).

¶ 21 Here, it is undisputed that defendant owed plaintiff a duty of care. It is also undisputed that plaintiff's injury occurred as a direct result of the transfer from his wheelchair to his bed on January 11, 2015. Thus, the issue is whether plaintiff presented at least some evidence that defendant breached its duty to plaintiff by negligently transferring him.

¶ 22 After reviewing the record, we find that genuine issues of material fact exist such that summary judgment is precluded. First, the evidence regarding plaintiff's physical condition at the time of the transfer and whether the defendant's employees used the appropriate transfer method is disputed. For example, plaintiff's condition required him to have "extensive assistance" in transferring, including the aid of at least two people. CNA Minton testified that they used a slide board transfer because plaintiff "was so lethargic and couldn't help us [with the transfer]." In fact, plaintiff's lethargic condition left him unable to react to the injury at all. However, Nurse Douglas testified that a slide board transfer is usually not used unless the patient is able to assist his aids in the transfer.

¶ 23 Second, we agree that plaintiff “produced both direct and circumstantial evidence supporting the theory [his] leg inappropriately came into contact with an exposed sharp surface on [his] bedframe during the transfer.” In particular, we note that Nurse Douglas testified that her assistant conducted the investigation following the incident, but then later stated she personally “went down and looked at [plaintiff’s] bed after the incident” and found no sharp or exposed metal. In addition, although Nurse Douglas admitted that she did not even know what the black caps looked like, how big they were, or where they were located on the bed frame, she testified that “there were no black caps [on plaintiff’s bed] near the area where we believe or where the staff believed the incident occurred.” The photographs of the bed frame that defendant attached to its motion for summary judgment as an “exemplar of the bed frame at issue,” however, clearly show a bed frame that contains 12 black caps (6 per side). Thus, Nurse Douglas’s credibility is clearly at issue. See *Nava v. Sears, Roebuck & Co.*, 2013 IL App (1st) 122063, ¶ 22 (summary judgment is not appropriate where credibility issues exist because credibility determinations are to be made by the trier of fact).

¶ 24 Finally, we reject defendant’s contention that the IDPH investigation “is not so closely related to the facts and direct evidence” at issue in this case “to be considered in ruling on [it’s] motion for summary judgment.” Just six months after the incident, the fact that 23 of the 25 beds audited by the IDPH were missing their black protective caps—caps that are intended to cover the blunt metal edge of the metal support bars to “prevent injuries”— is directly relevant to the case at bar and it supports plaintiff’s contention that his injury would not have occurred absent a defect, *i.e.*, sharp edge on his bed frame.

¶ 25 Based on the above evidence, we find that credibility issues and genuine issues of material fact exist such that fair-minded persons could draw more than one conclusion or

inference regarding defendant's culpability. Accordingly, we reverse the trial court's grant of summary judgment and remand for further proceedings.

¶ 26 Because we reverse the trial court's grant of summary judgment, we need not address plaintiff's remaining contention.

¶ 27 **CONCLUSION**

¶ 28 For the foregoing reasons, we reverse the Tazewell County circuit court's grant of summary judgment and remand for further proceedings.

¶ 29 Reversed and remanded.