

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANTS:

DAVID P. ALLEN
Allen, Allen & Brown
Salem, Indiana

ATTORNEYS FOR APPELLEES:

GEORGE A. BUDD
CHAD M. SMITH
Waters, Tyler, Scott, Hofmann
& Doane, LLC
New Albany, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ELIZABETH HOLLEN and DENNIS HOLLEN,)
individually and as Husband and Wife,)
Appellants-Plaintiffs,)

vs.)

TROY SPEARS and JOHNNIE SPEARS,)
Appellees-Defendants.)

No. 88A05-0808-CV-485

APPEAL FROM THE WASHINGTON SUPERIOR COURT
The Honorable Frank Newkirk, Jr., Judge
Cause No. 88D01-0707-CT-00186

June 4, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Elizabeth and Dennis Hollen filed a complaint in Washington Superior Court against Troy and Johnnie Spears seeking damages the Hollens incurred after Elizabeth Hollen fell down a flight of stairs at the Speares' home. The Speares filed a motion for summary judgment and argued that they did not breach the duty owed to Elizabeth Hollen, and therefore, they were entitled to judgment as a matter of law. The trial court granted the Speares' motion for summary judgment. The Hollens appeal and argue that genuine issues of material fact preclude the entry of summary judgment. Concluding that the trial court did not err when it granted the Speares' motion for summary judgment, we affirm.

Facts and Procedural History

Elizabeth Hollen ("Hollen") and Troy Spears ("Spears") are siblings. On July 2, 2005, Hollen was attending a party at Spears's residence. While carrying a bowl of salad in her left hand, Hollen descended a flight of stairs leading from the rear deck to the ground. There was no handrail on the stairway. As Hollen was stepping onto the bottom step with her right foot, she fell to the ground landing on her left side.

Hollen was not sure what caused her fall. However, she thought perhaps the stairs were too narrow or had inconsistent heights. She also stated she would have used a handrail if one had been available on the right-hand side of the stairway. Spears admitted that he occasionally has to re-level the stairs.

On June 21, 2007, the Hollens filed a complaint against the Speares alleging that Hollen's injuries resulted from the Speares' 1) failure to warn of a dangerous condition and/or 2) failure to maintain the property. On February 27, 2008, the Speares filed a

motion for summary judgment and argued they did not breach any duty owed to Hollen. A hearing was held on the Spearses' motion on June 30, 2008. The next day, the trial court granted the motion and entered summary judgment in favor of the Spearses. The Hollens now appeal. Additional facts will be provided as necessary.

Standard of Review

The purpose of summary judgment is to terminate litigation about which there can be no dispute and which may be determined as a matter of law. Swift v. Speedway Superamerica, LLC, 861 N.E.2d 1212, 1213 (Ind. Ct. App. 2007), trans. denied. Our standard of review is the same as that of the trial court. Id. Summary judgment is appropriate only where the evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); Naugle v. Beech Grove City Sch., 864 N.E.2d 1058, 1062 (Ind. 2007). For summary judgment purposes, a fact is "material" if it bears on ultimate resolution of relevant issues. Graves v. Johnson, 862 N.E.2d 716, 719 (Ind. Ct. App. 2007). In negligence cases, summary judgment is rarely appropriate because such cases are particularly fact sensitive and are governed by a standard of the objective reasonable person-one best applied by a jury after hearing all of the evidence. Id. (citing Rhodes v. Wright, 805 N.E.2d 382, 387 (Ind. 2004)). Nonetheless, summary judgment is appropriate when the undisputed material evidence negates one element of a negligence claim. Id.

Discussion and Decision

The tort of negligence is comprised of three elements: 1) a duty on the part of the defendant in relation to the plaintiff; 2) a failure by the defendant to conform its conduct

to the requisite standard of care; and 3) an injury to the plaintiff proximately caused by that failure. Shafer & Freeman Lakes Envtl. Conservation Corp. v. Stichnoth, 877 N.E.2d 475, 478 (Ind. Ct. App. 2007).

The nature and extent of a landowner's duty to persons coming on the property is defined by the visitor's status as an invitee, licensee, or trespasser. Rhoades v. Heritage Inv., LLC, 839 N.E.2d 788, 791 (Ind. Ct. App. 2005), trans. denied. The highest duty of care is owed to an invitee; that duty being to exercise reasonable care for the invitee's protection while he or she is on the premises. Id. In this case, it is undisputed that Hollen was an invitee. See id. at 792 (An invitee is a person who is invited to enter or to remain on another's land.); see also Burrell v. Meads, 569 N.E.2d 637, 643 (Ind. 1991) (“[S]ocial guest are invitees.”).

As an invitee, the scope of duty the Spearses owed to Hollen was as follows:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.

Burrell, 569 N.E.2d at 639-40 (quoting Restatement (Second) of Torts § 343 (1965)).

In this case, Hollen was walking down a short flight of stairs with a bowl of salad in her left hand. As Hollen stepped onto the fourth step, she felt her right ankle buckle. Hollen testified, “I’m not sure what really happened. I don’t know if [my foot] went over the edge of the step, but when I landed, it was under the bottom step. So, I’m not real for

sure exactly what did happen.” Appellant’s App. p. 25. Hollen speculated that the steps might be too narrow or the height of the steps was inconsistent. Yet, after expressing that opinion, she stated, “I’m not sure about any of it, though.” Id. at 26. There was no railing on the stairs. Because Hollen is left-handed and was carrying a bowl of salad in her left hand, she indicated that if there had been a railing on the right-hand side of the stairs, she would have grabbed it when she started to fall. Appellee’s App. p. 61.

Spears stated that no one had fallen on the steps before Hollen fell. He stated that the width of the steps appears to be the same and that he has never noticed an inconsistency in the distance between one stair to the next. Id. at 70. He has never repaired the stairs except to “re-level them every once in a while.” Id.

Mechanical Engineer Wilhelm Egger inspected the steps on April 9, 2008, and reviewed photographs of the stairs taken near the date of Hollen’s fall nearly three years prior. Egger identified the following defects, code violations, and safety concerns:

- A. The stairs do not have a proper handrail system. All stairs must have at least one handrail system.
- B. There was a variation of the riser height on the wood structure was 7/8" which is greater than allowed by the code of 3/8". The entire steps had a total variation of riser height of 3-1/2".
- C. The walking surface of the treads had a front to back slope greater than 2% which is identified in the drawing attached as Exhibit “C”.
- D. The treads further had a slope from side to side which is set out in the drawing attached as Exhibit “D”.

Appellant’s App. p. 44. Further, Egger stated, “it is extremely important that all the treads and risers be the same size to avoid the hazard of subconsciously measuring the stepping requirements and the mis-stepping when a step does not actually ‘match’ the prior steps. . . . It is further important that the treads be flat and not sloped to help

maintain balance while stepping.” Id. Egger’s exhibits demonstrate no variation in the width of the third and fourth steps, but a 1/8" inch variation in height. All of the steps exceeded a maximum slope of two percent. Id. at 47-49.

Although Egger identified several code and safety violations after inspecting the stairs nearly three years after the incident, Hollen can only speculate as to the cause of her fall and admits that she is not sure what happened.

In Midwest Commerce Banking Co. v. Livings, 608 N.E.2d 1010 (Ind. Ct. App. 1993), Livings, the injured plaintiff, was waiting near the front end of a queuing rope and began to walk around the end of the rope when the bank teller motioned her forward. Livings then fell and slammed into the teller counter causing injury to her left leg and shoulder. Livings speculated that she may have tripped on the carpet or was perhaps pushed by someone in line. Id. at 1011. After Livings sued the bank, the bank moved for summary judgment and argued that Livings designated no facts to support her negligence claim.

Our court concluded that the bank was entitled to summary judgment after citing the well-established principle that all “elements of a negligence action must be supported by specific facts designated to the trial court or reasonable inferences that might be drawn from such facts. An inference is not reasonable when it rests on no more than speculation or conjecture.” Id. at 1012. Therefore, Livings was required to “come forward with some evidence of how this alleged negligence proximately caused her fall[.]” Id.

This court has held that, absent factual evidence, negligence cannot be inferred from the mere fact of an accident. Similarly, causation may not be inferred merely from the existence of an allegedly negligent condition.

Without any evidence of how or why Livings fell and therefore no evidence on the cause of Livings' injury, Livings failed to meet her burden to come forward with specific facts.

Id. at 1013. See also Hayden v. Paragon Steakhouse, 731 N.E.2d 456 (Ind. Ct. App. 2000) (affirming grant of summary judgment to restaurant on claim of negligence by injured patron who slipped and speculated that he slipped on ice or "something.")

In Cergnul v. Heritage Inn of Indiana, Inc., 785 N.E.2d 328 (Ind. Ct. App. 2003), trans. denied, as Cergnul was ascending a hotel stairway, the stair railing came out of the wall and Cergnul fell and was injured. The top portion of the railing had come out of the wall, but the bottom section remained attached. The hotel manager never physically inspected the railings, but often used them when climbing the stairs. Further no other staff member or hotel guest ever reported a problem with the railing. Id. at 330. At trial, Heritage Inn argued that Cergnul did not produce sufficient evidence on the issue of negligence and moved for judgment on the evidence, which the trial court granted. On appeal, Cergnul asserted that the evidence was sufficient to support the conclusion that the hotel negligently failed to discover and correct the improper attachment of the railing, which was anchored in drywall instead of the wall studs. Id. at 332-33. We rejected Cergnul's argument and concluded that he had not presented any evidence that Heritage Inn possessed either actual or constructive knowledge that there may have been a problem with the railing. Id. at 333.

In this case, Hollen has designated evidence that the only allegedly negligent condition of the stairway that the Spearses were aware of was that the stairway needed to be re-leveled on occasion. The Spearses and Hollen were aware that the stairway lacked

a railing. However, Hollen did not identify the obvious lack of a railing as the cause of her fall. The Speares testified that Hollen was the only individual who has ever fallen on the stairs, and she was the only person to fall on the stairway on the day of the party.

Hollen relies heavily on Egger's report in her brief, and claims that the fact that her expert discovered code and safety violations creates a genuine issue of material fact. However, Egger inspected the deck stairs nearly three years after the date Hollen fell. Moreover, Hollen has not identified any of those code or safety violations as the cause of her fall. See Kincade v. MAC Corp., 773 N.E.2d 909, 912 (Ind. Ct. App. 2002) (“[C]ausation may not be inferred merely from the existence of an allegedly negligent condition.”). Finally, in the cases Hollen relies on in support of her argument, the injured plaintiff identified the cause of his or her fall. See e.g. State Street Duffy's Inc. v. Loyd, 623 N.E.2d 1099 (Ind. Ct. App. 1993), trans. denied (The decedent stated that she tripped over the step of a raised restaurant booth); Barsz v. Max Shapiro, Inc., 600 N.E.2d 151 (Ind. Ct. App. 1992) (The injured plaintiff testified that she slipped on something and a water glass was found on the floor in the area where she fell.); N. Ind. Pub. Serv. Co. v. Stokes, 493 N.E.2d 175 (Ind. Ct. App. 1986) (The injured plaintiff tripped on a plastic floor runner and claimed that a pucker along the edge caused her fall.).

Assuming arguendo that the Speares breached a duty owed to Hollen regarding the condition of the stairs, Hollen has identified only one specific cause of her fall, i.e. that her right ankle buckled. She has not designated any evidence which would support her claim that this was caused by a defect or negligent condition of the stairs. See Appellant's App. p. 26. Moreover, aside from Spears's statement that he would re-level

the stairs occasionally and the obvious lack of a railing, Hollen designated evidence tending to establish only that the stairs were not in compliance with building codes nearly three years after her fall.¹ We therefore conclude that Hollen has not designated specific facts to establish the existence of a negligent condition that proximately caused her fall and resulting injuries. Accordingly, we conclude that the trial court properly entered summary judgment in the Spearses' favor.

Affirmed.

BAILEY, J., and BARNES, J., concur.

¹ For this reason, we also reject Hollen's argument that the Spearses were negligent per se. As a matter of law, evidence of code violations nearly three years after the incident at issue cannot be negligence per se as to that remote event. Moreover, Hollen failed to designate any evidence to establish that the alleged code violations were the proximate cause of her fall. See Am. United Life Ins. Co. v. Douglas, 808 N.E.2d 690, 704 (Ind. Ct. App. 2004), trans. denied ("Negligence per se supplies liability, but the plaintiff must still prove causation and damages just as in any other negligence claim.").