

STATE OF MICHIGAN  
COURT OF APPEALS

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DAWN HASELHUHN,

Plaintiff-Appellant,

v

JAMES HUMPHREY, INC., d/b/a JIM'S  
CRACKER BARREL GENERAL STORE,

Defendant-Appellee.

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UNPUBLISHED

June 12, 2007

No. 267138

Oakland Circuit Court

LC No. 2004-059266-NO

Before: Servitto, P.J., and Jansen and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right following a jury verdict of no cause of action on her premises liability claim. Plaintiff also appeals the trial court's grant of summary disposition for defendant on her separate claims of negligence and intentional infliction of emotional distress. We affirm.

Plaintiff was injured when she slipped on water while shopping in defendant's store. She claims that defendant's employees refused to summon assistance for her and forced her to walk to her car, exacerbating her injuries. She maintains that the security video cameras in defendant's store captured the incident on videotape, and that defendant offered no reasonable excuse for failing to produce the videotape evidence. Defendant responds that the employees reasonably assisted plaintiff, and that there was no videotape of the incident.

On appeal, plaintiff first argues that the trial court erred by granting summary disposition on her claim of intentional infliction of emotional distress. We review de novo a trial court's grant of summary disposition. *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). Although our Supreme Court has not formally recognized the tort, this Court has accepted intentional infliction of emotional distress as a viable tort for more than twenty years. See *Rosenberg v Rosenberg Bros Special Account*, 134 Mich App 342, 350; 351 NW2d 563 (1984). The elements of intentional infliction of emotional distress are: (1) that the defendant engaged in extreme and outrageous conduct, (2) that the defendant's conduct was intentional or reckless, (3) that the conduct caused the plaintiff's injuries, and (4) that the plaintiff's injuries included severe emotional distress. *Doe v Mills*, 212 Mich App 73, 91, 536 NW2d 824 (1995).

Here, the trial court correctly determined that plaintiff failed to present sufficient proof of the first element of her claim. The initial determination as to whether defendant's conduct could be reasonably deemed extreme and outrageous is for the trial court. *Sawabini v Desenberg*, 143

Mich App 373, 383; 372 NW2d 559 (1985). As this Court has pointed out in several cases, a plaintiff claiming intentional infliction of emotional distress must assert something more than mere insulting, malicious, or aggravating behavior. *Doe, supra* at 91. The conduct at issue must be “atrocious” and “utterly intolerable in a civilized community.” *Id.*; see also 1 Restatement Torts, 2d, § 46, comment d, pp 72-73, quoted with approval in *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 603; 374 NW2d 905 (1985). The court must consider the allegedly tortious conduct in context. *Rosenberg, supra* at 351-352.

Taken in context, the evidence here indicates that the employees’ conduct was neither extreme nor outrageous. One of the employees was busy running the cash register when plaintiff fell. As for the two other employees directly involved in the incident, even assuming plaintiff is correct in her assertion that the employees refused to call an ambulance or to otherwise summon assistance, the employees’ behavior was not extreme or outrageous. No reasonable jury could find that the employees’ failure to call for help was atrocious, when plaintiff herself acknowledged that the employees were trying to figure out how they could help her. Plaintiff further acknowledged that although the employees did not summon supplementary help, they did help plaintiff to her car. The evidence was simply insufficient to establish atrocious or outrageous conduct by defendant’s employees in this case.

Plaintiff next argues that defendant’s employees breached a duty of reasonable care in assisting her to her car. Plaintiff correctly asserts that once the employees undertook to assist her, they had a duty to use reasonable care. As our Supreme Court has stated, “there is a clearly recognized legal duty of every person to avoid any affirmative acts which may make a situation worse.” *Farwell v Keaton*, 396 Mich 281, 287; 240 NW2d 217 (1976). However, even construing the evidence in the light most favorable to plaintiff, the evidence is insufficient to establish any breach of the duty of reasonable care.

Plaintiff claims that the employees forced her to walk, but her deposition testimony contradicts this claim. Her testimony indicates that she made a decision to lean on the shopping cart to walk, after being offered other options by the store employees. This testimony comports with the employees’ deposition testimony that plaintiff chose to walk to her car. Nothing in the testimony indicates that the employees’ specific acts of walking with plaintiff, steadying her, and setting her on the ground were beyond the realm of reasonable care.

Plaintiff’s physician’s report is similarly unavailing because it is based on the unsupported assertion that the employees forced plaintiff to walk. Plaintiff did not provide the entire report to the trial court, so the extent of the facts presented to the physician are unknown. Nonetheless, the excerpt in plaintiff’s summary disposition brief makes clear that the physician assumed that the employees forced plaintiff to walk. But that fact is inaccurate, according to the record established below. As such, the report is insufficient to create a question of fact concerning whether defendant breached its duty to plaintiff.

Plaintiff’s final argument is that the trial court erred by refusing to give the standard jury instruction concerning adverse inferences from failure to produce evidence. M Civ JI 6.01. This Court reviews claims of instructional error de novo. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002). Jury instructions must comport with the parties’ claims and theories of the case when the evidence supports those claims and theories. MCR 2.516(A)(2); *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). However, the evidence here

did not support plaintiff's claim concerning the alleged videotape evidence. The unrefuted evidence presented below indicated that defendant could not locate a videotape of the incident because no such videotape was ever made. Accordingly, the trial court correctly declined to give the adverse inference instruction.

Given our above analysis, we need not address the alternative ground for affirmance put forward by defendant on appeal.

Affirmed.

/s/ Deborah A. Servitto

/s/ Kathleen Jansen

/s/ Bill Schuette