

STATE OF MICHIGAN
COURT OF APPEALS

DONNA JOSEPH, a/k/a DONNA YOUNG-
JOSEPH,

UNPUBLISHED
February 23, 2006

Plaintiff-Appellant,

v

DENNY’S, INC., and CRYSTAL CARPET
CARE, INC.,

No. 257651
Kent Circuit Court
LC No. 03-005528-NO

Defendants-Appellees.

Before: Borrello, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Acting in propria persona, plaintiff appeals as of right from an order granting summary disposition to defendants pursuant to MCR 2.116(C)(10). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, who suffered from chronic obstructive pulmonary disease and other medical problems, alleged that her condition was aggravated when defendant Crystal Carpet Care, Inc., sprayed Scotchguard on the carpet while she was eating at a Denny’s restaurant. The trial court granted summary disposition on the ground that plaintiff failed to establish that the spraying was a cause or the proximate cause of her aggravated condition. Plaintiff filed an untimely motion for reconsideration and attached a letter from her treating physician, who stated that “cleaning solutions” sprayed at Denny’s were responsible for the aggravation. He appeared to be referring to cleaning solutions that defendant Crystal Carpet Care had identified as ones used on carpets at Denny’s *after* the date that plaintiff alleged she was in the restaurant and subjected to spraying. The trial court denied the motion for reconsideration.

Plaintiff first argues that Exhibit F to her “motion to deny defendant’s motion for summary disposition” should not have been disregarded on the ground that it was hearsay, apparently claiming that it was a statement by a party-opponent or its agent. Our review of the record shows that the trial court did not disregard this exhibit or rule that it was hearsay. Exhibit F was an August 7, 2000, letter to plaintiff’s attorney from Willis Corroon Administrative Services Corporation, apparently Denny’s insurer, stating that the spraying done on the day plaintiff was in the restaurant was for “scotch-guarding.” Plaintiff asserted that the letter established that the chemical sprayed was trademark “Scotchguard.” The trial court did not accept this assertion since the letter did not establish as much. The trial court properly concluded

that the admission that “scotch-guarding” was done did not establish that trademark Scotchguard was used.

Plaintiff’s second argument is that her attorney¹ was not entirely prepared, and that had she been prepared that summary disposition would not have been appropriate. At the motion hearing, plaintiff’s counsel relied on two letters from Denny’s independent physician to establish causation. He found “no objective evidence to support the claim that any significant pulmonary injury occurred at Denny’s.” However, he reviewed a letter from Scott Carlson, D.O., plaintiff’s treating physician, indicating that the letter predated the incident at Denny’s. Dr. Carlson had said that plaintiff had “experienced an acute exacerbation in her condition brought on by an environmental allergen at a restaurant.” Plaintiff’s counsel conceded that this recap of Dr. Carlson’s report was hearsay and noted that the date of Dr. Carlson’s letter must have been mis-recorded by the independent physician, because it referenced the incident at the restaurant and therefore could not have preceded the incident. Further, plaintiff stated at the motion hearing that she had “rebuttal” that was not available when she filed her brief, but apparently had been available for approximately two weeks before the motion hearing. This “rebuttal” evidence apparently refers to a March 29, 2004, letter in which Dr. Carlson states, “it is apparent that the patient’s symptomology has exacerbated in the presence of some cleaning solutions used at a Denny’s restaurant visit” Dr. Carlson also states that material safety data sheets provided by Crystal indicate the chemicals used carried warnings about pulmonary contact and the need for ventilation. However, when Crystal provided the names of these chemicals and the data sheets, it indicated that none were used on the date that plaintiff was at the restaurant. Crystal denied spraying Scotchguard on the carpeting and denied treating the carpet at all on the subject date. While Denny’s indicated that the carpet was “scotchguarded” on the subject date in correspondence predating the lawsuit, it stated that no spraying took place on that date in interrogatory answers.

In *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005) (footnote omitted), the Supreme Court stated:

This Court reviews de novo the trial court's decision to grant or deny summary disposition. In reviewing the motion, the pleadings, affidavits, depositions, admissions, and any other admissible evidence are viewed in the light most favorable to the nonmoving party.

The admissible evidence submitted in support of summary disposition did not establish causation. The March 29, 2004, letter from Dr. Carlson was not submitted to the trial court. However, this letter, as well as other documents and medical records, was submitted with plaintiff’s May 24, 2004, in pro per motion for reconsideration. The trial court denied that motion on two grounds—untimeliness and no palpable error. The motion, which was required to be filed within fourteen days, MCR 2.119(F), was five days late. Untimeliness was a valid basis for denying the motion.

¹ Plaintiff was represented by counsel at the time defendants moved for summary disposition.

Plaintiff's actual argument is that summary disposition was erroneous since her attorney could have but did not provide supporting documents. This is not a recognized basis for providing appellate relief. Since the evidence was not before the court at the summary disposition hearing and the motion for reconsideration was untimely, we conclude that summary disposition should be affirmed.

Furthermore, mistakes apparent in Dr. Carlson's opinion further support affirmance. In the March 29, 2004, letter, Dr. Carlson referred to a cleaning solution, not a form of scotchguard, as being the chemical irritant. In addition, he referred to the data sheets provided by Crystal, assuming the chemicals described in these data sheets were the chemicals that caused plaintiff's problems. However, no evidence in the record linked plaintiff's problems to cleaning solutions or to the specific chemicals described in the data sheets. If the identity of the substance was not established, and Dr. Carlson's opinion was based on an assumption that it was a harmful cleaning agent, the faulty premise would invalidate his conclusion.

Affirmed.

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald